

THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "SMC" BENCH

**Before: Shri Pramod Kumar, Vice President
And Shri Siddhartha Nautiyal, Judicial Member**

**ITA No. 2488/Ahd/2018
Assessment Year 2014-15**

Meghmani Energy Ltd. 'Meghmani House,' B/h Safal Profitaire, Corporate Road, Prahladnagar, Ahmedabad-380015 PAN: AAECM7819E (Appellant)	Vs	The DCIT, Circle-2(1)(2), Ahmedabad (Respondent)
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**Assessee by: Shri Bandish Soparkar, A.R.
Revenue by: Shri S.S. Shukla, Sr. D.R.**

Date of hearing : 13-04-2022
Date of pronouncement : 31-05-2022

ORDER

PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-

This is an appeal filed by the assessee against the order of the Id. Commissioner of Income Tax (Appeals)-6, Ahmedabad in Appeal no. CIT(A)-6/125/2018-19 vide order dated 14/11/2018 passed for the assessment year 2014-15.

2. The assessee has raised following (revised) Grounds of Appeal:-

“1. Ld. CIT (A) erred in law and on facts in confirming disallowance of depreciation by AO of Rs. 1,71,24,757/- in absence of complete plant and machinery being put to use for the purpose of business by the appellant.

2. Ld. CIT (A) erred in law and on facts in not appreciating the submissions that the assets existing in the opening block of WDV, depreciation has to be allowed since individual assets lose their identity and hence even if there is no business income, depreciation is allowable.

3. Ld. CIT (A) erred in law and on facts holding ground challenging action of AO not deducting unabsorbed brought forward depreciation and ordinary business loss as infructuous in absence of business activity during the year.

4. Levy of interest u/s. 234AB C & D of the Act is not justified.

5. Initiation of penalty proceedings u/s 271 (l)(c) of the Act is not justified.”

3. The brief facts of the case are the assessee is engaged in the business of producing energy. During the course of the assessment proceedings, Ld. Assessing Officer observed that the assessee had not generated any revenue for the year from business operations. Further, the assessee had claimed shifting and dismantling expenditure for Rs. 14,97,804/- and the assessee had shifted its plants and machinery in the year under consideration. Therefore, Ld. Assessing Officer held that it is evident that during the year under consideration, there was no business activity and assessee had not used its plants and machinery for business purposes. Hence, Ld. Assessing Officer disallowed certain expenditure and depreciation of Rs. 1,71,24,757/-

on plant and machinery claimed by the assessee during the year under consideration.

4. In appeal before Ld. CIT(A), he dismissed the assessee's appeal by holding that the assessee had no business activity during the year under consideration and had not used its Plant and Machinery during the entire year at all. In fact, as per assessee's own admission, the Plant and Machinery of the assessee was dismantled and shifted during the year under consideration and the assessee had claimed shifting and dismantling expenditure in respect of the same. Accordingly, since no part of entire block of Plant and Machinery was put to use in the entire year, assessee's claim for depreciation on Plant and Machinery of Rs. 1,71,24,757/- cannot be allowed. The Ld. CIT(A) while dismissing assessee's appeal, observed as below:

*“ The contention of the appellant that since the assets are part of the opening block of WDV, depreciation has to be allowed since individual assets lose their identity even if there is business income, cannot be accepted since in this case complete block of assets has not been used. **It is not the case that some assets out of the 'Opening Block' have been used while others have not been used.** Essentially for this reason, the judgments in Hon'ble Delhi High Court in CIT vs Oswal Agro Mills Ltd (supra) and hon'ble Gujarat High Court in ACIT vs S. K. Patel Family Trust (supra), relied on by the appellant are not applicable since in these case laws the issue was that some assets out of the 'Opening block of assets were put to use while some other assets were not used, Hon'ble Courts have held that once it was*

*found that the assets were used for business, it was not necessary that all the items falling under Plant and Machinery have to be simultaneously used for being entitled to depreciation. In these cases the issue was essentially the use of some assets out of the block of assets and disallowing depreciation on the whole block which is not the case in the case of the appellant. **Here, complete Plant and Machinery has not been put to use by the appellant for business purpose.** Further, the appellant has relied on CIT vs. Shahbad Coop, Sugar Mills Ltd (supra) and DCIT vs. Gujarat Mineral Development Corp, Ltd (supra), in support of its contention that 'Use' has broad meaning and even if the Plant is ready for use, depreciation has to be allowed, Again **the reliance by appellant on these case laws is misplaced since in the present case it is not a case of the Plant being ready for use' since in the present case as per appellant's own submission during the year under consideration the appellant company was under the process of winding-up.** During the appeal proceedings, the appellant submitted a letter dated 17/01/2017 from office of the Registrar of Companies, Ministry of Corporate Affairs to the effect that the appellant company is dissolved. Thus effectively, no business has been carried out by the appellant company during the year under consideration and in the subsequent years till it was dissolved on 17/01/2017. Therefore, there was no question of depreciation being allowed on the ground of Plant and Machinery being 'ready to use'. In view of this discussion, it is held that the AO was justified in disallowing the addition of Rs, 1,71,24,757/. Accordingly, this ground of appeal is rejected.”*

5. Before us, Ld. Counsel for the assessee invited our attention to Pages 3 and 34 of Paper-Book-II to assert that during the year, the assessee was in process of shifting its power plant from Sanad Site to Panoli District, Anlkeshwar Site for captive power consumption. The company, during the year was in transition period and had not finished restructuring of power plant at Panoli site and hence could not make sales during the year by generation and supply of power. He further drew our attention to Page 11 of Paper-Book-II to contend that during AY 2011-12 and 2012-13, the assessee was having substantial revenue from operations and it is not the case that the assessee has not having business operations since many years or had closed down its operations altogether. Ld. Counsel for the assessee further drew our attention to page 67 of Paper-Book-II to the strike-off letter by Registrar of Companies, which the assessee submitted took place on 14-07-2016 i.e. much after the year consideration. He further relied on the case of **Oswal Agro Mills 341 ITR 467 (Delhi)** to contend that since in the present facts it was a case of depreciation on "block of assets", assets of aforesaid closed unit could not be segregated for purpose of allowing depreciation and depreciation had to be allowed on entire block of assets. He also placed reliance on the decision of **Ganga Properties Limited 62 Taxmann 285 (Cal)** to contend that in case of a limited company, even if it does not carry on business but it derives income from "other sources" has to maintain its establishment for complying with statutory obligations so long it is in operation and its name is not struck off the register or unless the company is dissolved which means cessation of all corporate activities of the company for all practical purposes. Ld. Counsel for the assessee, further submitted that Ld. CIT(A) erred in not allowing set-off of brought forward

depreciation and business losses on the ground that no business activity was carried on during the year and the assessee company ceased to exist during the year, which is factually incorrect in the present set of facts.

6. In response, Ld. Departmental Representative submitted that the case laws cited by Ld. Counsel for the assessee are not an authority on the issue in hand. He submitted that since the entire block of assets was not put to use during the year, depreciation cannot be allowed to the assessee. The assessee has not been able to demonstrate that the assets were put to use even for a single day during the entire year. Whether the assets were put to use is purely a question of fact, and if on facts the assessee has not been able to demonstrate use of plant and machinery throughout the year, depreciation cannot be allowed. Further, Ld. Departmental Representative submitted that the assessee was in the process of winding up of business, which it eventually did, therefore no case is made for allowability of depreciation on assets never meant to be used.

7. We have heard the rival contentions and perusal the material on record. The issue for consideration before us are two-fold: First, whether depreciation amounting to 1,71,24,757/- can be allowed to the assessee, when admittedly, the plant and machinery was not put to use during the year under consideration, since assessee was in process of shifting the unit to a new location. Secondly, whether the assessee can be allowed set-off of unabsorbed brought forward depreciation and business loss in absence of business activity during the year.

7.1 We shall first deal with the first issue mentioned above.

7.2 In the case of **Nirma Credit & Capital Ltd. v. ACIT [2017] 82 taxmann.com 109 (Gujarat)**, the facts were that the assessee company is engaged in the business of manufacture of detergents. **During the year under consideration, manufacturing activity was not carried out by the assessee. Therefore, the assessee claimed depreciation on the block of Plant & Machinery from the earlier year.** However, the Assessing Officer passed the assessment order disallowing the depreciation. The CIT(A) allowed the assessee's appeal. Being dissatisfied with the same, the Revenue filed appeals before the Tribunal. However, all the appeals filed by the Revenue were dismissed. Hence, Revenue filed Appeal before the Gujarat High Court. The Gujarat High Court, while deciding in favour of the assessee observed as below:

*“The record reveals that the reason assigned by the Assessing Officer for rejecting the depreciation is that the **assessee had stopped the manufacturing activity and therefore, the question of use of machinery does not arise.** However, the CIT(A) reversed the findings of the Assessing Officer on the premise that individual items included in the block are not to be considered separately for the purposes of granting depreciation in light of the amended provisions. We do not find any legal infirmity in the aforesaid view adopted by the first appellate authority since the assessment order itself reveals that it is not the case of Assessing Officer that the assets were not put to use at all. Once the factory building is put to use, it is not possible to restrict the depreciation on the said building by stating that only a portion*

thereof has been put to use. Similarly, in relation to block of assets, it is not possible to segregate items falling within the block for the purposes of granting depreciation or restricting the claim thereof. Once it is found that the assets are used for business, it is not necessary that all the items falling within plant and machinery have to be simultaneously used for being entitled to depreciation.

7.3 In **PCIT v. Babul Products (P.) Ltd [2018] 96 taxmann.com 82 (Gujarat)** the facts were that Assessing Officer disallowed depreciation claimed by assessee on **ground that factory of assessee was closed and assessee was not using assets for which depreciation was claimed.** On appeal, Tribunal allowed claim of assessee on ground that assessee was in business, however, it could not run factory in year under consideration because of stay order granted by Court. The Gujarat High Court held that where assessee had not closed its business permanently, rather, on account of stay from Court it could not run factory in year under consideration, depreciation could not be denied on account of closure of business.

7.4 In the case of **Swati Synthetics Ltd. v ITO [2010] 38 SOT 208 (MUM.)**, the facts were that assessee had two divisions, one at Dombivili and the other at Surat. **The division at Surat was closed since two/ three years. The assessee claimed depreciation on the assets of the said Surat division which was rejected by the AO and the CIT (A) on the ground that the assets were not “used” and depreciation could not be allowed.** On appeal by the assessee, ITAT held allowing the appeal in **Gulati Saree Centre 71 ITD 73 (Chd.) (SB)**, that:

- (i) even after introduction of the concept of block of assets, the identity of individual assets was not lost & the AO could restrict depreciation u/s 38(2) having regard to the user of the assets. However, s. 38 (2) applies only to a case when the asset is not exclusively used for business purposes but is used for non business purposes as well. S. 38 (2) does not apply to an asset which is neither used for business purposes nor for non business purposes but remains in the block of assets;
- (ii) The concept of allowing depreciation on block of assets was introduced w.e.f. 01.04.1988 with the object of avoiding separate book keeping. A harmonious reading of the expression ‘used for the purposes of the business’, would show that it only means that the assessee has used the machinery for the purposes of the business **in earlier years**;
- (iii) The doubt as to how deprecation can be allowed on assets which are not used for the purpose of business is answered by the legislative scheme that though the profit of that year is reduced, the WDV is reduced and the gain is taxed u/s 50 when the asset is sold and block ceases to exist;
- (iv) The “use” of an individual asset can be examined only in the first year when the asset is purchased. In subsequent years the use of block of assets is to be examined. **The existence of an individual asset in block of asset itself amounts to use for the purpose of business. This is supported by the proviso to s. 32 which provides half depreciation for assets acquired in**

the year and held for less than 180 days. Once an asset is included in the block of assets it remains there and can only be removed when it is sold, discarded etc u/s 43(6)(c)(i)(B) or used for non-business purposes u/s 38 (2) or where the entire block ceases to exist.

- (v) On facts, though the entire division was closed, the assets were a part of the block of assets and depreciation was allowable thereon.

7.5 In the case of **DCIT v. Coromandal Bio Tech Industries (I) Ltd. [2012] 20 taxmann.com 520 (Hyd.)** the facts were that the assessee-company was incorporated on 12-3-1992 to carry on the business of aqua farms and shrimp farming. The assessee's name was subsequently changed in 1997 and it entered the business of handling transportation. **For the relevant assessment years, the assessee filed its returns claiming depreciation on ponds and plant and machinery which business was discontinued long back. The Assessing Officer rejected the assessee's claim holding that for claiming depreciation, the assessee should not only own the assets, but also the assets should be put to use in the relevant assessment year.** On appeal, the Commissioner (Appeals), however, allowed the assessee's claim. On revenue's appeal, ITTA held that in order to allow claim for depreciation, use of individual asset for purpose of business can be examined **only in first year of purchase and, in subsequent years when use of block of assets is to be examined, existence of individual asset in block of assets itself amounts to use for purpose of business.**

7.6 In **Hindustan Engineering & Industries Ltd. v. DCIT [2018] 90 taxmann.com 230 (Kolkata - Trib.)**, ITAT held that where a sick company amalgamated with assessee-company, by operation of law assets of sick company fell in 'Block of assets' of assessee-company and thus even through such assets were non-functional, yet they could not be segregated and depreciation had to be allowed in respect of same.

7.7 In **DCIT v. Boskalis Dredging India (P.) Ltd. [2012] 23 taxmann.com 4 (Mum.)** ITAT held that where asset purchased by assessee has been used for purpose of its business and same has been included in 'block of asset', depreciation is to be allowed thereon even if same could not be used during relevant assessment year due to some reasons beyond control of assessee;

7.8 In **CIT v. Chennai Petroleum Corpn. Ltd. [2013] 37 taxmann.com 332 (Madras)**, Madras High Court held that where assessee claimed depreciation on plant and Assessing Officer declined depreciation on plea **that plant had never been put to use for purposes of business during whole of previous year**, since assessee's business was a going concern and plant could not be put to use due to raw material paucity, assessee was entitled to depreciation on plant and machinery.

7.8 Now, on appreciation of facts of the present case, we note that during AY 2011-12 and 2012-13, the assessee was having substantial revenue from operations and it is not the case that the assessee was not having business operations for many years or had closed down its operations altogether. The

Notes forming part of Balance Sheet mentions specifically states “*The company is in transition period and has not finished restructuring of power plant at Panoli and hence could not made sales during the year by generation and supply of power*”. So this is not a case, where the unit had not been in operation for several years or has not been generating any revenue at all for many years altogether. Though, subsequently the unit closed down eventually (in 2016), but so far as the present assessment year is concerned, there is no observation either in the assessment order or CIT(A) order that relocation was purpose of closing down the unit altogether. Though, the unit could not generate revenue during the year on account of relocation of plant to Panoli, but the fact that the assessee did not earn revenue or did not put the assets to use on account of fact that it was in process of shifting of plant to Panoli, would not, in our view, disentitle the assessee to claim depreciation on plant and machinery forming part of block of assets. Thus, in absence of any finding to the effect that the purpose of shifting was to close down the unit altogether, in our view, it respectfully following the decision of Gujarat High Court in the case of **Nirma Credit & Capital Ltd** *supra* and **PCIT v. Babul Products (P.) Ltd** *supra* and various other judicial precedents cited above, in our view, Ld. CIT(A) erred in disallowing the claim of the assessee in respect of depreciation on plant and machinery forming part of block of assets on the ground that assets were not put to use in the present year.

8. In the result, Ground No. 1 and 2 of the assessee’s appeal are allowed.

9. The second issue for consideration before us is whether the assessee can be allowed set-off of unabsorbed brought forward depreciation and business loss in absence of business activity during the year.

9.1 In the case of **CIT v Deepak Textile Industries Ltd. [1987] 35 Taxman 92 (Gujarat)**, the Gujarat High Court held that unabsorbed depreciation can be carried forward and set off by assessee even though business of textile mills to which **such unabsorbed depreciation related had been discontinued by assessee**. The Gujarat High Court made the following observations while passing the order:

“Section 32(1) requires the existence of the following three facts for deduction of current year's current depreciation, namely : (1) ownership of machinery, (2) user of machinery, and (3) user of machinery for the purpose of business. All the aforesaid three facts must co-exist in the current year. It is also clear from the perusal of section 32(2) that said sub-section (2) is only subject to the provisions of sub-section (2) of section 72 and sub-section (3) of section 73. It is settled law that in interpreting or creating legal fiction, the Court has to ascertain as to for what purpose the legal fiction is created and after ascertaining this, the Court has to assume all those facts and the consequences which are incidental or inevitable corollaries in giving effect to the fiction. On reading section 32(2) it is clear that the purpose of the Legislature in introducing legal fiction is to give benefit of the unabsorbed depreciation in the following previous year or in the succeeding previous years and when that is the purpose of

legal fiction, all the facts necessary for the purpose of earning depreciation under section 32(1) must be assumed and, therefore, for the following previous year the ownership of machinery, user of machinery and user of machinery for the purpose of business and existence of business also will be required to be assumed for giving effect to the legal fiction. These facts are to be assumed only for the purpose of giving effect to the legal fiction and in doing so, there is no question of construing the legal fiction beyond the purpose for which it is created and/or beyond the language of the section by which it is created.

9.2 Again, the Gujarat High Court in the case of **Anant Mills Ltd. v Ld. CIT(A) [1994] 206 ITR 582 (Gujarat)/[1993]** has held that unabsorbed depreciation should be allowed to be carried forward and set off against assessable income of a subsequent year notwithstanding fact that business in respect of which it arose ceased to exist in year of such set off .

9.3 In the case of **CIT v. Rajratna Naranbhai Mills Co. Ltd. [1994] 208 ITR 597 (Gujarat)**, the facts were that the assessee claimed set off of unabsorbed depreciation allowance carried forward from the assessment year 1967-68 against income under the head "Income from other sources", in the relevant assessment years even though the assessee had gone into liquidation and as it was not doing business or earning income. The ITO rejected the claim of the assessee on the ground that there was no business income against which carried forward unabsorbed depreciation allowance could be set off. The AAC rejected the assessee's appeal but the Tribunal

allowed the appeals filed by the assessee. The Gujarat High Court held that the assessee was entitled to claim set off of unabsorbed depreciation allowance carried forward from the assessment year 1967-68 against the income under the head "Income from other sources" notwithstanding the fact that the business in respect of which it arose ceased to exist in the year of such set off.

9.4 In the case of **DCIT v. Dwarka Cement Works Ltd. [2005] 3 SOT 869 (Mumbai)**, the Mumbai ITAT held that unless there was some material on record to show that assessee had completely abandoned its cement manufacturing activity, merely because there was no manufacturing of cement in relevant previous year, that could not be reason enough to come to conclusion that losses incurred by assessee in that business in earlier years were not entitled to be set off against its business income in current year. Accordingly, Mumbai ITAT held that assessee was entitled to set-off of carried forward losses.

9.5 Now, in the case before us there is no specific finding either in the assessment order or CIT(A) order that the assessee had abandoned/ closed his business during the year. Though during the year, admittedly the assessee could not generate revenue on account of relocation of plant to Panoli, but that fact by itself, would not, in our view, *ipso facto* lead to the conclusion that the business of the assessee has ceased altogether. In our view, respectfully following the decisions of jurisdictional High Courts cited above and the decision of Mumbai ITAT in the case of Dwarka Cements *supra*, which has held that merely because there was no manufacturing

activity in relevant previous year, that could not be reason enough to come to conclusion that unabsorbed appreciation of assessee in earlier years was not entitled to be set off against its business income in current year, we are of the considered view that assessee should be allowed set-off of unabsorbed brought forward depreciation and business loss during the year.

10. In the result, Ground No. 3 of the assessee's appeal is allowed.

11. Ground Nos. 4 and 5 of the assessee's appeal are general in nature and do not require a specific adjudication.

12. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 31-05-2022

Sd/-

(PRAMOD KUMAR)

VICE PRESIDENT

Ahmedabad : Dated 31/05/2022

Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

Sd/-

(SIDDHARTHA NAUTIYAL)

JUDICIAL MEMBER