IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'C', NEW DELHI

Before Sh. N. K. Saini, Hon'ble Vice President
and
Smt. Beena A. Pillai, Judicial Member

ITA No. 4990/Del/2014 : Asstt. Year : 2010-11

M/s Abhisar Buildwell Pvt. Ltd., C/o RRA Tax India, D-28, South Extension, Part-I, New Delhi-110049	Vs	Deputy Commissioner of Income Tax, Central Circle-04, New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AAFCA6845D		

Assessee by : Sh. R. S. Singhvi, CA
Revenue by : Sh. Manish Gupta, CIT DR

Date of Hearing : 27.11.2018		**Date of Pronouncement : 28.11.2018**

ORDER

Per N. K. Saini, Vide President:

This is an appeal by the assessee against the order dated 25.04.2014 of ld. CIT(A)-XXXIII, New Delhi.

2. Following grounds have been raised in this appeal:

"1. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. A.O. in making disallowance of a sum of Rs.7,32,61,262/- on account of depreciation u/s 43(1) read with explanation 7 and 10 of the said section, more so when there was no incriminating material found during the course of search.

2. That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. A.O in making the impugned disallowance of Rs.7,32,61,262/- on account

of depreciation and framing the impugned assessment order is bad in law and contrary to facts and circumstances of the case, void ab initio, beyond jurisdiction and the same is not sustainable on various legal and factual grounds.

3. That the appellant craves the leave to add, modify, amend or delete any of the grounds of appeal at the time of hearing and all the above grounds are without prejudice to each other."

3. The assessee also moved an application for admission of the additional grounds which read as under:

"(i) That even otherwise, on facts and circumstances of the case, the appellant is entitled to claim benefit of statutory deduction u/s 80IC on additional income arising from disallowance of claim of depreciation.

(ii) That in view of CBDT Circular No. 37/2016 dated 02.11.2016, the benefit of deduction u/s 80IC is admissible on profits enhanced by the disallowance made u/s 32 and as such claim of depreciation is revenue neutral."

4. The ld. Counsel for the assessee submitted that these grounds are purely of legal and consequential nature and arise from assessment order. Therefore, the same may be admitted because no new facts or evidence is required in relation to these grounds. The reliance was placed on the judgment of the Honôble Supreme Court in the case of National Thermal Power Corporation Vs CIT 229 ITR 383.

5. The ld. CIT DR opposed the admission of the additional grounds.

6. After considering the submissions of both the parties and the material on record, we are of the view that the additional grounds

raised by the assessee are purely of legal in nature and no new facts or evidence are required, as the same are already available on the record. Therefore, these grounds are admitted by keeping in view the ratio laid down by the Honôble Supreme Court in the case of National Thermal Power Corporation Vs CIT 229 ITR 383 (supra) wherein it has been held as under:

> *"Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. The Tribunal should not be prevented from considering questions of law arising in assessment proceedings, although not raised earlier. The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner (Appeals) is too narrow a view to take of the powers of the Tribunal."*

It has been further held as under:

> *"Undoubtedly, the Tribunal has the discretion to allow or not to allow a new ground to be raised. But where the Tribunal is only required to consider the question of law arising from facts which are on record in the assessment proceedings, there is no reason why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee."*

So, respectfully following the ratio laid down by the Honôble Supreme Court in the aforesaid referred to case, the legal grounds raised by the assessee are admitted.

7. During the course of hearing, the ld. Counsel for the assessee at the very outset stated that the issue under consideration is squarely covered in assesseeôs favour in earlier order dated 17.09.2018 of the ITAT Delhi Bench óAô, New Delhi in ITA No.

823/Del/2015 for the assessment year 2011-12 in assesseeôs own case (copy of the said order was furnished which is placed on record).

8. In his rival submissions, the ld. CIT DR although supported the orders of the authorities below but could not controvert the aforesaid contention of the ld. Counsel for the assessee.

9. We have considered the submissions of both the parties and perused the material available on the record. It is noticed that an identical issue having similar facts was a subject matter of the assesseeôs appeal in ITA No. 823/Del/2015 for the assessment year 2011-12 wherein vide order dated 17.09.2018, the relevant findings have been given in paras 6 to 14 which read as under:

> *"6. Undisputedly, flexible packaging unit of M/s. Dharampal Satyapal Ltd. was demerged into the assessee company. The Id. AR for the assessee contended that no portion of cost of asset acquired by the assessee company was met out of the grant or subsidy or reimbursement of the Government or any other person rather cost of the assets in the hands of assessee company are as per demerger scheme approved and as such, there is no question of reducing the cost of asset and depreciation.*
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> *7. However, the AO as well as Id. CIT (A) by invoking the Explanation 7 to section 43 (1) of the Act proceeded to hold that the actual cost of the asset to the assessee company which is a resulting company shall be the same which was to be demerged company and thereby recomputed the claim of deprecation u/s 32 (1) of the Act by reducing the actual cost of asset by Rs.78,32,12,592/-.*
>
> *8. Ld. AR for the assessee by relying upon CBDT Circular No.37/2016 dated 02.11.2016 contended that benefit of deduction u/s 80IC is admissible on profits enhanced by disallowance made u/s 32 of the Act which makes the claim of depreciation as revenue neutral and further contended that the assessee is entitled to claim benefit of*

statutory deductions u/s 80IC on additional income arising from disallowance of claim of depreciation.

9. On the other hand, Id. DR also by relying upon Explanation 7 & 10 to section 43 (1) contended that the actual cost of resulting company shall also be nil and as such, actual cost of asset is to be reduced by the amount of Rs.78,32,12,592/-. The Id. DR further contended that the excise duty is reimbursement to the assessee.

10. In the backdrop of the aforesaid facts and circumstances of the case and arguments addressed by the ld. AR of the parties to the appeal, the first question arises for determination in this case is:-

> *"as to whether the assessee is entitled to claim benefit of statutory deduction u/s 80IC of the Act on additional income arising from disallowance of claim of depreciation and that the benefit of deduction u/s 80IC is admissible on profits enhanced by the disallowance made u/s 32 or that the claim of depreciation is revenue neutral?"*

11. Before proceeding further, the relevant para of Circular No.37/2016 dated 02.11.2016 issued by the CBDT, relied upon by the ld. AR for the assessee, is extracted as under:-

> *"Chapter VI-A of the Income-tax Act, 1961 ("the Act"), provides for deductions in respect of certain incomes. In computing the profits and gains of a business activity, the Assessing Officer may make certain disallowances, such as disallowances pertaining to sections 32, 40(a)(ia),40A(3), 43B etc., of the Act. At times disallowance out of specific expenditure claimed may also be made. The effect of such disallowances is an increase in the profits. Doubts have been raised as to whether such higher profits would also result in claim for a higher profit-linked deduction under Chapter VI-A.*
> *.....*
>
> *3. In view of the above, the Board has accepted the settled position that the disallowances made under sections 32, 40(a)(ia),40A(3), 43B, etc. of the Act and*

other specific disallowances, related to the business activity against which the Chapter VI-A deduction has been claimed, result in enhancement of the profits of the eligible business, and that deduction under Chapter VI-A is admissible on the profits so enhanced by the disallowance.

4. Accordingly, henceforth, appeals may not be filed on this ground by officers of the Department and appeals already filed in Courts/Tribunals may be withdrawn / not pressed upon. The above may be brought to the notice of all concerned."

12. Bare perusal of the operative part of the Circular(supra)goes to prove that disallowance made by the assessee u/s 32 of the Act relating to business activity against which deductions have been claimed under Chapter VI-A, as in the instant case, results in enhancement of the profits of the eligible business and that deduction under Chapter VI-A is admissible on profits so enhanced by the disallowance. In these circumstances, the claim of depreciation made by the assessee company of Rs.6,40,38,391/- is allowable deduction and as such, the benefit of deduction u/s 80IC is allowable on profits enhanced by the disallowance made u/s 32 of the Act and in these circumstances, the claim of depreciation is revenue neutral.

13. So far as question of treating the refund of excise duty as part of the cost is concerned, it is the case of the assessee that the entire cost has been paid by the assessee for plant & machinery and as such, it cannot be reduced from the cost of asset. Ld. AR for the assessee relied upon order passed by CIT (A) dated15.07.2016 in assessee's own case for AYs 2012-13 & 2013-14 where in excise duty refund has not been treated in the form of capital subsidy or grant which can be reduced from the cost of assets.

14. Since findings returned by the ld. CIT (A) are based upon the decision rendered by Hon'ble Apex Court in CIT vs. Meghalaya Steels Ltd. – (2016) 383 ITR 217 (SC), we are of the considered view that the excise refund is in the nature of revenue receipt forming part of profits and gains

arising from the business and as such cannot be reduced from the cost of plant & machinery. So, the findings returned by ld. CIT (A) on this issue are confirmed.

14. In view of what has been discussed above, we are of the considered view that AO as well as CIT (A) have erred in making addition of Rs.6,40,38,391/- by disallowing the claim of depreciation of the asset made u/s 32 of the Act which would further entitle to the assessee the benefit of deduction u/s 80IC on profits enhanced by such disallowances made u/s 32 of the Act.
Consequently, appeal filed by the assessee is partly allowed."

So, respectfully following the aforesaid referred to order dated 17.09.2018 in assesseeôs own case, the issue under consideration is decided in assesseeôs favour.

10. In the result, the appeal of the assessee is allowed.

(Order Pronounced in the Court on 28/11/2018)

Sd/-	Sd/-
(Beena A. Pillai)	**(N. K. Saini)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 28/11/2018
Subodh
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR