

IN THE INCOME TAX APPELLATE TRIBUNAL MUMBAI
BENCH "H", MUMBAI

Before Shri Shamim Yahya (AM) & Shri Pawan Singh (JM)

ITA No. 2783/Mum/2016 (Assessment Year : 2011-12)

Golden Computers Pvt Ltd Unit No.602, 6 th Floor, Floor Deck Plaza, MIDC, Andheri (E), Mumbai-400 093 PAN : AAACG1233E	vs	Dy.CIT 8(1), Aayakar Bhavan, M.K. Road, Mumbai-400020
APPELLANT		RESPONDEDNT

Appellant by	Dr. K Shivram & Rahul Hakani (AR)
Respondent by	Shri Rajesh Kumar Yadav (DR)
Date of hearing	18-09-2019
Date of pronouncement	13-11-2019

ORDER

PER PAWAN SINGH, JM :

1. This appeal by assessee is directed against the order of CIT(A)-16, Mumbai dated 08-02-2016 for Assessment Year 2011-12. The assessee has raised the following grounds of appeal:

“The appellant object to the order dated 08/02/2016 passed by commissioner of Income Tax appeal 16 Mumbai for the Asst. year 2011-12 on the following among other grounds.

1. On the facts and circumstances of the case the learned CIT appeal erred in confirming the decision of DCIT in assessing commission income of Rs. 7,33,360/- under the head income from other sources instead of business income.
2. On the facts and circumstances of the case the learned CIT appeal erred in confirming disallowance of car depreciation Rs. 44,09,123/- and interest 9,26,098/- on car loan and car expenses Rs. 26,812/-
3. On the facts and circumstances of the case the learned CIT appeal erred in confirming disallowance of financial charges Rs. 75,144/-
4. On the facts and circumstances of the case the learned CIT appeal erred in confirming that Motor car has not been used for business purpose.
5. On the facts and circumstances of the case the learned CIT appeal erred in confirming interest income Rs. 60,753/- though no such interest is accrued or received during the year.

6. On the facts and circumstances of the case the learned CIT appeal erred in confirming in assessing interest income Rs. 3,32,258/- under the head income from other sources instead of business income.

7. On the facts and circumstances of the case the learned CIT appeal erred in confirming that loss of Rs. 46,51,297/- is not allowed to be carried forward u/s 80 of IT Act though this loss is due to depreciation and not a business loss and it is allowable to be carried forward.

8. On the facts and circumstances of the case the learned CIT appeal erred in confirming in observing that no evidence is furnish by appellant in support of the claim though facts were submitted along with appeal papers.”

2. This appeal was earlier decided vide order dated 20-06-2017; however, the order was recalled on the Miscellaneous Application (MA) filed by the assessee in M.A. No.723/Mum/2017 vide order dated 02.01.2019. Therefore, this appeal was heard afresh by this regular bench.
3. Brief facts of the case are that assessee is a company engaged in the business of securities and derivatives transaction, commission, brokerage and financing business including investment in agricultural land. The assessment was completed u/s 143(3) on 22-03-2014. The AO, while passing the assessment order, made addition by treating the commission income under the head “Income from other sources” instead of claim as “business income” , disallowed depreciation on car, interest on car loan and car expenses, disallowed financial charges and treated the interest income and not allowed carry forward of loss of Rs.46,51,297/-. On appeal before the CIT(A), the action of AO was

upheld. Thus, further aggrieved, the assessee has filed present appeal before the Tribunal.

4. We have heard the submission of Ld.AR of the assessee and Ld. DR for revenue and perused the material available on record.
5. At the outset of hearing, the Ld.AR for the assessee submits that he is not pressing ground 1. Considering the submission of Ld.AR of the assessee, ground 1 of the appeal is dismissed, as not pressed.
6. Grounds 2 to 4 relate to disallowance of depreciation on car of Rs.44,09,123/- interest on car loan of Rs.9,26,098/- and car expenses of Rs.26,812/- and financial charges of Rs.75,144/-. The Ld.AR of the assessee submits that the assessee purchased motor car for the use of directors as per Board Resolution dated 30-08-2010 passed by Board of Director of assessee' s companies. The car was purchased for business purpose and the assessee claimed depreciation, interest on car loan and expenses. Detailed submissions were made before AO, vide submission dated 12-02-2014 that car is used for business in securities transactions. The business of assessee has increased year after year. The assessee also furnished various details before the AO on 12.02.204. The AO disallowed the depreciation, interest and expenses on car by taking view that it was not used for business purpose. The Ld.AR submits that motor car is used for directors driving from home to office and for

business purpose. The assessee has shown its business income from shares, financial income, commission income and derivatives income. The Ld.AR of the assessee submits that if the motor car is used for business purpose, the assessee is entitled for depreciation and other expenses in support of his submission. The Ld.AR relied upon the order of Hon' ble Gujarat High Court in the case of CIT vs Fluid Controls Manufacturing Co 280 ITR 86 (Guj) and CIT vs India Tea & Timber Trading Co (1996) 221 ITR 857(861)(Guu) and CIT vs Geo Tech Construction Corporation (2000) 244 ITR 452 (446)(Ker).

7. In other alternative submission, the Ld.AR submits that there is no personal expenditure in case of company as held by Hon' ble Gujarat High Court in Sayaji Iron & Engg. Co vs CIT (2002) 253 ITR 749(Guj) wherein it was held that whether the vehicle belonging to an assessee company, where the vehicle belonging to assessee company are used by its director for personal or other purposes, it would be wrong to hold that vehicles are personally used by company because a limited company, by its very nature, cannot have any personal use. However, the vehicle / car belonging to the assessee company are used by its director for personal or other purposes. On the issue of depreciation on car, the Ld.AR relied upon the decision of Hon' ble Supreme Court in

CIT vs Excel Industries (2013) 358 ITR 295 (SC). The Ld.AR further submits that motor car expenses was allowed in Assessment Year 2013-14 in assessment order u/s 143(3) dated 22.03.2016.

8. On the other hand, the Ld. DR for the revenue supported the orders of lower authorities. The ld. DR submits that vehicle was used for personal purpose of the Directors.
9. We have considered the rival submissions and perused the material placed before us. The AO disallowed the depreciation, interest and expenses on car by taking view that it was not used for business purpose. The AO also held that he conducted enquiry under section 131 with regard to commission income which was found to be bogus. The Assessing Officer on the basis of enquiry conducted with regard to commission income concluded that it is hardly believable that employee of company could be provided a costly vehicle for the purpose of visiting broker/sub-broker or for carrying out trading activities and that it is proved beyond doubt that the car was never used by directors of the assessee wholly and exclusively for the purpose of business. We have noted that the Assessing Officer has not questioned the ownership of vehicle. From the perusal of Tax Audit Report (TAR) filed by the assessee, we have seen that the assessee has claimed depreciation @ 15% on the on the Written Down Value (WDV) of vehicle in Annexure-

3 of Tax Audit Report, copy of which is placed at page no. 26 of Paper Book. The assessee has clearly mentioned in Annexure-3 of TAR that vehicle was put to use on 30.09.2010. The Assessing Officer has not disputed the date of put to use of the vehicle. The Id CIT(A) affirmed the action of AO by taking view that no evidences were furnished by the assessee and not challenged the inquiries conducted by the AO. Before us the Id. AR for the assessee vehemently submitted that the car was used wholly and exclusively for the purpose of business of the assessee and relied on various case laws, which we have noted above. With regard to depreciation on car, interest on car loan and expenses, the Ld.AR of the assessee relying upon the decisions of Hon' ble Gujarat High Court in the case of CIT vs Fluid Controls Manufacturing Co. (280 ITR 86 (Guj) and CIT vs India Tea & Timber Trading Co (1996) 221 ITR 857(861)(Gau) and CIT vs Geo Tech Construction Corporation (2000) 244 ITR 452 (446)(Ker), submits that though the cars are bought in the name of directors, but the cars are used for business purposes of the assessee and, therefore, depreciation on car, interest on car loan and expenses on the cars are business expenditure.

10. Considering the fact that neither the Assessing Officer has disputed the WDV of vehicle or its date of put to use. The Assessing Officer disallowed depreciation, interest claim and expenses by relying on the

investigation conducted with regard to commission income. We have further noted that Assessing Officer for Assessment Year 2012-13 allowed the depreciation and expenses in the order passed under section 143(3) dated 22.03.2016. Considering the aforesaid factual and legal discussion, we direct the AO to allow the expenditure incurred on use of motor car, interest on car loan.

11. With regard to the depreciation, we find that the Hon' ble Gujarat High Court in the case of CIT vs Fluid Controls Manufacturing Co (supra) held that once the conditions laid down in section 32 and section 34 of the Income-tax Act, 1961, are satisfied for any part of the previous year, the assessee is entitled to full depreciation allowance on the assets; though the term 'owned by the assessee' is used in section 32(1) there is nothing to show that the assessee should have remained the owner of the asset in question for the entire previous year in question. In the case of CIT vs India Tea & Timber Trading Co (supra), the Hon' ble Gauhati High Court held that expression 'used' appearing in sub-section (1) of section 32 should have a wider meaning so as to include not only actual but also passive user, and, therefore, machineries kept ready for use could also be treated as in passive use so that assessee could be allowed depreciation even though its machineries were used

for short period. Further, in the case of CIT vs Geo Tech Construction Corpn (supra), the Hon' ble Kerala High Court held that the word 'used' would include both passive as well as active user and an asset can be said to be used when it is kept ready for use. No contrary decision has been brought to our notice by the Ld. DR. In the circumstances, we find merit in the contention of the assessee that cars were exclusively used for the purpose of business of the assessee, and therefore, we direct the assessing officer to allow depreciation on the cars, as claimed by the assessee. Similarly, since the vehicles were exclusively used for business of the assessee, the claim of interest on car loans is also allowable expenditure, by applying the ratio of decisions in the above referred cases. The suit follows for expenses incurred on cars. Therefore, we direct the assessing officer to allow the depreciation on cars as claimed by the assessee, interest on car loans and expenses incurred on cars. In the result, the Ground No. 2 to 4 of the appeal are allowed.

12. Ground 5 relates to confirming the interest income of Rs. 60,753/-. The Id. AR of the assessee submits that assessee has given loan to Tovya Automation Pvt. Ltd. in F.Y. 2008-09 and charged interest of Rs. 60,753/-. The borrower has incurred heavy losses and they have not paid

any interest and the principle amount. The interest income receivable is appearing in other advances of balance-sheet as it was outstanding since 31.03.2009. This grouping of other advances also shown last year figure of outstanding of Rs. 60,753/-. The Assessing Officer without verifying or making any enquiry presumed that as an interest of the current year and the same is liable to be deleted

13. The Ld. DR for the revenue supported the order of lower authorities.
14. We have considered the submission of both the parties and perused the order of lower authorities and also gone through the orders of authorities below. The Assessing Officer made addition of Rs. 60,753/- by taking view that assessee has shown interest receivable but not offered to tax. Accordingly, added to the total income of the assessee under the head “Income from Other Sources” . The Id. CIT(A) confirmed the action of Assessing Officer by noting that the assessee has neither filed any written submission nor oral argument qua this ground of appeal. We have noted that in the statement of fact, the assessee has clearly mentioned that in F.Y. 2008-09, the assessee has given a loan to Tovya Automation Pvt. Ltd. and charged interest of Rs. 60,753/-. The borrower has incurred huge losses and they have not paid interest and principle outstanding. We have noted that the assessee has not offered to tax Rs.60,753/- receivable from Tovya Automation Pvt Ltd. The assessee,

though has shown the said sum as receivable from Tovya Automation Pvt Ltd in its details of 'loans and advances' in addition to the other interest receivable from the above named parties, has not offered the same for taxation. Considering the fact that neither the Assessing Officer nor the Id. CIT(A) verified the fact and made addition without verification of fact. Therefore, we set aside the issue to the file of the assessing officer and direct him to verify the contentions of the assessee with the records. If the contention of the assessee is found correct, then the assessing officer should delete the addition. This ground of appeal is treated as allowed, for statistical purpose.

15. Ground no. 6 relates to treatment of interest income of Rs.3,32,258/- under the head 'Income from other sources' as against claim of assessee under 'business income'. The Id. AR of the assessee submits that the details of interest income were provided to the assessee which is mentioned in para-8 of the assessment order. The assessee offered the interest income as business income. The Assessing Officer treated the same under the head "Income from Other Sources" by taking view that the business of the assessee is neither of money lending nor it is an Non-Banking Financial Company (NBFC). The Id. AR of the assessee further submits that non-registration in NBFC will

not make interest income as “Income from Other Sources” . Further, similar interest income is assessed as Business Income in A.Y. 2013-14 in the assessment order passed under section 143(3) dated 22.03.2016. In support of his submission, the ld. AR of the assessee relied upon the decision of Preimus Investment Finance Ltd. vs. DCIT (ITA No. 4879/M/2012).

16. On the other hand, the ld. DR for the revenue supported the order of authorities below.
17. We have considered the submissions of the parties and perused the orders of the authorities below. During the assessment the Assessing Officer treated the interest income under the head “Income from Other Sources” , though the assessee offered the interest income under the head ‘business income’ . The assessing officer treated it under the head ‘income from other sources’ by taking view that the business of the assessee is neither of money lending nor it is Non-Banking Financial Company (NBFC). The ld CIT(A) confirmed the action of assessing officer holding that no written submissions are filed by the assessee quo this ground of appeal. Before us, the ld. AR of the assessee vehemently submitted that similar interest income offered by assessee under the head Business Income was accepted by Assessing Officer in

Assessment Year 2013-14 passed under section 143(3) on 22.03.2016.

The Id. AR of the assessee also relied upon the decision of co-ordinate bench in Preimus Investment Finance Ltd. vs. DCIT (supra), wherein interest income of NBFC was allowed as Business Income. The relevant part of decision is extracted below:

“5. We have heard the rival submissions and perused the material before us. We find that the AO had assessed the interest income under the head Income from other sources, that the basis for not treating the interest income as business income was the denial of the RBI to register the assessee as NBFC, that the FAA upheld the order of the AO and held that the assessee was not carrying on any business, that expenditure incurred by the assessee towards running its office were also disallowed. In our opinion, the approach of the AO and the FAA was not as per the provisions of the Act. Permission/denial by the RBI to register an assessee as NBFC does not decide the issue of carrying of business or make the business illegal. If the assessee had violated any provisions of law under the RBI Act it would be penalised by the appropriate authority. But that does not mean that the systematic organized activity carried out by the assessee for earning profit would not be treated as business. The explanation to sec.37(1) of the Act is not at all applicable to the case under consideration. In the scrutiny assessment, completed in the earlier years, the AO had assessed the interest income as business income and had allowed all the expenditure related with the business activity. The rule of consistency demands that for deviating from the stand taken in the earlier AY, the AO should bring on record the distinguishing feature of that particular year. We find that the AO or the FAA has not mentioned even a single line as to how the facts of the case under appeal were different from the facts of the earlier or subsequent years. We find that the disallowance of the expenses was without any basis. In the case of Rampur Timber & Turnery Co. Ltd.(supra),the Hon’ble Allahabad High Court has held that expenditure incurred for retaining the status of the company, namely miscellaneous expenses, salary, legal

expenses, travel expenses, expenses would be expenditure wholly and exclusively for the purpose of making and earning income. There is no doubt that the assessee is a corporate entity. Even if it is not carrying on any business activity it has to incur some expenditure to keep up its corporate entity. Therefore expenditure incurred by it has to be allowed. Reversing the order of the FAA, we decide Ground No.1 and 2 in favour of the assessee. We hold that the interest income earned by the assessee has to be taxed under the head business income and all the expenses related with it have to be allowed.”

18. Considering the decision of co-ordinate bench in Preimus Investment Finance Ltd. (supra) and the fact that in subsequent AYs i.e. in A.Y. 2013-14 similar income was allowed as Business Income, therefore, this ground of appeal is allowed.
19. Ground No. 7 relates to disallowance of unabsorbed depreciation of Rs. 46,51,297/-. The ld. AR of the assessee submits that Assessing Officer disallowed the claim of unabsorbed depreciation by taking view that return of income was filed within time limit under section 139(1). The ld. CIT(A) confirmed the action of Assessing Officer. The ld. AR of the assessee submits that section 80 is not applicable to unabsorbed depreciation. In support of his submission, the ld. AR of the assessee relied upon the decision of Hon’ ble Delhi High Court in CIT vs. Govind Nagar Sugar Ltd. [2011] 334 ITR 18 (Del.), decision of Tribunal in Pioneer Enterprises vs. ITO (53 ITD 435 (440) (Cochin) (Trib.).

20. On the other hand, the Id. DR for the revenue relied upon the order of authorities below.
21. We have considered the rival submission of both the parties and have perused the order of authorities below. During the assessment, the Assessing Officer disallowed the unabsorbed depreciation by taking view that the assessee filed return of income beyond due date of filing prescribed under section 139(1). The Id. CIT(A) confirmed the action of Assessing Officer by taking view that no details or submission was furnished. We have noted that before the Id. CIT(A), the assessee in its statement of fact has clearly stated that Assessing Officer failed to appreciate that unabsorbed loss of Rs. 46,51,297/- comprise of unabsorbed depreciation of Rs. 44,09,123/-, which can be carried forward, even though return is filed beyond due date.
22. The Hon' ble Delhi High Court in CIT vs. Govind Nagar Sugar Ltd. (supra) while considering the similar question of law whether the loss referred under section 80 also includes unabsorbed depreciation. It was held that Section 80 contemplates determination of loss in pursuance of return filed under section 139(3) which is to be carried forward under sections 72, 73, 74, 74A. The Hon'ble Court further held that on examining the provisions of sections 72, 73 & 74 as referred in section 80,

prima facie, these sections do not cover or deal with procedure of setting-off of unabsorbed depreciation and investment allowance.

23. Further, the co-ordinate bench of Cochin Tribunal in Pioneer Enterprises vs. ITO (supra) held that from a plain reading of section 139(3) it is manifest that the filing of the return of income within the time allowed under section 139(1) is a condition precedent for allowing carry-forward of business loss or loss under the head 'Capital gains' and not for carry-forward of unabsorbed depreciation or unabsorbed investment allowance. These are governed by the provisions of sections 32 and 33 which form a code by themselves. The Assessing Officer was not justified in invoking the provisions of section 139(3) to disallow the claim of the assessee. The Assessing Officer invoked the provisions of section 139(10) to say that the return filed by the assessee was non-est in the eye of law as the income returned was below the taxable limit. The proviso to section 139(10) which carved out certain exceptions from the operation of that section mentioned 'only a return of the partner of the firm' as it stood on 1-4-1989, i.e. , relevant to the assessment year 1989- 90. However, with effect from 1-4-1990 'return of the firm' also was included as one of the exceptions to section 139(10). This amendment should be considered as clarificatory in nature and retrospective in effect.

24. Considering the decision of Hon'ble Delhi High Court and Co-ordinate Bench, we are of the view that assessee is entitled for carry forward of unabsorbed depreciation of Rs. 44,09,123/-, rest of the disallowance of carry forward loss is sustained. Since, the Assessing Officer has not verified the unabsorbed depreciation, therefore, the issue qua the unabsorbed depreciation is restored to the file of Assessing Officer for limited purpose to verify the same and allow in accordance with law. Rest of the disallowance of loss is sustained. In the result, this ground of appeal is partly allowed.
25. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 13-11-2019.

Sd/-

Sd/-

(Shamim Yahya)	(Pawan Singh)
ACCOUNTANT MEMBER	JUDICIALMEMBER

Mumbai, Dt : 13 November, 2019

Pk/-

Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

/True copy/

By order

Asstt. Registrar, ITAT, Mumbai