

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

BEFORE SHRI R.C.SHARMA, ACCOUNTANT MEMBER
AND
SHRI VIKAS AWASTHY, JUDICIAL MEMBER

ITA NO.2262/MUM/2016(A.Y.2011-12)
ITA NO.2314/MUM/2017(A.Y.2012-13)

Kellogg India Private Limited,
1001-1002, 10th Floor, Hiranandani Knowledge Park,
Hiranandani Business Park,
Powai, Mumbai 400 076.
PAN:AAACK 1748A Appellant
Vs.

Income Tax Officer-15(2)(1),
Room No.452, 4th Floor,
Aaykar Bhavan, M.K.Road,
Mumbai 400 020 Respondent

ITA NO.1906/MUM/2016(A.Y.2011-12)

Income Tax Officer-15(2)(1),
Room No.452, 4th Floor,
Aaykar Bhavan, M.K.Road,
Mumbai 400 020 Appellant
Vs.

Kellogg India Private Limited,
1001-1002, 10th Floor, Hiranandani Knowledge Park,
Hiranandani Business Park,
Powai, Mumbai 400 076.
PAN:AAACK 1748A Respondent

Assessee by : S/Shri Hirali Desai & Karan Mehta
Revenue by : Ms. Nillu Jaggi

Date of hearing : 12/12/2019
Date of pronouncement : 24/02/2020

ORDER

PER VIKAS AWASTHY, JM:

These three appeals, two by the assessee i.e ITA No.2262/Mum/2016 for assessment year 2011-12, ITA No.2314/Mum/2017 for assessment year 2012-13 and the appeal by the Department in ITA No.1906/Mum/2016 are taken up together as the issues involved in the appeals are similar and are arising from same set of facts.

2. ITA No.2262/Mum/2016 by the assessee and cross appeal by the Department in ITA No.1906/Mum/2016 are directed against assessment order for assessment year 2011-12 dated 29/01/2016 passed under section 143(3) r.w.s. 144C of the Income Tax Act, 1961 (in short 'the Act').

3. The brief facts as emanating from the records are: The assessee is engaged in the business of manufacturing and sale of ready to eat cereals . During the period relevant to assessment year under appeal, the assessee had entered into international transaction with its AEs. Reference under section 92CA(1) of the Act was made to TPO for computation of Arm's Length Price(ALP) in relation to the international transactions entered into by the assessee. The TPO vide order dated 30/01/2015 made adjustment of Rs.34.58 crores in respect of brand promotion and marketing expenditure. Apart from above transfer pricing adjustment, the Assessing Officer inter-alia made additions by reclassification of interest income and recomputation of depreciation under section 32 of the Act. Aggrieved against the draft assessment order dated 27/03/2015, the assessee filed objections before the DRP. The DRP vide directions dated 28/12/2015 partly accepted the objections

raised by the assessee. The Assessing Officer vide impugned order dated 29/01/2016 gave effect to the direction of the DRP. Against the said assessment order both, the assessee and the Revenue are in appeal before the Tribunal.

4. Shri Hiralal Desai appearing on behalf of the assessee submitted at the outset that he is not pressing ground No.1 of the appeal. Thus, the effective grounds for adjudication in the appeal by assessee are ground No.2 & 3. Ground No.4 of the appeal is against initiation of penalty proceedings under section 271(1)(c) of the Act, the said ground is premature at this stage.

5. The Id. Authorized Representative for the assessee submitted that in ground No.2 of the appeal, the assessee has assailed action of Assessing Officer in reclassification of interest income of Rs.74,61,945/- as 'Income from Other Sources' as against 'Business Income' declared by the assessee. The Id. Authorized Representative for the assessee submitted that this issue is recurring in nature. The assessee in the past i.e. assessment years 2007-08, 2008-09 and 2009-10 had offered interest income under the head 'Business Income'. The same was rejected by the Revenue and was treated as 'Income from Other Sources'. The Tribunal restored the issue back to the file of Assessing Officer for re-examination of the nature of fixed deposit receipts. The Id.AR referred to the decision of the Tribunal in assessee's own case in ITA No.431/Mum/2010 for assessment year 2007-08 decided on 22/12/2016 and ITA No.2866/Mum/2014 for assessment year 2009-10 decided on 19/07/2019.

5.1 In respect of ground No.3 of the appeal, the Id. Authorized Representative for the assessee submitted that the Assessing Officer while

complying with the direction of DRP in allowing set off of brought forward business loss of previous year has first set off unabsorbed depreciation against current year 'Business Income' and 'Income from Other Sources' of the current year. The method adopted by A.O set off business losses of previous is contrary to the provisions of section 72(2) of the Act. As per mandate of sub-section (2) of section 72, the brought forward business losses are to be set off first, before setting off of unabsorbed depreciation. The Id. Authorized Representative for the assessee prayed that a direction may be given to Assessing Officer to first set off brought forward business losses of previous year before setting off of unabsorbed depreciation against 'Business Income' and Income from Other Sources'.

6. Ms. Nillu Jaggi representing the Department vehemently defended the findings of Assessing Officer on both these issues, however, the Id. Departmental Representative fairly admitted that the issue regarding reclassification of interest income has been considered by the Tribunal in earlier assessment years in assessee's own case. The issue has been restored back to the file of Assessing Officer for re-examination.

7. We have heard the submissions made by rival sides and have perused the order of authorities below. The assessee in appeal has raised four grounds. The Id. Authorized Representative for the assessee has stated at the Bar that he is not pressing ground No.1 of the appeal. Thus, in view of the statement made by Id. Authorized Representative for the assessee, ground No.1 of the appeal relating to manner of recomputation of depreciation under section 32 of the Act is dismissed as not pressed.

8. The ground No.2 of the appeal is against reclassification of interest income. The assessee has earned interest income of Rs.74,61,945/- and has offered the same to tax under the head 'Business Income'. The Assessing Officer has held that the interest income earned by the assessee is to be assessed under the head 'Income from Other Sources'. We find that in assessee's own case this issue has travelled to the Tribunal in earlier assessment years i.e. assessment year 2007-08, 2008-09 and 2009-10 . The Co-ordinate Bench of the Tribunal in ITA No.2866/Mum/2014 for assessment year 2009-10 (supra) has restored the issue back to the file of Assessing Officer by following the decision of the Tribunal in assessee's own case in assessment year 2007-08 and 2008-09. Since the issue in the assessment year under appeal is identical, we deem it appropriate to restore this issue to the file of Assessing Officer for denovo examination in line with the direction of the Tribunal in ITA NO.431/Mum/2010 for assessment year 2007-08 (supra). The ground No.2 of the appeal is allowed for statistical purpose in the terms aforesaid.

9. In ground No.3 of the appeal the assessee has assailed the action of Assessing Officer in setting off of unabsorbed depreciation against Business Income and Income from Other Sources for the current year before setting off of brought forward business losses of previous year. Before proceeding further on this issue, it would be pertinent to refer to the provisions of sub-section(2) of section 72 of the Act dealing with carry forward and set off of business losses. Sub-section(2) relevant to the issue is reproduced herein below:-

“(2): Where any allowance or part thereof is, under sub-section (2) of section 32_or sub-section (4) of section 35, to be carried forward, effect shall first be given to the provisions of this section”.

A bare perusal of sub-section (2) of section 72 would show that before giving effect to the provisions of section 32(2) dealing with carry forward of unabsorbed depreciation, precedence is given to set off of brought forward business losses against income under the head Profits and Gains from Business or Profession. Thus, we find merit in the contentions of the assessee. The Assessing Officer is directed to first set off brought forward business losses of previous years before set off of unabsorbed depreciation of the earlier year. The assessee succeeds on ground No.3 of the appeal.

10. In ground No.4 of the appeal, the assessee has assailed initiation of penalty proceedings under section 271(1)(c) of the Act. This ground of appeal is premature at this stage. Accordingly, the same is dismissed.

