

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT AND
SHRI B. R. BASKARAN, ACCOUNTANT MEMBER**

ITA No.2742/Bang/2018
Assessment Year :2008-09

M/s. Herbalife International India Private Limited, Pardhanani Wilshire #14, Commissariat Road, Bengaluru – 560 025. PAN : AAACH 8025 R	Vs.	DCIT - 11(4), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri. Nageshwar Rao, Advocate
Revenue by	:	Shri. Sankar Ganesh K, JCIT(DR)(ITAT), Bengaluru

Date of hearing	:	27.12.2021
Date of Pronouncement	:	29.12.2021

ORDER

Per N. V. Vasudevan, Vice President

This is an appeal filed by the assessee against order dated 27.08.2018 of CIT(A)-3, Bengaluru, relating to Assessment Year 2008-09. The grounds of appeal Nos.2 to 12 raised by the assessee reads as follows:

2. *The Learned CIT(A) ought to have appreciated that the offices taken by the Appellant were on cancellable operating lease and the periodicities of the said leases varied from thirty six to forty eight months which could be renewed on mutual agreement and as such that the improvements made to the leasehold premises were temporary in nature.*

3. *The Learned CIT(A) erred in law and on facts in concluding that the additions made to the leasehold premises were not temporary without appreciating that the Appellant was permitted to make alterations which were of temporary nature as per the lease agreement entered into with the lessor of the premises.*
4. *The Learned CIT(A) erred in law and on facts in concluding that the additions made to the leasehold premises were not temporary without appreciating that the Appellant had to remove such partitions/ structures as may have been erected by it on the leased premises to its original condition on expiry of the lease period. as per lease agreement entered into with the lessor of the premises.*
5. *The Learned CIT(A) in his Order failed to understand the meaning of the term 'Purely temporary erections' included under the head 'Building' in New Appendix I. Part A. Tangible Assets.*
6. *The Learned CIT(A) ought to have appreciated that additions like air conditioners. electrical fittings, fire and access control. etc on the leased premises were purely of temporary nature and on removal upon expiry of the contract or vacation of premises they would be completely unusable for the Appellant.*
7. *The Learned CIT(A) erred in law and facts in concluding that additions on account of interiors and civil works do not qualify as temporary erections since it has been carried out on existing structures in the building. The Learned CIT(A) failed to appreciate that such additions were made only to facilitate the smooth running of the business and hence ought to be considered as temporary in nature. thus allowable for 100% depreciation.*
8. *The Learned CIT(A) erred in law and on facts in concluding that the ownership of the property is not a relevant criteria for claiming depreciation. It is a well settled principle that where expenditure for improvements/ modification, etc is incurred on a premise taken on rent or lease to facilitate more efficient working of the staff and for optimum utilisation of the space.*

it is to be considered of temporary nature, as in the case of the Appellant.

- 9. Notwithstanding and without prejudice to the above, the Learned CIT(A) erred in law and on facts, in not considering the fact that the amounts spent on leased premises was in the nature of business expenditure for proper carrying on of business of the Appellant and are otherwise allowable as revenue expenditure.*
- 10. The Learned CIT(A) erred in law in concluding that the Appellant has not disputed whether or not the expenditure was capital or revenue in nature since the Appellant has not made such claim in its income tax return. The Learned CIT(A) failed to appreciate that the Appellant had raised an alternate claim stating that the said expenditure, if not allowed as 100% depreciation, is otherwise available as revenue expenditure.*
- 11. The Learned CIT(A) ought to have directed the Learned Assessing Officer ("Learned AO"), to give the lawful relief or deduction, as directed under the Departmental Circular No.14 (XI-35) of 1955 dated April 11, 1955. which states that if from the facts investigated at the time of the assessment proceedings it emerges that the assessee is entitled to a particular relief provided in law, it is obligatory on the part of the Learned AO to draw the attention of the assessee to give the lawful relief or deduction, although the assessee did not claim it. Officers of the Department must not take advantage of ignorance of an assessee as to his rights.*
- 12. The Learned CIT(A) failed to appreciate the above alternate claim of the Appellant and erred in law and facts in concluding that the issue is not covered in the Appellant's own case by the order of the Hon'ble Delhi Income-tax Appellate Tribunal for AY 2000-01 and AY 2001-02 and by the order of the Learned CIT(A) itself for AY 2002-03. wherein it was held that the expenditure incurred was to facilitate day to day working so that the Appellant can run the business smoothly and that the entire expenditure on leasehold improvements was allowable as deduction.*

