

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.08.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

Tax Case Appeal No.582 of 2016

The Principal Commissioner of Income Tax 4,
No.121, Mahatma Gandhi Road,
Chennai 34. ... Appellant/Appellant

Vs.

M/s.Kanishk Steel Industries,
No.17 (New No.26),
Mookar Nallu Muthu Street,
Chennai 600 001. ... Respondent/Respondent
PAN No.AABCK2367G

Prayer: Appeal filed against the order of the Income Tax Appellate Tribunal, Madras 'D' Bench, Chennai, dated 01.01.2016 in ITA No.2955/Mds/2014, preferred against the Order dated 21.07.2014 made in ITA.No.920/2013-14 on the file of the Office of the Commissioner of Income Tax(Appeals) - II, No.121, Mahatma Gandhi Road, Chennai 34, preferred against the Assessment Order of the Assistant Commissioner of Income Tax, Company Circle II (4) Roo. No.514, New Block-121, Mahatma Gandhi Road, Chennai 34, dated 29.12.2008 made in PAN.No.AABCK2367G for the Assessment year 2006 - 07.

For appellant : Mr.T.R.Senthil Kumar
Senior Standing Counsel for Income Tax

JUDGMENT

(Judgment of the Court was made by S.Manikumar)

This Appeal has been filed against the order of the Income Tax Appellate Tribunal, 'D' Bench, Madras, dated 01.01.2016.

2. Facts leading to the appeal are that the assessee is a Company engaged in the manufacture of iron and steel products, including sponge iron. They own a wind mill. The assessee filed its return of income for the assessment year 2006-07 on 28.11.2006, declaring a loss of Rs.3,12,80,872/- (and income of Rs.8,06,36,588/-, under Section 115JB of the Income Tax Act,

1961). Return was processed under Section 143(1) of the Act and was selected for scrutiny. The assessing officer, while completing the assessment, under Section 143(3) of the Act, assessed the loss at Rs.1,99,68,040/-, under the regular provisions of the Act (and income of Rs.8,06,36,588/-, under Section 115JB of the Act), by disallowing the assessee's claim of additional depreciation on windmill and expenses claimed, by way of contribution of PF and ESI contributions. Thus, the assessing officer, vide order, dated 29.12.2008, passed an order, under Section 143(3) of the Income-Tax Act, 1961.

3. Being aggrieved by the same, the respondent/assessee filed an appeal in I.T.A.No.920/2013-14, before the Commissioner of Income-Tax (Appeals)-II, Chennai. On the disallowance of additional depreciation of the wind mill, before the appellate authority, the assessee has contended that they are engaged in the business of manufacturing of iron and steel products and during the financial year 2005-06, relevant to the assessment year 2006-07, they installed a windmill and the energy generated from the said windmill was used for captive use. Thus, they are eligible for the additional depreciation on the windmill, at the rate of 20%, amounting to Rs.1,12,74,024/-, under Section 32(1) (iia) of the Income-Tax Act, 1961.

4. Before the appellate authority, placing reliance on a decision of this Court in CIT v. VTM Ltd., reported in 319 ITR 336 (Mad.), contention has been made that once the assessee is engaged in the activity of manufacturing or producing a thing or article, he is eligible for additional depreciation on all the new plant and machinery purchased and installed, whether or not such plant and machinery is used in the activity of manufacturing or producing a thing or article.

5. In CIT v. VTM Ltd., reported in 319 ITR 336 (Mad.), contention has also been made before the appellate authority that insofar as application of Section 32(1)(iia) of the Income Tax Act, 1961, is concerned, what is required to be satisfied in order to claim additional depreciation is that a new machinery or plant, which has been set up, should have been acquired and installed after 31.03.2002 by an assessee, who has already engaged in the business of manufacture or production of any article or thing. It was also contended that the said provision does not state that setting up a new machinery or plant, which was acquired and installed after 31.03.2002, should have any operational connectivity to the article or thing that was already being manufactured by the assessee and therefore, setting up of a windmill has nothing to do with the manufacture of goods and that is not warranted under Section 32(1) (iia).

6. Cursory look at the reported case shows that on the question, as to whether, in order to claim additional depreciation, under Section 32(1)(ia), what is required to be satisfied is that only a new machinery or plant to be acquired and installed after 31.03.2002 by an assessee, who is already engaged in the business of manufacture or production of any article or thing and the said provision does not state that setting up of a new machinery or plant, acquired and installed after 31.03.2002, should have any operational connectivity to article or thing that was already being manufactured by the assessee, this Court, while answering the question, in favour of the assessee, allowed additional depreciation.

7. Observing that the decision in CIT v. VTM Ltd., reported in 319 ITR 336 (Mad.), is squarely applicable to the present case, the appellate authority, vide order, dated 21.07.2014 in I.T.A.No.920/2013-14, held that the assessee is entitled that for additional depreciation on windmill, under Section 32(1)(ia) of the Income Tax Act, 1961.

8. On the disallowance of Employees' Provident Fund and ESI contributions, the Commissioner of Income-Tax (Appeals), appellate authority, vide order, dated 21.07.2014, by observing that the dispute in the appeal relates to payments of Employees' Contribution towards PF & ESI, which are governed by the provisions of Section 36(1)(va) of the Income Tax Act and not subjected to the provision of Section 43B of the Act and on the facts and circumstances of the case, disallowed the Employees' Contribution towards PF of Rs.25,208/- and ESI of Rs.6,800/-, respectively.

9. Not satisfied with the order of the Commissioner of Income-Tax (Appeals), in I.T.A.No.920/2013-14, dated 21.07.2014, the revenue has preferred an appeal in I.T.A.No.2955/Mds/2014, before the Income Tax Appellate Tribunal, "D" Bench, Chennai. Revenue has reiterated the same contentions, as made before the appellate authority. Defence to sustain the order of the appellate authority was that the electricity generated by the windmill was used for captive construction and reliance was made to the decision in CIT v. VTM Ltd., reported in 319 ITR 336 (Mad.). After considering the rival submissions, at Paragraph 4, the Tribunal, by its order, dated 01.01.2016, in I.T.A.No.2955/Mds/2014, has ordered as follows:

"4. We have considered the rival submissions on either side and perused the relevant material available on record. The Assessing Officer admittedly disallowed the claim of the assessee on the ground that generation of electricity does not amount to manufacturing of article or thing. The assessee

admittedly in the business of manufacturing iron and steel products. The electricity generated by the windmill was used for captive consumption in manufacturing activity. Therefore, the question arises for consideration is when the assessee used the electricity generated 4 I.T.A. No.2955/Mds/14 by the windmill in manufacturing activity, whether the assessee is entitled for additional depreciation under Section 32(1)(iia) of the Act? An identical situation was considered by the Madras High Court in VTM Ltd. (supra). In the case before Madras High Court, the assessee was engaged in the manufacturing of textile goods and electricity generated by the windmill was used for captive consumption in manufacturing of textile goods. In those circumstances, the Madras High Court found that the provisions of the Act does not state that setting up of new machinery or plant should have operational connectivity to the article or thing that was already being manufactured by the assessee. In those circumstances, this Tribunal is of the considered opinion that the CIT(Appeals) has rightly placed his reliance on the binding judgment of Madras High Court. Therefore, this Tribunal do not find any reason to interfere with the order of the lower authority. Accordingly, the order of the CIT(Appeals) is confirmed.

5. In the result, this appeal of the Revenue is dismissed."

10. Being aggrieved by the concurrent orders of the appellate authority and that of the Tribunal, revenue has preferred the instant Tax Case Appeal, on the following substantial questions of law,

"(1) Whether on the facts and circumstances of the case, the Appellate Tribunal was right in holding that the assessee is entitled to additional depreciation on the purchase of wind mills under Section 32(1)(iia) even though the main business of the assessee is not producing or generating electricity?

(ii) Whether on the facts and circumstances of the case, the Appellate Tribunal was right in law in allowing the claim on additional depreciation on windmill for the assessment year 2006-07 in view of the fact that benefit of additional depreciation on power generation will apply in relation to assessment year 2013-14 onwards as per amended provisions of Section 32(1)(iia) w.e.f. 01.04.2013?"

11. Though in respect of the above substantial questions of law, for which, an answer is sought for, under Section 260-A of the Income Tax Act, Mr.T.R.Senthil Kumar, learned standing counsel for the Income-Tax Department, submitted that the Tribunal has failed to consider that the benefit of additional depreciation, conferred under Section 32(1)(iia), was not provided to the plant and machinery used in power sector, until the Finance Act, 2012, which came into effect, with an intention of granting the benefit of additional depreciation to the assessee, engaged in the business of generation of power, this Court is not inclined to accept the said contention, in view of the judgment of this Court in CIT v. VTM Ltd., reported in 319 ITR 336 (Mad.), wherein, this Court held that,

"It is true that the assessee is a company engaged in the business of manufacture of textile goods. As far as application of Section 32(1)(iia) of the Act, is concerned, what is required to be satisfied in order to claim the additional depreciation is that the setting up of a new machinery or plant should have been acquired and installed after 31st March 2002 by an assessee, who was already engaged in the business of manufacture or production of any article or thing. The said provision does not state that the setting up of a new machinery or plant, which was acquired and installed upto 31.03.2002 should have any operational connectivity to the article or thing that was already being manufactured by the assessee. Therefore, the contention that the setting up of a wind mill has nothing to do with the power industry, namely, manufacture of oil seeds etc. is totally not germane to the specific provision contained in Section 32(1)(iia) of the Act."

12. It is also to be noted that in Commissioner of Income-Tax v. Hi-Tech Arai Ltd., reported in (2010) 321 ITR 477 (Mad.), revenue sought for an answer, on the following substantial questions of law,

"(1) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in holding that the assessee is entitled to additional depreciation on the purchase of Wind Mills even though the main business of the assessee is not producing or generating of electricity?

(2) Whether on the facts and circumstances of the case, the Tribunal was right in allowing additional depreciation under Section 32(1)(iia) on wind mill amounting to Rs.33,29,562/- and Rs.37,28,824/- respectively for assessment years 2003-2004 and 2004-2005 was proper?

3. Whether the Tribunal was right in not considering the judgment of a Co-ordinate Chennai Bench passed in ITA 2107/Mds/06 dated 25.06.2008 in the case of Texmo Industries which is binding on it and in favour of the revenue as it against the ratio of the judgment of the Constitution Bench of the Supreme Court reported in AIR 1989 SC 1933?

4. Whether the new machinery or plant purchased is eligible for additional depreciation or only those plant and machinery purchased and used in its main business the exemption contemplated under Section 32(1)(iia) is to be given?"

After hearing the learned counsel for the appellant therein, a Hon'ble Division Bench of this Court, at Paragraphs 4 and 5, held as follows:

"4. As far as the contention based on Section 32 (1)(iia) of the Act, is concerned, the assessment years pertain to 2003-2004 and 2004-2005. The provision, which is relevant for our purpose, reads as under:

(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, 2002, by an assessee engaged in the business of manufacture or production of any article or thing, a further sum equal to fifteen per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii):

Provided that such further deduction of fifteen per cent shall be allowed to:-

(A) a new industrial undertaking during any previous year in which such undertaking begins to manufacture or produce any article or thing on or after the 1st day of April 2002; or

(B) any industrial undertaking existing before the 1st day of April 2002, during any previous year in which it achieves the substantial expansion by way of increase in installed capacity by not less than ten per cent."

5. In the case on hand, the assessee is stated to have set up two wind mills in addition to the already existing four wind mills and thereby increased its power generation capacity by above 50%. It is true that the assessee is a company engaged in the business of manufacture of oil seeds, moulded rubber parts, reed value assemblies apart from generation of power. After the installation of the additional wind mills, both prior to as well as after the installation of the additional wind mills, the assessee was using wind energy for generating power for its capitative

consumption apart from selling the surplus power generated to the Tamil Nadu Electricity Board. As far as application of Section 32(1)(iia) of the Act, is concerned, what is required to be satisfied in order to claim the additional depreciation is that the setting up of a new machinery or plant should have been acquired and installed after 31st March 2002 by an assessee, who was already engaged in the business of manufacture or production of any article or thing. The said provision does not state that the setting up of a new machinery or plant, which was acquired and installed upto 31.03.2002 should have any operational connectivity to the article or thing that was already being manufactured by the assessee. Therefore, the contention that the setting up of a wind mill has nothing to do with the power industry, namely, manufacture of oil seeds etc. is totally not germane to the specific provision contained in Section 32(1)(iia) of the Act."

13. Following the decision in Hi-Tech Arai's case (cited supra), in Commissioner of Income-Tax v. Texmo Precision Castings reported in (2010) 321 ITR 481 (Mad.), a Hon'ble Division Bench of this Court, upheld the order of the Tribunal, allowing additional depreciation.

14. In M.M.Forgings Ltd., v. Additional Commissioner of Income-Tax reported in (2012) 349 ITR 673 (Mad.), one of the substantial questions of the law, raised was whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was right in law in holding that the assessee is not entitled to additional depreciation u/s.32(1)(iia) of the Income-Tax Act, 1961, on the assets acquired after 30.09.2004? Reversing the order of the Tribunal, at Paragraphs 2 and 3, a Hon'ble Division Bench of this Court in M.M.Forgings Ltd., 's case (cited supra), held as follows:

"2. As far as the first question of law is concerned, the only issue to be considered is as to whether the assessee is entitled for the whole of the deduction permissible as provided under Section 32(1)(iia) of the Income-tax Act, as it stood then. The assessment year is 2005-2006. The provision as originally stood was as under:

"Provided ...

(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, 2002, by an assessee engaged in the business of manufacture or production of any article or thing, a

further sum equal to fifteen per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii)."

3. The Assessing Authority by applying the second proviso to Section 32(1) of the Act, restricted the allowability of the depreciation to 50% of the amount permissible under Section 32(1)(iia) of the Act. According to the appellant, when it satisfied all the conditions stipulated under the provisos to Section 32(1)(iia) of the Act, the Assessing Authority ought not to have restricted the depreciation permissible under the said section by resorting to the second proviso to Section 32(1) of the Act. The learned counsel however fairly pointed out before us that in the second proviso to Section 32(1) of the Act, that very Clause (iia) itself was inserted by Finance Act, 2002 with effect from 01.04.2003. Therefore, it was imperative that on and after 01.04.2003, the claim of the appellant made under Section 32(1)(iia) of the Act, had to be necessarily assessed by applying the second proviso to Section 32(1) of the Act. Therefore, when there was statutory stipulation providing for restriction to 50% of the amount allowable under Section 32(1)(iia) of the Act, no fault can be found with the conclusion of the Assessing Authority as well as that of the Appellate Authority and the Tribunal in having affirmed the action of the Assessing Authority. We, therefore, do not find any scope to entertain the said question of law."

15. Same is the view in the recent decision in Commissioner of Income-Tax v. Atlas Export Enterprise reported in (2015) 373 ITR 414 (Mad.), which followed in Hi-Tech Arai's case (cited supra).

16. In the light of the decisions and discussion, we have no hesitation to answer the substantial questions of law, raised in the instant Tax Case Appeal, against the revenue. Hence, the Tax Case Appeal is dismissed. No costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

skm

To

1.The Assistant Registrar,
Income Tax Appellate Tribunal,
Madras 'D' Bench, Chennai.

2.The Commissioner of Income Tax(Appeals)-II,
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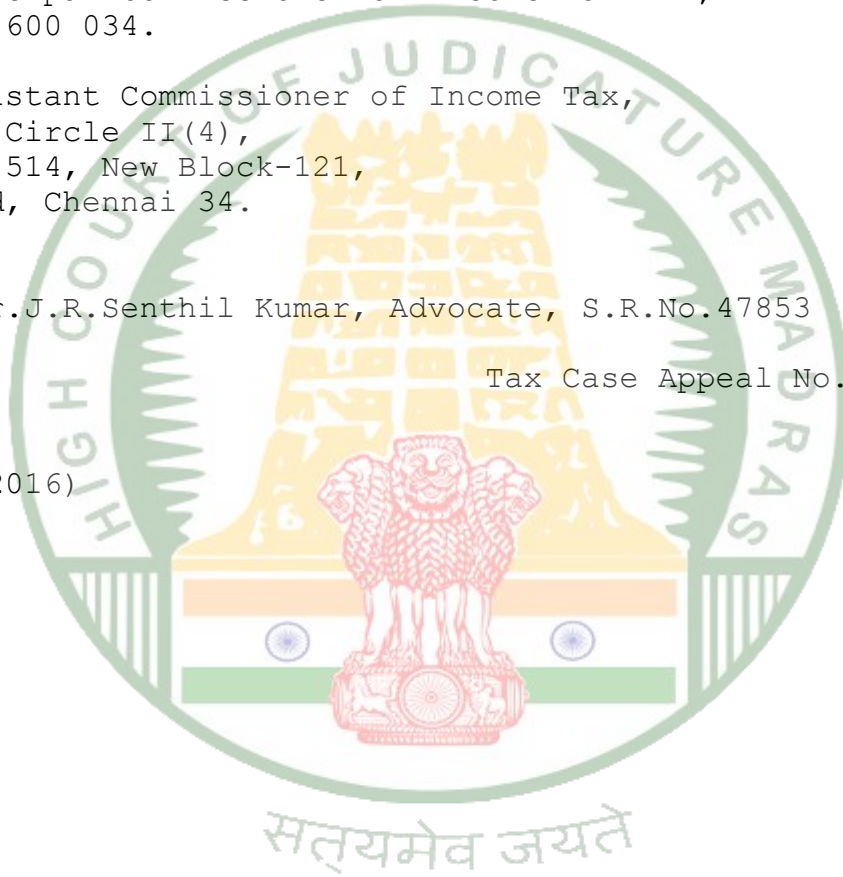
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+1cc to Mr.J.R.Senthil Kumar, Advocate, S.R.No.47853

Tax Case Appeal No.582 of 2016

MSM(CO)
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