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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 18th February, 2019

+ **ITA 1290/2018**

PR. COMMISSIONER OF
INCOME-TAX-6, NEW DELHI

..... Appellant

Through: Mr.Asheesh Jain, Sr.Std.Counsel
with Mr.Sanjay Kumar, Advocate

versus

NTPC SAIL POWER CO. PVT. LTD.

..... Respondent

Through: Mr.M.P.Rastogi, Mr.K.N.Ahuja &
Mr.Manu K.Giri, Advocates

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

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1. This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 [hereinafter referred to as "the Act"] is directed against an order of the Income Tax Appellate Tribunal [hereinafter referred to as "the Tribunal"], dated 24.07.2018, passed in ITA No.6501/DEL/2014, dismissing the Revenue's appeal. In the present appeal, notice has been issued only on one question - pertaining to the disallowance of additional depreciation claimed by the respondent/assessee for Assessment Year 2011-2012.

2. The assessee is a joint venture company of two public sector undertakings and is engaged in the production of thermal power. For the assessment year in question, it declared 'nil' income after setting off the current year's profits with brought forward unabsorbed depreciation. During

the course of assessment proceedings, the Assessing Officer (AO) raised a query regarding the assessee's claim for "additional depreciation", under Section 32(1)(iia) of the Act contending that such a deduction was permissible only if the assessee was engaged in the production of any "article or thing" which, it was claimed, does not include the generation of power. The assessee, in reply, claimed to have been granted such deduction from A.Y. 2006-07 onwards.

3. Ultimately, the Assessing Officer disallowed the addition holding that, on a plain reading of the statutory provision, additional depreciation could be claimed only by an assessee who produces something tangible or movable which could be handled/touched/stored. A later amendment to Section 32(1)(iia) of the Act, specifically dealing with additional depreciation in respect of an entity engaged in the business of generation and distribution of power, was held applicable only w.e.f. 01.04.2013, and not prior thereto.

4. The CIT(A) by an order dated 25.08.2014 allowed the assessee's appeal on this point following an order of the Tribunal dated 30.04.2012 in the case of *NTPC vs. Deputy Commissioner of Income Tax* [ITA No.1438/DEL/2009]. The Revenue's appeal has also been dismissed by the impugned order of the Tribunal on the basis of the same judgment.

5. We have heard Mr.Asheesh Jain, learned Senior Standing Counsel for the Revenue and Mr.M.P.Rastogi, learned counsel for the assessee.

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)."

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:

"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)(ia) 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.

12. For the above reasons, the Court is of the opinion that no substantial question of law arises. The appeal is dismissed.

PRATEEK JALAN, J.

S. RAVINDRA BHAT, J.

FEBRUARY 18, 2019/ 'hkaur'