2. The only issue that arises for consideration in this appeal is as to whether the Revenue authorities were justified in allowing depreciation @ 10% on improvements carried out in the lease hold premises of Rs.2,10,01,372/- as against the claim of the assessee that it is entitled to 100% depreciation on the leasehold improvements as the improvements were of the nature falling within the ambit of part-A in Appendix-I to the Income Tax Rules, 1962 (Rules) under the head 'Tangible assets' entry (4) "Purely temporary erections such as wooden structure". The grounds of appeal are argumentative in nature and project the different facets of arguments that the assessee wants advance in support of its claim.

3. The assessee is engaged in the business of distributing advanced weight management and nutritional products. For Assessment Year 2008-09, assessee filed his return of income declaring a loss of Rs.3,03,76,816/-. An Order of Assessment under section 143(3) r.w.s. 144C of the Act was passed on 29.10.2012. This order was revised by the CIT, Bengaluru-1, under section 263 of the Act by an Order dated 17.03.2014. In this order, the CIT was of the view that the assessee had claimed depreciation at 100% on lease hold improvements of Rs.2,10,01,372/- by treating the lease hold improvements as purely temporary erections. It is not disputed that as per entry appearing in Appendix – 1 of Rule 5 of the Income Tax Rules, 1962 (hereinafter called 'the Rules'), depreciation is allowable at 100% on "purely temporary erections such as wooden structures". According to the CIT, the AO failed to examine the nature of expenses and allowed the claim of the assessee. The CIT therefore directed the AO to examine whether depreciation claimed at 100% were on improvements would fall within the ambit of part-A in Appendix-I to the Income Tax Rules, 1962 (Rules) under the head 'Tangible assets' entry (4) depreciation at 100% on "Purely temporary erections such as wooden structure".

4. In the proceedings before the AO pursuant to the order of the CIT, the assessee claimed that the additions to the leasehold improvements were temporary in nature and further claimed that as per the agreement with the lessors, the leasehold premises has to be returned to the owners in the same condition as it was taken and therefore the improvements do not have any enduring nature and were to be regarded as temporary structures entitled to 100% depreciation.

5. The AO on going the nature of expenses incurred by the assessee found that the expenditure included the following items:

- i. Dismantling/removal and disposal of existing brick walls and trucking away all debris from the premises.
- ii. Demolition of existing toilets.
- iii. Dismantling of false ceiling.
- iv. Supplying and laying vitrified tiles for flooring.
- v. Providing and fixing of white vitreous floor mountadeuropean water closet.
- vi. Providing and fixing of white vitreous wash basin.
- vii. Providing and fixing CP brass angle stop cock with 15mm diaPVC..
- viii. Fixing aluminum framework with 12 mm thikgypsum board is fixed on both sides with 50 mm thik glass.
- ix. Fixing cabin doors.
- x. Putting false ceiling of 12 mm gypsum board sheets fixed...

According to the AO, the expenditure would give enduring benefit and not a temporary one. The expenditure is part of setting up of a business or a new unit of business. To test the expenses as temporary and it is not giving any enduring benefit, the AO called upon the Assessee to furnish the details of all the premises used for the business purpose and the details of expenses incurred in leasehold improvements for the same. The Details provided by the assessee is reproduced below:

Sl. No.	Location	Address	Date on which leasehold improvements put to use	Amount (Rs.)	Date of Vacation of premises
1	Guwahati	Mayur Gardens, Ground Floor, Opp. HDFC Bank, G.S. Road, Guwahati-781005	31-03-2008	12,75,451	Not vacated till date
2	Mumbai	AL-Dossal, 50, Pali Road, Bandra, Mumbai- 400050	31-03-2008	24,78,078	vacated in May 2012
3	Bangalore	Vaswani Wilshire, No. 14, Commissariat Road, Bangalore - 25.	1/4/2007	1,50,68,567	Not vacated till date
4	Kolkata	36A, Shakespeare, Sarani, kolkata - 700017	11/7/2007	11,17,125	Not vacated till date
			28-07-2007	29,12,000	Not vacated till date
Total				2,28,51,221	

6. On analysis of the details provided by the assessee, the AO noticed that out of four premises three were still occupation of the assessee and one premise was vacated in May, 2012. The AO therefore came to the conclusion that additions made to leasehold improvements cannot be treated as purely temporary erections as required by the appendix-IA of the Income Tax, Rules. Accordingly depreciation claimed at 100% by the assessee company was not allowed by the AO. The AO allowed depreciation at 10% on improvements that were made 180 days or more during the previous year of a sum of Rs.1,90,97,692/- and 5% for

additions that were made for period of less than 180 days during the previous year of a sum of Rs.37,53,529/-.

7. On appeal by the assessee, the CIT(A) confirmed the order of the AO. From a perusal of the order of the CIT(A), it emanates that the CIT(A) has examined each item of the expenditure from the angle whether it is temporary erections or not. The CIT(A) firstly noticed that the very fact that the assessee has claimed depreciation on the improvements made to the lease hold premises shows that the assessee itself accepts the expenditure as capital expenditure. The CIT(A) therefore did not go into the question whether the expenditure is capital or revenue in nature but focused mainly on the question whether the capital expenditure is purely temporary erection or not. The CIT(A) gave finding on each item of expenditure incurred by the Assessee at the various leased premises and held that the expenditure cannot be considered as purely temporary erections entitled to 100% depreciation. He however gave 15% depreciation on Air-conditioners. The following were his conlsions:

“4.9 Bangalore: — In relation to additions of Rs.1,50,68,567/- made by the appellant at Bangalore, the appellant has produced a copy of the agreement with the vendor and breakup of the work done. The same is as follows:

Civil works	Rs.44,69,926/-
Interiors	Rs.52,04,255/-
Air Conditioners	Rs.13,18,950/-
Electrical fittings	Rs.28,16,505/-
Fire and access control	Rs. 5,36,956/-
Networking	Rs.7,21,974/-
Total	Rs.1,50,68,567/-

4.10 As per schedule 1 of the agreement with the vendor, the scope of work is defined as follows:

"1. Detail study of the site/existing structural conditions with infrastructure on site like : AC, Electrical, DG, Power, Fire and Safety, Plumbing and Sanitary with appropriate consultants and the client.

2. Super imposing clients requirement.

1. Schematic proposal and approval.

2. Proposed infrastructure — Renovation of required Civil work, Mezzanine floor structural work, Wet areas, Interiors and chairs. Landscaping, External required glazing and structure, AC, Electrical works, Access control, Fire and Safety."

4.11 As per the agreement, following drawings/details were also made available to the appellant by the vendor in relation to the work assigned to it:

Following shall be the deliverables in the form of drawings / details.

SUPERSTRUCTURE

- **Structural layout and details for Ground floor , Entrance, Mezzanine floor, Staircase — Ground and Mezzanine floor.**
- **Fire escape staircase**
- **External glazing details**
- **Toilet**

ARCHITECTURAL&INTERIORS

- Super imposed false ceiling layout/AC/Electrical/Data/Fire and Safety. Super imposed other infrastructure details
- Flooring layout and details
- False ceiling layout and details
- Partition and door layout and details
- Wall, Column paneling•and cladding
- Non movable furniture details, Conference, Discussion, Country Manager, Reception, Training room.
- Modular
- Display storage and counter and back drop

PLUMBING / SANITARY

- Architectural drawings 1 Layout of toilets
- Plumbing layout
- IC & septic tank location layout.
- Miscellaneous detail drawings

ELECTRICAL WORKS

- Sections of all light fixtures
- Single-line diagram
- Circuit layout
- Lighting & power layout.
- DR schedules
- Electrical room layout
- Miscellaneous detail drawings

HVAC WORKS

- Ducting layout.
- AHU room details and layout
- Grills/diffuser location layout.
 - Miscellaneous detail drawings

FIRE FIGHTING AND ALARM SYSTEM

- Single line diagram
- Circuit layout

4.12 A perusal of the above details shows that the appellant has claimed depreciation @100% on an amount of Rs.13,18,950/-, which relates to purchase of air conditioners. The Air —conditioner is neither a building nor a temporary erection. It is a part of Machinery and Plant eligible for depreciation @ 15% as against 10% allowed by the AO or 100% claimed by the appellant. So the AO is directed to recompute depreciation on amount of Rs 13,18,950 @ 15%.

4.13 Another expenditure of Rs.5,36,956/- relates to fire fighting and alarm system, which will fall in the definition of 'fittings' as in 'furniture and fittings' and the same cannot be considered as a building to be considered as part of purely temporary erection. So the same would be eligible for depreciation @10% only. Similarly, the expenditure of Rs.7,21,974/- on networking would be part of furniture and fittings eligible for depreciation @10% only. The expenditure of Rs 28,16,505/- on electrical work includes electrical wirings , various light fixtures, electrical room fittings, switches, boards etc, which would fall within the definition of 'electrical fittings' eligible for depreciation @10% only.

4.14 As regards interiors, a perusal of the details of the agreement reproduced supra shows that the same includes furniture provided in conference room, training room, discussion room, manager room, reception and includes modular furniture, storage units, various counters, chairs, tables, etc. Separate details of the amount spent on each of such item of purchase have not been provided by the appellant. However these items cannot be considered as 'building' to be treated as 'purely temporary erection'. All these items would fall within the definition of furniture and fittings. As regards the remaining interior works including flooring, false ceiling, floor structure work, glazing, etc., the same do not involve any work of temporary erection as the above said work is carried out on already existing structures in the building. So these would form part of the building eligible for depreciation @10% only.

4.15 As regards expenditure of Rs.44,69,926/- on civil works, here again the same involves the renovation of the existing building including plumbing/sanitary work and fittings, partitioning and door layouts, which is carried out on the existing structure of the building and thus not in the nature of any temporary erection. So the above said expenditure would be eligible for depreciation @ 10%, being part of the building used for the business by the appellant.

4.16 Considering above, an amount of Rs 13,18,950/- would be eligible for depreciation @15% being Air conditioner forming part of Machinery and Plant and the balance amount of Rs.1,37,49,616/- would be eligible for depreciation @10% either due to fact that the expenditure forms part of the building eligible for depreciation @10% or the expenditure forms part of the furniture and fittings including electrical fittings eligible for depreciation @10%.

4.17 Kolkata: — In relation to expenditure of Rs.11,17,125/- incurred in Kolkata, the appellant has enclosed copies of two invoices. A perusal of the same shows that the same relates to the expenditure incurred on purchase of LED fittings and advertisement boards which again cannot be considered as a building. These items would form part of electrical fittings or other fittings eligible for depreciation @10% only.

4.18 In relation to balance expenditure of Rs.29,12,000/- incurred in Kolkata, the appellant has enclosed the relevant copy of the invoice as well as item wise detailed breakup of civil and interior work carried out by the vendor. The same is broadly classified as follows:

Description	Bill amount (Rs)	Discount (Rs)	Net amount (including VAT @4%) (Rs)
Preparatory and civil works	5,03,072.75	4487	5,18,528
Interior	9,21,154.70	8,298	9,49,370
Workstations	80,000.00	715	82,456

Description	Bill amount (Rs)	Discount (Rs)	Net amount (Including VAT @4%) (Rs)
Electrical data and Access Control	8,70,660.00	7,750	8,97,426
Variation Electrical work	2,53,594.00	2,258	2,61,390
Extra Miscellaneous Work	1,96,719.00	1,752	2,02,830
Total	28,25,260	25,260	29,12,000

4.19 A perusal of the detailed breakup of final bill shows that an expenditure of Rs.82,456/- relates to various modular works stations provided by the vendor. The same cannot be considered as building or a building in the nature of temporary erection. This amount would fall within the scope of furniture and fittings eligible for depreciation @10%.

4.20 In addition to above, an amount of Rs. 8,97,426/- has been spent on electrical fittings, data and access control system. The same includes work of electrical fittings e.g. internal wiring, switches, distribution boards, light fittings, earthing system etc. In addition to above data and telephone cables had **been** laid down. Access control includes various appliances or fittings installed for having door access control etc. All these items would fall within the scope of furniture and fittings including electrical fittings eligible for depreciation @10% as the same cannot be considered as building or a building in the nature of temporary erection.

4.21 Another amount of Rs. 2,61,390/- has been spent on various items of electrical fittings which includes main switches, electrical bus-bar, halogen blast and lamps, aluminium and copper cables, sockets, starters, MCBs, light fixtures, electricity meters, earthing etc. All these items would fall within the scope of electrical fittings eligible for depreciation @10% as the same cannot be considered as building or a building in the nature of temporary erection.

4.22 Expenditure of Rs. 9,49,370/- has been incurred on interiors which includes vertical blinds, storage units, Manager cabin table, reception table, sign boards etc. All these items would fall within the scope of furniture and fittings eligible for depreciation @10% as the same cannot be considered as building or a building in the nature of temporary erection. In addition there is expenditure on sanitary fittings and plumbing, pantry counter with sink, rolling shutter, glass doors, cabin doors, sliding doors and aluminium frame work with gypsum board, wall painting etc. These are not temporary erections but added to the existing structure of the building and as such this expenditure would become part of the building used for purpose of business eligible for depreciation @10%.

4.23 In addition to above, an expenditure of Rs.5,18,528/- has been incurred on civil works which includes laying of vitrified tiles and floors, sanitary fitting, plumbing, pantry counter with granite top and cladding in passage area, etc. Similarly another expenditure of Rs.2,02,830/- is incurred on extra miscellaneous works including fixing of aluminium frame work, glass doors, rolling shutters, column cladding, gypsum boxing, doors and mirror work, etc. A perusal of these details shows that the work had been carried out on the existing civil structure and no fresh temporary erection have been raised out to be considered to be eligible for depreciation @100%. All these items

would form part of the building used for the business eligible for depreciation @10%.

4.24 Considering above, the entire amount of Rs.11,17,125/- and Rs.29,12,000/- would be eligible for depreciation @10% either due to the fact that the expenditure forms part of the building eligible for depreciation @10% or the expenditure forms part of the furniture and fittings including electrical fittings eligible for depreciation @10%.

4.25 Mumbai - In relation to expenditure of Rs.24,78,074/- incurred in Mumbai, the appellant has enclosed copy of an invoice of Rs.22,19,009.60/-. For the balance amount of Rs.2,59,065/-, the relevant details were not produced. Thus it can be presumed that the appellant does not want to dispute the action of the AO in relation to the expenditure to the extent of Rs.2,59,065/-. As regards the balance amount of Rs.22,19,009/-, a perusal of the detailed invoice shows that the same includes the expenditure on purchase of work station for store keeper, low weight storage unit, conference table, executive table, work station for staff, chairs, display panel, discussion table, counter for customers, soft board for suspended writing, suspended sun board, signage, electrical fittings (Switches, distribution board, lights), bathroom fittings, etc. All these items would fall within the scope of furniture and fittings including electrical fittings eligible for depreciation @10% as the same cannot be considered as building or a building in the nature of temporary erection. Further since these assets worth Rs 24,78,074/- were put to use for less than 180 days, the depreciation rate would be 5%.

4.26 Guwahati - In relation to expenditure of Rs.12,75,451/- incurred in Guwahati, the appellant has enclosed copy of an invoice of Rs.10,35,000/-. For the balance amount of Rs.2,40,451/-, the relevant details were not produced. Thus it can be presumed that the appellant does not want to dispute the action of the AO in relation to the expenditure to the extent of Rs. 2,40,451/-. As regards the balance amount of Rs. 10,35,000/-, a perusal of the detailed invoice shows that the same includes the expenditure on purchase of work stations, cabinets, tables, chairs, display rack, steel rack, counters, soft board, electrical fittings (Switches, distribution board, lights) etc. All these items would fall within the scope of furniture and fittings including electrical fittings eligible for depreciation @10% as the same cannot be considered as building or a building in the nature of temporary erection. As regards front shutter, the work has been carried out on the existing

civil structure and no fresh temporary erections have been raised out to be considered to be eligible for depreciation @100%. So this item would form part of the building used for the business eligible for depreciation @10%. Further since these assets worth Rs 12,75,451/- were put to use for less than 180 days, the depreciation rate would be 5%.

4.27 Considering above the grounds of appeal 2 to 7 of the appellant need to be dismissed except that the appellant gets partial relief in relation to the depreciation available on Air-conditioners as the applicable depreciation rate would be 15% and not 10% as applied by the AO.”

8. Aggrieved by the order of the CIT(A), the assessee is in appeal before the Tribunal. We have heard the rival submissions. The learned Counsel for the assessee while relying on the stand taken in the grounds of appeal raised before the Tribunal, primarily relied on the decision of the Tribunal rendered in assessee's own case for Assessment Year 2001-02 in ITA No.1771/Del/2005 order dated 28.02.2006. It was submitted by the learned Counsel for the assessee that the nature of expenses in the present Assessment Year is also identical to the one decided by the Tribunal for Assessment Year 2001-02 and therefore the decision of the Tribunal will be applicable to the present Assessment Year also. The learned DR reiterated the stand of the Revenue as contained in the order of the CIT(A).

9. We have given a careful consideration to the rival submission. On the question whether the expenditure is purely temporary erections entitled to 100% depreciation, we are in agreement with the findings of the CIT(A), who has examined meticulously every item of expenditure and has rightly come to the conclusions that the nature of improvements cannot be regarded as purely temporary erections entitled to 100% depreciation. As rightly observed by the CIT(A), the very fact that the assessee has claimed depreciation on the lease hold improvements only means that the assessee has treated the expenditure

incurred on lease hold improvements as capital expenditure. Learned Counsel however made a submission that the treatment in the books of accounts is not final and determinative. While we agree with this proposition that treatment in the books of accounts is not conclusive but we observe that the issue whether the expenditure is capital or revenue in nature has not been examined by the lower authorities. In this regard, we find that though a specific ground viz., ground No.8 was raised by the assessee before the CIT(A) in this regard, the CIT(A) did not examine this issue specifically. The Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986 inserted Explanation 1 to section 32 w.e.f. 1.4.1988, which reads thus : –

“Explanation-1. Where the business or profession of the assessee is carried on in a building not owned by him but in respect of which the assessee holds a lease or other right of occupancy and any capital expenditure is incurred by the assessee for the purposes of the business or profession on the construction of any structure or doing of any work in or in relation to and by way of renovation or extension of, or improvement to the building, then, the provisions of this clause shall apply as if the said structure or work is a building owned by the assessee.”

Explanation-1 would apply when, (i) when the premises in which the Assessee carries on business in building not owned by it in respect of which the Assessee holds lease or other right of occupancy. (ii) when such Assessee incurs any expenditure which is capital expenditure ; (iii) and such capital expenditure should be incurred

(a) on construction of any structure or

(b) doing of any work in or relation to and

by way of renovation or extension of, or improvement to the building.

The ingredients and prerequisites of a capital expenditure or revenue expenditure would remain the same, and not undergo any change depending on whether the building is owned or occupied as lessee or other occupancy rights leased premises. As already stated this issue though raised by the assessee

before the CIT(A) and the grounds of appeal No.9 to 12 before the Tribunal as an alternative ground has not been examined by the CIT(A). In these circumstances, we are of the view that the issue needs to be set aside for fresh consideration by the CIT(A) as to whether the expenditure in question is capital or revenue in nature. We therefore allow this appeal for statistical purposes by remanding the said issue for consideration by the CIT(A). In this regard we find that the decision cited by the learned Counsel for the assessee in assessee's own case for Assessment Year 2001-02 which relates to issue whether the improvements to lease hold premises were capital or revenue in nature, would become relevant.

10. In the result, appeal of the assessee is allowed for statistical purposes.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-

(B. R. BASKARAN)
Accountant Member

Sd/-

(N. V. VASUDEVAN)
Vice President

Bangalore.

Dated: 29.12.2021.

/NS/*

Copy to:

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|---------------|---------------|
| 1. Appellants | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.