

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, SMC, मुंबई ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "SMC", MUMBAI**

श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं
श्री अश्वनी तनेजा, लेखा सदस्य, के समक्ष

**Before Shri Joginder Singh, Judicial Member, and
Shri Ashwani Taneja, Accountant Member**

**ITA NO.1584/Mum/2016
Assessment Year: 2011-12**

U.S. Instruments P. Ltd., C/O H.N. Motiwalla & Co. 508 Sharda Chamber, 33 New Marine Lines, Mumbai -400020	बनाम/ Vs.	ITO 1(3)(4) Aayakar Bhavan Mumbai
(Assessee)		(Revenue)
P.A. No.AAACU0667J		

Appellant by	Shri H. N. Motiwalla (AR)
Revenue by	Shri N. V. Nadkarni (DR)

सुनवाई की तारीख / Date of Hearing :	16/06/2016
आदेश की तारीख / Date of Order:	29/07/2016

आदेश / O R D E R

Per Ashwani Taneja (Accountant Member):

This appeal has been filed by the Assessee against the order of Ld. Commissioner of Income Tax (Appeals)-3, Mumbai, (in short 'CIT(A)', dated 19.01.2016 for Assessment year 2011-

12 which arises out of assessment order dated 16.01.2014 of Assessing Officer (AO) passed u/s 143(3) of the Act.

2. During the course of hearing, additional grounds of appeal were filed by the Ld. AR and after inviting objection of DR, the same were taken on record. The effective grounds raised by the Ld. AR are additional ground nos. 3 & 4 which read as under:

3. On the facts and in the circumstances of the case, the said learned Commissioner of Income tax has also erred in confirming the order of the Assessing Officer in respect of not setting off unabsorbed depreciation of Rs.6,67,929/- and current year depreciation of Rs.2,24,298/- against the assessed income under the head "Income from other sources", on the ground that there is no provision under the Act, to set off unabsorbed depreciation against income falling under the head "Income from other sources", without appreciating the provisions of section 32(2) r. w. sections 71(1)/70(1) of the Act.

4. On the facts and in the circumstances of the case, the said learned Commissioner of Income tax has also erred in confirming the order of the Assessing Officer in respect of not setting off unabsorbed depreciation of Rs.6,67,929/- and current year depreciation of Rs.2,24,298/- against the assessed income under the head "Income from other sources" without appreciating the judgements of the Supreme Court in CIT Vs. Virmani Industries Pvt. Ltd. [216 ITR 607] and CIT Vs. Mother India Refrigeration Industries (P) Ltd. [155 ITR 711 (SC)] which were specifically handed over to him at the time of hearing."

2.1. The facts in brief, are that the assessee is a company. It filed its return of income for A.Y. 2011-12 on 29.09.2011 declaring total income of Rs.1,49,383/-. The case was selected for scrutiny u/s 143(3) and the assessment thereof was

completed by AO vide order dated 16.01.2014, after making some adjustments and disallowances. The assessee was engaged in the business of electronics including computer hardware, which was no more in existence during the assessment year in question. The AO noted that the assessee had earned interest income of Rs.10,13,466/- which has been credited to the profit and loss account and business expenses including depreciation to the tune of Rs. 8,64,083/- has been claimed by the assessee. The AO concluded that as the business was not in existence during the year and it was closed down, the business expenses including depreciation is not allowable to the assessee. Further, he treated the interest income under the head 'income from other sources' against which expenses as mentioned in section 57(iii) only were allowable. He found expenses to the extent of Rs.42,303/- only to be essential and mandatory for the existence of the assessee company and disallowed rest of the expenses relying upon various judicial pronouncements. Further, the claim of the assessee with respect to set off of brought forward business losses and depreciation of assessment years 2003-04, 2004-05 & 2005-06 was also not allowed by the AO on the reasoning that there is no income under the head 'profit & gain of business or profession'. The total income declared by the assessee was Rs.1,49,383/- which was ultimately assessed at Rs.11,06,420/- by the AO after making above adjustments. The assessee preferred first appeal before the Ld. CIT(A) and raised various contentions in his favour. The appeal was partly allowed by Ld. CIT(A) vide its order dated 19.01.2016. The Ld.

CIT(A) noted that interest income mostly comprise of interest on unsecured advances and the assessee was not in the business of finance and accordingly, validated the action of the AO and held the income to be rightly chargeable under the head 'income from other sources'.

2.2. Similarly, setting off of carried forward unabsorbed depreciation of Rs.5,67,936/- was also not allowed by him on the reasoning that unabsorbed depreciation cannot be carried forward and set off in subsequent years under any other head including the head 'income from other sources'.

2.3. Aggrieved, the assessee is in second appeal before us.

2.4. Before us, various contentions have been raised by the Ld. AR in support of his claim and relied upon various judicial pronouncements. The main contention of the Ld. AR revolves on the ground that assessee is eligible to claim both current depreciation and carried forward unabsorbed depreciation, against income under the head income from other sources, as per the provisions of section 32(2) r.w. section 71(1) & 72(1) of the Income Tax Act. The Ld. AR submitted statements of carry forward unabsorbed depreciation and business losses as on 31.03.2011. The Ld. DR on the other hand, contended that as the business has been closed down and fixed assets have not been used at all for the purpose of business during relevant assessment year, all expenses including depreciation are not allowable to the assessee. He also contended that carry forward and set off of unabsorbed depreciation is also not

permissible against income assessed under the head income from other sources.

2.5. We have heard both the parties and perused the material on record. The assessee has earned income of interest during the year and financing is not main business of the assessee and therefore the income has rightly been found assessable under the head income from other sources. The issue which remain to be decided is whether depreciation is allowable in the current assessment year and if yes, whether inter-source adjustment is allowable and secondly whether brought forward unabsorbed depreciation can be set off under the head income from other sources? We find it appropriate to first refer to relevant provisions of Act hereunder:

32(1)

In respect of depreciation of—

(i) buildings, machinery, plant or furniture, being tangible assets;

(ii) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998, owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed—

(i) in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the assessee as may be prescribed¹⁰;

(ii) in the case of any block of assets, such percentage on the written down value thereof as may be prescribed¹¹:

(emphasis supplied by us)

2.6. Thus, the primary condition to claim depreciation is that the asset must be used for the purposes of business or

profession. The assessee was nowhere contended that the fixed asset have been used by him for the purpose of business during relevant assessment year. In fact, the business of the assessee is no more in existence and the assessee has accepted his income to be assessable under the head 'income from other sources'. The main business of the assessee is not financing and major earnings consists of interest on unsecured advances. These facts are not in dispute. Therefore, the assessee is not entitled for depreciation for the assessment year in question. We may refer to the judgment of Hon'ble Bombay High Court in Dineshkumar Gulabchand Agrawal vs v. CIT 141 taxmann 62 wherein it was held that the word 'used denotes actually used and not merely ready for use. The expression 'used' means actually 'used' for the purposes of the business. The use must be during relevant accounting year. If the machinery had not at all been used at any time during the accounting year, no allowance could be claimed. The assessee has relied on the judgment of G.R. Shipping Ltd. v. DCIT (ITA No.822/Mum/05. We find the same distinguishable on the ground that in that case, only a part of the fixed asset got destroyed and could not be used for the business. This is not the case here. The assessee has not carried on any business at all. Thus, in view of the above factual matrix of the case, depreciation for the current year is not allowable to the assessee.

2.7. The second issue involved here is whether brought forward unabsorbed depreciation can be set off under the

head 'income from other sources'. For this, the relevant extract of section 32(2) is reproduced below:

“32(2)Where, in the assessment of the assessee, full effect cannot be given to any allowance under sub-section (1) in any previous year, owing to there being no profits or gains chargeable for that previous year, or owing to the profits or gains chargeable being less than the allowance, then, subject to the provisions of sub-section (2) of [section 72](#) and sub-section (3) of [section 73](#), the allowance or the part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following previous year and deemed to be part of that allowance, or if there is no such allowance for that previous year, be deemed to be the allowance for that previous year, and so on for the succeeding previous years.”

Also, a relevant portion of section 71(1) is reproduced below:

“71(1) Where in respect of any assessment year the net result of the computation under any head of income, other than “Capital gains”, is a loss and the assessee has no income under the head “Capital gains”, he shall, subject to the provisions of this Chapter, be entitled to¹³ have the amount of such loss set off against his income, if any, assessable for that assessment year under any other head.”

2.8. A combined reading of the above section shows that unabsorbed depreciation of earlier year is added to current year's depreciation and takes the colour of current year's depreciation. Further, as per section 71(1) inter source adjustment is possible for business losses against income under the head 'income from other sources'.

2.9. Accordingly, the unabsorbed depreciation of earlier year of the assessee becomes current depreciation allowance and

accordingly, set off of the same is possible against 'income from other sources'. We hold so.

2.10. Hence, the AO is directed to verify the claim of the assessee with respect to brought forward unabsorbed depreciation and allow the set off of the same 'income from other sources'. The current year depreciation is not allowable to the assessee in view of our findings in earlier paragraphs.

3. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 29th July, 2016.

Sd/-

(Joginder Singh)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

(Ashwani Taneja)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated /07 /2016

Patel, P.S./नि.स.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai