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

+ ITA 195/2020

PR. COMMISSIONER OF INCOME TAX,
DELHI-2,

Through Appellant
Mr. Ajinkya Tiwari, Proxy Counsel
for Ms. Vibhooti Malhotra, Senior
Standing Counsel

versus

M/S BSES YAMUNA POWER LTD. Respondent
Through Mr. Vaibhav Kulkarni, Advocate

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Date of Decision: 13th March, 2020

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

MANMOHAN, J: (Oral)

CM APPL. 9644/2000

Allowed, subject to just exceptions.

CM APPLs. 9645/2020

Keeping in view the averments in the application, the delay in re-filing the present appeal is condoned.

Accordingly, the application stands disposed of.

ITA 195/2020

1. Present appeal has been filed under Section 260A of the Income Tax Act, 1961 challenging the order dated 25th March, 2019 passed by the Income-Tax Appellate Tribunal, New Delhi (for short 'ITAT') in ITA No. 6227/DEL/2018 for the Assessment Year 2006-07.

2. In similar appeals being ITA Nos. 2/2020 and 3/2020 filed by the revenue/appellant challenging the same impugned order 25th March, 2019 passed by the ITAT pertaining to the same Assessee for the Assessment Years 2008-09 and 2007-08, a coordinate Bench of this Court of which one of us (HMJ Sanjeev Narula) was a party, has held as under:-

“6. The following substantial question of law arises for our consideration:

a. Whether the Tribunal, while finding that the Assessing Officer had gone beyond the remand order dated 05.10.2015 and on that account setting aside the order passed by the Assessing Officer dated 31.03.2017, should have directed the Assessing Officer to act strictly in terms of its earlier order of remand dated 05.10.2015?

7. The Revenue is in appeal to assail the order dated 25.03.2019 passed by Income Tax Appellate Tribunal (ITAT), Delhi Bench: 'A' New Delhi in ITA No. 6225/Del/2018 pertaining to assessment year (AY) 2008-09 and ITA No. 6224/Del/2018, pertaining to AY 2007-08. The Tribunal has allowed the said appeals of the assessee along with several others, holding that the Assessing Officer (AO) had gone beyond the scope of remand as directed by the ITAT in order dated 05.10.2015.

8. On 05.10.2015, the Tribunal had held in favour of the assessee that it was entitled to depreciation at the rate of 80% on electronic meters/energy meters. The Tribunal also took note of the submission of the Revenue that more than 60% of the meters are mechanically advanced meters which did not have any

special feature entitling them to depreciation at the rate of 80%. Another aspect before the Tribunal was whether bus bars form an integral/inextricable part of the electronic meters/energy meters. The Tribunal while passing the order dated 05.10.2015 remanded the matter to the file of the AO to determine the extent of electronic meters/energy meters which were energy saving devices, since the assessee would be entitled to 80% depreciation on such meters and not on other meters which could not be classified as energy saving devices. The Tribunal also remanded the issue-whether the bus bars could be considered as an integral/inextricable part of the meters since the depreciation at the rate of 80% was claimed on bus bars by the assessee on the ground that it formed an integral/inextricable part of the meter on that premise only, the high depreciation on meters at the rate of 80% was claimed. The Tribunal passed the impugned order holding, that the AO had exceeded his jurisdiction while dealing with the remand, since he returned a finding that the electronic meters/energy meters were not energy saving devices and were therefore were not entitled to depreciation at the rate of 80%. So far as the issue of bus bars is concerned, he did not examine the said issue at all.

9. The submission of Ms. Malhotra is that although the issue that electronic meters/energy meters as energy saving devices are entitled to 80% depreciations stands concluded by the Tribunal, in its order dated 05.10.2015 and this Court has also dismissed Revenue's appeal, vide order dated 14.09.2019 in ITA 666/2016, the Tribunal should have ensured that the matter attains finality by remanding the matter back to the AO with a direction to act strictly in terms of the order of remand dated 05.10.2015. The issue as to what percentage of the meters are energy saving devices, being meters for measures of heat losses, furnace oil flow, steam flow, electric energy and power factor meters was not gone into by the AO in terms of the remand order dated 05.10.2015 and therefore the Tribunal should have ensured that the AO undertakes the said exercise and also determine whether the bus bars form an integral/inextricable part of the meters.

10. Learned counsel for the respondent submits that the issue that the electronic meters/energy meters, which are energy saving devices, are entitled to high depreciation at the rate of 80% stand included by the Tribunal, and as well as, by this Court and therefore the AO cannot be permitted to re-open the said issue.

11. We agree with the submission of the learned counsel for the respondent. However, we also find that the Tribunal stopped short of redirecting the AO to deal with the real issues, on which the remand was made vide order dated 05.10.2015. Thus, those issues remain undetermined till date. In our view, the Tribunal should have ensured that the outstanding issues, in terms of the remand order, attain finality one way or another.

12. We, therefore, answer the question in favour of the Revenue and remand back the matter to AO with a direction to strictly comply with the order of remand dated 05.10.2015 passed by the Tribunal which attained finality with the dismissal of ITA No. 666/2016 preferred by the appellant. The AO shall limit his consideration strictly in terms of order of remand and in particular paragraphs Nos. 12 to 12.5 of the order dated 05.10.2015, which read as follows:-

“12. Considering the above submission, we find that the Learned CIT(Appeals) has agreed with the submissions of the assessee to this extent that the meters are technologically advanced and are having features which can help consumers save energy but with human intervention. The contention of the assessee on the other hand remained that the energy meters acquired by the assessee are in the nature of energy saving equipment/devices having inter alia the following advanced features helping in conservation of energy:

i) Advanced feature of automatic electric load monitor time of day (TOD) displays, which indicates consumption at the particular point of time during the day that is

relevant/ helpful in collecting data and devising reliable technical solutions;

ii) Electricity leakage display (ELD) indicator, which glows in case of earth leakage/ faulty wiring at customer's premises;

iii) Feature of indicating the maximum demand which helps in regulating total energy load on the distribution transformers; in case the transformers are overloaded, it will result in increased technical losses

iv) Accurate measurement of energy consumption, which arrests losses due to power theft;

v) Provide load and energy data for proper management of energy/ power

12.1 Section 32 of the Income-tax Act, 1961 provides for allowance of depreciation in respect of block of assets at such percentage of the written down value as may be prescribed. Under Item-111(8) of the table rates of depreciation in "Old Appendix-!" to the Income-tax Rules, 1962 is relevant for the assessment year 2005-06 wherein depreciation @ 80% is available in respect .of equipment falling within the category of "energy measuring meters". The specific entries under which the depreciation was claimed by the assessee during the relevant assessment year reads as under:

"III. Machinery and Plant

xxxxxx

(8) (ix) Energy saving devices, being-

A. xxxx

B. Instrumentation and monitoring system (or monitoring energy flows:

(a) **Automatic electrical load monitoring systems;**

(b) Digital heat loss meters; xxxxxxxxx

(e) **meter's for measuring heat losses, furnace oil flow,**

stream flow, electric energy and power factor meters
(f) Maximum demand indicator and clamp on power meters

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12.2 The perusal of aforesaid provisions make it clear that item III (8)(ix)(B)(e) of the depreciation schedule provides for higher rate of depreciation in respect of "meters' for measuring electric energy".

12.3 The submission of the assessee that there is no further/additional condition requiring the assessee to actually establish any direct relationship of the meters with the energy saved nor the said schedule also mandate that the energy meters should be "electrical" or "mechanical" devices and merely provides that the meters should be electricity/energy measuring devices finds substance. In the aforesaid schedule, the electricity measuring meters have been recognized as energy saving devices. We also find substance in the contention of the assessee that even if meter does not have any special features, accurate measurement of energy consumption by itself results in conserving energy in as much as it enables regulation of energy consumption and arrests losses due to power theft. The "New Appendix-!" to the Income- tax rules, 1962 which is relevant for assessment year 2006-07 and onwards, depreciation at the rate of 80% is also available in respect of electrical equipment having been specific features of "time of day", as provided hereunder:

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E. Electrical Equipment

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(i)Time of Day (TOD) energy meters

XXXXXXXXXXXXXXXXXXXXXXXXXXXXX"

12.4 The submission of the assessee that specifications contained in the energy meters installed by the assessee company also included the specific features of "Time of Day"

has not been rebutted by the Revenue. We find that in the depreciation schedule for the assessment year 2006-07 and onwards specifically/separately covers feature of "Time of Day" under Item III (8)(ix)–E(i). Under the above facts and circumstances especially in view of above referred schedule read with sec. 32 of the Income-tax Act, we find that the assessee has been successfully able to demonstrate that it was very much entitled to claim depreciation on energy meters @ 80% and without appreciating the above schedule, the authorities below were not justified in disallowing the claimed depreciation on these assets on the ground that the energy meters did not facilitate in conservation of energy. The Assessing Officer had, however, pointed out that more than 60% of the meters are mechanically advanced meters which did not have any special feature. To meet out this objection and its submissions before the Learned CIT (Appeals) that most of the meters are energy saving meters, the Learned AR has referred page No.75 of the supplementary paper book i.e. copy of the relevant extracts of the tax audit report of the assessee for the assessment year under consideration reflecting statement of particulars including bifurcation of expenses between normal meter and electronic meters. We thus set aside the matter to the file of the Assessing Officer to verify and allow the claimed depreciation at the rate of 80% on electronic meters/energy meters only after affording opportunity of being heard to the assessee.

12.5 Regarding the claimed higher depreciation on the "bus bar chamber", the Learned AR submitted that these are devices through which connection from overhead line/underground cable is provided to the meters and the said device forms integral/inextricable part of the meters without which the meter cannot function. The authorities below have denied the claimed higher depreciation on this instrument on the basis that these are not energy saving device. We set aside this matter to the file of the Assessing Officer to verify the above claim of the assessee that 'bus bar chamber' forms integral/inextricable part of the meters without which a meter

cannot function and allow the depreciation thereupon accordingly after affording opportunity of being heard to the assessee. The ground No.1 of the appeal preferred by the assessee is accordingly allowed for statistical purposes. ”

13. In View of the above, the appeals are disposed of.”

3. Accordingly, present appeal is disposed of in terms of the aforesaid order dated 8th January, 2020 passed by this Court in ITA Nos. 2/2020 and 3/2020.

MANMOHAN, J

SANJEEV NARULA, J

MARCH 13, 2020

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