11. In the result, appeal of the assessee is partly allowed in the terms aforesaid.

ITA NO.1906/MUM/2016,A.Y.2011-12:

12. The Revenue in its appeal has raised four grounds. The ground No.1 of the appeal is against directions of DRP in deleting TP adjustment on account of advertising, marketing and sales promotion expenditure to the tune of Rs.17,68,29,302/-. The Id.Authorized Representative of the assessee submitted that the issue raised in the appeal by the Revenue is squarely covered by the decision of Tribunal in assessee’s own case in ITA No.2866/Mum/2014 for assessment year 2009-10 decided on 19/07/2019, wherein the entire adjustment has been deleted on

the ground that there is no agreement or arrangement for incurring AMP expenditure. The Id.Authorized Representative for the assessee asserted that the facts in the assessment year under appeal are identical.

12.1 In respect of ground No.2 of the appeal by Revenue, the Id.Authorized Representative of the assessee submitted that Revenue has assailed order of DRP in deleting the disallowance of royalty expenditure amounting to Rs.2,63,71,271/-. The Id.Authorized Representative of the assessee pointed that this issue was also subject matter of appeal before the Tribunal in ITA No.431/Mum/2011 for assessment year 2007-08. The facts in the assessment year under appeal are identical. The Tribunal deleted the disallowance of royalty by holding that the assessee fulfils all the prescribed conditions of section 10(6A) of the Act and hence, royalty is exempt from tax. The Assessing Officer erred in grossing up the same under section 195A of the Act. Similar issue had come up in the appeal the assessee for assessment year 2009-10 before the Tribunal. The Tribunal in principle accepted that if condition set out in section 10(6A) of the Act are satisfied, payment of royalty is not taxable, however, the matter was restored to the file of Assessing Officer for limited purpose of verification as to whether the conditions of section 10(6A) are fulfilled. In the assessment year under appeal the Assessing Officer has already verified the compliance of the condition set out under section 10(6A) of the Act and after having been satisfied with the compliance of the conditions the Assessing Officer deleted the addition.

13. The Id.Departmental Representative vehemently defended the findings of Assessing Officer in draft assessment order. However, the Id.Departmental Representative fairly admitted that both these issues raised in the appeal by the Department were subject matter of appeal before the Tribunal in earlier assessment years.

14. We have heard the submissions made by rival sides. The ground No.1 of the appeal the Revenue is with respect to TP adjustment of Rs.34.58 crores on account of AMP expenditure. The DRP after examining the issue thread bare directed the Assessing Officer to delete the adjustment. We find that in the assessment year 2009-10 in ITA No.2866/Mum/2014(supra) similar issue had come up. The Co-ordinate Bench of the Tribunal deleted the adjustment by observing as under:-

“6. We have considered rival submissions and perused material on record. We have also applied our mind to the decisions relied upon. Undisputed facts are, the assessee is not merely a distributor of the products manufactured by the AE but the assessee itself manufactures its own products in India under license from the AE. It is also a fact that for marketing and promotion of its manufactured products in India, assessee has incurred AMP expenditure by making payments to third parties in India. Therefore, the basic issue which arises for consideration is, whether the AMP expenditure incurred by the assessee in India can come within the purview of international transaction as defined under section 92B of the Act. In this regard, the contention of the assessee before the Transfer Pricing Officer was, since the assessee has incurred the AMP expenditure for products manufactured and sold by it in India, it does not come within the purview of international transaction. Further, the assessee has also submitted that since there is no arrangement/agreement between the assessee and the AE for incurring such expenditure to promote the brand of the AE, it cannot be said that there is an international transaction relating to AMP expenditure. It is worth mentioning, the Transfer Pricing Officer has also agreed with the assessee that the AMP expenditure was incurred with the third parties in India, hence, do not constitute international transaction. Having held so, the Transfer Pricing Officer has still proceeded to determine the arm's length price of the AMP expenditure on the reasoning that the compensation required in the arrangement between the assessee and the AE for improving the brand intangible of the owner has to be determined. Further, he has observed that the AMP expenditure incurred by the assessee not only benefits the assessee but also the AE in terms of increase in the brand value of Kellogg. Thus, the Transfer Pricing Officer has inferred that there is an arrangement between the assessee and the AE with regard to promotion of the brand of the AE by incurring AMP expenditure. However, he has not provided any factual basis on which he has drawn such inference. By merely stating that there is an arrangement between the assessee and the AE, the Transfer Pricing Officer cannot bring the AMP expenditure within the purview of international transaction. If the Transfer Pricing Officer alleges that the AMP expenditure comes within the purview of international transaction by virtue of an

