
(2011) 04 P&H CK 0358
In the Punjab And Haryana At Chandigarh
Case No : IT Appeal No. 537 of 2006

Commissioner of Income Tax, Faridabad	APPELLANT
Vs	
Mark Auto Industries Ltd.	RESPONDENT

Date of Decision : 05-04-2011

Acts Referred:

Income Tax Act, 1961 — Section 260A

Citation : (2011) 201 TAXMAN 137

Hon'ble Judges : Ajay Kumar Mittal, J;A.K. Goel, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Ajay Kumar Mittal, J.—This order shall dispose of ITA Nos. 537 of 2006, 127 of 2007 and 255 of 2008 as according to the learned counsel for the parties identical questions are involved therein. For brevity, the facts are being extracted from ITA No. 537 of 2006.

2. This appeal has been preferred by the revenue u/s 260A of the income tax Act, 1961 (in short "the Act") against the order dated 30-12-2005 passed by the income tax Appellate Tribunal, Delhi Bench "F", New Delhi (hereinafter referred to as "the Tribunal") in ITA No. 3550/(Delhi)/2000 for the assessment year 1996-97. The appeal was admitted by this Court on 22-7-2008 for determination of the following substantial questions of law:-

(i) Whether, on the facts and in the circumstances of the case, the ITAT is right in law in confirming the order of the CIT(A) regarding deletion of Rs. 13,76,990, made by the Assessing Officer on account of rent undercharged by the assessee from its sister concern?

(ii) Whether on the facts and circumstances of the case, the ITAT is right in law in allowing Rs. 24,93,443 as depreciation on building for the full year, whereas the Assessing Officer has established that the said fixed asset was not completed and put to use on or before 30-9-1995?

(iii) Whether on the facts and circumstances of the case, the ITAT is right in allowing Rs. 66,04,880 as depreciation on plant and machinery for the full year, when the Assessing Officer has established that the Plant & Machinery was not put to use on or before 30-9-1995?

(iv) Whether on the facts and circumstances of the case the ITAT is right in law in allowing deduction of Rs. 43,52,604 as interest paid on money advanced to its sister concern free of interest in the light of judgment of this Court in CIT-I, Ludhiana v. Abhishek Industries Ltd., dated 4-8-2006?

3. The facts, in brief, necessary for adjudication as pleaded in the appeal are that the assessee filed its return of income on 28-11-1996 declaring a loss of Rs. 20,83,260. The assessment in this case was completed on 16-3-1999 at an income of Rs. 1,46,35,810. The disallowances made by the Assessing Officer which are relevant for the purposes of present appeal are as under-

(a) Rs. 13,76,990 on account of rent under charged from M/s. Mark Exhaust Ltd., a sister concern of the assessee;

(b) Rs. 24,93,443 as depreciation, which was allowed at the rate of 5 per cent on the additions made to the factory buildings to the tune of Rs. 4,98,68,854 instead of 10 per cent claimed by the assessee on the ground that the building was not complete and fit for use before 30-9-1995;

(c) depreciation on Rs. 5,28,39,089 on the plant and machinery was restricted to 12.5 per cent only as against claim of the assessee at 25 per cent as the assessee had failed to produce any cogent evidence of start of production prior to 30-9-1995 and, thus, enhancing the income by Rs. 66,04,880;

(d) Rs. 43,52,604 out of interest claimed as expenses on account of interest paid on money advanced to its sister concern free of interest.

4. Feeling aggrieved, the assessee filed an appeal before the Commissioner of income tax (Appeals) [in short "the CIT(A)"] who vide order dated 23-5-2000 deleted the aforesaid additions. Against the order of the CIT(A), the revenue approached the Tribunal who vide order dated 30-12-2005 dismissed the appeal. Hence, the present appeal by the revenue.

5. We have heard learned counsel for the parties.

6. The issues to be adjudicated in these appeals relate to the following:-

(A) Whether an addition on account of rent undercharged by the assessee from its sister concern was rightly deleted by the CIT(A) and the Tribunal?

