

आयकर अपीलीय अधिकरण, मुंबई “जे” खंडपीठ में
Income-tax Appellate Tribunal -“J”Bench Mumbai
सर्वश्री राजेन्द्र,लेखा सदस्य एवं सी. एन. प्रसाद, न्यायिक सदस्य
Before S/Sh.Rajendra,Accountant Member and C. N. Prasad,Judicial Member
आयकर अपील सं./I.T.A./2309/Mum/2015,निर्धारण वर्ष /Assessment Year:2010-11

Income tax Officer Room no.637, 6th Floor, Aayakar Bhavan Mumbai-400 020	Vs.	M/s. Sunvin Industries Pvt.Ltd. Nadinaka, Mithpada, Behind Sainik Hospital Parol Rd. Bhiwandi, Thane-421 302. PAN:AAECS 3087 L
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

राजस्व की ओर से / **Revenue by:** Ms. Arju Goradia-DR

अपीलार्थी की ओर से / **Assessee by:** Ms. Usha Gopalan

सुनवाई की तारीख / **Date of Hearing:** 30/03/2017

घोषणा की तारीख / **Date of Pronouncement:** 05.04.2017

लेखा सदस्य, राजेन्द्र के अनुसार/ PER Rajendra A.M.-

Challenging the order dated 13/02/2015 of CIT(A)-9,Mumbai, the Assessing Officer (AO)has filed the present appeal.Assessee-company,engaged in the business of manufacturing of textiles and handloom,filed its return of income on 27/09/2010,declaring total income of **Rs.Nil**.The AO completed the assessment u/s. 143(3) on 13.3.2013,determining its income at Rs.90.88 lakhs.

2.First Ground of appeal is about direction given by the First Appellate Authority(FAA)about PF contribution.During the assessment proceedings,the AO observed that employees contribution to PF amounting to Rs.81,815/- was made belatedly, that same was to be added as income of the assessee u/s. 2(24)(x) of the Act.

2.1.Aggrieved by order of AO,the assessee preferred an appeal before the First FAA.Before him,it was stated that payments were made within the grace period. After considering the submission of the assessee and the assessment order,the FAA held that all the payments to PF had been deposited in government account within the grace period allowed to the assessee as per the provisions of employees' Provident Fund Scheme,1952. Referring to the judgment of the Hon'ble Supreme Court in the case of Alom Extrusions (319ITR306),he directed the AO to verify from the records as to whether the payments had been within the grace period.He further held that if the claim of the assessee was supported by evidences addition made by AO should be deleted.

2.2. Before us the Departmental Representative stated that matter could be decided on merits. The Authorised Representative supported the order of the FAA.

We find that the FAA has directed the AO to verify the records and to delete the addition only after verification. In our opinion, the direction of the FAA is as per law and no appeal should have been filed with regard to the said issue. Accordingly, we decide First Ground of appeal against the AO.

3. Second ground of appeal is about restricting the remuneration to the Directors to Rs.10 lakhs. During the assessment proceedings, the AO found that in the assessment year 2009-10, the company was paying remuneration to the director to the tune of Rs.6.00 lakhs, that during the year under consideration director was paid remuneration of Rs.60 lakhs, he observed that there was increase by 500% in the remuneration, that there was no evidence to show that directors had rendered any extra services for payment of huge remuneration as compared to the earlier year, that the turnover and the profit did not show any exceptionally high standard as compared to earlier years, that the payment made to the directors was a tax avoidance tool, it had failed to justify the expenditure, that the payment was made to a related party. Invoking the provisions of section 40A(2)(b) of the Act he held that remuneration of Rs.8 lakhs was justifiable. Finally, he made a disallowance of Rs.22 lakhs under the provisions of section 40A(2) of the Act.

3.1. During the appellate proceedings, the assessee made submissions before the FAA and relied upon the case of Hive Communication (P.) Ltd. (201taxman 99). After considering the available material, he held that remuneration paid to directors was in excess as per the market and business exigencies, that the disallowance made by AO was on a higher side. Accordingly, he directed the AO to restrict the disallowance to Rs.10 lakhs.

3.2. Before us, the DR stated that there was no justification for abnormal rise in the remuneration to the directors, that provisions of section 40A(2)(b) were applicable. The AR stated that while deciding the appeal filed by assessee in ITA 2893/Mum/ 2015, dt.9.12.2016, the Tribunal had restored the issue to the file of FAA for fresh adjudication. We find that the Tribunal has dealt the issue at para-4 of the above mentioned order as under :-

“4. We have considered the rival contention of the parties and gone through the orders of authorities below. During the assessment proceeding, the assessee was asked to file copy of Form No.16, 12BA issued to Directors, copy of Board resolution and the year wise details of remuneration paid to the Directors. The assessee filed only copy of Form 16 issued to the Directors

and the copy of Board resolution in case of Sh. Vinod Khetrpal only. On the basis of details the AO observed from the Profit & Loss A/c, found that remuneration paid to Director in AY 2009-10 was Rs. 6,00,000/- and the assessee-company all of sudden decided to increase the remuneration by 500% to Rs. 30,00,000/- to the Directors. While the gross remuneration in AY 2009-10 to the Net Profit was 5.93%, it was jumped to 22.35% in the year under consideration and disallowed Rs. 22,00,000/- u/s 40A(2) holding as excessive and unreasonable. Before the ld. CIT(A), it was argued that the remuneration was paid as per market and business exigencies. The Directors to whom the remuneration was paid are responsible to carry out the function such as production, planning and marketing, financial planning and control. However, the ld. CIT(A) after referring the decision of Delhi High Court in Hive Communication Pvt. Ltd. vs. CIT (2011) 201 Taxman 99 held that the disallowance is on higher side and restricted the same to Rs. 10,00,000/- and granted partial relief to the assessee. We have seen that while making the disallowance, the onus is on the AO and the AO has not brought any material on record as to how the remuneration paid to two Directors are excessive, no comparable on the basis of region cum industry was referred by the AO or by the ld. CIT(A) while restricting the disallowance. Considering the fact that the order of ld. CIT(A) is of non-speaking order, we restore this ground of appeal to the file of ld. CIT(A) to decide the issue afresh. Needless to say that the ld. CIT(A) will grant adequate and sufficient opportunity to the assessee before deciding the issue in accordance with law. The assessee is also directed to fully cooperate and to provide the necessary information and documents which may be required by ld. CIT(A). ”

Respectfully following the above order of the Tribunal, we direct the FAA to pass a speaking and reasoned order after providing a reasonable opportunity to the assessee. Second Ground is decided in favour of the AO, in part.

4. Last Ground of appeal is about allowing the carryforward of unabsorbed depreciation for AY 2000-01 and 2001-02 aggregating to Rs. 64.58 lakhs. While computing the assessment the AO did not allow depreciation for the above mentioned two AY.s, relying upon the decision of the Tribunal in the case of Times Guarantee Ltd. After considering the submission of the assessee and following the judgment of the Hon'ble Gujarat High Court in the case of General Motors India Pvt.Ltd. (354ITR244) he allowed the appeal of the assessee.

4.1. Before us, the DR stated that matter could be decided on merits. The AR relied upon the judgment of General Motors India Pvt.Ltd. (supra). We would like to reproduce the judgment of Hon'ble Gujarat High Court in the case of General Motors and it reads as under :-

32. The last question which arises for consideration is that whether the unabsorbed depreciation pertaining to the assessment year 1997-98 could be allowed to be carried forward and set off after a period of eight years or it would be governed by section 32 as amended by the Finance Act, 2001 ? The reason given by the Assessing Officer under section 147 is that section 32(2) of the Act was amended by the Finance (No. 2) Act of 1996, with effect from the assessment year 1997-98 and the unabsorbed depreciation for the assessment year 1997-98 could be carried forward up to the maximum period of eight years from the year in which it was first computed. According to the Assessing Officer, eight years expired in the assessment year 2005-06 and only

till then, the assessee was eligible to claim unabsorbed depreciation of the assessment year 1997-98 for being carried forward and set off against the income for the assessment year 2005-06. But the assessee was not entitled for unabsorbed depreciation of Rs. 43,60,22,158 for the assessment year 1997-98, which was not eligible for being carried forward and set off against the income for the assessment year 2006-07.

33. *Prior to the Finance (No. 2) Act of 1996 the unabsorbed depreciation for any year was allowed to be carry forward indefinitely and by a deeming fiction became allowance of the immediately succeeding year. The Finance (No. 2) Act of 1996 restricted the carry forward of unabsorbed depreciation and set-off to a limit of eight years, from the assessment year 1997-98. Circular No. 762, dated February 18, 1998 (see [1998] 230 ITR (St.) 12), issued by the Central Board of Direct Taxes (CBDT) in the form of Explanatory Notes categorically provided, that the unabsorbed depreciation allowance for any previous year to which full effect cannot be given in that previous year shall be carried forward and added to the depreciation allowance of the next year and be deemed to be part thereof.*

34. *So, the unabsorbed depreciation allowance of the assessment year 1996-97 would be added to the allowance of the assessment year 1997-98 and the limitation of eight years for the carry forward and set off of such unabsorbed depreciation would start from the assessment year 1997-98.*

35. *We may now examine the provisions of section 32(2) of the Act before its amendment by the Finance Act, 2001. The section, prior to its amendment by the Finance Act, 2001, read as under :*

"Where in the assessment of the assessee full effect cannot be given to any allowance under clause (ii) of sub-section (1) in any previous year owing to there being no profits or gains chargeable for that previous year or owing to the profits or gains being less than the allowance, then, the allowance or the part of allowance to which effect has not been given (hereinafter referred to as unabsorbed depreciation allowance), as the case may be,

(i) shall be set off against the profits and gains, if any, of any business or profession carried on by him and assessable for that assessment year ;

(ii) if the unabsorbed depreciation allowance cannot be wholly set off under clause (i), the amount not so set off shall be set off from the income under any other head, if any, assessable for that assessment year ;

(iii) if the unabsorbed depreciation allowance cannot be wholly set off under clause (i) and clause (ii), the amount of allowance not so set off shall be carried forward to the following assessment year, and—

(a) it shall be set off against the profits and gains, if any, of any business or profession carried on by him and assessable for that assessment year ;

(b) if the unabsorbed depreciation allowance cannot be wholly so set off, the amount of unabsorbed depreciation allowance not so set off shall be carried forward to the following assessment year not being more than eight assessment years immediately succeeding the assessment year for which the aforesaid allowance was first computed :

Provided that the time limit of eight assessment years specified in sub-clause (b) shall not apply in case of a company for the assessment year beginning with the assessment year relevant to the previous year in which the said company has become a sick industrial company under sub-section (1) of section 17 of the Sick Industrial Company (Special Provisions) Act, 1985 (1 of 1986), and ending with the assessment year relevant to the previous year in which the entire net worth of such company becomes equal to or exceeds the accumulated losses.

Explanation.—For the purposes of this clause, 'net worth' shall have the meaning assigned to it in clause (ga) of sub-section (1) of section 3 of the Sick Industrial Companies (Special Provisions) Act, 1985."

36. *The aforesaid provision was introduced by the Finance (No.2) Act, 1996, and further amended by the Finance Act, 2000. The provision introduced by the Finance (No. 2) Act was clarified by the Finance Minister to be applicable with prospective effect.*

37. *Section 32(2) of the Act was amended by the Finance Act, 2001, and the provision so amended reads as under :*

"Where, in the assessment of the assessee, full effect cannot be given to any allowance under sub-section (1) in any previous year, owing to there being no profits or gains chargeable for that previous year, or owing to the profits or gains chargeable being less than the allowance, then, subject to the provisions of sub-section (2) of section 72 and sub-section (3) of section 73, the allowance or the part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following previous year and deemed to be part of that allowance, or if there is no such allowance for that previous year, be deemed to be the allowance of that previous year, and so on for the succeeding previous years."

38. *The purpose of this amendment has been clarified by the Central Board of Direct Taxes in Circular No. 14 of 2001 (see [2001] 252 ITR (St.) 65, 90). The relevant portion of the said Circular reads as under :*

"Modification of provisions relating to depreciation

30.1 Under the existing provisions of section 32 of the Income-tax Act, carry forward and set off of unabsorbed depreciation is allowed for eight assessment years.

30.2 With a view to enable the industry to conserve sufficient funds to replace plant and machinery, specially in an era where obsolescence takes place so often, the Act has dispensed with the restriction of eight years for carry forward and set off of unabsorbed depreciation. The Act has also clarified that in computing the profits and gains of business or profession for any previous year, deduction of depreciation under section 32 shall be mandatory.

30.3 Under the existing provisions, no deduction for depreciation is allowed on any motor car manufactured outside India unless it is used (i) in the business of running it on hire for tourists, or (ii) outside in the assessee's business or profession in another country.

30.4 The Act has allowed depreciation allowance on all imported motor cars acquired on or after 1st April, 2001.

30.5 *These amendments will take effect from the 1st April, 2002, and will, accordingly, apply in relation to the assessment year 2002-03 and subsequent years."*

39. *The Central Board of Direct Taxes Circular clarifies the intent of the amendment that it is for enabling the industry to conserve sufficient funds to replace plant and machinery and accordingly the amendment dispenses with the restriction of eight years for carry forward and set off of unabsorbed depreciation. The amendment is applicable from the assessment year 2002-03 and subsequent years. This means that any unabsorbed depreciation available to an assessee on the 1st day of April, 2002 (the assessment year 2002-03), will be dealt with in accordance with the provisions of section 32(2) as amended by the Finance Act, 2001, and not by the provisions of section 32(2) as it stood before the said amendment. Had the intention of the Legislature been to allow the unabsorbed depreciation allowance worked out in the assessment year 1997-98 only for eight subsequent assessment years even after the amendment of section 32(2) by the Finance Act, 2001, it would have incorporated a provision to that effect. However, it does not contain any such provision. Hence, keeping in view the purpose of the amendment of section 32(2) of the Act, a purposive and harmonious interpretation has to be taken. While construing the taxing statutes, rule of strict interpretation has to be applied, giving fair and reasonable construction to the language of the section without leaning to the side of the assessee or the Revenue. But if the Legislature fails to express clearly and the assessee becomes entitled for a benefit within the ambit of the section by the clear words used in the section, the benefit*

accruing to the assessee cannot be denied. However, Circular No. 14 of 2001 had clarified that under section 32(2), in computing the profits and gains of business or profession for any previous year, deduction of depreciation under section 32 shall be mandatory. Therefore, the provisions of section 32(2) as amended by the Finance Act, 2001, would allow the unabsorbed depreciation allowance available in the assessment years 1997-98, 1999-2000, 2000-01 and 2001-02 to be carried forward to the succeeding years, and if any unabsorbed depreciation or part thereof could not be set off till the assessment year 2002-03 then it would be carried forward till the time it is set off against the profits and gains of subsequent years.

40. Therefore, it can be said that, current depreciation is deductible in the first place from the income of the business to which it relates. If such depreciation amount is larger than the amount of the profits of that business, then such excess comes for absorption from the profits and gains from any other business or business, if any, carried on by the assessee. If a balance is left even thereafter, that becomes deductible from out of income from any source under any of the other heads of income during that year. In case there is a still balance left over, it is to be treated as unabsorbed depreciation and it is taken to the next succeeding year. Where there is current depreciation for such succeeding year the unabsorbed depreciation is added to the current depreciation for such succeeding year and is deemed as part thereof. If, however, there is no current depreciation for such succeeding year, the unabsorbed depreciation becomes the depreciation allowance for such succeeding year. We are of the considered opinion that any unabsorbed depreciation available to an assessee on the 1st day of April, 2002 (the assessment year 2002-03), will be dealt with in accordance with the provisions of section 32(2) as amended by the Finance Act, 2001. And once Circular No. 14 of 2001 clarified that the restriction of eight years for carry forward and set off of unabsorbed depreciation had been dispensed with, the unabsorbed depreciation from the assessment year 1997-98 up to the assessment year 2001-02 got carried forward to the assessment year 2002-03 and became part thereof, it came to be governed by the provisions of section 32(2) as amended by the Finance Act, 2001, and were available for carry forward and set off against the profits and gains of subsequent years, without any limit whatsoever.”

Respectfully following the above, we decide the last Ground against the AO.

As a result appeal filed by the AO stands partly allowed.

फलतः निर्धारिती अधिकारी द्वारा दाखिल की गई अपील अंशतः मंजूर की जाती है।

Order pronounced in the open court on 5th April, 2017.

आदेश की घोषणा खुले न्यायालय में दिनांक 5 अप्रैल, 2017 को की गई।

Sd/-

(सी. एन. प्रसाद / C.N.Prasad)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक/Dated : 05.04.2017.

Jv.Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त

5.DR “A ” Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, ए खंडपीठ, आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.