

**IN THE HIGH COURT OF DELHI AT NEW DELHI
ITA 97 OF 2009 & ITA 657/2010
Judgment Reserved on: 25.02.2011
Decision Delivered On: 25.03.2011**

(1) ITA 97 OF 2009

Commissioner of Income Tax ... Appellant
Through: Mr. N.P. Sahni, Sr. Standing Counsel

Versus

Eli Lilly & Co. India Pvt. Ltd. ... Respondent
Through: Mr. Ajay Vohra, Advocate with Ms. Kavita Jha and Mr. Somnath Shukla, Advocates

(2) 657/2010

Commissioner of Income Tax ... Appellant
Through: Mr. N.P. Sahni, Sr. Standing Counsel

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Eli Lilly & Co. India Pvt. Ltd. ... Respondent
Through: Mr. Ajay Vohra, Advocate with Ms. Kavita Jha and Mr. Somnath Shukla, Advocates

Coram :MR. JUSTICE A.K. SIKRI and MR. JUSTICE M.L. MEHTA

J U D G M E N T

A.K. SIKRI, J.

1. In both these appeals issue involved is identical. These appeals pertain to the same assessee and the issue which has cropped up relate to assessment years 2000-01 and 2001-02. For the sake of convenience, we may take note of the facts which appear in ITA 97/2009 as that appeal relates to the prior assessment year namely assessment year 2000-01.

2. The assessee had filed Income Tax Return showing losses. Since losses under the normal provisions were much higher than the loss computed as per the book profit under Section 115 JA of the Income-Tax Act (hereinafter referred to as the "Act"), this return was processed under Section 143(1) of the Act and was completed on 7th March, 2002 after accepting the return as filed. The Assessing Officer, however, issued notice under Section 154/143 (1) of the Act as according to him a mistake apparent on the face of record had occurred while accepting the return vide assessment orders dated 7th March, 2002. We may point out here that the assessee had incurred losses in earlier years which remained unabsorbed and were being carried forward to successive assessment years. Likewise, there

was unabsorbed depreciation as well. In the year in question, there were profits and as per the Assessing Officer the unabsorbed depreciation available for set off against the profits in this assessment year was just Rs. 80,38,600/- instead the figure of Rs. 1,39,36,000/- which was earlier taken as unabsorbed depreciation. Thus, the Assessing Officer passed orders dated 16th May, 2005 thereby allowing brought forward unabsorbed depreciation at Rs. 80,38,6000/- instead of Rs. 1,39,36,000/-. The assessee challenged this order by filing appeal before the CIT (A). In the first instance it was submitted by the assessee that it was not a mistake apparent on the face of record and, therefore, could not be corrected in exercise of jurisdiction under Section 154 of the Act. It was also submitted that in any case the aforesaid figures taken by the Assessing Officer, were incorrect. According to the assessee, the unabsorbed depreciation of Rs. 1,39,36,000/- was rightly brought forward and adjusted in this year. The CIT (A), however, dismissed the appeal of the assessee. Aggrieved by this order, the assessee preferred second appeal before the ITAT. The Tribunal has accepted the contention of the assessee and held that the adjustment made by the AO for the intimation issued under Section 143 (1) of the Act by way of a rectification order in respect of unabsorbed depreciation was beyond the scope of Section 154 of the Act. Thus, the Assessing officer had no power to take recourse to the provisions of Section 154 of the Act.

3. Mr. Vohra, learned counsel for the respondent assessee has pointed out the circumstances under which the adjustment of ` 1,39,36,000 was made against the profits in the assessment year 2000-01. He has pointed out that in the immediate previous year i.e. in the assessment year 1999-2000, there were profits and the return was filed under the normal provisions and not under Section 115 JA of the Act. At the same time, there were unabsorbed losses and unabsorbed depreciation of previous year which were carried forward to this year. He has clarified that in so far as unabsorbed depreciation is concerned, it was ` 1,39,36,000/-. The profits of the assessment year 1999-2000 were set off against the carried forward losses of the previous year which were more than 15 crores. Even after absorbing the entire profits of the year 1999-2000, against the carried forward losses, losses still remained unabsorbed and the unabsorbed depreciation was not even touched. This figure of unabsorbed depreciation i.e. ` 1,39,36,000/- remained as it is and it is under these circumstance, this figure was carried forward to the assessment year in question and this is how in the returns filed, the amount of unabsorbed depreciation of ` 1,39,36,000/- was set off being the lower of the two namely unabsorbed losses and unabsorbed depreciation, having regard to Clause (iii) to the Explanation of Section 115 JA of the Act. According to him, in these circumstances, the exercise carried out by the Assessing Officer while rectifying the order was not permissible. In the process of doing so, the Assessing Officer has treated ` 1,39,36,000/- as unabsorbed depreciation to be set off against the profits earned in the year 1999-2000 and after setting off those profits, he has assumed that the carried forward depreciation would be ` 80,38,600/-. It is on this basis, it is argued that it is not an error apparent on the face of record and rather it depends on the interpretation that has to be given to Clause (iii) of the Explanation to Section 115 JA of the Act and such an exercise was not permissible under Section 154 of the Act. Furthermore, it is argued, it amounts to even disturbing the assessment in respect of assessment year 1999-2000 which could not be done even while making regular assessment of assessment year 2000-01.

4. The aforesaid contention of Mr. Vohra carries sufficient strength. However, in an attempt to mollify the same, Mr. Sahni had produced the copies of the assessment in respect of assessment year 1999-2000 and submitted that the MAT computation done by the assessee itself in that year and assured that the carried forward depreciation was ` 80,38,600/- only. For this purpose, he referred to the following computation and given by the assessee in the assessment years 1999-2000:-

"Assessment year 1999-2000

As on 01.04.1998 (as per books)

(i) Unabsorbed Depreciation `	1,39,36,000
(ii) Brought Forward Business Loss (excluding depreciation) `	14,21,44,000

MAT COMPUTATION DONE BY ASSESSEE

Profit as per Profit and Loss Account `	58,98,000
Less: lower of Unabsorbed Depreciation And brought forward business loss	(` 1,39,36,000)
[As per explanation (ii) of the second proviso to section 115JA (2)]
Book Profit `	(80,38,000)"

5. On this basis it was claimed that in the next assessment year, the Assessing Officer has rightly corrected the error under Section 154 of the Act by setting off ` 80,38,600 instead of ` 1,39,36,000/-. This plea of Mr. Sahni is not correct. Mr. Sahni has only picked up the MAT computation done by the assessee in that year but knowing the fact that in that year the assessee had earned profits and actually it was only brought forward business loss of the previous year which was adjusted and unabsorbed depreciation of ` 1,39,36,000/- remained as it is without any adjustment. The manner in which the computation was done in the assessment years 1999-2000, 2000-01 and 2001-2002 is reproduced below which would clearly demonstrate that unabsorbed depreciation was in fact ` 1,39,36,000/- which was allowed to be set off in the assessment year 2000-01 while passing the original assessment order:-

"Assessment year 1999-2000
as on 01.04.1998 (as per books)

(i) Unabsorbed Depreciation `	1,39,36,000
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(ii) Brought Forward Business Loss
(excluding depreciation) ` 14,21,44,000

MAT COMPUTATION DONE BY ASSESSEE

Profit as per Profit and Loss Account ` 58,98,000
Less: lower of Unabsorbed Depreciation
And brought forward business loss (` 1,39,36,000)
[As per explanation (ii) of the second
proviso to section 115JA (2)]
Book Profit ` (80,38,000)"

As on 31.03.199 (as per books)

(iii) Unabsorbed Depreciation ` 1,39,36,000
(iv) Business Loss (excluding depreciation)
to be carried forward ` 13,62,46,000*
*[` 14,21,44,000-` 58,98,000]
Aggregate Loss ` 15,01,82,000

Assessment Year 2000-01

MAT COMPUTATION DONE BY ASSESSEE

Profit as per Profit and Loss Account ` 1,23,00,504
Add: Provision for Doubtful Debts ` 3,49,292 Add:
Provision for Doubtful Advances ` 3,21,696
Less: lower of Unabsorbed Depreciation
And brought forward business loss (` 1,39,36,000)
[As per explanation (ii) of the second
proviso to section 115 JA (2)]
Balance Profit ` (9,64,508)

As on 31.03.2000 (as per books)

(v) Unabsorbed Depreciation `	139,36,000
(vi) Business Losses (excluding depreciation) to be carried forward `	12,39,45,496*
*[` 13,62,46,000-` 1,23,00,504]
Aggregate Loss `	13,78,81,496

Assessment Year 2001-02
MAT COMPUTATION DONE BY ASSESSEE

Profit as per Profit and Loss Account `	1,19,99,177
Less: lower of Unabsorbed Depreciation and brought forward business loss	(` 1,39,36,000)
[As per explanation (ii) of the second proviso to section 115 JA (2)]
Book Profit `	(19,36,823)

As on 31.03.2001

(vii) Unabsorbed Depreciation `	1,39,36,000
(viii) Business Losses (excluding depreciation) to be carried forward `	11,19,46,319*
*[` 12,39,45,496-` 1,19,99,177]
Aggregate Loss `	12,58,82,319"

6. When this is the position and the assessments were done in this manner it could not be stated that there was an error which could be corrected by invoking the provisions of Section 154 of the Act. The assessee had claimed the set off Rs 1,39,36,000 in terms of Explanation III (of (2) proviso to Section 164 JA (2) of the Act) as against the brought forward loss as per the books at Rs. 15,01,82,00/-. Thus, the matter related to the interpretation of the effect which is to be given to the aforesaid provision and, therefore, it was not a mistake which was to be corrected for which jurisdiction under Section 154 of the Act could be exercised, as held by the Apex Court in **Apollo Tyres Vs. Commissioner of Income Tax**, 255 ITR 273 and **T.S. Balaram Income Tax Officer, Company Circle IV, Bombay Vs. M/s Volkart Brothers**, 82 ITR 50.

7. We, thus do not find any merits in these appeals. No question of law arises. These appeals are accordingly dismissed.