

**In the Income-Tax Appellate Tribunal,
Delhi Bench 'A', New Delhi**

**Before : Shri H.S. Sidhu, Judicial Member And
Shri L.P. Sahu, Accountant Member**

**ITA No. 4139/Del./2014
Assessment Year: 2010-11**

D.C.I.T., Circle 3(1), New Delhi. (Appellant)	vs.	M/s. Bikanerwala Foods Pvt. Ltd., A-28, Lawrence Road Industrial Area New Delhi (PAN-AAACB0611P) (Respondent)
--	------------	--

Appellant by	Sh. Ravi Kant Gupta, Sr. DR
Respondent by	Sh. Ranjan Chopra, C.A.

Date of Hearing	18.04.2018
Date of Pronouncement	04.05.2018

ORDER

Per L.P. Sahu, A.M.:

This is an appeal filed by the Revenue against the order of Id. CIT(A)-VI, New Delhi dated 30.04.2014 for the assessment year 2010-11 on the following solitary ground :

- "1. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in allowing additional depreciation of Rs.72,90,238/- u/s. 32(1)(iia) of the I.T. Act, 1961 on items installed in the various outlets of the assessee not linked to manufacturing activities without adjudicating this issue raised specifically by the A.O. in the assessment order."*

2. From the above ground, the only challenged thrown by the Revenue is with respect to deletion of disallowance of additional depreciation worth Rs. 72,90,238/-. The brief facts of the case are that the assessee is engaged in the

business of sweets and Namkins and filed its return of income at an income of Rs.8,47,58,721/- on 26.06.2010. In the assessment proceedings, the Assessing Officer noticed that the assessee has claimed additional depreciation of Rs.72,90,238/- on the capital assets purchased and installed by the assessee virtue of section 32(1)(ia) of the Act. The assessee was asked to justify the claim. In response, the assessee filed the details of assets on which the impugned additional depreciation was claimed u/s. 32(1)(ia) of the IT Act. From these details, the Assessing Officer prepared a list of some of the items randomly gathered on sample basis as under :

S. No.	Item	Bill No.	Amount	Installed at
01.	General A.C. 2 Ton	483	31.000/-	Record Room
02.	Split A.C. 1.5 Ton	483	22.000/-	R&D Office
03.	Jet Air Curtain	002/APR/ 2009-10	18.125/-	Preet Vihar Outlet
04.	Exhaust & Ventilation Work	SA/2/09	9,04,950/-	Preet Vihar Outlet
05.	Blue Star Window A.C.	R-2009-10/ 00101	66,500/-	Not known
06.	InkJet Printer	XM/09-10/ 00000183	2,16,480/-	Plot No. 21, Sec.-24, Faridabad.
07.	Dhir Dish Washing Machine	588	1,55,0007-	Preet Vihar
08.	Misc. Item (Ice Cream Counter, Matka Kulfi Counter, Chat Counter etc).	009	3,07,3207-	Preet Vihar
09.	Tandoor	569	30,0007-	Preet Vihar
10.	Multiple Items	068	T5^T87-	Pitampura
11.	Multiple Items (Wash Table, Discharge table).	847	2,27, 250/-	Preet Vihar
12.	Compressor	209	9,7677-	Pitampura
13.	Extension for change over	191	18,7307-	Faridabad
14.	Distribution panel as roof top.	-DO-	1,08,130/-	Faridabad

15.	Air Conditioner	R-3064	2,36,250/-	Not known
16.	Chat Coffee Trolley	21	1,95,000/-	
17.	Blue Star A.C.	201	86,000/-	Preet Vihar
18.	Blue Star make duetable unit	204	4,46,433/-	Preet Vihar
19.	Installation of A.C. Ducts	118	1,76,700/-	Not known
20.	Wrapping Machine	137	38,000/-	C.P.
21.	Display Counter	056	3,36,262/-	Not known

3. Considering the nature of items randomly listed above, the Assessing Officer was of the view that the plant and machinery, on which the assessee claimed additional depreciation, were not plant & machinery to be used in manufacturing and are used /installed in the office premises, residential premises and show room. The Assessing Officer has reached this conclusion on the following premise –

(i) They are not installed in factory as the so called factory of the assessee is located at Lawrence Road. Therefore, these items are utilized for offices or residential or show room purposes;

(ii) All of these items cannot be termed as plant & machinery e.g., the distribution penal at Faridabad is falling under the category of furniture & fixture and not under plant and machinery. Same is the case with other items also e.g. Air Conditioners are more in nature of office appliances rather than plant & Machinery to be used in manufacturing. Similarly Inkjet printer installed at Faridabad is undoubtedly an office appliance and not plant & Machinery.

Besides, the Assessing Officer, after considering the definition of ‘manufacture’ as given in section 2(29BA) of the IT Act, and also various case laws, observed that the assessee was not a manufacturer so as to qualify for additional

depreciation, as claimed. He also observed that the products of the assessee are not excisable commodities. The Assessing Officer has also considered the proviso to section 32(1)(iia) of the IT Act, which, inter alia, debars the allowance of additional depreciation on any machinery or plant installed in any office premises or any residential accommodation, including accommodation in the nature of a guest house or on any office appliances or road transport vehicles. Based on the above considerations, the Assessing Officer disallowed the additional depreciation worth Rs. 72,90,238/-, claimed by assessee and added the same to the total income of the assessee.

4. In appeal before the Id. CIT(A), assessee filed a detailed written submissions and relied on various case laws. The Id. CIT(A), after considering the submissions of the assessee, deleted the addition observing as under :

“5.3.7. An assessee engaged in the business of manufacture or production of any article or thing is entitled to claim additional depreciation in respect of new machinery or plant (other than ships & aircraft) acquired and installed after 31 March, 2005, subject to the fulfillment of specified conditions. Additional Depreciation is allowable at 20% of the actual cost of such plant or machinery in the year in which such plant or machinery is acquired and put to use. However, if the said plant & machinery is put to use for less than 180 days in the year in which it is acquired, the additional depreciation is allowable at 50% of the prescribed rate, i.e. at 10% of the actual cost of such plant or machinery. Additional or Enhanced Depreciation is in addition to normal depreciation allowable u/s 32 of the Act & it is allowable in respect of new Plant & Machinery even for existing business.

5.3.8. However, Additional Depreciation will not be available for the following :

(i) Any machinery or plant which was used by any other person, before its installation by the assessee.

(ii) Any machinery or plant which is installed in any office premises or residential accommodation, including a guest house

(iii) Any office appliances or road transport vehicles.

(iv) Any Plant & Machinery, the whole of the actual cost of which was allowed as deduction (whether as depreciation or otherwise) in any one previous year.

5.3.9. Additional Depreciation is thus allowed only once and that too in the previous year in which the eligible asset is acquired and installed & it shall be deductible while computing the WDV for the next year.

5.3.10. For claiming Additional Depreciation, the phrase 'Manufacture or produce an article or thing' is of paramount importance under the Act. The term 'manufacture' has been defined u/s 2(29 BA), as inserted by the Finance (No.2) Act, 2009, w.r.e.f 01.04.2009. Generally, the test evolved for determining whether manufacture can be said to have taken place is whether the commodity which is subject to the process of manufacture can no longer be regarded as the original commodity but is recognized in the trade as a new and distinct commodity. In this regard, reliance is placed on the decision of Apex Court in the case of DCIT V. Pio Food Packers (1980) 46 STC 63, in which following observation was made at page 65 of the case.

"Commonly, manufacture is the end result of one or more processes through which the original commodity is made to pass. The nature and extent of processing may vary from one case to another, and indeed there may be several stages of processing and perhaps a different kind of processing at each stage. With each process suffered, the original commodity experiences a change. But it is only when the change, or a series of changes, taken the commodity to a point where commercially it can no longer be regarded as the original commodity but instead be recognized as, a new and distinct article that a manufacture can be said to take place."

5.3.11 Relying on the observation rendered in the case of Pio Food Packers cited supra, and on analysis of processes involved, the Hon'ble Supreme Court in *Aspinwall & Co. Ltd. V. CIT*(2001) 251 ITR 323 (SC) has held that curing of coffee by process of producing coffee beans from raw berries amounts to manufacture. The court observed that the term has to be understood as meaning the production of articles for use from raw or prepared materials by giving such materials new forms, qualities or combinations, whether by hand labour or machines. The process of curing of Coffee starts with the drying of coffee and thereafter there comes the stage of hulling which means removing Outer husk of coffee bean. Thereafter, there is a process of roasting which gives brown colour to coffee and there is also change in chemical component and that the process of roasting brings with it splendid aromatic qualities and pleasing taste.

5.3.12 Though it is true that while interpreting a taxing statute, regard must be had to the scheme, context and legislative history of provision, but with all humility, it appears that there is no material to hold that legislature did not intend to provide the deduction of Additional Depreciation to the Manufacturers of food products/foodstuff e.g sweets and namkeens etc, Hotels and Quick Service Restaurants (QSR). Moreover the Hon'ble Supreme Court in the later decision in the case of Aspinwall and Co. (Supra) held that food prepared from raw materials is certainly a new commodity i.e food stuff that is prepared is different from raw materials in terms of name, character, taste, colour, aroma & use. The business for preparation of food staff cannot be treated as merely a trading activity.. Therefore, the appellant's case also falls under the newly inserted provisions of Section 2(29BA), as well. Further, relying on Hon'ble Madras High court decision in CIT V. VTM Ltd. (2010) 187 Taxman 319(Mad), as submitted by the appellant, the appellant view point is held to be legally and factually tenable, so far as this ground of appeal is concerned.

5.3.13 Considering the submission of the appellant & material on record, I am of the opinion that the appellant is eligible for Additional Depreciation u/s 32 (1)(iia) of the Act. The AO is hereby directed to delete the said addition of Rs.72,90,238/-."

5. The learned DR relying on the order of the Assessing Officer, submitted that the ld. CIT(A) was not justified in deleting the disallowance made by the Assessing Officer on the additional depreciation claimed. It was submitted that the ld. CIT(A) has nowhere discussed in the appellate order that the assets on which the assessee claimed additional depreciation are in nature of plants and machinery so as to qualify for additional depreciation. It is further submitted that from the details mentioned in the assessment order, even the place of installation of some of the assets is not known, and that the product of the assessee is not excisable commodity, which the ld. CIT(A) failed to consider before allowing additional depreciation.

6. On the other hand, the Id. AR of the assessee reiterated the submissions made before the Id. CIT(A). Referring to page 39 of the paper book, the Id. AR submitted that as per National Industrial Classification, 2008, the product of the assessee is covered under the Group 107 of Section C, i.e., "Manufacture of other food products". He also referred to APB-45, containing the tariff of Code No. 2106 90 99. It was submitted that as per para 6 of the supplementary Notes, this tariff code item is explained as under :

"6. Tarrif item 2106 90 99 includes sweet meats commonly known as "Misthan" or Mithai" or called by any other name. They also include products commonly known as "Namkeen", "Mixtures", Bhujia", "Chabena" or called by any other name. Such products remain classified in these sub-headings irrespective of the nature of their ingredients."

He also relied on a case law in DCIT vs. Bengal Beverages (P) Ltd., 87 taxmann.com 13 (Kol. Bench).

7. After considering the rival submissions of the parties and perusing the entire material available on record, we find much force in the contention of the assessee that the assessee is engaged in the manufacturing activities. The Id. CIT(A) has also correctly dealt with the objection of the Assessing Officer regarding the activities of the assessee being that of a manufacturer. The Id. CIT(A) has also considered various case laws in support of his conclusion that the assessee comes within the category of a manufacturer. The contentions made by the assessee based on National Industrial Classification, referred to above, are also found acceptable on the point of assessee being manufacturer. We, therefore, do not find any justification to interfere with the findings reached by the Id. CIT(A) that the assessee is a manufacturer and was

eligible to claim, on this count, the additional depreciation on the plants and machineries acquired and installed.

8. However, while going through the assessment order and the order of the Id. CIT(A), we find it obvious on record that the Assessing Officer, apart from doubting the activities of assessee, being that of manufacturer, has also objected, from the details of assets, that they are not installed in factory as the so called factory of the assessee is located at Lawrence Road and these items are utilized for offices or residential or show room purposes; that all of these items cannot be termed as plant & machinery e.g., the distribution penal at Faridabad is falling under the category of furniture & fixture and not under plant and machinery; that same is the case with other items also e.g. Air Conditioners are more in nature of office appliances rather than plant & Machinery; and that Inkjet printer installed at Faridabad is undoubtedly an office appliance and not plant & Machinery. It cannot be disputed that by virtue of proviso to section 32(1)(ia) of the Act, no additional depreciation is allowable the following eventualities. The relevant proviso reads as under :

“Provided further that no deduction shall be allowed in respect of—

(A) any machinery or plant which, before its installation by the assessee, was used either within or outside India by any other person; or

(B) any machinery or plant installed in any office premises or any residential accommodation, including accommodation in the nature of a guest-house; or

(C) any office appliances or road transport vehicles; or

(D) any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head "Profits and gains of business or profession" of any one previous year;"

9. In view of the aforesaid proviso, no additional depreciation is, inter alia, allowable to any assessee, even engaged in the manufacturing business, if the plant and machinery is installed in any office premises or any residential accommodation, including any guest house. It is also clear from the above proviso that no such deduction is permissible on any office appliances or road transport vehicles. Therefore, applying the above provisions, the claim of assessee is required to be tested. The assessee, as stated above, is engaged in manufacturing of sweets, as the assessee is engaged in the manufacturing activities and restaurant business. On each of the outlet, it manufactures sweets and other food products. It is also obvious from the financial statement that about 91% of the Revenue is collected by the assessee from manufacturing activities and 9% thereof is earned from restaurant. Also, the equipments or plants are installed at those premises. Further, the ld. AO has not brought any material on record to show that those plants are installed at any office premises or any residential accommodation in the nature of guest house. It is also a matter of common knowledge that Air Conditioners are required at manufacturing outlets to keep the sweets also in proper condition over and above refrigerators. Electricity distribution panel also cannot be said to be installed at residential place. No material is brought on record by the AO that the outlets do not manufacture sweets. It is of paramount importance that the AO has granted normal depreciation on all those items holding them to be plant and machinery. In view of this, we are of the view that assessee has satisfied the conditions for additional depreciation. We, therefore, do not find

any justification to interfere with the order of the Id. CIT(A) for allowing additional depreciation, as claimed by the assessee. Accordingly, the appeal of the Revenue deserves to be dismissed, being devoid of merits.

10. In the result, the appeal is dismissed.

Order pronounced in the open court on 4TH May, 2018.

Sd/-

(H.S. Sidhu)
Judicial member

Sd/-

(L.P. Sahu)
Accountant Member

Dated: 4TH May, 2018

aks

Copy of order forwarded to:

(1) <i>The appellant</i>	(2) <i>The respondent</i>
(3) <i>Commissioner</i>	(4) <i>CIT(A)</i>
(5) <i>Departmental Representative</i>	(6) <i>Guard File</i>

By order

*Assistant Registrar
Income Tax Appellate Tribunal
Delhi Benches, New Delhi*