IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J" MUMBAI

BEFORE SHRI JOGINDER SINGH (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 4669/MUM/2016
Assessment Year: 2011-12

Income Tax Officer-6(1)(2), R. No. 508, 5th floor, Aayakar Bhavan, M.K. Road, Mumbai-400020.	Vs.	M/s Aristo Reality Development Ltd. 601, Symphony Nehru Road, Vile Parle (E), Mumbai-400057 **PAN No. AAACL0593J**
Appellant		**Respondent**

Revenue by : Ms. Aarju Garodia, DR
Assessee by : Mr. Dilip Lakhani, AR

Date of Hearing : 13/03/2018
Date of pronouncement : 18/04/2018

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the Revenue. The relevant assessment year is 2011-12. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-12, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143 (3) of the Income Tax Act 1961, (the 'Act').

2. The 1st ground of appeal reads as under:

> On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing the claim of the assessee on account of Foreign travelling expenses amounting to Rs.29,91,772/-, despite the fact that neither

during the assessment proceedings nor during the remand proceedings the assessee could bring any evidence on record to show that the said expenses were expended wholly and exclusively for the purpose of the assessee's business. Without prejudice to above, if any fresh evidence has been furnished during appellate proceedings for the first time without giving opportunity of examining the same to the A.O., the same has been admitted in contravention of Rule 46A of I.T. Rules.

3. Briefly stated, the facts of the case are that the Assessing Officer (AO) asked the assessee to explain the nature and purpose of expenses of Rs.29,91,772/- incurred towards foreign travel. The assessee submitted before the AO a note explaining that major expenditure was incurred on foreign travel of the Managing Director Mr. Ravi Agarwal on visit to countries such as Singapore, France, Italy etc. It was stated before the AO that Mr. Agarwal visited those countries for the purpose of making investment in existing projects of the company as well as for marketing existing ready units. However, the AO observed that the documents furnished by the assessee are only of tickets and foreign currency incurred on different tours. The AO further found that (i) the assessee was not able to give single documentary support to prove that the foreign travels made by the Director related to the assessee's own business of property development and sale of residential and commercial premises, (ii) the assessee was not able to give details of meeting held/sales from any of the clients/parties out of the countries where the Director visited. Further the AO noted that the assessee has not earned any income from foreign either in the current year or in the earlier year, even though the Director makes foreign travel every year.

As the assessee failed to file documentary evidence in support of its expenses for business purposes in the foreign trips performed, the AO relying on the decision in *CIT v. Calcutta Agency* 19 ITR 191, *CIT v. Transport Corporation of India Ltd*. 256 ITR 701 and *CIT v. Imperial Chemical Industries (I) Pvt. Ltd*. 74 ITR 17 disallowed the above sum of Rs.29,91,772/-.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A), following the order of the Tribunal in the case of the assessee for the AY 2009-10 allowed the appeal.

5. Before us, the Ld. DR submits that the assessee was not able to file before the AO a single documentary support to prove that a foreign travels made by the Director relates to its own business of property development and sale of residential and commercial premises. Also it is stated that the assessee was not able to file before the AO details of meeting held/sales happened from any of clients/parties out of the countries where the Director visited. Thus the Ld. DR submits that the order of the Ld. CIT(A) on the above issue be set aside and the disallowance of Rs.29,91,772/- made by the AO be confirmed.

6. *Per contra*, the Ld. counsel of the assessee relies on the order of the Ld. CIT(A) and the order of the Tribunal in the case of the assessee for the AY 2009-10 (ITA No. 3589/Mum/2014) and AY 2010-11 (ITA No. 5237/Mum/2014).

7. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

In the instant case, the fact remains that the assessee failed to file before the AO documentary evidence that the foreign travel made by the Director related to assessee's own running business of property development and sale of residential and commercial premises. It has been held in *CIT v. Dr. B.V. Raman* (1966) 59 ITR 20 (Mys), that if the object of the undertaken tour is dominantly commercial, the expenditure would qualify for deduction. If, however, the advantage gained for the assessee's business, profession or vocation was secondary and was a remote consequence, the expenditure would not come within the exemption provisions. In *Seshasayee Brothers Ltd. v. CIT*, (1961) 42 ITR 568 (Mad.); *Cooper Engineering Ltd. v. CIT*, (1982) 135 ITR 597 (Bom), it has been held that where the details were not furnished by the assessee, the claim can be disallowed on the ground that the assessee had not established that the amount in question was an expenditure laid out wholly and exclusively for the purposes of business.

In the Income Tax Act, each year is a self-contained separate period. In *CIT v. Sanjeev Woollen Mills* (2003) 264 ITR 68, 75 (Bom), *Kotak Mahindra Finance Ltd. v. DCIT* (2004) 265 ITR 114, 119 (Bom.), it has been held that under the income-tax law, each year constitutes a separate unit. It is a settled law that the doctrine of *res judicata* or estoppel by record does not apply to AO's decisions. A finding or decision of the income tax authorities in one year may be departed from in a subsequent year. It has been held so in *New Jehangir Vakil Mills v. CIT* 49 ITR 137 (SC) and *Sanakarlinga v. CIT* 4 ITC 226, 241 (FB).

In the instant case the assessee has not filed details before the AO or the Ld. CIT(A) establishing that the amount in question was an expenditure laid out wholly and exclusively for the purposes of business. Accordingly, present case of the assessee is distinguishable from the order of the ITAT in assessee's own case for the AY 2009-10 and 2010-11 relied on by the Ld. counsel.

As the assessee failed to file before the AO as well as the Ld. CIT(A) and also before the Tribunal, the details relating to the claim that the said expenditure was laid out wholly and exclusively for the purposes of the business, by following the ratio laid down in *Dr. B.V. Raman* (supra), *Seshasayee Brothers Ltd.* (supra), *Cooper Engineering Ltd.* (supra), we set aside the order of the Ld. CIT(A) on the above issue and confirm the disallowance of Rs.29,91,772/- made by the AO. Thus the 1st ground of appeal is allowed.

8. The 2nd ground of appeal

> Whether in law circumstance and in the facts of the case and in law, the Hon'ble Ld. CIT(A) has erred in allowing the claim of set off of carry forward unabsorbed depreciation amounting to Rs.3,75,59,436/- and not following the Special Bench decision of the jurisdictional tribunal in the case of Times Guarantee Ltd. in ITA No.4917 & 4918/Mum/2008 which is binding on it.

9. The AO observed that in the computation of income, the assessee has set off business income of Rs.1,17,40,002/- against brought forward unabsorbed depreciation for AY 1996-97 to AY 2000-01 to the extent of income. The details submitted by the assessee in respect of depreciation loss pertaining to AY 1996-97 to 2000-01 before the AO are as under:

AY	Rs.
1996-97	91,00,236
1997-98	1,05,59,992
1998-99	82,02,827
1999-00	69,71,152
2000-01	27,25,229
Total	**3,75,59,436**

The AO followed the order of the Tribunal in *DCIT v. Times Guarantee Ltd*. (ITA No. 4917 & 4918/Mum/2008) stating that unabsorbed deprecation of AY 1997-98 to AY 2001-02 was not eligible for relief granted by amended section 32(2) in AY 2002-03 and therefore, the above loss is only allowed to be carried forward for 8 years only. The assessee submitted before the AO that the judgment of the Hon'ble Gujarat High Court in the case of *General Motors Pvt. Ltd. v. DCIT* 354 ITR 244 is applicable to the instant case. However, the AO was not convinced with the said reply and differentiating the decision in *General Motors Pvt. Ltd*. (supra), and then relying on the order of the Special Bench of the Tribunal in Times Guarantee Ltd., the AO denied the set off of depreciation loss from AY 1997-98 to AY 2001-02 amounting to Rs.3,75,59,436/- claimed by the assessee.

10. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) relying on the order of the ITAT, Mumbai dated 09.10.2013 in the case of M/s *Arch Fine Chemicals P. Ltd.*

(ITA No. 2414 & 2415/Mum/2012) and the decision in *General Motors India P. Ltd*., held that the assessee is entitled to carry forward unabsorbed depreciation even beyond period of 8 years. The Ld. CIT(A) thus allowed the appeal of the assessee on the above ground.

11. Before us, the Ld. DR relies on the order of the AO, whereas the Ld. counsel of the assessee relies on the order of the Ld. CIT(A).

12. We have heard the rival submissions and perused the relevant materials on record. We find that the above issue is covered in favour of the assessee by the decision in *General Motors India (P.) Ltd. (supra)*. The question before the Hon'ble High Court was whether the unabsorbed depreciation pertaining to AY 1997-98 could be allowed to be carried forward and set off after a period of eight years or it would be governed by section 32 as amended by Finance Act 2001? We find that the Hon'ble Gujarat High Court held as under:

> "However, Circular No. 14 of 2001 had clarified that under section 32 (2), in computing the profits and gains of business or profession for any previous year, deduction of depreciation u/s 32 shall be mandatory. Therefore, the provisions of section 32(2) amended by Finance Act, 2001 would allow the unabsorbed depreciation allowance available in the AY 1997-98, 1999-2000, 2000-01 and 2001-02 to be carried forward to the succeeding years, and if any unabsorbed depreciation or part thereof could not be set off till the AY 2002-03 then it would be carried forward till the time it is set off against the profits and gains of subsequent years.
>
> Therefore, it can be said that, current depreciation is deductible in such first place from the income of the business to which it relates. If, such depreciation amount is larger than the amount of the profits of that business, then such

excess comes for absorption from the profits and gains from any other business or business, if any, carried on by the assessee. If a balance is left even thereafter, that becomes deductible from out of income from any source under any of the other heads of income during that year. In case there is a still balance left over, it is to be treated as unabsorbed depreciation and it is taken to the next succeeding year. Where there is current depreciation for such succeeding year the unabsorbed depreciation is added to the current depreciation for such succeeding year and is deemed as part thereof. If, however, there is no current depreciation for such succeeding year, the unabsorbed depreciation becomes the depreciation allowance for such succeeding year. We are of the considered opinion that any unabsorbed depreciation available to an assessee on 1st day of April 2002 (AY 2002-03) will be dealt with in accordance with the provisions of section 32(2) as amended by Finance Act, 2001. And once the Circular No.14 of 2001 clarified that the restriction of 8 years for carry forward and set off of unabsorbed depreciation had been dispensed with, the unabsorbed depreciation from AY 1997-98 upto the AY 2001-02 got carried forward to the assessment year 2002-03 and became part thereof, it came to be governed by the provisions of section 32(2) as amended by Finance Act, 2001 and were available for carry forward and set off against the profits and gains of subsequent years, without any limit whatsoever."

12.1 Now we refer to the judgment of the Hon'ble Bombay High Court in the case of *CIT vs. M/s Hindustan Unilever Ltd.* (ITA No. 1873 of 2013) by the Bombay High Court. The relevant question of law before the High Court is mentioned below:

"7. Whether on facts and in circumstances of the case and in law the Tribunal was right in directing to allow the set off of brought forward depreciation losses of amalgamating company for the Assessment

Years 1996-97 and 1997-98 i.e. for the period prior to amendment in sub-section (2) of Section 32 of the Act w.e.f. 01/04/2002?"

The Hon'ble High Court held as under:

"6. Regarding question No.7:

(a) The impugned order of the Tribunal has allowed the respondent-assessee's appeal on the issue of allowing unabsorbed depreciation pertaining to Assessment Year 1996-97 and 1997-98 which was carried forward to be set off in the subject Assessment Year.

(b) The grievance of the Appellant is that in view of the fetter (of eight years) in carrying forward depreciation for Assessment Year 1997-98 upto Assessment Year 2002-03, the set off of the same cannot be allowed in this Assessment Year.

(c) We find that the impugned order of the Tribunal while allowing the Assessee-respondents' claim follows the decision of the Gujarat High Court in General Motors India Pvt. Ltd. vs. DCIT reported in 354 ITR 244 wherein on identical facts it was held that the unabsorbed depreciation for the Assessment Year 1997-98 upto Assessment Year 2001-02 could be allowed to be set off, if it was still unabsorbed on 1st April, 2001. The above decision also placed upon the CBDT circular No. 14 of 2001 dated 22nd November, 2001 to hold that any unabsorbed depreciation which is available on 1st day of April, 2001 would be dealt with in accordance with the provisions of section 32(2) of the Act as amended by the Finance Act 2001. Moreover, the Circular No. 14 of 2001 issued by the CBDT clarifies that restriction of the eight years to carry forward and set off the unabsorbed depreciation has been dispensed with. Consequently, unabsorbed depreciation for the intervening periods between assessment year 1997-98 upto 2001-02, if available in the assessment year 2002-03 would be allowable as part

> of carried forward depreciation from Assessment Year 2002-03 onwards. No decision contrary to the decision of the Gujarat High court has been shown to us. It is clarified that although the decision of the Gujarat High Court was rendered in context of re-opening notice it has also examined the issue on merits and drew support from the CBDT circular which is beneficial to the assessee to conclude as aforesaid. Nothing has been shown to us to indicate why the decision of the Gujarat High Court in General Motors (India) Ltd. should not be followed in the present facts."

12.2 In view of the ratio laid down by the Hon'ble Gujarat High Court in *General Motors India (P.) Ltd. (supra)* and Hon'ble Bombay High Court in *M/s Hindustan Unilever Ltd. (supra)*, we uphold the order of the Ld. CIT(A).

13. Thus the 2nd ground of appeal is dismissed.

14. The 3rd ground of appeal

> Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition made to the book profit of Rs.2,19,037/- by referring to section u/s 14A r.w.r. 8D of the Income Tax Act, 1961 for purpose of calculating the MAT u/s 115JB of the Act without considering.

15. We find that the above ground has to be decided in favour of the assessee in view of the order of the Special Bench of the Tribunal in *ACIT v. Vireet Investment (P) Ltd*. (2017) 165 ITD 27 (Delhi-Trib.) (SB), wherein it has been held that computation under clause (f) of *Explanation* 1 to section 115JB(2) is to be made without resorting to computation as contemplated u/s 14A r.w. Rule 8D. We follow the above

order and delete the addition of Rs.2,19,037/- made by the AO u/s 14A to the book profit of the assessee.

Thus the 3rd ground of appeal is dismissed.

16. In the result, the appeal is partly allowed.

Order pronounced in the open Court on 18/04/2018.

Sd/-	Sd/-
(JOGINDER SINGH)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 18/04/2018
Rahul Sharma, Sr. P.S.

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.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai