

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.08.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE D.KRISHNA KUMAR

T.C.A.No.591 of 2016

The Commissioner of Income Tax,
Trichy .. Appellant/Appellant

versus

M/s.Sangu Chakra Hotels (P) Ltd.,
Collector Office Road,
Cantonment, Trichy 620 001. ... Respondent/Respondent

Prayer: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal Madras 'D' Bench, made in I.T.A.No.1351/Mds/2014, dated 14.10.2015, against the Order of The Commissioner of Income Tax (Appeals) Trichy, made in ITA No.1881/2010-11/CIT(A)/TRY dated 29/1/14 against the order of the Deputy Commissioner of Income Tax, Company Circle-I(I/C) Trichy, made in PAN/GIR No.AADCM2094G dated 30/12/2010 for the Assessment Year 2008-09.

For Petitioner : Mr.J.Narayanasamy
Sr.Standing Counsel for IT

JUDGMENT

(Judgement of the Court was made by S.MANIKUMAR, J.)

Challenge in this Tax Case Appeal, is to an order made by the Income Tax Appellate Tribunal in I.T.A.No.1351/Mds/2014, dated 14.10.2015, by which, the Tribunal has dismissed the appeal preferred by the revenue, against the order of the Commissioner of Income-Tax(A) in I.T.A.No.188/2010-11/CIT(A)/TRY, dated 29.01.2014.

2. Short facts leading to the appeal are that the assessee is a private limited company, engaged in the business of running a Tourist Hotel. The assessee filed its return of income on 21.09.2008, admitting total income as Rs.70,10,580/-. Return was taken for scrutiny and assessment under Section 143(3) of the Income Tax Act (Hereinafter referred to as, "the Act") was

completed on 30.12.2010, wherein the Assessing Officer disallowed the claim of depreciation of Rs.3,78,00,000/-, on the cost of Wind Mill of Rs.9,45,00,000/-, because the wind mill was not acquired during the relevant previous year. Reasons for arriving at the abovesaid conclusion were that,

(a) The invoice for sale of the windmill was dated 31.03.2008 i.e. the last date of the relevant previous year.

(b) The assessee had paid only Rs.1,86,00,000/- out of the total cost of the windmill Rs.9,45,00,000/- as on 31.03.2008.

(c) The balance amount of Rs.7,79,00,000/- was paid during the month of May & June 2008 as follows:-

Sl.No.	Date of Payment	Amount (Rs.)
1	06.05.2008	59,00,000/-
2	30.06.2008	7,00,00,000/-
	Total	7,59,00,000/-

(d) The agreement with TNEB for sale of power was dated 29.03.2008 and the approval of the same was communicated by the S.E. Tirunelveli/TNEB on 22.04.2008.

(e) The office of S.E. TNEB has not responded to the query raised by the Ld. Assessing Officer to clarify as to how sale agreement of power could be entered with the assessee by the TNEB on 29.03.2008 when the assessee has purchased the windmill vide invoice dated 31.03.2008.

(f) No specific evidence was produced either by the seller or by the buyer of the windmill that the property has passed hands before 31.03.2008.

(g) By the test of preponderance of probabilities, it could be construed that the windmill would have passed hands only during the Financial Year 2008-09 relevant to the assessment year 2009-10."

3. Being aggrieved by the same, the respondent-assessee filed I.T.A.No.188/2010-11/CIT(A)/TRY, before the Commissioner of Income-Tax (Appeals). Before the appellate authority, the respondent-assessee filed supporting evidence. Going through the evidence and after hearing both sides, vide order in I.T.A.No.188/2010-11/CIT(A)/TRY, dated 29.01.2014, the appellate authority has allowed the appeal of the respondent-assessee and directed the assessing officer to delete the addition made on account of disallowance of depreciation of Rs.3,78,00,000/-.

4. Not satisfied with the order, the Deputy Commissioner of Income Tax, Trichy, has filed I.T.A.No.1351/Mds/2014, before the Tribunal. After hearing the department's representative and the learned counsel for the respondent-assessee, the Tribunal

confirmed the decision of the Commissioner of Income-Tax (Appeals), Trichy. Being aggrieved by the same, the instant Tax Case Appeal is filed, on the following substantial questions of law,

"(i) Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee is entitled for depreciation on the wind mill generator purchased from M/s.Simran Wing Project (P) Ltd., eventhough no evidence was produced before the assessing officer to show that the asset was transferred to the assessee as on 31.03.2008?

(ii) Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that there was no violation of Rule 46A, even though the CIT(A) had admitted the evidences that were not produced before the assessing officer?"

5. Supporting the substantial questions of law, Mr.J.Narayanasamy, learned standing counsel for the Income-Tax Department submitted that the Tribunal has erred in holding that the assessee is entitled for depreciation on the second hand wind mill generator, even through the assessee had only paid partial monies towards the asset and had not become the owner of the asset. He further submitted that the Tribunal ought to have appreciated that the assessee itself had admitted payment of Rs.7.59 Crores, in the instalments in the months of May' 2008 and June' 2008, after the end of the financial year and therefore, the asset was not transferred to the assessee.

6. Learned counsel for the appellant further submitted that the Tribunal ought to have appreciated the fact that the purchase invoice was dated 31.03.2008 and approval of the Superintending Engineer, Tamil Nadu Electricity Board, was communicated only on 22.04.2008. It is also his submission that the documents relied on by the respondent-assessee to conclude that they are entitled for depreciation, were not placed before the assessing officer.

7. Learned counsel for the appellant further submitted that the Tribunal ought to have appreciated that the wind mill generator was not ready to use and operational, as on the last day of the financial year and therefore, the assessee is not entitled for depreciation, on the asset. On the above submissions, he took this Court through the orders of the authorities and that of the Tribunal and thus, prayed for an answer in favour of the revenue, on the first substantial question of law.

8. As regards the second substantial question of law, learned counsel for the appellant further submitted that the Tribunal in holding that no opportunity was given to the appellant to revert the documents, filed at the appellate stage. According to him, the Commissioner of Income-Tax (Appeals), has considered the said documents and there is no violation of principles of natural justice. According to him, the Tribunal has not addressed the said issue, in proper perspective. For the abovesaid reasons, he prayed that the second substantial question of law, also deserves to be considered and answered in favour of the revenue.

Heard the learned counsel for the appellant and perused the materials available on record.

9. Sequence of events deduced from the order of the Commissioner of Income-Tax (Appeals) in I.T.A.No.188/2010-11/CIT (A)/TRY, dated 29.01.2014, are as follows:

"One of the assets acquired during the previous year ended 31.03.2008, consists of a wind mill of capacity 1500 KW, from M/s.Simran Wind Project (P) Ltd., at a cost of Rs.9,45,00,000/- and the facts, in regard to the said acquisition was narrated in detail by the appellant are summarized in the following format:

Date	Sequence of Events
02.02.2008	Booking Advance of Rs.20.00 Lakhs paid by the Company to M/s.Simran Wind Project (P) Ltd.,
08.02.2008	Passing of resolution by the appellant Company for acquisition of Wind Mill
14.02.2008	Placing of Order with M/s.Simran Wind Project (P) Ltd., for supply of One Number 1500 KW Suzlon Wind Turbine Generator (Wind Mill)
14.02.2008	Further payment of Rs.1,66,00,000/- by the Company to the supplier
07.03.2008	Land on which Wind Mill is situated transferred and registered in the name of the appellant company
10.03.2008	Application to TNEB for transfer of Wind Mill to the appellant company.
19.03.2008	Sanction of Term Loan of Rs.700.00 Lakhs by State Bank of India for acquisition of Wind Mill
24.03.2008	Term Loan disbursed by SBI
25.03.2008	Payment of balance amount of Rs.59.00 Lakhs by the Appellant Company to the supplier.

Date	Sequence of Events
28.03.2008	Payment of fees to TNEB for the transfer of the Wind Mill in the name of the appellant Company
29.03.2008	Letter by TNEB for the Approval of transfer of the Wind Mill assigned to M/s.Simran Wind Project (P) Ltd., to the appellant Company
29.03.2008	Energy Purchase Agreement entered into with TNEB by the appellant-Company
29.03.2008	Consumption of Electricity Generated from the said Wind Mill by the Appellant Company

10. Considering the evidence adduced at the appellate stage and the arguments, the Commissioner of Income-Tax (Appeals), in I.T.A.No.188/2010-11/CIT(A)/TRY, dated 29.01.2014, has ordered hereunder:

"I have carefully considered the facts of the case; the arguments relied upon by the Assessing Officer for the disallowance and also the arguments advanced by the appellant. The appellant has established the fact that the order for the acquisition of the Wind Mill started as early as on 02.02.2008. The appellant has also established the passing of consideration by its own resources to the extent of Rs. 186.00 Lakhs before 31.03.2008. The same is verifiable from the copy of the Bank account of the appellant with SBI. It is also seen from the Term Loan Account copy furnished by the appellant that the said bank has debited the appellant a sum of Rs. 700.00 Lakhs on 24.03.2008, by way of disbursement of Term Loan and has even charged interest of Rs.1,68,767/- for the period 24.03.2008 to 31.03.2008, on such disbursement. The document conveying the land to the appellant vide sale deed dt. 07.03.2008 also confirms that the physical possession was handed over on the said date. The Assessing Officer has not produced any material to controvert the following facts:

1) The letter dt. 29.03.2008 approving the transfer of the Wind Mill in favour of the appellant.

2) The payment of name transfer fee by the appellant vide the receipt issued by TNEB No- 137846 dt. 28.03.2008.

3) The entering of the Energy Purchase Agreement with TNEB on 29.03.2008.

4) The generation of Electricity from such Wind Mill w.e.f. 29.03.2008 and adjustment of such generation in the Bill issued by TNEB for the month of April 2008.

The fact that the Wind Mill was installed and

commissioned at the site is also established by these evidences produced and as argued by the appellant the issue of Invoice on 31.03.2008 cannot vitiate all these evidences. The Appellant placed his reliance in support of its claim for depreciation on the ratios held in the case of Mysore Minerals Ltd Vs CIT 239 ITR 775 and CIT Vs Kences Construction (P) Ltd 236 ITR 503. On Analyzing the case laws mentioned wherein it was held that when the assessee even if he has made only part payment of the sale consideration and also even the actual deed of conveyance was not executed in its favor the assessee was entitled to depreciation on the assets which form part of block of assets at the end of the year as shown in depreciation schedule in the balance sheet as well as in his books of accounts this view was held in the case of Mysore Minerals Ltd Vs CIT as mentioned supra. Similarly the Honorable Madras Jurisdictional High Court also held a view which is in favor of the Assessee that the Assessee having taken over possession of the wind mill and the income from the wind mill having been assessed in the Assessee's hands, the Assessee's claim of depreciation on wind mill is allowable notwithstanding the fact that the wind mill are still under hypothecation with the bank in the name of Transferor Company. In the second case referred above wherein the Assessee claimed that it had purchased the windmills from its sister company and it had been duly recorded in the Assessee's books of accounts and the entire consideration has also been paid by the Assessee. The entire bank loan which was taken by the sister company was also discharged by the Assessee. Therefore the Assessee is the owner for the purpose of the IT Act and the Assessee is entitled to claim depreciation. This was rejected by the Assessing Officer on the ground that the windmills are still under hypothecation with the bank and the Application to the Tamil Nadu Electricity Board was made only by the sister company and the loan taken from the bank continue to appear as liability in the books of the sister company. There was no evidence to show that there was a transfer of the windmills and that for the same property i.e., windmills, depreciation has been claimed both by the sister company and by the Assessee. Hence the Assessing Officer disallowed the claim of depreciation. On appeal it was found that possession had been handed over to the Assessee by the sister company which is the transferor and an invoice had been raised by the transferor company on the Assessee. A board resolution had also been passed by the Assessee for the purpose of windmills. The

windmills had been used for the business of the Appellant and the income generated on such business was admitted for assessment by the Assessee. The Appellate Authority also found that the Assessee is a legal owner of the windmills and the possession of the property was also handed over to the Assessee and the fact that the windmills are still hypothecated with the bank in the name of the transferor company, or the fact that the agreement with the TNEB was in the name of the transferor company could not change the position. The Appellate Authority in the referred case mentioned also concluded that the entire bank loan availed of by the transferor company was repaid by the Assessee and not the Transferor Company. Therefore the appeal was allowed. Even the tribunal dismissed the revenue's appeal by holding that the Assessee as the owner of the windmill and held that when the income from the windmill is assessed in the hands of the Assessee, all related expenses and depreciation thereon have to be allowed. The Honorable Madras High Court has also upheld the contention of the Assessee for the claim of the Appellant for depreciation on the ground that the possession of windmill is with the Assessee, the loan has been discharged by the Assessee and the income from the property is assessed in the hands of the Assessee. The jurisdictional High Court on ascertaining the sister company has not claimed the depreciation on the assets transferred to the Assessee Company and allowed the claim of the Assessee.

The Standard Textiles, Karur vs Dy. Commissioner of Income Tax, Circle Tiruchirapalli Order dated 22/06/2011,

"In this appeal filed by the assessee, its grievance is that depreciation of Rs.76 lakhs claimed on Wind Mill was disallowed for the reason that only trial production was done and wind mill was not connected to the power grid.

The assessee engaged in the business of exporting cotton fabrics had in the Relevant previous year claimed depreciation on a wind mill. Assessee produced a letter issued by the Executive Engineer, Tamil nadu Electricity Board (TNEB), which stated that the wind mill was commissioned on 05.03.05. As per the assessee, the trial production was started and it was not necessary to produce electricity for the whole of the year for claiming depreciation. However, the Assessing Officer was of the opinion that as per the agreement entered into by the assessee with the Member (generation) TNEB, wind mill would be connected to the power grid only on commissioning of 22 kv enercon Feeder. Therefore, as per the Assessing Officer, wind

mill could not be considered connected to the grid till the Transformer was commissioned. Assessee having not put the wind mill to actual use, depreciation could not be allowed.

In the appeal before the commissioner of income Tax(A), submission of the assessee was that commissioning certificate issued by the Executive Engineer(TNEB) on 08.03.05 clearly mentioned that it was tied up with the TNEB grid. As per the assessee, the said certificate also mentioned initial reading as on 05.03.05. Assessee argued that use of machine for trial production was as much use of a machine that would entitle it to claim depreciation. According to it there was no requirement that wind Mill should keep on producing power every day of the year and even if it had producing power only for a moment, it would be eligible for claim of depreciation. The AR of the appellant has objected the contention of the Assessing Officer in disallowing the depreciation claimed on the ground that the wind mill was not put in use. The AC has not considered the evidence produced before him establishing the wind mill generation being connected to the electricity grid before 31.03.2005 and generating the electricity and also receiving the payment from the TamilNadu Electricity Board. The wind mill Turbine generator (WTG) was connected to the grid for commissioning of 22kv enercon feeder and the feeder was commissioned before 31.03.2005."

Admittedly the Executive Engineer Operation and Maintenance for TNEB vide its letter dt. 08.03.05 had given the commissioning certificate to the assessee and the said commissioning certificate also reflected there in the initial reading on 05.03.05. There is no case for the Revenue such initial reading was Zero, it cannot be presumed that certificate issued by the Executive Engineer stating that the wind mill was tied up with TNEB grid was fabricated. The AR of the appellant further argued that the AO cannot presume that there was no production of wind mill at all after its commissioning on 05.03.05 up to 31.03.05. In our opinion, assessee had clearly established use of the wind mill for production of electricity. Electricity as a product, unlike other tangible material, would be the same whether it results out of a trial production or of a commercial production. Nobody would attempt to touch a electrical wire carrying potential difference, just for a reason that the electricity charged there in, was from the trial production of a generator unit and not for commercial production. Electricity as a commodity remains the same whether in trial production or commercial production. Rules relating to necessity

of establishing commencement of commercial production cannot be transported to a case where the commodity produced is electricity. Assessee was clearly eligible for depreciation and it was unjustly denied by the Assessing Officer.

On verifying the relevant records, the object of allowing higher rate of depreciation on Wind Mill is to encourage the use of energy saving and nonconventional energy generator devices. The higher allowance of depreciation at 80 to 100% allowed by the legislature is for the purpose of promoting and encouraging the use nonconventional device of energy generation. Keeping in view of the following judicial precedents wherein the depreciation claimed by the assesseees have been allowed.

1. Tamil Nadu Cholride Vs.DCIT (2006) 98 1TD 1 (Chennai)
2. Chettinadu Cement Corporation Ltd., in ITA I029/Mds/2005
3. Atlost Exploit Enterprises Vs. DCIT Trichy
4. M/s.Velathal Spinning Mills Private Ltd., Vs. ACIT, Salem ITA No.202 & 203/Mds/2010.
5. Standard Textiles, Kaur Vs. DCIT, Trichy
6. P.Meenakshisundaram Vs. DCIT In ITA No.26/Mds/2009

Several courts have held that as per the judicial precedents as mentioned above wherein the depreciation claimed by the assessee has been allowed in full as per law. The Appellant has argued that on similar lines the Assessing Officer may be directed to allow the claim of the Appellant as genuine and do the justice.

On having gone through various case laws referred by the Appellant which are squarely applicable to the facts of the case and the claim made by the Appellant of depreciation on the windmills which were shown as assets in the depreciation schedule in its block of assets as on 31.03.2008, as well as various submissions made in favor of the claim for depreciation, it is amply made clear that the Appellant had paid an advance of Rs. 20,00,000/- for purchase of windmill of 1500 KV capacity from MIs Simran Wind project P Ltd. at a cost of Rs.9,45,00,000/- were on 02.02.2008, subsequently on 14.02.2008 a further amount of Rs.1,66,00,000/- has been paid by the company to the supplier of windmill. Further there was a sanction of term loan of Rs. 7,00,00,000/- by State Bank of India for acquisition of windmill on 19.03.2008 which has been disbursed by the State Bank of India on 24.03.2008. There was also subsequent payment of Rs.59,00,000/- on 25.03.2008 by

the Appellant Company to the Supplier. On delivery as well as installation of windmill and generation of electricity and entering of approval for transfer of the windmill to the Appellant Company by the TNEB on 29.03.2008 itself proved that the windmill has been kept on operation and started generating electricity during the FY relevant to the AY 2008-09 has been commenced and therefore the Appellant is eligible to claim the depreciation on the windmill at Rs. 3,78,00,000/-.

Thus, the Assessing Officer is not justified in denying the depreciation without analyzing various materials brought on record. Thus, the appellant has not only established the acquisition of the asset but also the putting the windmill into use for generation of electricity from the asset acquired before 31.03.2008. The fact that Section 32 of the Act nowhere stipulates that an assessee in order to claim depreciation ought to have paid the full cost of acquisition of depreciable asset. Taking into account the facts of the case, the materials placed on record and also relying upon the decisions in the cases cited supra, the Assessing Officer is not justified in denying the claim of the Appellant for depreciation. Therefore the Assessing Officer is directed to delete the addition made on account of disallowance of depreciation claimed by the Appellant at Rs. 3,78,00,000/-."

11. The Deputy Commissioner of Income-Tax (Appeals), Trichy, filed an appeal before the Income-Tax Appellate Tribunal, Chennai, contending inter alia, that the Commissioner of Income Tax (Appeals) has failed to appreciate that the sale invoice was issued on 31.03.2008, whereas, agreement for sale of power with TNEB, was dated 29.03.2008 and the approval of the same was communicated by the Superintending Engineer, ECD, Tamil Nadu Electricity Board, Tirunelveli, only on 22.04.2008.

12. The appellant has further contended that the Commissioner of Income-Tax (Appeals) has erred in not considering that TNEB has not replied to the clarification sought by the assessing officer, as to how, the agreement could be entered on 29.03.2008, when the seller had issued invoice on 31.03.2008. Further contention has been made that the appellate authority has erred in accepting fresh evidence that the payment of Rs.700 Lakhs was on 24.03.2008 and Rs.59 Lakhs on 25.03.2008, without giving opportunity to the assessing officer, under Rule 46A of the Income Tax Rules, 1962 and therefore, the assessment deserved to be remitted back to the assessing officer for fresh consideration.

13. On the other hand, facts, such as, (a) placement of order, as early as in February' 2008, (b) payment of Rs.1.86 Crores, by 14.02.2008, (c) payment by State Bank of India of Rs.700 Lakhs by 24.03.2008, (d) payment of balance consideration of Rs.0.59 Crores on 25.03.2008, (e) approval of transfer of windmill in favour of the respondent/assessee by TNEB, on 29.03.2008 and (f) generation of electricity and credit for the value, favouring the appellant for the period between 29.03.2008 and 31.03.2008, have been placed before the appellate authority.

14. For disbursement of term loan of Rs.7 Crores on 24.03.2008, the State Bank of India, has even charged interest of Rs.1,68,767/- for the period between 24.03.2008 and 31.03.2008. The respondent/assessee has also submitted that the sale deed, dated 07.03.2008, confirmed the physical possession. When evidence adduced at the appellate stage, was within the knowledge of the revenue, no contra material was produced to controvert the above.

15. Going through the documentary evidence, the appellate authority, has arrived at the conclusion that the wind mill has been installed and commissioned at the site and was operational before 31.03.2008. It started generating electricity during the financial year, relevant to the assessment year 2008-09 and therefore, the appellate authority has held that the respondent/assessee is eligible to claim the depreciation on the windmill at Rs.3,78,00,000/-.

16. Referring to Section 32 of the Income-Tax Act, 1961, the Commissioner of Income Tax (Appeals), Trichy, has also observed that the section does not stipulate any condition that an assessee, in order to claim depreciation, ought to have paid the full cost of acquisition of depreciable asset. Added further, the Commissioner has considered the following decisions,

- (i) Mysore Minerals Ltd v. CIT reported in 239 ITR 775
- (ii) CIT v. Kences Construction (P) Ltd., reported in 236 ITR 503
- (iii) Tamil Nadu Cholride v. DCIT reported in (2006) 98 ITD 1 (Chennai)
- (iv) Chettinadu Cement Corporation Ltd., [ITA I029/Mds/2005]
- (v) Atlost Exploit Enterprises v. DCIT, Trichy
- (vi) M/s.Velathal Spinning Mills Private Ltd., v. ACIT, Salem [ITA No.202 & 203/Mds/2010]
- (vii) Standard Textiles, Kaur v. DCIT, Trichy
- (viii) P.Meenakshisundaram Vs. DCIT [ITA No.26/Mds/2009]

Ultimately, for the reasons recorded, the Commissioner of Income-Tax (Appeals), allowed the respondent/assessee's appeal, with a direction to the assessing officer to delete the addition made, on account of disallowance of depreciation claimed by the respondent/assessee at Rs.3,78,00,000/-.

17. When the Deputy Commissioner of Income-Tax (Appeals), Trichy, filed an appeal before the Income Tax Appellate Tribunal, "D" Bench, Chennai, going through the evidence considered by the appellate authority, the Tribunal, has recorded as hereunder:

"9. On perusing the paper book filed by the assessee, we find that sufficient evidence were before the Revenue based on which the Ld. CIT (A) had come to a conclusion that the windmill has been purchased before 31.03.2008 and commissioned. Paper book page No.2 - Receipt for Rs.20/- lakhs dated 14.02.2008 mentioning that the amount was received on 02.02.2008 from M/s. Simran Wind project Pvt. Ltd., Paper book page No.3 - Receipt for Rs.20/- lakhs from M/s. Simran Wind Project P Ltd., dated 02.02.2008, page Nos.4 & 5 extract of the Minutes of the Meeting of the Board of Directors dated 08.02.2008 for purchasing the windmill from M/s. Simran Wind project P Ltd., paper book page Nos.6 to 10 - purchase order for procuring the windmill from M/s. Simran Wind project P Ltd., dated 14.02.2008, paper book page Nos.11 & 12 receipt from M/s. Simran Wind project P Ltd., for Rs.1,66,00,000/- dated 17.03.2008, paper book page Nos.13 to 26 sale deed for the purchase of the land dated 07.03.2008 on which windmill is erected, paper book page Nos.32 to 41 sanction letter and proof for disbursement of loan from State Bank of India dated 19.03.2008 amounting to Rs.7/- crores, page Nos.44 to page 53 - documents issued by Tamil Nadu Electricity Board for purchase of power generated by the windmill from the assessee and proof for having purchased the power from the assessee before 31.03.2008, Page No.61 - invoice dated 31.03.2008 from M/s. Simran Wind project P Ltd., on the name of the assessee for purchase of the windmill. The genuineness of these documents could not be satisfactorily confronted by the Revenue. Moreover we do not find Rule 46A being violated by the Ld.CIT(A) because the Ld A.R has certified that all the above documents were before the both the Revenue Authorities and the same could not be proved otherwise by the Ld.D.R by producing the assessment records. Further it is apparent from the order of the Ld.A.O that he had placed more reliance on the theory of preponderance of probabilities because many of the material events had occurred during the fag end of the previous year which

arise some suspicion. In these circumstances, we do not find it necessary to interfere with the order of the Ld. CIT (A) who had arrived at his decision based on the above mentioned documents and certain Judgments of the higher judiciary which are in support of the case of the assessee considering the facts of the case. Hence we hereby uphold the order of the Ld. CIT (A).

10. In the result, the appeal of Revenue is dismissed."

18. A substantial question of law does not arise on the findings of fact, unless it is substantiated that there is perversity. In *Bhagat Construction Co. (P) Ltd., v. CIT* reported in (2001) 250 ITR 291 (Del.), the Delhi High Court held that a question of fact, becomes a question of law, if the finding is either without any evidence or material or, if the finding is contrary to the evidence, or is perverse or there is no direct nexus between the conclusion of fact and the primary fact upon which that conclusion is based. But it is not possible to turn a mere question of fact into a question of law by asking whether as a matter of law the authority came to the correct conclusion on a matter of fact.

19. In *M. Janardhana Rao v. Joint CIT* reported in (2005) 273 ITR 50 (SC), the Hon'ble Supreme Court held that in the exercise of the powers under Section 260A, the findings of fact of the Tribunal cannot be disturbed. In the said judgment, the Apex Court further held that the tests for determining whether a substantial questions of law, is involved in an appeal are,

- (a) whether directly or indirectly it affects substantial rights of the parties, or
- (b) the question is of general public importance, or
- (c) whether it is an open question in the sense that the issue is not settled by a pronouncement of the Supreme Court or Privy Council or by the Federal Court, or
- (d) the issue is not free from difficulty, or
- (e) it calls for a discussion for alternative view.

20. Though Mr. J. Narayanasamy, learned Standing Counsel for the Income-Tax Department reiterated the very same grounds, before us, going through the material on record, we are of the considered view that the whole issue revolves only on the finding of fact recorded by the Commissioner of Income-Tax (Appeals), Trichy and confirmed by the Tribunal. Eligibility of the assessee, for allowance, with reference to Section 32 of the

Income Tax Act, 1962, has been considered, in the light of the decisions, referred to above, with a categorical finding on all the issues raised, by the revenue.

21. On the facts and circumstances of the case, we are of the view that the Tribunal was right in holding that the assessee is entitled to depreciation, as the assessee had taken over the possession of the wind mill, and that the same was put to use and started generating electricity, before 31.03.2008, during the financial year, relevant to the assessment year 2008-09. Hence, the first substantial question of law raised, is answered against the revenue.

22. On the 2nd substantial question of law, this Court deems it fit to extract Rule 46A of the Income Tax Rules, 1962, which deals with production of additional evidence before the Deputy Commissioner (Appeals) and Commissioner (Appeals), as follows:

"(1) The appellant shall not be entitled to produce before the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals), any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the Assessing Officer, except in the following circumstances, namely :-

(a) where the Assessing Officer has refused to admit evidence which ought to have been admitted ; or

(b) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the Assessing Officer ; or

(c) where the appellant was prevented by sufficient cause from producing before the Assessing Officer any evidence which is relevant to any ground of appeal ; or

(d) where the Assessing Officer has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

(2) No evidence shall be admitted under sub-rule (1) unless the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) records in writing the reasons for its admission.

(3) The Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) shall not take into account any evidence produced under sub-rule (1) unless the Assessing Officer has been allowed a reasonable opportunity-

(a) to examine the evidence or document or to cross-examine the witness produced by the appellant, or

(b) to produce any evidence or document or any witness in rebuttal of the additional evidence produced by the appellant.

(4) Nothing contained in this rule shall affect the power of the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) to direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal, or for any other substantial cause including the enhancement of the assessment or penalty (whether on his own motion or on the request of the Assessing Officer) under clause (a) of sub-section (1) of section 251 or the imposition of penalty under section 271."

23. Facts that the respondent/assessee has filed documents, in respect of sequence of events, set out in the foregoing paragraphs of this judgment, have not been denied. Knowledge of the revenue to the documentary evidence adduced at the appellate stage, is per se apparent on the face of the record. The only grievance of the revenue is that a remand report to have been obtained.

24. Paper Book Page Nos.32 to 41, produced before the Tribunal are sanction letter and proof for disbursement of loan from State Bank of India, dated 19.03.2008, amounting to Rs.7/-crores. Among the other documents produced by the respondent/assessee, Paper Book Page Nos.44 to 53 are stated to be documents issued by the Tamil Nadu Electricity Board for purchase of power generated by the windmill from the assessee and proof for having purchased power from the assessee before 31.03.2008.

25. Going through the documents issued by the State Bank of India and the Tamil Nadu Electricity Board and other evidences, extracted supra, the Tribunal has observed that the genuineness of the documents has not been confronted by the Revenue. Same was the case before the Commissioner of Income Tax (Appeals). When production of evidence at the appellate stage, is permissible under the Income-Tax Act, 1961 and the Rules made thereunder, nothing prevented the Revenue from raising objections or to question the genuineness of the documents.

26. What is contemplated under the rules is examination of evidence or to cross examine the witness produced by the appellant. Revenue is also entitled to produce any evidence or

witness, rebutting the additional evidence produced by the appellant. When all the above was open to the revenue, it is the categorical finding of both the appellate authority and the Tribunal that the revenue has not confronted the evidence adduced by the assessee, in which event, it would not be correct to contend that the Commissioner of Income-Tax (Appeals), ought to have sought for a remand report. There was no challenge to the documentary evidence.

27. The question now posed before us, is whether, the Commissioner of Income-Tax (Appeals), has properly exercised the powers, under Rule 46A of the Income Tax Rules, 1963. It is the case of the revenue that a remand report ought to have been obtained. Exercise of power by the Commissioner of Income-Tax (Appeals, is to enable the appellate authority to pass orders, for substantial cause, while entertaining additional evidence, the appellate authority is empowered to allow additional evidence to do substantial justice, between the parties. The appellate authority may admit the evidence and decide the appeal. The appellate authority may keep the appeal pending and direct the assessing officer to ascertain the facts, essential for the purpose of deciding the appeal and then, on the basis of the remand report, decide the appeal. Where additional evidence is adduced, the other side has to be given an opportunity to explain or rebut such additional evidence. It is also well settled that if evidence has been allowed to be let in, without objection, it will not be open to the party aggrieved to raise any objection, as to its admissibility, at a subsequent stage. When all the materials were available before the appellate authority and not objected by the revenue, the contention that a report ought to have been obtained, cannot be countenanced. Exercise of jurisdiction by the appellate authority, cannot be said to be contrary to the provisions of the Income Tax Rules, 1963.

28. When the State Bank of India, a schedule bank/Public Sector Undertaking has issued documentary proof for disbursement of the loan on 19.03.2008, amounting to Rs.7,00,00,000/- and the Tamil Nadu Electricity Board, controlled by the State, have issued documents to prove the purchase of power generated by the windmill from the assessee, they were not objected by the department and in such circumstances, it would not be appropriate to contend that the Tribunal went wrong in holding that there is no violation of Rule 46-A of the Income-Tax Rules, 1962. Thus, both before the Commissioner of Income-Tax (Appeals), Trichy and the Tribunal, the revenue has not only failed to controvert the contents of the documents nor produced the assessment records, to disprove the same.

29. Thus, after considering the credence of the documentary evidence, produced by the respondent/assessee and on the facts

and circumstances of the case, the Tribunal, by observing that the assessing officer had placed reliance only on the theory of preponderance of probability, and thus, disallowed depreciation, has confirmed the order of the Commissioner of Income-Tax (Appeals), Trichy. The Tribunal has also found that the decisions relied on, supported the case of the respondent/assessee.

30. In the light of the above discussion and the decisions, we are of the view that the appellant has not made out a case for an answer in its favour, on the substantial question of law No.2, raised in the instant appeal. Hence, the same is answered against the revenue.

31. There are no valid grounds to reverse the order of the Tribunal. Both the questions of law raised are answered against the revenue and in favour of the assessee.

32. In the result, the Tax Case Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

To

- 1.The Income Tax Appellate Tribunal,
"D" Bench, Chennai.
- 2.The Commissioner of Income Tax,
Trichy.
- 3.The Commissioner of Income Tax(Appeals),
Trichy.
- 4.The Deputy Commissioner of Income Tax,
Company Circle-I,
Trichy.

+1cc to Mr.J.Narayanaswamy, Advocate Sr.47850

T.C.A.No.591 of 2016

ca[co]
srg 28/09/2016