

IN THE INCOME TAX APPELLATE TRIBUNAL, JODHPUR BENCH, JODHPUR

BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

ITA. No. 35/JODH/2021
Assessment Years : 2015-16

Shri Satya Narayan Dhoot Street, 1 st A Road, Sardarpura, Jodhpur	Vs.	Asstt. Commissioner of Income Tax, Circle-03, Jodhpur
PAN/GIR No.: AAAPD4945L		
Appellant		Respondent

Assessee by : Sh. Mohit Soni (Adv.)
Sh. Rajendra Jain (Adv.) &
Smt. Raksha Birla (CA)
Revenue by: Smt. Sanchita Kumar (CIT-DR)

Date of Hearing : - 12/08/2021
Date of Pronouncement : 07/09/2021

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee challenging the order of Id. Pr. CIT-1, Jodhpur passed u/s 263 of the Act dated 27.03.2021 for A.Y 2015-16.

2. During the course of hearing, the Id. AR submitted that the assessee is an individual and derives income from sale of electricity through power projects, income from partnership firm and capital gains. The assessee had maintained books of accounts which are subject to audit as per provision of law. The case of assessee was selected for

limited scrutiny on various issues and accordingly, the Ld AO had issued a query letter asking various queries/questions including the question about claim of liquidated damages of Rs. 1,20,00,000/- as capital receipt in the books of accounts. In response to such query, the assessee had furnished the explanation & documentary evidence supported by judicial decisions from time to time which are evident from Order Sheet. The details of documentary evidence furnished during the assessment proceeding are a copy of purchase order, Certificate of commissioning of plant & machinery, Confirmation of account of Sulzon Pvt.Ltd and bills & invoices. Further, reliance was placed on the decision of the Hon'ble Supreme Court in case of CIT v/s Saurashtra Cement Ltd 325 ITR 422 and Hon'ble Gujarat High Court in the case of Shri Digvijay Cement Company Ltd. 138 ITR 45. The Ld. AO after due examination and verification of facts from documentary evidence and in the light of the decisions of Hon'ble Supreme Court and Hon'ble Gujarat High Court had accepted that the amount received as liquidated damages due to delay in supply of machinery was a capital receipts and accordingly had allowed the claim of depreciation.

3. It was submitted that the Ld PCIT thereafter issued a show cause notice u/s 263 of the Act and in response, a reply was furnished to Ld PCIT along with documentary evidence and judicial decisions which were also part of assessment records. The PCIT passed the order u/s 263 of the Act and his findings read as under:-

"In this regard, I am of the opinion that the order passed is based on incorrect/ mistaken assumption of the facts of the case by way of accepting the statement of the assessee without due

verification/ erroneous application of provisions of the Act. I, therefore, cancel the assessment order passed by the AO u/s 143(3) on 14.12.2017 with the direction to the Assessing Officer to pass the assessment order afresh after considering the above mentioned issues, apart from other issues discussed in the assessment order dated 14.12.2017 and also the issues which may subsequently come into the notice of Assessing Officer, during the assessment proceedings u/s 143(3) r.w.s. 263 of the Income Tax Act, 1961.”

4. It was submitted that on perusal of finding of the Ld. PCIT, it is crystal clear that the Ld PCIT had passed the order without due application of mind on the documentary evidence placed on record during the assessment proceeding as well as revision proceedings. However the observation of Ld. PCIT that the Ld. AO had arbitrarily relied on the statement of the assessee without proper application of provisions of law is totally incorrect, false and contrary to the law laid down by the Hon'ble Supreme court & Hon'ble Gujarat High Court.

5. It was submitted that when the law laid down by the Hon'ble Supreme court and followed by the Hon'ble Gujarat High Court that when the damages to the assessee was directly and intimately linked with the procurement of a capital asset then the amount received by the assessee from the suppliers of the plant was in the nature of a capital receipt and accordingly the Ld AO had accepted the liquidity damages as capital receipt then how Ld PCIT without giving any reason as to why the order passed by the Assessing officer is erroneous in

following that decision. However the PCIT has exercised power u/s 263 of the Act on the basis that order of Assessing officer in terms of decision of Hon'ble Supreme Court and High court order is erroneous as such action is contrary to the provision of law and also highly disregarding the law laid down by Hon'ble Courts.