(B) Whether the assessee was entitled to depreciation for the full year on the building?

(C) Whether depreciation on plant and machinery could be restricted to 50 per cent on the ground that the production had started after 30-9-1995?

(D) Whether the interest paid on money advanced to its sister concern free of interest was exigible to tax in the hands of the assessee?

7. As regards first issue, the CIT(A) had accepted the plea of the assessee that the assessee-company was situated in village Begumpur Khatola which was far away from any industrial estate with no facility of electricity available there. The comparable cases had not been referred by the Assessing Officer while determining notional rent. The Tribunal while affirming the aforesaid findings had recorded as under:-

31. The Assessing Officer has opined that the total investment in the newly constructed building and land being that of Rs. 7,73,09,772 interest thereon at the minimum rate of 10 per cent would work out at Rs. 77,30,972, 50 per cent of which would amount to Rs. 38,65,465 that against this, the assessee was charging rent at the annual rate of Rs. 18 lakhs only, which amounted to under charging of rent. Before the learned Commissioner (Appeals), the assessee had placed on record written submissions along with the lease agreement, on the basis of which the learned Commissioner (Appeals) deleted the addition in question.

32. The Department has not been able to controvert the findings of fact recorded by the learned Commissioner (Appeals). The lease agreement produced by the assessee showed that the location of the company was far away from any industrial estate. The Assessing Officer failed to consider the market rent and did not make a comparison with other instances, for arriving at a notional rent, taking an ad hoc 10 per cent of the value of rent etc. The learned Commissioner (Appeals) took into account the written submission filed by the assessee also, along with the lease agreement. The findings recorded by the learned Commissioner (Appeals) have not been successfully challenged before us by the Department. Therefore, the order of the learned Commissioner (Appeals), in this regard, is found to be in order. It is, as such, upheld.

8. Nothing could be shown that the findings recorded by the CIT(A) and as affirmed by the Tribunal were perverse or erroneous in any manner.

9. Adverting to the second issue, the CIT(A) on appreciation of evidence had come to the conclusion that the assessee was entitled to depreciation on the building for the full year as it was ready and put to use prior to 30-9-1995. The findings recorded by the Tribunal while affirming the order of the CIT(A) in this regard are as under-

39. Apropos Plant II, the assessee submitted before the learned Commissioner (Appeals) that it had constructed two different building, a new building at 39 Milestone, Village Begumpur Khatola Delhi Jaipur Highway, Gurgaon and an extension to the existing building at Plant II (Maruti Joint Venture Gurgaon). The assessee, in support of its claim, filed two certificates from Architects, M/s. Abhijit Ray & Associates. The first certificate dated 20-9-1995 gave proof that a substantial part of the factory and office building was completed on the total cost

of Rs. 4,90,22,897. The second certificate dated 25-3-1996 stated that the remaining part of the factory and office building have been completed and that the total cost incurred thereon was Rs. 83,72,158. The assessee submitted that these certificates were furnished to the Assessing Officer during the assessment proceedings, but the Assessing Officer ignored the first certificate and relying only on the second certificate dated 25-3-1996 proceeded to disallow the depreciation of building completed in the first half of the property; that the Assessing Officer treated it as having been completed in the second half of the year; that the assessee company had already ignored sum of Rs. 2,52,94,478 till 31-3-1995 out of the total cost of building amounting to Rs. 4,90,22,897, which amount appeared as work-in-progress; that the Assessing Officer accepted the fact that the building was in existence but held that it was put in use only in the latter half of the year; that commercial production had begun at the new site on 29-6-1995; that raw material machines etc., had been received and installed at the new building much before 30-9-1995; and that could only have been happened if the building was ready and put to use. The learned Commissioner (Appeals), after considering the evidence placed, agreed with the submission on behalf of the assessee to the effect that the building was constructed and put to use on 30-9-1995, it was held that the assessee was entitled to depreciation for whole year. As such, a further relief of Rs. 24,51,145 was given. The total relief to the assessee on depreciation of building thus amounted to Rs. 24,94,443 (Rs. 42,298 + Rs. 24,51,145).

40. The plea raised by the department has been that since as per the certificate from M/s. Abhijit Ray & Associates, the Architects of the assessee, the process of completion of the building was only in the month of March, 1996. So, it could not have been possibly put to use before 30-9-1995. As a result, according to the department, the assessee is not entitled to the relief on account of depreciation of the building, as granted by the learned Commissioner (Appeals).

41. The learned Commissioner (Appeals) has found as a fact that the Assessing Officer failed to take into consideration both the certificates furnished by the Architects of the assessee. The first certificate dated 20-9-1995, gave proof that a substantial part of the factory and office building was completed and that the total cost incurred thereon was Rs. 4,09,22,897. It was only the second certificate dated 25-3-1996 which was taken into consideration by the Assessing Officer. This certificate stated that the remaining part of the fact and office building had been completed and that the total cost incurred thereon was Rs. 83,72,158. Even though both the certificates were furnished before the Assessing Officer, the Assessing Officer did not taken into consideration both of them. The Assessing Officer took into consideration only the second one. This clearly amounted to non-appreciation and non-consideration of material evidence brought on record, resulting in the Assessing Officer having treated the building as having been completed only in the second half of the year. The first certificate of the Architects has not been found to be false. It was just ignored by the Assessing Officer. Here also, it is not controverted that till 31-3-1995, out of a

total cost of building of Rs. 4,90,22,897, the assessee company had incurred a sum of Rs. 2,52,94,478 which amount was reflected as Work-in-Progress in the balance sheet of the assessee as on 31-3-1995. The Assessing Officer himself observed that the building was in existence, but it was put to use only in the latter half of the year. It was also not controverted, as stated by the assessee, that commercial production began at the new site at Gurgaon on 26-6-1995 and that raw material, machines, etc. were received and installed at the new building, much earlier than 30-9-1995. This was not possible if the building was not ready and put to use.

42. The above facts and circumstances led the learned Commissioner (Appeals) to hold the assessee entitled for depreciation for whole year. We do not find any error in the finding of facts recorded by the learned Commissioner (Appeals). The ground raised by the Department in this regard in view of the aforesaid first certificate dated 20-9-1995 issued by the Architects of the assessee and the un rebutted material brought on record by the assessee before the authorities, does not have any force. It is, therefore, rejected.

10. Learned counsel for the revenue could not demonstrate that there was any misreading or misappreciation of material on record which may require interference by this Court in the aforesaid findings.

11. Taking up third issue, the Tribunal while affirming the findings of the CIT(A) had concluded that plant and machinery were put to use before 30-9-1995 entitling the assessee depreciation for the entire year. The relevant observations noted by the Tribunal read thus:-

47. The Assessing Officer observed that this letter clearly showed that no production had actually taken place till 26-9-1995 and that production was yet to commence. The assessee also claimed that the first sale from the new plant was made to M/s. Mark Exhaust Systems Ltd. On 27-9-1995. In this regard, the Assessing Officer observed that M/s. Mark Exhaust Systems Ltd. was none other than the assessee's own sister concern; that the copy of invoice issued by the assessee in respect of the said first sale showed that some 25 "End Covers" were sold in returnable cases against a purchase order received just a day before, i.e. on 26-9-1995; that the assessee could not produce any corroborative evidence to establish that the goods ordered on 26-9-1995 could be manufactured within a short span of one day and that they were also dispatched on the same day; that it was noticed from the details of additions to plant and machinery, filed by the assessee, that while details of purchases of various items of plants and machinery in Plant I and Plant II were furnished, no evidence of installation and use of new power connection of inaugural ceremony, etc. was filed; that there was absence of evidence of installation and use of machinery before 30-9-1995. The Assessing Officer thus restricted the claim of the assessee for depreciation at the rate of 25 per cent on the additions of Rs. 5,28,39,089 to 12.5 per cent. Thus, a sum of Rs. 66,04,886 was disallowed out of depreciation claimed on additions to plant and machinery before 30-9-1995.

48. The learned CIT(A) observed in this regard, that new power connection would not be required for the existing Plant I, which fact had not been considered by the Assessing Officer; and that the plant and machinery installed at Plant I were mainly a few presses spot welder machines, acquired in June/July 1995 and other small machines. Apropos Plant II, the assessee had submitted before the Ld. Commissioner (A) that it had imported plant and machinery from Comas, Italy, vide their letter dated 25-9-1995 the said plant and machinery was cleared from Customs, Kandla, Port, Gandhidham, Kutch, on 17-8-1995 vide Bill of Entry No. 6401 dated and dispatched from Kandla Port on 19-8-1995, vide Bill No. 28/95-96 dated 19-8-1995, of Veera Transport. The said plant and machinery was received on 23-8-1995 and unloaded by M/s. Aneja Crane Service. It was contended that these documents clearly indicated that the plant and machinery was received before 30-9-1995; that the plant and machinery was installed, commissioned and commercial production begun on 26-9-1995, under the supervision of Engineers from M/s. COMAS, Italy; that in support of the said fact of installation of plant and machinery, the assessee had filed two certificates, one dated 25-9-1995, and a confirmation dated 19-3-1999, issued by M/s. Comas, Italy. The formal intimation, as required under the Excise Regulations, was given to the Superintendent of Central Excise, stating that production of the assessee's factory was going to start on 26-9-1995, and that 25 pieces of End Covers were procured which were sold on 27-9-1995. Invoices of proof of Excise Duty paid have been placed on record. It was averred that the new plant and machinery at Begumpur Khatola, Gurgaon was set up as an ancillary of the assessee company's subsidiary, namely M/s. Mark Exhaust Systems Ltd. and that in the absence of adequate power from Haryana State Electricity Board for running the plant and machinery, the assessee company had to rely on the DG set. Bills for hire of the DG set and diesel consumed were also produced.

12. The said finding being based on appreciation of material on record could not be held to be vitiated in any manner.

13. Referring to the last issue, the Tribunal has specifically recorded that the amount was invested by the assessee as share application money with the sister concern, i.e., M/s Mark Exhaust Systems Ltd. and the department had failed to produce any evidence that there was diversion of borrowed funds on which interest had been paid by the assessee. The relevant findings recorded by the Tribunal read as follows:-

70. Under Ground No. 18, the Department pleads that the learned Commissioner (Appeals) has erred in deleting the disallowance of Rs. 43,53,604 made by the Assessing Officer on account of interest on moneys advanced to M/s. Mark Exhaust Systems Ltd. simply relying on the submission of the assessee. The learned Commissioner (Appeals) has followed his own order for assessment year 1995-96 in the assessee's own case, wherein the Id. CIT(A) had found that the Assessing Officer had not established that any of the borrowed funds had been

diverted for investing in M/s. Mark Exhaust Systems Ltd. For the year under consideration, the learned CIT(A) observed that the specific borrowings from IFCI and ICICI were shown spent only on acquisition of specific machinery. It was on this basis, that the addition was deleted.

71. Before us, the learned counsel for the assessee has placed reliance on the Tribunal decision in the assessee's own case for assessment year 1995-96 in ITA Nos. 338(Delhi)/2000 and 262 (Delhi)/1998, wherein, this issue has been decided in favour of the assessee. Respectfully following the said order, ground No. 18 is rejected.

14. Learned counsel for the revenue was unable to make reference to any evidence which either had been ignored or improperly appreciated warranting intervention of this Court in the above noted conclusion.

15. Accordingly, there is not merit in these appeals and the same are hereby dismissed.