

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH 'D', KOLKATA**

[Before Shri P.M. Jagtap, AM and Shri S.S. Viswanethra Ravi, JM]

**I.T.A. Nos. 1263 to 1266/Kol/2015
Assessment Years: 2004-05 to 2007-08**

***DCIT, Circle - 11(2), Kolkata.....Appellant
P-7, Chowringhee Square,
Kolkata - 700 069***

***M/s. Peerless Hospitex Hospital & Research Centre Ltd.Respondent
360, Panchasayar,
Kolkata - 700 084
[PAN : AABCP 7225 L]***

Appearances by:

Shri A.K. Tiwari, CIT & appearing on behalf of the Revenue.

Shri S.K. Tulsian, Advocate appearing on behalf of the Assessee.

Date of concluding the hearing : December 13, 2017

Date of pronouncing the order : January 12, 2018

ORDER

Per P.M. Jagtap, AM

These four appeals preferred by the revenue are directed against four separate orders passed by the Ld. CIT(A) – 4, Kolkata all dated 17.07.2015 and since the issues involved therein are common, the same have been heard together and are being disposed of by a consolidated order for the sake of convenience.

2. The assessee in the present case is a company which is engaged in the business of rendering hospital services. The returns of income for all the four years under consideration were filed by it in the regular course declaring a total income at Nil. The assessee company had substantial amount of unabsorbed depreciation carried forward from the earlier years and the same was set off against the income of all the four years under consideration. The returns of income filed by

the assessee for all the four years under consideration were initially processed by the A.O. under section 143(1) of the Act allowing such set off. Thereafter the assessment of the assessee company for A.Y. 2008-09 was completed by the A.O. under section 143(3) wherein he disallowed the claim of the assessee for set off of unabsorbed depreciation for A.Y. 1995-96 on the ground that the assessee was not entitled for set off of unabsorbed depreciation prior to 01.04.1997 in view of the amendment made in section 32(2) of the Act.

3. On the basis of the assessment order passed in assessee's case for A.Y. 2008-09 under section 143(3), the assessment in the case of the assessee for all the four years under consideration were reopened by the A.O. for the reason that the claim of the assessee for set off unabsorbed depreciation prior to 01.04.1997 was wrongly allowed. The A.O. accordingly issued notices under section 148 in reply to which a letter was filed by the assessee requesting the A.O. to treat the returns of the income originally filed by it as the returns filed in response to the notices under section 148. The assessee also raised objection challenging the validity of initiation of reassessment proceedings by the A.O. under section 147/148. The A.O. however did not find merit in the said objection and overruling the same, he proceeded to complete the assessments for all the four years under consideration under section 143(3) / 147 vide four separate orders passed on 26.12.2011 wherein he disallowed the claim of the assessee for set off of unabsorbed depreciation prior to 01.04.1997 against the income for all the four years under consideration.

4. Against the orders passed by the A.O. under section 143(3) / 147 for all the four years under consideration, appeals were preferred by the assessee before the Ld. CIT(A) and after considering the submissions made by the assessee as well as the material available on record, the Ld. CIT(A) found merit in the preliminary issue raised by the assessee challenging the validity of initiation of reassessment proceedings for all the 4 years under consideration and treating the reopening as bad in law, he annulled the assessments made by the A.O. under section 143(3) / 147 for all the 4 years under consideration for the following identical reasons given in his impugned orders:

"4.2. I have considered the submissions of the AR of the appellant and perused the material facts on record. The legal contention raised by the appellant prima facie seems to be valid. In the assessment framed consequent to the issue of notice u/s 148, the total income has been computed at NIL which was the declared income of the appellant. There has been no escapement of income warranting the issue of notice u/s 148 of the Act. There are certain pre-conditions which need to be fulfilled in order to invoke the provisions of section 147 of the Act. The primary condition is that there should be escapement of income which is not the case of the appellant. Furthermore, the crucial point of dispute in the appeal is that the unabsorbed depreciation prior to AY 1997-1998 could not be carried forward in view of amendment to section 32(2) w.e.f. 1.4.1997 as held by the AO. The jurisdictional Tribunal the appellants own case for A.Y. 2008-2009 in ITA No.1254/Kol/2012 has held that the unabsorbed depreciation prior to 1.4.1997 shall be allowed to be carried forward.

4.3. The action of the AO in reopening the assessment is also examined under the material facts and circumstances subsisting in the appellant's case. The judicial precedence relevant to the matter is also gone through. The AO has merely relied on the materials which were on record during the processing of the return u/s 143(1) of the Act. It is only the relevancy of reasons which is justifiable. Therefore, without any justification as to how the income of the appellant has escaped assessment, the action of the A.O. is fraught with invalidity. Further, it is clearly evident from the reasons

recorded by the A.O. that there was no new material coming to the possession of the AO on the basis of which the assessment completed u/s 143(1) was reopened. The AR has relied on ITAT Third Member decision in the case of *Telco Dadaji Dhackjee Ltd.* in ITA No.4613/Mum/2005. The question referred to the Third Member for resolving, inter alia, was the following point of difference:

"Whether on the facts and circumstances of the proceedings initiated by the AO u/s 147 is liable to be confirmed or quashed when there was no fresh material available with the AO and the assessment had been completed originally u/s 143(1)"

The third member agreed with the view taken by the learned Judicial Member relying mainly on the decision of Hon'ble Supreme Court in the case of *Kelvinator of India Ltd (2010) 320 ITR 561*. It was held by the Third Member that section 147 applies both to section 143(1) as well as section 143(3) and, therefore, except to the extent that a reassessment notice u/s 148 in a case where the original assessment was made u/s 143(1) cannot be contested on the ground of a mere change of opinion, still it is opened to an assessee to challenge the notice on the ground that there is no reason to believe that income chargeable to tax has escaped assessment. As regards the decision of Hon'ble Supreme Court in the case of *Rajesh Jhaveri Stock Brokers (P) Ltd. (2007) 291 ITR 500* cited by the Revenue and relied upon by the Accountant Member, the Third Member held that the same was applicable in cases where the return was processed u/s 143(1) but later on notice was issued u/s 148 and the assessee challenged the notice on the ground that it is prompted by a mere change of opinion. The Third Member then referred to the decision of Hon'ble Supreme Court in the case of *CLT vs. Kelvinator of India* wherein it was held that there should be "tangible material" to come to the conclusion that income had escaped assessment. Relying on the said decision, it was held by the Third Member that while resorting to action under section 147 even in a case where only an intimation had been issued u/s 143(1)(a), it is essential that the AO should have before him tangible material justifying his reason to believe that income had escaped assessment. The Third Member held that reassessment proceedings initiated by the A.O. were liable to be quashed on the ground that there was no tangible material before the A.O. even though the assessment was completed originally u/s 143(1). The principle involved in this case was also upheld by the Hon'ble Delhi High Court in the case of *Orient Crafts Ltd.* The Hon'ble Court vide para 15, has observed as under:

"In the present case the reasons disclose that the Assessing Officer reached the belief that there was escapement of income 'on going

through the return of income' filed by the assessee after he accepted the return under section 143(1) without scrutiny, and nothing more. This is nothing but a review of the earlier proceedings and abuse of power by the Assessing Officer, both strongly deprecated by the Supreme Court in CIT vs Kelvinator (supra). The reasons recorded by the Assessing Officer in the present case do confirm our apprehension about the harm that a less strict interpretation of the words 'reason to believe' vis-a-vis an intimation issued u/s 143(1) can cause to the tax regime. There is no whisper in the reasons recorded, of any tangible material which came to the possession of the Assessing Officer subsequently to the issue of the intimation. It reflects an arbitrary exercise of the power conferred under section 147"

In my opinion, the decision of the Hon'ble Delhi High Court and the Hon'ble Third Member, ITAT, Mumbai are squarely applicable in the present case since no tangible material came to the notice of the A.O. after processing of return u/s 143(1). Therefore, respectfully following the same, I hold that the initiation of reassessment proceedings by the A.O. was bad in law. Accordingly, the issue raised on Ground No. 1 of the appeal is allowed and the order passed pursuant to the impugned notice u/s 148 is treated as an ultra vires order and stands annulled."

5. The Ld. CIT(A) also found that the common issue involved in the assessee's case for all the 4 years under consideration relating to its claim for set off of unabsorbed depreciation prior to 01.04.1997 was squarely covered on merit in favour of the assessee by the decision of the Tribunal rendered in assessee's own case for A.Y. 2008-09 vide its order dated 18th March, 2013 in ITA No. 1254/K/2012 wherein the similar disallowance made by the A.O. on account of assessee's claim for unabsorbed depreciation prior to 01.04.1997 was deleted by the Tribunal. He accordingly followed the said decision of the Tribunal and deleted the similar disallowance made by the A.O. for all the 4 years under consideration. Aggrieved by the orders of the Ld. CIT(A), the revenue has preferred these appeals

before the Tribunal on the following grounds which are identical except for the amount of unabsorbed depreciation claimed by the assessee:

"1. That on the facts and in the circumstances of the case Ld. CIT(A) has erred in holding that initiation of reassessment proceedings was bad in law.

2. That on the facts and circumstances of the case, Ld. CIT(A) and erred in allowing assessee's claim of carry forward of unabsorbed depreciation amounting to Rs. 36,94,40,287/- for A.Y. 2004-05, Rs. 6,14,54,975/- for A.Y. 2005-06, Rs. 9,80,89,016/- for A.Y. 2006-07 and Rs. 30,50,71,691/- for A.Y. 2007-08."

6. We have heard the arguments of both the sides and also perused the relevant material available on record. As submitted by the learned counsel for the assessee, the common issue involved in ground no 2 of these appeals filed by the revenue is squarely covered by the decision of this Tribunal in assessee's own case for A.Y. 2008-09 rendered vide its order dated 18th March, 2013 (supra) wherein it was held that by relying on the decision of Hon'ble Gujarat High Court in the case of General Motors India Ltd. vs DCIT that the legal position relating to the assessee's claim for set off unabsorbed depreciation prior to 01.04.1997 has been restored status quo ante by the amendment made by Finance Act 2000 w.e.f. A.Y. 2001-02. It was also held by the Tribunal that even when the restriction in respect of set off of carried forward unabsorbed depreciation was there, such restriction was to apply only for depreciation carried forward during the A.Y. 1997-98 to A.Y. 1999-2000 and such restriction would have no application for earlier depreciation carried forward. Even the learned DR has not disputed this position. As further submitted by the

learned counsel for the assessee, although the department has filed an appeal before the Hon'ble Calcutta High Court against the order of the Tribunal dated 18.03.2013 (supra), relief given by the Tribunal to the assessee by way of allowing its claim for set off of unabsorbed depreciation prior to 01.04.1997 is not challenged by the department in the said appeal. The common issue involved in ground no 2 of the present appeals filed by the department thus is squarely covered in favour of the assessee by the decision of the Tribunal in assessee's own case for A.Y. 2008-09 and respectfully following the same, we uphold the impugned orders of the Ld. CIT(A) allowing the claim of the assessee for set off of unabsorbed depreciation prior to 01.04.1997 against the income for all the 4 years under consideration. Ground no 2 of the revenue's appeals for A.Y. 2004-05 to 2007-08 is accordingly dismissed.

7. Although the common issue raised by the revenue is in ground no 1 of its present appeals relating to the validity of reassessment proceedings has become infructuous as a result of our decision rendered above upholding the orders of the Ld. CIT(A) allowing the claim of the assessee for set off of unabsorbed depreciation prior to 01.04.1997 against the income of all the 4 years under consideration, it is observed that the same is also covered in favour of the assessee by the decision of Hon'ble Delhi High Court in the case of Orient Crafts Ltd. (supra) as well as by the Third Member decision of this Tribunal in the case of Telco Dadaji Dhackjee Ltd. (supra) on which reliance was placed by the Ld. CIT(A) in the impugned orders while giving relief to the assessee on this issue.

8. In the result, all the four appeals of the revenue are dismissed.

Order Pronounced in the Open Court on 12th January, 2018.

Sd/-

(S.S. Viswanethra Ravi)
JUDICIAL MEMBER

Sd/-

(P.M. Jagtap)
ACCOUNTANT MEMBER

Dated: 12/01/2018

Biswajit, Sr. PS

Copy of order forwarded to:

1. M/s. Peerless Hospitex Hospital & Research Centre Ltd., 360, Panchasayar, Kolkata – 700 084.
2. DCIT, Cir 11(2), Aayakar Bhawan, P-7, Chowringhee Square, Kolkata – 700 069.
3. The CIT(A)
4. The CIT
5. DR

True Copy,

By order,

Sr. P.S. / H.O.O.
ITAT, Kolkata