6. It was submitted that the Hon'ble Supreme Court in the case of CIT V/s G.M Mittal Stainless Steel (P) LTD 263 ITR 255 has held that "if at the time of when the power under section 263 was exercised the decision of the jurisdictional High Court had not been set aside by this court or at least had not been appealed from, it would not be open to the commissioner to have proceeded on the basis that the High Court order was erroneous and the Assessing officer who had acted in terms of the High Courts decision had acted erroneously."

7. It was submitted that the Id AO had exercised the quasi-judicial power vested in him in accordance with law and arrived at conclusion on the basis of legal & valid documentary evidences and such a conclusion cannot be termed to be erroneous and prejudice to interest of Revenue on the basis of representation of factually incorrect facts.

8. It was submitted that it is settled position of law that revisionary powers of CIT u/s 263 can be invoked only when the assessment order is erroneous as well as prejudicial to the interest of the Revenue. Since, in the case of assessee, the assessment order could not be established to be erroneous, by Pr CIT. The sole ground of 263 jurisdiction by the Pr. CIT was that the Id AO did not make proper enquiry. This itself

cannot be said to be erroneous and prejudicial to the interest of the Revenue since the AO was alive on all these questions and he has called upon the assessee to produce relevant material in regard to areas which were stated by the PCIT in his show cause notice. It is very important to note that the Id PCIT is not specific as to the reasons why the assessment made by the AO was erroneous and prejudicial to the interest of the Revenue. The PCIT has not arrived at any independent finding for issuance of notice under section 263. Further, a thorough enquiry has been conducted by the AO which comprised of questionnaire to which the assessee has submitted his reply, thereafter there is a notice under s. 142(1) with a query letter to which again the assessee has replied to the queries, so it is evident there has been a detailed investigation and enquiry conducted by the AO. When such judicially exercise has been apparently made by Id AO, therefore the order of the AO cannot be branded as erroneous and prejudicial to the interests of the Revenue. The exercise of jurisdiction under section 263 by the PCIT is not valid in eye of law as held in following decisions:

- CIT vs. Girdhari Lal (2002) 258 ITR 331 (Raj),
- CIT vs. Shiv Hari Madhu Sudan (1998) 233 ITR 649 (Raj),
- CIT vs. Kanda Rice Mills (1989) 178 ITR 446 (P&H)
- CIT vs. Arvind Jewellers 259 ITR 502 (Guj)
- Rakesh Khandelwal vs CIT (*ITA No.204/Ind/2019 dated 29.01.2020*)
- PCIT vs. M/s Cartier Leaflin Pvt. Ltd. (2020) 268 Taxman 0222 (Bombay)

- Perfect Stoneware Pipes Ltd. vs. Commissioner of Income Tax (2018) 61 ITR (Trib) 0526 (Jabalpur)

In light of above, it was submitted that the order passed by the PCIT may kindly be quashed.

9. Per contra, the Id CIT/DR relied on the findings of the Id PCIT and our reference was drawn to his findings which read as under:

"On examination of assessment record for the AY 2015-16, it is noticed that the assessee has received sum of Rs. 1,20,00,000/- towards liquidity damages from M/s Suzlon Energy Ltd., which was not deducted from the cost of plant and machinery of wind mill of Rs. 7,80,99,198/-. The assessee claimed depreciation @ 100% on the cost of plant and machinery in the audited financials and the same was accepted by the AO while completing the assessment without proper examination and verification of the facts of the case.

As per the provision of section 43(1) of the Income-tax Act, 1961, the amount of liquidity damages received during the year was required to be reduced from the actual cost of the asset and on the balance amount depreciation was to be calculated. As per the provisions of Section 32(1)(i) of the Income-tax act, 1961, in respect of depreciation of building machinery, plant or furniture, being tangible asset, owned, wholly or partly by the assessee and used for the purpose of business or profession, the following deductions shall be allowed.

(i) In the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the assessee as may be prescribed.

