

**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE**

**BEFORE SHRI R.S. SYAL, VICE PRESIDENT
AND SHRI VIKAS AWASTHY, JM**

**आयकर अपील सं. / ITA No.1680/PUN/2015
निर्धारण वर्ष / Assessment Year : 2011-12**

Shri Moti Udharam Panjabi,
MZSK & Associates
Chartered Accountants,
Level 3, Business Bay,
Plot No.84, Wellesley Road,
Near RTO, Pune – 411001
PAN : AARPP2118D

.....अपीलार्थी /Appellant

Vs.

DCIT, Central Circle-2(1),
Pune

.....प्रत्यर्थी /Respondent

Assessee by : Shri Nilesh Khandelwal
Revenue by : Shri Sudhendu Das

सुनवाई की तारीख / Date of Hearing : 01.11.2018	घोषणा की तारीख / Date of Pronouncement: 02.11.2018
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आदेश / ORDER

PER R.S.SYAL, VP :

This appeal by the assessee arises out of the order passed by the CIT(A)-12, Pune, dated 09-10-2015 in relation to the assessment year 201-12.

2. The first two grounds are directed against reallocating amount of depreciation on all assets which amount was subsequently enhanced by the Ld. CIT(A).

3. Briefly stated, the facts of the case are that the assessee earned income from projects titled as Head Office (HO), Swiss County and Silver Mist. The income from Swiss County and Silver Mist projects is eligible for deduction u/s.80IB(10) of the Income-tax Act, 1961 (hereinafter also called 'the Act'), whereas income from the HO is not

so eligible. The assessee claimed deduction for depreciation of Rs.50,76,731/- in total, which was bifurcated as Rs.41,51,812/- under HO; Rs.9,18,420 under 'Swiss Country'; and Rs.6,499/- under 'Silver Mist'. The AO observed that almost 80% of depreciation was claimed by the assessee in non-80IB project, namely, HO, which was not appropriate. He rejected the assessee's claim that separate books of account were maintained for each project and hence the disallowance of depreciation was not permissible. In the backdrop of such an allocation made by the assessee, the AO disallowed 25% of depreciation claimed by the assessee in the HO project and allocated it to non-80IB projects namely, 'Swiss County' and 'Silver Mist' in the ratio of their closing stocks. This led to an addition of Rs.10,37,953/-. The assessee approached the Ld. CIT(A) against such a disallowance. The Ld. first appellate authority has drawn a chart of assets on page 17 of his order giving project-wise location of different assets. He, *inter alia*, observed that all the relevant assets necessary for construction projects and vehicles were appearing as assets of HO. As such, it was held that it was not possible to carry out construction projects without the use of any construction machinery by the eligible projects. That is how, he opined that all the assets of the assessee were being used commonly for all the projects. The total amount of depreciation was allocated between the HO, 'Swiss County' and 'Silver Mist' in the ratio of increase in inventory as added by the amount of sales. This led to the allocation of depreciation to the HO at Rs.7,55,417/- and the balance amount of depreciation was apportioned between the eligible projects, which resulted into enhancement of disallowance of depreciation by

Rs.23,58,442/-. The assessee is aggrieved by such an enhancement of amount of depreciation.

4. Having heard both the sides and perused the relevant material on record, it is found as admitted position that the assessee earned income from the HO, 'Swiss County' and 'Silver Mist' projects. Whereas income from the HO project is chargeable to tax, income from 'Swiss County' and 'Silver Mist' is admittedly eligible for deduction u/s.80IB of the Act. The assessee allocated a larger chunk of assets and the resultant depreciation to non-eligible project of the HO so as to depress the amount of profit chargeable to tax. The fact that the assessee was maintaining separate books of account and the assets were shown distinctly, cannot be a ground to allocate depreciation appropriately, if the assessee has considered majority of assets in non-eligible project, but such assets were also used by the eligible projects, as is the case under consideration. The Ld. CIT(A) has aptly pointed out that the assessee has not shown several important assets in the eligible units without which no construction activity could have been carried out. We, therefore, uphold, in principle, the action of the authorities below in making disallowance of depreciation.

5. As regards the quantum of the amount of depreciation to be disallowed, we find that the Ld. CIT(A) has bifurcated total amount of depreciation in three projects in the ratio of increase in inventory as added by amount of sales under the respective projects. Such a mechanism of allocation of depreciation is not fully appropriate. In our considered opinion, the disallowance can be correctly made by firstly allocating the assets to the respective projects which

exclusively used such assets. Then the common assets, which are used by all the eligible and non-eligible projects, should be separately identified. Depreciation on such commonly used assets should be allocated amongst the three projects including two eligible units. The Ld. CIT(A) allocated the total amount of depreciation in the ratio of increase in inventory as added by the amount of sales. In our considered opinion, the more rational basis for allocation of depreciation on common assets in the given peculiar circumstances, is increase in inventory as added by cost of goods sold. We, therefore, set aside the impugned order and remit the matter to the file of AO for computing the disallowance of depreciation in the manner aforestated, after proper opportunity of hearing to the assessee.

6. The next ground in the assessee's appeal is against the enhancement of addition made by the Ld. CIT(A) out of Salaries and Wages.

7. The assessee claimed deduction on account of Salary and Wages totalling to Rs.1.96 crore and odd, which was bifurcated amongst the three projects at Rs.62.03 lakh under the HO, Rs.92.01 lakh under 'Swiss County' and Rs.15.75 lakh under 'Silver Mist'. The AO observed that in the HO project, the assessee was mainly in land dealings requiring lesser use of manpower as compared to the use of manpower needed in the construction projects, namely, eligible 80IB projects. Applying the ratio of closing stock of the three projects of the assessee, the AO made disallowance of Rs.31,47,157/-. The Ld. CIT(A) applying the same yardstick as for depreciation, increased the amount of disallowance to Rs.52,80,650/-, against which the assessee has approached the Tribunal.

8. Having heard both the sides and gone through the relevant material on record, we find that the assessee did not appropriately allocate the amount of Salary and Wages to the eligible and non-eligible projects. It is an admitted position that under HO project, the assessee was mainly in land dealings and did not undertake any construction activity, which work was being done under the eligible projects. In such a scenario, the allocation of the amount of Salary and Wages is also required to be done accordingly. Following the view taken hereinabove, we set aside the impugned order and remit the matter to the file of AO for firstly ascertaining the amount of Salary and Wages relatable to specific projects, namely, the HO, 'Swiss County' and 'Silver Mist', and then the common amount of Salary and Wages, which cannot be specifically identified with a particular project, should be apportioned in the ratio of increase in inventory as added by the amount of cost of goods sold under the three projects. Needless to say, the assessee will be allowed a reasonable opportunity of hearing.

9. The last effective ground of the assessee's appeal is against disallowance u/s.14A to the tune of Rs.4,83,625/-.

10. The facts apropos this issue are that the assessee debited Finance charges of Rs.2.02 crore and odd in its Profit and loss account, out of which a sum of Rs.1.72 crore was allocated to the HO project. The AO made allocation of such Finance charges in the ratio of closing stock of the three units, which led to the disallowance of Rs.1.35 crore. The Ld. CIT(A) held that the action of the AO in allocating Finance charges to the HO and the other two eligible projects was not justified. He however invoked the provisions of

section 14A and computed disallowance under Rule 8D at Rs.4,83,625/-. The assessee is aggrieved by the sustenance of addition u/s.14A. There is no cross appeal by the Revenue against the deletion of addition of Finance charges.

11. We have heard the rival submissions and perused the relevant material on record. Circular No.37/2016 dated 02-11-2016 provides that where an assessee is entitled to deduction under Chapter VIA of the Act and the AO makes certain disallowances, such as pertaining to section 32, 40(a)(ia), 40A(3) or 43B etc. which led to increase in the amount of profits, then deductions in respect of income covered under Chapter VIA should be allowed on resultant enhanced income. The effect of such circular is that, if there is some increase in the profit by virtue of certain additions or disallowances made by the AO on account of disallowance of expenses etc., then the eligible income for deductions under Chapter VI of the Act should be enhanced accordingly and the deductions should be allowed at such an enhanced amount. Under such circumstances, we set aside the impugned order to this extent and direct the AO to add back the amount of such disallowance made by the ld. CIT(A) u/s 14A and then allow deduction u/s 80IB(10) of the Act accordingly.

12. In the result, the appeal is partly allowed for statistical purpose.

Order pronounced in the Open Court on 02nd November, 2018.

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य / JUDICIAL MEMBER

पुणे Pune; दिनांक Dated : 02nd November, 2018

सतीश

Sd/-

(R.S.SYAL)

उपाध्यक्ष/ VICE PRESIDENT

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT (Appeals)-12, Pune.
4. आयकर आयुक्त / The Pr. CIT-11, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "बी" / DR 'B', ITAT, Pune;
6. गार्ड फाइल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

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