

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D" MUMBAI**

**BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 623/MUM/2019
Assessment Year: 2010-11.**

M/s Dharmandan Diamonds
Pvt. Ltd.,
FC 7081-7082, Bharat
Diamond Bourse, B.K.C.,
Bandra (E), Mumbai-400051

Vs. Addl. C.I.T.-5(1), Mumbai.
Ayakar Bhawan, M.K.Marg
Mumbai-400021

Appellant

Respondent

Assessee by : Shri Rashmikant C. Modi, AR
Revenue by : Smt. Jotilakshmi Nayak,DR

Date of Hearing : 05.03.2020
Date of pronouncement : 16.03.2020

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the assessee. The relevant assessment year is 2010-11. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-10, Mumbai [in short 'CIT(A)'] and arises out of the assessment made u/s 143(3) of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the assessee read as under :

1. On the facts and in the circumstances of the case, the Appellant submits that the Ld. CIT(A) erred in upholding the disallowance of depreciation of Rs.5,71,92,626/- by granting depreciation u/s 32 to the extent of Rs.16,66,94,997/- as against Rs.22,38,18,892/- claimed by the Appellant Company.
2. On the facts and in the circumstances of the case, the Appellant submits that the Ld. CIT(A) erred in treating the Original Cost of Fixed Assets to the erstwhile firm less depreciation allowed to the erstwhile firm as Written Down Value as on 01.04.2008 instead of the enhanced value of

assets as paid by the Appellant Company as the Written Down Value as on 01.04.2009 for allowing depreciation u/s 32 of the Income Tax Act, 1961.

The Appellant submits that the enhanced value of assets paid by the Appellant be considered as Written Down Value on 01.04.2008 for allowing depreciation u/s 32 of the Income Tax Act, 1961.

3. Briefly stated, the facts of the case are that the assessee filed its return of income for the assessment year (AY) 2010-11 on 15.10.2010 declaring total income of Rs.6,14,66,210/-. The Assessing Officer (AO) completed the assessment u/s 143(3) on 18.03.2014 determining the total income at Rs.28,11,45,540/- under normal provisions . He determined the book profit u/s 115JB at Rs.38,96,10,591/-. Since the tax payable on normal income is higher than the tax payable u/s 115JB of the Act, the AO considered the income of Rs.28,11,45,540/- as per normal provisions as total income of the assessee.

During year under consideration, the assessee had claimed normal depreciation of Rs.19,69,19,145/- and additional depreciation of Rs.2,68,99,747/- (total depreciation of Rs.22,38,18,892/-). The AO found that on conversion of partnership firm into private limited company w.e.f. 01.09.2007, the erstwhile firm had claimed depreciation upto 31.08.2007 and the depreciation is claimed in the case of the company from 01.09.2007 to 31.03.2008 for AY 2008-09 on the basis of WDV of the assets. However, as evident from the schedule of fixed assets annexed to the balance sheet in the case of the firm for the AY 2008-09 (for the period upto 31.08.2007), the assessee had revalued its assets on 30.06.2007 (when it was a firm) by a sum of Rs.61,36,23,130/-. The AO noted that depreciation was not claimed in the case of the firm, as well as in the case of the company for AY 2008-09, in respect of the revaluation of assets. However, for AY 2009-10, the assessee-company claimed depreciation on the enhanced value of assets as per the revaluation of assets made as on 30.06.2007 by the firm.

In response to a query raised by the AO to explain as to why depreciation may not be restricted to the WDV of the assets, which would have been the value prior to the revaluation, the assessee filed a reply. However, the AO was not convinced with the said reply for the reasons recorded while making the disallowance in AY 2009-10. To summarise, the reasons given by the AO are (i) as per provisions of section 32(1)(ii) of the Act, depreciation is to be allowed in the case of block of assets on the WDV of the assets, as defined in section 43(6)(c)(ii) of the Act, (ii) as per proviso to Rule 5 of the Income Tax Rules, 1962(the Rules), the aggregate depreciation allowed in respect any assets for different assessment years shall not exceed the actual cost of the said assets, (iii) in the case of Energy Saving Devices , the actual WDV carried forward from AY 2009-10 works out to Rs.1,52,52,027/-, whereas the assessee -company has adopted the said WDV at Rs.5,17,40,452/- and claimed depreciation at 80%, (iv) the assessee had claimed depreciation far in excess of the actual cost of the assets, (v) the Income Tax Act, nowhere provides for depreciation on the basis of revaluation.

The AO thus calculated that the assessee is entitled to depreciation amounting to Rs.16,66,94,997/- as against the claim of Rs.22,38,18,892/-. Thus the AO made a disallowance of Rs.5,71,23,915/-.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the learned CIT(A). We find that *vide* order dated 20.07.2016, the learned CIT(A) dismissed the appeal by following similar disallowance made by the AO for AY 2009-10 in the assessee's own case, which was sustained by the CIT(A) *vide* order dated 04.03.2014.

5. Before us, the learned counsel for the assessee relies on the order of the Tribunal for the AY 2009-10 in assessee's own case in ITA No.

3861/Mum/2014 and submits that the order of the Coordinate Bench be followed. On the other hand, the learned Departmental Representative (DR) relies on the order of the learned CIT(A).

6. We have heard the rival submissions and perused the relevant materials on record. As mentioned earlier the learned CIT(A) has followed the order of his predecessor-in-office for AY 2009-10 and dismissed the appeal. Aggrieved by the order of the learned CIT(A) for AY 2009-10, the assessee filed an appeal before the Tribunal. The only ground of appeal was against the “confirmation of disallowance of depreciation to the tune of Rs.22,28,71,726/- by upholding the order of the AO allowing depreciation of Rs.12,92,66,889/- as against claimed by the assessee-company at Rs.35,21,38,615/- including additional depreciation of Rs.35,81,977/- by holding that the assessee is entitled to claim depreciation at WDV of the erstwhile firm and not at the cost at which the assets were acquired by the assessee-company upon succession, even when all the conditions as envisaged in section 47(xiii) of the Act were satisfied.”

So that was the only ground of appeal before the Tribunal for AY 2009-10. The Tribunal *vide* order dated 21.06.2017 in assessee’s own case held :

“After examining and considering the cases law as relied by the ld AR and ld DR we find that the assessee is squarely covered by the ratio laid down by the cases relied by the ld AR whereas the decisions referred and relied by the ld DR are distinguishable in facts and therefore not applicable in the instant case of the assessee. Accordingly we set aside the order of CIT(A) and hold that the assessee is entitled to depreciation on the enhanced cost at which the assessee has taken over the assets and direct the AO to allow the depreciation as claimed by the assessee of Rs,35,21,38,615/-.

In the result, the appeal of the assessee stands allowed.”

6.1 We further find that same issue arose before the ITAT “D”Bench, Mumbai in assessee’s own case for AY 2011-12. The Tribunal *vide* order

dated 15.03.2019 followed the order of the Coordinate Bench for AY 2009-10 and allowed the appeal by observing as under :

“8. We find that Ld. CIT(A) for the present assessment year has referred and followed his decision for A.Y. 2010-11, wherein he had referred to this decision of Ld. CIT(A) is assessee case for AY 2009-10.

9. Since the issue has been decided by the ITAT in earlier year in assessee's favour the disallowance of depreciation by the AO for this year is not sustainable as the same is consequential to the depreciation allowed and W.D.V of assets in earlier year. All the issues raised by the AO has been elaborately decided by the ITAT is assessee's favour. It is not the case that Hon'ble Bombay High Court has reversed the decision of ITAT as above.

10. In the background of aforesaid discussion and precedent we set aside the order of authorities below and hold that disallowance of depreciation by the AO is not sustainable.

11. In the result, assessee's appeal is allowed as above.”

6.2 Since the issue has been decided by the ITAT in earlier year in assessee's favour , the disallowance of depreciation by the AO for this year is not sustainable as the same is consequential to the depreciation allowed and WDV of assets in earlier year. Therefore, following the order of the Coordinate Bench in assessee's own case for AY 2009-10, we set aside the order of the learned CIT(A) and allow the appeal filed by the assessee.

7. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on 16/03/2020.

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER.

Sd/-
(N.K.PRADHAN)
ACCOUNTANT MEMBER

Mumbai;
Dated: 16/03/2020
Wakode, Sr. P.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