Further, section 43(1) provides that in sections 28 to 41 and in this section, unless the context otherwise requires "Actual Cost" means the actual cost of the assets to the assessee, reduced by that portion of the cost thereof, if any, has been met directly or indirectly by any other person or authority.

In response to the show cause notice, the assessee filed a reply relying on the judgment of Hon'ble Apex Court in the case of CIT vs. M/s Saurashtra Cement reported in (325 ITR 422 (SC)). In the relevant paragraph of the said judgment, the Hon'ble Supreme Court has held as under:

"The question whether a particular receipt is capital or Revenue has frequently the attention of the Courts but it has not been possible to lay down any single criterion as decisive in the determination of the question. Time and again, it has been reiterated that answer to the question must ultimately depend on the facts of a particular case, and the authorities bearing on the question are valuable only as indicating the matters that have to be taken into account in reaching conclusion."

From the above finding of the Hon'ble Supreme Court it is crystal clear that particular receipt is capital or Revenue depends on the facts of the case. In the instant case liquidity damage receipts cannot be accepted as capital receipts, hence amount of liquidity damages were required to be reduced as per section 43(1) of the I.T. Act.

In this regard, it is stated that section 43(1) of the Income Tax Act does not differentiate between a Capital or A Revenue receipt to determine actual cost of the asset. Section 43(1) provides that unless the context otherwise requires "actual cost" means, the actual cost of the assets to the assessee, reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority. The Hon'ble Supreme Court in its landmark judgment in Commissioner of Income Tax vs. Saurashtra Cement reported in (325 ITR 422 (SC), which was referred by the assessee, has also enunciated that "the damages to the assessee were directly and intimately linked with the procurement of a capital asset" Therefore, in the present case, amount of 'Liquidity Damages' received by the assessee was directly relatable to the procurement of the Capital Asset, hence, the amount of Liquidity Damages was required to be reduced for determining actual cost of plant and machinery as provided under section 43(1) of the Act and depreciation was to be charged accordingly. Therefore, reliance on the above said judgment of the Hon'ble Supreme Court is found to be not attracted on the facts of the case.

From the above facts and circumstances of the case and having regard to the material available on record, the Assessing Officer failed to consider the information available on record with regard to allowing the claim of depreciation @ 100% on the cost of plant and machinery of wind mill of Rs. 7,80,99,198/- in terms of section 43(1) of the I.T. Act, 1961. The Assessing Officer in a routine and perfunctory manner allowed excess claim of depreciation without deducting the liquidity damages from the cost of Wind Mill as per the provision Section 43(1) of the Act. The order has thus resulted in excess allowance of depreciation to the assessee.

In this regard, the AO is directed to examine and verify the issue discussed above in the light of the provisions of Section 43(1) of the Income-tax Act, 1961."

10. We have heard the rival contentions and perused the material available on record. During the year under consideration, the assessee has capitalized a sum of Rs 7,80,99,198/- towards cost of windmill and has claimed depreciation @ 80% and additional depreciation @ 20% on such cost. The assessee has also received a sum of Rs 12 crores towards liquidated damages from M/s Suzlon Energy which has supplied the windmill to the assessee and the same was treated as capital receipt by the assessee. The said receipt of liquidated damages was neither offered to tax nor reduced from the cost of the windmill for the purposes of claiming depreciation.

11. As per the Id PCIT, the amount of liquidated damages was directly relatable to the procurement of windmill as per the decision of the Hon'ble Supreme Court in case of Saurashtra Cements (supra) and was required to be reduced from the actual cost of windmill as per provisions of section 43(1) of the Act and on the balance amount, the depreciation should have been claimed and allowed, however, the Assessing officer in a routine and perfunctory manner without proper examination and verification of the facts of the case has allowed excess claim of depreciation and the order so passed is thus found to be erroneous in so far as prejudicial to the interest of Revenue.

