IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "C" BENCH

Before: DR. BRR Kumar, Vice President
And Shri T.R. Senthil Kumar, Judicial Member

ITA Nos: 3164 & 3124/Ahd/2015
Assessment Year: 2011-12

Deputy Commissioner of Income Tax Circle-1(1), Baroda	Vs	Gujarat State Electricity Corporation Limited, Sardar Patel Vidyut Bhavan, Race Course Circle, Baroda-390007
Gujarat State Electricity Corporation Limited, Sardar Patel Vidyut Bhavan, Race Course Circle, Baroda-390007 **PAN: AAACG6864F (Appellant)**	Vs	Deputy Commissioner of Income Tax Circle-1(1), Baroda **(Respondent)**

Revenue Represented: Shri A.P. Singh, CIT-DR
Assessee Represented: Shri Manish J Shah, A.R. & Shri Jimi Patel, A.R.

Date of hearing : 12-12-2024
Date of pronouncement : 19-12-2024

आदेश/ORDER

PER : T.R. SENTHIL KUMAR, JUDICIAL MEMBER:-

These cross appeals are filed by the Revenue and the Assessee as against the appellate order dated 21-08-2015 passed by the Commissioner of Income Tax (Appeals)-1, Vadodara arising out of the assessment order passed under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') relating to the Assessment Year 2011-12. Since common issues are involved in both the appeals, the grounds raised by both parties are inter connected the same are disposed of by this consolidated order.

2. The Grounds of appeal raised by the Revenue in ITA No. 3164/Ahd/2015 reads as under:

> *1. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in directing the Assessing Officer to allow the Guarantee Fee after verification, by disregarding the applicable statutory provisions contained u/s 37 of the IT Act which do not allow any expenditure of capital nature.*
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> *2. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in directing the Assessing Officer to treat the miscellaneous receipts of Rs.1442.34 lacs as business income instead of income from other sources, without appreciating the fact that the receipt is not covered in Clauses (i) to (vii) of Section 28 of the IT Act under which such income is charged.*
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> *3. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition/adjustments made to the Book Profit computed u/s 115JB of the IT Act,*
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> > *(a) on account of Prior Period Expenses claimed at Rs. 19,02,80,000/-in view of the Explanation to Section 115JB of the IT Act, also supported by Hon'ble Kerala High Court Decision in the case of Shree Bhagawathy Textiles Ltd. Vs. ACIT, (2011), 199 Taxman 14 (Ker).*
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> > *(b) on account of Capital Grants claimed at Rs.47,17,19,100/-, without appreciating the fact that the same was not routed through the P&L account, either by taking directly to P&L account by considering the Grant as revenue, nor by deducting the same from the capital asset.*

(c) on account of excess depreciation claimed at Rs.5,55,52,000/- without appreciating the fact that, the same was not allowable as per the Company's Act and therefore, as per the provisions of the Section 115JB of the IT Act, such excess claim had to be disallowed and added back to the Book Profit.

4. The appellant craves to add to, amend or alter the above grounds as may be deemed necessary.

3. The Grounds of appeal raised by the assessee in ITA No. 3124/Ahd/2015 reads as under:

1.0 The learned Commissioner of Income Tax (Appeals) erred in law and on facts has set aside the additions of Rs.7,19,63,000/- being Guarantee Fees paid to the Government of Gujarat in consideration of it issuing the guarantee for repayment of unsecured loan with the direction to re-verify the claim despite the fact that the documents establishing the facts were submitted at the time of appeal hearing.

2.0 The Commissioner of Income Tax (Appeals) erred in law and facts has confirmed the additions of Rs, 47,17,19,100/- being 15% of the year-end balance of Capital Grants amounting to Rs. 31427.94 lacs on the ground that the appellant should offer the same as income.

The Commissioner of Income Tax (Appeals) failed to appreciate that the appellant has not received any fresh grant during the year and 15% of the original grant has already been added as income in the immediately preceding year. Hence the Commissioner of Income Tax (Appeals) has erred by confirming the additions of 15% of the total grant received without reducing the amount already taxed as income in earlier year.

The Commissioner of Income Tax (Appeals) has not considered the provisions of section 43(1) of the IT Act and has wrongly considered the grant as being received for meeting the cost of Fixed Assets.

3.0 The learned Commissioner of Income Tax (Appeals) has erred in law and on facts in confirming the disallowance of prior period expenses amounting to Rs.34,75,000/- without appreciating the fact that such expenditure crystallized during the year and that the same has never been claimed in earlier years.

4.0 The learned Commissioner of Income Tax (Appeals) erred in law and on facts has confirmed the disallowance of the additional depreciation amounting to Rs.55,03,67,064/- claimed under section 32(1)(iia) of the IT Act on the ground that the appellant is not engaged in the manufacturing or production of article or thing.

The appellant had explained that the activity of power generation satisfies the condition of manufacture or production of any article or thing as required by the Act. The learned Commissioner of Income Tax (Appeals), however, brushed aside the appellant's contention and disallowed the claim of additional depreciation.

5.0 The learned Commissioner of Income Tax (Appeals) has erred in law and on facts in confirming the action of Assessing Officer in treating the interest income amounting to Rs.347,27,000/- as Income from Other Sources as against the Business Income and thereby disallowing the claim of set off of business losses of earlier years against the said income.

6.0 The learned Commissioner of Income Tax (Appeals) erred in law and on facts has dismissed the ground relating to the initiation of penalty proceedings under section 271(1)(c) of the IT Act.

7.0. The learned Commissioner of Income Tax (Appeals) erred in law and on facts in confirming the charging of interest under section 234B and 234C of the Income Tax Act, 1961.

8.0 The appellant craves leave to add to, alter, delete or modify any of the grounds of appeal either before or at the time of hearing of this appeal.

Ground No. 1: Disallowance of guarantee fees paid to Govt. of Gujarat of Rs. 7.19 crores. This guarantee fees paid by the assessee to Govt. of Gujarat in consideration of guarantee issued by it for repayment of unsecured loans.

3.1. Ld. Counsel submitted that this issue is covered in favour of the assessee by Co-ordinate Bench of this Tribunal in the case of Gujarat Energy Transmission Corporation Ltd. in ITA No. 852/ Ahd/2018 by order dated 24.08.2022 which was followed in assessee's own case in ITA Nos.787 & 849/Ahd/2018 dated 18-08-2023 relating to Asst. Years 2014-15 & 2012-13. Per contra the Ld. D.R. could not contravent the above submissions of the assessee.

3.3. We have gone through the materials available on record as well as submissions made by both the parties. In fact the Ld.CIT(A)

deleted the above addition following assessee's own case for the Assessment Year 2008-09 by holding that the guarantee fees is directed to be allowed as revenue expenditure but directed the Ld AO to verify the above claim. Co-ordinate Bench of this Tribunal in assessee's own case for Asst. Years 2014-15 & 2012-13 followed the above ratio of decisions, wherein it was held as follows:

> *"5.2. I have considered the submissions of the ld.AR and the facts of the case. The issue relating to whether an item of expenditure lies in the capital or the revenue field has exercised the courts in numerous cases. From an analysis of such cases a few guiding principles/tests can be identified. One of the important tests for categorizing any expenditure as capital in nature is whether the laying out of the impugned expenditure results in the acquisition of creation of any new asset. Where no such asset is created, it would be indicative of an expenditure which was not capital in nature. Another test relates to the principle of "enduring benefit". "Enduring benefit" may be in the form of long lasting use of an asset or the acquisition of a right to exploit certain commercial processes, etc. In the instant case, the assessee did not acquire any right to exploit a commercial technology or process, and neither was the benefit "enduring", since the payment of guarantee commission was an annual charge. The benefit derived from payment of such commission thus lasted for exactly one year only. Such shortlived benefit cannot be categorized as "enduring". Hence, I am inclined to the view that the payment of guarantee commission was a revenue expenditure. 5.3. Further, the jurisdictional Bench of ITAT had occasion to consider the allowability of guarantee commission paid to a Director of the company in respect of loans taken from the bank. In the case of Himalaya Machinery Pvt.Ltd. (ITA No.738/Ahd/2009) for AY 2006-07, the Tribunal held, vide order dt.5.6.2009, following the decision of the Rajasthan High Court in CIT v. Metalising Equipment Co.Pvt.Ltd., 8 DTR 12, that the payment of commission for guaranteeing repayment of loan was allowable as revenue expense. In the instant case, the loan has been guaranteed by the Government of Gujarat. Hence, quite apart from the other sound reasons for treating the expenditure as revenue, it would be unrealistic to say that the appellant company could derive any undue advantage or collateral benefit by making such payment to the GOG. In view of the totality of the circumstances, I am of the opinion that the AO was not justified in treating the payment of guarantee commission (Rs.8,39,04,550/-) as capital in nature. The addition is directed to be deleted. 6.2. I have considered the submissions of the ld.AR and the facts of the case. The jurisdictional Bench of ITAT has held in the case of Shri Rama Multi Tech vs. ACIT, 92 TTJ 568, that in determining the nature of expenditure incurred for obtaining loan, it is irrelevant to consider the purpose of loan. The amount spent on stamp duty, lawyer fees, etc. for obtaining loan secured by charge on its fixed assets is a revenue*

expenditure, because the transactions were entered into directly to facilitate the business of the company and payment of consultancy charges was made on ground of commercial expediency. In India Cements Ltd. vs. CIT, 60 ITR 52, the Supreme Court had also held that the expenditure incurred for securing the use of money for a certain period was revenue expenditure. In the instant case, the assessee has secured the loan by creating a charge (hypothecation of its assets). Hence the ratio of the above mentioned two cases would squarely apply. Accordingly, it is held that the AO was not justified in making the disallowance of Rs.45,24,582/-, which is directed to be deleted."

3.4. Respectfully following the Co-ordinate Bench decision, the **Ground No. 1 raised by the Revenue** is devoid of merits and the same **is hereby dismissed**. Since Ld CIT[A] directed the AO to verify the Certificate filed by the assessee during appellate proceedings whether the loans on which guarantee fee was paid were utilized for construction of plant or not, questioning this direction by the **assessee in its Ground No.1 is hereby rejected and dismissed.**

4. **Ground No. 2 by the assessee:** Addition of Rs. 47.17 crores being 15% of year-end balance of capital grant. The Ld. Counsel for the assessee submitted that this issue was remanded back to the file of the A.O. with specific direction by the Co-ordinate Bench of this Tribunal in Gujarat Energy Transmission Corporation Ltd. in ITA No. 753/Ahd/2018 by order dated 24.08.2022 wherein it was held as follows:

7. We find that on the identical issue as submitted the Ld. A.R. in ITA Nos. 2885 & 2886/Ahd/2015 the Coordinate Bench has been pleased to set-aside the issue to the file of the Ld. AO for adjudication afresh for verifying the proportionate amount of grant relevant to different assets and upon apply the actual rate of depreciation relates to those assets.
… … … …

7.1. Relying upon the observation and the decision taken by the Coordinate Bench and in order of consistency, we find it fit and proper to remand the issue to the file of the Ld. AO for re-adjudication of the same

> *and to pass orders upon verification of the proportionate amount of grant relating to different assets and upon applying the actual rate of depreciation relates to those assets and to pass orders accordingly. This ground of appeal preferred by the assessee is allowed for statistical purposes.*

4.1. Respectfully following the same, this issue is remitted back to the file of the Assessing Officer for verification of the proportionate amount of grant relating to different assets and upon applying the actual rate of depreciation relates to those assets and pass fresh order by giving proper opportunity of hearing to the assessee. **Thus Ground No. 2 filed by the Assessee is allowed for statistical purpose**.

5. **Ground no. 3 by the assessee:** Disallowance of prior period expenditure of Rs. 34.75 lakhs.

5.1. The Ld. Counsel for the assessee submitted that this issue is also covered by setting aside the same to the file of the Assessing Officer by the Co-ordinate Bench of this Tribunal in ITA No. 753/ Ahd/2018 by order dated 24.08.2022 which was followed in assessee's own case in ITA Nos.787 & 849/Ahd/2018 dated 18-08-2023 relating to Asst. Years 2014-15 & 2012-13. The Ld. D.R. appearing for the Revenue has no objection in setting aside the matter back to the file of the Assessing Officer for reconsideration.

5.2. After perusal of records, we find that the Co-ordinate Bench of this Tribunal on the prior period expenses held as follows:

> *4. We find that Coordinate Bench on the identical issue disposed of the ground by remitting the same to the file of the Ld. AO to adjudicate de novo with the following observation:*

"12. During the course of assessment, the Assessing Officer noticed that assessee company has shown prior period income of Rs. 130.05 lacs after adjustment of prior period expenses for Rs. 408.01 lacs. On query, the assessee has explained that all expenditure booked under this head crystallized in the hands of the company only during the year under consideration therefore same expenditure cannot be added back. The Assessing Officer has not accepted the submission of the assessee stating that assessee was following mercantile system of accounting in which the expenses related to the prior period were not an allowable expenses. Therefore, the prior period expenses amounting to Rs. 408.01 lacs was disallowed and added to the total income of the assessee.

13. Aggrieved assessee has filed appeal before the ld. CIT(A). The ld. CIT(A) has dismissed the appeal of the assessee stating that assessee has not made any submission showing that the prior period income was crystallized in the previous year relevant to the assessment year under consideration.

14. During the course of appellate proceedings before us, the ld counsel has submitted that similar issue in the case of Group concern Gujarat Urja Vikas Nigam Ltd. was adjudicated by the Co-ordinate Bench of the ITAT vide ITA No. 996/Ahd/2011 for assessment year 1988-89 dated 31st May, 2017 and the issue was remanded back to the file of Assessing Officer for deciding afresh in the light of the decision of Hon'ble High Court in the case of PCIT vs. Adani Enterprises Ltd. in Tax Appeal No. 573 of 2016. The ld. Departmental Representative was fair enough not to controvert these undisputed facts and findings of Co-ordinate Bench.

15. With the assistance of ld. representatives, we have gone through the decision of Co-ordinate Bench of ITAT in the case of Group concern Gujarat Urja Vikas Nigam Ltd. vs. ACIT for assess ment year 1988-89 wherein similar issue has been set aside to the file of Assessing Officer for adjudicating afresh according to the direction laid down by the Hon'ble Gujarat High Court in the case of Adani Enterprises Ltd. in Tax Appeal No. 573 of 2016. The relevant part of the decision of the Co-ordinate Bench in the Gujarat Urja Vikas Nigam Ltd. supra as cited above is reproduced as under:-

> *"6. We have carefully heard the rival submissions and perused the orders of the authorities as well the case-laws referred. The assessee is aggrieved by the disallowance of prior period expenses of Rs.53.53crores as per Ground No.4 of its appeal. The disallowance has been made on the ground that the expenses under various heads as noted in the assessment order pertained to earlier years and the assessee which is following system of accounting should have made provision for expenses in those respective years*

and claimed them as deduction. We have gone through the break-up of the expenses as noted in para-8 of the assessment order and observe that certain expenses declared under the head 'other adjustments Rs.30.75 crores'; 'other charges Rs.79.34 lakhs'; 'depreciation under provided Rs.7.86 crores' etc. are ostensibly vague and does not indicate the nature of claim with sufficient particularity obscure. We simultaneously note that assessee is a State Government Undertaking and its accounts are subjected to review by CAG and therefore it cannot be postulated that there was any deliberateness in not furnishing relevant details before the revenue authorities. The bonafides of the Assessee is also augmented by the facts that the Assessee has reported staggering carry forward losses in its returned income. Thus, there is no immediate tax advantage accrued to the assessee by the claim of impugned prior period expenses per se. We therefore deem it expedient to restore the issue back to the file of AO for examining the issue de novo after verifying facts as may be considered necessary and expedient in accordance with law. The AO shall bear in mind the ratio laid down by the Hon'ble Gujarat High Court in the case of Adani Enterprises Ltd. (supra) while adjudicating the issue. Needless to say, reasonable opportunity shall be provided to the assessee while adjudicating the issue. Hence, all the contentions of the assessee are kept open. The issue raised as per Ground No.4 is thus set aside to the file of AO in terms of directions noted above. As a result, Ground No.4 is allowed for statistical purposes."

In the light of the decision of Co-ordinate Bench as cited above, we restore this issue to the file of Assessing Officer for deciding de-novo after verification the facts and material as per the ratio laid down by the Hon'ble Gujarat High Court in the case of above cited case of Adani Enterprises Ltd. As a result, this ground of appeal of the assessee is allowed for statistical purposes. "

4.1. Respectfully relying upon the order passed by the Coordinate Bench we are disposing of the ground by setting aside the issue to the file of the Ld. AO for de novo adjudication upon giving an opportunity of being heard to the assessee and upon considering the evidence which the assessee may choose to file at the time of hearing of the matter. This ground is allowed for statistical purposes.

5.3. Respectfully following the above decision by the Co-ordinate Bench of this Tribunal, this ground no. 3 raised by the Assessee is hereby setaside to the file of the Assessing Officer for de novo

assessment and by giving proper opportunity to the assessee for being hearing. Thus **Ground No. 3 raised by the Assessee is allowed for statistical purpose**.

6. **Ground No.4 by the assessee:** Disallowance of Additional Depreciation of Rs.55.03 crores u/s.32[1][iia] of the Act.

6.1. Brief facts, the assessee company is engaged in generation of Power and claimed additional depreciation amounting to Rs.55,03,67,064/- u/s. 32(1)(viia) of the Act in addition to normal depreciation. The same was disallowed by the Assessing Officer on the ground that generation of electricity which is covered under clause (i) of section 32(1) is excluded from availing additional depreciation. Option given under Rule 5(1) of IT for units generating electricity is for depreciation u/s. 32(1)(iia) and not for additional depreciation covered u/s. 32(I)(ha) which is a separate provision of promoting manufacturing units. Thus denied the claim of additional depreciation.

6.2. On appeal, Ld. CIT(A) confirmed the addition by observing as follows:

> "3 I have considered the appellant's submissions and AO's observations. So far as the appellant's contention that as per Rule 5(1) of 1.T. Rules 1962, it has opted for claiming depreciation under Clause (1) of Sub-section (1) of Section 32 of the I.T. Act 1961 is concerned, this is found to be correct. But the appellant's contention that it is engaged in manufacture or production of article or thing is not acceptable in view of the definition given in Section-2(29BA) with effect from 01.04.2009. The AO's observation that as per this definition, the generation of electricity will not amount to manufacture or production of an article or thing is correct. This is also evident from the fact that vide Finance Act 2012, It was a specifically provided that additional depreciation under Clause-(iia) of

> Sub Section-1 of Section 32 will be allowable to the assesses who is in the business of generation or in the business of generation and distribution of power. This specific amendment shows that in view of the legislature also, such additional depreciation was not allowable to the assesses like the appellant before the A.Y. 2013-14. Under such circumstances, it is held that the AO has rightly disallowed the additional depreciation claimed by the appellant. Hence this ground of appeal is dismissed."

6.3. Aggrieved against the same, assessee is in appeal before us. Ld. Counsel submitted that the issue of claim of additional depreciation by a power generating company stands concluded by the judgment of Hon'ble Gujarat High Court rendered in the case of PCIT vs. Kadodara Power Pvt. Ltd. in Tax Appeal No. 383 of 2019 dated 06-08-2019 wherein Hon'ble High Court has agreed with the judgment of Hon'ble Delhi High Court rendered in the case of CIT vs. NTPC Sail Power Co. Ltd. reported in (2019) 103 taxmann.com 398.

6.4. Per contra, Ld. CIT-DR appearing for the Revenue supported the orders passed by the Lower Authorities.

6.5. We have given our thoughtful consideration and perused the materials available on record as well as the Jurisdictional High Court judgment in the case of Kadodara Power Pvt. Ltd. (cited supra) wherein it was held as follows:

> 7. We take notice of the fact that the ITAT while allowing the appeal of the assessee observed in Paragraphs-11 and 12 of its impugned order are as under:-
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> > 11. We may note that the expression 'article or thing' used in section 32(1)(iia) is not defined in the IT Act, 1961. The Supreme Court in case of State of Andhra Pradesh Vs. NTPC Ltd. 5 SSC 203 held that electricity is 'goods' and therefore production/generation of electricity is production of article or thing. Further, Delhi Tribunal in case of NTPC Ltd. Vs.DCIT (2012) 54 SOT 177 wherein

assessee's claim of additional depreciation was disallowed on the ground that power/ electricity generated by assessee could not be equated with an article or thing which was being manufacturing in an industrial undertaking, held that if there can be sale and purchase of electric energy like any movable object, then electric energy is covered by the definition of goods and thus admissibility of additional depreciation could not be denied to assessee merely on the ground that electricity is not an article and thing. In view of the said decisions, P&M acquired and installed by assessee for generation of electricity is akin to manufacture or production of an article or thing and consequently assessee is entitled for additional depreciation u/s.32(1)(ia) on same.

12. It is now a settled position as held by the Hon'ble Supreme Court and the various Co-ordinate Benches of the Tribunal that the process of generation of electricity is akin to manufacture of an article or thing, the assessee in the instant case satisfy the requirement that it is engaged in the business of manufacture or production of an article or thing. Now coming to the amendment which has been brought-in by the Finance Act 2012 w.e.f. A.Y. 2013-14 whereby the assessee engaged in the business of generation or generation & distribution of power have specifically been included and held eligible for claim of additional depreciation. In our view, the said amendment cannot be held to disentitle the assessee to claim of the additional depreciation. Various Coordinate Benches have held that even prior to the amendment brought in by the Finance Act, 2012, the assessees enegaged in generation or generation and distribution of electricity were held eligible for additional depreciation. In this regard, reference can be drawn to the decision of NTPC Ltd. (supra). No contrary authority has been brought to our notice. In our view, the said amendment cannot be read to negate the settled legal position that generation of electricity is akin to manufacture or production of an article or thing. The said amendment by the Finance Act 2912 gives an impetus to the view that generation of electricity is a manufacturing process. In light of above, the assessee is held entitled to the additional claim of depreciation on plants and machinery installed in the Captive Power Plant. Hence, the Ground No.2 of appeal of the assessee is allowed.

8. The issue raised by the Revenue is no longer res-integra in view of a decision of the Delhi High Court in the case of Principal Commissioner of Income-tax, New Delhi Vs. NTPC Sail Power Co. (P.) Ltd. reported in [2019] 103 taxmann.com 398 (Delhi).

9. The Delhi High Court in NTPC Sail Power Co. (p.) Ltd (supra) relied upon the decision of the Supreme Court in the case of State of Andhra Pradesh Vs. NTPC Ltd. reported in AIR 2002 SC 1895. The Delhi High Court also took note of the fact that with effect from 01.04.2013, the provision i.e. Section 32 of the Act has been amended by the Finance Act, 2012 and the assessee engaged in the generation of power has expressly been included in the ambit thereof. The Delhi High Court by placing reliance on Supreme Court decision referred to above ultimately took the view that the electricity has all the necessary trappings of "articles" or "things" and the benefit of additional depreciation cannot be denied. We quote the relevant observations as under:-

> 6. Section 32(1)(iia) of the Act as it stood at the relevant time, read as follows:
> "32. Depreciation: (1) In respect of depreciation of - ....
> (iia) In the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31st day of March, 2005, by an assessee engaged in the business of manufacture or production of any article or thing, a further sum equal to twenty per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii)."
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> 7. Learned counsel for the assessee has drawn our attention to the judgment of the Karnataka High Court dated 16.09.2014 in ITA No.08/2014 [Commissioner of Income Tax vs. The Hutti Gold Mines Co. Ltd.] wherein the question of additional depreciation was considered and it was held as follows:
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> "3. The material on record shows that the assessee is generating electricity through windmill as a second line of business. It is a product of the assessee company. It is covered under the words "article" or "thing", which is tradable / identifiable. In other words, the electricity falls within the definition of Sale of Goods Act, 1930, and process of generation of electricity is akin to manufacture or production of an "article" or "thing". The power generated need not necessarily be used in the production of assessee's own products namely mining and extraction of gold.

The use of electricity in the manufacturing activity of the core business of the assessee is not a precondition for the grant of additional depreciation under the statute. Therefore, we do not see any merit in this appeal. Accordingly, this appeal is rejected.

4. However, we have not gone into the question of applicability of Section 32(1)(iia) of the Income Tax Act, 1961, and the question as to whether clarificatory or not is kept open to be decided at proper time."

Although the Karnataka High Court held that it was not going into the question of Section 32(1)(iia) and the question of whether the subsequent amendment was clarificatory, the analysis of the Court is in our view also applicable to the interpretation of the said provision for the purposes of the present dispute.

8. Similarly, it is clear that electricity has been held to be "goods" for the purposes of sales tax in the Constitution Bench judgment of the Supreme Court in State of Andhra Pradesh vs. NTPC Ltd. AIR 2002 SC 1895. The Supreme Court, in that judgment held as follows:

> "20. Before we deal with the constitutional aspects let us first state what electricity is, as understood in law, and what are its relevant characteristics. It is settled with the pronouncement of this Court in Commissioner of Sales Tax, Madhya Pradesh, Indore v. Madhya Pradesh Electricity Board, Jabalpur – 1969(2) SCR 939 that electricity is goods. The definition of goods as given in Article 366 (12) of the Constitution was considered by this Court and it was held that the definition in terms is very wide according to which "goods" means all kinds of moveable property. The term "moveable property" when considered with reference to "goods" as defined for the purpose of sales-tax cannot be taken in a narrow sense and merely because electrical energy is not tangible or cannot be moved or touched like, for instance, a piece of wood or a book it cannot cease to be moveable property when it has all the attributes of such property. It is capable of abstraction, consumption and use which if done dishonestly is punishable under Section 39 of the Indian Electricity Act, 1910. If there can be sale and purchase of electrical energy like any other moveable object, this Court held that there was no difficulty in holding that

> electric energy was intended to be covered by the definition of "goods". However, A.N.Grover, J., speaking for three-Judge Bench of this Court went on to observe that electric energy "can be transmitted, transferred, delivered, stored, possessed etc. in the same way as any other moveable property". In this observation we agree with Grover. J., on all other characteristics of electric energy except that it can be "stored and to the extent that electric energy can be "stored , the " " observation must be held to be erroneous or by oversight. The science and technology till this day have not been able to evolve any methodology by which electric energy can be preserved or stored."

> 9. The Tribunal's judgment in NTPC vs. DCIT [relied upon in the orders of the CIT(A) as well as the Tribunal in the present case] followed this judgment of the Supreme Court to hold that electricity has all the necessary trappings of "articles" or "things" and the benefit of additional depreciation cannot be denied.

> 10. As held by the Constitution Bench, electricity is capable of abstraction, transmission, transfer, delivery, possession, consumption and use like any other movable property. Following the same logic, to deny the benefit of additional depreciation to a generating entity on the basis that electricity is not an "article" or "thing" is in our view an artificially restrictive meaning of the provision. The benefit of additional depreciation under Section 32(1)(iia) has, therefore, been rightly granted to the assessee by the concurrent judgments of the CIT(A) and the Tribunal.

> 11. We also note that, w.e.f. from 01.04.2013, the provision has been amended by the Finance Act, 2012 and assessees engaged in the generation of power have expressly been included in the ambit thereof.

10. This Court in the case of Commissioner of Income-tax-1 Vs. Diamines & Chemicals Ltd. reported in [2014] 42 taxmann.com 193 observed in Para-3 as under:-

> 3. Heard Shri K.M. Parikh, learned Counsel appearing on behalf of the revenue and perused the impugned judgement and order passed by the ITAT. At the outset, it is required to be noted that the

> assessee claimed the deduction under Section 32(1)(iia) of the Income Tax Act with respect to the cost incurred by it for installation of the Wind Electric Generator. The Assessing Officer disallowed the same and made the addition of Rs.1,17,98,030/- by observing that as the assessee is not in the business of generation and distribution of power, the assessee shall not be entitled to deduction under Section 32(1)(iia) of the Income Tax Act of Rs.1,17,98,030/-. The said addition has been deleted by the CIT(A) relying upon the decisions of the Madras High Court in the case of VTM Ltd (Supra) and in the case of Hi Tech Arai Ltd. (Supra). In both the aforesaid decisions, the Madras High Court had an occasion to consider the similar issue and it is held that while claiming the deduction under Section 32(1)(iia) of the Income Tax Act setting up will mill has nothing to do with the power industry and what is required to be satisfied in order to claim additional depreciation is that the setting up of new machinery or plant should have been acquired and installed by an assessee, who was already engaged in the business of manufacture or production of any article or thing. Considering the aforesaid facts and circumstances and considering the relevant provisions of Section 32(1)(iia) of the Income Tax Act, which was prevailing at the relevant time, i.e. during the year under consideration, it cannot be said that the ITAT by applying the ratio of decision of the Madras High Court in the case of VTM Ltd (Supra) and in the case of Hi Tech Arai Ltd. (Supra) has committed any error in deleting the addition of Rs.1,17,98,030/- on account of disallowance of additional depreciation of Wind Electric Generator.
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> 11. In view of the aforesaid, no error not to speak of any error of law could be said to have been committed by the appellate tribunal in passing the impugned order.
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> 12. In the result, this appeal fails and is hereby dismissed.

