IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH: KOLKATA
[Before Shri M. Balaganesh, AM & Shri S. S. Viswanethra Ravi, JM]

I.T.A No. 1458/Kol/2015
Assessment Year: 2011-12

Damodar Valley Corporation (PAN: AABCD0541M) (Appellant)	Vs.	Deputy Commissioner of Income-tax, Circle-9(1), Kolkata. (Respondent)

Date of hearing: 12.07.2016
Date of pronouncement: 15.07.2016

For the Appellant: Shri D. S. Damle, FCA
For the Respondent: Shri Niraj Kumar, CIT, DR

ORDER

Per Shri M. Balaganesh, AM:

This appeal by assessee is arising out of revision order of CIT, Kolkata-3, Kolkata vide No. Pr.CIT-3/u/s.263/2015-16/8515-17 dated 29/30.10.2015. Assessment was framed by JCIT, Range-9, Kolkata u/s. 143(3) of the Income tax Act, 1961 (hereinafter referred to as the "Act") for AY 2011-12 vide his order dated 28.03.2014.

2. The only issue to be decided in this appeal is as to whether the ld CIT is justified in invoking revisionary jurisdiction u/s 263 of the Act in the context of allowability of additional depreciation u/s 32(1)(iia) of the Act in the facts and circumstances of the case.

3. The brief facts of this issue is that the assessee is a public sector undertaking engaged in the business of generation and distribution of electricity. The return of income for the Asst Year 2011-12 was filed by the assessee on 28.9.2011 declaring loss of Rs. 247,36,00,558/-. The assessment was completed u/s 143(3) of the Act on 28.3.2014 determining the total loss at Rs. 227,00,22,060/- after making disallowance u/s 14A of the Act in the sum of Rs. 20,35,78,496/-. The ld CIT issued show cause notice dated 31.7.2015 seeking to revise the assessment framed u/s 143(3) of the Act in as much as the ld AO had granted the claim of additional depreciation to the assessee company in the sum of Rs. 6,37,45,348/- which, in his opinion, could be granted only with effect from Asst Year 2013-14 as the assessee was engaged in the business of generation and distribution of

electricity pursuant to the amendment brought in by the Finance Act 2012 in section 32(1)(iia) of the Act. For the sake of convenience, the show cause notice is reproduced hereunder:-

> *"Sub: Proceedings u/s. 263 of the I.T Act 1961 in the case of M/s. Damodar Valley Corporation passed u/s.143(3) dated 28.03.2014 for the A.Y 2011-12.*
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> *Please refer to the above.*
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> *The ROI was e-field on 28.09.2011 declaring a total income at NIL. Thereafter it was selected for scrutiny through CASS and the case was completed u/s. 143(3) by JCIT, Ranqe-9, Kolkata on 28.03.2014 determining total income of Rs. (-) 2,27,00,22,060/-(loss).*
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> *On perusal of the assessment record vis-a-vis the return and other document submitted it is seen that the assessee company had claimed additional depreciation @ 20% on additions made to plant and machinery at Thermal Power Station and Hydel Power Station. Total additional depreciation u/s. 32(1)(ii) was found to have been claimed to the tune of Rs. 6,37,45,348/-. In case of any new machinery or plant which has been acquired and installed by an assessee engaged in the business of generation or generation and distribution of power a further sum equal to 20%, of the actual cost of such machinery or plant shall be allowed as deduction. It was further clarified in the Finance Act, 2012 that additional depreciation is allowable w.e.f assessment year 2013-14 in the case of generation or generation and distribution of power as this category was inserted w.e.f 01.04.2013. It is clear thus that additional depreciation in respect of business of generation or generation and distribution of power is only applicable w.e.f assessment year 2013-14 and subsequent years but not during the assessment year 2011-12. The wrongful act on the part of the AO on the point discussed above has made the assessment order erroneous and prejudicial to the interest of Revenue. The assessment order passed u/s. 143(3) dated 28.03.2014 is erroneous and prejudicial to the interest of Revenue on this point for the reasons discussed above.*
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> *In view of the above discussion, I am of the opinion that the assessment order made u/s.143(3) dated 28.03.2014 for the AY 2011-12 is erroneous in so far as it prejudicial to the interest of Revenue. You are therefore given an opportunity to make your submission personally or through your duly Authorized representative on 13/08/2015 at 11:30 A.M. before me at my chamber. RoomNo.4/2A, Aayakar Bhawan, 4th Floor along with your written submission as to why the above assessment made u/s. 143(3) dated 28.03.2014 for 2011-12 should not be revised u/s.263 of the I.T Act, 1961.*
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> *In case of non compliance on the date noted for hearing, the case would be decided ex-parte without any/further opportunity."*

4. The assessee replied to the ld CIT in response to show cause notice that Sec. 32(1)(iia) has come in force with effect from 01.04.2005 provides that any assessee which is engaged in the business of manufacture or production of any article or thing is entitled to claim additional depreciation @ 20% of the actual cost in respect of new machinery or plant acquired and installed in the relevant previous year. On bare perusal of the said section it would be noted that an "eligible assessee" u/s 32(1)(iia) is the one who "manufactures or produces any article or thing". In the present case the assessee during the relevant year was

engaged in the business of generation and distribution of power. The assessee submits that its activity of generation of power amounted to production of an article or thing.

Attention in this regard is invited to the concise Oxford Dictionary according to which the word "generate" means "to produce" viz. to produce energy / electricity. The issue as to whether the generation of power amounts to production of an article or goods was examined by Supreme Court in the following judgments:

1. Commissioner of Sales Tax Vs. M.P. Electricity Board (AIR 1970 SC 732)
2. State of AP Vs. National Thermal Power Corpn Ltd (127 STC 280 SC)

In the above decisions it has been held by the Apex Court that the generation of power amounts to production of "goods". Attention is specifically drawn to the decision of the Supreme Court in the case of Madhya Pradesh Electricity Board (Supra). In the decided case the State Electricity Board generated and distributed electricity energy to various consumers. The question posed before the Supreme Court was whether the activity of generation, sale and supply of electricity comes within the purview of the Sales Tax Act. The assessee in that case contended before the Court that "electricity" generated was not "goods" as it did not have any physical existence or attributes or mass which "goods" possess. The Supreme Court observed that the term "goods" has to be understood in a wider sense and merely because electric energy is not tangible or cannot be moved does not cease to be "goods". The Court observed that when there can be sale and purchase of electricity then they did not see any reason as to why electricity would not be assumed to be "goods" The Supreme Court therefore held that "electricity" comes within the purview of the term "goods" and therefore sale of electricity came within the taxing provisions of the sale of goods Act so as to attract levy of sales tax. This view was again reiterated by the Supreme Court in the case of National Thermal Power Corporation (Supra).

In view of the ratio laid down in these judgments we submit that "electricity" is an article or thing an contemplated by Sec 32(l)(iia) of the I T Act and therefore an assessee who generates such an article or thing comes within the ambit of Sec 32(l)(iia) because the process of generation of electricity is akin to production of an article which is separately marketable as a distinct goods.

4.1. The assessee stated before the ld CIT that one of the case involving identical issue was that of NTPC Ltd a public sector undertaking whose principal business is generation of Thermal Power. For AY 2005-06 NTPC in its return claimed additional depreciation of Rs.187.55 cr. in respect of additions to plant and machineries at its Rama Gundam and Talcher Super Power Plants. In the assessment order for AY 2005-06 the AO allowed the additional depreciation. The CIT however revised the assessment order u/s. 263 of the Act. In the said order the CIT held the AO's order granting additional deprecation to be erroneous on the ground that the assessee was not engaged in the business of manufacture or production of any article or thing. In CIT's opinion the assessee's business of generation of power could not be equated with the connotation of "production of an article or thing". According to CIT in common parlance the expression "article or thing" meant to be something which was tangible or moveable. According to CIT the electricity generated did not have any tangible existence nor it was having physical properties or mass and therefore the same could not be considered to be an article or thing and, therefore, the assessee could not be considered to be engaged in the business of production of an article or thing and hence not eligible for deduction u/s. 32(1)(iia). Besides the said reason; revision order was also passed on other issue of inclusion of additional power tariff. Being aggrieved by the CIT's order u/s 263 the matter was carried before the ITAT. The Delhi Bench of the ITAT decided the appeal of NPTC on 30.04.2012 in ITA No.1438/D/2009 which is reported in 22 taxmann.com 247. In its order the Tribunal upheld the CIT's power to invoke revisionary jurisdiction and also upheld CIT's order with regard assessment of power tariffs with reference to provisional tariff approved by CERC. However, with regard to the issue of allowing additional depreciation u/s 32(1)(iia) the Tribunal found that the assessment order did not suffer from any infirmity. The Tribunal held that the AO's order allowing additional depreciation was not erroneous and hence was not amenable for revision u/s. 263. The ITAT Delhi applied the ratio laid down by the Supreme Court in the case of CST VS. Madhya Pradesh Electricity Board (Supra) and State of AP Vs. NTPC (supra)and then held that in law "electricity" constituted "goods" and therefore it was certainly an article or thing as contemplated in Sec 32(1)(iia). The Tribunal further held that the process of power generation was akin to manufacture or production of an article or thing. The Tribunal noted that the power was generated by deploying huge plants and therefore it may be said that

there was transformation of one source of energy into another. The energy so produced in law constituted "goods". The Tribunal accordingly held that the benefit of additional depreciation u/s 32(1)(iia) could not be denied to the assessee. Accordingly the ITAT reversed the CIT's order u/s. 263 on this ground. The assessee also submitted that no appeal was preferred by the revenue to the Hon'ble Delhi High Court against the order of the Delhi Tribunal supra. The assessee also placed on record before the ld CIT the decision of the Hon'ble Madras High Court in the case of CIT vs VTM Ltd reported in 319 ITR 336 (Mad) wherein, the Hon'ble Madras High Court dismissed the revenue's appeal. It would be pertinent to understand the question raised before the Hon'ble Madras High Court which is reproduced hereunder:-

> *"Whether on the facts and in the circumstances of the case the Tribunal was right in holding that generation of power by windmill would amount to manufacture or production of any article or thing" ?*

It was contended that the Hon'ble Madras High Court was specifically seized of the question as to whether an assessee engaged in the business of generation of power can be said to be engaged in manufacture or production of an article and hence qualified for claiming additional depreciation u/s 32(1)(iia) of the Act. After due consideration of the facts and the question raised before it, the Hon'ble Madras High Court dismissed the revenue's appeal by holding that the assessee engaged in the business of generation of power fulfilled the condition of production of any article or thing as contemplated in section 32(1)(iia) of the Act and accordingly eligible for additional depreciation. Similar views were also expressed in the following decisions :-

> *CIT vs Hi Tech Arai Ltd reported in (2010) 321 ITR 477 (Mad)*
> *CIT vs Texmo Precision Castings reported in (2010) 321 ITR 481 (Mad)*
> *CIT vs Atlas Export Enterprises reported in (2015) 57 taxmann.com 285 (Mad)*
> *ACIT vs M Satishkumar in ITA No. 718/Mds/2012 dated 28.9.2012 (Chennai Tribunal)*
> *DCIT vs Hutti Gold Mines Co. Ltd in ITA No. 832/Bang/2012 dated 2.8.2013 (Bangalore Tribunal)*

It was contended that in the aforesaid decisions, the asst year involved was prior to Asst year 2013-14.

4.2. It was also submitted that the show cause notice seeking to revise the assessment u/s 263 of the Act was issued on the ground that the assessee is not engaged in the business of

manufacture or production of any article or thing and hence not eligible to claim additional depreciation prior to Asst Year 2013-14. The Chennai Tribunal held that although the amendment was with effect from 1.4.2013 but it only gave impetus to the existing view that generation of electricity was a manufacturing process and therefore qualified for the benefit of section 32(1)(iia) of the Act. Accordingly the Chennai Tribunal dismissed the departmental appeal after taking note of the amendment in Section 32(1)(iia) of the Act by the Finance Act 2012. Similar view was also taken by the Bangalore Tribunal in the case referred supra. Accordingly, the assessee submitted before the ld CIT that the ld AO's order was in conformity with the view expressed in the aforesaid judicial decisions and therefore cannot be considered to be erroneous and prejudicial to the interest of the revenue. It was also submitted that the similar claims were allowed to the assessee commencing from Asst Year 2005-06 onwards u/s 143(3) proceedings and there is no reason to disturb the same during Asst Year 2011-12 alone. In view of these decisions, the view taken by the ld AO cannot be treated as unsustainable in law.

4.3. The ld CIT however, in his concluding paragraph , stated that there was no enquiry conducted by the ld AO with regard to allowability of additional depreciation which had made the order erroneous and prejudicial to the interest of the revenue and accordingly passed an order u/s 263 of the Act. Aggrieved, the assessee is in appeal before us on the following grounds :-

> *"1. For that on the facts and in the circumstances of the case, the CIT was grossly unjustified in law and on facts in directing the AO to reassess the taxable income of the appellant after making further enquiries even though the assessment order u/s. 143(3) was neither erroneous nor prejudicial to the interest of the revenue within the meaning of Sec. 263 of the Act.*
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> *2. For that on the facts and in the circumstances of the case the appellant Corporation being engaged in the business of generation of power; was entitled to additional depreciation u/s. 32(1)(iia) since it was engaged in production of an article or thing and in that view of the matter was entitled to additional depreciation and hence order of assessment granting deduction for additional depreciation was not erroneous.*
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> *3. For that on the facts and in the circumstances of the case, various judicial forums like High Court & ITAT having held that assessees engaged in generation of power were eligible for additional depreciation u/s. 32 (1)(iia) and these decisions being available in public domain prior to passing of the order u/s. 143(3) for A.Y. 2011-12; the CIT was grossly unjustified in holding the assessment order u/s 143(3) to be erroneous on the ground that additional depreciation was allowed by the AO.*
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> *4. For that on the facts and in the circumstances of the case, in the assessment order passed u/s 143(3) while allowing deduction for additional depreciation u/s. 32 (1)(iia) the AO having followed one of the course permissible in law, the CIT was unjustified in invoking his revisionary power u/s. 263 of the Act & holding the assessment to be erroneous.*

5. For that on the facts and in the circumstances of the case, the CIT was unjustified in passing the revision order u/s. 263 on the alleged ground that the AO did not make any enquiry into the aspect of allowability of additional depreciation even though in the show cause notice issued; no such ground was assigned for considering the order of assessment to be erroneous and in that view of the matter the CIT's order setting aside the assessment for lack of enquiry was unsustainable and deserves to be set aside.

6. For that on the facts and in the circumstances of the case, the CIT''s order u/s 263 dated 29.10.2015 being legally and factually unsustainable the same be cancelled and the AO's order u/s. 143(3) dated 28.03.2014 allowing the deduction for additional depreciation u/s. 32(1)(iia) be restored."

5. The ld AR reiterated the arguments advanced before the ld CIT. Apart from that, he stated that the ld CIT originally proposed in the show cause notice that the assessee is not entitled for additional depreciation as the amendment was with effect from 1.4.2013 only, but proceeded to treat the order of the ld AO as erroneous and prejudicial on a different footing that no enquiry was made by the ld AO with regard to allowability of additional depreciation. He argued that no opportunity was given by the ld CIT to the assessee to put forth its arguments on the said aspect of 'lack of enquiry' thereby violating the mandate of section 263(1) of the Act. In response to this, the ld DR argued that the meaning of 'manufacture' or 'production' given by the Hon'ble Supreme Court in the context of sales tax act cannot be imported blindly into the Income Tax Act which is a separate statute. The legislature in its wisdom thought it fit to bring in a specific amendment with effect from Asst Year 2013-14 in order to confer the benefit of additional depreciation u/s 32(1)(iia) of the Act for the assessees engaged in the business of generation and distribution of power and the same cannot be held to be retrospective in operation.

6. We have heard the rival submissions and perused the materials available on record. At the outset, we find that on perusal of section 32(1)(iia) of the Act as it stood upto Asst Year 2012-13, it is evident that the additional depreciation is permissible to all assessees who are engaged in the business of manufacture or production of any article or thing. In the circumstances, the assessee who is desirous of claiming the additional depreciation need only to prove that during the relevant year he was engaged in the business of manufacture or production of any article or thing. Now whether the question to be decided is as to whether the assessee engaged in generation and distribution of electricity could be said to be engaged in the business of manufacture or production of any article or thing so as to be eligible for claiming additional depreciation u/s 32(1)(iia) of the Act. It is well settled that

for the purpose of manufacture, an element of transformation is a pre-requisite. A particular item should undergo changes in its colour and character and become a separate and new marketable commodity after the manufacturing process. In the instant case, the assessee had set up hydel power and thermal power plant, wherein the water and coal gets converted into electricity through the manufacturing process. Hence it is undisputed that transformation from mere coal to electricity and from mere water to electricity happens pursuant to the manufacturing process and the electricity so produced or generated becomes a separate marketable commodity. The various apex court decisions relied upon by the assessee before the ld CIT as mentioned supra in the context of levy of sales tax on the sale of electricity had also decided that the generation of electricity amounts to production of article or thing. We also find that the *co-ordinate bench decision of this tribunal in the case of ACIT vs Ankit Metal & Power Ltd in ITA No. 517/Kol/2012 for Asst Year 2008-09 dated 8.1.2014* had also held that assessee is entitled for additional depreciation u/s 32(1)(iia) of the Act for its power plant. This matter was further carried by the revenue to the Hon'ble Calcutta High Court which was dismissed by the *Hon'ble Calcutta High Court in the case of CIT vs Ankit Metal & Power Ltd reported in (2016) 66 taxmann.com 367 (Calcutta) dated 20.11.2014*.

Hence, it could be safely concluded that the assessee is entitled for claiming additional depreciation u/s 32(1)(iia) of the Act even prior to the amendment brought in by Finance Act 2012. The various decisions supra relied upon by the assessee before the ld CIT were very much in the public domain (except the Hon'ble Calcutta High Court decision dated 20.11.2014 in the case of CIT vs Ankit Metal and Power Ltd) as they were reported judgments and the ld AO following the same while framing the assessment u/s 143(3) of the Act for the Asst Year 2011-12, cannot be termed as erroneous in terms of section 263 of the Act. Moreover, the ld AO had the benefit of the jurisdictional tribunal decision before him in the case of CIT vs Ankit Metal and Power Ltd in ITA No. 517/Kol/2012 dated 8.1.2014 before him before passing the assessment order for the Asst Year 2011-12 u/s 143(3) dated 28.3.2014. We find that the ld AR had produced a chart regarding the claim of additional depreciation in all the earlier assessment years. Moreover, the ld AO had the benefit of the very same issue being allowed as allowance in all the earlier asst years commencing from Asst Year 2005-06 onwards in section 143(3) proceedings. Hence there was no iota of doubt in the mind of the ld AO to adjudicate this specific issue in the asst year under appeal

from a different perspective. We are of the view that the ld AO had adjudicated this issue on a right footing in so far as he has followed the judicial discipline in following the various decisions of the Hon'ble Apex Court, Madras High Court, Gujarat High Court, Chennai Tribunal, Bangalore Tribunal and the Jurisdictional Kolkata Tribunal and allowed the claim of additional depreciation to the assessee, though not discussed about the same in his assessment order. Hence passing an assessment order by following the various judicial decisions would not in any manner make the assessment order erroneous.

6.1. The *Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd vs CIT reported in 243 ITR 83 (SC) at page 88* held as follows:-

> *"The phrase «prejudicial to the interest of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interest of the revenue. For example, when an Income tax officer adopted one of the courses permissible in law and it has resulted in loss of Revenue; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income tax officer is sustainable in Law.*"

6.2. We find that the decisions of the Hon'ble Madras High Court and Delhi Tribunal supra involving identical facts were very much available in the public domain prior to the date on which the assessment was framed by the ld AO on 28.3.2014 granting allowance of additional depreciation u/s 32(1)(iia) of the Act and hence it could be safely concluded that the ld AO had followed one of the course permissible in law.

6.3. We find that the ld CIT had changed his track from originally stating that the order passed by the ld AO had incorrectly applied the provisions of section 32(1)(iia) of the Act for the Asst Year 2011-12 , to 'lack of enquiry' on the part of the ld AO with regard to the claim of additional depreciation. It is pertinent to note that the assessee had not been given any opportunity by the ld CIT to address his changed track. Even otherwise, from the aforesaid judicial decisions which are in the public domain, it would be wrong on the part of the ld CIT to assume that the ld AO had not made any enquiry or applied his mind on the aspect of additional depreciation. It cannot be swept under the carpet that there was no debate in the case of the assessee with regard to the claim of additional depreciation in the earlier years as the same had been consistently been claimed and allowed by the ld AO in the scrutiny assessment proceedings. We find that even in the recent decision of the *Hon'ble Supreme Court in the case of CIT vs Amitabh Bachchan in Civil Appeal No. 5009*

of 2016 dated 11.5.2016 had only concluded that the ld CIT can proceed to adjudicate other issues other than what is mentioned in the original show cause notice. But the same could be done only after affording opportunity of being heard to the assessee to address on the new issue taken up by the ld CIT. It is undisputed that no opportunity was afforded to the assessee in the instant case before us by the ld CIT to address on the aspect of 'lack of enquiry' on the allowability of claim of additional depreciation. Hence the apex court decision in the case of CIT vs Amitabh Bachchan also would not advance the case of the revenue in the facts and circumstances of the case. We hold that the ld CIT in concluding that lack of enquiry with regard to allowability of additional depreciation on the part of the ld AO would automatically make the order of ld AO erroneous and prejudicial to the interest of the revenue, is palpably illegal in the facts and circumstances of the case in as much as no opportunity of hearing was given to the assessee in that regard.

6.4. In view of the aforesaid findings and in the facts and circumstances of the case and respectfully following the various judicial precedents relied upon on the impugned issue, we have no hesitation in quashing the order passed by the ld CIT u/s 263 of the Act and allow the grounds raised by the assessee.

7. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 15.07.2016

Sd/-	Sd/-
(S. S. Viswanethra Ravi)	(M. Balaganesh)
Judicial Member	Accountant Member

Dated :15th July, 2016

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. APPELLANT – Damodar Valley Corporation, DVC Towers, 4th floor, VIP Road, Kolkata-700054.
2. Respondent –DCIT, Circle-9(1), Kolkata.
3. The CIT, Kolkata
4. JCIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy, By order,

Asstt. Registrar.