12. Per contra, the contention of the assessee is that when the damages was directly and intimately linked with the procurement of windmill, then as per the terms of the agreement, the same is in nature of compensation for delayed delivery and has nothing to do with the cost of the windmill and the amount received from the supplier of windmill was in nature of capital receipt and not required to be reduced from the actual cost of windmill as per provisions of section 43(1) of the Act and on the whole of the cost of windmill, the depreciation claim is eligible which has been rightly claimed and allowed by the Assessing officer after due examination and verification in light of decision of Hon'ble Supreme Court in case of Saurashtra Cements (supra) and Hon'ble Gujarat High Court in case of Shree Digvijay Cement Co Ltd (supra) and the order so passed cannot be said to be erroneous in so far as prejudicial to the interest of Revenue.

13. We find that contentions advanced by both the parties as to the true nature and character of liquidated damages are guided by the decision of the Hon'ble Supreme Court in case of Saurashtra Cements (supra) and decision of the Hon'ble Gujarat High Court in case of Shree Digvijay Cement Co Ltd (supra). It would therefore be appropriate to refer to these two decisions to understand the true purport and the legal proposition so laid down by the Hon'ble Supreme Court and Hon'ble High Court in these decisions and its applicability in the facts of the present case.

14. In case of Saurashtra Cements (supra), the question for consideration before the Hon'ble Supreme Court was whether the liquidated damages received by the assessee from the supplier of plant and machinery on account of delay in supply of plant was capital or revenue receipt. In that case, the facts of the case were that the assessee engaged in the manufacture of cement entered into an agreement with M/s. Walchandnagar Industries Limited, Bombay for purchase of additional cement plant. The agreement contained a condition with regard to the manner in which the machinery was to be delivered and the consequences of delay in delivery. As per the said condition in the agreement, in the event of delay caused in delivery of the machinery, the assessee was to be compensated at the rate of 0.5 per cent of the price of the respective portion of the machinery for delay of each month by way of liquidated damages by the supplier, without proof of actual loss and the total amount of damages was not to exceed 5 per cent of the total price of the plant and machinery. The supplier defaulted and failed to supply the plant

and machinery on the scheduled time and, therefore, as per the terms of contract, the assessee received an amount of Rs. 8,50,000 from the supplier by way of liquidated damages. During the course of assessment proceedings, a question arose whether the said amount received by the assessee as damages was a capital or a revenue receipt. The Assessing Officer treated the same as a capital receipt which was confirmed by the Id CIT(A). On further appeal, the Tribunal held that the said amount could not be treated as a revenue receipt. According to the Tribunal, the payment of liquidated damages to the assessee by the supplier was intimately linked with the supply of machinery i.e., a fixed asset on capital account, which could be said to be connected with the source of income or profit-making apparatus rather than a receipt in course of profit-earning process and, therefore, it could not be treated as part of receipt relating to a normal business activity of the assessee. The Tribunal also observed that the said receipt had no connection with loss or profit because the very source of income viz., the machinery was yet to be installed. Accordingly, the Tribunal allowed the appeal and deleted the addition made on this account.

15. On behalf of the Revenue, the reference to High Court was again decided in favour of the assessee and on appeal by the Revenue, the Hon'ble Supreme Court referring to the terms of the agreement providing for liquidated damages held that determination of damages was not based upon the calculation made in respect of loss of profit on account of delayed supply of the plant and the damages to the assessee was directly and intimately linked with the

procurement of a capital asset, i.e., the cement plant, which would obviously lead to delay in coming into existence of the profit-making apparatus, rather than a receipt in the course of profit-earning process. It was held that the compensation paid for the delay in procurement of capital asset amounted to sterilization of the capital asset of the assessee as supplier had failed to supply the plant within time as stipulated in the agreement and the amount received by the assessee towards compensation for sterilization of the profit-earning source, not in the ordinary course of their business was held as a capital receipt in the hands of the assessee.