6.6. Respectfully following the Jurisdictional High Court Judgment, we hold that the assessee is entitled for additional depreciation u/s. 32(1)(viia) of the Act and direct the A.O. to grant the same.

6.8. In the result, Ground No. 4 raised by the Assessee is hereby allowed.

7. **Assessee's Ground no. 5 and Revenue's Ground No.2:** Treatment of interest income and miscellaneous receipts as "income from other sources" as against the claim as "business income".

7.1. Ld. Counsel submitted that this issue is also covered in favour of the assessee by decision of Co-ordinate Bench of this Tribunal in ITA No.753/Ahd/2018 by common order dated 24.08.2022 in the case of Gujarat Energy Transmission Corporation Ltd. which was followed in assessee's own case in ITA Nos.787 & 849/Ahd/2018 dated 18-08-2023 relating to Asst. Years 2014-15 & 2012-13 wherein it was held as follows:

> *".....8.1. At the time of hearing of the instant appeal the Ld. Counsel appearing for the assessee with all his fairness submitted before us that the identical issue has been decided by the Coordinate Bench in assessee's own case in ITA Nos. 2885 & 2886/Ahd/2015 [cited supra]. On this aspect he has drawn our attention to Page 10 of the above order filed before us. However, by and under the order passed by the Hon'ble Orissa High Court in the case of Odisha Power Generation Corporation Ltd. vs. ACIT, Circle-2(2), Bhubaneswar & ors. in ITA Nos. 1, 2, 3 of 2015 and ITA Nos. 24 & 25 of 2009 the issue has been decided otherwise. A copy of the same has also been submitted before us by the Ld. Counsel appearing for the assessee.*
>
> *8.2. On the other hand, the Ld. D.R. relied upon the order passed by the lower authorities.*
>
> *9. We have heard the rival submissions made by the respective parties, and we have also perused the relevant materials available on record and also gone through the order passed by the Hon'ble Orissa High Court in the case of Odisha Power Generation Corporation Ltd. (supra). It appears that the Hon'ble Orissa High Court while dealing with the issue the Court was pleased to observe as follows:*
>
> > *"12. The Assessee offered an explanation regarding interest income earned by it, from advances given to its employees as well*

> *as provision of electricity and water charges collected from water through its employees and contractors for facilities in the township, receipt from transit hostel, sale of scrap, insurance claim etc. The facilities were given to its employees for better conditions of employment. This was to improve the overall efficiency of the undertaking which is devoted to the single purpose of generation of power. The Court, therefore, has no difficulty in accepting the submission of the Assessee that the interest received on advances and loans given to its employees are receipts in normal course of carrying its business and should be considered as income derived from its essential business activities. Likewise, the late payment by GRIDCO for the electricity supplied, is sought to be made up by GRIDCO by issuing bonds on which the Assessee earns interest. This also therefore, has a direct nexus with the essential business activity of the Assessee."*
>
> *9.1. In that view of the matter we find it fit and proper to direct the Ld. AO to consider the issue afresh upon examining the same in regard to the head of income upon considering the relevant evidence in the light of the observation made by the Hon'ble High Court as mentioned hereinabove. We, thus, pass order accordingly. This ground is allowed for statistical purposes.*

7.2. We have gone through the records and found that ld. CIT(A) held that the miscellaneous receipts of Rs.1442.34 lacs treated as income from business. However the interest income of Rs.347.27 lacs was treated as "income from other sources". Considering the judgment of the Orissa High Court in the case of Odisha Power Generation Corporation Ltd., we direct the Ld AO to consider the issue afresh and pass orders accordingly. Thus the **Ground No. 5 raised by assessee is allowed for statistical purpose** and **Ground No. 2 raised by the Revenue is dismissed**.

8. **Ground No. 3 by the Revenue:** Deletion of additions while computing book profit u/s. 115JB of the Act on the following counts:

(a) Prior period Expenses of Rs.19.02 crore

(b) Addition of capital grant of Rs. 47.17 crore

(c) Addition of Rs. 5.55 crore being excess depreciation

8.1. (a) Prior Period Expenses, this issue is decided in favour of the assessee in the case of Gujarat Energy Transmission Corporation Ltd. in ITA No.852/Ahd/2018 by order dated 24.08.2022 which was followed in assessee's own case in ITA Nos.787 & 849/Ahd/2018 dated 18-08-2023 relating to Asst. Years 2014-15 & 2012-13 wherein it was held as follows:

16.1. The brief facts leading to the issue is this that the Ld. AO made addition of Rs. 1,24,73,000/- to the Book Profit under Section 115JB of the Act on account of prior period expenses is also added back to the book profit of the assessee.

16.2. Before the First Appellate Authority the assessee submitted that in assessee's own case for A.Y. 2012-13 the Ld. CIT(A) has deleted the addition. In that view of the matter considering the order dated 22.09.2015 passed by his predecessor, the Ld. CIT(A) hold that the said addition cannot be made to the Book Profit as this item has not been mentioned in any of the Clauses of the Explanation to Section 115JB of the Act. He, therefore, directed the Ld. AO to delete such addition. He has further relied upon the order dated 15.04.2011 passed by the Co-ordinate Bench in assessee's own case in ITA No. 1777/Ahd/2009 & 2028/Ahd/2009 for A.Y. 2006-07.

16.3. We have further considered the order passed by the Chandigarh Bench in the case of M/s. Ashirwad Hgiene Pvt. Ltd. vs. ITO in ITA No. 72/Chd/2014 for A.Y. 2010-11 while deciding the issue in favour of the assessee the Coordinate Bench was pleased to observe as follows:

> *"In the present case the undisputed fact is that the Net Profit shown in the profit & loss account has been arrived at after reducing the prior period expenses. As discussed above, this Net Profit, is in compliance with Schedule-VI Part-II of the Companies Act and the prescribed Accounting Standard, i.e. AS-5. No adjustment, on account of prior period expenses, is required to be made to the same. Moreover, even as per Explanation—1 to section 115JB, no adjustment on account of prior period expenses is required to be made to the net profits reflected in the profit and loss account of the assessee. Therefore we hold that no adjustment of prior period expenses is to be made by the assessee to arrive at the book profits*

> *for the purpose of levying tax u/s 115JB. The reliance placed by the Ld. DR on the decision in the case of Sree Bhagwathy Textiles Ltd. (supra) is distinguishable on facts, since in that case it was found the assessee had debited the prior period expenses to the Profit and Loss Appropriation account. The Court in that case held that profit as per Profit and Loss Account is to be taken for computing book profits and any adjustments thereafter in the appropriation account are not to be considered. Since in the present case the prior period expense have been debited to the Profit and Loss Account and not appropriation account the ratio propounded therein will not apply to the present case.*
>
> *7. In view of the above we hold that no adjustment on account of prior period expenses amounting to Rs. 46,64,504/- is to be made in the net profit of the company for arriving at the book profits u/s 115JB of the Act. The appeal of the assessee is therefore allowed."*

16.4. Having regard to the facts and circumstances of the case and the judgments passed by the different Bench. We do not find any reason to interfere with the order passed by the Ld. CIT(A) in deleting addition. The ground of appeal preferred by the Revenue is found to be devoid of any merit and hence dismissed.

8.2. The Ld. D.R. appearing for the Revenue could not contravent the above decision of this Tribunal. Thus the **Ground No.3 [a] raised by the Revenue is devoid of merits** and the same is rejected and addition on this account is deleted.

8.3. (b) **Addition of capital grant of Rs. 47.17 crores**: This issue is also decided in favour of the assessee in the case of Gujarat Energy Transmission Corporation Ltd. in ITA No. 852/Ahd/2018 by order dated 24.08.2022 wherein it was held as follows:

> *"….17.1. The assessee company has received capital grant of Rs. 2969.47 lacs which was transferred to the Reserve & Surplus account. The Id. Principal CIT was of the view that the same should have been reduced from the cost of assets and since the same has not been done, the company has claimed excess depreciation thereby offering lesser Book Profits.*
>
> *17.2. We find that the ld. Principal CIT has ignored the fact that the grant in question was received in terms of the Financial Restructuring Plan from*

the Government and the company has accounted Government Grants in terms of the mandatory Accounting Standard (AS)-12 on "Accounting for Government Grants" prescribed by the ICAI. The relevant part of AS-12 reads as under:-

> *10. Presentation of Grants of the nature of Promoters, contribution 10.1 Where the government grants are of the nature of promoters' contribution, i.e., they are given with reference to the total investment in an undertaking or by way of contribution towards its total capital outlay (for example, central investment subsidy scheme) and no repayment is ordinarily expected in respect thereof, the grants are treated as capital reserve which can be neither distributed as dividend nor considered as deferred income.*

17.3. The relevant Office Note needs special mention here:-

> *Sub: Allocation of FRP Grant as Share Capital contribution to subsidiaries.*
>
> *At the Board Meeting held on 29.06,2009, Board approved to allocate the FRP grant of Rs.250 crores being given by Govt. of Gujarat to GUVNL for system strengthening as Share Capital contribution from GUVNL to subsidiaries. Board further authorized MD, GUVNL to decide the quantum of such equity contribution to each of the subsidiaries. As far as DISCOMs are concerned, their equity requirement is being met through consumers' contribution and as such there is hardly any equity requirement which is required to be contributed by GUVNL. Moreover, the capita! grant being released by GoG to GUVNL for various DISCOM related projects, the Board at the meeting held on 04.01.2010 has approved to allocate the same to DISCOMs in the form of Share Capital from GUVNL. Since the DISCOM related grants along with consumers' contribution meet with the equity requirement of DISCOMs it is proposed not to allocate the FRP grant to DISCOMs for the F.Y. 2009-10.*
>
> *As regards to GETCO, they have incurred capital expenditure of Rs.650 crores upto January'10. Against the said capital expenditure, they have received consumers' contribution to the tune of Rs.87 crores. Further, the Govt. grant creation of transmission lines and sub-stations ofRs.151 crore (RE) is By meant for GETCO. In addition for creation of new Sub-Stations in areas under Sagarkhedu Yojana, Govt. of Gujarat has given Share Capital Contribution of Rs.37.20 crores to GUVNL. The said grant and share capital contribution will be given to GETCO as share capital contribution from GUVNL. In addition, in the revised estimate, Govt. has made a provision ofRs.50 crores as Equity Share Capital contribution to GETCO directly (without routing through GUVNL). Thus, GETCO is already having Equity Share Capital contribution to*

the tune of Rs. 238.20 crores in addition to consumer's contribution of Rs. 87 crores whereas in case of GSECL whose equity requirement is substantially higher than that of GETCO, they have been given only Rs. 60.77 crores as Equity Share Capital contribution from GUVNL.

Considering the above position, it is proposed to allocate entire FRP grant of Rs. 250 crores to GSECL as Equity Share Capital contribution from GUVNL for their projects.

17.4. Considering the accounting treatment in the light of the Accounting Standard-12, we do not find any error on facts or in law. Therefore, to this extent the findings of the Id. Principal CIT are reversed.

