

**INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'G' BENCH, MUMBAI**

**[Coram: Pramod Kumar, Vice President
and, Kavitha Rajagopal, Judicial Member]**

ITA No.: 297/Mum/2017
Assessment year: 2012-13

**Deputy Commissioner of Income Tax-1(1)(2)
Mumbai**

.....Appellant

Vs.

**Goldstar Metal Solution Pvt. Ltd.,
512, Himalaya House, 79- Palton Road, CST,
Mumbai 400 001 [PAN: AACCG5917H]**

.....Respondent

Appearances:

Gaurav Kabra for the appellant
Mehul Jain for the respondent

Date of concluding the hearing : 27/05/22
Date of pronouncing the order : 26/08/22

O R D E R

Per Pramod Kumar, VP:

1. By way of this appeal, the Assessing Officer has challenged the correctness of the order dated 29th September 2016, passed by the learned CIT(A) in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2012-13.

2. In ground nos 1 and 2, which we will take up together, the appellant has raised the following grievances:-

1. “Whether on the facts and circumstances of the case and in Law, the ld. CIT(A) erred in deleting the disallowance of depreciation of Rs. 47,40,000/- on mining rights which are claimed to be in the nature of commercial rights without appreciating that the Deed of Compromise records that assessee paid the amount of Rs. 10 crores on behalf of all the members of Group II and not in his individual capacity?”

2. “Whether on the facts and circumstances of the case and in law, the ld. CIT(A) erred in holding that the assessee has purchased the assets for Rs. 10 crores in the absence of MOU between members of Group II of which assessee is a member?”

3. So far as this disallowance is concerned, it is sufficient to take note of only a few material facts. During the course of scrutiny assessment proceedings, the Assessing Officer disallowed depreciation of Rs. 47,40,000/- by observing as follows:-

4. *DISALLOWANCE OF DEPRECIATION ON GOODWILL:*

4.1 *Assessee has, during the year, made payment of Rs.10 crores for acquisition of exclusive mining rights, on behalf of group of persons, including its directors, and its subsidiary company. The back ground of the case is as follows.*

4.2 *The assessee had entered into an agreement for exclusive purchase of iron ore from the mines of M/s Deccan Minerals Pt Ltd, dated 24.06.2006. Deccan Earlier, the assessee had also entered into a similar agreement with M/s Minerals and Metals, and M/s Raw and Finished Products, in October, 2007. Prior to the agreement with the assessee, M/s Deccan Minerals entered into an agreement M/s Melateru Mining Company giving exclusive rights for purchase of iron ore from the mine belonging to Deccan Minerals, Minerals and Metals, & Raw and Finished Products, vide agreement dated 06.08.2006. But the assessee was granted exclusive rights earlier. Hence a dispute arose.*

4.3 *The dispute over mining rights was settled by the assessee by making a payment of Rs. 10 crores to Melateru Mining Company during the year. The assessee got its exclusive rights back after this payment, which was made vide agreement entered into on 05.01.2011. Further, M/s Deccan Minerals, M/s Minerals and Metals, and M/s Raw and Finished Products, entered into separate agreements, dated 10.05.2011, granting exclusive mining rights back to the assessee.*

4.4 *Out of the payments of Rs. 10 crores, the assessee acquired assets of Rs.8.104 crores. The balance of Rs. 1,89,60,000/- was credited to the goodwill account of the assessee, on which the assessee claimed depreciation @ 25%, amounting to Rs. 47,40,000 / -.*

4.5 *The assessee asked to submit the details and justify the depreciation on intangible assets, vide questionnaire dated 05.01.2015. The assessee replied vide letter dated 13.01.2015. The same has been placed on records, after perusal. But the arguments of the assessee have not been found to be tenable in law.*

4.6 *The payment itself was on behalf of a group of companies to settle the disputes relating to earlier mining contract, and it is not clear as to how much share of rights has accrued to the account of assessee. In any case, the payment is in nature of debt, for which other parties to contract have to settle the accounts with assessee, and it is not for assessee to unilaterally claim the benefit of entire payment. Assessee has by its conduct waived off amounts due to itself from other parties to contract, which may lead to a separate taxable incidence in their hands. The payments made by the assessee, however, as per agreement dated 05/01/2011, is made to Melatheru Mining Company Pvt. Ltd., on behalf of (Group-II) as referred in the agreement:*

1. *M/s. Gold Star Metals Solutions P Ltd. (Company itself),*
2. *M/s. Vidharbha Mining Pvt. Ltd.*
3. *Shri Prem Prakash Saraogi,*
4. *Shri Umapati Shyamhari Tiwari,*
5. *Decan Mineral Pvt. Ltd.,*
6. *M/s. Minerals and Metals,*
7. *M/s. Raw & Finished Products,*
8. *Shri Shyamkumar Shrivastava,*
9. *Shri Sandeep S. Shrivastava*
10. *M/s. Sudeep S. Shrivastava*

The payments made are not only for company itself, but for the entire group as above. Hence the assessee cannot claim the benefit only for itself since it is not clear, how much benefit has accrued to the assessee.

4.7 Irrespective of above, the claim of having any intangible assets itself is incorrect and with it, claim of any depreciation claimed against the profit of the period. Explanation of assessee, give vide letter dated 13.01.2015 just reiterates the facts already mentioned and is silent on the core issue of inter party rights and liabilities.

4. Aggrieved, assessee carried the matter in appeal before the CIT(A) who deleted the disallowance on the basis of following reasons:-

3.3 I have duly considered the submission of the appellant's AR and the facts of the case. It is an established fact that this is a genuine business expenditure ought to be allowed. The AR of the appellant contends that all the assets have been purchased in the name of the appellant company. Corresponding payments have been made by the appellant company. Therefore, the assets are physically owned by the appellant, and therefore, it is eligible to claim depreciation thereon. It is understood that except for the commercial rates payment of Rs. 1.89 crores, all other depreciation found to be allowed by the AO. Any other commercial asset is part of the intangible assets. The AR argues that depreciation should be allowed thereon. The AR of the appellant relied on the Hon'ble ITAT decision in the case of Skyline Caterers P Ltd. vs. ITO 306 ITR (AT) 369 Mumbai.

Respectfully following the jurisdictional High Court decision in the case of Skyline Caterers Pvt. Ltd., I am of the opinion that the appellant is eligible to claim depreciation and any other commercial rights obtained by payments of Rs. 1.89 crores.

5. Not satisfied with the relief so granted by the CIT(A), the Assessing Officer is in appeal before us.

6. We have heard the rival contentions, perused the material on record, and duly considered the facts of the case in light of the applicable legal position.

7. We find that there is no dispute that the amount of Rs 1,89,00,000 on which depreciation has been claimed as commercial rights is the difference between the consideration paid and the break-up value of the assets purchased under the arrangements. The asset belongs to the assessee exclusively, and the entire payment, under the arrangements, has been made by the assessee. What is material is that the payment has been made by the assessee. We also find that the issue is now covered, in favour of the assessee, by a coordinate bench decision in the case of Skyline Caterers Pvt Ltd Vs ITO [(2008) 116 ITD 248 (Mum)]. No distinguishing features have been pointed out to us. In this view of the matter, and bearing in mind the entirety of the case, we approve the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

8. Ground nos 1 and 2 are thus dismissed.

9. In ground no 3, the Assessing Officer has raised the following grievance:-

“Whether on the facts and circumstances of the case and in law, the Id. CIT(A) has erred in deleting the addition of Rs. 4,07,10,542/- by admitting additional evidence in the form of Research without recording reason for admitting such additional evidence and also without giving an opportunity to the AO to examine the same which is a violation of Rule 46A and hence ought to be quashed as bad in law?”

10. The relevant material facts are like this. During the course of scrutiny assessment proceedings, the Assessing Officer disallowed a sum of Rs 4,07,10,542 on account of processing loss, and, while doing so, he reasoned as follows:

5. *CLAIM OF LOSS REDUCED:*

5.1 *Assessee has claimed 10% loss as standard loss on iron ore due to moisture loss, handling and loading of iron ore, and similar activities associated with mining activity. The assessee was required to justify the wastage @ 10% vide questionnaire dated 05.01.2015. The assessee replied vide letter dated 13.01.2015, which has been perused. However the justification of the assessee has not been found to be tenable in law.*

5.2 *As per the agreement with Deccan Minerals and Melateru Mining Company, mentioned in the issue discussed above in para 4 and its sub-paragraphs, it was stated that these iron ore mines were not working and a huge inventory of iron ore, dug up, was lying in the plot of land, when the new management and the contract were entered into. In such a situation, it is likely that the moisture would have evaporated to a large extent, and hence the claim of 10% loss of raw material all comes into doubt. A/R has just reiterated the claim of loss without attempting to explain the same with factual details about the stock lying in the mines.*

5.3 *In light of above, to balance the claims (even unfounded) of the assessee with the practical reality of loss on the movement of commodity, 2% of stock loss claimed in Metric Tonnes, is disallowed and added to the Book result. In essence, the total loss is reduced by 20%, and the reduced value is added to the income of the assessee as unexplained sales.....*

11. Aggrieved, assessee carried the matter in appeal before the learned CIT(A) who deleted the aforesaid disallowance, and, while doing so, observed as follows:

4.3. *I have duly considered the submission of the appellant's AR and the facts of the case. The AO has stated that the so called loss on drying of iron ore is unexplained sale. The loss of 10.8% as claimed is comparable to the loss claimed in AY 2013-13 and in earlier years. The disallowance has to be based on some cogent material and cannot be arbitrary. The AO has not placed any material on record to show that the drying loss were excessive compared to the earlier year. On the contrary the appellant has been able to prove with the evidence that the loss on the basis of research paper of Department of Metallurgical and Materials Engineering, National Institute of Technology Rourkela 2013 on the subject of Effect of size distribution and water content on properties of iron ore. In that research paper it has been established that the moisture content in the iron ore is between 11% to 17%. In this case the water content is 10.8% which is below the threshold limit as mentioned in the above referred paper. Further the AR also argues that for the*

AY 2013-14 and 2011-12, the loss claimed by the appellant company and wastage percentage of 10.8% has already been accepted by the AO but for the AY 2012-13 the AO has not accepted and treated it as unaccounted sales to the extent of Rs. 4,07,10,542 /-. It is not fair and has to be deleted.

I have also gone through the assessment order, the submissions filed by the AR of the appellant and other documents. The moisture content claimed made by the appellant of 10.8% is consistent for the AY 2011-12, 2012-13 and 2013-14. So only for AY 2012-13, the AO has taken differently and not accepted the moisture content claimed by the appellant of 10.8%, the same was treated as unaccounted sales. In support of his claim, the AR of the appellant relied on the data submitted by the Department of Metallurgical and Materials Engineering, National Institute of Technology Rourkela wherein it is established that the moisture content in the iron ore is between 11% to 17%. But the appellant has claimed only 10.8%. So in the light of the above discussion, I am of the opinion that moisture content claimed by the appellant company as invisible loss is found to be in order and the addition made of Rs. 4,07,10,542/- is not warranted. I, therefore direct the AO to delete the above addition.

12. The Assessing Officer is aggrieved of the relief so granted by the learned CIT(A) and is in appeal before us.

13. We have heard the rival contentions, perused the material on record, and duly considered facts of the case in the light of the applicable legal position.

14. We have noted that in the other assessment years, in the assessee's own cases for the preceding as also the subsequent assessment year, the similar losses have been allowed by the Assessing Officer himself. Once such a stand has been taken by the Assessing Officer himself, it cannot be open to him to challenge relief given on the same point by the learned CIT(A). There is no good reason for taking a different stand in this year, nor any specific reasons are pointed out for the same. In any event, we are in considered agreement with the well-reasoned stand of the learned CIT(A). We, therefore, approve the conclusions arrived at by the learned CIT(A), and decline to interfere in the matter.

15. Ground no. 3 is thus also dismissed.

16. In the result, the appeal is dismissed. Pronounced in the open court today on the 26th day of August 2022.

Sd/-
Kavitha Rajagopal
(Judicial Member)

Sd/-
Pramod Kumar
(Vice President)

Mumbai, dated the 26th day of August, 2021

Copies to:

<i>(1)</i>	<i>The appellant</i>	<i>(2)</i>	<i>The respondent</i>
<i>(3)</i>	<i>CIT</i>	<i>(4)</i>	<i>CIT(A)</i>
<i>(5)</i>	<i>DR</i>	<i>(6)</i>	<i>Guard File</i>

By order

*Assistant Registrar/ Sr PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai*