

आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL  
'A' BENCH, CHENNAI [**CAMP: COIMBATORE**]

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं  
श्री अब्राहम पी.जॉर्ज, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND  
SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.1719/Mds/2016

निर्धारण वर्ष / Assessment Year : 2009-10

Smt. V. Sabithamani,  
C/o Pioneer Corporation,  
358, Mettupalayam Road,  
Coimbatore – 641 043.

v. The Assistant Commissioner of  
Income Tax,  
Circle II,  
Coimbatore.

PAN : AJXPS 7311 Q  
(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

आयकर अपील सं./ITA No.2038/Mds/2016

निर्धारण वर्ष / Assessment Year : 2009-10

The Assistant Commissioner of  
Income Tax,  
Circle – 2,  
Coimbatore.

v. Smt. V. Sabithamani,  
C/o Pioneer Corporation,  
358, Mettupalayam Road,  
Coimbatore – 641 043.

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

निर्धारिती की ओर से /Assessee by : Shri V. Jagadisan, CA

राजस्व की ओर से /Revenue by : Shri Shiva Srinivas, JCIT

सुनवाई की तारीख/Date of Hearing : 18.01.2017

घोषणा की तारीख/Date of Pronouncement : 03.02.2017

**आदेश / O R D E R****PER BENCH:**

These cross appeals of the assessee and Revenue respectively, are directed against the order dated 30.03.2016 of the Commissioner of Income Tax (Appeals) -2, Coimbatore.

2. Grounds taken by the assessee as well as the Revenue are reproduced hereunder:-

**Grounds taken by assessee:-**

“1. The Commissioner of Income Tax (Appeals) is not justified in holding that “by implication” the assessee-appellant acceded to the actual cost of determination at ₹1,50,00,000/- - the filing of cross-objection is as good as filing appeal by assessee and CIT(A) cannot take advantage based on this fact.

2. The Commissioner of Income Tax (Appeals) erred in estimating the cost of acquisition of second-hand windmill at ₹1,50,00,000/- as against actual cost of acquisition of windmill at ₹2,36,10,000/- by assessee.

3. The Commissioner of Income Tax (Appeals) is not justified in holding that provisions of Explanation 3 to section 43(1) is applicable to the cost of acquisition of windmill acquired by assessee from M/s Sundararaja Mills Ltd.

4. The reopening of assessment is not legal to reduce depreciation claim on windmill from ₹98,21,273/- to ₹94,44,000/-.”

Grounds taken by Revenue:-

“2. Ld. CIT(A) has erred in law and on facts of the case in failing to appreciate that the assessing officer, while computing the 'actual cost' of the asset, has taken into account the effective life of the asset, the wear and tear of the asset during its utilisation, the amount of depreciation already allowed on the asset in the hands of the seller and the intent of the legislature in allowing an accelerated depreciation on the renewable energy device.

3. The Ld. CIT(A) has erred in law and facts of the case that the intention of the assessee in obtaining the second hand windmill at enhanced cost was only to reduce the liability to income-tax and Ld. CIT(A) in his order in para No.4.4 was of the considered view that the A.O. was justified in invoking the provisions of Explanation (3) to Section 43(1).

4. The Ld. CIT(A) has erred in law and facts of the case by adopting the valuation method adopted by TIIC which is for the purpose of advancing the loan which is not<sup>5</sup> based on the life of the asset or actual performance of the asset.

5. The Ld. CIT(Appeals) has failed to appreciate the facts that the value adopted by the Assessing Officer with the approval of the Joint Commissioner of Income Tax was based on the effective life of the asset and average generation of electricity from the windmill.

6. The Ld. CIT(A) has erred in adopting the value by which the depreciation claimed by the assessee and the

previous owner put together would exceed the cost of the asset.”

All the grounds relate to issue of acquisition of a second hand windmill by the assessee during the relevant previous year and pricing of such windmill.

3. Facts apropos are that the assessee, an individual, engaged in the business of trading in steel goods, had filed her return for the impugned assessment year declaring income of ₹12,92,820/-. Assessee had an operating profit of ₹63,37,493/- from operation of windmill, which became a loss of ₹34,83,780/- by virtue of claim of depreciation of ₹98,21,273/-. Original return was processed under Section 143(1) of the Act. Thereafter assessment was reopened for a reason that assessee had claimed excessive depreciation. A.O. noted that the claim of depreciation of ₹98,21,273/- included depreciation of ₹94,44,000/- on a windmill. As per the A.O., such claim of depreciation was on second hand windmill acquired by the assessee on 29.03.2013 from one M/s Soundararaja Mills Ltd. According to the A.O., the windmill was already used by another person and depreciation claimed for a number of years. The A.O. was of the

opinion that the main idea behind the purchase of the windmill at a price of ₹2,36,00,000/- was to reduce tax liability by claiming depreciation on such enhanced cost. As per the A.O., M/s Soundararaja Mills Ltd., who had sold the windmill to the assessee, had claimed depreciation of ₹3,00,00,000/- on such windmill for the period April 2003 to March 2009. The assessee, as per the A.O., had claimed the depreciation of ₹2,07,68,000/- for the period March 2009 to March 2010, based on an enhanced value of windmill. Thus, as per the A.O., the total asset value, if depreciation alone was considered, came to ₹5,07,68,000/-. The A.O. noted that the manufacturer of the windmill, namely, Enercon (India) Ltd. had certified its cost as ₹3,00,00,000/- and if the aggregate of the depreciation claimed by M/s Soundararaja Mills Ltd. and by Smt. V. Sabithamani, the assessee, considered together, it would be much more than the cost of windmill.

4. Though the assessee relied on a valuation by a Chartered Engineer, done for the purpose of availing a bank loan of ₹144 lakhs, valuing the windmill at ₹2,55,34,000/-, the Assessing Officer did not accept such valuation report. As per the A.O., once the depreciation

claimed by the original user was considered, it was clear that the price at which assessee acquired the windmill was heavily overvalued. The A.O. noted that WDV of the windmill as on the date of acquisition by the assessee was only ₹1920/-. In any case, as per the A.O., by acquiring the windmill at ₹2,36,00,000/- from M/s Soundararaja Mills Ltd., assessee was taking undue benefit of the enhanced rate of depreciation available for windmills under the Act. Relying on Explanation 3 to Section 43(1) of the Act, the Ld. A.O. held that the main purpose of acquiring windmill was reduction of liability to tax, by claiming depreciation with reference to the enhanced cost. He worked out the actual cost of the windmill as ₹43,28,388/- and allowed depreciation only on the said amount. Such depreciation came to ₹17,31,355/- and the resultant disallowance came to ₹77,12,645/-

5. Aggrieved, the assessee moved in appeal before the CIT(Appeals). Argument of the assessee was that the Assessing Officer had fixed an arbitrary value for the windmill. According to the assessee, fair market value of the asset was certified by registered valuer and such registered valuer had given a value higher than the price paid by the assessee. Contention of the assessee was that she

had raised a term loan of ₹144 lakhs from M/s Canara Bank, Gandhipuram Branch, Coimbatore, for buying the windmill from M/s Soundararaja Mills Ltd. Relying on the valuation report given by Shri P. Muthuperumal, registered valuer, appointed by M/s Canara Bank, the assessee contended that the total valuation given by the said valuer was ₹2,55,34,000/- which, inter alia, included windmill value of ₹2,19,00,000/- and land value of ₹36,34,000/-. Assessee also relied on the valuation done by one M/s Vaidyanathan and Associates, Government approved valuer, who had valued the windmill at ₹2,95,00,000/-. As per the assessee, there was a huge market for second hand windmill due to substantial profits from sale of power generated through windmills. As per the assessee, it might be true that M/s Soundararaja Mills Ltd. did not offer any short term capital gains for the sale of windmill to her. However, according to the assessee, they had confirmed receipt of the consideration and how they treated the amount in their books of account was not relevant.

6. However, the Ld. CIT(Appeals) was not impressed by the above arguments. According to him, what the assessee had acquired was a wholly depreciated windmill having negligible value. As per the

Ld. CIT(Appeals), there were deficiencies in the valuation report produced by the assessee. According to him, the valuer had applied depreciation at 27% only for one year though the windmill was used for six years by the earlier owner. As per the Ld. CIT(Appeals), the manufacture of the windmill model acquired by the assessee was stopped long back by M/s Enercon (India) Ltd. and it was an obsolete item. Hence he held that the Assessing Officer was justified in invoking Explanation 3 to Section 43(1) of the Act. However, at the same time, the Ld. CIT(Appeals) held that the method of arriving at the actual cost adopted by the Assessing Officer was not a reasonable one. According to him, the Assessing Officer had applied a multiplication of average units of power generated per annum with per unit value of ₹3/- for arriving at such value. As against this, as per the Ld. CIT(Appeals), the assessee had given a working based on a unit rate of ₹15/-. The Ld. CIT(Appeals) was of the opinion that the method of valuation based on number of units generated per year may not reflect the future potentiality of the windmill. Ld. CIT(Appeals) noted that Tamilnadu Industrial Investment Corporation, a Government agency, had given a guideline method for valuing second hand



windmills and if such method was applied, the value of windmill acquired by the assessee would be ₹1,50,00,000/-. The Ld. CIT(Appeals) noted that the assessee herself had suggested adoption of such value in her grounds. Thus, he modified the order of the Assessing Officer and directed the A.O. to consider the actual cost as ₹1,50,00,000/- and recompute the disallowance.

7. Now before us, the assessee is aggrieved on adoption of value of ₹1,50,00,000/- as actual cost, whereas, the Revenue is aggrieved on rejection of the value assigned by the Assessing Officer.

8. The Ld. representative for the assessee submitted that Explanation 3 to Section 43(1) of the Act had no application. According to him, the said Explanation could be applied only where the main purpose of transfer of assets was reduction of liability to income-tax. Ld. A.R. submitted that the parties were not related and there was no valid ground for coming to a conclusion that the purpose of transfer was reduction of tax liability. As per the Ld. A.R., a genuine transaction was disbelieved. Contention of the Ld. A.R. was that

depreciated value of machinery had no relevance in fixing actual sale price which was dependent on market forces. Submission of the Ld. A.R. was that wind power was a lucrative and profit earning business. According to him, the second hand windmill was having a high value considering the profit potentiality. Just because the earlier owner had derived benefit of enhanced depreciation on windmill, would not, as per the Ld. A.R., discredit the claim of assessee for depreciation on the cost at which assessee had acquired the windmill. According to Ld. A.R., the agreement for transfer of windmill entered with M/s Soundararaja Mills Ltd. was never doubted by the lower authorities. In any case, according to the Ld. A.R., the cost at which the assessee had acquired the windmill could never be considered as fictitious or far-fetched since the valuation made by M/s Canara Bank was available on record. By virtue of such valuation, the windmill, according to the Ld. A.R., had to be valued at ₹2,55,34,000/-. As per the Ld. A.R., the assessee had acquired the windmill at a lower amount of ₹2,36,10,000/- and therefore, the question of application of Explanation 3 to Section 43(1) of the Act did not arise. Further, as per the Ld. A.R., the Ld. CIT(Appeals) had assigned the value of

₹1,50,00,000/- based on a method of estimation devised by TIIC, the Government agency and how such method was applied to arrive at value of ₹1.5 Crores was never explained by the Ld. CIT(Appeals) at any part of his order. Thus, according to him, the CIT(Appeals) had erred in not allowing the depreciation claim of the assessee in full. Though one of the grounds taken by the assessee does assail the reopening, no arguments on this were advanced by the Ld. A.R.

9. Per contra, the Ld. Departmental Representative, in support of the grounds of appeal, submitted that explanation 3 to Section 43(1) of the Act would clearly apply. According to him, unscrupulous persons were taking advantage of the higher depreciation rates available for windmill with ulterior motives. As per the Ld. D.R., if depreciation claimed by the assessee as well as earlier owner were considered, the total depreciation was in excess of ₹5 Crores, whereas the windmill itself had a cost of less than ₹3 Crores. Thus, according to him, this was the right case where Explanation 3 to Section 43(1) was invoked.

10. We have perused the orders and heard the rival contentions. Claim of the assessee is that she had acquired windmill from M/s

Soundararaja Mills Ltd. for a price of ₹2,36,10,000/- and M/s Soundararaja Mills Ltd. was in no way related to her. As per the assessee, it was a pure business transaction and assessee was not concerned on the quantum of depreciation claimed by M/s Soundararaja Mills Ltd. Section 43(1) of the Act and Explanation 3 thereto, which has been applied by the A.O., are reproduced hereunder:-

“43. In sections 28 to 41 and in this section, unless the context otherwise requires -

(1) “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:

**Provided** that where the actual cost of an asset, being a motor car which is acquired by the assessee after the 31st day of March, 1967, but before the first day of March, 1975, and is used otherwise than in a business of running it on hire for tourists, exceeds twenty-five thousand rupees, the excess of the actual cost over such amount shall be ignored, and the actual cost thereof shall be taken to be twenty-five thousand rupees.

Explanation 1. - .....  
.....

Explanation 2. - .....  
.....

*Explanation 3.— Where, before the date of acquisition by the assessee, the assets were at any time used by any other person for the purposes of his business or profession and the Assessing Officer is satisfied that the main purpose of the transfer of such assets, directly or indirectly to the assessee, was the reduction of a liability to income-tax (by claiming depreciation with reference to an enhanced cost), the actual cost to the assessee shall be such an amount as the Assessing Officer may, with the previous approval of the Joint Commissioner determine having regard to all the circumstances of the case.”*

11. A reading of above explanation brings out the circumstances in which it can be applied. The requirement is that the Assessing Officer should be satisfied that the purpose of transfer of assets was reduction of liability to tax. No doubt, such satisfaction should be an objective one and not a subjective one. The basis on which Assessing Officer, had in the case before us, reached this satisfaction is that the depreciation claimed by the earlier owner as well as the assessee on the windmill when aggregated, came to a sum in excess of ₹5 Crores, and this was much higher than original cost of the windmill as such. In our opinion, when original cost of the windmill was itself much less than ₹5 Crores, the main purpose of transfer of windmill by M/s Soundararaja Mills Ltd. to the assessee could only be seen as motivated by an intent to reduce liability to income-tax. It is a well

settled principle of law that what is permissible is tax planning and not evasion. When an attempt is made to evade tax, it is the bounden duty of the authorities to find the real intention. It is the duty of the judicial authorities, in every case, when ingenuity is expended to avoid taxes and scuttle welfare legislations, to get behind the smoke screen and discover the true state of affairs. Form has to take make-way for substance. That the parties were not related and transfer of windmill from M/s Soundararaja Mills Ltd. to the assessee was only a business transaction, in our opinion, were not relevant factors. Relevant factor was the main purpose which motivated the assessee to acquire the second hand windmill at an excessive cost. It is not disputed that depreciated value of the said windmill in the hands of M/s Soundararaja Mills Ltd. was negligible at the time of such sale. M/s Enercon (India) Ltd. who manufactured the windmill had certified that the model sold by M/s Soundararaja Mills Ltd. to the assessee was no more in market. They also declined to assign a value which, in other words, mean that the windmill which was more than 5-1/2 years old was of obsolete technology. These factors, in our opinion, clearly indicate that the transfer of windmill to the assessee from M/s

Soundararaja Mills Ltd. at a price of ₹ 2.36 Crores itself was a questionable and doubtful one, with the only intention to reduce tax liability. It may be true that assessee had raised a loan of ₹144 lakhs from M/s Canara Bank, based on a valuation report requisitioned by the said bank and in the said valuation report, the value of the windmill was fixed as ₹2,19,00,000/-. It may also be true that Government approved valuer had fixed the value of windmill at ₹2,95,00,000/-. However, for invoking Explanation 3 to Section 43(1) what is required is the objective satisfaction reached by the Assessing Officer that the main purpose of transfer is reduction of tax liability. The valuations may be relevant in ordinary circumstances but when the cumulated depreciation claimed was far in excess of the cost, relevance of such valuations, in our opinion, is insignificant. Especially so since CIT(Appeals) had found glaring deficiencies in such valuation, where only depreciation for one year alone was considered. The CIT(Appeals), in our opinion, was not justified in substituting the value adopted by the A.O. with one based on a method adopted by TIIC, a Government agency. A.O. had adopted a fair method of multiplying the average generation per year with per unit cost of electricity

generated. This was the method adopted by the assessee itself for valuing four numbers of windmill offered by it as collateral for raising loan from M/s Canara Bank, except for the difference in unit rate. In our opinion, the conditions for invoking Explanation 3 to Section 43(1) of the Act were satisfied. We, therefore, have no hesitation to set aside the order of the CIT(Appeals) and reinstate the order of the A.O.

12. In the result, appeal of the assessee is dismissed, whereas that of the Revenue is allowed.

Order pronounced on 3<sup>rd</sup> February, 2017 at Chennai.

sd/-

(एन.आर.एस. गणेशन)  
(N.R.S. Ganesan)  
न्यायिक सदस्य/Judicial Member

sd/-

(अब्राहम पी.जॉर्ज)  
(Abraham P. George)  
लेखा सदस्य/Accountant Member

चेन्नई/Chennai,

दिनांक/Dated, the 3<sup>rd</sup> February, 2017.

Kri.

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. निर्धारिती /Assessee
2. Assessing Officer
3. आयकर आयुक्त (अपील)/CIT(A)-2, Coimbatore
4. Principal CIT-1, Coimbatore
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.