INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E": NEW DELHI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
(Through Video Conferencing)

ITA No. 1546 & 1547/Del/2018
(Assessment Year: 2012-13 and 2014-15)

Metropolis Healthcare Ltd, 250-D, Udyog Bhawan, Hindi Cycle Marg, Worli, Mumbai, Maharashtra, PAN: AACCP1414E	Vs.	DCIT, Circle-16(2), New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Mayank Patwari, CA
Revenue by:	Shri S. S. Negi, Sr. DR
Date of Hearing	08/04/2021
Date of pronouncement	06/07/2021

ORDER

PER PRASHANT MAHARISHI, A. M.

1. These are the two appeals filed by the assessee against the order of the ld CIT (A)-33, New Delhi dated 30.03.2017 for Assessment Year 2012-13 and 2013-14 wherein, the appeal filed by the assessee against the assessment order passed u/s 143(3) of the Income Tax Act, 1961 on 09.03.2015 and 22/12/2016 respectively passed by ld DCIT, Circle-16(2), New Delhi is partly allowed. In both appeals identical issues have been raised by both the parties, therefore, same are disposed of by this common order.
2. The assessee has raised the following grounds of appeal in ITA No. 1546/Del/2018 for the Assessment Year 2012-13:-

"1. That Ld. CIT(A) has erred in law as well as on facts by allowing the additional depreciation u/s 32(1)(iia) only on those assets which are used for diagnostic and report making at central facility whereas the appellant has major laboratories in Mumbai, Delhi, Kolkata, Chennai and Bangalore where pathological testing and diagnostic are being carried on. Therefore, the plants and machinery used in laboratories at different stations and at collection centers are also eligible for additional depreciation u/s 32(l)(iia) of I.T. Act

2. That Ld. CIT(A) has erred in law as well as on facts by making the disallowance of additional depreciation u/s 32(l)(iia) in respect of plant and machinery used in collection centers on the ground that collection centers do not produce any article or things but only collect sample and

therefore in the nature of office premises. However, the assets used at collection centers to store the blood samples are necessary for their business without which the diagnostic and report making would not happen. Accordingly, plants and machinery used at collection centers are eligible for additional depreciation u/s 32(l)(iia) of the IT Act.

3. The Ld. CIT(A) has erred in law as well as on fact in disallowing the claim of additional depreciation on UPS, refrigerator, air conditioners, oxygen cylinder, microwave oven, trolley, cabinet, blood collection stands, filing cabinet, punching machine, token machine etc. without appreciating the facts that these items are integral part of the plants and machinery necessary for pathological and diagnostic purpose without which the diagnostic and report making would not be possible. The business of pathological and diagnostic testing having been held as industrial undertaking, the appellant would be entitled to additional depreciation on all such items."

3. During the course of hearing the assessee has filed an application for admission of additional grounds as under:-

"*1. On the facts and circumstances of the case and in law, the ld Assessing Officer/ CIT (A) ought to have allowed the TDS credit to the appellant company which was available in the hands of the entities that merged with the appellant company w.e.f. 01.04.2006. The Appellant Company is legally entitled to claim the TDS credit of the merged entities."*

4. Subsequently, the assessee also made one more application for admission of additional ground of appeal raising the following additional grounds:-

"*1. That on the facts and circumstances of the case and in law, education cess paid by the assessee on total income and dividend distribution tax should be directed to be allowed as deduction in terms of the law clarified by the Hon'ble Bombay High Court in case of Sesa Goa Ltd Vs. JCIT 423 ITR 426 (Bombay) and other decisions."*

5. The brief facts in the case for Assessment Year 2012-13 shows that Assessee Company incorporated in the year 2000 engaged in the business of providing referral laboratory services and diagnostic services etc. It filed its return of income on 29.11.2012 for Rs. 55,93,07,984/-. The ld AO noted that assessee has claimed additional depreciation of Rs. 23,33,715/- on the plant and machinery as per Annexure-E of Tax Audit Report. The ld AO questioned the above claim which was explained by the assessee that assessee his claimed additional depreciation of ₹ 2,333,715 as addition has been made to plant and machinery of Rs1,72,61,293. On these additions, the assessee company has claimed depreciation in accordance with the rates prescribed which amounted to Rs 121,25,239/– in addition, the company has claimed additional depreciation at the rate of 20% on the additions made during the year. The additional depreciation so claimed in a stated hereinabove was ₹ 2,333,715. Assessee also submitted that it has been claiming such additional depreciation in the earlier

assessment year also and there is been no disallowance on this account. Assessee also explained the provisions of Section 32 (1) (iia) of the act and relied upon the decision of the honourable Gujarat High Court in CIT versus Suresh Amin family trust (2007) 158 taxmann 105 Gujarat/288 ITR 101 (Gujarat). The assessee also relied upon the decision of the coordinate bench in 81 taxman 109 (Ahd). Thus the assessee submitted that the claim of the assessee is also allowed in earlier years and there is been no case for any disallowance on this account. It was stated that there is no change in the facts and circumstances of the case.

6. The ld AO examined the claim of the assessee and disallowed the additional depreciation for the following reasons:-

   a. That the assessee has not invested in the industrial undertaking as it is engaged in the business of providing referral service and diagnostic services.
   b. The work done in pathological laboratory cannot be put at bar to an industrial undertaking as there is no product in the pathological examination of the material supplied. The ld AO relied on the decision of Andhra Pradesh High Court in CIT Vs. Dr. Surender Reddy wherein, it has been held that the report given by conducting the test did not amount to production of an article or a thing. Thus, additional depreciation was disallowed.

7. The learned assessing officer further examined the issue of disallowance u/s 14 a read with rule 8D of the act wherein it has been noted that the assessee has made assume to disallowance of ₹ 2,419,116. Therefore, it was examined and assessee was asked to the show cause why the provision of Rule 8D cannot be applied for working out the disallowance u/s 14A of the Act. Thereafter, the ld AO computed the disallowance u/s 14A read with Rule 8D of Rs. 45,32,806/- and made a further balance disallowance of Rs. 21,13,640/-. Consequently, the total income of the assessee was assessed at Rs. 56,37,55,340/- against the returned income of Rs. 55,93,07,985/- and passing the order u/s 143(3) of the Act on 09.03.2015.

8. The assessee being aggrieved with the order of the ld AO preferred appeal before the ld CIT(A). The ld CIT(A) on the issue of additional depreciation noted that there are deferring decisions of different High Courts on the issue in respect of investment allowances however, no judicial pronouncement are available with respect to additional depreciation. He asked the assessee to furnish the list of

additions to fixed asset on which additional depreciation was claimed. He held that the depreciation is not available on the asset used at the collection centers at multiple locations however, all other assets that are used for diagnostic and report making, he allowed the claim of the assessee. Thus, he partly allowed the claim of the assessee on additional deprecation.

9. On the issue of disallowance u/s 14A of the Act it was claimed before him that total investment made by the assessee in equity shares capital is in respect to foreign subsidiaries, any income received form it is not an exempt income but is chargeable to tax. The assessee also submitted the working of the disallowances of Rs. 24,19,116/- which is as per Rule 8D only. It is submitted that investment made in foreign subsidiaries has not been considered for working out the disallowances. The assessee also submitted that it has received dividend of Rs. 4,18,25,082/- and share of profit from partnership firm of Rs. 21,03,235/- resulting into an exempt income of Rs. 4,39,28,370/-. Assessee submitted that the working of disallowance of Rs. 24,19,116/- is in accordance with Rule 8D. The ld CIT(A) directed the ld AO to consider the submission of the appellant and recomputed the disallowance u/s 14A in accordance with law. However, assessee is aggrieved with the order of the ld CIT(A) with respect to the restriction of the additional depreciation and has preferred this appeal on the solitary issue.

10. The ld AR submitted that claim of additional depreciation has been allowed to the assessee in Assessment Year 2010-11 and 2011-12. Therefore, by placing reliance on the assessment order passed in those year he submitted that when the ld AO himself has allowed it for the earlier years it cannot be disallowed for this year. He relied on the Principles of consistency. He further relied upon the decision of the CIT Vs. VTM Ltd 319 ITR 336, decision of ITAT Bangalore in Texas Instrument Pvt. Ltd Vs. Additional CIT, ITA Nos. 144 and 169/Bang/2014, DCIT Vs. Bengal Beverages ITA No. 1218/Kol/2015 dated 06.10.2017, CIT Vs. Trinity Hotels 225 ITR 178 of Hon'ble Rajasthan High Court and decision of the coordinate bench in Bikanerwala Foods Vs. DCIT 6357/Del/2015. He submitted that the ld CIT(A) has held that machinery installed at the collection center depreciation is not to be allowed however, he allowed additional depreciation with respect to the machinery installed in pathological laboratory, against which the revenue is not in appeal. Therefore, he submitted that the revenue has accepted that the assessee is entitled to the additional depreciation on the assets installed at pathological laboratories. He submitted that it is an

interconnected operation of same business and cannot be bifurcated into machinery installed at collection center and machinery installed at pathological laboratories. It is a composite business, therefore, even the collection of the samples is part of the whole business of the assessee, and therefore, the assessee is eligible for additional depreciation on the machinery installed at various collection centers also. He further explained that at collection centers the samples of the blood are required to be maintained in a particular environmental condition for onward testing. He therefore, submitted that the ld CIT(A) was not correct in restricting the claim of the additional depreciation and disallowing the same on asset allowing at collection centers.

11. The learned departmental representative supported the orders of the lower authorities.

12. We have carefully considered the rival contentions and per use the orders of the lower authorities. The issue of the additional depreciation has been dealt with by the learned CIT – A wherein he has noted that the business of pathological testing diagnostic laboratories is the main business of the assessee blood tests etc on collection samples at diagnostic tests at the central facilities can be carried out. The assessee has set up various collection centers at multiple locations. According to the learned CIT – A these collection centers do not produce any article or thing and therefore are in the nature of office premises hence he disallowed the additional depreciation on these assets. However the learned CIT – A allowed the additional depreciation on the assets which are used in the diagnostic centre and report making central facilities. The revenue has also accepted the stand that assessee is entitled for additional depreciation on machinery installed at diagnostic and report making central facilities. We find that the collection centers are also integral part of the whole process of the business of diagnostic and report making central facilities and therefore there is no reason that additional depreciation on those facilities should not be allowed to the assessee when revenue has already accepted the claim that assessee is entitled to additional depreciation on the assets installed by it. The past assessment record also stated to be acceptance of this claim of assessee which is not negated by revenue. In view of this solitary ground raised by the assessee is allowed and the learned assessing officer is directed to grant claim of additional depreciation of ₹ 2,333,715/– to the assessee which was restricted by the learned CIT – A. Accordingly ground number 1 – 3 of the appeal are allowed.

13. Coming to the first additional ground raised he submitted that the appellant company (earlier known as 'Pathnet India Private Limited') underwent a merger with four companies w.e.f. 01st April, 2006 pursuant to orders dated 19.12.2008 of Hon'ble Delhi Court, dated 09.01.2009 of Hon'ble Bombay High Court and dated 14.11.2008 of Hon'ble Madras High Court. However, in the subsequent years, the tax was deducted on the receipts of the merged entity (the appellant company) by the deductors, who filed their TDS returns with the PAN of the merging entities instead of the merged entity. Resultantly, the TDS deducted on the receipts of the appellant company was not reflecting in its Form 26AS, thus denying the appellant company its rightful claim of TDS for which corresponding income had been duly disclosed in the Return of Income for the years under consideration. Therefore, the appellant company is entitled to claim the tax deducted on its receipts, which erroneously lie in the hands of the merging entities and have been denied due to the fault of the deductors . The aforesaid issue of allowing additional TDS credit, it is submitted, purely a legal issue and facts in relation to the same are already available on record. The additional ground of appeal is being raised on the appellant being recently advised by the legal counsel and the omission to raise the aforesaid additional ground of appeal in the original memorandum of appeal was neither willful nor deliberate. The additional ground of appeal calls for being admitted and adjudicated on merits in view of the discretion vested in your Honour under Rule 11 of the Income- tax (Appellate Tribunal) Rules, 1963, the decision of the Supreme Court in the case of National Thermal Power Co. Ltd. v. CIT: 229 ITR 383 and the decision of the Delhi High Court in the case of DCM Henetton India Ltd. vs. CIT: 173 Taxman 283. In view of the aforesaid legal position, it is submitted that since in the present case, the additional ground raised involves a purely legal issue and facts in relation to the same are already available on record, the appellant should not be precluded from raising the ground at this stage.

14. On the merits of the claim is submitted that assessee is entitled to the credit of taxes paid or tax deduction at source with respect to the entities whose income have now been included in the return of income.

15. The learned departmental representative vehemently objected to the additional ground raised by the assessee and submitted that the assessee has to claim the same in the return of income.

16. We have carefully considered the rival contention. We find that the assessee has raised an additional ground for which the facts are available on the record. We

therefore admit the same. On the merits of the claim of the assessee, we find that assessee is eligible for the tax credit of the income, which is been included in the return of income of the merged entities. Therefore, we direct the assessee to approach the assessing officer with the requisite claim, the AO is directed to verify the same and grant the credit in accordance with the law. Accordingly, the additional ground raised by the assessee is allowed with above direction.

17. With respect to the additional ground for the deduction of education cess paid by the assessee on the total income, we find that this ground of appeal can be admitted, as there are no fresh facts required to be investigated. The requisite facts are already on record. Hence, we admit the same.

18. On the merits of the claim the learned authorized representative submitted that this issue is squarely covered in favour of the assessee by the decision of the honourable Bombay High Court in case of Sesa Goa r Ltd versus joint Commissioner of income tax 423 ITR 426 and the host of the other decisions.

19. The learned departmental representative submitted that education cess is a tax and therefore it cannot be granted as deduction to the assessee by the virtue of the provisions of Section 40 (a)(ii) of the act.

20. We find that assessee has raised the additional ground claiming deduction of education cess paid by the assessee on the total income as well as dividend distribution tax. On careful analysis, we find that the issue of deduction of education cess as an allowable deduction is covered in favour of the assessee by the decision of the honourable Bombay High Court in SesaGoa Ltd (supra) and therefore we direct the learned assessing officer to grant the deduction of the same.

21. With respect to the claim of the dividend distribution tax, we find that same is not an expenses incurred by the assessee wholly and exclusively incurred for the purposes of the business and therefore same is not allowable to the assessee u/s 37 (1) of the act. The learned authorized representative also could not show us any other provisions of the income tax act where the expenditure is allowable to the assessee. In the result, the claim of the deduction of dividend distribution tax made by the assessee in this additional ground is rejected.

22. Thus, the additional ground raised by the assessee with respect to the deduction of educational cess is allowed and with respect to the claim of deduction of dividend distribution tax is dismissed.

23. In the result, appeal of the assessee for assessment year 2012 – 13 in ITA number 1546/del/2018 is partly allowed.

24. Coming to the appeal of the assessee for assessment year 2014 – 415 where the solitary ground is with respect to the additional depreciation claim by the assessee, this ground is already been decided by us in the appeal of the assessee for assessment year 2013 – 14 allowing the claim of the assessee and therefore for similar reasons we allow 1-3 of the appeal.

25. With respect to the additional ground raised of deduction of education cess paid by the assessee as an expenses as well as of dividend distribution tax, as decided by us in the appeal of the assessee for assessment year 2013 – 14 we direct the learned assessing officer to only allow the claim of deduction of education cess paid by the assessee as an expenses. Accordingly, the additional ground raised for this assessment year also is partly allowed.

26. Accordingly, appeal of the assessee for assessment year 2014 – 15 is also partly allowed.

27. Accordingly, both the appeals of the assessee are partly allowed.

Order pronounced in the open court on 06/07/2021.

-Sd/-	-Sd/-
(AMIT SHUKLA)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 06/07/2021
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi