**IN THE INCOME TAX APPELLATE TRIBUNAL**
**COCHIN BENCH, COCHIN**

**Before Shri Satbeer Singh Godara, Judicial Member &**
**Shri Amarjit Singh, Accountant Member**

ITA Nos.71 & 255 to 257/Coch/2021
Assessment Years: 2017-18, 11-12, 12-13 & 16-17

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| M/s.Malabar Cements Limited<br>Walayar – 678 624<br>Palakkad District.<br>**PAN : AABCM5814C.** | v. | The Assistant Commissioner of Income-tax<br>Palakkad. |
| (Appellant) | | (Respondent) |

Appellant by : Shri Harikrishnan Unny, CA
Respondent by : Smt. V. Swarnalatha, Sr. D.R.

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| **Date of Hearing : 12.08.2024** | | **Date of Pronouncement : 12.08.2024** |

**O R D E R**

**Per Bench :**

These assessee's four appeals arise against orders of the National Faceless Appeal Centre, Delhi [CIT(A)] in proceedings u/s. 250 of the Income Tax Act, 1961 (the Act) as below: -

| Sr. No. | ITA No. | AY | NFAC order | Date |
|---|---|---|---|---|
| 1 | 71/Coch/2021 | 2017-18 | ITBA/NFAC/S/250/2020-21/1037739568(1) | 25.03.2021 |
| 2 | 255/Coch/2021 | 2011-12 | ITBA/NFAC/S/250/2021-22/1036291198(1) | 11.10.2021 |
| 3 | 256/Coch/2021 | 2012-13 | ITBA/NFAC/S/250/2021-22/1036291223(1) | 11.10.2021 |
| 4. | 257/Coch/2021 | 2016-17 | ITBA/NFAC/S/250/2021-22/1036291249(1) | 11.10.2021 |

Heard both the parties. Case file perused.

2. The learned counsel for the assessee submits at the outset that the assessee's identical sole substantial grievance canvassed in all these four appeals is that of disallowance of depreciation made by both the lower authorities; involving varying sums. We find that this is the "second" round of proceeding s before the tribunal as the earlier learned coordinate bench order dated 09.12.2022 had rejected the assessee's very claim as under: -

*"2. The assessee is a public sector undertaking with 100% shares held by Govt. of Kerala. The assessee filed its return of income electronically as per details given below.*

| *Assessment year* | *Date of filing original return* | *Income declared – Rs.* | *Date of filing revised return* | *Income declared – Rs.* |
|---|---|---|---|---|
| *2011-12* | *23.03.2012* | *44,78,40,810* | *N/A* | *N/A* |
| *2012-13* | *29.09.2012* | *37,15,15,630* | *29.05.2013* | *36,86,11,310* |
| *2016-17* | *12.10.2016* | *39,41,57,030* | *17.06.2017* | *39,81,77,960* |
| *2017-18* | *17.10.2017* | *3,99,99,190* | *26.07.2018* | *3,63,65,410* |

*3. The return was taken up for scrutiny through CASS to verify various issues out of which one of the issues was excess depreciation. Notice u/s. 143(2) was issued and served on the assessee.*

*4. The assessee's claim for depreciation was disallowed by the AO from AY 2011-12 onwards on the grounds that the assessee did not have any supporting evidence to prove the existence of the asset, it was claimed on the advice of statutory auditor, the asset being spares the description would have been included in the cost of machinery itself and the assets may have used it and worn out in the earlier years and the assessee was not able to satisfactorily prove that the asset was put to use during the relevant years so as to claim depreciation.*

*5. Before the CIT(Appeals), the assessee submitted that it was the practice to show the cost of insurance spare parts under the head inventory, stores and spares which consisted of spare parts in the machineries acquired from 1984 onwards. Therefore the cost of spares replaced was charged to stores and spares account at the time of issue of spares. The value of spares purchases which were not used was negligible on account of replacement of original machineries itself. Hence it was claimed that the value of such spare parts is to be depreciated and charged to profit & loss account of every year which was also pointed out by the statutory auditors for the year ended 31.3.2010 about non-provision of depreciation on insurance spares. It was a statutory requirement as per the provisions of the Companies Act and assessee was legally bound to provide the depreciation. Many of the spare parts were not usable because the machineries*

*for which spares are required were not in use at present. Hence it is to be treated as part of machineries and depreciation has to be allowed.*

*6. The CIT(Appeals) upheld the findings of the AO denying excess depreciation claim. He also observed that the assessee was not able to furnish any concrete evidence with respect of the existence of the assets and that the assessee has made separate payments towards purchase of spares. to claim of the assessee neither before the AO nor before him. Hence, the AO's order was confirmed.*

*7. Before us, the ld. AR reiterated the submissions made before the lower authorities. The ld AR prayed that the assessee may be given an opportunity to produce the evidences and that the issue may be remitted back to the lower authorities.*

*8. The ld. DR supported the orders of revenue authorities.*

*9. We have considered the rival submissions and perused the material on record. Both the AO and the CIT(A) have held that there is no evidence to the various claims made with respect to the insurance spare parts on which depreciation is claimed. We see merit in the contention that without evidence, the claim cannot be factually accepted. Further the impugned issues pertain to AY 2011-12, 2012-13, 2016-17 and 2017-18 and the assessee from this time had plenty of opportunities to collate the evidences. However even before us, the assessee has not produced any evidence in support of its claim for denying excess depreciation claimed by it. Therefore at this stage of the appellate proceedings there is no merit in the submissions of the assessee praying for one more opportunity to produce the supporting evidences. We accordingly confirm the order of the CIT(Appeals) for all the years on identical facts and circumstances of the case. The grounds raised in this regard in all the assessment years is dismissed."*

3. The assessee thereafter filed its Tax Appeal ITA No. 8 & 11 to 13 of 2023 before the Hon'ble Jurisdictional High Court. Their Lordships vide common order/judgement dated 21st May, 2024 has restored the instant issue of allowability of assessee's depreciation back to the tribunal as under:-

*"5. Thus, without going into the merits of the case before us and without answering the questions of law raised in these appeals, we set aside the common order of the Appellate Tribunal on the issue of depreciation for the various assessment years aforementioned, and remand the said issue for fresh consideration by the Tribunal. The Appellate Tribunal shall pass fresh orders in the matter, after considering the evidence produced by the appellant before it, within three months from the date of receipt of a copy of this judgment. To enable the Appellate Tribunal to pass fresh orders without any delay, the appellant is also directed to furnish a fresh set of the documents produced along with Annexure-E e-mail for consideration before the Tribunal within two weeks from the date of receipt of a copy of this judgment. We make it clear that the other*

*issues considered by the Tribunal, and which are not impugned in these appeals, shall be treated as finally decided by the common order of the appellate tribunal impugned in these appeals."*

It is in this factual background that we are now adjudicating upon the assessee's instant identical sole substantial grievance claiming depreciation in these four cases.

4. Learned counsel submits that the assessee has claimed the impugned depreciation involving relevant fixed asset(s) for the first time in AY 2011-12. And that it had acquired the same in earlier assessment years (subject to the Assessing Officer's verification indeed) and the same have now been capitalised in the first and foremost adjudication herein, i.e., AY 2011-12 making the assessee entitled for depreciation.

5. The Revenue on the other hand supports the impugned disallowance of depreciation that the same is no more admissible as it ought to have been claimed in the year of acquisition of the fixed asset(s) only.

6. We find no merit in the Revenue's instant technical argument in the light of the corresponding statutory provision, i.e. s. 43(6)(b) of the Act, which reads as under: -

**"43.** In sections 28 to 41 and in this section, unless the context otherwise requires—

……

(*6*) "written down value" means—

(*a*) ……

(*b*) in the case of assets acquired before the previous year, the actual cost to the assessee less all depreciation actually allowed to him under this Act, or under the Indian Income-tax Act, 1922 (11 of 1922), or any Act repealed by that Act, or under any executive orders issued when the Indian Income-tax Act, 1886 (2 of 1886), was in force:

7. It is thus clear that the provisions of the Act itself indeed give option to the assessee to claim the impugned depreciation even in the subsequent assessment years as well subject to the condition that the "written down

value" of the relevant fixed asset has to be reduced by the depreciation actually allowed, which is 'Nil' in this case. The Hon'ble Apex Court in CIT v. Dom Dooma India Ltd. [2009] 310 ITR 392 (SC) has also decided the very issue against the department as follows: -

*"8. The key word in section 43(6)(b) of the 1961 Act is "actually". We quote hereinbelow an important observation, made by this court on the meaning of the words "actually allowed: in section 43(6)(b) in the case of Madeva Upendra Sinai v. Union of India [1975] 98 ITR 209 (SC) at pages 223 and 224, which reads as under:*

*"The pivot of the definition of 'written down value' is the 'actual cost of the assets. Where the asset was acquired and also used for the business in the previous year, such value would be its full actual cost and depreciation for that year would be allowed at the prescribed rate on such cost. In the subsequent year, depreciation would be calculated on the basis of actual cost less depreciation actually allowed.*

*The key word in clause (b) is 'actually. It is the antithesis of that which is merely speculative, theoretical or imaginary. 'Actually' contra-indicates a deeming construction of the word 'allowed' which it qualifies. The connotation of the phrase 'actually allowed' is thus limited to depreciation actually taken into account or granted and given effect to, i.e., debited by the Income-tax Officer against the incomings of the business in computing the taxable income of the assessee; it cannot be stretched to mean 'notionally allowed' or merely allowable on a notional basis.*

*From the above conspectus, it is clear that the essence of the scheme of the Indian income-tax Act is that depreciation is allowed, year after year, on the actual cost of the assets as reduced by the depreciation actually allowed in earlier years. It follows, therefore, that even in the case of assets acquired before the previous year, where in the past no depreciation was computed, actually allowed or carried forward, for no fault of the assessee, the 'written down value' may , under clause (b) of section 43(6), also, be the actual cost of the assets to the assessee."*

*9. Therefor, this court has clearly laid down the meaning of the words 'actually allowed" in section 43(6)(b) to mean – 'limited for depreciation actually taken into account or granted and given effect to, i.e., debited by the Income-tax Officer against the incomings of the business in computing the taxable income of the assessee."*

We adopt the above detailed reasoning mutatis mutandis to accept the assessee's argument in principle.

9. Next come quantification of the impugned depreciation claim on merits. The assessee has reiterated the facts before us that it has filed all the relevant details in the case files which also formed subject matter of their lordships' discussion herein above. Faced with this situation we direct the Assessing Officer to examine the assessee's claim on merits as per law in above terms after affording due opportunity of hearing. Ordered accordingly.

10. No other grounds or arguments have been pressed before us.

11. To sum up, these assessee's four appeals in ITA Nos. 71 & 255 to 257/Coch/2021 are allowed for statistical purposes in above terms. A copy of this common order be placed in respective case files.

Order pronounced in the open court on this 12th Day of August, 2024.

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| **Sd/-** | **Sd/-** |
| **(Satbeer Singh Godara)** | **(Amarjit Singh)** |
| **Judicial Member** | **Accountant Member** |

Cochin ; Dated : 12th August, 2024.
Devadas G*

Copy to :
1. The Appellant.
2. The Respondent.
3. The CIT(A), Concerned.
4. The CIT Concerned.
5. The DR, ITAT, Cochin.
6. Guard File.

Asst. Registrar/ITAT, Cochin