

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, "B" JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 489/JP/2018
निर्धारण वर्ष/Assessment Year : 2014-2015

M/s Associated Soapstone Distributing Co. Pvt. Ltd., Golcha Gardens, Agra Road, Jaipur-302003.	बनाम Vs.	The ACIT, Circle-5 Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAGCA 2491 N		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ITA No. 640/JP/2018
निर्धारण वर्ष/Assessment Year : 2014-15

The DCIT, Circle-5, Jaipur.	बनाम Vs.	M/s Associated Soapstone Distributing Co. Pvt. Ltd., Golcha Gardens, Agra Road, Jaipur-302003.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAGCA 2491 N		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Rajeev Sogani(C.A.) &
Shri Rohan Sogani (C.A.)

राजस्व की ओर से / Revenue by : Shri K.C. Gupta (JCIT)

सुनवाई की तारीख / Date of Hearing : 06/09/2018
उदघोषणा की तारीख / Date of Pronouncement: 04/12/2018

आदेश / ORDER

PER: SHRI VIKRAM SINGH YADAV, A.M.

These are the cross appeals filed by the assessee and the Revenue directed against the order of Id. CIT(A)-2, Jaipur dated 21.02.2018 for A.Y. 2014-15. These appeals were heard together and are being disposed off by this consolidated order. The respective grounds of the appeal are as under:-

Assessee's grounds of appeal (ITA No. 489/JP/2018)

" 1. In the facts and circumstances of the case and in law, Id. CIT(A) has erred, in not allowing the claim of the assessee company under section 37(1) of Rs. 60,000/- and, restricting such claim to Rs. 52,98,858/-, for the reason that such amount was claimed as a deduction in the return of income filed by the assessee company for the relevant previous year. The action of Id. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by allowing deduction under section 37(1), of the entire amount of Rs. 60,00,000/-, as claimed by the assessee company before the Id. AO, in the assessment proceedings and before Id. CIT(A), in the first appellate proceedings."

Revenue's grounds of appeal (ITA No. 640/JP/2018)

"(i) (a) whether in the facts and circumstances of the case and in law the Ld. CIT(A) is justified in holding that the sum of Rs. 60 lacs being payment to farmers is in the nature of compensation and hence admissible deduction u/s 37(1).

(b) whether in the facts and circumstances of the case and in law the Ld. CIT(A) is justified in holding that the payment of Rs. 60 lacs pertaining to Khasara No. 42/63; 42/64 (total area of 15 Bigha) is in the nature of "compensation" even when the agreement clearly states "purchase of land".

(c) whether in the facts and circumstances of the case and in law the Ld. CIT(A) is justified in overlooking that these land i.e.

Khasara No. 42/63; 42/64 are different from the lands which are stated in the "Samarpan Patra" submitted to the Tehsildar.

(ii) Whether in the facts and circumstances of the case and in law the Ld. CIT(A) was justified in deleting the addition of Rs. 13,70,733/- made for depositing the employees contribution to PF & ESI beyond the prescribed time limit provided in the respective Act.

(iii) Whether in the facts and circumstances of the case and in law the Ld. CIT(A) was justified in holding that the employees contribution to PF & ESI are governed by the provisions of Section 43B and not by section 36(1)(va) r.w.s. 2(24)(x) of the Income Tax Act, 1961."

2. Regarding ground no. 1 of the assessee's appeal and the ground no. 1 of the Revenue's appeal, briefly the facts of the case are that the assessee company is engaged in mining, manufacturing and trading of minerals besides it derives income from mining contracts. The assessee company has mining area allotted by the Government of Rajasthan on lease for a period of 20 years. During the relevant previous year, the assessee company paid compensation for vacating the land, within the leased area, amounting to Rs. 60,00,000/-. In the books of accounts, the same was shown under the head "mining rights" forming part of the intangible assets and in the return of income depreciation amounting to Rs. 52,98,858/-, at the rate of 25% was claimed U/s 32 of the IT Act. During the course of assessment proceedings, the assessee alternatively claimed the payment as revenue expenditure U/s 37(1) of the Act. The AO at para 5.3 of the assessment order U/s 143(3) stated that the facts of the case are clearly identical with preceding year i.e. A.Y 2013-14 and following the same, he disallowed the depreciation claimed of Rs. 52,98,858/- made by the assessee.

