IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH “C”, MUMBAI

BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI AMARJEET SINGH, JUDICIAL MEMBER

ITA No.2324/M/2017
Assessment Year: 2011-12

M/s. City Life Developers, 5th Floor, Agarwal Golden Chamber, Plot No.13/A, Fun Republic Road, Off New Link Road, Andheri – West, Mumbai – 400 053 **PAN: AADFC1252B**	Vs.	Income Tax Officer-25(1)(1), 201, 2nd Floor, C-11, Pratyakshakar Bhavan, BKC Bandra (E) Mumbai
(Appellant)		(Respondent)

Present for:
Assessee by : Dr. K. Shivram, A.R.
Shri Sashank Dundu, A.R.

Revenue by : Shri Abi Rama Kartikeyan, D.R.

Date of Hearing : 06.03.2019
Date of Pronouncement : 13.03.2019

O R D E R

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against the order dated 09.01.2017 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2011-12.

2. The only issue raised by the assessee is against the confirmation of disallowance on account of additional depreciation of Rs.1,87,53,204/- as made by the AO under section 32(1)(iia) in respect of wind mill.

3. The facts in brief are that the assessee is engaged in the business of construction and during the year filed the return of income on 26.09.2011 declaring loss of Rs.9,12,45,483/- which was processed under section 143(1) of the Act. Thereafter statutory notices were issued and served upon the assessee. During assessment proceedings, the AO noticed that assessee has debited depreciation of Rs.2,55,58,684/-whereas the depreciation in the corresponding previous year was Rs.1,35,18,814/-only. The AO noted that the said increase in depreciation was on account of addition to the fixed assets on account of wind mills. Accordingly, the assessee was asked to produce the complete details of wind mill purchased and put to use in the current financial year. The assessee responded vide letter dated 28.01.2014 by submitting that the wind mill was procured in 2009-10 but same was not used for the purpose of business in the financial year 2009-10 as was installed and invoiced in the next year. The assessee filed copies of delivery challan, lorry receipts etc to corroborate his averments. The operation of wind mill was started in 2010-11 and therefore the assessee claimed depreciation @ 80% along with additional depreciation @ 20% under section 32(1)(iia) of the Act. Hence, the AO issued show cause notice to the assessee vide order sheet entry dated 14.03.2014 calling upon the assessee to justify the claim of additional depreciation and also state as to why the same should not be disallowed. According to the AO, in the business of generation and distribution of power the additional depreciation shall be allowed only from 01.04.2013 whereas the assessee has wrongly claimed the additional

depreciation in A.Y. 2011-12. Thus AO disallowed depreciation to the extent of Rs.1,87,53,204/- in the assessment framed.

4. In the appellate proceedings, the Ld. CIT(A) also dismissed the appeal of the assessee by observing and holding as under:

> "3.3. I have carefully gone through the assessment order as well as the written submission of the appellant. I have also carefully perused the details filed by the appellant. The only issue in dispute is regarding allowability of claim of additional depreciation. Additional depreciation is discussed in section 32(1)(iia) of the Income tax Act. For the relevant assessment year the language of the section is as follows:
>
>> "In *the case of any new machinery or plan! (oilier than ships and aircrafts), 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 percent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii)*"
>
> 3.4 From a perusal of the section it can be clearly seen that the words "in the business of generation or generation and distribution of power" was not there in the section for the impugned assessment year. The section was amended by the Finance Act 2012 and the amended provision was applicable from 01.04.2013. Therefore, the AO was not wrong in interpreting the law to the effect that the advantage of additional depreciation would be available to the appellant only from the AY 2013-14. However, the appellant has relied on the decision of the jurisdictional ITAT Mumbai in the case of Shri Atul Shivdas Ganatra vs DCIT 22(1), Mumbai ITA No. 4899/Mum/2014 dtd 26.08.2016. In this judgment the Hon'ble ITAT Mumbai has held that the electricity generated by an assessee is an article or good and has allowed additional depreciation on windmill for AY 2010-11 i.e. for a period prior to the amendment. Similarly, the appellant has relied on the decision of the ITAT, Delhi in the case of NTPC Ltd. Vs DCTT wherein it was held that the production of electricity amounts to production of an article or thing. However, the decision of the Hon'ble ITAT is distinguishable on facts and law. The basic requirement for claim of additional depreciation is that the assessee has to acquire and install a new machinery or plant in the concerned previous year. In the judgment given by the ITAT Mumbai cited above the windmills were acquired and installed during the concerned previous year. However, in the case of the appellant, it has been stated by the appellant itself before the AO vide its letter dated 20.08.2014 that *"although we have procured the windmill and the same was installed in FY 2009-10, the .said windmill was not used for the purpose of business during FY 2009-10."* Thus, the windmill was neither acquired nor installed in the relevant previous year 2010-11. Further, in the case of NTPC Ltd Vs DCIT the issue of acquisition and installation of the new machinery was not discussed at all. It has been held by the Hon'ble ITAT Delhi in the case of International Cars & Motors Ltd. Vs ITO 30 Taxrnann.com 5 that for claiming additional depreciation both conditions that new machinery or plant has been acquired and installed are required to be fulfilled. Consequently, additional depreciation on the windmill which was neither

acquired nor installed during the FY 2010-11 will not be available to the appellant for AY 2011-12. After considering the facts of the case and the position of law as given in section 32(1)(iia), I have come to a conclusion that the additional depreciation on windmill is not allowable for AY 2011-12. The addition of Rs 1,87,53,2047- is confirmed and grounds of appeal nos. 1 & 2 are dismissed."

5. The Ld. A.R. vehemently submitted before us that assessee is entitled to additional depreciation on the wind mill commissioned during the year. The Ld. A.R. took us to the page No.29 of the paper book wherein complete details of additions along with date of purchase, name of the supplier, invoice number etc were given. The Ld. A.R. also took us to the pages Nos.30 to 38 which are in respect of invoices issued by the suppliers and debit note etc. Further, the Ld. A.R. referred to the certificate issued by Maharashtra Electricity Distribution Co. Ltd., O & M Circle, Satara dated 29.04.2010 wherein it is certified that wind turbine generator in respect of the assessee was installed on 28.04.2010 in the presence of the executive engineer. The Ld. A.R. submitted that the AO has not doubted the installation and commissioning of the wind mill whereas Ld. CIT(A) doubted the acquisition and installation of wind mill in previous year 2010-11. The Ld. A.R. submitted before the Bench that the finding of the Ld. CIT(A) that wind mill is not acquired nor installed during the financial year 2010-11 is totally wrong and contrary to the facts of the case as is clear from the certificate issued by the Maharashtra Electricity Distribution Co. Ltd. at page No.39 and various copies of the invoices as referred to above. The Ld. A.R. also submitted that the assessee started the charging the consumption of electricity by referring to the bill dated 27.04.2011 filed in the paper book covering the period from 03.05.2010 to 04.06.2010. The Ld. A.R. admitted that the plant was received in the last year on

30.03.2010 but invoiced and installed in the next financial year 2010-11. The Ld. A.R. also referred to the balance sheet of the assessee filed on page No.11 specifically the schedule of fixed assets wherein the addition of wind mill plant was shown during the financial year 2010-11. Thus Ld. A.R. submitted that the findings of the Ld. CIT(A) are factually incorrect. The Ld. A.R. finally submitted that since the actual purchase, installation and commencement of generation of electricity units have happened during the current year assessment year, therefore the assessee is entitled to additional depreciation which ought to be allowed to the assessee by the lower authorities. In defence of his argument, the Ld. A.R. relied on the decision of the Tribunal in the assessee's own case in ITA No.6116/M/2014 A.Y. 2010-11 order dated 03.04.2017, NTPC vs. ACIT (2012) 54 SOT 177 URO (Del-Trib).

6. The Ld. D.R., on the other hand, relied heavily on the order of authorities below.

7. We have heard the rival submissions of both the parties and perused the material on record including the case laws cited by the Ld. A.R. during the course of hearing. We observe that in this case the plant of wind mill was installed in the financial year 2010-11 as is apparent from the invoices attached from page No.30 to 38, certification of commissioning of the wind mill plant dated 29.04.2010 issued by Maharashtra Electricity Distribution Co. Ltd. and copy of bill showing the meter reading dated 27.04.2011. Therefore, we are not in agreement with the finding of the lower authorities that wind mill has been purchased in financial year 2009-10 and installed in the next

financial year i.e. 2010-11. We observe that AO has disallowed the claim of the assessee on the ground that amendment in section 32(1)(iia) has come into effect from 01.04.2013 whereas assessee had claimed additional depreciation in the assessment year 2011-12 while Ld. CIT(A) confirmed the disallowance by following the decision in the case of International Cars and Motors Ltd. vs. ITO 30 Taxmann.com (2013) 56 SOT 50 (Del-Trib.) wherein it has been held that for the purpose of claiming additional depreciation both the conditions of acquisition and installation are required to be fulfilled and thus observed that wind mill was neither acquired nor installed during the financial year 2010-11 and therefore assessee is not entitled to additional depreciation under section 32(1)(iia) of the Act. After perusing the order in assessee's own case in ITA No.6116/M/2014 (supra) we observe that the similar issue has arisen in AY 2010-11 which has been decided by the co-ordinate bench of the Tribunal in favour of the assessee as under:

> "8. The ground No.(i) of the appeal is relating to the issue regarding the allowability of additional depreciation on wind mill. At the outset, the Ld. Counsel for the assessee has submitted that the issue is squarely covered by the decision of the Hon'ble Delhi High Court in the case of "NTPC Ltd. vs. DCIT" 2012 54 SOT 177 wherein the Hon'ble Delhi High Court has held that the process of generation of electricity is akin to manufacture or production of article or thing and that an assessee engaged in the activity of generation of electricity would be entitled to additional depreciation under section 32(1).
>
> 9. The Ld. D.R. could not point out any differentiating case law against the above stated proposition of law laid down by the Hon'ble Delhi High Court. In view of this, we do not find any force in ground No.I of the appeal and the same is accordingly dismissed."

8. Similarly, in the case of NTPC vs. DCIT (supra) it has been held that the additional depreciation is allowable to the assessee as the generation of electricity is akin to manufacture of production of article or thing and the assessee has, in fact, been

engaged in the business of generation of electricity. To sum up, we are of the view that the assessee has installed and commissioned the wind will in A.Y. 2011-12 and is entitled to additional depreciation after respectfully following the ratio laid down in the assessee's own case in A.Y. 2010-11 which has been passed after following the Delhi Tribunal in the case of NTPC vs. DCIT (supra).

9. Accordingly, the appeal of the assessee is allowed.

Order pronounced in the open court on 13.03.2019.

Sd/-
(Amarjeet Singh)
JUDICIAL MEMBER

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai, Dated: 13.03.2019.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.