16. In case of Shree Digvijay Cement Co Ltd (supra), the question for consideration before the Hon'ble Gujarat High Court was whether the actual cost of machinery, has to be reduced by the amount of compensation for delay in shipment of the machinery received from the suppliers, for the purposes of allowing depreciation and development rebate. In that case, the facts of the case were that the assessee was mainly engaged in the business of manufacture and sale of cement and asbestos cement products. It entered into an agreement with Revisione Construzione Machine of Torino, Italy for supply of machinery for manufacture of asbestos cement products. Under the sub-title "Delivery", of this agreement, the suppliers agreed to deliver the machinery as set out under the shipment plan and undertook to reimburse the assessee-company with compensation for delay in delivery. There was delay in supply of the machinery by the suppliers. The assessee-company, therefore, claimed compensation for the delay under the aforesaid term of the agreement. This claim for compensation

made by the assessee-company was settled and under an agreement dated 12-7-1965, the suppliers agreed to pay Lira 74,559,725 equivalent to Rs. 5,72,216 by way of compensation for the delay to the assessee-company. Under the agreement dated 12-7-1963, it was agreed between the parties that the assessee-company would not pay Lira 74,559,725 out of the price of the machines which it was liable to pay under the first agreement. In other words, the amount of compensation which was settled between the parties was to be adjusted against the cost of machinery agreed to be supplied by the suppliers. The contention of the assessee-company before the ITO was that the amount of compensation of Rs. 5,72,216 did not in any way reduce the price of the machinery which it had agreed to purchase from the suppliers. In other words, according to the assessee-company, compensation paid to it for the delay in supply of machinery had no relation or connection with the cost of machinery and, therefore, payment of such compensation would not reduce the cost or price of the machinery. The ITO, however, rejected this contention holding that the combined effect of the agreements dated 17-8-1960 and 12-7-1963 was that the price of the machinery stood reduced to the extent of Rs. 5,72,216. According to the ITO, payment of compensation was incidental to the acquisition of machinery and such payment would in effect and substance reduce or decrease the price of machinery. Consequently, the ITO deducted Rs. 5,72,216 out of the total price of the machinery and allowed development rebate and depreciation on such reduced price treating it to be the actual cost of machinery. The AAC and the Tribunal have confirmed the view taken by the ITO. On further appeal, the High Court held that in order to answer the

question, it is relevant to understand the nature of right of the assessee company to receive the compensation under the terms of the agreement and their effect on the actual cost of the machinery. It was held that provision for compensation for the delay in delivery was made in the agreement to compensate the assessee company for a loss including the loss of profit which it would suffer on account of delay in the delivery of the machinery and has no relation whatsoever with the cost of the machinery. It was held that the method adopted by the assessee company in receiving the compensation by way of adjustment against the price of the machinery doesn't change its nature or character and it will retain the character of compensation only. It was accordingly held that actual cost or price of the machinery and compensation payable to the assessee company for the delay in delivery are two different and distinct things and the same shouldn't be mixed up. It was held that referring to the provisions of section 43(1), the actual cost of the machinery to the assessee company is the price at which it agreed to purchase the machinery, and compensation paid for the delay in delivery is to set off or reduce the loss which the assessee company suffered as a result of delay in supply of machinery and the same would not reduce the cost of machinery for the purposes of calculating depreciation and development rebate.

17. Applying the legal proposition so laid down in the instant case, we refer to the relevant clauses of the purchase order dated 10.09.2013 as under:

"2. Price

<i>Sr. No.</i>	<i>Description</i>	<i>Price per unit (In Rs.)</i>	<i>No. of units</i>	<i>Total Price (in Rs.)</i>
1	A Supply of S-82 SUZLON 1500 KW Wind Turbine Generator comprising mainly of: <ul style="list-style-type: none"> • Nacelle • Hub • Controller (Micro Processor etc.) 	4,03,58,000/-	1	4,03,58,000/-
	Total (Rupees Four Crore Three Lacs Fifty Eight Thousand only)	4,03,58,000/-	1	4,03,58,000/-

3. Price basis

- The above prices are on basis of delivery at our site. (Ex-Factory basis plus transportation and transit insurance which is included in price).
- The above prices include taxes, duties, cess, other levies etc. at the prevailing rates. In the event of introduction of GST and/or any increase in or introduction of new taxes, duties and levies, these will be payable extra. The period for Lodha Street, 1st A Road, Sardarpura, Jodhpur-342001 (Rajasthan)

considering these additional incidences of taxes (including GST), duties, levies, etc. will be from the date of this Purchase Order till the supplies/services are over.

- We agree to register under the Local Sales tax/VAT regime for this Supply and will inform the Sales Tax/VAT Authorities about (i) commencement of business of generation of electricity with the use of Wind Turbine Generator at the proposed Wind Farm Site and shall inform you about the Local Sales Tax/VAT/CST No. as applicable. You will commence delivery only after communication of Sales Tax/VAT Registration by us.*
- For each inter-state dispatch, we will issue separate valid 'C' Form latest by 45 days from the date of your invoice for each of your dispatching manufacturing units. In case of our inability to issue 'C' Form within stipulated time, we agree to pay additionally Sales Tax/VAT @ the rate applicable to renewable energy device in the State/Union Territory from where the supplies are made.*

4. Delivery

- The delivery of WTG shall be made for Daman/Pondy works to our project site.*
- The delivery of WTG shall be completed on or before 30th September 2013 or any extended date as may be mutually agreed upon.*
- Part shipments will be accepted.*
- We accept and confirm that adherence to the delivery schedule shall be subject to release of all payments as agreed under this Purchase Order.*

6. Payment

- *We will effect total payment of Rs. 4,03,58,000/- on completion of milestones as under:-*
 - a. *Rs. 80,00,000/- already paid.*
 - b. *Rs. 3,23,58,000/- on intimation of Supply of Nacelle, Hub, Controller from your factory.*
- *We confirm that the payments will be made as indicated above. In case the payments are not effected as per above schedule, we understand that further supplies may be delayed accordingly.*

Lodha Street, 1st A Road, Sardarpura, Jodhpur 342001 (Rajasthan)

- *Until 100% of the total payments including interest for delayed payments are realized by you, you will have all rights of unpaid supplier's lien on complete supplies made by you. You will also have all remedies available under applicable law to recover possession of the goods supplied and seek damages to the extent of any loss or costs incurred as a result of such non payment.*

12. Liquidity Damages

- *As you are aware that timely delivery of WTG is crucial for the timely commissioning of the WTG, any delay in delivery of WTG shall result in delayed commissioning of our Wind Farm Project. In order to make you stick to the target, you shall as sole remedy pay to us Liquidated Damages (LD) of 15% of total project cost i.e. Rs. 120 Lacs per WTG, on pro rate basis for the WTG delivered after 30th September 2013, if resulting in delayed commissioning.*
- *However, as our sole objective is to achieve end result, i.e. timely commissioning of our Wind Farm Project, we shall not lodge claim for LD, if we are able to achieve the end result i.e., commissioning of the*

WTG through our erection & commissioning agency, on or before their committed date of commissioning.”

18. On combined reading of the aforesaid clauses of the purchase order placed by the assessee with M/s Suzlon Energy Limited and the acceptance thereof by the latter vide letter dated 12.09.2013 and thus mutually agreed between the two parties, we find that liquidated damages have been provided to ensure that there is timely delivery and commissioning of the windmill project and where the delivery is delayed beyond 30.09.2013 resulting in delayed commissioning, the liquidated damages of 15% of total project cost of Rs 120 lacs has been provided. The same is thus in nature of compensation for the delayed delivery and consequent delayed commissioning of windmill project. Thereafter, vide letter dated 3.10.2013, the assessee has raised a claim towards liquidated damages on M/s Suzlon Energy Limited as per clause 12 of the aforesaid agreement stating that timelines for timely delivery and commencing of windmill project has elapsed and M/s Suzlon Energy Limited is liable to pay liquidated damages and in event of failure, the assessee may invoke its contractual right to cancel the purchase order. In response, M/s Suzlon Energy Limited vide its letter dated 5.10.2013 has acknowledged the fact that due to some unavoidable circumstances, they were unable to deliver within the timeframe as stipulated in the purchase order and accepted their liability to pay liquidated damages of Rs 1.20 crores. Further, the assessee has debited the account of M/s Suzlon Energy Limited during the year under consideration and a credit note has been issued by M/s Suzlon Energy Limited on 2.05.2015. We therefore find that the contractual terms for

compensating the assessee for the delayed delivery of the windmill project have not just been agreed upon but due to actual delay in the delivery, the same have been acknowledged and there has been acceptance on part of M/s Suzlon Energy Limited to pay the liquidated damages to compensate the assessee for the delayed delivery.

19. It is therefore not in dispute that the liquidated damages were directly and intimately linked with the procurement of the windmill, however, as held by the Hon'ble Supreme Court in case of Saurashtra Cement (supra), it would lead to delay in coming into existence of the profit-making apparatus, rather than a receipt in the course of profit-earning process and the amount received by the assessee towards compensation for sterilization of the profit-earning source is a capital receipt and the same by default cannot be held as meeting the cost of the windmill in the hands of the assessee and be reduced for determining the actual cost of windmill under section 43(1) of the Act which needs to be examined independently based on review of terms and conditions of the contract. As discussed above, on review of terms of the contract, the liquidated damages retains its independent character of compensating the assessee and cannot be mixed up with the cost of the windmill at which the assessee agreed to purchase the windmill and the same would therefore not reduce the cost of windmill for the purposes of calculating depreciation u/s 32(1) of the Act.

20. We therefore find that the decision of the Hon'ble Supreme Court in case of Saurashtra Cement (supra) as well as the decision of the Hon'ble Gujarat High Court in case of Shree Digvijay Cement Co Ltd

(supra) supports the case of the assessee in treating the liquidated damages as capital receipts and not reducing the same from the cost of the windmill in terms of section 43(1) for the purposes of claim of depreciation and where such a claim is allowed by the Assessing officer, it cannot be held that there is erroneous application of provisions of law and legal position so emerging from reading of the aforesaid two decisions.

21. During the course of assessment proceedings, we find that the matter was duly examined by the Assessing officer as evident from the notice issued u/s 143(2) wherein one of the reasons for selection of case has been stated to be claim of depreciation which was followed by specific queries raised on 11.10.2017, 7.11.2017, 10.11.2017 and 30.11.2017 and replies dated 10.11.2017 and 7.11.2017 submitted by the assessee providing the necessary information and documentation as well as the legal decisions referred supra in support of his claim. It is therefore not a case where the queries were raised and submissions were accepted on face value, rather the Assessing officer on receipt of initial submissions has examined the same and has thereafter raised further queries and sought submissions and once he was satisfied with the claim of the assessee, he has allowed the said claim. Therefore, where the Assessing Officer has taken into consideration the factual and legal position and examined the matter at length and allowed the claim of the assessee, the opinion so formed by the Assessing Officer cannot be held as erroneous in nature. It is therefore not a case of mere acceptance of statement of the assessee without due verification or a case of erroneous application of provisions of law as

held by the Id. Pr. CIT rather it is a case where the Assessing Officer has duly taken into consideration the factual and the legal position as emanating from contractual terms and conditions and the decisions of the Hon'ble Supreme Court and the Hon'ble Gujarat High Court and only after satisfying himself has allowed the claim of the assessee.

22. In light of aforesaid discussions and in the entirety of facts and circumstances of the case, we are of the considered view that the necessary enquiries and examination as reasonably expected have been carried out by the Assessing officer and he has taken a prudent, judicious and reasonable view after considering the entire material available on record and the order so passed u/s 143(3) cannot be held as erroneous in so far as prejudicial to the interest of Revenue. The impugned order passed by the Id PCIT u/s 263 is accordingly set aside and the order of the Assessing officer is sustained.

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

Order pronounced in the open Court on 07/09/2021.

Sd/-
(Sandeep Gosain)
Judicial Member

Sd/-
(Vikram Singh Yadav)
Accountant Member

Jodhpur

Dated:- 07/09/2021.

*Ganesh Kumar

Copy of the order forwarded to:

1. The Appellant- Shri Satya Narayan Dhoot, Jodhpur

2. The Respondent- ACIT, Circle-03, Jodhpur
3. CIT
4. CIT(A)
5. DR, ITAT, Jodhpur.
6. Guard File { ITA No. 35/Jodh/2021 }

By order,

Asst. Registrar