

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "G", MUMBAI**

BEFORE SHRI G. MANJUNATHA (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 3562/MUM/2016
Assessment Year: 2009-10**

RMC Readymix (India) P. Ltd., (Now amalgamated with Prism Cement Limited), Windsor, 7 th Floor, C.S.T. Road, Near Vidyanagari, Kalina, Santacruz (E), Mumbai - 400098 PAN: AAACR4938D	Vs.	The Assistant Commissioner of Income Tax, Central Circle 34, Central Circle- 34, Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

Assessee by : Shri Nitesh Joshi (Advocate)
Revenue by : Shri Arju Garodia (DR)

Date of Hearing: 01/10/2019
Date of Pronouncement: 20/12/2019

ORDER

PER RAM LAL NEGI, JM

This appeal has been filed by the assessee against the order dated 03.03.2016 passed by the Commissioner of Income Tax (Appeals)-54 (for short 'the CIT(A), Mumbai, for the assessment year 2009-10, whereby the Ld. CIT(A) has partly allowed the appeal filed by the assessee against the assessment order passed u/s 143 (3) of the Income Tax Act, 1961 (for short the 'Act').

2. Brief facts of the case are that the assessee engaged in the business of manufacturing ready mixed concrete and aggregates, filed its return of income for the assessment year under consideration declaring nil income under the normal provisions of the Act and Rs. 2,08,53,749/- u/s 115JB of the Act. Since, the case was selected for scrutiny, the AO issued notice to the assessee u/s 143 (2) of the Act. In response to the said notice, the authorized representative (AR) of the assessee appeared before the AO and submitted the

details called for. The AO after examining the details and hearing the AR determined the income of the assessee at Rs. 2,90,87,607/- under the normal provisions of the Act and Rs. 2,08,53,749/- under section 115JB of the Act. After making additions on account of disallowance of lease rental claimed, addition on account of disallowance of depreciation of UPS and other additions. In the first appeal, the Ld. CIT (A) partly allowed the assessee's appeal, however, confirmed the addition made on account of disallowance of lease rental and depreciation of UPS and Batteries. Still aggrieved, the assessee is in appeal before the Tribunal.

3. The assessee has challenged the impugned order passed by the Ld. CIT (A) on the following effective grounds:-

- 1 *"The learned Commissioner of Income Tax (Appeals) erred in upholding the action of the learned Assistant Commissioner of Income tax (hereinafter referred to as 'the Assessing Officer') in disallowing a sum of Rs. 1,22,209/- out of the total lease rental expense of Rs. 3,00,364/- incurred by the appellant:*
- 2 *(a) The learned Commissioner of Income-tax (Appeals) erred in upholding the action of the Assessing Officer in restricting the claim of the appellant for depreciation on UPS, Battery etc. @ 15% as against 60%, by treating the same as plant & machinery and disallowed a sum of Rs. 1,18,221/-.*
(b) The learned Commissioner of Income Tax (appeals) erred in upholding the action of the Assessing Officer in restricting the claim of the appellant for depreciation on the additions made to the computers in nature of UPS, Battery etc. during the assessment year 2008-09, of a sum of Rs. 5,89,033/- @ 15% as against 60% on the grounds that the same was upheld by the Commissioner of Income tax (Appeals) in the earlier year and thereby disallowed a sum of Rs. 1,30,619/-.
(c) Without prejudice to what is stated above, the appellant submits that Ups are in the nature of energy saving device and as such entitled to depreciation @ 80%.
3. *The appellant submits that the Assessing Officer be directed:-*
 - i. *to delete the disallowance of Rs. 1,22,209/- out of lease rental charges.*
 - ii *(a) to delete the disallowance made of Rs. 1,18,221/- by granting depreciation @ 15% as against 60% on additions*

made to computers being UPS, Battery etc. during the previous year relevant to assessment year 2009-10.

(b) to delete the disallowance made of Rs. 1,30,619/- by granting depreciation @ 15% as against @ 60% on additions made to computers being UPS, Battery etc. during the previous year relevant to assessment year 2008-09.

(c) Without prejudice to what is stated above, to hold that the NPS are in the nature of energy saving device and as such entitled to depreciation @ 80% and to modify the assessment in accordance with the provisions of the Act.”

4. Vide first ground the assessee has challenged the action of the Ld.CIT (A) in upholding the action of the AO in disallowing a sum of Rs. 1,22,209/- out of the total lease rental expenses of Rs. 3,00,364/- incurred by the assessee. The Ld. counsel for the assessee submitted that this issues is covered in favour of the assessee by the decision of the ITAT in assessee’s own case for the AY 2006-07, 2007-08 and 2008-09. The “D” Bench of the ITAT has allowed this ground of appeal by following the decision of the coordinate Bench in assessee’s own case for the AY 2003-04.

5. The Ld. Departmental Representative (DR) fairly admitted that the issue of lease rental expenses is covered in favour of the assessee by the order of the ITAT rendered in the assessee’s own case for the AYs. 2006-07, 2007-08 and 2008-09, however the Ld. DR supported the order passed by the Ld. CIT (A).

6. We have heard the rival submissions and perused the material on record including the order dated 29.08.2019 passed by the coordinate Bench in assessee’s own case ITA No. 3371/Mum/2010 for the AY 2006-07, ITA No. 8048/Mum/2010 for the AY 2007-08 and ITA No. 7682/Mum/2011 for the AY 2008-09. The “D” Bench of the Tribunal has decided this issue holding as under:-

“6. We have heard the rival submissions of the parties and also gone through the entire material on record including the cases relied upon by the parties. The Ld. CIT (A) has affirmed the findings of the AO relying on the decision of the ITAT, Mumbai in the case of DCIT vs. Marico Industries, ITA No. 3373/Mum/2002, AY 1995-96. In the said case, the

Tribunal has held that in case of finance lease, lessee is the owner of the assets for all practical purposes and depreciation is allowable to the lessee and not to the lessor. As pointed out by the Ld. counsel for the assessee, the then CIT (A) has decided the similar issue in favour of the assessee in the assessee's own case for the AY 2003-04. The operative part of the order of the Ld. CIT (A) reads as under

" I have heard the A.R. and I find merit in the contention of the A.R. of the appellant. The asset does not belong to the appellant as such both principal and interest has to be paid by it. Since the appellant has used them in business, it is an allowable expenditure. Accounting treatment has nothing to do with such allowance as has been rightly pointed out by the A.R. quoting CBDT Circular and Supreme Court decision in the case of Kedarnath Jute Mfg. Co Ltd. vs. CIT (1971) 82 ITR 363. As such the A.O directed to allow the expenditure as claimed by the appellant on this issue.

7. *We further notice that in the subsequent assessment years i.e. for the AY 2004-05 and 2005-06, the then Commissioners (Appeals) allowed the identical claim of the assessee by following the decision of their predecessor passed in the assessee's own case for the AY 2003-04 referred above. Further, as pointed out by the Ld. counsel, the Central Board of Direct Taxes (CBDT) vide Circular No. 2 of 2001 dated 02.09.2001 has clarified that the New Accounting Standard on lease by the Institute of Chartered Account of India which require capitalization of the asset by the lessee in finance lease transaction by itself will have no implication on the allowance of depreciation on assets under the provisions of the Income Tax Act. In the light of the aforesaid clarification, the Ld. counsel submitted that the treatment given in the books is only to comply with the provisions of the Companies Act as required under AS-19 and will not in any way change the treatment of such transaction under the provisions of the Act. Para 3 of the said circular reads as under:-*

"3. It has come to the notice of the Board that the New Accounting Standard on "leases" issued by the Institute of Chartered Accountants of India require capitalization of the asset by the lessees in financial lease transaction. By itself,

the accounting standard will have no implication on the allowance of depreciation on assets under the provisions of the Income-tax Act.”

8. *Further, the Ld. counsel relied on the judgment of the Hon’ble Supreme Court in the case of ICDS Ltd. vs. CIT (supra), wherein it has been held that the lessor is the owner of the asset and eligible to claim depreciation on the vehicles given on lease which implies that the lessee should not be granted the deduction on account of depreciation but should be granted claimed for deduction of the lease rentals. The findings of the Hon’ble Apex Court read as under:-*

“19. We may now advert to the first requirement i.e. the issue of ownership. No depreciation allowance is granted in respect of any capital expenditure which the assessee may be obliged to incur on the property of others. Therefore, the entire case hinges on the question of ownership, if the assessee is the owner of the vehicles, then he will be entitled to the claim on depreciation, otherwise, not.”

22. A scrutiny of the material facts at hand raises a presumption of ownership in favour of the assessee. The vehicle, along with its keys, was delivered to the assessee upon which, the lease agreement was entered into by the assessee with the customer. Moreover, the relevant clauses of the agreement between the assessee and the customer specifically provided that:

(i) The assessee was the exclusive owner of the vehicle at all points of time;

(ii) If the lessee committed a default, the assessee was empowered to re-possess the vehicle (and not merely recover money from the customer);

iii) At the conclusion of the lease period, the lessee was obliged to return the vehicle to the assessee;

iv) The assessee had the right of inspection of the vehicle at all times.

For the sake of ready reference, the relevant clauses of the lease agreement are extracted hereunder:-

“2. Lease Rent

The lessee shall, during the period of lease punctually pay to the lessor free of any deduction whatsoever as rent for the assets the sum of moneys specified in the Schedule 'B' hereto. All rents shall be paid at the address of the Lessor shown above or as otherwise directed by the Lessor in writing. The rent shown in Schedule 'B' shall be paid month on 1st day of each month and the first rent shall be paid on execution thereof.

4. Ownership

The assets shall at all times remain the sole and exclusive property of the lessor and the lessee shall have no right, title or interest to mortgage, hypothecate or sell the same as bailee

9. Inspection

The Lessor shall have the right at all reasonable time to enter upon any premises where the assets is believed to be kept and inspect and/or test the equipment and/or observe its use.

18. Default

If the lessee shall make default in payment of moneys or rent payable under the provisions of this agreement, the Lessee shall pay to the Lessor on the sum or sums in arrears compensation at the rate of 3% per month until payment thereof, such compensation to run from the day to day without prejudice to the lessor's rights under any terms, conditions and agreements herein expressed or implied. All costs incurred by the Lessor in obtaining payment of such arrears or in endeavoring to trace the whereabouts of the equipments or in obtaining or endeavouring to obtain possession thereof whether by action, suit or otherwise, shall be recoverable from the lessee in addition to and without prejudice to the lessors right for breach of this lease.

19. Expiration of Lease:

Upon the expiration of this Lease, the Lessee shall deliver to the Lessor the assets at such place as the Lessor may specify in good repair, condition and working order. As soon as the return of the asset the Lessor shall refund the amount of security deposit. If the lessee fails to deliver the equipment to the Lessor in accordance with any direction given by the Lessor, the Lessee shall be deemed to be the tenant of the

assets at the same rental and upon the same terms herein expressed and such tenancy may be terminated by the Lessor immediately upon default by the lessee hereunder or upon 7 days notice previously given.”

24. The only hindrance to the claim of the assessee, which is also the lynchpin of the case of the Revenue, is Section 2(30) of the MV Act, which defines ownership as follows: -

“owner” means a person in whose name a motor vehicle stands registered, and where such person is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase agreement, or an agreement of lease or an agreement of a hypothecation, the person in possession of the vehicle under that agreement.”

26. We do not find merit in the Revenue’s argument for more than one reason: (i) Section 2(30) is a deeming provision that creates a legal fiction of ownership in favour of lessee only for the purpose of the MV Act. It defines ownership for the subsequent provisions of the MV Act, not for the purpose of law in general. It serves more as a guide to what terms in the MV Act mean. Therefore, if the MV Act at any point uses the term owner in any Section, it means the one in whose name the vehicle is registered and in the case of a lease agreement, the lessee. That is all. It is not a statement of law on ownership in general. Perhaps, the repository of a general statement of law on ownership may be the Sale of Goods Act; (ii) Section 2(30) of the MV Act must be read in consonance with sub-sections (4) and (5) of Section 51 of the MV Act, which were referred to by Mr. S. Ganesh, learned senior counsel for the assessee. The provisions read as follows: -

“(4) No entry regarding the transfer of ownership of any motor vehicle which is held under the said agreement shall be made in the certificate of registration except with the written consent of the person whose name has been specified in the certificate of registration as the person with whom the registered owner has entered into the said agreement.

(5) Where the person whose name has been specified in the certificate of registration as the person with whom the registered owner has entered into the said agreement, satisfies the registering authority that he has taken

possession of the vehicle from the registered owner owing to the default of the registered owner under the provisions of the said agreement and that the registered owner refuses to deliver the certificate of registration or has absconded, such authority may, after giving the registered owner an opportunity to make such representation as he may wish to make (by sending to him a notice by registered post acknowledgment due at his address entered in the certificate of registration) and notwithstanding that the certificate of registration is not produced before it, cancel the certificate and issue a fresh certificate of registration in the name of the person with whom the registered owner has entered into the said agreement:

Provided that a fresh certificate of registration shall not be issued in respect of a motor vehicle, unless such person pays the prescribed fee:

Provided further that a fresh certificate of registration issued in respect of a motor vehicle, other than a transport vehicle, shall be valid only for the remaining period for which the certificate cancelled under this sub-section would have been in force.”

Therefore, the MV Act mandates that during the period of lease, the vehicle be registered, in the certificate of registration, in the name of the lessee and, on conclusion of the lease period, the vehicle be registered in the name of lessor as owner. The Section leaves no choice to the lessor but to allow the vehicle to be registered in the name of the lessee. Thus, no inference can be drawn from the registration certificate as to ownership of the legal title of the vehicle; and (iii) if the lessee was in fact the owner, he would have claimed depreciation on the vehicles, which, as specifically recorded in the order of the Appellate Tribunal, was not done. It would be a strange situation to have no claim of depreciation in case of a particular depreciable asset due to a vacuum of ownership. As afore- noted, the entire lease rent received by the assessee is assessed as business income in its hands and the entire lease rent paid by the lessee has been treated as deductible revenue expenditure in the hands of the lessee. This reaffirms the position that the assessee is in fact the owner of the vehicle, in so far as Section 32 of the Act is concerned.

29. Therefore, in the facts of the present case, we hold that the lessor i.e. the assessee is the owner of the vehicles. As the owner, it used the assets in the course of its business, satisfying both requirements of Section 32 of the Act and hence, is entitled to claim depreciation in respect of additions made to the trucks, which were leased out.”

9. In the said case, the assessee as a part of its business had leased out the vehicles purchased by it from the manufacturers, to its customers. The lessees were registered as the owners of the vehicles in the certificate of registration. The assessee claimed depreciation as it had been financed by the assessee. The AO disallowed the claim of the assessee on the ground that the assessee use of these vehicles was only by way of leasing out to others and not as actual user of the vehicles in the business of running them on hire. In the first appeal the CIT (A) allowed the claim of the assessee. In the further appeal, the ITAT affirmed the findings of the CIT (A). The revenue challenged the order of the CIT (A) before the High Court. The Hon'ble High Court reversed the findings of the ITAT holding that since the vehicles were not registered in the name of the assessee and had only financed the transaction, it could not held to be the owner of the vehicle. Therefore, the assessee is not entitled to claim depreciation in respect of the vehicles in question. The Hon'ble Supreme Court reversed the findings of the High Court and allowed the appeal of the assessee holding that the assessee is entitled for the depreciation claimed.

10. Hence, in our considered view, the claim of the assessee is covered in favour of the assessee by the decision of the Hon'ble Supreme Court in the case of ICDS Ltd. vs. CIT (A) (supra). We therefore following the ratio laid down by the Hon'ble Supreme Court in the case discussed above, set aside the findings of the Ld. CIT (A) and allow this ground of appeal and accordingly direct the AO to delete the addition made on account of disallowance of lease rentals.”

6. Since, the coordinate Bench has already allowed this ground of appeal of the assessee in assessee's own case for the AYs 2006-07, 2007-08 and 2008-09 and since there is no change of material facts in the present case, we do not find any reason to take a different view. Hence, consistent with our findings, we

allow this ground of appeal and direct the AO to delete the addition made on account of disallowance of lease rentals.

7. Vide Ground No. 2 (a) the assessee has challenged the action of the Ld.CIT (A) in upholding the findings of AO vide which the AO restricted the depreciation claimed by the assessee on UPS and Inverter to 15% as against 60% claimed by the assessee, treating the same as plant and machinery. The Ld. counsel submitted that this issue is covered by the judgment of the Hon'ble Bombay High Court in the case of *CIT vs. Sarswat Infotech Ltd. Income Tax Appeal No. 1243 of 2012*, wherein the Hon'ble High Court dismissed the appeal filed by the revenue against the findings of the ITAT holding that depreciation on UPS is allowable @ 60%. The Ld. counsel further pointed out that the Tribunal has allowed the identical ground in assessee's own appeal pertaining to the AY 2006-07, 2007-08 and 2008-09 by following the ratio laid down by the Hon'ble Bombay High Court in the case of *CIT vs. Sarswat Infotech Ltd.* (supra).

8. The Ld. DR fairly admitted that the Tribunal has decided the identical issue in favour of the assessee in the assessee's own case for the earlier assessment years. However, supported the order passed by the authorities below.

9. We have heard the rival submissions and perused the material on record. As pointed out by the Ld. counsel, the coordinate Bench has decided the identical issue in favour of the assessee in assessee's own case for the earlier assessment years by following the ratio of law laid down by the Hon'ble Gujarat High Court in the case of *CIT vs. Sarswat Infotech Ltd.* (supra), the operative part of which reads as under:-

"5) In second appeal, the Tribunal by its order dated 14/03/2012 held that UPS is an integral part of the computer system and regulate the flow of the power to avoid any kind of damage to the computer network due to fluctuation in power supply which could lead to loss of valuable data. The Tribunal relied upon the decision of the Delhi High Court dated 20/01/2011 in the matter of CIT v. Orient Ceramics and

Industries Ltd. in which UPS was held to be the part of the computer system and depreciation at 60% was allowed. Similarly, so far as ATMs are concerned, the Tribunal on finding of fact concluded that ATM cannot function without the held pf computer and would be a part of the computer used in the banking industry. Reliance was placed by the Tribunal upon the decision of the Delhi Bench of Tribunal in the matter of DCIT v. Global Trust Bank (ITA No. 474/D/09) wherein it has been held that ATM was a computer equipment and depreciation @ 60% was allowed. So far as the use of software is concerned, the Tribunal records a fact that the evidence of the use of the software on 31/03/2008 was produced before the Tribunal. Thus, the Tribunal held that depreciation @ 30% on software was rightly claimed.

6) *“We note that the Tribunal has arrived at a finding of fact on all the three questions. The revenue has not been able to show that the above finding of fact is perverse. Thus, we do not see any reason to entertain question (i), (ii) and (iii) above.”*

10. Since, the Tribunal has decided the identical issue in favour of the assessee in assessee's own cases referred above and since there is no change of facts in the present case, we do not find any reason to take a different view. Hence, consistent with our findings in the assessee's appeals pertaining to the earlier assessment years aforesaid, we allow this ground of appeal and set aside the findings of the Ld. CIT (A). Accordingly, we direct the AO to delete the addition.

11. Vide Ground No. 2(b), the assessee has challenged the action of the Ld.CIT (A) in restricting the assessee's claim of depreciation on UPS, Battery etc. to 15% as against 60% in the AY 2008-09. In this regard, we noted that in the earlier year, the coordinate bench has directed the AO to allow depreciation @ 60% on UPS, Batteries etc., therefore, the assessee is entitled for 60% depreciation on the opening written down value. Hence, we direct the AO to allow 60% depreciation on UPS and Batteries purchased in the year relevant to the assessment year 2008-09.

12. The Ld. counsel further submitted that the assessee does not want to press ground No. 2 (c) of the appeal. Hence, we dismiss Ground No. 2 (c) of the appeal as not pressed.

In the result, appeal filed by the assessee for assessment year 2009-2010 is partly allowed.

Order pronounced in the open court on 20th December, 2019.

Sd/-
(G. MANJUNATHA)
ACCOUNTANT MEMBER

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 20/12/2019

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai