

Acit - 1 (3) Vs. Weizmann Ltd.

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Feb-07-2013

Judge : B. Ramakotaiah, Accountant Member & the Honourable Mr. Amit Shukla, Judicial Member

Appeal No. : ITA No. 5697/Mum/2008

Appellant : Acit - 1 (3)

Respondent : Weizmann Ltd.

Judgement :

B. Ramakotaiah, A.M.

1. This is a Revenue appeal against the order of the CIT (A)-21 Mumbai, dated 24.06.2008. Assessee is a limited company engaged in the business of manufacturing and exports of textiles and other goods and also engaged in services like leasing, financing, money lending and borrowings, bill discounting, financial consultancy services and is a dealer in foreign exchange and is also engaged in wind power generation. AO in the course of assessment made certain additions/disallowances which have been challenged before the CIT (A) who after considering the submissions and past records deleted the same. Revenue is aggrieved and raised the following four grounds:

"1. On the facts and circumstances of the case and in law, the learned CIT (A) erred in deleting the addition of Rs.23,31,963 against disallowances of lease

rental, paid on windmill, ignoring the fact that assessee company with mutual understanding first purchased and then sold back to the manufacturer and against purchased through its sister concern from whom it has borrowed the same on lease.

2. On the facts and circumstances of the case and in law, the learned CIT (A) erred in granting set off of unabsorbed depreciation against income from capital gain and dividend income.

3. On the facts and circumstances of the case and in law, the learned CIT (A) erred in directing AO to allow the deduction under section 80HHC of Rs.1,23,80,610 while computing the book profit under section 115JB of the Act, inspite of the fact that deduction under section 80HHC computed under clause (a), (b) and (c) of sub section (3) or sub section 3(A) is nil as provided under section 115JB of the Act.

4. On the facts and circumstances of the case and in law, the learned CIT (A) erred in directing AO to recompute the deduction under section 80HHC by taking the turnover of the taxable division only on "standalone" basis and ignoring the turnover of the other division without considering the provision of the section 80AB of the Act which talk about the gross profit of assessee and not of the Division".

2. We have heard the learned DR and the learned Counsel. It was submitted that most of the issues are covered in favour of assessee by the orders of the ITAT in later year of 204-05 and placed a chart referring to the grounds and the issues.

3. Ground No.1. This is with reference to the lease rent. Assessee paid lease rent of Rs.23,31,963 to M/s Weizmann Homes Ltd on account of 250 KW Wind Mill taken on lease. AO discussed the issue on page 2, para-3 of the order. The said addition was initially made in assessment year 1998-99. It was observed by AO in assessment year 1998-99 that the said wind mill was initially purchased by assessee and was sold to manufacturers, who in turn sold to another party and was leased to the assessee company. Consequently, AO treated the same as sale and lease back transaction and disallowed the lease rent on the wind mill taken on lease. Consequent to the orders in 1998-99 and 1999-2000 and also ITAT

decision in earlier years, the learned CIT (A) deleted the addition. The ITAT in ITA No.4603/Mum/2008 for assessment year 2004-05 in assessee's own case has decided as under:-

"3. Having heard the rival contentions, we do not find any infirmity in the order of the CIT (A) to interfere as the CIT (A) has followed the decision of the ITAT in assessee's own case for the assessment years 1998-99 and 1999-2000 on similar facts, wherein, the Tribunal has allowed the deduction of lease rental on this windmill, observing as follows:- "We have carefully considered the rival submissions. The case of the authorities below is that there was no need for the assessee to sell these two windmills because in any case directly or indirectly these windmills were utilized for the purposes of the business of the assessee. As to windmill 250 KW the assessee took it back on lease from WHL. Windmill 500 KW was finally taken on lease by Tapi Energy Product Ltd (Tapi) who was a sister concern of the assessee. Tapi was sharing revenue from assessee's sale of electricity to Andhra Pradesh Government. The Revenue has also contended that the series of transactions were entered into between the group concerns with a view to avoid tax liability of the group as a whole. There is certain flaw on the face of this argument in as much as Bank of Madura who purchased windmill 500 KW is not part of the assessee group. Secondly, it is not for the Income-tax authorities to determine as to in what manner the assessee should have conducted his business affairs. It is not in dispute that the transactions were given effect to by the parties. Even if the hunch of the learned CIT(A) that windmill 250 KW was not physically moved is correct the fact remains that ownership of the assessee over the windmill was substituted and the assessee thereafter operated the windmill as a lessee. The authorities below have approached the issue from physical point of view alone. They have not gone into the financial restructuring part of the transactions which too could be an important consideration for the assessee. The assessee has argued before the authorities below that there is no reduction in the assessee's tax liability by the transactions and in fact the assessee stood to gain by the transactions in as much as the assessee received Rs.550 lacs by way of liquidated damages. The case of the Revenue is that all these arrangements might have facilitated reduction of tax liability of the assessee group taken as a whole. The learned counsel for the assessee has rightly argued that the assessment of

the assessee cannot be affected by what happened in the case of there assessee even if they were part of the same group as the assessee himself. Action, if any was legally permissible, could be taken in the assessment of there assessees. For the purpose of Income-tax proceedings each assessee is a separate entity. Above all there is considerable force in the contention of the assessee that while on the one hand the assessee's claim of deduction of lease rentals has been disallowed, the income earned by the assessee on sale of power to Andhra Pradesh Government has been assessed without demur. We therefore hold that the disallowance of the assessee's claim of deduction on account of lease rent paid in respect of windmill 250 KW is without adequate justification and direct the Assessing Officer to allow deduction of lease rental on this windmill."

4. Respectfully following the views of the Coordinate Bench, we confirm the order of the learned CIT (A) and decline to interfere in the matter.

5. Ground No.2 is with reference to the action of AO in not allowing set off of unabsorbed depreciation of earlier years against the short term capital gain and dividend income. After considering the legal provisions and submissions of assessee on the issue the learned CIT (A) allowed the claim of assessee by holding as under:

"6.4 As both the grounds are interlinked grounds, I take both the grounds together for disposal. I have considered the submissions of the appellant carefully. I have also gone through the assessment order. During the year, the appellant had an income of Rs.82,50,950 on account of short term capital gains and Rs.8,78,000 as dividend income totaling to Rs.91,82,950. I have noticed that for the assessment year under consideration, there is a current depreciation of Rs.1,41,12,292 available for set off and the carry forward unabsorbed depreciation of Rs.6,95,88,082 is also available to be set off, totaling to Rs.8,37,00,374. The issue to be decided is whether the said depreciation could be set off against the income of Rs.91,28,950 on account of short term capital gains and dividend income. The appellant has placed reliance in this regard on the provisions of section 32(2) of the Act read with provisions of section 71. A combined reading of both the provisions clearly show that a carry forward unabsorbed depreciation merges with

the depreciation of the current year and the whole depreciation becomes the depreciation of the current year. In the said provisions, it is clearly mentioned that if the profits of that business were not sufficient to absorb the depreciation allowance of the current year, the said excess allowance could be adjusted against the chargeable income from any other heads of income as mentioned in section 14 of the Act. I find that the issue was settled by the decision of the apex court in the case of CIT vs. Jaipuria China Clay Mines (P) Ltd (1966) 59 ITR 555 (SC) wherein the Hon'ble Supreme Court has held that unabsorbed depreciation of an earlier year could be set off against the income under other heads. The Hon'ble Supreme Court has further observed that the words "no profits or gains chargeable for that year" are not confined to profits and gains derived from the business whose income is being computed under section 10 but they refer to the totality of the profits or gains computed under the various heads and chargeable to tax. The Delhi High Court in the case of Escorts Electronics Ltd vs. CIT (258 ITR 23) also held that brought forward depreciation could be set off against all the heads of income. The Supreme Court in an another decision in the case of Rajapalayam Mills Ltd v. CIT (1978) 115 ITR 777, held that no unabsorbed depreciation was not only to be set off against other heads of income in the relevant previous year but where it is carried forward, it stands exactly on the same footing as the current depreciation". The Supreme Court in an another case of Virmani Industries Pvt. Ltd (1995) 216 ITR 607 held that though on the first impression the expression "profits or gains chargeable" appears to refer only to profits or gains of business or profession chargeable under section 28 in view of the said decisions, the said expression is not so confined and it refers to income from all the heads of income specified in section 14 f the Act, which includes income from other sources". In another decision in the case of CIT vs. Principal Officer, Laxmi Surgical Pvt. Ltd, reported in 202 ITR 601, the Bombay High Court has held that the carried forward unabsorbed depreciation is deemed to be depreciation of the subsequent year to which it is carried forward, it would be permissible to set off such depreciation against the income of subsequent year under any head.

6.5 Considering the plethora of decisions available on the issue, I find that the question of setting off of unabsorbed carried forward depreciation against short term capital gains and dividend income, has now been settled. The carry forward unabsorbed

depreciation merges with the current year depreciation and thus whole of the depreciation comes the current year depreciation and the same can be set off against the income from other sources. Thus there is no ambiguity on this issue so far as the legal position is concerned. I am therefore, of the considered opinion that the appellant is eligible to get the set off of unabsorbed carry forward depreciation along with the depreciation of the current year. Accordingly, AO is directed to allow set off of depreciation against the short term capital gain and dividend income amounting to Rs.91,13,950".

6. The learned DR in support of AO, relied on the decision of the Chennai bench in the case of Southern Travels vs. ACIT, 103 ITD 198 to submit that the unabsorbed depreciation can not be set off to the current year's income. The learned Counsel in turn relied on the decision of the Special Bench in the case of DCIT vs. Times Guaranty Ltd, 131 TTJ (Mum)(SB) 257 and also the decision of the Hon'ble High Court of Gujarat in the case of General Motors India (P) Ltd vs. DCIT in special leave application No.1773 of 2012 dated 23.08.2012. The above Special Bench decision and the Hon'ble Gujarat High Court judgment are in favour of assessee. The Hon'ble Gujarat High Court on the facts on the issue held as under:

"37. The CBDT 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 8 years for carry forward and set off of unabsorbed depreciation. The amendment is applicable from assessment year 2002-03 and subsequent years. This means that any unabsorbed depreciation available to an assessee on 1st day of April, 2002 (A.Y. 2002-03) will be dealt with in accordance with the provisions of section 32(2) as amended by 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 A.Y. 1997-98 only for eight subsequent assessment years even after the amendment of section 32(2) by 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 amendment of section 32(2) of the Act, a purposive and harmonious interpretation has to be taken. While construing 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 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 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 Finance Act, 2001 would allow the unabsorbed depreciation allowance available in the A.Y. 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 A.Y. 2002-03 then it would be carried forward till the time it is set off against the profits and gains of subsequent years.

38. 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 1st day of April 2002 (A.Y. 2002-03) will be dealt with in accordance with the provisions of section 32(2) as amended by Finance Act, 2001. And once the Circular No.14 of 2001 clarified that the restriction of 8 years for carry forward and set off of unabsorbed depreciation had been dispensed with, the unabsorbed depreciation from A.Y.1997-98 upto the A.Y.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

Finance Act, 2001 and were available for carry forward and set off against the profits and gains of subsequent years, without any limit whatsoever".

7. Not only on legal principles, even on facts, contentions of assessee are acceptable. Assessee's unabsorbed depreciation for the assessment year 2001-02 and 2002-03 and current year's depreciation, as held by the CIT (A) are more than the capital gains and dividend being brought to tax separately by AO. In these circumstances both on facts as well as on law, assessee's contentions are allowable. Therefore, we do not see any reason to interfere with the order of the CIT (A). Accordingly the ground is rejected.

8. Ground No.3 pertains to the claim of section 80HHC of Rs.1,23,80,610 while computing the book profits under section 115JB. AO disallowed the claim as deduction under section 80HHC was not allowed in the regular computation, whereas assessee's contention was that the deduction was allowable on the profits worked out under section 115JB.

9. The learned CIT (A) following the decision of the Kerala High Court in the case of Commissioner Of Income-Tax vs. G.T.N. Textiles Ltd. 248 ITR 372 and the ITAT decision in the case of Starchik Specialities Ltd. Vs. Deputy Commissioner of Income-tax, 90 ITD 34 allowed the claim of assessee. The ITAT in assessment year 2004-05 confirmed the same by holding as under:

"9. The learned representatives fairly agree that the issue under consideration is squarely covered by the decision of a Coordinate bench in the case of DCIT vs. M/s Glenmark Laboratories Ltd in ITA No.4155/M/2007 for the assessment year 2004-05, wherein the Tribunal following the decision of the ITAT (SB) in the case of syncome formulations (I) Ltd (Supra) has affirmed the view of the CIT (A) deleting the similar addition. In any event, the view taken by the Tribunal in Special Bench decision in the case of Syncome Formulations (supra) now stands approved by the Hon'ble Supreme Court in the case of Ajanta Pharma Ltd vs. CIT (327 ITR 305)".

10. In view of this, we have no reason to interfere with the order of the CIT (A) and accordingly Revenue ground is dismissed.

11. Ground No.4 pertains to the direction of the CIT (A) to re- compute the deduction under section 80HHC by taking over the turnover of the taxable division only on "standalone" basis. This issue is also stand covered by the decision of the ITAT in assessee's own case in assessment year 2004-05 wherein the issue was decided as under:

"16. With regard to Ground No.4, learned representatives fairly agree that the issue is covered by the decision of the ITAT in assessee's own case for the assessment years 1998-99, 1999- 2000(supra). We find that similar issue had come up for consideration before a co-ordinate Bench of this Tribunal and it was, inter alia, observed as follows:-

"During the course of hearing before us the learned counsel for the assessee pointed out that the assessee company was engaged in diversified business activities and each business was distinct and separate from another. For this purpose the assessee company had several division viz. Textile Division, Lease and Hire Purchase Division; Power Generation Division, Foreign Exchange Division and Financial and Other Services Division. These activities were distinct and separate from each other. For this purpose the assessee had maintained separate books of account in respect of each division and separate P and L A/s. and separate balance sheet were prepared in respect of each division. For the purpose of annual accounts of the company as a whole the accounts of various divisions were consolidated and a consolidated P and L A/s. and balance-sheet was also prepared. The Assessing Officer had simply adopted the figures appearing in the consolidated account and ignored the separate accounts of Textile Division. In the case of an assessee carrying on more than one business it was only the business of which export was a part was required to be taken into consideration and not other business which had nothing to do with the export business. At our direction the assessee has filed separate balance sheet and P and L A/s. of Textile Division as also audit report in form no.10CCAC. In support of its contentions the learned counsel has relied upon the judgments reported in 245 ITR 49 (Bom); 245 ITR 769 (Bom); 246 ITR 429 (Bom); 246 ITR 439 (Bom); 254 ITR 656 (Mad); 257 ITR 60 (Mad) and 132 Taxmann 297 (Ker). The learned counsel has also placed reliance on the decisions reported in 63 TTJ 409 (Ahd);

66 ITD 353 and the decision of ITAT Mumbai Bench 'A' in ITA NO. 4205/Mum/96 in the case of Miku Agencies and Mumbai Bench 'C' decision in ITA No.4259 and 4260/M/95 in the case of M/s. Trab Enterprises. The learned Departmental Representative argued that under the provisions of section 80HHC(3) no distinction has been drawn as to whether the assessee was engaged in a single business or more than one business. For the purpose of that sub-section all the business of the assessee were required to be aggregated even if the same were separate and distinct from each other. In support of these contentions he placed reliance on the decision reported in 212 ITR (AT) 1 (Del) and 257 ITR 41 (Ker). On consideration of the matter we find that the claim of the assessee for deduction u/s. 80HHC on Textile Division on stand alone basis is fully supported by the decisions of ITAT Mumbai Bench 'A' Mumbai dated 29/8/02 in ITA NO.4205/Mum/1996 in the case of Miku Agencies v. DCIT Spl. Rg.9, Mumbai for A.Y 1991-92 and decision of ITAT Mumbai Bench 'C' dated 8/7/02 in ITA No. 4259 and 4260/Mum/95 in the case of DCIT Spl. Rg.22 Mumbai Vs. M/s. Trab Enterprises for A. Y.s 1990-91 and 1991-92. it is seen that in the later case the Tribunal has followed the judgment of the Jurisdictional High Court in the case of K.K. Doshi and Co. 245 ITR 849 (Bom) Respectfully, following these decisions of the Tribunal we accept the assessee's grounds of appeal no.7 and direct that the assessee should be allowed deduction u/s.80HHC on the basis of the business turnover and business profit of Textile Division only without taking into consideration the business turnover and the business profit of other Divisions."

17. Having heard the rival contentions and having perused the material on record, we see no reasons to disturb the conclusions arrived at by the CIT(A) Since the CIT (A) has followed the decision of the Tribunal (supra) directing the AO to compute the deduction under section 80 HHC in respect textile division on 'stand-alone' basis taking into account the total turnover and business profits of textile division only, we see no reason to interfere with the order of the CIT (A). The view so taken by the CIT(A) is consistent with the views of the coordinate benches, and no contrary decision has been cited before us.

18. Accordingly ground No.4 is dismissed".

12. The view taken by the CIT (A) is consistent with the view of the Coordinate Bench and accordingly there is no need to interfere with the said decision. Ground is dismissed.

13. In the result appeal of the Revenue is dismissed.

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