arrangement between the related parties, the burden is entirely upon the Transfer Pricing Officer to demonstrate the existence of such arrangement. A careful reading of the impugned order of the Transfer Pricing Officer does not reveal any such factual basis which can demonstrate the existence of an arrangement between the assessee and the AE for incurring AMP expenditure to promote the brand of the AE. That being the case, the entire approach of the Transfer Pricing Officer in determining the arm's length price of AMP expenditure is fallacious.

7. Moreover, there is no doubt that the Transfer Pricing Officer has determined the arm's length price of AMP expenditure by applying BLT method. While doing so, he has heavily relied upon the Special Bench decision of the Tribunal, in LG Electronics India Pvt. Ltd. (supra). Now, it is fairly well established that determination of arm's length price of AMP expenditure by applying BLT method is not valid. In a catena of decisions, the Hon'ble Delhi High Court while disapproving the decision of the Tribunal in L.G. Electronics India Pvt. Ltd. (supra) have held that BLT method is invalid as it is not prescribed in the statute. In this context, we may refer to the decision of the Hon'ble Delhi High Court in Maruti Suzuki India Ltd. (supra). Following the decision of the Hon'ble Delhi High Court in Maruti Suzuki India Ltd. (supra) and various other decisions, different Benches of the Tribunal have also held that in absence of an express arrangement/agreement between the assessee and the AE for incurring AMP expenditure to promote the brand of the AE, AMP expenditure incurred by making payment to third parties for promoting and marketing the product manufactured by the assessee, does not come within the purview of international transaction.

8. At this stage, it is relevant to observe, while deciding identical nature of dispute in assessee's own case for the assessment year 2011-12, learned DRP in direction dated 28 th December 2015, have deleted the adjustment made by the Transfer Pricing Officer on account of AMP expenditure by recording a factual finding that the Transfer Pricing Officer has failed to demonstrate that there is an agreement/arrangement between the assessee and the AE for incurring AMP expenditure. While doing so, learned DRP has relied upon the decision of the Hon'ble Delhi High Court in Maruti Suzuki India Ltd. (supra). Thus, viewed in the light of the ratio laid down in the decisions cited by the learned Authorised Representative, including the decision of the Hon'ble Delhi High Court in Maruti Suzuki India Ltd. (supra), it has to be concluded that the AMP expenditure incurred by the assessee in India cannot come within the purview of the international transaction. Hence, the Transfer Pricing Officer has no jurisdiction to determine the arm's length price of AMP expenditure.

9. Having held so, it is now necessary to deal with the contention of the learned Departmental Representative to restore the issue to the Assessing Officer for keeping it pending till the issue is settled by the Hon'ble Supreme Court. In our view, the aforesaid contention of the learned Departmental Representative is not acceptable. As per the prevailing legal position, the AMP expenditure incurred by the assessee in India cannot come within the purview of international transaction. That being the case, the adjustment made by the Transfer Pricing Officer cannot survive. Therefore, we do not find any necessity to restore the issue to the Assessing Officer. Grounds are allowed."

The Id.Departmental Representative has been not able to controvert the findings of Co-ordinate Bench of the Tribunal. Respectfully following the same, we uphold the findings of the DRP/Assessing Officer on this issue. Thus, Ground No.1 of the appeal of the Revenue is dismissed, sans-merit.

15. In ground No.2 of the appeal, the Revenue has assailed deletion of disallowance of royalty expenditure. The Id.Authorized Representative of the assessee has pointed that the issue is identical to the one adjudicated by the Tribunal in assessee's own case in assessment year 2007-08 and 2009-10 (supra). We find that in assessment year 2007-08 the Tribunal deleted the addition on account of royalty payment by observing as under:-

"5.2 Ground No. 4 relates with addition of royalty payment of Rs.75,27,2537- for non deduction of tax at source. The assessee paid certain royalties which was subject to TDS @15%. However, the payment of tax was the responsibility of the assessee and assessee deducted due TDS @15% on 'net amount' paid as royalty. AO was of the view that the impugned payments were required to be 'Grossed up' in terms of provisions of Section 195A and thereafter, TDS on gross amount was to be deducted @15%. Thus, there was a shortfall of TDS on royalty payment of Rs.75,27,253/- and hence disallowance of the same was made under Section 40(a)(i). Before CIT(A), the assessee contended that the royalty payments were made by assessee to Kellogg Company, USA under an Agreement dated 18/07/1994. The agreement was entered pursuant to approval granted by Government of India vide letter dated 25/06/1993. Therefore, 'grossing up' was not required to be done for the purposes of TDS in terms of provisions of Section 10(6A). CIT(A) rejected the same on the ground that Provisions of Section10(6A) were applicable only up to 31/05/2002 and the present AY being 2007-08, the benefit thereof was not available to the assessee. Aggrieved, the assessee is in appeal before us.

5.3 The Ld. AR drew our attention to the fact that the provisions of Section 10(6A) has been misunderstood/misapplied by lower authorities to arrive at the conclusion that benefit thereof was not available to the assessee. The assessee fulfilled all the conditions of the said section and was squarely entitled for the benefit of the same. The Ld. DR placed reliance on stand of lower authorities. We have heard rival contentions. The short dispute is with regard to correct interpretation of Section 10(6A) which is extracted below:-

"(6A) where in the case of a foreign company deriving income by way of royalty or fees for technical services received from Government or an Indian concern in pursuance of an agreement made by the foreign company with Government or the Indian concern after the 31st day of March, 1976 but before the 1st day of June, 2002 and,-

(a) where the agreement relates to a matter included in the industrial policy, for the force, of the Government of India, such agreement is in accordance with that policy ; and

(b) in any other case, the agreement is approved by the Central Government,

the tax on such income is payable, under the terms of the agreement, by Government or the Indian concern to the Central Government, the tax so paid."

(emphasis supplied by us)

After analyzing the above provisions, we cull out the following essential requirements to be fulfilled to claim the benefits thereof;-

- i. The income is derived by foreign company,
- ii. Such income is derived from 'royalty' or Fees for technical services'.
- iii. The income should be derived from Government or Indian Concern.
- iv. The income must be derived in pursuance of agreement entered into between 31/03/1976 and before 01/06/2002.
- v. If the agreement relates to matter included in the industrial policy, it should be with in accordance with that policy. In other cases, the agreement should be approved by the Government.

We find that CIT(A) wrongly interpreted the time window to mean that the benefits of provisions were available only up-to 31/05/2002 which is not the correct interpretation. As assessee fulfilled all the prescribed conditions, he is entitled for the benefit of the same and hence, we are inclined to delete the impugned additions and allow the appeal of the assessee. We direct so."

Similar addition was made by Assessing Officer in assessment year 2009-10 and the matter travelled to the Tribunal. The Co-ordinate Bench of the Tribunal in principle followed the decision of the Tribunal for assessment year 2007-08, however, the issue was restored to the file of Assessing Officer for the limited purpose of verification. In the assessment year under appeal we find that the DRP/Assessing Officer has already verified the facts. We, therefore, find no reason to restore this issue to the file of Assessing Officer. Following the order of Tribunal in assessment year 2007-08, we uphold the findings of DRP/TPO on this issue. Accordingly, the ground No.2 of the appeal by the Revenue is dismissed.

16. The Ground No.3 & 4 of appeal are general in nature, hence, require no adjudication.

17. In the result, appeal of the Revenue is dismissed.

ITA NO.2314/Mum/2017, A.Y.2012-13:

18. The assessee in appeal has raised as many as seven grounds. The Id. Authorized Representative for the assessee submitted that the issue raised in ground No.1 & 2 of the appeal are squarely covered by the decision of the Tribunal in assessee's own case for assessment year 2009-10. The Id. Authorized Representative for the assessee submitted that ground No.1 of the appeal is with respect to TP adjustment on account of AMP expenditure of Rs.33,14,18,410/-. The Id. Authorized Representative for the assessee submitted that this issue is identical to ground No.1 raised in the appeal by the Department in assessment year 2011-12. The submissions made therein would equally apply to the present ground of appeal. The Id AR pointed that DRP in para-2.12 of the directions has observed that there is no arrangement/agreement between the assessee and its ASSOCIATED ENTERPRISE

for incurring AMP expenditure. The DRP has further observed that in the immediately preceding assessment year the DRP has decided the issue in favour of the assessee. However, the DRP in the current assessment year decided the issue against the assessee as the decision of DRP was not appealable by the Department and the Department wanted to keep the issue alive.

18.1 In respect of ground No.2 of the appeal, the Id. Authorized Representative for the assessee submitted that the issue is identical to ground No.2 of the appeal in assessment year 2011-12, therefore, the submissions made in the appeal for assessment year 2011-12 would equally apply to the assessment year 2012-13.

18.2 In respect of ground No.3 of the appeal, the Id. Authorized Representative for the assessee submitted that the Assessing Officer has erred in not allowing brought forward unabsorbed depreciation of Rs.7,15,99,575/- pertaining to assessment year 1997-98. The Assessing Officer disallowed unabsorbed depreciation on the ground that assessee could carry forward unabsorbed depreciation upto a maximum period of eight years. The DRP rejected the objections filed by the assessee merely to keep the issue alive as the Department could not have filed appeal against the order of DRP. The authorities below have erred in not considering the judgment of Hon'ble Bombay High Court in the case of CIT vs. Hindustan Unilever Ltd. reported as 394 ITR 73 (Bom), wherein it has been held that the assessee can set off brought forward unabsorbed depreciation without any cap of years. To further buttress his contention, the Id. Authorized Representative for the assessee placed reliance on the following decisions:-

- (1) CIT vs. Associated Cables Pvt. Ltd., 263 Taxaman 250 (SC)
- (2) General Motors India Pvt. Ltd. vs. DCIT, 354 ITR 244(Guj).

18.3 The Ground No.4 is in respect of levy of interest under section 234B of the Act. The Id. Authorized Representative for the assessee failry conceded that it is consequential in nature.

18.4 The Id. Authorized Representative for the assessee submitted that ground No.5 of the appeal is with respect to computation of interest under section 234B of the Act without considering set off of credit of MAT Tax paid for assessment year 2009-10, 2010-11 and 2011-12. The Id. Authorized Representative for the assessee prayed that appropriate directions may be given for computing interest under section 234B after considering set off of credit of MAT tax paid for assessment year 2009-10, 2010-11 and 2011-12.

18.5 The ground No.6 of the appeal is with respect to computation of interest under section 234C of the Act. The Id. Authorized Representative for the assessee submitted that interest under section 234C of the Act is to be computed on returned income and not assessed income. The Id. Authorized Representative for the assessee submitted that appropriate directions may be given to the authorities below for computation of interest under section 234C in accordance with the settled position.

18.6 In ground No.7 of the appeal assessee has assailed initiation of penalty proceedings under section 271(1)(c) of the Act. The Id. Authorized Representative for the assessee submitted that this ground of appeal is consequential in nature.

19. The Id. Departmental Representative vehemently defended the impugned order. However, the Id. Departmental Representative fairly admitted that the issues raised by the assessee in ground No.1 & 2 of the appeal are similar to the one raised

in assessment year 2011-12 in the appeals by the Revenue and the assessee, respectively.

20. Both sides heard Orders of the authorities below perused. Both sides are unanimous in admitting that ground No.1 of the appeal relating to TP adjustment on account of AMP expenditure Rs.33,14,18,401/- is identical to ground No.1 raised in appeal by the Department for assessment year 2011-12. On examination of the directions of DRP we find that the DRP has decided this issue against the assessee in the impugned assessment year only to keep the issue alive, as the Department could not have filed appeal against the directions of the DRP in the impugned assessment year consequent to the amendment in the provisions of the Act. The DRP has categorically observed that on same set of facts in the immediately preceding assessment year the DRP has allowed assessee's claim. The DRP further observed that there is no explicit agreement between the assessee and its AE for incurring AMP expenditure, hence, AMP expenditure cannot be considered as international transaction with AE. Thus, in the given facts our finding on the issue in appeal by the Revenue for assessment year 2011-12 would *mutatis mutandis* apply to the present ground raised by the assessee. Consequently the findings of DRP/Assessing Officer are reversed and ground No.1 of the appeal is allowed.

21. The ground no.2 of appeal is with respect to taxability of interest income under the head 'Income from Other Sources' as against 'Income from Business or Profession. The assessee has offered interest income to tax under the head Profits and Gains from Business or Profession. The Assessing Officer has changed the head of income and has interest income under the head income from other sources. This issue had emerged in the earlier assessment years as well. In assessment year 2011-12 we have restored this issue back to the file of Assessing Officer for

verification of facts. We deem it appropriate to restore the issue in present appeal for verification with similar directions. The Ground No.2 of the appeal is thus, allowed for statistical purpose.

22. The Ground No.3 of the appeal is qua set off of brought forward unabsorbed depreciation of Rs.7,15,99,575/- pertaining to assessment year 1997-98. The DRP in assessment year 2011-12 has decided this issue in favour of the assessee. The DRP in the assessment year under appeal has decided this issue against the assessee merely to keep the issue alive as after the amendment, the Department cannot file appeal against the directions of DRP. We find that the Hon'ble Bombay High Court in the case of CIT vs.Hindustan Unilever Ltd. (supra) following the decision of the Hon'ble Gujarat High Court in the case of General Motors India Ltd. (supra) has allowed the assessee to set off unabsorbed depreciation in accordance with the amended provisions of section 32(2) of the Act. As per amended provision of section 32(2), the unabsorbed depreciation can be carry forward and set off without any time limit. Thus, in the light of the settled position we find merit in the contentions of the assessee and direct the Assessing Officer to allow set off of brought forward unabsorbed depreciation pertaining to assessment year 2007-08 against the profits of the current year's assessment.

23. Ground No.4 of the appeal is against charging of interest under section 234B of the Act. Charging of interest under section 234B is consequential and mandatory. Accordingly, ground No.4 of the appeal is dismissed.

24. The ground No.5 of the appeal is in respect of computation of interest under section 234B of the Act . The contention of the assessee is that interest under section 234B has been computed without set off of credit of MAT tax paid for assessment year 2009-10, 2010-11 and 2011-12. It is no more res-integra that

interest under section 234B is to be charged after MAT credit available under section 115JAA is set off against tax payable on total income[CIT vs. Sage Metals Ltd., 354 ITR 675(SC)]. The ground No.5 of the appeal is allowed, accordingly.

25. The ground No.6 is qua charging of interest under section 234C on returned income. The contention of the assessee is that the Assessing Officer has erred in charging interest under section 234C on assessed income. A bare perusal of the provisions of section 234C would make it clear that the interest under section 234C is to be charged on returned income and not assessed income. The Assessing Officer is directed to recompute interest under section 234C of the Act in the aforesaid manner. The ground No.6 of the appeal is allowed accordingly.

26. The ground No.7 is against initiation of penalty under section 271(1)(c) of the Act. This ground is premature at this stage. Accordingly, the same is dismissed.

27.. In the result, appeal of the assessee, is partly allowed.

28. To sum up, the appeals of the assessee for assessment year 2011-12 and assessment year 2012-13 are partly allowed and appeal of the Revenue for assessment year 2011-12 is dismissed.

Order pronounced in the open court on Monday, the 24th day of February, 2020.

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Mumbai, Dated 24/02/2020
Vm, Sr. PS(O/S)

Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai