

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'C' : NEW DELHI)**

**BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
and
SHRI AMIT SHUKLA, JUDICIAL MEMBER**

**ITA No.6708/Del./2018
(ASSESSMENT YEAR : 2012-13)**

DCIT, Circle 12 (1), vs. M/s. Indo Rama Industries Limited,
New Delhi. Tower – B, 2nd Floor, DLF IT Park,
Chandigarh (Punjab)

(PAN : AABCI9690N)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Gautam Jain, Advocate
REVENUE BY : Shri Kumar Padmapani Bora, Sr.DR

Date of Hearing : 08.12.2021
Date of Order : 13.12.2021

ORDER

PER AMIT SHUKLA, JM :

Aforesaid appeal has been filed by the assessee against the impugned order dated 25.07.2018 passed by the Id. CIT (A)-22, New Delhi for the quantum of assessment passed under section 143(3) of the Income-tax Act, 1961 (for short 'the Act') for the assessment year 2012-13.

2. In the grounds of appeal, the Revenue has raised the following grounds :-

“1. Whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) has erred in deleting the addition of Rs.50,81,93,950/- made by the AO on account of disallowance of depreciation claimed by the assessee u/s 32 of the Income Tax Act, 1961 ('the Act'), not appreciating the fact that the assessee failed to prove that the fixed assets had been put to use during the year under consideration.

2.(a) Whether on the facts and the circumstances of the case, the Ld CIT(A) had erred in holding that the assets had been put to use during the year under assessment on the basis of the documents furnished during the appellate proceedings, not appreciating the fact that the assessee had failed to adduce any evidence during the assessment proceedings regarding having actually put the assets to use during the year under assessment.

(b) Whether on the facts and in the circumstances of the case, the Ld CIT(A), was correct in admitting the additional evidence produced by the assessee by observing that the additional documents furnished by the assessee during appellate proceedings were sent to the AO for his comments, when no such documents were enclosed with the communication(s) addressed by the Ld CIT(A) to the AO and, therefore, the AO never got the opportunity to examine the additional evidence.

(c) Whether on the facts and in the circumstances of the case, the Ld CIT(A) has erred in allowing depreciation on the fixed assets on the ground that the AO had made high-pitched assessment without giving reasonable opportunity of being heard to the assessee, not appreciating the fact that the assessee was given ample opportunities to prove that the assets had been actually put to use, as evident from the specific queries raised to this effect in notice u/s 142(1) dated 06.11.2015 (followed by reminder dated 08.12.2015) and the fact more than 10 opportunities of being heard were given to the assessee to furnish details/evidence in support of the queries raised in the said notices.

(d) Without prejudice to the above, whether the Ld CIT(A) has erred in holding that the assessee had put the assets to use during the year under assessment on the basis of the Mechanical Completion Certificate, Excise/VAT Return etc., not appreciating the fact that the use of the assets has to be actual, real & effective in the commercial sense and the mere fact that a meager

amount of "income from operation" is reflected in the accounts does not establish that all the block of assets had been actually put to use during the year.

3. The sole issue involved in the present appeal is disallowance of depreciation of Rs.50,81,93,950/- claimed by the assessee u/s 32 of the Act on the fixed assets acquired/purchased during the year.

4. The facts in brief as discussed in the assessment order is that during the relevant assessment year, assessee has set up a green field project to produce Spandex Filament Yarn at Baddi, Himachal Pradesh. The assessee has installed state of the art plant equipped with latest technology to produce 5000 MT of yarns per annum. For setting up this new industry, the assessee had purchased plant & machinery and made addition to the fixed assets amounting to Rs.3,23,60,13,477/-. The copies of bills purchased in respect of addition to the fixed assets were also submitted before the AO. Ld. AO as noted in assessment order that during the course of hearing on 18.03.2016, it was pointed out to the assessee company that it had not started the business and asked the assessee to produce that assets were actually put to use during the

year so as to make the assessee entitled to claim depreciation of Rs.50,81,93,950/-. In response, the assessee has filed its reply on 22.03.2016 which is reproduced in the impugned assessment order. Ld. AO admitted that copies of bills in respect of fixed assets have been filed and he also noted that these fixed assets were purchased by the assessee company. He observed that though there is no denial of this fact that assessee has purchased fixed assets for the purpose of business, however assessee has failed to prove that the assessee has put to use these assets during the year under consideration. Merely purchasing such fixed assets the assessee does not get entitled for such huge depreciation and accordingly, he disallowed the entire depreciation claimed of Rs.50,81,93,950/-.

5. Before the ld. CIT (A), one of the main contention raised by the assessee was that nowhere in show-cause notice or queries, AO has asked, whether the assessee has started its business or not. He has simply asked for the fixed assets and disallowed the depreciation without appreciating the material available on record in the form of

financial statements and other documents. Accordingly, the assessee had filed certain additional evidences and other documents which were also filed before the AO. The details of which are as under :-

- (i) Mechanical completion certificate;**
- (ii) RG-1 Register;**
- (iii) Copy of excise return (ER-1);**
- (iv) Copy of VAT Return;**
- (v) Finished goods inventories (Schedule 15 of audited financial statements);**
- (vi) Excise duty amounting to Rs.88,363/- (Schedule 19 of audited financial statements);**
- (vii) Cost of material consumed amounting to Rs.1,75,10,366/-;**
- (viii) Revenue from operations amounting to Rs.6,80,056/- (Schedule 19 of audited financial statements);**
- (ix) Trade Receivables amounting to R.3,47,525/- (schedule 19 of audited financial statements);**
- (x) Party-wise detail of Trade receivables amounting to Rs.3,47,525/-.**

6. Ld. CIT (A) called for the remand report from the AO vide his letter dated 16.11.2017 to submit the report within a time period of 15 days. However, no report was submitted and accordingly, ld. CIT (A) again sent a reminder on 28.03.2018 and asked the AO to submit the remand report by 06.04.2018. However, despite such reminder also, no remand report was furnished. The contents asked in the

remand report and the observation made by the ld. CIT(A) in letter dated 16.11.2017 to the AO is quite relevant, therefore, for the sake of ready reference, the same is reproduced hereunder :-

“To

**The DCIT, Circle – 12(1), Delhi
C.R. Building, I.P. Estate,
New Delhi**

Sub : Remand Report in the case of Indorama Industries Ltd., for A.Y. 2012-13 in appeal No.31/17-18 (old appeal No.235/16-17), PAN : AABCI9690N Order passed u/s 143(3) dated 28.03.2016 – reg.

Please refer to the above.

2. In the appellate proceedings, the appellant has raised the following grounds.

1. Ground No.4 the Ld. AR of the Appellant Company has mentioned that the Ld. Assessing officer has erred both in law and on facts of the case in disallowing the whole Depreciation claimed as per the income tax act, 1961 amounting to Rs.50,81,93,951/- by alleging that on 18.03.2016 the assessee was specifically asked to submit proof that the fixed assets were actually put to use during the year. But actually, on 18.03.2016 the Ld. AO did not ask us to prove that the fixed assets were actually put to use or not by the assessee company. An affidavit from the authorized representative can be given to this effect.

You are requested to comment from record whether on 18.03.2016. such query was asked or not from the Appellant Company. Please provide copy of order sheet/notice issued to the Appellant Company on 18.03.2016.

3. Ground No.3. the Ld. AR of the Appellant Company has mentioned that no Show Cause Notice (SCN) was issued to the Appellant Company before making such high pitched assessment. Therefore, no opportunity of being heard was given to the Appellant Company before making such huge addition.

You are directed to comment on the same and also provide copy of Show Cause Notice issued to the Appellant Company, if any.

4. In the submission submitted before me, the Ld. AR of the Appellant Company has mentioned that on perusal of the financial statements it can be seen that the Appellant Company has started its business during the AY 2012-13 itself. The Ld. AR has drawn a attention on the following items of the financial statement to establish that the Appellant Company had already started its business during the AY 2012-13 and was also eligible for depreciation under normal provisions of Income Tax Act. 1961:

- a. Finished Goods Inventories (manufactured) amounting to Rs.67,91,425/-.
- b. Excise duly amounting to Rs.88,363/-.
- c. Cost of material consumed of Rs.1,75,10,366/-
- d. Revenue From Operations amounting to Rs.6,80,056/-
- e. Trade receivables amounting to Rs.3,47,525/-

Before me, ld. AR is relying on the above entries In the financial statement of the appellant company to prove the starting of business during the A.. 2012-13 itself. You are directed to directed to comment on the same and if the same is considered in the assessment proceedings, then justify the reason for not taking the above facts Into cognizance.

5. Further, the ld. AR also submitted following documents under Rule 46A of the Income Tax Rules, 1962:

1. Mechanical completion certificate:
2. RG-I Register:
3. Copy of excise return (E.R.-1):
4. Copy of VAT return.

As per the Ld. AR, on the basis of the above mentioned proofs it can be established that the business of the Appellant Company was started and assets were also put to use during the AY 2012-13 itself. As per the ld. AR, if opportunity of being heard had given to the Appellant

Company at the time of assessment proceedings, such proofs must have been submitted before the AO itself.

You are requested to comment on the admissibility of additional evidence u/r 46A and merit of the evidences submitted.

6. If required necessary enquiries may be conducted for examining these evidences for which this letter should be treated as directed u/s 250(4) as well.

7. You are directed to submit your report within 15 days of the receipt of this letter.”

7. Even after the reminder, no such remand report was submitted. The ld. CIT (A) had passed the order on 25.07.2018 after a lapse of substantial time, however till the date of passing of the impugned order, also, no communication was received from the AO. Ld. CIT (A) also asked the AO to provide the assessment record to see, whether any query relating to the fact that assets were put to use, was asked by the AO from the assessee or not. From the perusal of the order sheet entry and show-cause notice, he noticed that firstly, no adequate opportunity was given to the assessee; and secondly, nowhere AO actually required the assessee, whether the assets were put to use. Ld. CIT (A), after considering the additional evidences, the details of which have been incorporated above, he held that not only the assets were purchased but also the assessee had carried

out production of goods after utilization of raw material and also shown revenue from the operations. The relevant finding and observation of the Id. CIT (A) is as under :-

“6.5 Now coming over to the disallowance of depreciation made by the AO. I have carefully considered the submissions, documentary evidences and judgements filed by the Ld. AR on behalf of the Appellant Company. The Ld. AR of the Appellant Company has furnished following evidences to prove that the business of the Appellant Company was already started in the AY 2012-13 itself and assets were actually put to use during the year involved:

- (i) Mechanical completion certificate;**
- (ii) RG-1 Register;**
- (iii) Copy of excise return (ER-1);**
- (iv) Copy of VAT Return;**
- (v) Finished goods inventories (Schedule 15 of audited financial statements);**
- (vi) Excise duty amounting to Rs.88,363/- (Schedule 19 of audited financial statements);**
- (vii) Cost of material consumed amounting to Rs.1,75,10,366/-;**
- (viii) Revenue from operations amounting to Rs.6,80,056/- (Schedule 19 of audited financial statements);**
- (ix) Trade Receivables amounting to R.3,47,525/- (schedule 19 of audited financial statements);**
- (x) Party-wise detail of Trade receivables amounting to Rs.3,47,525/-.**

6.6 From the assessment record I find that apart from first four item in the above list, all other documents were filed before AO. However the AO did not appreciate these documents. From the assessment order itself, it can be appreciated that by way of furnishing bills of assets purchased, ownership of the assets was proved by the Appellant Company before the AO. So it is not disputed by the AO that fixed assets were purchased by the company, the disallowance is made only on the basis that the appellant failed to prove the fact that these

plant & machinery are put to use during the relevant assessment year. The Ld. AR filed a mechanical completion certificate dated 19.03.2012 which states that plant has been started today by the first feeding of raw material into the plant following mechanical completion.

6.7 Apart from mechanical completion certificates, other corroborative evidences and considering the case laws relied upon by Ld. AR, I am of the view that business of the Appellant Company was started during the AY 2012-13 itself and assets were also put to use in that year. In view of this facts I find that AO is not justified in making the disallowance of depreciation. Hence the same is deleted. Accordingly, grounds of appeal are allowed.”

8. Ld. DR for the Revenue submitted that once the ld. CIT (A) has admitted the additional evidence then sufficient opportunity should have been given to the AO and from the perusal of ground 2(b), it can be seen that the Revenue has specifically raised this issue that, in the remand letter, there was no document annexed, therefore, AO never get an opportunity to examine the additional evidences. Thus, he requested that the matter be restored back to the AO to examine the additional evidences and AO will decide the issue in accordance with law.

9. On the other hand, ld. counsel for the assessee strongly objecting to the ld. DR's contention that matter should be restored back to the AO. He pointed out various facts as incorporated in the appellate order as well as

material placed on record that, firstly, AO himself did not raise any show-cause notice specifically requiring to prove, whether the assets were put to use during the year or not; and secondly, AO had asked for the details of purchase of assets which were duly furnished and also acknowledged by the AO that fixed assets were actually purchased during the year. He further submitted that even if additional evidences were not considered then the copy of audited financial statements was there on the record before the AO. From the said financial statements, he pointed out that the assessee during the year had earned revenue from operations by putting use to the same fixed assets/plant & machinery of Rs.6,80,056/-. Apart from that, he also submitted that the assessee had consumed raw material of around Rs.9.95 crores and finished goods of Rs.32,22,945, unfinished goods of Rs.67,91,425/-, closing stock, trade receivables and cost of material consumed of Rs.1.75 crores. Thus, it clearly shows that assessee carried out its production and huge stock of finished goods and closing stock was generated out of the manufacturing process and part of this were also sold. These facts were available before the lower

authorities, which has been accepted by the AO. Thus, it cannot be held that assets were not put to use, because without the assets and plant & machinery, no manufacturing can be carried out. In order to prove the factum of production, the assessee had filed various documents partly before the AO and partly before the Id. CIT (A), as noted by the first appellate authority in its impugned order. Out of the 10 documents in the appellate order, most of them were before the AO as even noted by the Id. CIT (A), i.e. details of finished goods inventories, excise duty, cost of material consumed, revenue from operations and trade receivables. Assessee has submitted additionally, Mechanical Completion Certificate, RG-1 register which is excise record, copy of excise return and copy of VAT return. Technically, these cannot be held to be additional evidence as they are part of public statutory record. It is from these records assessee amply demonstrated that assets were put to use.

10. On the contention of Id. DR for the Revenue that no sufficient opportunity was given to the AO, he strongly relied upon the decision of Hon'ble jurisdictional High Court

in case of CIT vs. Imperial Cables (P) Ltd. (2007) 159 taxman 328 (Delhi)(11.09.2006), wherein Hon'ble High Court has categorically observed that if more than adequate opportunities have been given to the AO to respond to the application of additional evidence moved by the assessee before the first appellate authority and if AO did not take any interest in the matter, then first appellate authority has no option but to allow the application and to take additional evidence on record. The ratio of said judgment is squarely applicable on the facts of the present case wherein ld. CIT(A) has categorically noted that ample opportunity has been given to the AO and AO did not respond. Thus, the matter should not be set aside and the order of the ld. CIT (A) be upheld.

11. We have heard the rival submissions and perused the material placed on record as well as relevant finding given in the impugned order. From bare perusal of the assessment order, it is seen that ld. AO put a query to the assessee on 18.03.2016 to file the details of fixed assets and why the depreciation should not be denied. In response, the assessee has submitted the details as well as purchased

bills as noted by the AO. However, in the show-cause notice dated 18.03.2016 which has been noted by the Id. CIT (A) that, in the entire show-cause notice, nowhere there was any specific query whether the assets were put to use during the year. This factum has not been rebutted. This is seen from the following observation of the Id. CIT (A) in paras 6.2 & 6.3 of the impugned order as under :-

“6.2 On the basis of the same, vide letter dated 16.11.2017, report from the AO is called for. A time period of 15 days was given to the AO. But no report was received from the office of the AO. Further, on 28.03.2018 a reminder has been sent and asked to submit the report on 06.04.2018. Despite the same no reply was received from the AO. Finally, I have asked the AO to provide the assessment record. On perusal of the assessment record, it is found that no show cause notice was issued to the Appellant Company, before making such a huge addition of Rs.50,81,93,951/-. The Ld. AR has categorically submitted that had the assessee been given an opportunity by the AO it could have demonstrated that business activities were started and assets were also put to use during the AY 2012-13 and no addition or: disallowance could be made.

6.3 Further, the Ld. AR also submitted certain additional evidences. In the aforesaid letter to the AO, comment on the additional evidences i.e. Mechanical completion certificate, RG-1 register, Excise Return and Vat return, submitted by the Appellant Company before me, is also sought. But no report was received from the office of the AO. Accordingly, I have asked the AO to provide the assessment record. On perusal of the order sheet entry dated 18.03.2016, it is observed that the query relating to the fact that the assets were put to use was asked by the AO on 18.03.2016 and the

assessment order is passed on 28.03.2016. On perusal of the order sheet it can be made out that adequate opportunity was not given to the appellant.”

12. It was in this background the ld. CIT (A) had called for the remand report and admitted additional evidence which AO has failed to respond despite reminders. Thus, we do not find any error in the action of the ld. CIT (A) in admitting the additional evidences and adjudicating the same.

13. Further, Ld. CIT (A) has not solely gone by the four additional documents filed before him which are though part of the statutory record only, but has decided the issue on totality of facts and circumstances as was available before the AO and on the audited financial statements which were not disputed by the ld. CIT (A) or noted by the AO. In fact, in his remand letter, he has categorically pointed out this fact.

14. After considering the entire gamut of facts and material placed on record before the AO and ld. CIT (A), we find that there is no dispute that assessee had not only purchased the assets/plant & machinery but also had put

to use during the relevant assessment year. This is evident from the fact that production was carried out by utilizing raw material and finished & semi-finished stocks at the year end. Not only that, the goods produced had also been sold and revenue from the operation has also been shown at Rs.6,80,056/-. This is not only mentioned in the audited financial accounts, which were there before the AO, but also from the statutory record of RG-1 register, copy of excise return and copy of VAT Return. Once a new factory has been set up with new plant & machinery which was used for production during the year and depreciation has been claimed on such plant & machinery, then same cannot be denied on the ground that the plant & machinery of the new assets purchased during the year were not put to use. The aforesaid finding of the Id. CIT (A) is not only based on appreciation of facts but also in accordance with law and hence said finding is affirmed. Be that as it may be, now it is a well trite law even if assets are ready to use, which here in this case was actually put to use, then also depreciation cannot be denied.

15. In view of the above, depreciation claimed by the assessee has to be allowed in accordance with law and the order of the ld. CIT (A) is accordingly upheld.

15. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in open court on this 13th day of December, 2021.

**Sd/-
(ANIL CHATURVEDI)
ACCOUNTANT MEMBER**

**sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER**

**Dated the 13th day of December, 2021
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-22, New Delhi.
- 5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.