IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH : KOLKATA

[Before Hon'ble Shri M.Balaganesh, AM & Hon'ble Shri S.S.Viswanethra Ravi, JM]

I.T.A No. 508/Kol/2016

Assessment Year : 2010-11

Tata Steel Processing and Distribution Ltd. -vs- DCIT, Circle-8(2), Kolkata
[PAN: AABCT 1029 L]
(Appellant) (Respondent)

For the Appellant : Shri J.P. Khaitan, Sr. Counsel
Shri P. Jhunjhunwala, AR

For the Respondent : Shri S. Dasgupta, Addl. CIT DR

Date of Hearing : 09.08.2018

Date of Pronouncement : 24.08.2018

ORDER

Per M.Balaganesh, AM

1. This appeal by the assessee arises out of the order of the Learned Commissioner of Income Tax(Appeals)-1, Kolkata [in short the ld CIT(A)] in Appeal No. 230/CIT(A)-3/Circle-8(2)/14-15(13-14) dated 19.01.2016 against the order passed by the ACIT, Circle-8, Kolkata [in short the ld AO] under section 143(3) of the Income Tax Act, 1961 (in short "the Act") dated 29.03.2013 for the Assessment Year 2010-11.

2. The first issue to be decided in this appeal is a to whether the ld. CIT(A) was justified in upholding the disallowance made towards leave encashment u/s 43B(f) of the Act.

2.1. The brief facts of this issue are that the assessee made a provision for leave encashment for Rs 38,50,798/- and claimed the same as deduction by following the

decision of the Hon'ble Jurisdictional High Court in the case of Exide Industries Ltd reported in 292 ITR 470 (Cal). The ld AO sought to disallow the same in terms of section 43B(f) of the Act as the same was not paid within the due date of filing the return of income. The ld AO observed that the said decision has been stayed by the Hon'ble Supreme Court and accordingly disallowed the provision for leave encashment on the ground that the same is allowable only on payment basis in terms of section 43B(f) of the Act, which was upheld by the ld CITA. Aggrieved, the assessee is in appeal before us .

2.2. We have heard the rival submissions. We find that though the Hon'ble Calcutta High Court in the case of Exide Industries Ltd vs Union of India reported in 292 ITR 470 (Cal) had struck down the provisions of section 43B(f) of the Act as unconstitutional, the revenue had carried the matter further to the Hon'ble Supreme Court which initially in Special Leave to Appeal (Civil) CC 12060 / 2008 dated 8.9.2008 had held as under:-

> *"The petition was called on for hearing today.*
> *Upon hearing counsel the court made the following Order.*
> *Issue Notice.*
> *In the meantime, there shall be stay of the impugned judgement, until further orders.*"

Later the Hon'ble Supreme Court in Special Leave to Appeal (Civil) No(s). CC 22889 / 2008 dated 8.5.2009 had held as under:-

> *"The petition was called on for hearing today.*
> *Upon hearing counsel the court made the following Order*
> *Delay condoned.*
> *Leave granted.*
> *Pending hearing and final disposal of the Civil appeal, Department is restrained from recovering penalty and interest which has accrued till date. It is made clear that as far as the outstanding interest demand as of date is concerned, it would be open to the department to recover that amount in case Civil Appeal of the department is allowed.*

We further make it clear that the assessee would, during the pendency of this Civil Appeal , pay tax as if Section 43B(f) is on the statute book but at the same time it would be entitled to make a claim in its returns."

Hence from the aforesaid Supreme Court judgement, it could be inferred that the Hon'ble Supreme Court had not stayed the judgement of the Calcutta High Court during Leave proceedings. But the Hon'ble Supreme Court had only passed an interim order on the impugned issue. Hence we deem it fit and appropriate , in the interest of justice and fair play, to remand this issue to the file of the ld AO to pass orders based on the outcome of the main appeal on merits by the Hon'ble Supreme Court as stated supra. Accordingly the ground no. 1 raised by the assessee in this regard is allowed for statistical purposes.

3. The next issue to be decided in this appeal is as to whether the ld. CIT(A) was justified in upholding the disallowance made u/s 14A of the Act read with Rule 8D of the Rules both under normal provisions of the Act as well as u/s 115JB of the Act, in the facts and circumstances of the case.

3.1. The brief facts of this issue are that the ld. AO observed that during the year the assessee company earned tax exempt dividend income of Rs. 46,42,000/- from its investment in units of mutual funds. The assessee claimed that a sum of Rs. 24,000/- was relatable to the earning of such income and accordingly disallowed the same in the return of income u/s 14A of the Act. The ld. AO computed the disallowance u/s 14A read with Rule 8D(2)(iii) and computed the figure of Rs. 6,41,255/- for disallowance in the assessment. The action of the ld. AO was upheld by the ld. CIT(A). Aggrieved the assessee is in appeal before us.

3.2. We have heard rival submissions. We find that the Co-ordinate Bench of this Tribunal in the case of REI Agro Ltd. reported in 144 ITD 141 had held that only those investments which had yielded dividend income to the assessee are to be considered for

the purpose of computing disallowance under third limb of Rule 8D(2) of the Rules. Accordingly, we direct the ld. AO to re-compute the disallowance in the light of above mentioned decision of this Tribunal for the purpose of normal computation of income under the Act. Accordingly, ground no. 2(a) raised by the assessee is allowed for statistical purpose.

3.3. With regard to disallowance u/s 14A read with Rule 8D of the Rule while computing the book profits u/s 115JB of the Act in the sum of Rs. 6,41,255/- is concerned , we find that this issue has been decided by the Hon'ble Special Bench of Delhi Tribunal in ACIT vs. Vireet Investment Pvt. Ltd. reported in [2017] 82 Taxmann. Com 415 (Del. Trib.)(SB) wherein it was held as under:

> *"6.2.2. In view of the above discussion, we answer the question referred to us in favour of assessee by holding that the computation under clause (f) explanation (1) to section 115JB(2) is to be made without resorting to the computation as contemplated u/s 14A read with Rule 8D of the Income Tax Rules, 1962."*

We find that the ld. AO had disallowed a sum of Rs. 6,41,255/- u/s 14A and Rs. 24,000/- u/s 14A while computing the book profit u/s 115JB of the Act. We find that the assessee had not furnished the workings and the basis of arriving on the disallowance figure of Rs. 24,000/- u/s 14A before us. Hence in the light of the aforesaid Special bench decision of Delhi Tribunal, the ld. AO is directed to examine the accounts of the assessee and the workings for Rs. 24,000/- disallowed u/s 14A by the assessee and decide the issue afresh in accordance with law. Accordingly, ground no. 2(b) raised by the assessee is allowed for statistical purposes.

4. The last issue to be decided in this appeal is as to whether the ld. CIT(A) was justified in upholding the disallowance of remaining portion of 50% of additional depreciation u/s 32(1)(iia) of the Act on plant and machinery put to use for a period of less than 180 days during the financial year 2008-09 relevant to assessment year 2009-10.

4.1. The brief facts of this issue is that the ld. AO from Appendix 3 of Tax audit report containing workings for income tax depreciation observed that the assessee company has claimed additional depreciation of Rs. 1,43,24,748/- on additions to fixed assets of plant and machinery made in earlier year. It was clear from the note in respect of this claim of depreciation, that such claim represented the unclaimed 50% of the additional depreciation of 20% u/s 32(1)(iia) of the Act of the actual cost with respect to plant and machinery put to use for a period of less than 180 days in the financial year 2008-09, which was claimed in the current financial year 2009-10 relevant assessment year 2010-11. The ld. AO observed that unclaimed 50% portion of additional depreciation pertaining to earlier assessment year i.e. 2009-10 cannot be allowed as an allowance in assessment year 2010-11 and accordingly proceeded to disallow the sum of Rs. 1,43,24,748/- in the assessment. This action of the ld. AO was upheld by the ld. CIT(A). Aggrieved the assessee is in appeal before us.

4.2. We have heard rival submissions. We find that this issue is no longer res integra in view of the decision of Hon'ble Madras High Court in the case of CIT vs. Shri T. P. Textiles Pvt. Ltd. reported in 394 ITR 483 (Mad) wherein it was held as under:

> *"6.1. Therefore, the only issue, which arose for consideration before the Tribunal was, whether the additional depreciation, in the sum of Rs. 8,03,233/- could be claimed by the assessee in the relevant assessment year, i.e., the assessment year 2011-12, in respect of machinery, which was purchased and used for less than 180 days, in the previous year, 2009-10 (i.e., the assessment year 2010-11).*
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> *7. The Tribunal, relying upon its own judgment in the case of Fresh & Honest Cafe Ltd. V. DCIT, dated 10.08.2016, passed in I.T.A.No.1373/Mds/2016 allowed the appeal of the Assessee.*
>
> *7.1. Pertinently, in the judgment of the Tribunal, delivered in the case of Fresh & Honest Cafe Ltd. V. DCIT, reliance was placed on the judgment of the Karnataka High Court in the case of : CIT V. Rittal India (P.) Ltd., [2016] 66 taxmann.com 4 (Karnataka).*

7.2. The issue, which arose for consideration before the Tribunal in the Fresh & Honest Cafe Ltd. V. DCIT, was also, whether the Assessee could be allowed balance additional depreciation in the relevant A.Y., following the A.Y., in which, the machinery had been purchased, and put to use, albeit, for a period of less than 180 days.

7.3. The Tribunal has, thus, in the context of the provisions of Section 263 of the Act, considered, as to whether the assessment order, as passed, qua the issue encapsulated above, erroneous and/or prejudicial to the interest of the Revenue.

7.4. In order to appreciate the issue at hand, relevant provisions of Section 32 of the Act, to the extent applicable in the A.Y. in issue, would be required to be noticed :

> *"Section 32 (1) In respect of depreciation of –*
>
> *(i) buildings, machinery, plant or furniture, being tangible assets;*
> *(ii) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998, owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed -*
>
> *(i) in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the assessee as may be prescribed;*
>
> *(ii) in the case of any block of assets, such percentage on the written down value thereof as may be prescribed:*
>
> *Provided further that where an asset referred to in clause (i) or clause (ii) or clause (iia), as the case may be, is acquired by the assessee during the previous year and is put to use for the purposes of business or profession for a period of less than one hundred and eighty days in that previous year, the deduction under this sub-section in respect of such asset shall be restricted to fifty per cent of the amount calculated at the percentage prescribed for an asset under clause (i) or clause (ii) or clause (iia), as the case may be:*
>
> *(iia) in the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31st day of March, 2005, by an assessee engaged in the business of manufacture or production of any article or thing or generation or generation and distribution of power, a further sum equal to twenty per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii)." (Emphasis is ours)*

8. Pertinently, the Karnataka High Court, in a decision rendered in the case of CIT V. Rittal India (P.) Ltd., [2016] 66 taxmann.com 4 (Karnataka), has interpreted the aforesaid provision, in particular, the proviso incorporated therein. The Karnatake High Court, in the said case, has come to the conclusion that additional depreciation granted under clause (iia) of Section 32(1) of the Act is for the purpose of affording benefits to the Assessees and, to encourage industrialization, either by setting up a new industrial unit, or, by expanding a new industrial unit, by purchasing and installing a new machinery, or, plant, and putting the same to use for the purposes of business.

8.1. The Court, went on to say, that while, the proviso appearing in Section 32(1) restricts the claim of depreciation to 50% of the amount calculated at the percentage prescribed for an asset referred to in clause (iia), nowhere does it restrict allowance of the balance 50% of the additional depreciation, which in percentage terms, would be 10% in the succeeding A.Y.

8.2. The relevant observations made by the Division Bench of the Karnataka High Court in the case of CIT V. Rittal India (P.) Ltd., as contained in paragraphs 7, 8 and 9 of the said judgment, for the sake of convenience are extracted hereafter :

> *"..... 7. Clause (iia) of Section 32(1) of the Act, as it now stands, was substituted by the Finance Act, 2005, applicable with effect from 01.04.2006. Prior to that, a proviso to the said Clause was there, which provided for the benefit to be given only to a new industrial undertaking, or only where a new industrial undertaking begins to manufacture or produce during any year previous to the relevant assessment year.*
>
> *8. The aforesaid two conditions, i.e., the undertaking acquiring new plant and machinery should be a new industrial undertaking, or that it should be claimed in one year, have been down away by substituting clause (iia) with effect from 01.04.2006. The grant of additional depreciation, under the aforesaid provision, is for the benefit of the assessee and with the purpose of encouraging industrialization, by either setting up a new industrial unit or by expanding the existing unit by purchase of new plant and machinery, and putting it to use for the purpose of business. The proviso to Clause (ii) of the said Section makes it clear that only 50% of the 20% would be allowable, if the new plant and machinery so acquired is put to use for less than 180 days in a financial year. However, if nowhere restricts that the balance 10% would not be allowed to be claimed by the assessee in the next assessment year.*
>
> *The language used in Clause (iia) of the said Section clearly provides that "a further sum equal to 20% of the actual cost of such machinery or plant shall be allowed as deduction under Clause (ii)". The word "shall" used in the said Clause is very significant. The benefit which is to be granted is 20% additional depreciation. By virtue of the proviso referred to above, only 10% can be claimed in one year, if plant and machinery is put to use for less than 180 days in the said financial year. This would necessarily mean that the balance 10% additional deduction can be availed in the subsequent assessment year, otherwise the very purpose of insertion of Clause (iia) would be defeated because it provides for 20% deduction which shall be allowed....."*

9. We are in respectful agreement with the view taken by the Division Bench of the Karnataka High Court, passed in CIT V. Rittal India (P.) Ltd. (No.1)

10. According to us, these are provisions included by the Legislature in the Statute to give a fillip to new industries as also to existing industries, which seek to expand its sway, by investing in and making use of new plant and machinery.

10.1. The plain language of Section 32(1)(iia) read along with the relevant proviso would have us come to the conclusion that, there is no limitation in the assessee claiming the balance 10% of additional depreciation in the succeeding assessment year.

10.2. As a matter of fact, with effect from 01.04.2016, the ambiguity, if any, in this regard, in the mind of the Assessing Officer, stands removed by virtue of the Legislature, incorporating in the Statute, the necessary clarificatory amendment.

10.3. The amendment brought in the relevant proviso obtaining in Section 32, reads as follows:

> *" 32. (1) .....*
>
> *Provided also that where an asset referred to in clause (iia) or the first proviso to clause (iia), as the case may be, is acquired by the assessee during the previous year and is put to use for the purposes of business for a period of less than one hundred and eighty days in that previous year, and the deduction under this sub-section in respect of such asset is restricted to fifty per cent of the amount calculated at the percentage prescribed for an asset under clause (iia)for that previous year, then, the deduction for the balance fifty per cent of the amount calculated at the percentage prescribed for such asset under clause (iia) shall be allowed under this sub-section in the immediately succeeding previous year in respect of such asset: ....." (Emphasis is ours)*

11. We may only indicate that during the course of the arguments, our attention was drawn to the "Memorandum Explaining the provisions in Financial Bill, 2015", whereby, the aforementioned amendment was brought about.

11.1. The relevant part of the Memorandum is extracted hereafter:

> *"..... To remove the discrimination in the matter of allowing additional depreciation on plant or machinery used for less than 180 days and used for 180 days or more, it is proposed to provide that the balance 50% of the additional depreciation on new plant or machinery acquired and used for less than 180 days which has not been allowed in the year of acquisition and installation of*

such plant and machinery, shall be allowed in the immediately succeeding previous year.

This amendment will take effect from 1st April, 2016 and will, accordingly, apply in relation to the assessment year 2016-17 and subsequent assessment years."

11.2. A perusal of the extract of the Memorandum relied upon would show that the legislature recognised the fact that the manner in which the Revenue chose to interpret the provision, as it stood prior to its amendment would lead to discrimination, in respect of plant and machinery, which was used for less than 180 days, as against that, which was used for 180 days or more.

11.3. In our opinion, as indicated above, the amendment is clarificatory in nature and not prospective, as is sought to be contended by the Revenue. The Memorandum cannot be read in the manner, in which, the Revenue has sought to read it, which is, that the amendment brought in would apply only prospectively.

11.4. We are, clearly, of the view that the Memorandum, which is sought to be relied upon by the Revenue, only clarifies as to how the unamended provision had to be read all along.

11.5. In any event, in so far as the Court is concerned, it has to go by the plain language of the unamended provision, and then, come to a conclusion in the matter. As alluded to above, our view, is that, upon a plain reading of the unamended provision, it could not be said that the Assessee could not claim balance depreciation in the A.Y., which follows the A.Y., in which, the machinery had been bought and used, albeit, for less than 180 days.

12. Thus, having regard to the foregoing discussion, we are of the view that no interference is called for with the impugned judgment of the Tribunal.

13. The appeal is, accordingly, dismissed."

Respectfully following the aforesaid decision of the Hon'ble Madras High Court we are inclined to grant relief in respect of claim of additional depreciation of Rs. 1,43,24,748/- to the assessee. Accordingly, ground no. 3(a) raised by the assessee is allowed.

5. Ground nos. 3(b) and 4 raised by the assessee are general in nature and does not require any specific adjudication.

6. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the Court on 24.08.2018

Sd/-	Sd/-
[S.S. Viswanethra Ravi]	[M.Balaganesh]
Judicial Member	Accountant Member

Dated : 24.08.2018

SB, Sr. PS

Copy of the order forwarded to:
1. Tata Steel Processing and Distribution Ltd., Tata Centre, 43, Chowringhee Road, Kolkata-700071.
2. DCIT, Circle-8(2), Kolkata, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata-700069.
3..C.I.T(A).- 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches