IN THE INCOME TAX APPELLATE TRIBUNAL DELHI

(DELHI BENCH 'E' : NEW DELHI)

BEFORE SH. G.S.PANNU, HON'BLE PRESIDENT
AND
SH. ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.2536/Del/2017
(Assessment Year : 2012-13)

ACIT, Circle 18(2), New Delhi	Vs.	M/s. Nitrex Chemicals India Ltd. 1213, Ansal Towers, 38-Nehru Place, New Delhi 110019 PAN : AAACF7820L

ITA No.2860/Del/2017
(Assessment Year : 2012-13)

M/s. Nitrex Chemicals India Ltd. 1213, Ansal Towers, 38-Nehru Place, New Delhi 110019 PAN : AAACF7820L	Vs.	DCIT, Circle 18(2), New Delhi
(APPELLANT)		**(RESPONDENT)**

Assessee by	Sh. Ved Jain, Adv. & Sh. Aasish Goel, CA
Revenue by	Sh. Sumit Kumar Verma, Sr. DR

Date of hearing:	01.06.2023
Date of Pronouncement:	30.06.2023

ORDER

PER ANUBHAV SHARMA, JM:

The appeal has been preferred by the Revenue and the Assessee against appellate order dated 20.02.2017 in appeal no. 248/16-17 for the assessment year 2012-13 passed by Commissioner of Income Tax (Appeals)-33, New Delhi (hereinafter referred to as the 'First Appellate Authority' or in short 'Ld. F.A.A.') in appeal against order dated 27.03.2015 u/s 143(3) of the Income Tax Act, 1961 passed by DCIT, Circle 18(2) (herein after referred to as 'Ld. Assessing officer or in short Ld. AO').

2. The facts in brief are that Assessee company was engaged in the business of manufacturing of Industrial Nitrocellulose, having plant at Gujrat. During the course of scrutiny assessment proceedings, Ld AO had made following additions.

2.1 In regard to 1st addition, Assessee company has made investment amounting to Rs. 9,96,82,500/- in the form of equity shares. Ld AO enquired as to why disallowance of expenses u/s 14A may not be made. In response to query raised, the assessee company had furnished the reply stating therein that the company has made investment out of interest free funds in the form of share capital, Reserve and surplus, Deferred Tax Liability and accumulated depreciation of Rs. 14542 lacs against investment in shares of Rs. 996 lacs. The assessee further relied upon the decision of the Hon'ble High Court of Delhi in the case of CIT vs. Oriental Engineers Pvt. Ltd. However AO had made disallowance u/s 14 A by applying rule 8 D ;

2.2 In regard to 2nd addition, during the course of assessment proceedings, the assessee company was asked to show cause as to why loss on foreign

exchange fluctuation on ECB may not be added to taxable income on the similar lines as in earlier assessment years. In response to query raised, the assessee company has furnished the reply stating therein that with regard to the Forex Exchange Loss on ECB Rs. 1,03,34,504/-, there was no change in the facts of the case compared with the earlier years and the Ld. CIT(A) has deleted the said addition in the AY 2009-10. However, relying Sutlej Cotton Mills V CTR (SC) 155(1979) the Ld AO observed that as the term loan was taken for fixed assets later on converted into USD the loss is not admissible u/s 37(1) of the Act.

2.3 In regard to 3rd addition, during the course of assessment proceedings, it was observed from the P&L account that the assessee had made huge expenses under the head repair and maintenance & replacement amounting to Rs. 3,08,45,539/- as compared to last year's expenses at Rs. 53,64,765/-. The assessee was asked to justify the huge expenses incurred under the head of the repair & maintenance and replacement. In response to query raised, the assessee has furnished the reply stating therein that during the year under consideration, there is an increase in the said expenses on account of fire at the factory at Valsad (Gujrat). Accordingly, the assessee was asked to furnish copy of the documents regarding claim lodged before insurance company and to also provide the details in respect of insurance claim lodged. In response to this, the assessee has submitted a copy of claim lodged before the Insurance Company. On perusal of the said claim, Ld AO noticed that the assessee has lodged a claim on account of building and machinery, which were destroyed or damaged amounting to Rs. 86,42,865/- after reducing the value of salvage of Rs. 2,15,00/-. Further, it was observed from the fixed asset chart/ depreciation chart that the assessee had not

reduced the destroyed/ damaged by fire amounting to Rs. 86,42,865/- from the block of building and machinery and claimed depreciation on the said destroyed plan & machinery. Ld AO observed that as per the provisions of section 32(l)(iii) of the Act, the value of the money payable by the Insurance company is to be reduced from the written down value. Thus, as the assessee had not reduced the written down value of the asset in respect of claim lodged before the insurance company. It was held that the assessee has claimed excess depreciation of Rs. 8,64,264/- on account of building and machinery destroyed by fire amounting to Rs. 86,42,865/- and the same was added back to the assessee's total income.

2.4 In regard to 4th addition, Ld AO as observed from the P&L account that the assessee had made huge expenses under the head repair and maintenance & replacement amounting to Rs. 3,08,45,539/- as compared to last year's expenses at Rs. 53,64,765/-. The assessee was asked to justify the huge expenses incurred under the head of the repair & maintenance and replacement. Assessee furnished a chart in a excel format. Ld AO observed that the assessee has claimed the expenses for repair and maintenance under the head mechanical and the Digester amounting to Rs 1,77,66,854/- and Rs 85,57,096/- which were destroyed in fire. As Ld AO found them not verifiable in nature of revenue expenditure an amount to extent 20%, i.e Rs 52,64,790 was considered to be capital in nature and added back to the total income.

3. The Ld CIT(A) had partly allowed the appeal so Revenue has come in appeal raising following grounds :-

1. *Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in deleting disallowance of 'foreign*

exchange fluctuation loss of Rs 1,03,34,504/- on External Commercial Borrowing (ECB) which was illegally diverted for other than prescribed purpose without considering Explanation 1 to section 37(1) of the Income Tax Act, 1961 (the Act)?

2. *Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in deleting disallowance of 'foreign exchange fluctuation loss of Rs 1,03,34,504/- on External Commercial Borrowing (ECB) even when the assessee had not discharged its primary onus u/s 37(1) of the Act?*

3. *Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in setting aside the issues pertaining to disallowance out of depreciation on account of destroyed/damaged assets and disallowance out of repair and maintenance expenditure being capital in nature without recording a clear cut finding on the issue and by ignoring provisions of clause (a) of sub-section (1) of section 251 of the Act?*

4. *Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in setting aside the issues pertaining to disallowance out of depreciation on account of destroyed/damaged assets and disallowance out of repair and maintenance expenditure being capital in nature by ignoring clear cut finding of the Assessing Officer (the AO) and solely on the basis of various presumptions/assumptions which were not supported by any credible evidence?*

5. *Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in setting aside the issues pertaining to disallowance out of depreciation on account of destroyed/damaged assets and disallowance out of repair and maintenance expenditure being capital in nature without making its own enquiry u/s 250(4) of the Act?*

6. *That the appellant craves leave to add, amend, alter or forgo any ground/(s) of appeal either before or at the time of hearing of the appeal."*

4. The Assessee had come in appeal raising following grounds :-

"1. That the learned CIT (A) has erred in law and facts by confirming the disallowance of Rs.4,98,412/- under section 14A of the Act and therefore, the Assessing officer should be directed to

delete the said disallowance in full while computing total income.
2. That the learned CIT (A) has erred in law and facts, by directing the learned AO, for computing and allowing the depreciation on the asset destroyed and therefore, the Assessing officer should be directed to allow the depreciation claimed in full, while computing total income.
3. That the learned CIT (A) has erred in law and facts by directing the learned AO, to consider the amount of replacement expenses as capital expenditure and therefore, the Assessing officer should be directed to allow the same as revenue expense, while computing total income.
4.Your appellant craves a leave to add, alter or amend any grounds at the time of hearing."

5. Arguments were heard and record perused. The grounds raised are common and accordingly determined as below.

6. **Ground no 1 and 2 of Revenue's Appeal.** As for the disallowance of foreign exchange fluctuation loss of Rs. 1,03,34,504/- it can be observed that Ld. CIT(A) has followed the Hon'ble Delhi High Court's order dated 03.08.2018 in regard to assessee's own case where considering the ECB loan as an old one the treatment of the foreign exchange fluctuation as revenue income or loss was sustained and Ld. DR was unable to cite any change of facts or law. There is no force in the ground raised by Revenue.

7. **Ground no 1 of Assessee's Appeal**. The issue is with regard to addition of Rs. 4,98,412/- made by Ld. AO on account of disallowance u/s 14A read with rule 8D. It appears admitted from the matter on record that during the year under consideration, no exempt income has been earned by the assessee and ld. CIT(A) has although taken note of judgment of Hon'ble Delhi High Court in **Maxopp Investment Ltd. 203 taxmann.com 364** but failed to distinguish it on facts, as present assessee had no exempt income. On the contrary the judgments relied on behalf of the assessee expressly held that as assessee has not claimed any exempt income, no disallowance u/s 14A is required. Ground is allowed in favour of assessee.

8. **Ground no 2 of Assessee's Appeal**. In regard to the disallowance on account of depreciation amounting to Rs. 86,42,865/- substantial arguments were raised on behalf of both revenue and the assessee. It was submitted that the assessee had only lodged the claim and no insurance claim was received during the year and therefore no adjustment is required to be made in the book value of assets in the present assessment year. It was submitted for the Assessee that Ld. Tax Authorities below ignored the contention of assessee that assessee has received the claim from insurance company in F.Y. 2013-14 and offered same as income while filing the return of income for the assessment year 2014-15. Thus, the disallowance of depreciation in present AY will lead to double taxation of the same amount and for that consecutive. Ld. Counsel has taken rescue u/s 45(1A) of the Act and contend that in the year of receipt of the claim the compensation amount can be taxed as per the amendment which has come into effect from 1st April, 2000.

9. At the outset what can be observed is that the clerical error of making addition of Rs. 86,42,865/- as a whole for the depreciation amount instead of alleged excess depreciation of Rs 8,64,264/- by the Ld. AO has been taken note by Ld. CIT(A) and corrected also while partly allowing the ground.

10. As for further discussion of the controversy certain relevant provisions need to be reproduced. The first being, Section 45(1A) of Act which provides that :

> *"Notwithstanding anything contained in sub-section (1), where any person receives at any time during any previous year any money or other assets under an insurance from an insurer on account of damage to, or destruction of, any capital asset, as a result of --*
>
> *(i) Flood, typhoon, hurricane, cyclone, earthquake or other*

convulsion of nature; or

(ii) Riot or civil disturbance; or

(iii) Accidental fire or explosion; or

(iv) Action by an enemy or action taken in combating an enemy (whether with or without a declaration of war),

Then, any profits or gains arising from receipt of such money or other assets shall be chargeable to income-tax under the head "capital gains" and shall be deemed to be the income of such person of the previous year in which such money or other asset was received and for the purposes of section 48, value of any money or the fair market value of other assets on the date of such receipt shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of such capital asset.

Next **Section 43(6) (c)** of the Act which defines the "**written down values"** provides :

"(c) in the case of any block of assets,-

(i) in respect of any previous year relevant to the assessment year commencing on the 1st day of April, 1988, the aggregate of the written down values of all the assets falling within that block of assets at the beginning of the previous year and adjusted, --

(A) by the increase by the actual cost of any asset falling within that block, acquired during the previous year;

(B) by the reduction of the moneys payable in respect of any asset falling within that block, which is sold or discarded or demolished or destroyed during that previous year together with the amount of the scrap value, if any, so, however, that the amount of such reduction does not exceed the written down value as so increased; *and"*

11. The Ld. AO had directed the disallowance of depreciation, on the understanding, that the WDV is liable to be adjusted with the Claim amount raised with the insurance company. While in the impugned order of Ld CIT(A), the assessing officer has been directed to examine and identify assets which were required to be replaced as they were destroyed and Ld. CIT(A)

distinguished them from those assets which were damaged and required only repair. Based upon the same, Ld. AO has been directed that the written down value will be reduced in respect of those assets which were destroyed and thus recalculate the depreciation. The Ld. CIT(A) has thus distinguished those assets which were destroyed to those which were damaged but were repairable while holding in para 7.9 to 7.11 as below :

> *" 7.9 It is seen from the above that since the digester no 1 had disintegrated into 3 pieces, the same would fall under the term 'destroyed'. Whereas the glass pan of the main office will fall in the category of damaged. Therefore it is imperative that the impact of the explosion is required to be bifurcated into assets that got destroyed and those which got damaged.*
>
> *7.10 According to provision of section 43(6)(c) the assets which were destroyed will be required to be removed from the block of assets and the WDV of the block will get reduced to that extent. On the contrary those assets which merely got damaged and were repairable will continue to be in the block of assets and the depreciation thereon will be available to the appellant.*
>
> *7.11 The Assessing Officer is directed to examine the insurance claim of the appellant and identify assets which were required to be replaced as these had got destroyed and those which were damaged and required repair. The WDV will be reduced in respect of those assets which were destroyed."*

12. Now, as a matter of admitted fact, the assessee has not received the insurance claim during the year. However, the Bench is of considered view that as far as adjustment of WDV for the purpose of Section 43(6)(c)(i)B of the Act is concerned, as the case of assessee is that no insurance claim was settled in the relevant year and the assessee got the claim amount of Rs. 64,84,434/- on 12.09.2013, instead of claim raised of Rs 86,42,865/-, and the

claim amount of Rs 64,84,434/- was offered as income under the assessment year 2014-15 as per the Section 45(1A) of the Act. Then the written down value for the purpose of Section 43(6)(c)(i) B of the Act is not liable to be adjusted in the relevant AY as the insurance claim amount was not received. As such the assessee was not even aware as to what is the value of loss assessed by the insurance company which can be reflected by way of adjustment in WDV. Therefore, distinguishing assets as one destroyed or damaged is irrelevant in relation to assets for which the insurance claim was raised. As such the claim may also have been raised for the damaged assets as for the destroyed. The distinction created by Ld. CIT(A) on the basis of judgment of Bombay Tribunal in JR Enterprises vs. ACIT 124 ITAT 493 (ITA No. 5124/Mum/2005) decided on 30.06.2008 is not sustainable. In that case the assessee had received the insurance settlement amount in the same. So the distinction may have been relevant.

12.1 The Mumbai Bench in ITA No. 2824/Mum/2014 vide order dated 01.12.2015, case titled **Hathway Cable and Datacom Limited vs. CIT, 2015 SCC Online ITAT 14736,** was confronted with similar situation. In that case the assessee had made additions in plant and machinery to the extent of Rs. 23,55,968/- to the block of assets which was stated to be adjustment on account of lower amount of insurance claim received. It was stated by the assessee that it had made a claim of Rs. 23.55 lakhs on account of assets destroyed/ lost by theft during the earlier years and by same amount it was reduced from WDV of the assets in the preceding years, since no claim was settled, therefore, consequential difference was added in the assessment year 2007-08. The AO held that the said adjustment should have been made in the preceding year itself and on that depreciation should have been claimed. The AO observed that since the assessee has made the relevant

adjustment in this year, therefore, there is an enhanced claim of depreciation on the said assets. The Ld. CIT(A) also sustained the addition with the further reasoning that if the assets were destroyed or lost in the earlier years then such an asset was not put to use for the business purpose, therefore entire claim of depreciation of such use plant and machinery has to be disallowed. The Tribunal held that "*such a reasoning given by the Ld. CIT(A) for the enhancement cannot be sustained, because now it is quite a settled proposition that if the "assets" have already entered into the 'block of assets' and is forming part of the gross block of assets, then deprecation has to be allowed even if the said assets has not been used in the relevant year. This proposition now stands settled by the catena of decisions including that of a jurisdictional High Court in the case of CIT v. G.R. Shipping Ltd., which is based on the decision of earlier Bombay High Court decisions. Otherwise also, if the assessee's claim for insurance has not been settled and amount has been added back, then the depreciation has to be allowed on such an amount. Accordingly, we direct the AO to grant deprecation on Rs. 23.56 lakhs in the previous year relevant to AY 2006-07, that is, when it was added back to the block of assets and secondly, rework the deprecation for the assessment year under appeal accordingly. Thus, the grounds raised by the assessee are treated as allowed in the manner indicated above.*"

13. Thus the order of Ld.CIT(A) on basis of non use of assets is not sustainable. Ld. CIT(A) erred in giving directions to Ld AO to examine the insurance claim of the appellant and identify assets which were required to be replaced as these had got destroyed and those which were damaged and required repair and that the WDV will be reduced in respect of only those assets which were destroyed is not sustainable. In relevant year the Assessee was not required to adjust the WDV of the block of assets, for the amount of

insurance claim submitted irrespective of assets being of the category destroyed or damaged. Grounds of assessee is allowed.

14. **Ground no 3 of Assessee's Appeal and 3 to 5 of Revenue's appeal**. In regard to the disallowance of repair and maintenance expenditure treating the same as capital expenditure. It was submitted on behalf of the assessee that assets replaced were existing assets and no new asset has come into the existence. Therefore, the expenditure cannot be considered to be of capital nature. Ld. Counsel relied the following judgments to contend that where no new asset has come into existence and expenses have been incurred with the objected of preserving and maintaining the asset for the purpose of huge in the business demolished due to fire, the same shall be treated as revenue expenditure :

1.	***Precision Wires India Ltd. vs. ACIT***	***R/T ax Appeal No. 307 of 2008 Dtd. 11 Feb. 2020***	***Gujarat High Court***
2.	***CIT vs. Grand Hotel***	***[1991] 189 ITR 153 Dtd. 23 Jan. 1991***	***Allahabad High Court***
3.	***ITAT vs. B.Hill & Co.P Ltd.***	***[1983] 142 ITR 185 Dtd. 08 Mar.1982***	***Allahabad High Court***
4.	***CIT, Bhatinda Vs. Bhupindera Flour Mills (P) Ltd.***	***[20 Taxmann.com 593] Dtd. 03 May, 2011***	***Punjab & Haryana High Court***
5.	***CIT vs. Shree Hari Industries***	***[1986] 161 ITR 249 Dtd. 04 Oct, 1985***	***Rajasthan High Court***

15. There appears to be no error in the findings of Ld. CIT(A) while referring the matter back to ld. AO to consider the expenses into repair and maintenance expenses or replacement expenses. As a distinction has to be made if the replacement is of a baby part only, then the same cannot be considered to be a capital expenditure. It is only when a baby part alone cannot be repaired and the whole of machine is required to be replaced, the expenditure of replacement will be of capital nature. Thus, in regard to these grounds there is no substance in the contentions on behalf of the revenue or the assessee. The grounds are disallowed.

16. As a sequel to determination of aforesaid grounds, as raised by the assessee and the revenue, the appeal of assessee succeeds partly with regard to ground no. 1 and 2 and of Revenue is dismissed.

Order pronounced in the open court on 30th June, 2023.

Sd/-	**Sd/-**
(G.S.PANNU)	**(ANUBHAV SHARMA)**
PRESIDENT	**JUDICIAL MEMBER**

Date:-30.06.2023

Binita, SR.P.S

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI