

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

श्री डी. करुणाकरा राव, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No. 1776/PUN/2016

निर्धारण वर्ष / Assessment Year : 2012-13

M/s. Mula Pravara Electric Co-op.

Society Ltd.,

Ward No.7, Belapur Road,

Tal. Shrirampur,

Dist. Ahmednagar

PAN : AAAAT3309A

.....अपीलार्थी / Appellant

बनाम / V/s.

DCIT, Ahmednagar Circle,

Ahmednagar

.....प्रत्यर्थी / Respondent

Assessee by : Shri S.M. Doshi

Revenue by : Shri Amit Dua

सुनवाई की तारीख / Date of Hearing : 24.08.2018

घोषणा की तारीख / Date of Pronouncement : 28.09.2018

आदेश / ORDER

PER D. KARUNAKARA RAO, AM :

This is the appeal filed by Assessee against the order of CIT (Appeals)-2, Pune, dated 30.06.2016 for the A.Y.2012-13.

2. Grounds raised by the Assessee are extracted here as under:

"1. On the facts and the circumstances of the case, the Ld. CIT(A) has erred in sustaining the assessment order passed by the AO holding that the appellant **has discontinued its business** and in the process CIT(A) has further erred in **confirming the disallowance of business expenses** including depreciation totaling to Rs.41,89,87,895/- debited to the P&L Account.

2. On the facts and in the circumstances of the case and in continuation with ground No.1 CIT(A) has erred **in not giving the benefit of carry forward of current year business loss** of Rs.41,82,75,484/-.

The above grounds of appeal may kindly be allowed to be amended, altered and/or modified in the interest of natural justice."

3. Briefly stated relevant facts of the case are that the assessee is a society engaged in the business of Distribution of Electricity-a service provider. Assessee filed the return of income declaring loss of Rs.16.23 crores (rounded off). Subsequently, the return was revised by revising the loss at Rs.43.04 crores (rounded off). During the scrutiny proceedings, AO noticed that the assessee reflected the rental income of Rs.1,59,831, scrap sales of Rs.5,29,950/- and miscellaneous receipts of Rs.22,630/- totalling to Rs.7,12,411/-. Against this income, assessee claimed various expenses including VRS expenditure of Rs.41.90 crores (rounded off). As such, no income on account of the core activity of "distribution of electricity" is reported by the assessee in the year under consideration.

3.1 Regarding the electricity distribution business, assessee was engaged in the business for the past 20 years under the license issued by Government of Maharashtra under the provisions of Indian Electricity Act, 1910. The license was renewed from time to time. Eventually, the said license granted to the assessee expired on 31-01-2011. The Maharashtra Electricity Regulatory Commission (MERC) issued license to the Maharashtra State Electricity Distribution Company Limited (MSEDCL) for distribution of electricity to the specified areas. Thus, the assessee was ordered to hand over the infrastructure and database of clientele etc. of the assessee to MSEDCL.

3.2 On these facts, AO issued a show cause notice to the assessee proposing to treat the assessee as closed business and resultantly, the assessee shall not be eligible to claim the business expenditure as allowable as well as not eligible for carry forward of business losses. AO observed that the removal of employees of the assessee under Voluntary Retirement Scheme (VRS) supports the AO's decision. In response,

assessee submitted that the said development of handing over the business to MSEDCL by MERC is a temporary phenomenon. In this regard, assessee submitted that the facts relating to the pendency of the appeal by the assessee before the Appellate Tribunal for Electricity which set aside the order of the MERC No. 39/2011, dated 17-12-2011. In this order, the Appellate Tribunal for Electricity (APTEL) directed the MERC **to consider** the issuing of license to the assessee and dispose the issue on merits. There is an **indication of renewing/granting license** to the assessee as well as to MSEDCL to operate in some areas. The assessee challenged the same before the Appellate Tribunal for Electricity (APTEL) vide No.222 and 223/2014. In this regard, the APTEL passed an order dated 13-03-2015 requiring the MSEDCL to pay Rs.50 crores till the final quantum of dues is decided. Thus the assessee tried to demonstrate the existence of business operations of the assessee and argued that the expenditure of Rs.41.90 crores (rounded off) is incurred for business purposes. Assessee pleaded for allowing the claim of expenditure and also for carry forward of the current year losses.

3.3 In the assessment, AO considered the above submissions of the assessee and concluded that there is no possibility of revival of the business. AO held that the business of the assessee is substantially a closed one and the assessee is only to receive the compensation or rent from the MSEDCL for handing over of the entire infrastructure of the assessee. Further, AO discussed certain case laws, i.e. New Seven Sugar and Gur Refinery Co. Ltd. Vs. CIT 74 ITR 7 (SC), Madras Silk and Rayon Mills Pvt. Ltd. Vs. ITO & Another 262 ITR 122 (Mad.), Universal Plast Limited Vs. CIT 237 ITR 454 (SC), Guntur Merchants Cotton Press Company Ltd. Vs. CIT 154 ITR 861 etc. and held that, how a particular

receipt of income is taxed under the “income from business” or from “income from other sources” is specific to the facts of that case. Further, he also discussed intention of the assessee to resume the business after obtaining the license from the Govt. AO opined that the intention to carry on the business is the determining factor.

3.4 Further, referring to the judgment of the Appellate Tribunal for Electricity dated 13-03-2015, the assessee mentioned that the APTEL directed the State Commission to evaluate the assets of the assessee and to pay Rs. 1 crore per month towards the lease rent of the infrastructure owned and handed over by the assessee. The fact of about granting 10% interest per annum to compensate the outstanding amount due to assessee was also directed by the State Tribunal. Based on these, AO concluded that assessee is not going to resume the business of distribution of electricity and it is only to earn rental income from the laying of the infrastructure of MSEDCL. Referring to the Supreme Court judgment in the case of Universal Plast Limited Vs. CIT 237 ITR 454 (SC) and Vikram Cotton Mills Ltd. 169 ITR 597 (SC), the AO highlighted the “intention of the assessee” to start or to stop the business and in Para No.16 of the assessment order, the AO concluded by stating if there is no intention to resume the business the transaction of earning rent will not be for business purposes. Applying the same to the case of the assessee, the AO relied heavily on the order of the Appellate Tribunal for Electricity (APTEL) and treated the income earned by the assessee under the head income from other sources. Contents of Para No.19 are relevant in this regard and therefore, we proceed to extract the same here as under :

“19. In view of above, the entire income claimed under the head of rent income, income from sale of store scrap material and other misc. receipts, i.e. Rs.7,12,411/- as per Para-111 “Misc. Revenue” to the profit & Loss

Account for the year ending as on 31-03-2012 treated income under the head of "Income from other sources."

3.5 Resultantly, considering the decision of AO on the cessation of business of the assessee, the AO did not allow the claim of business expenditure and allow the carry forward and set off of earlier years brought forward losses against the income reported by the assessee in this year. Eventually, the AO taxed the said sum of Rs.7,12,410/- as "income from other sources".

4. Aggrieved with the same, the assessee filed an appeal before the First Appellate Tribunal and raised various issues relating to the discontinuation of business treating the income as income from other sources denying the carry forward of losses etc.

5. **Before the CIT(A)** : Assessee filed various written submissions during the proceedings before the CIT(A). Assessee relied on various judgments/orders passed by MERC, APTEL, Hon'ble Supreme Court to demonstrate the intention to continue the business. Further, assessee relied on various judgments in its favour and contended that his case is not the case of discontinuation of business and it is merely a temporary phenomenon. Assessee would resume the business soon after the license is renewed. Therefore, assessee requested for reversing the order of the AO. He also submitted the facts relating to the pending judicial proceedings before the Hon'ble Supreme Court and also relied in the interim order of the Hon'ble Supreme Court dated 11-05-2016. Infact, the Hon'ble Supreme Court upheld the order of the APTEL dated 06-05-2016 and on the compensation issue, the Hon'ble Supreme Court gave a direction to State Commission to release Rs.64 crores from MSEDCL to the assessee and also directed for considering the infrastructural assets of

the company as security against the same. The Hon'ble Supreme Court also directed the assessee to furnish the undertaking that, incase, the assessee is entitled to said amount as per the final order it will refund the said amount with interest. Based on these, assessee submitted that the assessee stand a chance of winning on the core issues and for this, assessee rely on the courts observation about the assets and the possibility of winning is not ruled out. The decisions relied upon by the assessee are enlisted in pages 9 to 11 of the order of CIT(A). In para No.5 of his order, the CIT(A) extracted the contents of Para Nos. 4 to 17 of the AO's order and gave his conclusion against the assessee as per the discussion given in Para No.5.2 of the order of CIT(A). The contents of the same as extracted here as under :

"5.2.1 I have examined the facts of the case on this issue. It is seen that the appellant society was having distribution license till 31st January 2011. Thereafter the regulatory authority, i.e. MERC called for expression of interest from prospective applicants and after considering the applications filed, the distribution license was finally issued in favour of Maharashtra State Electricity Distribution Company Ltd. (MSEDCL). The relevant operative part of the order of MERC dated 27-01-2011 reads as under :

"xiv. Accordingly the MPECS is required to vest the undertaking of distribution to the new licensee.

xv. Over the period of 40 years, MPECS has expanded the distribution network, it inherited from erstwhile MSECS. Now, as fresh Distribution License to MPECS is rejected by the Commission, there is no use of distribution network for MPECS. Therefore, in the interest of the consumers in MPECS area, the Commission directs MPECS, to hand over their complete distribution network and allied equipments and asset to MSEDCL, MPECS will however be entitled to claim value for the assets handed over. MPECS may file a separate petition before the Commission for deciding transfer value of their asset, with all relevant documentary evidence.

xvi. Also, MPECS is directed to handover all the consumer and billing database in hard as well as soft format to MSEDCL. The Commission also directs MPECS to hand over the scrutiny deposits paid by the consumers to MSEDCL, along with records, and not to create any third party interest on the security deposit held by them.

*xvii. Keeping in view the larger interest of all consumers in this Area, consisting of **183 villages in five talukas**, the Commission directs the Directors, the Management and Officers of the MPECS to provide all help and assistance to the Management and Officers of*

MSEDCL, to ensure a smooth transition from the existing "Service Provider" (MPECS) to a "New Service Provider" (MSEDCL) with effect from 1st February, 2011."

5.2.1 On a perusal of the aforesaid order issued by MERC, it is very clear that after detailed examination of various proposals received, MERC issued the license to MSEDCL and the appellant was directed to hand over the entire infrastructure of electricity distribution, power system including electrical system, substations, overhead lines, service lines, offices and associate facilities like land, buildings, materials, stores and plants in the areas of its operation w.e.f. 01-02-2011. Not only that, the appellant was also directed to handover the consumer and billing database including security deposits paid by the customers to MSEDCL.

5.2.2 In view of the above facts, it was rightly held by the Assessing Officer that for all purposes business of electricity distribution of the appellant society was discontinued and closed w.e.f. 01-02-2011. No such activity could be started even up to the current year and there was no possibility of restarting the business. All the decisions on the appellants appeal till date are against the appellant. This point is further cemented by the fact that almost all employees of the appellant society were granted VRS. I am therefore in agreement with the view of the Assessing Officer that the business activity of the appellant has discontinued and therefore claim of allowing any business expenses or depreciation does not arise at all.

5.2.3 The reliance placed by the appellant on various decisions are distinguishable on facts. In the case relied upon on I.C.D.S. Ltd. Vs. CIT, the fact was entirely different as in that case the assessee was engaged in the business of hire purchase and leasing and High Court held that the assessee was entitled to claim depreciation on the leased vehicles. No such fact is there in the present case.

5.2.4 The appellant has also placed reliance on the case of CIT Vs. Vellore Electric Corporation. In this case, the appellant had claimed establishment, salary and other expenses which was disallowed by the Assessing Officer and in view of the appeal filed by the assessee it was held by the Hon'ble Court that these expenses were allowable. However facts are little different in the present case as because in the present case the appellant was directed to handover all assets including database and security deposits of the customers to new licensee, i.e. MSEDCL. Not only that in the present case, the appellant society itself has given VRS to almost all of its employees. Such facts were not present in the cited case.

5.2.5 The appellant has also placed reliance on the case of K.N.P. Securities, ITAT, Mumbai. The facts are again distinguishable and in the cited case SEBI had cancelled the registration of the assessee for being involved in shares scam. However in the present case no such fact is there and in fact the entire business asset and all related establishments and databases were transferred to new licensee. No such fact is there in the cited case.

5.2.6 I accordingly uphold the action of the Assessing Officer in holding that the business of electricity distribution of the appellant society has been closed and therefore it is not entitled for any claim of business expenses and depreciation. Ground of appeal No.1 is accordingly dismissed."

From the above, it is evident that the CIT(A) relied heavily on the order of the APTEL and MERC for considering the assessee as a discontinued entity. CIT(A) also relied on certain decisions for deciding the issue against the assessee. Handing over of the assets of the society, retrenchment of the employees of the society, handing over of databases etc., are other supporting reasons.

6. Further, on the issue of taxability of rental income of Rs.1,59,831/-, the CIT(A) held that the same is taxable as “income from house property” and not under the head “income from other sources” as held by the AO. Accordingly, the CIT(A) allowed this issue in favour of the assessee. Other receipts such as scrap scales/misc. receipts are treated as “income from other sources:”. In the result, the CIT(A) partly allowed the appeal of the assessee.

7. Aggrieved with the same, the assessee filed the appeal before us with the grounds extracted above.

BEFORE THE TRIBUNAL

8. At the outset, Ld. Counsel for the assessee narrated the aforementioned facts of the case/issue and filed the paper books giving the various orders of the MERC, APTEL, interim orders of the Hon’ble Supreme Court, the proceeding of the committees of State Govt. etc. He also filed the compendium of Judgments to establish the law on the issue of intention of the assessee, continuation of business, related issues of allowability of expenses and set off of carry forward of losses etc. After all these things, Ld. Counsel listed the issues for adjudication and the same are (A) Whether the business stands discontinued – the intention of the assessee vide the judgment of Hon’ble Supreme Court in the assessee’s

own case; (B) Whether the Expenses debited to Profit and Loss Account constitute business expenditure eligible for claim of deduction u/s.37 of the Act; and (C) Whether the assessee is eligible to carry forward of the losses after set off against the current years business income as claimed by the assessee.

We shall deal with each of these 3 issues separately in the succeeding paragraphs of the order.

(A) Whether the business of assessee stands discontinued – the intention of the assessee vide the judgment of Hon’ble Supreme Court in the assessee’s own case

9. During the proceedings before us, Ld. Counsel for the assessee filed a thick paper book as well as chart of major developments pertaining to the business of the assessee. The said chart contains the chronology of events and brief narration of the issues. For the sake of completeness, the said chart is extracted here as follows :

CHART SHOWING VARIOUS EFFORTS UNDERTAKEN FOR RENEWAL OF LICENSE/BUSINESS - INTENTION

Sr.No.	Date	Event	Remark
1	28-01-1971	License for carrying on the business of electricity granted by Government of Maharashtra. Electricity to be provided in the area of 167 villages of 4 talukas namely Rahuri, Shrirampur, Newasa and Sangamner. The validity of the license is of 20 years, i.e. expiring on 31-01-1991	See page 7 to 15 of paper book
2	02-05-2000	Renewal of license by Notification dated 02-05-2000 upto 31-01-2011	See page No.17 & 18 of paper book
3	27-01-2004	MERC by its letter dated 27-01-04 required Secretary (Energy) Industries, Energy and Labour Department to submit its views on the findings and recommendations relating to the viability of the appellant	
4	24-08-2004	GOM by its GR dated 24-08-2004 directed MERC to allow the appellant to continue its operation as distribution license and for that purpose providing revenue subsidy of Rs.72 crores and capital subsidy Rs.4 crore per annum	See Page No.168 & 169 of paper book

5	13-07-2010	Administrative Staff College of India furnished the report recommending for getting its license renewed	See Page No.579 to 587 of this synopsis
6	28-07-2010	Maharashtra Electricity Regulatory Commission (MERC) invited "Expression of Interest" for granting the license for the period after the expiry of license on 31-01-2011 by publishing notice to that effect in newspaper. Appellant and other filed applications in response to invitation by MERC of Expression of Interest. Applicant filed application on 28-07-2010 for renewal. Of these 6 applicants there remained only 2 applicants namely appellant and Maharashtra State Electricity Distribution Ltd. (MSEDCL)	See Page No.19 to 35 of paper book
7	27-01-2011	MERC on examining the applications filed by MSEDCL and appellant granted license to MSEDCL and refused the renewal of license to appellant vide its order in Case No.85 and 87 dated 27-01-2011	See Page No.42 to 53 of paper book. In para 24 of this order MERC has given the reasons for not granting the renewal of license to the appellant
8	16-12-2011	The Appellate Tribunal for Electricity (APTEL) on an appeal filed by the appellant by its Case No.39 of 2011 set aside the order of MERC with the direction to reconsider the application for renewal of license and considering the feasibility of granting license to both MSEDCL and appellant to provide the electricity in the said area. The Tribunal in this order clearly held that : i. License already to appellant is neither suspended nor revoked. ii. MERC has no power to direct the transfer of assets unless its existing license is suspended/revoked. iii. It cannot direct the appellant to vest all its assets in MSEDCL. iv. Since no proper opportunity was given directed MERC to reconsider the application of the appellant	See Page No.61 to 124 of paper book. Particularly 117 to 124 of paper book
9	15-10-2012	MERC in interim order dated 15-10-2012 directed MSEDCL to pay the user charges of Rs. 1 crore per month for using the infrastructure etc of the appellant as temporary arrangement	See Page No. of paper book
10	28-02-2014	Supreme Court order the appellant to hold the election	See Page No.182 & 183 of paper book
11	18-06-2014	MERC gave effect to the above order of APTEL by its order dated 18-06-2014. In this order MERC has neither refused renewal of license nor revoked or suspended. It however directed the appellant to file fresh application	See Page No.125 to 161 of paper book

12	31-07-2014	Appellant filed appeal No.222 and 223 against the MERC order dated 18-06-2014 reiterating that it only should be granted the license and to hold that MSEDCL is not distribution license	See Page No.163 & 164 of paper book and page No.296 to 578 of the synopsis. Particularly Page No.431
13	30-09-2015/ 16-08-2016/ 25-09-2016	Resolutions passed by the appellant in order to pursue the Government to grant the renewal of license	See Page No.588 to 590 of synopsis
14	01-03-2016	GOM vide its order dated 01-03-2016 as per its resolution dated 07-11-12 appointed the committee to recommend the reality of the demand of the appellant by its letter dated 01-03-2016	See Page No.172 & 173 of paper book. This committee has not yet given the report
15	11-05-2016	Order of Supreme Court directing appellant to give undertaking to refund the user charges paid by MSEDCL with interest on sorting out issue of granting the license if it goes against the appellant	See Page No.626 to 628 of paper book
16	13-05-2016	Undertaking given by appellant as per the order of Supreme Court	See Page No.605 to 606 of paper book
17	04-01-2018	Business Plan obtained from World Institute of Sustainable Energy (WESE) Pune	See Page No.599 to 603 of paper book

Summary of Chart : From the above chronology of events, Ld. Counsel for the assessee submitted that the assessee is licensed to be a service provider qua the distribution of electricity to 183 villages spread over in Five Mandals of the State of Maharashtra. Assessee is engaged in this business activity since 1971. Referring to the above chart of chronology of events, Ld. Counsel for the assessee labored extensively to demonstrate that the assessee has always been for continuation of the business. Assessee had to struggle at the time of **first renewal in 2000 till** the license was renewed on 02-05-2005, doing the business for another period of 20 years. Eventually, the license was renewed. Presently, for renewal, only the assessee has been litigating before MERC, APTEL and Hon'ble Supreme Court against the decision of not renewing of license, not awarding of compensation in lieu of use of the assets of the company by the MSEDCL etc. Assessee spent huge amount of time and money in this endeavour and it is all for the purposes of the continuation of

business. Having considered the factual matrix and the various steps taken up by the assessee for continuation of business/renewal of license, we shall now proceed to examine the "intention" of assessee for continuation of business in the following paragraphs.

10. Intention to carry on the business of service provider qua the Electricity Distribution – Case of the assessee : Before us, on this issue, Ld. Counsel for the assessee filed a written submission explaining the facts and the issues and submitted various arguments enlisted from A to O of the written submissions. The same are extracted as under :

"A The AO. as well as the Ld. CIT(A) placed their heavy reliance.

- i. Order of MERC in Case No.85 & 87 of 2010 dated 27/01/2011*
- ii. The Assessee society has given VRS 1522 employees.*

B. The reliance placed on Order dated 27/01/2011 of MERC by the both the Authorities is misplaced as said order is nonest as the same has been set aside by the Appellate Tribunal for electricity, Delhi (APTE) allowing the Appeal filed by the Assessee being Appeal No.13 of 2011 order dated 16/12/2011 (Page No._ Paperback).

- Hon'ble APTE, Delhi held that impugned order of MERC dated 27/01/2011 is set aside.

- MERC's direction for handing over assets to the MSEDCL is not in accordance with law.

- Matter was set aside to MERC for fresh adjudication and also to consider granting of licence to the Assessee with MSEDCL. (Page No._ Paperback).

C. In respect of determination of interim compensation/user charges directed MSEDCL to pay Rs.1 Crore per month (Case no.24 of 2012 Order dated 15th October, 2012).

D. MERC did not finalise the compensation/charges payable by MSEDCL for the use of assets and infrastructure of the Assessee and disposed of Case No.24 of 2012.

E. MSEDCL refused to pay ad interim user charges/compensation as directed by MERC on adhoc basis.

F. Assessee challenged order passed by MERC dated 15th October, 2012 on the issue of payment of ad interim compensation/user charges by filing appeal in the APTE, New Delhi. The APTE directed MSEDCL vide order dated 13th March, 2015 to pay Rs.1 crore per month as per interim

order dated 15/10/2012 in Case No.24 of 2012 by MERC. APTEL also directed MERC to do valuation of the assets of the assessee through independent agency and determine user charges/compensation.

G. MSEDCL challenged the order of the APTE dated 13th March, 2015 in the Hon'ble Supreme Court, i.e. Civil Appeal No.6079 of 2015. Hon'ble Supreme Court dismissed appeal of the MSEDCL vide order dated 17/09/2015 and directed MSEDCL to deposit user charges in the MERC, Mumbai. The Hon'ble Supreme Court also directed MERC to make investment in bank Fixed Deposits and disbursement of deposit shall be subject to final outcome of the dispute (Page No._ paper book S.C. order)

H. MERC disposed of the interim application of the Assessee vide order dated 02/05/2016 on the issue of payment of the interim user charges/compensation.

I. MERC also disposed of the application of the Assessee being Case No.87 of 2010 by declining to grant license and directed the Assessee to file fresh application vide order dated 18-06-2014. Assessee challenged the order of the MERC, Mumbai in Hon'ble APTE, New Delhi which is registered as Appeal No.223 of 2014 **which is presently pending hearing and final adjudication on the issue of grant of license to the Assessee society.** The assessee society is fighting its case for renewal and grant of license under Electricity Act, 2003. **The matter has not reached the finality.** The orders of Hon'ble APTE, Delhi challenged by MSEDCL before the Hon'ble Supreme Court were on the issue of payment of interim compensation/user charges. As on today MSEDCL challenged all the order passed by Hon'ble APTE, Delhi.

J. The Assessee submit that the orders of the MERC and APTE on the payment of interim compensation/ user charges reached the Hon'ble Apex Court and as per the order of the Apex Court dated 11/05/2016 it is clarified that Assessee should file undertaking in case it is not entitled to the amount of interim compensation/user charge, the shall be refunded to MSEDCL.

K. The reliance placed by the Assessing Officer as well as Ld. CIT(A) on the following decision is totally misplaced, as the facts are totally different.

a. In case of Savan Sugar and Gur Refinery Company Ltd. (Supra) - In this case the said Assessee lease out its building, machinery and plant for initial period of five years with option to renew the list. Assessee had option to terminate lease after first two years. On interpretation of the terms of the lease deed it was held that intention of said Assessee was to go out of business.

b. In case of Madras Silk & Rayon Mills (P) Ltd. (Supra) - Company was running into losses and sold most of his machineries without carrying on any manufacturing activity and lease out its premises. In backdrops of those facts it was held that lease rent cannot be treated as a business income.

c. In case of Universal Plast Ltd. (Supra) - The Apex Court laid down following important guidelines.

1. no precise test can be laid down to ascertain whether income (referred to by whatever nomenclature, lease amount, rents, licence fee) received by an assessee from leasing or letting out of assets

would fall under the head 'Profits and Gains of business or profession';

2. it is a mixed question of law and fact and has to be determined from the point of view of a businessman in that business on the facts and in the circumstances of each case, including true interpretation of the agreement under which the assets are let out;

3. where all the assets of the business are let out, the period for which the assets are let out is a relevant factor to find out whether the intention of the assessee is to go out of business altogether or to come back and restart the same:

4. if only or a few of the business assets are let out temporarily while the assessee is carrying out his other business activities, then it is a case of exploiting the business assets otherwise than employing them for his own use for making profit for that business; but if the business never started or has started but ceased with no intention to be resumed, the assets also will cease to be business assets and the transaction will only be exploitation of property by an owner thereof, but not exploitation of business assets.

L. The Assessee also placed reliance on the decision of the Hon'ble Apex Court in the case of Universal Plast Ltd. (Supra). In fact the facts laid down in said decision support the contention of the Assessee that **intention of the Assessee** is not to go out of business but Assessee is fighting legal battle for restoration of its licence to resume its business.

M. In the case of CIT Vs. Vellore Electric Corporation Ltd. - 243 ITR 529 (MAD). Said Assessee was private electric company. Its undertaking vested with the State Government due to enactment of the Tamil Nadu Electricity Supply Undertaking (Acquisition) Act, 1973. Said Assessee challenged validity of that Act in the Supreme Court. The Assessee claimed expenditure on salary paid to employees and other expenses. Hon'ble High Court confirmed the order of the Tribunal holding that it cannot be said that **there was a permanent closure of Assessee's business as validity of the Act** was pending in Supreme Court and said company was maintaining establishment was indication of its intention to resume business.

N. It is submitted that in the AGM by the members of Assessee's Society it was resolved to fight for grant of licence. Copy of AGM Resolution No. 17(5) dated 30/09/2015 and Resolution No.17(5) dated 25/05/2016 are filed in the Paperbook. The Assessee also approached to the World Institution for Sustainable Energy and Sought the Business Plan (copy submitted). The Assessee is also pursuing the issue of restoration of licence with the Govt. of Maharashtra. It is submitted that the fact and evidences support the case of the Assessee that it has intention to restart business once license is restore.

O. The issue of VRS given to the employees cannot be taken as a ground by the Assessing Officer as well as Ld. CIT(A) to come to erroneous conclusion that Assessee has closed down its business permanently. The Industrial Dispute Act, 1947 gives right to the employer to retrench his employees/workmen Sec.25(F) of the I.D. Act, 1947, if employees are surplus and employer unable to give work to his employees. Till today minimum required employees/staff are with the Assessee looking after day to day matters and also pursuing Court cases. Hence, it is submitted that claim of expenses, brought forward losses and the depreciation cannot be denied to the Assessee and the

same may be allowed under the head Profit and gains, business or profession i.e. as business loss.”

Thus, as per the Ld. Counsel for the assessee, the case of the AO is that, with the removal of 1522 employees through the VRS and also when the MERC ordered for non-renewal of license, the business of the assessee should be considered discontinued. In this regard, the intention of assessee is not a relevant factor. Consequently, the claim of expenditure is not an allowable one and the loss computed for this year under consideration is not allowable to be set off against the business income earned by the assessee in the year under consideration and also not allowable for the carry forward benefits u/s.70 to 71 of the Act.

10.1 In reply, Ld. Counsel commented the above conclusion of the AO is factually erroneous. The fact is that the order of MERC stands set-aside by the APTEL in appeal proceedings. APTEL directed for fresh consideration of the assessee's claim. The MSEDCL, who is now given the job of power distribution to the said villages, also did not comply with said order of the MERC in matters of payment for use of the assets/infrastructure of the assessee. In the interim order, the assessee was to receive Rs.1 crore per month as per the order of the APTEL. Against the said order, MSEDCL approached the Apex Court and its attempt for non-payment of fee to assessee did not fructify. Hon'ble Apex Court confirmed the direction of APTEL and detailed the available safeguard for the MSEDCL for recovery of the fee paid to the assessee in case the assessee requests for license is eventually allowed. As per the assessee, such a direction or the observation of the Hon'ble Supreme Court is taken as hope to assessee in matters of the core issue of renewal of license.

10.2 As on date, the MERC is still ceased up with the issue of granting or renewal of license to the assessee vide the Appeal No.223 of 2014. Assessee also distinguished series of judgments relied upon by the AO vide the discussion in Para “K” vide Para 10 above. In Para “L & M” above, Ld. Counsel highlighted the test relating to “intention” of the assessee vide the Apex Court’s judgment in the case of Universal Plast (supra).

10.3 Further, Ld. Counsel rely on another judgment of Hon’ble Supreme Court in the case of M/s. Vellore Electric Corporation Ltd. (supra) and submitted, like the assessee’s case, the company was taken over Govt.of Tamilnadu, employees were removed and expenses was incurred on salaries etc.. In the context of disallowing of the claim of business expenditure u/s.37 of the Act, Hon’ble Supreme Court highlighted the “intention” of the assessee to stay in the business and decided the issue in favour of the assessee.

10.4 Further, Ld. Counsel rely on the resolution No. 17(5) & 17(5) dated 25-05-2016 and 30-09-2015 of AGM of assessee for continuation of legal fight for renewal of license.

11. **Legal propositions :** Thus. Ld. Counsel for the assessee relied on the following judgments/decisions in favour of his claims of existence of deep intention for continuation of its business, allowability business expenses, set off and carry forward of losses. They are (1) Supreme Court judgments in the case of Universal Plast Limited Vs. CIT 237 ITR 454 (SC); (2) Vikram Cotton Mills Ltd. 169 ITR 597 (SC); (3) CIT v. Lahore Electric Supply Company Limited. 60 ITR 1; (4) CIT Vs. Vellore Electric

Corporation Ltd. 243 ITR 529; and (5) CIT Vs. Shri Lakshmi Silk Mills Limited 20 ITR 451

12. Per Contra, to continue the elaborate case of the Revenue, the demand for renewal of license is a futile exercise as the Govt. of Maharashtra already allowed/employed licensed MSEDCL for providing distribution of power to specified villages by the State Govt. of Maharashtra. Further, it is undisputed fact that the assessee granted VRS of 1552 employees and claims expenses of Rs.36.03 crores on this account. Assessee has not rendered any service of providing business activities during the year. Further, Ld. DR submitted that the assessee did not report any business income out of power distribution during the year. No sales, no receipt of service charges out of core activities of electricity distribution etc. was reported. Infact, assessee has no license to do such business till date despite the long legal proceedings initiated by the assessee before the MERC/APTEL, Hon'ble Supreme Court etc. Therefore, assessee stands no possibility of revival of its business. AO concluded that it is a case of cessation of business once and for all and hence, it stands closed. As per Ld. DR, assessee is only to receive the rent or compensation subject to the conditions specified in the judgment of Hon'ble Supreme Court. Further, Ld. DR for the Revenue relied heavily on the orders of the AO and the CIT(A).

13. Responding to the elaborate arguments of Ld. Counsel on the intention aspect, Ld. DR submitted that the assessee failed to prove the intention of the assessee in matters of continuation of the business. He also reiterated the fact that even after 7 years of litigation there is nothing concrete materialized in favour of the assessee so far as granting of license is concerned. Therefore, Ld. DR submitted for confirming the

orders if the CIT(A)/AO is without any modification on all the three issues, i.e. (i) continuation of business intention; (ii) set off of expenses against the business income; (iii) brought or/and carry forward of business or brought forward losses to future assessment years for set off against income of subsequent assessment years.

TRIBUNAL DECISION

14. Thus sofar, we have culled out the facts necessary or relevant for adjudication of three issues, i.e. (i) the continuation of business or intention for continuing business; (ii) the set off of current year expenses against the income of the year; and (iii) brought or carry forward of losses to subsequent assessment years. Further, we have also recorded the various arguments of Ld. Counsel as well as Ld. DR exhaustively. We have extracted the written submissions of the assessee wherever necessary and recorded various decisions/judgments cited by the Ld. Counsels. On completion of the same, we shall now proceed to adjudicate each of the triple issues in the succeeding paragraphs of the order.

A. Discontinuation of Business – Intention vide Ground No.1 :
Hon'ble Supreme Court held in the case of M/s. Lahore Electric Supply Company Ltd. (supra) that the "intention" of the assessee decides the issue of continuation or otherwise of the business of the assessee. On hearing both the sides on the issue of "intention to continue the business" or discontinue the same, briefly, we find **the case of the AO** is that the business stands closed in view of the non-renewal of the license by MERC to distribute the electricity to the said areas. Further, with the removal of 1522 employees, there is no possibility of grant of renewal of license. Therefore, conducting of any business of power distribution does not

arise. Further, earning of rental income or compensation income from MSEDCL in accordance with the directions of the Hon'ble Supreme Court, APTEL etc., is the only source of income and the same cannot be held as business income of the assessee. Revenue also rely on various decisions as discussed in the preceding paragraphs of this order. When the business is substantially closed, making claims of deduction of expenditure on account of VRS and others, is not sustainable. Consequently, the claim of set off of the expenditure against the income earned by the assessee during the year and the carry forward of the balance of expenditure/losses to the future years is not sustainable.

Per Contra, **the case of the assessee, in brief**, is that the business is never closed despite the non-renewal of the license for power distribution in those 183 villages of 5 Talukas. No authority/legal bodies have ever cancelled the license for doing the business by the assessee. It is merely a case of non-renewal of license and the same is distinct from non cancellation of license. The "cancellation of license" is different from "non-renewal of license". Assessee has been earning income by exploiting the business assets of the assessee since the year 2011, the year of non-renewal of license. Assessee has been showing the same in the returns filed regularly since the A.Y. 2012-13 onwards. The fact that assessee reported earning of such income either on account of compensation or on account of "sale of scrap" and others and it demonstrate the spirit of continuation of business. Further, the fact that assessee has been sincerely knocking the doors of every institution, i.e. Hon'ble Supreme Court, MERC or APTEL etc demonstrates that the assessee's bonafide desire for continuation of the business should be beyond any doubt. As per Ld. Counsel, the assessee never surrendered the right to conduct the

business of power distribution in any form before any authority/judicial body. No authority has ever ordered for closure of the business. Assessee still owns the business assets such as land, office building, distribution network, database, of the customers, goodwill with electricity consumers etc. and he has no intention to sell the same. Hence, this is merely the case of non-renewal of license. Elaborating the business assets of the assessee, Ld. Counsel submitted that the assessee built up huge infrastructure over the past 50 years in those villages as notified by the Government.

The assets of the company are never for sale. The assessee has been incessantly knocking the doors of Hon'ble Supreme Court, Tribunal, MERC etc. for grant of renewal of license. The business assets are being used by MSEDCL against the payment of fee and this arrangement is approved by the Hon'ble Supreme Court. Assessee removed 1522 employees pending the order on renewal of license. These are some of the issues, which need to be analysed when it comes to the assessee's intention to continue the business. The same are elaborately discussed and adjudicated in the following paragraphs.

14.1 Infrastructure – Not for sale : Coming to the infrastructure of the assessee, the case of the assessee is that assessee owns crores worth of infrastructure by way of land, building, transmission network, power connections, customer database etc. He relies on the books of account in this regard. The assessee never sold the said infrastructure for any consideration in any form. This decision/resolutions of the assessee-society for fighting for renewal of license indicates the assessee's earnest desire to continue the business and he is hopeful that, one day, the order of renewal of license by the State Government for Power Distribution will

be issued in one form or other, i.e. stand-alone basis or in continuation of MSEDCL. The same is left to the discretion of the Government. In this regard, relying on judgment of Hon'ble Supreme Court (supra) and the order of the APTEL (supra), assessee asserted the possibility of resuming business in those villages on a standalone basis or in association with the MSEDCL as joint service providers. Therefore, we have to hold that assessee never gave up the demand for renewal of license implying the intention to not to exit the business of power distribution.

14.2 Possibility of Renewal of License (ROL) : Mentioning about the possibility of renewal of license, the case of the assessee is that the possibility of granting license to assessee as well as MSEDCL in the same locations was already communicated by judicial bodies as discussed in the preceding paragraphs of this order. In this regard, assessee relying on the Hon'ble Supreme Court's judgment which ordered for filing an 'affidavit' for the refund of amount of compensation by the assessee to the MSEDCL as and when the decision of MERC/APTEL/Hon'ble Supreme Court on the core issue of renewal of license goes in various of the assessee. Assessee also relies on the order of the APTEL in this regard. Assessee indicates the chance of renewal of license. In these circumstances, AO's finding that the business is substantially closed or closed and no possibility of renewal of license, are not held on sound footing. The very fact that the APTEL has referred the matter back to the MERC for reconsideration and the MERC's direction to file a fresh application by the assessee for grant of renewal of license also indicates the possibility of renewal of license. It is a matter for the future and the finality of the judicial bodies. We have nothing to comment on this as the matter is sub-judice before the other institutions.

14.3 Assessee earns income by way of Fee : Highlighting the fact that assessee earns fee/income of Rs.1 crore per month from MSEDCL of the State Government consequent to the Hon'ble Supreme Court's judgment read with order of the APTEL in the assessee's own case (supra), assessee claims that he did not close or discontinue the business as held by the AO erroneously. This decision of CIT(A) was confirmed unfairly without appreciating the facts. The fact is that assessee earns income from MSEDCL on take over of the assets/database etc. consequent to the order of the APTEL and then confirmed by the judgment of Hon'ble Supreme Court and the same constitutes business income and it evidences the fact of continuation of business. In this regard, assessee submits that assets of assessee are not for sale or lease to MSEDCL and assessee would never have to hand over the assets/infrastructure but for the judgment of the Hon'ble Supreme Court or APTEL or MERC. Thus, the assessee is determined to fight out for renewal of license till the end and intend is to resume the business. Reporting of business income in the return of income of the year is undisputed. Therefore, in our opinion, the assessee cannot be said to have no intention to continue the business. Thus, we agree with the same and order accordingly.

14.4 Intention – Litigation : Further, detailing the extent of litigation undertaken by the assessee for renewal of license, the case of the assessee is that the ongoing litigation for the grant of license ever since 2011 till 2018 should demonstrate the assessee's strong intention to continue the business in this line. Assessee also takes a cue from the development from the renewal after 2000, and mentioned that the process of renewal of license by the MERC was never a smooth affair. The assessee had to wait for nearly a decade during the first renewal of license

vide Notification dated 02-05-2000 (Sl.No.2 of the chronology of events chart). In our view, it cannot be concluded that the assessee does not have the intention to continue the business. We order accordingly.

14.5 Legal Scope on discontinuation of business – Assessee's intention: After considering the case of the assessee and the Revenue on the issue of intention Vs. discontinuation of business, we have perused the said decisions relied on by both the parties.

a. In the case of CIT Vs. Vikram Cotton Mills Ltd. the Hon'ble Supreme Court held that where an assessee leases its assets and the intention of the assessee is not to discontinue the business but to lease out the assets for a temporary period as a part of their exploitation, the lease rent derived from letting out the assets is **assessable as business income** and not as income from other sources.

b. In the case of CIT Vs. National Mills Co. Ltd. the Hon'ble Supreme Court held that company under liquidation having leased its plant and machinery, it **could not be said that business of company ceased** in the face of clear findings of Tribunal and income from leasing could be set off against past losses.

c. In the case of CIT Vs. Shri Lakshmi Silk Mills Ltd., the Hon'ble Supreme Court that where a manufacturer, being unable to use his plant gainfully, lets it out temporarily for making profits for that business, the plant so let out **does not cease to be a commercial asset of the manufacturer** and the income earned by letting it out is **chargeable as business income** under sec.10 of 1922 Act.

d. In the Case of CIT Vs. Vellore Electric Corporation Ltd., the Hon'ble Madras High Court held that there was **no discontinuation** of assessee's

business while it was challenging the acquisition of its undertaking by State Government and the matter was pending in the court; **all the expenses** incurred by assessee in running the establishment during that period are **allowable as deduction**.

e. In the case of L.Ve. Vairavan Chettiar Vs. CIT, the Hon'ble Madras High Court held that if a person carries on two or more distinct businesses, the profits or losses of all of them ought to be added together and **the aggregate sum would represent his profits** or gains in the business.

f. In the case of CIT Vs. Lahore Electric Supply Co. Ltd., the Hon'ble Supreme Court observed as under (HELD PORTION) :

*“None of the above grounds led to the conclusion that the **company intended to canyon business**. The mere fact that the company had not gone into liquidation would not establish that it had the intention to do business. There was further no question of the company's going into liquidation in the accounting years, for, during that time it had not received from the Government the entire amount due to it as compensation for the said acquisition. At the relevant time the company was not possessed of any commercial undertaking. It was unnecessary to go into the question whether **an expression of an intention to resume business in vacuo would amount to carrying on business**. It was sufficient for the purpose of this case to state that even an intention to resume business had not been established.*

Therefore, the business was closed and the company had not established an intention to resume it. That would be enough to show that no business was carried on and it would be irrelevant to enquire whether the business was permanently closed.

*The facts that the company had to pay the Government half share of the profits between 27-11-1942, and 5-9-1946 and that it had to return to the consumers the deposits made by them would not indicate that it was carrying on a business. It would be laying down strange law to hold that **where a business had in fact ceased to be run, it must be deemed as continuing because the outstanding liabilities of that business had not been liquidated. Business as contemplated by section 10 is an activity capable of producing a profit which can be taxed. Payment of outstanding liabilities was not an activity which could ever produce such a result. It could not be said, therefore, that because liabilities of a closed business were outstanding, it had to be held that either the business was continuing or that an intention to resume business must be inferred. Hence, the***

company had ceased to carry on business, and the Tribunal's conclusion to the contrary was incorrect.”

These ratios of various decisions/judgments support the case of the assessee and the claims need to be allowed in favour of the assessee. We order accordingly.

14.6 Removal of 1522 employees – Not a litmus Test : Coming to the AO's reservation on the decision of the assessee is giving VRS to 1522 employees, we find it a prudent commercial decision and the same cannot be interpreted against the assessee as lack of intention. In our view, saying bye to these employees cannot be equated with the decision of no sale of capital assets like land/building/distribution network, database etc. Recruitment of employees is not a significant and decisive event to decide the termination of business. In this regard, Ld. Counsel submitted that the moment, the assessee gets the order on renewal of license, the assessee shall recruit the employees as required for the business. We find merit in the same. Therefore, we dismiss this aspect of objection from Revenue side. We order accordingly.

14.7 Further, on the other objection of the AO on the orders of MERC/APTEL about their closure order, we find the same are unsustainable in view of subsequent developments till 2016 on the decision of MERC and APTEL. Therefore, we dismiss the same too.

Summary : Therefore, to sum up, it is a settled legal proposition that the existence of “intention” to continue business and its demonstration by the assessee assumes significance in matters relating to decision on the cessation of business. The judgment in the case of Lahore Electric Supply Co. Ltd. (supra) is relied. In this regard, we considered the undisputed

facts of (i) demonstration by way of passing of Resolution by AGM of assessee for continuation for fighting for renewal of license (ii) approaching the State Govt. MERC, APTEL, Supreme Court etc. for renewal of license, (iii) opposing the takeover bid of the MERC for MSEDCL with or without consideration; (iv) compliance to the legal orders of Supreme Court/APTEL without prejudice to the demand for renewal of license; (v) assessee never entertained the idea of sale of assets and infrastructure to MSEDCL, (vi) assessee did not entertain the idea of lease of assets too; (vii) assessee did not resort to liquidation or insolvency, (viii) assessee receives compensation of Rs.1 crore plus every month from MSEDCL and reports to income tax office every year; (ix) no authority/executive/judiciary ever rejected the demand for renewal of license till date. Further, various committees recommended for grant of renewal of license to the assessee along with MSEDCL along with subsidy if any.

Therefore, all these undisputed facts, in our view, support the existence of "intention" to do business of power distribution. Unlike in the case of Lahore Supply Co. Ltd.(supra) where mere clearing of outstanding liabilities is only defense from 'Revenue' in support of intention for continuation of business activity, the case on hand and its facts distinguishes the facts of other case. Further, we find the judgment in the case of Vellore Electric Corporation Ltd. (supra) is very close to the facts of the present one under consideration so long as the takeover decision of the Court is concerned. But the basis of actions of the present assessee keeps the assessee on a different pedestal. Therefore, the business of the assessee cannot be held to be a discontinued one. All the administrative expenses have to be allowable as business expenditure.

Therefore, we find it difficult to conclude that the assessee does not have any intention to continue the business of power distribution. Accordingly, the Ground No.1 raised by the assessee is allowed.

(B) Whether the Expenses debited to Profit and Loss Account constitute business expenditure eligible for claim of deduction u/s.37 of the Act

15. On scrutinizing of the profit and loss account of the assessee, the main expenditure incurred by the assessee relates to claim of Rs.41.90 crores. Ground No.2 relates to denial of benefit of carry forward of the current year business losses and set off of the assessee and determination of proper head of income for taxing the returned income of Rs.7,21,411/- are the issues connected to the Ground No.2. During the assessment proceedings, AO noted that the assessee claimed huge expenditure amounting to Rs.41.90 crores. More than 1522 employees availed VRS of the assessee which demanded incurring of the above expenditure. In the return of income, assessee did not claim the same as an allowable expenses considering the specific income tax provisions meant for claim of VRS expenses. These are the expenses incurred on employees, in view of commercial expediency and the prudent business decision.

16. Arguments of Ld. Counsel for the assessee : Ld. Counsel submitted that the genuineness and correctness of the expenditure on this account was never verified by the authorities below due to their decision on the aspects of cessation of business. The claim of the assessee was passively denied conjoint with the adverse decision on continuation of business. In this regard, Ld. Counsel for the assessee filed the paper book giving the details of the expenditure (pages 4 to 9 of the paper book) and explained the business exigency in incurring of the expenses. Referring to page 1 of the paper book, Ld. Counsel for the

assessee furnishing of the breakup of the expenditure for Rs.36,71,81,348/-. The salary of employees with the figure of Rs.36,03,23,569/- is a major expenditure. Rs.15 lakhs was paid as Gratuity to the employees. Other major expenditure includes Audit Fees at Rs.13,69,000/- and Administrative Expenses at Rs.16,51,547/-. Ld. Counsel submitted that these expenses constitutes establishment, administrative/personal cost. He submitted that since these details are not examined by the authorities and therefore, the same needs to be allowed. Further, Ld. Counsel for the assessee submitted for remanding the issues.

Further, Ld. Counsel also submitted that the assessee earned total income of Rs.7,12,411/-, i.e. Rs.1,59,831/- and Rs.5,29,950/- out of rental income and income on sale of scrap respectively. Assessee considered the entire income as business and set off the same against the expenditure before claiming the benefit of carry forward of loss for set off in future assessment years. AO taxed Rs.1,59,831/- (rental income) and Rs.5,29,950/- (income from sale of scrap) under the head income from other sources. However, the CIT(A) confirmed the AO's action regarding Rs.1,59,831/-. However, CIT(A) upheld the AO's view on the discontinuation of business and consequent claim of set off of carry forward of losses.

Further, Ld. Counsel submitted that the claim of assessee for taxing Rs.5,29,950/- under the head business income is sustainable and relied on the judgment in the case of Vellore Electric Corporation Ltd. (supra). Further, he also submitted that the expenditure incurred on personnel (VRS + Gratuity of establishment etc.) constitutes business expenditure and the same needs to be allowed u/s.37 of the Act.

17. **Arguments of Ld. DR for the Revenue** : On the other hand, Ld. DR for the Revenue submitted that allowability of these expenses becomes relevant only if the issue relating to continuation of business is decided against the Revenue. He also submitted that assessee did not have the recognition required for granting of VRS. Therefore, it is a case of removal of employees in view of closure of business. Further, Ld. DR argued that the claim of VRS expenditure is capital nature as it is a one-time expenditure. However, when the assessee referred to the Approval dated 24-05-2012 of the Labour Commissioner, Maharashtra Govt., and demonstrated the business nature of it.

18. **Decision of the Tribunal on Ground No. 2** : We heard both the sides on this issue, perused the orders of the Revenue and the paper book filed by the assessee. Further, we have also perused the decisions relied on by both the sides. The fact on VRS of 1522 employees of the company was also analysed. In this regard, the case of the assessee is that there is no point in bearing the employee cost when the request for renewal of license is not yet decided by the MERC, who ordered for handover of the power distribution network to MSEDCL. Assessee also demonstrated the business nature of each and every account debited to profit and loss account. Further, justifying the expenditure, assessee claims that the business of the assessee is subjected to up & downs due to many adverse circumstances around it. Any business has its financial risks of various kinds which forces the management to take financial decision. Declaration of VRS to the employees is a commercial decision of the assessee and the same is rightly justified. The same is done with the approval of the State Govt. Ld. Counsel also mentioned that the assessee

is in the process of getting the renewal of license soon and in the event of positive on this, the same is followed by the fresh requirement of the employees. Ld. Counsel requests for granting the set off to the extent of available current year profit of Rs.5,29,950/- and prayed for grant of the benefit of carry forward of the expenditure of such losses.

Genuineness of Expenditure : we find that the assessee claimed total expenditure of Rs.40.90 crores against the total income of the year at Rs.7,12,411/-. Genuineness of expenditure was never the issue before the AO/CIT(A) for the reason that they concluded against the assessee on the issue of discontinuation/cessation of business of electricity distribution. This issue of discontinuation of business was independently raised in Ground No.1 and the same stands adjudicated by us in favour of the assessee. Consequently, the genuineness, the allowability etc. becomes relevant now.

Therefore, on this issue, we heard both the sides and examined all the accounts debited to profit and loss account of the year/assessee and found, prima-facie, that they are allowable expenditure and the salary expenses, bonus expenses, audit fee etc. relate to business expenditure allowable u/s.37 of the Act. However, there is no categorical finding by AO/CIT(A) with respect to the allowability of these expenditures accounts. In the absence of the same, we cannot decide this issue at this point of time as there is no adverse finding or otherwise exists on the allowability of disallowability of the expenses.

Hence, we find it relevant to remand this issue to the file of AO for fresh adjudication both on the genuineness as well as on the allowability of the expenses amounting to Rs.40.90 crores. We direct the AO to pass a

speaking order on the claim in all individual accounts debited to profit and loss account. AO shall note that employee cost constitutes an business expenditure and there are specific provisions in the Act for allowing the VRS expenditure. AO is directed to admit any evidence for adjudication of this issue. AO shall grant reasonable opportunity of being heard to the assessee in the said remand proceedings as per the set principles of natural justice. Accordingly, this part of the ground No.2 is allowed for statistical purposes.

19. Set off of current year business loss against the scrap sales income and carry forward of loss

Before us, on the issue of giving set off of business loss against the receipts earned on sale of scrap as well as on the issue of grant of benefit of carry forward of unabsorbed loss for set off against income in subsequent assessment years, both the counsels submitted that this issue needs to be decided as per the provisions of the Act. They also mentioned that the same is linked to the finding of the Tribunal on the Ground No.1 in the Grounds of appeal.

On hearing both the sides on this technical or consequential issue, we find that the set off of carry forward of the unabsorbed loss issue needs to be decided as per the provisions of Section 70 to 72 of the Act. Thus, we direct the AO to pass a speaking order on this aspect of the claim of the assessee. It is also the claim of the assessee before us that the brought forward losses from earlier assessment years were not properly allowed in the order of the AO due to their adverse decision on the "intention to continue the business". AO is directed accordingly.

In the remand proceedings on this issue, AO shall consider our favourable finding on Ground No.1, i.e. continuation of business and decide these linked-issues too after considering the said provisions on one side and the judgmental laws on the other. AO shall grant reasonable opportunity of being heard to the assessee. Accordingly, this part of Ground No.2 is allowed for statistical purposes.

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

Order pronounced on 28th day of September, 2018.

Sd/-

Sd/-

(विकास अवस्थी /VIKAS AWASTHY)
न्यायिक सदस्य/JUDICIAL MEMBER

(डी. करुणाकरा राव/D. KARUNAKARA RAO)
लेखा सदस्य/ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 28th September, 2018.
Satisht

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT (Appeals)-2, Pune.
4. The Pr. CIT-1, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच, पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.