



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Reserved on : 10th October, 2012.**
Date of Decision : 15th October, 2012.

+ **ITR NO.43-44/1998**

NATIONAL THERMAL POWER CORPN. LTD. Petitioner
 Through: Mr.S.Krishnan, Advocate

VERSUS

THE COMMISSIONER OF INCOME TAXRespondent
 Through: Mr.Abhishek Maratha, Sr.Standing
 Counsel with Mr.Anshul Sharma, Advocate.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.:

These are two references under Section 256(2) of the Income Tax Act, 1961 relating to the assessment years 1979-80 and 1980-81. The following common question of law has been referred to us:-

“Whether on the facts and in the circumstances of the case, the assessee is entitled to depreciation in respect of capital construction equipment acquired by the assessee and kept ready for use by the contractor putting up the power plants of the assessee.”

2. The brief facts relating to the references may be noticed. The assessee who is the applicant herein, was incorporated on 7th November, 1975 as a public sector undertaking with the main object of development of thermal power in all its aspects including construction, generation, operation and



maintenance of thermal power stations and associated transmission network. The entire construction activity of the thermal power stations was entrusted to various reputed contractors by the assessee. The projects were mammoth in size and in order to enable the contractors to carry out construction work on schedule, the assessee purchased costly construction equipment which the contractors were unable to procure and let them out to the contractors for being used by them in construction work. After completion of the construction of the projects, the construction equipment was to be dispensed with as such equipment would not be of any use to the assessee thereafter.

3. In the relevant previous years, the assessee used some construction equipments in the construction activity in the three projects, namely, Singrauli, Korba and Ramagundam. These equipments were given on hire to the contractors and hire charges were received. The hire charges were claimed to be income under the head “income from other sources” in the returns filed by the assessee. In respect of the machinery/equipment let out on hire to the contractors in connection with the construction of the projects in the above three stations the assessee claimed depreciation. In the assessments, the Assessing Officer allowed the depreciation while computing the income under the head “income from other sources” apparently by virtue of the provisions of Section 57(ii) of the Act. There is no dispute on this aspect. However, the assessee also claimed depreciation in respect of its machinery and equipment which were not actually used in the construction projects, nor were they required to be let out on hire to the contractors. The claim of the assessee was that not only the machinery which was given out on hire to the contractors was eligible for depreciation, but all other machineries and equipment which had



been bought for the purpose of setting up the three projects were also entitled to the allowance of depreciation, despite not being actually put to use, on the ground that they were kept ready for use. This claim was disallowed by the Assessing Officer in the assessments, whose action was confirmed by the CIT(Appeals) as well as by the Tribunal for both the years under reference.

4. Before the Tribunal the assessee had contended that the income shown by way of hire purchase was properly assessable under the head “profits and gains of business” and it was wrongly assessed under the head “income from other sources”. This claim was rejected by the Tribunal, holding that the income by way of hire charges cannot be considered to arise out of an activity of business. The Tribunal also dealt with the claim of the assessee that even if the equipment or machinery remained idle, though they were kept ready for use, they would be eligible for depreciation. The Tribunal opined that though in theory the claim was allowable, it cannot be allowed in the present case because the machinery and equipment were to be installed at a future date in the three projects and as held by this Court in the case of *Capital Bus Service Pvt. Ltd. Vs. CIT (1980) 123 ITR 404*, a case of failure to use the machinery on account of incapacity or existence of other circumstances which do not warrant the use of machinery was not covered by the expression “kept ready for use” or “passive user”. According to the Tribunal since the construction work was still going on and it would take long before the projects would be set up, the machinery and equipment which were required to be installed in those projects were not eligible for the grant of depreciation.

5. On a careful consideration of the matter, we note that the assessee claimed depreciation in respect of machinery which was let out on hire to



contractors and also other equipment and machinery which was not so let out since these machinery and equipment were also required only for the construction of the three projects. There was no material before the Tribunal to come to the conclusion that the machinery or equipment which was kept ready for use, but not actually used, represented machinery or equipment relating to the power generation which would be installed only after the construction of the projects were completed. The list of machinery and plant on which depreciation was claimed by the assessee shows that all of them related only to the construction work, such as crawler tractors, bulldozers, mobile cranes, coal carriers, road rollers, survey equipment, water tankers, drilling machines, compressors, auto workshop equipment etc. None of the items of machinery represents power generation equipment which was required to be installed only after the construction of the three projects was completed. No such case had been made out by the Assessing Officer whose only ground of disallowance was that machinery or equipment kept ready for use in the construction projects, but not actually used, was not entitled to depreciation. The Tribunal had no material before it to take the view that the machinery kept ready for use, but not actually put to use, was to be installed after the projects were completed and did not represent equipment or machinery meant for construction of projects. The refusal to apply the judgment of this Court (supra) apparently arises out of this misconception on the part of the Tribunal.

6. Under Section 32 of the Act, two conditions are necessary before an allowance by way of depreciation can be granted to the assessee:-

(a) ownership of the asset and;



(b) user of the assets for the purposes of the business.

The expression “used for the purposes of the business” has been judicially interpreted to include a case where the asset is kept ready for use, but is not actually put to use. The following rulings establish this proposition:

1. Capital Bus Service P. Ltd. vs. CIT, (1980) 123 ITR 404 (Del)
2. CIT vs. Yamaha Motor India Pvt. Ltd. (2010) 328 ITR 297 (Del)
3. CIT vs. Refrigeration and Allied Industries Ltd. (2001) 247 ITR 12 (Del)
4. CIT vs. Viswanath Bhaskar Sathe (1937) 5 ITR 621 (Bom)
5. Whittle Anderson Ltd. vs. CIT (1971) 79 ITR 613 (Bom)
6. CIT vs. Dalmia Cement Ltd. (1945) 13 ITR 415 (Pat)
7. CIT vs. Vayithri Plantations Ltd. (1981) 128 ITR 675 (Mad)

The principle laid down in the aforesaid judgments consequently applies to the present references. Certain machinery and equipment were let out on hire to the contractors and they used them in the construction of the projects. Depreciation was allowed in respect of those equipment and machinery under Section 56(ii) of the Act. Some machinery and equipment relating to the construction of the projects were not actually put to use, though they were kept ready for use and this factual position is not in dispute. Moreover, though the Tribunal took the view that the equipment and machinery which was not actually put to use related to the power generation and were to be installed after the construction of the projects was completed, the question referred to this Court for opinion shows that the equipment was “capital construction equipment” which was kept



ready for use. Moreover, it does not stand to reason that the assessee would invest monies in acquiring power generation equipment long before the construction of the projects is completed. In any case the description of the machinery and equipment which was kept ready for use shows that no power generation equipment was involved.

7. In the aforesaid circumstances, we are of the view that the Tribunal erred in rejecting the assessee's claim for depreciation on capital construction equipment kept ready for use, though not actually used, for the assessment years 1979-80 and 1980-81. The common question of law is accordingly answered in the affirmative, in favour of the assessee and against the Revenue. There shall be no order as to costs.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

OCTOBER 15, 2012
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