3. On appeal, the Id. CIT(A) following the decision of the Coordinate Bench in assessee's own case for A.Y. 2013-14 (*ITA No. 572/JP/2017 order dated 01.09.2017*) allowed the claim of the assessee U/s 37(1) however the quantum of claim was restricted to Rs. 52,98,858/- and her relevant findings are as under:-

"However, it is seen that in the return filed for the relevant year a deduction of Rs. 52,98,858/- had been claimed against the depreciation of intangible assets, in view of the same the deduction to be allowed is to be restricted to this amount as against Rs. 60 lakhs claimed in the alternate claim under section 37(1). Reliance is placed on the decisions of ITAT Jaipur in the case of ACIT vs. Subh Lakshmi Construction Company 2003, 1SOT 587 (JP) and ITAT Jodhpur bench in ITO vs. New Mitheralwal construction Co. 120 Taxman 83 (Jodhpur) for this proposition. In view of the above, ground of appeal is accordingly allowed."

4. During the course of hearing, the Id. AR submitted that under identical set of facts, for immediately preceding assessing year 2013-14, wherein the assessee had paid compensation of Rs. 35,00,000/- the claim of the assessee was allowed U/s 37(1) of the Act. It was accordingly submitted that Id. CIT(A) has rightly followed the decision of the Coordinate Bench and allowed the deduction U/s 37(1) of the Act.

5. At the same time, it was submitted that the finding of the Id. CIT(A) that the claim of the assessee company U/s 37(1) of the Act cannot be greater than the amount originally claim in the return is not

correct and Id. CIT(A) has misplaced her reliance on the decision in case of ACIT vs. Subh Laxmi Construction Co. (2003) 1 SOT 587 and ITO vs. New Mitherwal Construction Co. (2002) 120 Taxman 82 as the facts in those two cases are total different from the present case. In both these cases, entire mechanism of determining the assessed income had undergone change during appellate proceedings, wherein percentage of NP to be applied, in the case of the assessee, subject to certain deduction, was determined. However, after application of such percentage determined, assessed income, unknowingly, had become lower than the returned income whereas, the appellate authorities had never intended to give relief to the assessees, in such a manner, that their assessed income could go below the returned income. Neither, any such claim, at any point of time, was made by the assessee, before the AO or the appellate authorities. However, in the present case, a fresh claim, was made by the assessee company, allowable under section 37(1), before both the lower authorities, which was even accepted by the Id. CIT(A).

5.1 It was further submitted that in the case of New Mitherwal Construction Co. (*Supra*), the ITAT Jodhpur Bench adjudicated the issue under Miscellaneous Application filed u/s 254(2) by the Department. In this case, Net Profit % was estimated by the ITAT which resulted into the assessed income being lower than the returned income which was subsequently rectified by ITAT. It is a trite law that the powers of the ITAT are different from the powers, as assigned under the statute, to the AO, and CIT(A). The ITAT has to pass orders "thereon" as it thinks fit. Thus, the ITAT, cannot go beyond the grounds of the appeal filed

before it by aggrieved party and its powers are restricted to granting relief to the extent as has been claimed by the assessee.

5.2 It was further submitted that this proposition can be explained with the help of an illustration. Suppose Mr X an assessee filed his return of income with Rs. 10,00,000, thereafter addition was made by the AO of Rs. 5,00,000. Against such addition, appeal was preferred before CIT(A) appeals who granted relief of Rs. 3,00,000 and confirmed addition of Rs. 2,00,000. Thereafter, assessee preferred second appeal, before ITAT against the additions confirmed of Rs. 2,00,000 by the CIT(A). In such a case ITAT cannot grant relief to the assessee more than Rs. 2,00,000. On the other hand, if department prefers appeal for the Rs. 3,00,000 relief granted by CIT(A), then ITAT apropos such appeal cannot confirm the addition of more than Rs. 3,00,000. However, AO, being a *quasi judicial authority*, and CIT(A), having powers co-terminus as that of the AO, have wide powers under the law and can even entertain new claims made before them, during the proceedings, even to the extent that the assessed income may go lower than the returned income. Both AO and CIT(A) are entrusted with the responsibility of assessing income/passing orders in accordance with the law and not to take any benefit of any mistake committed by the assessee. In the aforementioned judgments, relied by Id. CIT(A), no claims were made by the assessee before the lower authorities. However, in the present case, the assessee consistently made the claim before the AO and CIT(A) for allowability of entire amount of Rs. 60,00,000 under section 37(1) of the Act.

5.3 It was further submitted that it is a settled law that fresh claim can be made for the first time before the CIT(A). The Id. CIT(A) herself has accepted the said legal proposition. However, having accepted the said legal proposition, Id. CIT(A) gravely erred in coming to a conclusion that fresh claim should not lead to assessed income below returned income. Such a proposition would frustrate the established legal principle that fresh claim can be made before the CIT(A) even if the same is not claimed in the return of income. Reliance is placed on the judgment of Hon'ble Supreme Court in the case of Jute Corporation of India [1991] 187 ITR 688 [SC], wherein the claim of the assessee of additional deduction in respect of its liability of purchase tax made during the hearing of appeal was held to be lawful and admissible.

5.4 Further, reliance was placed on the judgment of the Hon'ble Supreme Court in the case of National Thermal Power Company Limited [1998] 229 ITR 383 (SC). In this case, assessee had deposited its funds not immediately required by it on short term deposits with banks. The interest received on such deposit was offered by the assessee company itself for tax and the assessment was completed on that basis. This, inclusion of the interest income was not challenged by the CIT(A), however, before the ITAT the company contended that such interest income was not includible in the total income. The Hon'ble Supreme Court held such a claim made for the first time before ITAT allowable.

5.5 Needless to mention that in both the above situations, the decisions of the Hon'ble Supreme Court resulted into the assessed income being lower than the returned income. Reliance is also placed

on the judgment of the Hon'ble Bombay High Court in the case of Pruthvi Brokers & Shareholders [2012] 252 CTR 151 (Bombay) wherein it was held that an assessee is entitled to raise before appellate authorities additional grounds in terms of additional claims not made in return filed by it.

5.6 It was further submitted that the CBDT *vide* Circular No. 549 dated 31.10.1989 issued instructions regarding the procedure for the assessment and formulated a new scheme of scrutiny assessment and laid as under:

"5.12 Since under the provisions of sub-section (1) of the new section 143, as assessment is not to be made now, the provisions of sub-sections (2) and (3) have also been recast and are entirely different from the old provisions. A notice under sub-section (2), which will be issued only in cases picked up for scrutiny, is now issued only to ensure that the assessee has not understated his income or has not computed excessive loss or has not underpaid the tax in any manner while furnishing his return of income. This means that under the new provisions, in an assessment order passed under section 143(3) in a scrutiny case, neither the income can be assessed at a figure lower than the returned income, nor loss can be assessed at a figure higher than the returned loss, nor a further refund can be given except what was due on the basis of the returned income, and which would have already been allowed under the provisions of section 143(1)(a)(ii)."

