

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "I", MUMBAI

Before Shri Saktijit Dey, JM & Shri Rajesh Kumar, AM

ITA No.5736/Mum/2016
Assessment Year : 2009-10

Penguin Electronics Ltd., 4, Pirmal Indl. Estate, S V Road, Goregaon (W) Mumbai 400 064. PAN AAACP3361L	Vs.	DCIT 13 (1)(2) Mumbai
(Appellant)		(Respondent)

Appellant By : Shri Shri Tanmay Phadke
Respondent BY : Shri Saurabh Kumar Rai

Date of Hearing :11.04.2018

Date of Pronouncement :09.05.2018

ORDER

Per Saktijit Dey, Judicial Member

This is an appeal by the assessee against the order, dated 10.06.2016, of the learned Commissioner of Income Tax (Appeals)-21, in short CIT(A), Mumbai, for the assessment year 2009-10. The dispute in the present appeal is confined to the disallowance of depreciation claimed @30% on mould and dyes amounting to ₹ 1,11,493/-.

2. There is a delay of twelve days in filing the appeal. Assessee has filed a petition seeking condonation of delay supported by an affidavit. After considering the submissions of the learned AR, we are satisfied that the delay in filing of the appeal is due to reasonable cause. Accordingly, we condone the delay of twelve days and admit the appeal for hearing on merits.

3. Briefly, facts are the assessee - a company, is engaged in the business of manufacturing of home appliances and electronic items. For the assessment year under consideration, the assessee had filed its return of income on 27.09.2009, declaring income of ₹ 1,19,03,860/-. The assessment in case of the assessee was completed u/s. 143(3) of the Act vide order dated 20.06.2011, determining the total income at ₹ 1,36,92,222/-. Subsequently, the Commissioner of Income Tax in exercise of power u/s. 263 of the Act called for the assessment record of the assessee for the impugned assessment year and, after examining it, was of the view that the assessment order passed by the Assessing Officer was erroneous and prejudicial to the interest of the Revenue as the Assessing Officer while completing the assessment has allowed deduction u/s. 80IC of the Act in respect of an amount of ₹ 5,80,614/- which is otherwise ineligible for such deduction. He further observed that the Assessing Officer has wrongly allowed depreciation claimed on mould and dyes @ 30%. Accordingly, after issuing a show cause notice to the assessee and considering the submissions of the assessee the learned Commissioner of Income Tax passed an order u/s. 263 of the Act on 28.03.2014 setting aside the assessment order passed u/s. 143(3) of the Act with a direction to the Assessing Officer to consider the facts and issues mentioned by him and pass a fresh order. In pursuance to such directions of the learned Commissioner of Income Tax, the Assessing Officer passed a fresh assessment order disallowing an amount of ₹ 5,80,614/- from the deduction claimed u/s. 80IC of the Act and further, restricting the depreciation on moulds and dyes to 15%, which resulted in disallowance of depreciation to the extent of ₹ 1,11,493/-. As it appears, against the aforesaid assessment order passed by the Assessing Officer, the assessee

preferred appeal before the learned CIT(A) only for contesting the disallowance of depreciation. The CIT(A), though, accepted that in assessee's own case for A.Y. 2010-11, he has allowed assessee's claim of depreciation on mould and dyes @30% however, he observed that the assessee did not inform him whether any appeal was filed against the revision order passed u/s. 263 of the Act. Proceeding further, learned CIT(A) observed that the assessee being a manufacturer of radio and mixer/grinder it cannot be classified as plastic and rubber industry and, accordingly, sustained disallowance of depreciation made by the Assessing Officer.

4. The learned AR submitted that in the order passed u/s. 263 of the Act, the Commissioner of Income Tax has not issued any specific direction to the Assessing Officer to disallow assessee's claim of depreciation, but, has simply asked the Assessing Officer to pass fresh assessment order on the issues mentioned by him. He submitted, even assuming that the Commissioner of Income Tax has issued specific directions, however, such directions, though, are binding on the Assessing Officer are not binding on the first appellate authority. He submitted, in the preceding assessment years the assessee had claimed depreciation @30% on mould and dyes and the department has allowed the same. He submitted, even the first appellate authority himself has allowed assessee's claim of depreciation on mould and dyes @30% in A.Y. 2010-11. He submitted in view of the aforesaid, claim of the assessee should be allowed.

5. The learned DR relying upon the observations of the CIT(A) submitted that since the assessee has not challenged the order of the Commissioner of Income Tax and the Assessing Officer has completed the assessment implementing the

directions of the Commissioner of Income Tax, the assessee cannot challenge the addition/disallowance made by the Assessing Officer in appeal.

6. We have considered the rival submissions and perused the materials on record. It is an undisputed fact that the assessee has not challenged the revision order passed u/s. 263 of the Act by filing appeal before the Tribunal. However, the issue before us is, whether non-filing of appeal against the revision order passed u/s. 263 of the Act would debar the assessee from challenging the disallowance made by the Assessing Officer in the fresh assessment order. After perusing the material on record, we are of the view that there is no bar or prohibition for the assessee in challenging the disallowance of depreciation made by the Assessing Officer in appellate proceedings. Though, in the revision order the Commissioner of Income Tax has held the assessment order to be erroneous and prejudicial to the interests of the Revenue on the issues of allowance of deduction u/s. 80IC of the Act and claim of depreciation @30% on mould and dyes, however, he has ultimately directed the Assessing Officer to pass a fresh order after considering the facts and issues mentioned by him. Therefore, there is no specific direction by the Commissioner of Income Tax to disallow depreciation claimed by the assessee @30%. He has simply directed the Assessing Officer to examine whether the assessee is eligible to claim depreciation @30%. Even assuming that the Commissioner of Income Tax has issued a specific direction, still it remains to be seen whether the assessee is debarred from raising the issue in appeal. As could be seen from the observations of the learned CIT(A), in paragraph no.7 of his order, though, he has referred to the directions of the Commissioner of Income Tax u/s.

263 of the Act, he has ultimately decided the issue on merit by holding that the assessee having not been classified as plastic and rubber industry is ineligible to claim depreciation@30%. Thus, in our considered view the Commissioner (Appeals) has also decided the issue independently on merits. That being the case, the assessee has right to appeal against such order of the first appellate authority. As regards the merits of the issue, it is seen from record that in the preceding assessment years, assessee's claim of depreciation on mould and dyes @30% has been accepted by the department. In fact, in A.Y. 2010-11, the CIT(A) himself has allowed assessee's claim of deprecation @30%, which has been acknowledged by the first appellate authority in the impugned order. Further, as brought to our notice by the learned AR, in subsequent assessment years also the Assessing Officer has allowed assessee's claim of depreciation on mould and dyes @30%. This is evident from the copies of the assessment orders passed u/s. 143(3) of the Act for A.Ys 2010-11 to 2014-15, which were placed on record. Therefore, considering overall facts and circumstances of the case, we allow assessee's claim of depreciation @30% thereby deleting the addition made by the Assessing Officer.

7. In the result, assessee's appeal is allowed.

Order pronounced in the open court on this day of 9th May 2018.

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai, Dated : 9th May, 2018.

Sd/-
(Saktijit Dey)
JUDICIAL MEMBER

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Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT(A), Mumbai.
4. The CIT
5. The DR, 'I' Bench, ITAT, Mumbai

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BY ORDER,

(Assistant Registrar)
Income Tax Appellate Tribunal, Mumbai