

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A": NEW DELHI
BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 4194/Del/2014
(Assessment Year: 2010-11)

DCIT, Circle-2(1), New Delhi	Vs.	Avantha Power & Infrastructure Ltd, Thapar House, 124, Janpath, New Delhi PAN:AACCB7469B
(Appellant)		(Respondent)

Revenue by :	Ms. Reena Lamba, CA Shri Mohit Bansal, CA
Assessee by:	Shri RC Pandey, Sr. DR
Date of Hearing	28/08/2017
Date of pronouncement	31/10/2017

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This appeal is filed by the Id Assessing Officer against the order of the Id CIT(A)-V, New Delhi dated 15.05.2014 for AY 2010-11 wherein the following grounds of appeal have been raised:-
 - “1. Whether the Id CIT(A) has erred in law and on facts in deleting the addition of Rs. 114753688/- made on account of disallowance of depreciation u/s 32 of the It Act, 1961 by invoking Explanation 3 of Section 43(1) of the It Act, 1961.
 2. Whether the Id CIT(A) has erred in law and on facts in deleting the addition on account of ESoP expenses amounting to Rs. 1817144/- by overlooking the facts that these were capital in nature.
2. The brief facts of the case is that the assessee is a company carrying on the business of generation and distribution of power and it has steam units at Bhigwan, Pune, Balarpur, Nagpur, Srigopal, Yamunagar, Haryana and at Sewa, Orrisa. It filed its return of income on 27.09.2010 showing income of Rs. 42188171/-. The assessment u/s 143(3) of the Act was passed on 28.03.2013 at Rs. 16166559/-. The two main additions contested before us are on account of disallowance of excess depreciation of Rs. 114753688/- consequences of demerger. The further disallowances contested before us is of ESoP expenditure of Rs. 1817144/- . On appeal before the Id CIT(A) both the additions were deleted as covered by appellate authorities and therefore, revenue is in appeal before us.

3. The Id Departmental Representative relied on the order of the Id Assessing Officer with respect to both the grounds.
4. The Id Authorised Representative submitted that for ground No. 1 in assessee's own case for earlier years the issue has been decided in favour of the assessee. They took us to the decision of the Hon'ble Delhi High Court for Assessment Year 2007-08 to Assessment Year 2009-10 wherein, Hon'ble High Court has confirmed the order of ITAT allowing the depreciation. Therefore, it was stated that ground No. 1 of the appeal of the Revenue is covered against revenue by the order of Hon'ble High Court. Regarding the disallowance of ESoP expenditure it was stated that issue is squarely covered in favour of the assessee by the decision of the special bench of ITAT in Biocon Ltd Vs. DCIT 35 Taxmann.com 335.
5. We have carefully considered the rival contentions and also perused the orders of the lower authorities. The ground No. 1 of the appeal is against the disallowance of depreciation of Rs. 11.47 crores. The brief facts of the case are that pursuant to the scheme of demerger the assessee acquired power division from another company. The assessee capitalized the assets forming the part of undertaking in its books at values based on the valuation report and claimed depreciation. The Id AO did not accept the claim of the assessee but allowed the depreciation on the written down value of the assets as reflected in the books of transferor prior to the demerger. The Assessing Officer disallowed the excess depreciation holding that the scheme of demerger of the assessee did not fall within the scope of "demerger" as defined u/s 2(19AA) of the Act and consequently explanation 7A to Section 43(1) is not applicable. On the identical facts and circumstances of the case the Hon'ble High Court for AY 2007-08 has decided the issue in favour of the assessee and held that there was no infirmity in the order of the coordinate bench and therefore, no substantial question of law arose. The Hon'ble High Court in para No. 8 to para No. 13 has given the reasons for holding so in ITA NO. 310/2013 dated 31.08.2015. The Id Departmental Representative could not show us that issue is not covered by the decision of the Hon'ble High Court in favour of the assessee. In view of this, respectfully following the decision of the Hon'ble High Court, we confirm the finding of the Id CIT(A) in allowing the claim of the assessee of depreciation u/s 32 of the Act of Rs. 114753688/-. In the result ground No. 1 of the appeal of the Revenue is dismissed.
6. Ground No. 2 of the appeal of the revenue contest the disallowance related of ESoP expenses of Rs. 1817144/-. The claim of the revenue is that the above expenditure is in the nature of capital expenditure. This issue has been considered by the coordinate bench in case of Bharti Airtel Ltd Vs. Addl Commissioner of Income Tax, Range-II, New Delhi in ITA No.

5636/2011 dated 11.03.2014 (43 Taxmann.com 50) (Delhi) wherein, it has been held vide para NO. 13 and 14 that ESoP expenditure are not capital expenditure but revenue in nature. Ld Departmental Representative could not state that this issue is now not covered in favour of the assessee by the above decision of the coordinate bench which followed the decision of Special Bench in case of Biocon Ltd (supra). Hence, we do not find any infirmity in the order of the ld CIT(A) in deleting the ESOP expenses of Rs. 1817144/-. In the result ground No. 2 of the appeal of the revenue is dismissed.

7. In the result, the appeal of the Revenue is dismissed.
Order pronounced in the open court on 31/10/2017.

-Sd/-

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

-Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 31/10/2017
A K Keot

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi