

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "A", MUMBAI**

**BEFORE SHRI G.S. PANNU (AM) AND SHRI RAM LAL NEGI (JM)**

**ITA No. 4018/MUM/2016  
Assessment Year: 2011-12**

The Asst. CIT 6(2)(2), Room No. 563, Aayakar Bhavan, M.K. Road, Churchgate, Mumbai - 400020	<b>Vs.</b>	M/s Essar Infrastructure – Services Limited, Essar House, 11, K.K. Marg, Mahalaxmi, Mumbai - 400034  PAN: AABCE3527C
<b>(Appellant)</b>		<b>(Respondent)</b>

Revenue by : Shri Rajesh Kumar Yadav (DR)

Assessee by : Shri Vijay Mehta &  
Shri Anuj Kisnadwala (AR)

Date of Hearing: 25/05/2018  
Date of Pronouncement: 23/08/2018

**ORDER**

**PER RAM LAL NEGI, JM**

This appeal has been preferred by the revenue against the order dated 23/03/2016 passed by the Ld. Commissioner of Income Tax (Appeals)-12, Mumbai, for the assessment year 2011-12, whereby the Ld. CIT (A) has partly allowed the appeal filed by the assessee against assessment order passed u/s 143 (3) of the Income Tax Act, 1961 (for short 'the Act').

2. Brief facts of the case are that the assessee company engaged in the business of rendering infrastructure facility, investment in shares and security filed its return of income for the assessment year under consideration declaring Nil income. Since, the case was selected for scrutiny, the AO issued notice u/s 143 (2) and 142 (1) of the Act. In response to the said notices, the authorized

representative (AR) appeared before the AO and furnished the details called for. The AO after examining the details furnished by the assessee and hearing the AR, *inter alia* made addition of Rs. 25,64,591/- u/s 14A read with rule 8D of the Act and disallowed the brought forward unabsorbed depreciation against the income of the current year holding that in view of the amendment u/s 32(2) of the Act, the assessee is not entitled for such benefit w.e.f. assessment year 2002-03. In the first appeal, the Ld. CIT (A) deleted both the additions. The revenue has filed the present appeal against the findings of the Ld. CIT (A).

3. Aggrieved by the order of Ld. CIT (Appeals), the revenue has preferred this appeal before the Tribunal on the following effective grounds:-

1. *“On the facts and in the circumstances of the case and in law, the ld. CIT (A) has erred in deleting the disallowance made u/s 14A r.w.r 8D of Rs. 25,64,591/- ignoring the CBDT circular no. 5/2014 dated 11.02.2014 that disallowance u/s 14A has to be made irrespective of the fact whether any exempt income has been earned during the year by the assessee or not.*
2. *On the facts and circumstances and in law, the Ld. CIT (A) was right in holding that the unabsorbed depreciation pertaining to A.Y. 1997-98 to A.Y. 2001-02 was allowable to be carried forward and adjusted after the lapse of 8 assessment years in view of the section 32(2) as amended by the Finance Act, 2001?*
3. *On the facts and circumstances and in law, the Ld. CIT (A) has erred in holding that the amendment brought into the section 32(2) by the Finance Act, (No. 2) of 1996 in respect of unabsorbed depreciation pertaining to A.Y. 1997-98 to A.Y. 2001-02 is no longer applicable ignoring the decision in Times Guaranty Ltd. (ITA No. 4917 & 4918/Mum/2008) for A.Y. 2003-04 & A.Y. 2004-05 on which the Revenue’s contention has been upheld.”*

4. Before us, the Ld. departmental representative (DR) submitted that the Ld. CIT(A) has deleted the addition u/s 14A read with Rule 8D of the Income

Tax Rules made by the AO in contravention of CBDT Circular No 5/2014 dated 11.02.2014, which contemplates that disallowance u/s 14A has to be made irrespective of the fact whether the assessee has earned exempt income or not during the relevant assessment year. The Ld. DR further submitted since the impugned order is not in accordance with the CBDT Circular aforesaid, the same is liable to be set aside. As regards unabsorbed depreciation pertaining to the assessment year 1997-98 to 2001-02, the Ld. DR submitted that the Ld.CIT (A) has wrongly held that the amendment brought in section 32(2) by the Finance Act 2 of 1996 not applicable to the case of the assessee ignoring the decision of the Mumbai Tribunal rendered in the case of *Times Guaranty Ltd. ITA No. 4917 and 4918/Mum/2008* in which the contention of the revenue has been upheld.

5. On the other hand, the Ld. counsel for the assessee relying on the findings of the Ld. CIT(A) submitted that there is no infirmity in the findings of the Ld. CIT(A) as the first issue is covered in favour of the assessee by the judgments of the Hon'ble High courts of Delhi, Punjab & Haryana and the Allahabad. So far as the second issue is concerned, the Ld. counsel submitted that the Ld. CIT(A) has decided the issue of unabsorbed depreciation in favour of the assessee by following the decision of the then CIT(A) passed in assessee's own case for the assessment year 2009-10. The Ld. counsel accordingly contended that there is no merit in the appeal of the revenue.

6. We have heard the rival submissions and also perused the material on record. Vide Ground No. 1, the assessee has challenged the action of the Ld. CIT (A) in deleting the addition made by AO u/s 14A read with rule 8D. The Ld. CIT (A) has deleted the addition holding as under:-

*“11. Ground of Appeal No. 3 relates to the disallowance of expenses of Rs. 25,64,591/- u/s 14A of the Act. It is seen that the appellant's main contention is that if there is no exempt income, then the*

*disallowance u/s 14 was not triggered off. The appellant has not disputed the facts that the appellant has not received the exempt income during the year. I find merit in the submission of the appellant that unless and until, there is receipt of exempted income for concerned assessment years, section 14A cannot be invoked. This view has also been held by Hon'ble Delhi High Court Holeim India Pvt. Ltd. ITA No. 486/2014 and 299/2014, Hon'ble High Court of Punjab & Haryana in the case of Lakhani Marketing Inc (49 taxmann.com 257) and Hon'ble High Court of Allahabad in the case of CIT Vs. M/s Shivam Motors (P) Ltd. ( 55.taxmann.com 262). Thus the addition is liable to deleted.”*

7. We notice that the Ld. CIT (A) has deleted the addition by following the judgments of Hon'ble High Courts referred above. Further in the cases of *Cheminvest Ltd. vs. CIT -IV 378 ITR 33 (Del)*, the Hon'ble Delhi High Court has held that section 14A does not apply where no exempt income is received or receivable during the relevant previous year. In the present case, since the assessee has not received any exempt income during the previous year relevant to the assessment year under consideration, no question of disallowance does arise in the light of the ratio laid down by the Hon'ble High Courts in the cases discussed above. Since, the findings of the Ld.CIT (A) are based on the principles of law laid down by the Hon'ble High Courts referred above, we uphold the findings of the Ld. CIT (A) and dismiss this ground of appeal of the revenue.

8. Vide Ground No. 2, the revenue has challenged the action of the Ld. CIT (A) in holding that the unabsorbed depreciation pertaining to the A.Y. 1997-98 to 2001-02 was allowable to be carried forward and adjusted after the lapse of 8 assessment years. In the return of income, the assessee company claimed unabsorbed depreciation pertaining to the assessment year 1998-99 and 1999-2000 amounting to Rs. 17,10,26,398/-. The AO disallowed the claim on the ground that as per

the provisions u/s 32(2) applicable during the relevant period unabsorbed depreciation could be carried forward up to eight years. The Ld. CIT (A) has decided this issue in favour of the assessee by following the decision of the then CIT (A) passed in the assessee's own case for the A.Y. 2009-10. The findings of the Ld. CIT (A) are as under:-

*“Attention was invited to order in appellant's own case for A.Y. 2009-10 vide CIT (A)-9/ITO 5(1)(4)/436/2011-12 DT. 27.8.2013 wherein the CIT (A) has allowed the issue in favour of the appellant. Therefore since the issue here is also identical to the appellant's own case for A.Y. 2009-10 respectfully following the CIT (A)'s order this Ground of Appeal No. 4 is allowed”*

9. Though, the Ld. CIT (A) has decided the said issue in favour of the assessee by following the decision of his predecessor passed in the assessee's own case for the assessment year 2009-10, however, as pointed out by the Ld. counsel this issue is covered by the decision of the Hon'ble Gujarat High Court in the case of *General Motors India Pvt. Ltd. vs. DCIT 354 ITR 244 (Guj)* in which the Hon'ble High. In the said case, the issue before the Hon'ble High Court was that whether the unabsorbed depreciation pertaining to the assessment year 1997-98 could be allowed to be carried forward and set off after a period of 8 years or it would be governed by section 32 as amended by the Finance Act, 2001. The Hon'ble Court decided the said issue in favour of the assessee holding that the provisions of section 32(2) of the Act as amended by the Finance Act, 2001 would allow the unabsorbed depreciation allowance available in the assessment years 1997-98, 1999-2000, 2001-02 to be carried forward to the subsequent years and if any unabsorbed depreciation or part thereof could not be set off till the assessment year 2002-03 then it would be carried forward till the time it is set off against the profit and gains of the subsequent years. The coordinate Bench of the Tribunal has decided the identical issue in favour of the assessee in the case of the *DCIT vs. P.Z. Cussons*

*India Pvt. Ltd. ITA No. 1428/M/2016 A.Y. 2006-07 ITA No. 1429/M/2016 A.Y. 2007-08 and ITA No. 1430/M/2016 A.Y. 2011-12* by following the judgment of the Hon'ble Gujarat High Court in the case of General Motors India Ltd. (supra). Since, the findings of the Ld. CIT (A) are in accordance with the law laid down by the Hon'ble Gujarat High Court in the aforesaid case, we do not find any infirmity in the said order to interfere with. We therefore dismissed ground no. 2 and 3 of the revenue's appeal.

In the result, appeal filed by the revenue for assessment year 2011-2012 is dismissed.

Order pronounced in the open court on 23<sup>rd</sup> August, 2018.

*Sd/-*

(G.S. PANNU)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 23/08/2018

Alindra, PS

*Sd/-*

(RAM LAL NEGI)

JUDICIAL MEMBER

**आदेश प्रतिलिपि अग्रेषित/ Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /  
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

**आदेशानुसार/ BY ORDER,**

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)**  
**आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**