

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES, JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एव श्री भागचन्द, लेखा सदस्य सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI BHAGCHAND, AM

आयकर अपील सं./ITA No. 277 & 278/JP/2018
निर्धारण वर्ष/Assessment Year: 2010-11 and 2011-12

| | | |
|--|-------------|--|
| M/s. Golden Triangle Fort & Palace Pvt.Ltd 312,3 rd Floor, Ganpati Plaza Jaipur | बनाम Vs. | The DCIT Central Circle - 3 Jaipur |
| स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AABCG 3600 Q | | |
| अपीलार्थी / Appellant | | प्रत्यर्थी / Respondent |

निर्धारिती की ओर से / Assessee by: Shri Manish Agarwal, CA
राजस्व की ओर से / Revenue by: Smt. Poonam Rai, DCIT - DR

सुनवाई की तारीख / Date of Hearing : 21/06/2018
घोषणा की तारीख / Date of Pronouncement : 2/07/2018

आदेश / ORDER

PER BHAGCHAND, AM

Both these appeals filed by the assessee emanate from separate orders of the ld. CIT(A)-4, Jaipur dated 01-01-2018 for the Assessment Years 2010-11 and 2011-12 raising therein following grounds of appeal.

ITA No. 277/JP/2018 – A.Y. 2010-11

“1. On the facts and in the circumstances of the case, the ld. CIT(A) has grossly erred in sustaining disallowance of Rs. 28,01624/- by observing that the disallowance so made by the AO was a mistake

apparent on record and holding the same as rectifiable under section 154 of the Act without appreciating that the same is debatable issue and outside the ambit of provision of sec 154 of the Act. Thus the order so passed deserves to be held void ab-initio and the consequent additions deserves to be deleted.

2. On the facts and in the circumstances of the case, the Id. CIT(A) has grossly erred in sustaining the addition of Rs. 28,01,624/- by disallowing the depreciation claimed by assessee u/s 32(2) without appreciating the facts and circumstances of the case and the submissions made. Thus the addition of Rs. 28,01,624/- deserves to be deleted.

2.1 That the Id. CIT(A) has further erred in ignoring the amendment made w.e.f. A.Y. 2002-03 that the unabsorbed depreciation available as on 01-04-2002 would become the part of current year depreciation and thereafter treated as current year depreciation which could be carried forward for next years, thus in accordance with the said amendment, the unabsorbed depreciation deserves to be allowed.

2.2 That the Id. CIT(A) further erred in ignoring the decision of Hon'ble Gujarat High Court in the case of M/s. General Motors (India) Ltd vs DCIT, reported in 354 ITR 244, therefore, the impugned disallowance deserves to be deleted.”

ITA No. 278/JP/2018 – A.Y. 2011-12

“1. On the facts and in the circumstances of the case, the Id. CIT(A) has grossly erred in sustaining disallowance of Rs. 38,09,013/- by observing that the disallowance so made by the AO was a mistake apparent on record and holding the same as rectifiable under section 154 of the Act without appreciating that the same is debatable issue and outside the ambit of

provision of sec 154 of the Act. Thus the order so passed deserves to be held void ab-initio and the consequent additions deserves to be deleted.

2. On the facts and in the circumstances of the case, the Id. CIT(A) has grossly erred in sustaining the addition of Rs. 38,09,013/- by disallowing the depreciation claimed by assessee u/s 32(2) without appreciating the facts and circumstances of the case and the submissions made. Thus the addition of Rs. 38,09,013/- deserves to be deleted.

2.1 That the Id. CIT(A) has further erred in ignoring the amendment made w.e.f. A.Y. 2002-03 that the unabsorbed depreciation available as on 01-04-2002 would become the part of current year depreciation and thereafter treated as current year depreciation which could be carried forward for next years, thus in accordance with the said amendment, the unabsorbed depreciation deserves to be allowed.

2.2 That the Id. CIT(A) further erred in ignoring the decision of Hon'ble Gujarat High Court in the case of M/s. General Motors (India) Ltd vs DCIT, reported in 354 ITR 244, therefore, the impugned disallowance deserves to be deleted.

2.1 First of all, we take the appeal of the assessee in ITA No. 277/JP/2018 for the A.Y. 2010-11 for adjudication.

2.2 Apropos Ground No. 1 and 2 of the assessee, the facts as emerges from the order of the Id. CIT(A) are as under:-

“3. In the present case, it is seen that the appellant filed its return of income on 29-09-2010 declaring Nil income. A search was conducted on 17-07-2013 in the case

of MRS Group, Jaipur to which the appellant belongs. Subsequently, assessment u/s 153A r.w.s. 143(3) was completed on 9-3-2016 accepting returned income. On verification of record, it was found that the appellant was allowed set off of unabsorbed depreciation of Rs. 21,32,776/- of A.Y. 2000-01 and Rs. 6,68,848/- of A.Y. 2001-02 which was irregular as the time limit for set off within 8 years has lapsed as per the provision of section 32(2)(iii) of the Act. As such, a notice u/s 154 was issued to the appellant on 19-12-2016 to rectify the mistake that the unabsorbed depreciation of Rs. 28,01,624/- was irregular as the time limit for set off within 8 years lapsed. In this regard, observation of the AO can be seen in para 6 to 8 of the AO's order.

4....

5. I have perused the order of the AO and submissions made in this regard. The first dispute raised is that the mistake so rectified by the AO is not apparent from record. I am not inclined to agree with the contention as the AO has given effect to position of law as is evident from the assessment records and the prevailing section and applicable rules.

With regard to the main ground, I find that the AO has correctly given effect to the section 32(2) as amended w.e.f. AYrs. 2002-03. This is very clear from the Circular No. 14 of 2001 issued by CBDT in this regard. The unabsorbed depreciation of the A.Yr 2001-02 cannot be claimed in the A.Yr 2010-11 and 2011-12 as discussed by the AO. There is no infirmity in the order of the AO. On facts and in the circumstances of the case, the addition made by the AO is confirmed.

2.3 During the course of hearing, the ld.AR of the assessee challenged the action of the ld. CIT(A) vide Ground No. 1 and Ground No. 2 to 2.2.

However, the Id.AR of the assessee filed the written to this effect which has been taken into consideration.

2.4 On the other hand, the Id. DR supported the order of the Id. CIT(A).

2.5 We have heard the rival contention and perused the material available on record. In this case the assessment was completed u/s 143(3) r.w.s. 153A wherein the AO has allowed the set-off of unabsorbed brought forward depreciation pertaining to assessment years 2000-01 & 2001-02 totalling to Rs. 28,01,624/- [Rs. 21,32,776/- & Rs. 6,68,848/- respectively]. Thereafter u/s 154 a rectification order was passed withdrawing the set-off by holding that the same related to the assessment years prior to the amendment made by Finance Act, 2001 u/s 32(2) and accordingly the same is eligible to be carried forward for 8 years only which stood expired and therefore assessee is not eligible for such set-off in A.Y. 2010-11 i.e. the year under appeal. The Id. AR of the assessee contended that the issue is debatable and has therefore to be decided by various High Courts. Therefore the order of the assessee cannot be rectified u/s 154 which is meant for rectification of mistake apparent on record and as such the issue of allowance of brought forward unabsorbed depreciation pertaining to assessment year 2000-01 and 2001-02 is not

mistake apparent of record, accordingly the Id.AR prayed for the cancellation of the rectification order. On merits, the Id. AR referred the amendment made in Finance Act, 2001 by which the section 32(2) has been substituted w.e.f. 01.04.2002 which reads as under:

“32(2) Where, in the assessment of the assessee, full effect cannot be given to any allowance under sub-s. (1) in any previous year, owing to there being no profits or gains chargeable for that previous year, or owing to the profits or gains chargeable being less than the allowance, then, subject to the provisions of sub-s. (2) of s. 72 and sub-s. (3) of s. 73, the allowance or the part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following previous year and deemed to be part of that allowance, or if there is no such allowance for that previous year, be deemed to be the allowance for that previous year, and so on for the succeeding previous years.”

The Id. AR submitted that as per the new amended provisions unabsorbed depreciation of A.Yrs. 2000-01 and 2001-02 which are legitimately eligible for brought forward and to be set off in A.Y. 2002-03 became the part of the current depreciation allowance of A.Y. 2002-03 and is eligible

for set-off as per the new amended provision for unlimited period as current depreciation of next year and so on till there fully absorbed. Besides this the ld. AR also referred the CBDT Circular No. 14 in which the amendment made by Finance Act, 2001 the section 32(2) is discussed and observed that with a view to enable the industry to conserve sufficient funds to replace plant and machinery, especially in an era where obsolescence takes place so often, the Act has dispensed with the restriction of 8 years for carry forward and set off of unabsorbed depreciation. For this reliance is placed on the direct decision of Hon'ble Gujarat High Court in the case of General Motors (I) Pvt. Ltd. Vs. DCIT 354 ITR 244 wherein it has been held as under:

“We are of the considered opinion that any unabsorbed depreciation available to an assessee on 1st day of April 2002 (A. Y. 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 A. Y.1997-98 upto the A. Y. 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.’’

Further reliance is placed on the following decisions:

- (i) CIT vs. Gujarat Themis Biosyn Ltd. (2014) 105 DTR 72 (Guj.)
- (ii) Bengal Tea & Fabrics Limited (ITA No 467/Kol/2012) dated 26th July, 2012
- (iii) Cooperative Milk producers Federation Ltd. -vs.- DCIT 53 DTR 81 (Kar)
- (iv) ITO -vs- Suraj Solvent Vanaspati Industries Ltd. (2008) 16 DTR 492 (Amritsar)
- (v) Minda Sai Ltd Vs. ITO (ITAT DEL) dated 09.01.2015
- (vi) ACIT Vs. M/s J K Tyre and Industries ltd (ITAT Kol) dated 12.08.2016
- (vii) DCIT Vs. M/s Orient Paper & Industries Ltd. (ITAT Kol) dated 09.06.2017

Taking into consideration the materials and arguments of both the parties, we find that the assessment order passed u/s 143(3) r.w.s. 153A was rectified by taking shelter of section 154 though it is not a mistake apparent on record and the issue is debatable. Further the Hon’ble Gujarat High Court in the case of General Motors (I) P. Ltd. (supra) has categorically decided this issue and held that any unabsorbed depreciation

from A.Yrs. 1997-98 to 2001-02 got carried forward to A.Y. 2002-03 and became part thereof is to be governed by the provisions of amended section 32(2) and were available for carried forward and set-off against the profit and gains of subsequent years without any limit whatsoever. Following the decision of Hon'ble Gujarat High Court in the case of General Motors (I) Pvt. Ltd. Vs. DCIT, and CIT Vs. Gujarat Themis Biosyn Ltd. (Supra), we hold that the assessee is eligible for carried forward and set-off of the unabsorbed brought forward depreciation of A.Yrs. 2000-01 and 2001-02 in the impugned assessment years i.e. 2010-11 and in subsequent years without any time limit. Thus the addition made by the AO on this account is deleted and the appeal of the assessee is allowed.

3.1 It is further noted that the similar issue has been raised by the assessee in ITA No. 278/JP/18 for the Assessment Year 2011-12 (supra). It is pertinent to mention that identical issues have been decided by us in the case of the assessee for A.Y. 2010-11 in ITA No. 277/JP/18 wherein we have deleted the additions made by the AO and allowed the appeal of the assessee by holding that the assessee is eligible for set-off for unabsorbed depreciation of A.Y. 2000-01 & 2001-02 without any time limit. In view of the decision taken by us in the case of the assessee for

the Assessment Year, 2010-11, the same shall apply mutatis mutandis in the Assessment Year 2011-12 of the assessee . Accordingly the appeal of the assessee is allowed.

4.0 In the result, both the appeals of the assessee are allowed.

Order pronounced in the open Court on 02-07-2018.

Sd/-
(विजय पाल राव)
(Vijay Pal Rao)
न्यायिक सदस्य /Judicial Member

Sd/-
(भागचन्द)
(Bhagchand)
लेखा सदस्य /Accountant Member

जयपुर /Jaipur
दिनांक /Dated:- 02 /07/ 2018

*Mishra

आदेश की प्रतिलिपि अग्रेषित /Copy of the order forwarded to:

- 1.अपीलार्थी /The Appellant- M/s. Golden Triangle Fort & Palace Pvt. Ltd., Jaipur
2. प्रत्यर्थी / The Respondent- The DCIT, Central Circle – 3, Jaipur
3. आयकर आयुक्त(अपील) / CIT(A).
4. आयकर आयुक्त / CIT,
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर /DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No.277 /JP/2018)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar