IN THE INCOME TAX APPELLATE TRIBUNAL
Kolkata Bench, KOLKATA
(Bench- "C")

BEFORE SHRI N. V. VASUDEVAN JUDICIAL MEMBER AND

SHRI M. BALAGANESH, ACCOUNTANT MEMBER,

I.T.A. No. 459/Kol/2012
Assessment Years: 1996-97

ITO., Ward-1(3), Kolkata [PAN :**AAACG0671K**]	-Vs-	M/s GKW Ltd.
(Appellant)		(Respondent)

For the Appellant/Revenue	Sri Rajat Kumar Kureel, JCIT, Sr. DR
For the Respondent/Assessee	Sri Soumen Adak, AR
Date of Hearing	**23.03.2017**
Date of Pronouncement	**05.04.2017**

ORDER

Per M. BALAGANESH, AM

This is an appeal preferred by the Revenue against the order of the Ld. CIT(A)-XII, passed u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the Act, dt. 07/12/2011, for the Assessment Year 1996-97

2. At the outset, we find that there is a delay of 7 days in filing the appeal by the revenue before us. In view of the concession given by the ld AR for condoning the same and in view of the reasons given for condonation of delay, we hereby condone the delay and admit the appeal of the revenue for adjudication.

3. The first issue to be decided in this appeal is as to whether the ld CITA was justified in deleting the disallowance of Rs.74,635/- u/s 40A(3) in the facts and circumstances of the case.

3.1. The brief facts of this issue is that the assessee *suo moto* disallowed an amount of Rs.74,635/- while computing total income being 20% of cash payment of Rs.3,73,173/- made in violation of provisions of section 40A(3) of the Act in the return of income. The ld AO without any discussion again disallowed an amount of Rs.74,635/- in the assessment thereby resulting in double disallowance. The ld CIT(A) deleted the same in first appeal. Aggrieved, the revenue is in appeal before us on the following ground:-

"1.That the Ld. CIT(Appeals)-I, Kolkata was not justified in deleting disallowance of Rs. 74,635/- made u/s 40A(3) of the Income Tax Act., 1961.

3.2. We have heard the rival submissions. We do not find any infirmity in the order of the ld CIT(A) deleting the double disallowance made by the ld AO. Hence the Ground No.1 raised by the revenue is dismissed.

4. The next issue to be decided in this appeal is as to whether the ld CIT(A) was justified in deleting the disallowance of property expenses amounting to Rs.1,62,747/- in the facts and circumstances of the case.

4.1. The brief facts of this issue is that the assessee debited an amount of Rs.1,62,747/- towards maintenance of property under the head 'Miscellaneous

Expenses' . Details of property expenses were filed before the ld AO vide assessee letter dated 9.12.1998. The ld AO without calling for further queries or details disallowed the property expenses amounting to Rs.1,62,747/- on the contention that the same is not related to the business of the assessee. The ld CIT(A) held that the ld AO had not given specific finding as to how expenses are not related to business. Since expenditure incurred was not in the nature of capital expenditure and same was related to business of the assessee, the ld CIT(A) deleted the disallowance. Aggrieved, the revenue is in appeal before us on the following ground:-

> *"2.That the Ld. CIT(Appeals) was not justified in deleting disallowance of Rs.1,62,747/- on account of property expenses as the same is capital in nature."*

4.2. We have heard the rival submissions. We find that the ld DR did not advance any argument on the subject mentioned deletion of disallowance. On the contrary, the ld AR relied on the order of the ld CIT(A). We find that the assessee had submitted that the expenses were incurred towards maintenance of property located at King's Court, Calcutta which is situated just adjacent to the registered office of the assessee and it was used for the purpose of business only. We find that the ld CIT(A) had observed that on perusal of the details filed thereon, the said expenses related to mainly salaries to the maintenance staff, staff uniform including washing charges, service charges for lift, municipal taxes etc. We find that the said expenses are not in the nature of capital expenditure and also not personal in nature. Hence the same are squarely allowable as deduction u/s 37 of the Act. Hence we do not find any infirmity in the order of the ld CIT(A) in this regard. Hence the Ground No.2 raised by the revenue is dismissed.

5. The last issue to be decided in this appeal is as to whether the ld CIT(A) was justified in allowing the carry forward of losses of amalgamating company amounting to Rs.9,93,82,438/- in the hands of the amalgamated company , in the facts and circumstances of the case.

5.1. The brief facts of this issue is that M/s Powmex Steels Limited (PSL) was merged with the assessee company w.e.f. 1.10.1995 pursuant to the orders of the Hon'ble High Court of Calcutta and Orissa dated 14.8.1996 and 27.9.1996 respectively. The assessee preferred an application before the Specific Authority i.e. The Secretary, Department of Industrial Development, Government of India, Udyog Bhavan, New Delhi – 110011, for obtaining the certificate to the effect that adequate steps have been taken for the rehabilitation or revival of the business of the amalgamating company. In connection with the aforesaid application, the ld AO vide letter dated 25.3.1998 had raised certain queries. The assessee vide letter dated 22.6.1998 duly replied to the queries raised by the ld AO. Thereafter, no correspondence was received from the department and losses of Rs.9,93,82,438/- of amalgamating company was claimed by the assessee company. The ld AO disallowed the claim of the assessee to carry forward the loss of the amalgamating company stating that no order to carry forward the losses etc. has been passed by the authority so far.

5.2. The ld CIT(A) deleted the disallowance made by the ld AO on the following contentions:-

a) The unabsorbed losses of PSL was duly approved by the order of Hon'ble High Court of Calcutta dated 14.8.1996 to be carried forward in the hands of the assessee.

b) The assessee has duly filed an application before the specified authority for obtaining certificate u/s 72A(2)(ii) of the Act and has replied to all the queries as raised by the revenue in this regard. Hence there is no failure on the part of the assessee to fulfill its obligation.

c) The assessee has duly fulfilled all the conditions as required by press note dated 23.2.1981 for obtaining approval for carry forward of losses in case of amalgamation.

d) Amendment made u/s 72A of the Act with respect to removal of requirement of obtaining certificate being procedural in nature will have retrospective application.

e) The assessee had fulfilled all the condition relating to the amended provision for it being eligible for carry forward of brought forward losses of the erstwhile amalgamating company and hence the said brought forward losses as claimed by the assessee on account of amalgamation needs to be allowed in the interest of justice.

5.2.1. With these observations, the ld CIT(A) allowed the assessee company to have the benefit of adjustment of brought forward losses of PSL in the sum of Rs.9,93,82,438/-. Aggrieved, the revenue is in appeal before us on the following ground :-

"3.That the Ld. CIT(Appeals) was not justified in allowing the carry forward of the loss of the Powmex Steels Limited i.e. amalgamating company, in as much as the order of the Hon'ble Kolkata & Orissa High Courts are in specific connection with the process of amalgamation and not with specific reference to sec. 72A of the I.T. Act.

5.3. The ld DR argued that the ld AO passed the assessment order u/s 143(3) of the Act on 31.3.1999 on which date, even the court order approving the scheme of amalgamation was presented before him. Even the certificate as required under the erstwhile provisions of section 72A(2)(ii) of the Act from the Specified Authority was not produced before the ld AO by the assessee. Hence on the date of passing the assessment order, no fault could be attributed on the part of the ld AO. He further argued that this requirement of obtaining the Certificate from the Specified Authority had been done away with pursuant to the amendment brought by the Finance Act, 1999 with effect from 1.4.2000. In the said amendment, the legislature imposed further stringent measures by imposing conditions that the amalgamated company should hold for a minimum period of five years from the date of amalgamation, at least three-fourths in the value of assets of amalgamating company ; continue the business of the amalgamating company for a minimum period of five years ; and fulfill such other conditions as may be prescribed to ensure the revival of the business of the amalgamating company or to ensure that the amalgamation is for genuine business purpose. He further argued that section 72A(3) of the Act states that in case where any of the conditions stipulated in sub-section (2) of section 72A of the Act are not complied with, the set off of loss or allowance of depreciation made in any previous year in the hands of the amalgamated company shall be deemed to be the income of the amalgamated company, chargeable to tax for the year in which such conditions are not complied

with. He argued that on bare reading of the amended provisions of section 72A(2) and 72A(3) of the Act, the same does not fall under the ambit of 'beneficial provision ' or an amendment which is 'procedural in nature' warranting retrospective application of the same. Hence the ld CIT(A) erred in treating the same as beneficial and procedural amendment thereby treating the amendment as retrospective in application and granted the benefit of set off of loss of amalgamating company in the hands of the amalgamated company (i.e. the assessee herein). He further argued that the approval of the scheme of amalgamation by the Hon'ble High Court is relevant only for the purpose of Companies Act and the same is absolutely not relevant for the provisions of the Act as the set off and brought forward of losses in such case is governed by the exclusive provisions of section 72A of the Act, which is not complied with by the assessee. He further argued that even as on date, the assessee was not able to produce the certificate from the specified authority in terms of erstwhile provisions of section 72A(2)(ii) of the Act proving its bonafide. Hence the assessee cannot plead that he had not committed any default in the instant case warranting any relief.

5.4. In response to this, the ld AR reiterated the arguments made before the ld CITA and stated that the ld CIT(A) had passed an elaborate order in this regard for non-interference in the said order. He stated that the assessee had duly applied for obtaining the certificate from the Specified Authority and no orders have been passed in that regard by the Specified Authority. In such a scenario, there was no default on the part of the assessee in compliance with the provisions. In this regard, he placed reliance on the decision of the Mumbai Tribunal in the case of DCIT vs Famy Care Ltd reported in (2014) 41 CCH 562 (Mum). The ld AR also placed reliance on the following decisions in support of his other contentions:-

a) CWT vs Sharvan Kumar Swarup & Sons reported in (1994) 210 ITR 886 (SC)

b) CIT vs Vatika Township P Ltd reported in (2014) 367 ITR 466 (SC)

c) CIT vs Virgin Creations in GA No. 3200/2011 dated 23.11.2011 rendered by Hon'ble Calcutta High Court

*d) CIT vs Karnataka Urban Infrastructure Development & Finance Corporation in ITA No. 129 of 2006 dated 21.2.2012 rendered by Hon'ble Karna*taka High *Court.*

5.5. We have heard the rival submissions and perused the materials available on record including the paper book of the assessee. The facts stated hereinabove remain undisputed and hence the same are not reiterated for the sake of brevity. We find that the Hon'ble Calcutta and Orissa High Court specifically stated in respect of carry forward of losses in para 7 of its order as below:-

> *7. ……"Accordingly all profits accruing to the transferee company or losses arising or incurred by it shall for all purposes, be treated as the profits or losses undertakes not to utilize the profits, if any, for the purpose of declaring or paying any dividend in respect of the period falling on and after the appointed dated ….."*

5.5.1. Hence it cannot be concluded that the order of Hon'ble High Court was only with respect to amalgamation and does not state about the carry forward of losses. We find that all the conditions of section 72A of the Act have been duly complied with. Hence the losses of amalgamating company should be allowed to be carry forward in the hands of the amalgamated company. We also find that the requirement of obtaining certificate from the Specified Authority with effect from 1.4.2000 has been done away with pursuant to the amendment in section 72A(2)(ii) of the Act. Even otherwise, we find that the assessee had taken enough

steps for obtaining the certificate from the specified authority by preferring an application in the prescribed form which is part of the records. The ld AO had also acknowledged this fact by posing some queries on the said application and the assessee had duly replied to the said queries. All these are forming part of the paper book filed before us. If the specified authority had not passed any order on the application preferred by the assessee, the assessee cannot be faulted upon. In this regard , the reliance placed on the decision of the Mumbai Tribunal by the ld AR in the case of *DCIT vs Famy Care Ltd reported in (2014) 41 CCH 562 (Mum)* is well founded , wherein it was held that where assessee had complied with the requirements of section 35(2AB) of the Act, deduction could not be denied merely on the ground that the prescribed authority does not submit Form No. 3CL in time to the Income Tax Department as it was beyond the control of the assessee to direct the authority to submit such form to the Department. The assessee, in such a case, cannot be penalized for the fault, if any, of the Department. We find that the decision rendered by the Mumbai Tribunal supra is squarely applicable to the facts of the instant case.

5.5.2. We find that the main purpose of the amendment with effect from 1.4.2000 was the legislature thought that both the process of obtaining the sanction of the court order and parallel process of obtaining certificate from specified authority was a time consuming process. The practical difficulty in obtaining eligibility certificate from Central Government was removed vide amendment in section 72A of the Act. Moreover, during the course of approval of the scheme of amalgamation by the Hon'ble High Court, the income tax department is also one of the stakeholders to the transaction of amalgamation which has to give No-Objection before the Court for the proposed amalgamation. Hence the objections, if any, on the part of the income tax department, to protect its interests, could be

raised at that point of time itself and hence the necessity of obtaining separate certificate from the specified authority was done away with. Hence the legislature had done away with the multiple approvals to be obtained by a person. We find that the *Hon'ble Karnataka High Court in the case of CIT vs Karnataka Urban Infrastructure Development & Finance Corporation in ITA No. 129 of 2006 dated 21.2.2012*, wherein in similar circumstances, it was held that the deletion of first proviso to section 36(1)(viii) of the Act was held to be procedural in nature. We find that the question raised before the Hon'ble Karnataka High Court was as below:-

> *"a) Whether the Tribunal was correct in holding that the requirement of obtaining the prior approval of the central government under section 36(1)(viii) of the Act was not mandatory but only procedural and since the same was deleted subsequently the requirement of central government approval was not necessary for the current assessment year.*
>
> *b) Whether the Tribunal was correct in holding that the belated filing of the application for approval under section 36(1)(viii) should be deemed to have been granted as the same was not refused by the CBDT before passing of the assessment year ?"*

It was held as below:-

> *3. Section 36 of the Act deals with the deductions, which shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28 of the Act. Section 36(1)(viii) deals with special reserve created and maintained by a financial corporation which is engaged in providing long term finance for industrial or agricultural development or development of infrastructure facility in India. However, prior to 01.04.2000 the proviso to the said provision provided that the corporation or, as the case may be, the company for the time being approved by the Central Government for the purposes of this clause. Therefore, unless the Central Government approved the company or corporation, such company or corporation was not entitled to claim deduction. In the instant case,*

> *admittedly the assessee filed an application for approval on 28.03.2000. Even on this date, the approval is not granted. However, the said provision was deleted with effect from 01.04.2000. As on today, no approval is required. Further, the assessee claimed the benefit of deduction, which was refused solely on the ground that the Central Government has not approved the said corporation. It is in this context, the Tribunal has pointed out that , when once such approval is deleted, the approval of the Central Government is not necessary. The said provision was only procedural in nature. Even till today, the CBDT has not rejected the application of the assessee. Having regard to the object with which such provision is enacted and subsequently whereby this technicality of obtaining prior approval is given a go by, it was of the view that the assessee is entitled to the benefit of deduction. If we take the substance of the said section and not the form in which it is shown, the said provision was enacted to give the benefit to the public corporation and companies which are involved in infrastructure development where public interest is involved. In that view of the matter, we do not see any illegality committed by the Tribunal in extending the said benefit to the assessee, which is in public interest. Accordingly, we answer the substantial question of law in favour of assessee and against the revenue and the appeal is dismissed.*

Respectfully following the aforesaid decision of Hon'ble Karnataka High Court, we hold that the amendment brought in section 72A(2)(ii) of the Act is only procedural in nature.

5.5.3. Now the next question is whether the procedural amendment would have retrospective application. In this regard, it would be relevant to understand the purpose behind introduction of the amendment in section 72A(2)(ii) of the Act and doing away with the old provisions. The old provisions was somewhat creating an unworkable situation and the assessees are not given the benefit of carry forward of losses in the scheme of amalgamation and accordingly the provisions of section 72A of the Act was not serving its intended purpose. This resulted in genuine hardship to the assessee. To curb this hardship, the sub-section 2 of section 72A

of the Act was amended with effect from 1.4.2000 by removing the condition of obtaining a certificate from the Specified Authority with regard to the rehabilitation and revival of the business of the amalgamating company. The legislature also appreciated the concerns of the assessees involved in the said revival of business unit and had introduced this amendment in the procedure to be adopted for obtaining the benefit of carry forward of loss. We hold that though equity and taxation are often strangers , attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction. It is only elementary that a statutory provision is to be interpreted *ut res magis valeat quam pereat, i.e to make it workable rather than redundant*. Hence it could be safely concluded that the amendment brought in the procedural law to cure unintended consequences is to be construed to have retrospective application. We would like to place reliance on the following decisions in this regard:-

a) *Hon'ble Apex Court in the case of CWT vs Sharvan Kumar Swarup & Sons reported in (1994) 210 ITR 886 (SC)* held that laws which fix duties, established rights and responsibilities among and for persons, natural or otherwise, are 'Substantive Laws' in character, while those which merely prescribe the manner in which such rights and responsibilities may be exercised and enforced in a Court are 'Procedural Laws'.

b) *Hon'ble Supreme Court in the case of CIT vs Vatika Township P Ltd reported in (2014) 367 ITR 466 (SC)* had held as below:-

> ***33.*** *We would also like to point out, for the sake of completeness, that where a benefit is conferred by a legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some*

other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. In Government of India v. Indian Tobacco Association [2005] 7 SCC 396, the doctrine of fairness was held to be relevant factor to construe a statute conferring a benefit, in the context of it to be given a retrospective operation. The same doctrine of fairness, to hold that a statute was retrospective in nature, was applied in the case of Vijay v. State of Maharashtra [2006] 6 SCC 286. It was held that where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature. However, we are confronted with any such situation here.

c) Hon'ble Supreme Court in the case of Allied Motors (P.) Ltd. v. CIT reported in (1997) 224 ITR 677 (SC) had held that :

"8. ……..
The departmental understanding also appears to be that section 43B, the proviso and Explanation 2 have to be read together as expressing the true intention of section 43B. Explanation 2 has been expressly made retrospective. The first proviso, however, cannot be isolated from Explanation 2 and the main body of section 43B. Without the first proviso, Explanation 2 would not obviate the hardship or the unintended consequences of section 43B. The proviso supplies an obvious omission. But for this proviso the ambit of section 43B become unduly wide bringing within its scope those payments, which were not intended to be prohibited from the category of permissible deductions.

9. In the case of Goodyear India Ltd. v. State of Haryana (1991) 188 ITR 402, Supreme Court said that the rule of reasonable construction must be applied while construing a statute. Literal construction should be avoided if it defeats the manifest object and purpose of the Act.

11. ……..
As observed by G.P. Singh in his Principles of Statutory Interpretation, 4th Edn., Page 291, "It is well settled that if a statute is curative or merely declaratory of the previous law, retrospective operation is generally

intended". In fact the amendment would not serve its object in such a situation, unless it is construed as retrospective.

d) *Hon'ble Calcutta High Court in the case of CIT v. Virgin Creations in ITAT No. 302 of 2011 in GA 3200/2011 dated 23.11.2011*, held that the amendment to section 40(a)(ia of the Act by the Finance Act 2010 w.e.f. 1.4.2010 would have retrospective application. It was held as below:-

"The supreme court in the case of Allied Motors P ltd and also in the case of Alom Extrusions Ltd has already decided that the aforesaid provision has retrospective application. Again, in the case reported in 82 ITR 570, the Supreme Court held that the provision, which has inserted the remedy to make the provision workable, requires to be treated with retrospective operation so that reasonable deduction can be given to the section as well".

5.5.4. In our considered opinion, the amendment brought in section 72A(2)(ii) of the Act had shifted from stringent measures to be complied with to the relaxation scheme for the benefit of the assessee. Hence the same is a beneficial provision intended to cure the genuine hardship that had been hitherto created to the assessee. Hence the same would have to be held retrospective in operation. We have already held the purpose of the amendment brought in section 72A(2)(ii) of the Act hereinabove and the amendment brought in thereon is only procedural in nature and hence respectfully following the aforesaid Hon'ble Supreme Court and Hon'ble Jurisdictional High Court decisions supra, we hold that the procedural amendment would have to be retrospective in nature and hence the same is applicable for the Asst. Year 1996-97 in the hands of the amalgamated company and accordingly the loss of the amalgamating company shall be eligible to be carried forward in the hands of the amalgamated company.

5.6. In view of the aforesaid findings and respectfully following the various judicial precedents relied upon hereinabove, we hold that the ld CIT(A) had rightly granted relief to the assessee by allowing the benefit of carry forward of losses pertaining to the amalgamating company in the hands of the amalgamated company (assessee herein). Accordingly, the grounds raised by the revenue are dismissed.

6. In the result, the appeal of the revenue is dismissed.

Order pronounced in the Court on 05.04.2017

Sd/-	**Sd/-**
[N. V. Vasudevan]	**[M. Balaganesh]**
Judicial Member	Accountant Member

Dated : 05.04.2017
{SC SPS}

Copy of the order forwarded to:
1.Appellant/Assessee- M/s GKW Ltd.Central Plaza2/6. Sarat Bose Road Office Space No. 406, 4th Floor, Kolkata-700020.
2.Respondent – ITO., Ward-1(3), Kolkata
3.CIT(A)- Kolkata.
4.CIT – , Kolkata.
5.CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Asstt.Registrar, ITAT, Kolkata Benches