

THE INCOME TAX APPELLATE TRIBUNAL
"SMC" Bench, Mumbai
Before Shri B.R. Baskaran (AM)

I.T.A. No. 5389/Mum/2016
(Assessment Year 2011-12)

M/s. Essar Investments Ltd. Essar House 11, Keshavrao Khadye Marg Mahalaxmi Mumbai-400 034. (Appellant)	Vs.	ACIT 6(2)(2) Aayakar Bhavan M.K. Road Mumbai-400 020. (Respondent)
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PAN No.AABCE0686Q

Assessee by	Shri Nitesh Joshi
Department by	Ms. Beena Santosh
Date of Hearing	1.5.2017
Date of Pronouncement	3.5.2017

ORDER

The assessee has filed this appeal challenging the order dated 9.6.2016 passed by the learned CIT(A)-12, Mumbai for A.Y. 2011-12 on the following issues :-

- a) Disallowance of provision for leave encashment u/s. 43B of the Act.
- b) Disallowance claim for set off unabsorbed depreciation relating to A.Y. 2001-02.

2. I heard the parties and perused the record. The assessee-company is engaged in the business of promotion of industrial undertaking and providing specialized management and project related services. The first issue relates to disallowance of provision for leave encashment made by the assessee to the tune ₹ 3.67 crores. Even though, Hon'ble Kokatta High Court has held in the case of Exide Industries that the amendment made in section 43B by inserting clause (f) relating to provision for leave encashment is not valid, yet the Hon'ble Supreme Court has stayed the said order. The Hon'ble Supreme Court has further held in his order dated 8.5.2009 in SLP No. 22889 of 2008 in the case of Exide Industries Ltd that during the pendency of this civil appeal the

assessee should pay tax as if section 43B(f) is on the statute book but at the same time it would be entitled to make a claim in its return. Accordingly, I restore this matter to the file of the Assessing Officer with the direction to amend the assessment order, if required, after this issue is decided by Hon'ble Supreme Court.

3. Next issue relates to deduction of claim for set off of unabsorbed depreciation relating to A.Y. 2011-12. This issue has been decided in favour of the assessee by Hon'ble Gujarat High Court in the case of General Motors India (P) Ltd. (354 ITR 244), wherein it has been held that unabsorbed depreciation available at the end of A.Y. 2001-02 shall be added to the current depreciation relating to A.Y. 2002-03. We noticed from the order passed by the learned CIT(A) that the decision rendered by Hon'ble Gujarat High Court in the above said case was followed by the Coordinate Bench in the case of Bajaj Hindustan Ltd. (47 Taxmann.com 333) and also in the case of M/s. Divyarath Developers P. Ltd. (ITA No. 5231/Mum/2012 dated 11.3.2015). Even though, the learned CIT(A) has taken note of these decisions, he has proceeded to confirm the order passed by the Assessing Officer on this issue. However, as noticed earlier, this issue has already been decided in favour of the assessee by the Coordinate Benches by following the decision rendered by Hon'ble Gujarat High Court in the case of General Motors India (P) Ltd. (supra). Hence, consistent with the view taken by the Coordinate Benches, I set aside the order passed by the learned CIT(A) and direct the Assessing Officer to allow the claim of the assessee.

4. In the result, appeal filed by the assessee is allowed.

Order has been pronounced in the Court on 3.5.2017.

Sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 3/5/2017

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai

PS