

**IN THE INCOME TAX APPELLATE TRIBUNAL
“E” BENCH, MUMBAI**

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER**

**ITA No. 5252/Mum/2019
(A.Y: 2008-09)**

The Asst. Commissioner of Income Tax, Circle - 16 (1), Room No. 439, 4 th Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020	बनाम/ Vs.	M/s Tata Sky Ltd., 3 rd Floor, C1, Wadia International Centre, Worli, Mumbai - 400025
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAGCS9294M		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से / Appellant by :	Shri Vijay Kumar Menon, DR
प्रत्यर्थी की ओर से/ Respondent by :	Shri J.D. Mistri, AR

सुनवाई की तारीख / Date of Hearing	09/02/2021
घोषणा की तारीख / Date of Pronouncement	15/02/2021

आदेश / O R D E R

PER PAVAN KUMAR GADALE:

The revenue has filed the appeal against the order of the Commissioner of Income Tax (Appeals) -4,

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Mumbai, passed u/s. 143 (3) r.w.s. 147 and 250 of the Income Tax Act, 1961.

2. The revenue has raised the following grounds of appeal:-

i) *“Whether on the facts, in the circumstances of the case and as per law, the Ld. CIT(A) has erred in directing to delete the addition of Rs.2,82,03,771/-made on account of depreciation on Computer Software.*

ii) *Whether on the facts, in the circumstances of the case and as per law, the Ld.CIT(A) has erred in granting relief to the assessee by directing to delete the disallowance of depreciation on Computer Software, solely relying on the stand of the Assessing Officer in the assessee's case in preceding year without going into the merits of the case and ignoring that the principle of resjudicata does not apply to income tax proceedings.*

iii) *Whether on the facts, in the circumstances of the case and as per law, the Ld.CIT(A) has erred in holding that the Computer Software is an asset eligible for depreciation @ 60%, ignoring the fact that the Computer Software involved in the assessee's case is 'Procurement of Software Licences' which falls under the category of 'intangible asset' which is eligible for depreciation @ 25%.*

iv) *The appellant prays that the order of Ld.CIT(A) on the above grounds be set-aside and that of the assessing officer be restored.*

v) The appellant craves leave to amend or alter any ground or add a new ground which may be necessary.”

3.The Brief facts of the case are that, the assessee Company is engaged in the business of providing Direct to Home (DTH) services and filed the return of income electronically on 27.9.2008 disclosing the total loss at Rs. 778,74,01,684/.The assessment was completed u/s 143 (3) of the Act on 27.12.2010 with assessed total loss at Rs. 778,51,83,680/-. Further, the assessment was reopened u/s 147 of the Act and the order u/s 143 (3) r.w.s.147 of the Act was passed on 15.03.2013 determining total loss of Rs. 778,29,79,750/-. Subsequently, the A.O. has reason to believe that, the income has escaped assessment as the assessee company was allowed excess depreciation on tangible assets @60% rate as against @25%. Therefore, notice u/sec148 of the Act was issued, where as the assessee company vide its letter dated 09.04.2015 submitted to treat the return of income filed on 27.09.2008 u/s 139(1) of the Act as due compliance of the notice and further the reasons for reopening of the assessment were provided to the assessee vide office letter dated 24.07.2015. Subsequently, notice u/s 143 (2) and 142 (1) of the Act

were issued in respect of disputed issue of claim of excess depreciation on Tangible Assets. The assessee filed explanations mentioning that in the earlier assessment proceedings, the revenue has accepted the claim of depreciation rate. Whereas in the reassessment proceedings, the A.O. observed that the submissions of the assessee company are not satisfactory and was of the opinion that the licenses acquired by the assessee for day-to-day business activities are to be treated as intangible asset as per the provisions of the Act. Hence, the A.O. has allowed the depreciation @ 25% rate on assets and disallowed the excess depreciation and assessed the total loss of Rs. 775,47,75,980/- and passed order u/sec143(3) r.w.s.147 of the Act dated 23-03-2016.

4. Aggrieved by the Assessment order, the assessee has filed an appeal with the Ld. CIT(A). The Ld.CIT (A) considered the grounds of appeal and the submissions of the assessee on the reopening of assessment and the claim of depreciation on the Computer software license. The assessee has filed written submission in the appellate proceedings referred at para 5 of the CIT (A) order. The Ld. CIT(A) has dealt on the disputed issue at para 6.2 to 6.2.4 and observed that the

A.O. in the preceding assessment years and succeeding assessment years has allowed the depreciation @60% rate. Therefore allowed this ground of appeal of the assessee and partly allowed the assessee appeal. Aggrieved by the CIT(A) order, the revenue has filed the appeal before the Hon'ble Tribunal. At the time of hearing, the contentions of the Ld. DR are that the Ld.CIT(A) has erred in granting relief as the licenses are to be considered as intangible assets and depreciation rate @ 25% has to be applied and relied on the order of the assessing officer. Contra, the Ld.AR supported the order of the Ld. CIT(A) and substantiated his arguments relying on the judicial decisions and prayed for dismissal of the revenue's appeal.

5. We have heard the rival submissions and perused the material on record. The Ld.DR emphasized that the Ld.CIT (A) has erred in directing depreciation @60% rate on the computer software licenses, but actually rate applicable is @25% and the license has to be treated as intangible assets. Whereas, the Ld.AR submitted that the nature of payment is for obtaining the license of computer software and has enduring benefits and is eligible for higher rate of depreciation under the Income Tax Rules and supported the

arguments with the judicial decisions. We find the Ld.CIT (A) has dealt on the disputed issue at para 6.2.1 to 6.2.4 of the order which is read as under:-

“6.2.1 During the course of appellate proceedings, the appellant company submitted that in the return of income, the depreciation on computer software was claimed at 60% and in the original assessment which was framed on 27 December 2010, the claim of depreciation of 60% on computer software was granted. The original assessment was reopened vide notice dated 28 March 2012 and upon filing of return pursuant to such notice, reasons for reopening were asked by the appellant and the reason as communicated was. to disallow under Section 40(a)(ia) of the Income-tax Act. 1961 ('the Act') an alleged commission paid to distributors on which tax was not deducted at source under Section 194H of the Act. In the course of this, first, reopening proceedings. a query was raised by the Assessing Officer as to why depreciation of computer software should be allowed at 60% instead of at 25%. In response to this, the appellant company submitted a detailed submission. The appellant stated that in the course of first reassessment, after examining the rate of depreciation applicable to computer software, depreciation at full 60%, as claimed, was granted in the first reassessment order passed by Ld. AO u/s 143(3) r.w.s.147. Further AY 2008-09 was again reopened for the second time vide notice dated 27 March 2015 pursuant to which the assessee wrote that return filed on 27 September 2008. subject to the modification of total income as per assessment order under Section 143(3) dated 27 December 2010 and reassessment order under Section 143(3) read with Section 147 dated 15 March 2013, be

treated as return filed pursuant to second reopening notice. Thereafter, reasons for second reopening were asked by the appellant and in the second reopening depreciation on computer software was granted @ 25% applicable to intangible assets instead of at 60% attributable to computer software.

6.2.2 The appellant company further pointed out that in the next year, that is, AY 2009-10, the Assessing Officer raised a similar query on the rate applicable to - computer software and after due consideration the Ld. AC allowed depreciation @ 60% as claimed.

6.2.3 Further, the appellant stated that this issue being examined in earlier years and also in later year and was allowed in the original assessment as well as in the first reassessment proceedings and now sought to be disturbed in the second reassessment, amounts to a clear change of opinion and devoid of consistency. The appellant placed its reliance on the judgement of Non'ble Supreme Court in the case of Kelvinator India Limited (320 ITR 561), wherein it was held that change of opinion is not permitted with the purview of Section 147 and on the facts of this matter, and this was a clear change of opinion. The appellant submitted that A.Y. 2008-09 is the only year in which the claim of depreciation on computer software was reduced from 60% to 25% whereas in the later years also, depreciation continued to be allowed at 60%. There was thus a breach of consistency in this year.

6.2.4 The Ld. AO had allowed depreciation @ 60% in immediately preceding years and succeeding years also. The only deviation taken by AO is in the year under consideration without give any specific reason to do so.

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Software is a special block of asset on which depreciation @ 60% was accepted by AO in immediately preceding years and succeeding years. No change without any specific reason can be allowed. Hence, this ground of appeal of the assessee is allowed.”

5. The Ld.DR could not controvert the observations of the Ld. CIT (A) with any new evidence or information but relied on the order of the Assessing officer. We find the Ld.CIT(A) considered the facts of granting of depreciation@60% rate in the earlier and subsequent assessment years by the revenue, provisions of law, and allowed the claim of the Assessee. Accordingly, we do not find any infirmity in the order of the Ld.CIT (A) and uphold the same and dismiss the grounds of appeal of the revenue.

6. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 15.02.2021.

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 15.02.2021

AK, PS

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

1.

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