5.7 It was submitted that the aforesaid CBDT circular created a confusion amongst the assessing officer and they were of the view that the assessing officers cannot assess the income lesser than returned income and cannot assess loss higher than returned loss while carrying out regular assessments under section 143(3). This matter came up Hon'ble Andhra Pradesh High Court in the case of Bakelite Hylam Ltd. [1999] 107 Taxman 429 (AP) wherein Hon'ble High Court considered the provisions of section 143 and the said CBDT Circular and held that AO has power to grant refund to the assessee in assessment proceedings. For example, if assessee claims depreciation at a rate lower than the rate prescribed in the Income Tax Rules, then in such case at the time of assessment AO will apply the correct rate as prescribed in the rules. This will result in a situation where assessed income would be lower than returned income. Therefore, even if returned income is higher, assessing officer in regular assessment can determine the assessed income at an amount lower than returned income by allowing all the deductions to which the assessee is lawfully entitled.

6. The Id. DR is heard who has relied on the order of the lower authorities.

7. We have heard the rival contentions and perused the material available on record. Firstly, on merits, undisputedly, there are no changes in the facts and circumstances of the case as compared to previous AY 2013-14 and the alternate claim of assessee U/s 37(1) made during the course of assessment proceedings is fairly covered by

the decision of the Coordinate Bench in assessee's own case in AY 2013-14 (*ITA No. 572/JP/17 dated 1.9.2017*) wherein the Coordinate Bench has held as under:-

"24. As held by the Hon'ble Supreme Court, in considering the cases of mining business as in the instant case, the nature of the lease, the purpose for which expenditure is made, its relation to the carrying on of the business in a profitable manner should be considered. Where the assessee has an existing right to carry on a business, any expenditure made by it during the course of business for the purpose of removal of any restriction or obstruction or disability would be on revenue account, provided the expenditure does not acquire any capital asset. Payments made for removal of restriction, obstruction or disability may result in acquiring benefits to the business, but that by itself would not acquire any capital asset.

25. In the instant case, during the relevant previous year, the assessee company paid an amount of Rs. 35,00,000, to Mr. Ranga, S/o Mr. Panchiya Meena. It is the contention of the AR that the amount has been paid as compensation to the land owner. The area for which compensation was paid forms part of the area which has already been leased out by the Government of Rajasthan to the assessee company and for which the assessee company had the right to carry out mining operations. It was contended that as the existence of the landowner on such land had the potential of obstructing the mining operations, the assessee company paid the compensation with a view to carry on its business activities smoothly and without any operational hindrances. It

was further submitted that on payment of compensation, the landowner surrendered the land to the Government of Rajasthan and the land becomes exclusive property of Government of Rajasthan and mutated in the name of Government of Rajasthan in the revenue records. It was accordingly submitted that the assessee company didn't acquire the said piece of land by way of any new asset and the amount was spent merely for the purposes of removing the obstruction to facilitate the mining operations. In support of his contentions, the Id AR has submitted various documents such as undertaking for surrender of land by land owner, surrender Letter or Samarpan Patra executed by the Land owner, chain of events documented by Tehsildaar, letter written by Land Owner to Tehsildaar surrendering the land, report of Tehsildaar for verification of facts and evidence that the land surrendered by Mr. Ranga was mutated in the name of the Government of Rajasthan in the revenue records. It has been contended that all these documents were submitted before the Id CIT(A). In our view, these are relevant documents which have been brought on record by the assessee company to determine the exact nature of transaction and amount paid by the assessee company to the land owner. The Id CIT(A) has recorded a finding that during the previous year relevant to A.Y 2013-14, the appellant paid Rs. 35 lac to Shri Ranga who was having in his possession, a piece of land (Khasra No. 53, Arajji No. 157, Rakba 3 bigha & 8 biswa), as this piece of land was part of the total area allotted by the government to the appellant for mining the soap stone. The appellant had in the past also made such payments to other persons for getting possession of the land in order to do the mining in the area. The said finding of the Id CIT(A) remain uncontroverted

before us. Given that the piece of land falls within the mining area in respect of which assessee has an existing right to carry on its mining operations and the fact that assessee wishes to carry on the mining area in that area, the assessee was required to pay compensation to the land owner so that the latter doesn't obstruct or challenge the carrying of the mining activity underneath the surface of land which belongs to him. The payment is for the purposes of removing the disability or obstruction and to facilitate the carrying on its business. No fresh rights have been acquired by the assessee by virtue of paying the said compensation. The assessee was already having a right to carry on the mining operations. The fact that land stand mutated in the name of the Government of Rajasthan post surrender by Shri Ranga also shows that the land or the surface rights therein have not being acquired by the assessee. In light of above discussions and respectfully following the decision of the Hon'ble Supreme Court in case of Bikaner Gypsum (supra), the assessee deserve to succeed in the instant case. The AO is therefore directed to allow the claim of deduction of Rs 35,00,000 u/s 37(1) of the Act. In the result, the ground of appeal is allowed."

8. Regarding the quantum of claim which can be allowed under section 37(1) of the Act, it is again an undisputed fact that the assessee has incurred an expenditure of Rs 60 lacs during the previous year relevant to impugned assessment year and a claim u/s 37(1) was made during the course of assessment proceedings. The fact of incurrance of the expenditure and the fact that the said expenditure has been incurred for the purposes of the business has not been disputed. In the

return of income, the assessee has claimed depreciation of Rs 52.98 lacs however, the said depreciation relates to expenditure incurred in earlier years and which has been capitalized as well as expenditure incurred during the year under consideration on which depreciation has been claimed. In the earlier year i.e, AY 2013-14, the whole of the expenditure has been allowed as revenue expenditure and therefore, if we were to approve the approach of the Revenue, it will create an inconsistent position as far as this claim of expenditure is concerned. Once a claim is held to be legally allowed, there is thus no basis to restrict the quantum of such claim once other conditions for claiming such expenditure has been duly satisfied. Therefore, consistent with the position in the earlier year and following the decision of the Coordinate Bench referred supra, the whole of the expenditure of Rs 60,00,000 incurred during the year is allowed as revenue expenditure u/s 37(1) of the Act. In the result, ground of assessee's appeal is allowed and the ground of Revenue's appeal is dismissed.

9. Regarding ground No. 2 and 3 of the Revenue's appeal, the Revenue has challenged the deletion of addition of Rs. 13,70,733/- towards contribution to PF and ESI. The Id. AR submitted that the assessee company has deposited employee's contribution to PF and ESI amounting to Rs. 13,70,733/- with delay of few days from the due dates, however the same were deposited before the due date of filing of the return of income U/s 139(1) of the Act which is evident from the order of the Assessing Officer. It was further submitted that the matter is squarely covered in favour of the assessee by the decisions of the Hon'ble Rajasthan High Court in case of CIT vs. State Bank of Bikaner &

Jaipur 43 taxman.com 411 and CIT vs. Jaipur Vidyut Vitran Nigam Ltd.
49 taxman.com 540.

10. We find that the Id CIT(A) has relied upon the decision of the Hon'ble Rajasthan High Court referred supra in deleting the disallowance made by the Assessing Officer. Accordingly, we confirm the order of the Id CIT(A) and the ground of revenue's appeal is hereby deleted.

In the result, the appeal of the assessee is allowed and the appeal of the Revenue is dismissed.

Order pronounced in the open court on 04/12/2018.

Sd/-

(विजय पाल राव)
(Vijay Pal Rao)

न्यायिक सदस्य / Judicial Member
जयपुर / Jaipur

दिनांक / Dated:- 04/12/2018.

*Santosh.

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

1. अपीलार्थी / The Appellant- M/s Associated Soapstone Distributing Co. Pvt. Ltd., Jaipur.
2. प्रत्यर्थी / The Respondent- ACIT/DCIT, Circle-5, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. ITA No. 489 & 640/JP/2018}

Sd/-

(विक्रम सिंह यादव)
(Vikram Singh Yadav)

लेखा सदस्य / Accountant Member

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar

