OD-57

ITAT/172/2017
IA No.GA/2/2017 (Old No.GA/1455/2017)

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF INCOME TAX-3, KOLKATA

-Versus-

M/S. DAMODAR VALLEY CORPORATION

Appearance:
Mr. Tilak Mitra, Adv.
Mr. Soumen Bhattacharjee, Adv.
...for the appellant.

Mr. Rahul Tangri, Adv.
Mr. Deepro Sen, Adv.
...for the respondent.

BEFORE:
The Hon'ble JUSTICE T.S. SIVAGNANAM
-And-
The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

Date : 17th November, 2021.

The Court : This appeal of revenue filed under Section 260A of the Income Tax Act (the 'Act' in brevity) is directed against the order dated 15th September, 2016 passed by the Income Tax Appellate Tribunal, B-Bench, Kolkata (the 'Tribunal') in ITA No.1458/Kol/2015 for the assessment year 2011-12.

The revenue has framed the following substantial questions of law for consideration :

"a) Whether on the facts and in the circumstances of the case the Learned Income Tax Appellate Tribunal, "B" Bench, Kolkata, has erred in law in allowing the additional depreciation @20% under Section 32(1)(iia) which was allowed by the A.O. without any enquiry?

b) Whether on the facts and circumstances of the case the Learned Income Tax Appellate Tribunal, "B" Bench, Kolkata, has erred in law in quashing the order passed by the Ld. CIT u/s 263 of the I.T. Act, 1961, by disregarding that the assessment order of the A.O. was erroneous and prejudical to the interest of the Revenue in allowing the claim of depreciation u/s 32(1)(iia) in A.Y. 2011-12 which came into effect from 1st April, 2013, i.e. from the A.Y. 2013-14?"

We have heard Mr. Tilak Mitra, learned counsel for the appellant assisted by Mr. Soumen Bhattacharjee, learned advocate and Mr. Rahul Tangri, learned counsel for the respondent assisted by Mr. Deepro Sen, learned advocate.

The short question involved in this appeal is whether the respondent/assessee which generates electricity from thermal power is entitled for additional depreciation at the rate of 20% under Section 32(1)(iia) of the Act. The substantial question which needs to be considered is whether the initiation of proceedings under Section 263 of the Act was justified? If we answer the first question of law in favour of the assessee, then the necessity to answer the second question may not arise as it would become academic. We need not answer the first question of law as there are various decisions of the Hon'ble Supreme Court as well as other High Courts including this Court. In the *State of Andhra Pradesh vs. National Thermal Power Corporation (2002)5 SCC 203,* the Hon'ble Supreme Court held that electric energy can be transmitted, transferred, delivered, stored, possessed etc. in the same state as movable property. The Hon'ble Supreme Court followed its earlier decision in *Commissioner of Sales Tax, Madhya Pradesh, Indore vs. Madhya Pradesh Electricity Board, Jabalpur 1969(1)SCC 200.* Therefore, the revenue cannot dispute the fact that the electricity needs to be construed as a movable property as it being capable of being transmitted and transferred etc.

The next issue is whether the respondent/assessee would be entitled to additional depreciation under Section 32(1)(iia)? We are guided by the decision of this Court in the case of *Commissioner of Income Tax, Kolkata-I vs. Ankit Metal and Power Limited* reported in *(2016)66 taxmann.com 367(Calcutta).* In the said decision the Division Bench followed the decision of the High Court of Madras in *CIT vs. Hi-tech Arai Limited* reported (2010)321 ITR 477 (Madras) and CIT vs. *VTM Ltd.* reported in [2009] 319 ITR 336 (Mad) and held that the assessee therein which was also engaged in the activity of manufacturing of power is entitled for additional depreciation under Section 32(1)(iia) of the Act. To the same effect, there are several other decisions of other High Courts and the latest being in the case of PCIT, New Delhi vs.

NTPC SAIL Power Co.(P.) Ltd. reported in [2019]103 taxmann.com 398 (Delhi).

In the light of the above, we hold that the respondent/assessee is entitled for additional depreciation under Section 32(1)(iia) of the Act. For the reasons, the appeal filed by the revenue is dismissed and the substantial question of law is answered against the revenue.

As pointed out earlier, since the core issue has been decided in favour of the respondent/assessee, the question whether exercise of jurisdiction by the Commissioner under Section 263 of the Act is justified or not is not required to be considered.

Accordingly, the appeal stands dismissed. The stay application also stands closed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

A/s./S.Das.