8.4. Respectfully following the same, **Ground No.3 [b] raised by the Revenue is hereby dismissed** and the addition is deleted.

8.5. **Addition of Rs. 5.55 crores being excess depreciation**: The Ld. Counsel submitted that this issue of excess depreciation is decided in favour of the assessee in the case of Kansara Popatlal Tribhuvan Metal Pvt. Ltd. vs. PCIT in ITA No. 1057/Ahd/2015 by order dated 22.07.2022 which is followed in assessee's own case in ITA No. 3165/Ahd/2015 wherein it was held as follows:

*6. We have heard the rival contentions and perused the material on record on this ground. In the case of **Malayala Manorama Co. Ltd v. CIT [2008] 169 Taxman 471 (SC)**, the facts were that in the profit and loss account for the relevant assessment year, the assessee had debited depreciation at the rates prescribed by the Income-tax Rules, 1962. However, the Assessing Officer was of the view that for purposes of section 115J, depreciation should have been calculated in terms of the Companies Act, 1956 and Schedule XIV thereof. Accordingly, he disallowed the assessee's claim of depreciation charged at the rates prescribed by the Income-tax Rules. The Commissioner (Appeals) as well as the Tribunal allowed the assessee's claim and directed the Assessing Officer to allow the claim of depreciation as per the Income-tax Rules for the purposes of computing the book profit under section 115J. On reference, the High Court reworked the profits of the assessee under section 115J by substituting the rates of depreciation prescribed in Schedule XIV of the Companies act, 1956. In appeal, the Supreme Court held that where assessee was consistently charging depreciation in its books of account at rates prescribed in Income-tax Rules and accounts of*

assessee had been prepared and certified as per provisions of 1956 Act, Assessing Officer would not have any jurisdiction under section 115J to rework net profits of assessee by substituting rates of depreciation prescribed in Schedule XIV to 1956 Act. We further note that the jurisdictional Gujarat High Court in the case of ***DCIT v. Vardhman Fabrics (P.) Ltd. [2002] 122 Taxman 375 (Gujarat)*** *has also adjudicated on this issue in favour of the assessee. The brief facts of the case were that assessee calculated depreciation on plant and machinery at 33.33 per cent as permissible under the Income-tax Rules, 1962 as against 30 per cent depreciation required to be calculated under Schedule XIV of the Companies Act. The Commissioner, acting under section 263, held that rate of depreciation claimed was in excess of the rate under the Companies Act and that excess was to be disallowed. The Tribunal held that Circular of Company Law Board lays down minimum rate of depreciation for purpose of distribution of dividend and company may decide to claim higher depreciation on basis of a bona fide technological evaluation and proper disclosure is to be made by way of a note forming part of annual accounts. The Tribunal further held that, in instant case, proper disclosure was made by way of a note to annual statement of accounts and rates claimed on basis of income-tax records were based on bona fide information of Board of Directors as contained in aforesaid minutes of meeting of Board of Directors. In appeal, the High Court held that the Tribunal was right in holding that depreciation worked out by assessee on basis of income- tax records and debited to profit and loss account was not violative of provisions of Companies Act and ITAT has not erred in cancelling order passed by Commissioner under section 263 of the Act. Again, in the case of* ***CIT Ludhiana v. Sona Woollen Mills (P.) Ltd. 2007] 160 Taxman 22 (Punjab & Haryana),*** *assessee claimed depreciation as per provisions of income tax Act for computing quantum of income under section 115J. The Assessing Officer rejected claim of assessee on ground that depreciation for purposes of section 115J was permissible as per Schedule XIV of Companies Act. The Commissioner (Appeals) allowed claim of assessee holding that depreciation provided under Companies Act was minimum but there was no bar to higher depreciation being claimed by assessee and, thus, for purposes of section 115J, depreciation actually debited could be allowed. The High Court held that in view of Supreme Court decision in Apollo Tyres Ltd. v. CIT [2002] 122 Taxman 562, Commissioner (Appeals) was justified in holding that the assessee is eligible to claim higher rate of depreciation and Income Tax Act. The Delhi ITAT in the case of* ***HAL Offshore Ltd [2019] 108 taxmann.com 390 (Delhi - Trib.)*** *held that where depreciation provided in profit and loss account is at same rate as provided for purpose of profit and loss account being laid before Annual General Meeting (AGM), no addition could be made to assessee's income on ground that while calculating total income as per section 115JB, assessee had adopted rate of depreciation as per Income-tax Act instead of Companies Act in profit and loss account. The Andhra Pradesh High Court in the case of* ***Deccan Tools Industries (P.) Ltd.[2014] 52 taxmann.com 55 (Andhra Pradesh)*** *held that where for purpose of section 115J, assessee claimed*

depreciation at rates provided under Income-tax Rules, action of Assessing Officer in redrawing profit and loss account and adopting rates prescribed under Companies Act, was totally unauthorized.

6.1 In view of the various decisions cited above, we are of the considered view that in the instant facts, PCIT erred in facts and law in holding that the assessment order was erroneous and prejudicial to the interests of the revenue so far as ground number 3 of the assessee's appeal is concerned.

8.6. Respectfully following the above decision, therefore the **Ground No.3 [c] raised by the Revenue is devoid of merit and the same is hereby rejected.**

9. Ground No.4 by the Revenue and Ground Nos. 6 to 8 by the Assessee are general in nature and does not require any specific adjudication.

10. **In the result, the appeal filed by the Assessee in ITA No. 3124/Ahd/2015 is partly allowed and appeal filed by the Revenue in ITA No.3164/Ahd/2015 is hereby dismissed.**

Order pronounced in the open court on 19 -12-2024

Sd/-	**Sd/-**
(DR. BRR KUMAR)	**(T.R. SENTHIL KUMAR)**
VICE PRESIDENT	**JUDICIAL MEMBER**
Ahmedabad :	
Dated 19/12/2024	

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad

6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद