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% **16.05.2011**

Present: Mr.R. Santhanam and Mr.Sanjay Sharma, Advocate for the appellent.
Mr.Sanjeev Sabharwal, Advocate for the respondent.

+CMs No. 4511-4512/2011 in ITA No.675/2009

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The appeal was dismissed for non appearance on 1st September, 2010. One application is for restoration of the appeal and another application is for condonation of delay in filing the first application. The applications are supported by the affidavits of the counsel seeking giving reasons why the counsel could not appear on the said date. No replies to these applications have been filed.

For the reasons stated in the application, delay is condoned and prayer for restoration of appeal is allowed.

The ITA No.675/2009 is restored to its original number.

The applications are disposed of.

ITA No.675/2009

The issue involved in this case pertains to the rate at which the depreciation is to be allowed on UPS (Uninterrupted Power Supply) attached to the computer. The assessee had claimed depreciation @ 60% on the ground that the said UPS is an integral part of the computer. This contention of the assessee was not accepted by the Assessing Officer who allowed the depreciation @ 25%. This view of



the AO has been upheld by the CIT (A) as well as ITAT. Challenging the said order of the ITAT, present appeal is preferred by the assessee proposing the following question of law:-

“Whether on the facts and circumstances of the case, the Tribunal was justified in holding that UPS is not part of the Computer or Computer System and does not qualify for depreciation @ 60% thereon as claimed by the assessee.”

It is clear that the allowability of deprecation @ 25% or 60% depends on the question as to whether UPS is to be treated as an integral part of the computer or computer system. The Tribunal has held that the UPS attached to the computer is a source of alternate supply of power to computer and applying the functional test, the said UPS would be treated as part of power supply system and not the computer system. It is further explained that the computer system can function without UPS and even UPS can be used to ensure uninterrupted supply of power to other equipments also. The Tribunal also distinguished the cases of scanner and printer which are treated as integral part of the computer as scanner and printer cannot be used separately and independently without the computer. In arriving at this conclusion, the Tribunal referred to the decision of Delhi Bench of the ITAT in the case of **Nestle Vs. DCIT**, 111 TTJ 498. We find that the Tribunal has based his decision on the aforesaid sound judicial reasoning while coming to the conclusion that UPS cannot be treated as integral part of the Computer.



Learned Counsel for the appellant referred to the orders dated 20th January, 2011 passed by this Court in ITA 65 & 66 of 2011 wherein this Court allowed 60% depreciation on UPS on the following basis:-

“The third issue pertaining to depreciation on UPS arises only in the Assessment Year 2005-06. The assessee had claimed depreciation on UPS @ 60% whereas the AO had allowed it @ 25% and on this basis, disallowance of ₹ 1,470 was made. The issue now stands covered by the judgment of this Court in the case of **Commissioner of Income Tax Vs. BSES Yamuna Powers Ltd.** (in ITA No.1267 decided on 31.08.2010) wherein it was held that the depreciation @ 60% on such items shall be allowed.”

The aforesaid appeals were dismissed wherein the issues including the issue of depreciation on UPS was involved. The disallowance was to the extent of ₹ 1470 only. We may observe that the said order was also passed by this very Bench. The aforesaid extracted portion of the said order would indicate that the counsel for the assessee had relied upon the judgment of this Court in **CIT Vs. BSES Yamuna Power Ltd.** (in ITA No.1267/2010 decided on 31.08.2010) and there was hardly any opposition on behalf of counsel for the Revenue which led to the passing of the said order.

Today, Mr. Sabharwal, learned counsel appearing for the Revenue brought to our notice the orders dated 31st August, 2010 in **BSES Yamuna Power Ltd.**(supra) that in that case the Court was concerned with the printers and scanners etc. and which was treated



as integral part of the computer . That was not the case relating to UPS. There is no discussion as to how UPS would be treated as integral part of the computer system and only on the basis of **BSES Yamuna Power Ltd.(supra)** the appeal on the said question was dismissed.

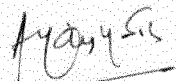
After bestowing our thoughtful consideration to the issue at hand, we are of the opinion that UPS cannot be treated as integral part of the computer or computer system and, therefore, depreciation was rightly allowed @ 25% by the AO instead of 60% as claimed by the assessee.

At this stage, learned counsel for the appellant submits that the appellant has also, in the alternate, raised the ground before the Tribunal that UPS is a part of “ Instrumentation and Monitoring System for monitoring energy flows” under item 3 (iii) B or as electrical equipment-automatic voltage controller falling under item 3 (iii) E (c) and the Tribunal has not dealt with this ground at all. From the orders of the Tribunal, it is clear that there is no discussion on this aspect and, therefore it cannot be made out whether the appellant had argued this aspect before the Tribunal or not. In such an eventuality, the proper course for the appellant shall be to move application under Section 254 (2) of the Act before the Tribunal as it is within the knowledge of the Tribunal whether such an issue was raised or not at the time of arguments .



On moving such an application, the Tribunal shall decide the same in accordance with law.

Subject to the aforesaid observations, this appeal is dismissed.


A.K. SIKRI, J.

MAY 16, 2011

Dev/skb


M.L. MEHTA, J.

fresh
- C.M. no - 14137/11 - for condonation of delay of 40 days
in filing.
- Review pet. - 427/11 - for review of order dt. 16-5-11.