HIGH COURT OF DELHI

CIT
vs.
Bharat Alumunium Co. Ltd.

ITA Nos. 532,1484,1486,1487,1592,1593,1670 and 1671 of 2006
ITA Nos. 657 and 659 of 2007
ITA No. 1489 0f 2008 and 323 of 2009
October 15, 2009

JUDGEMENT

Per: A K Sikri:

1. All these appeals are filed by the Commissioner of Income Tax against the same assessee, viz., Bharat Aluminum Company Ltd. There are various common issues, which have arisen in these appeals relating to different Assessment Years. It is for this reason all these cases were grouped together, though the arguments were heard specifically on all the issues involved in these appeals. We now proceed to discuss and decide these issues one by one.

2. ITA No.532 of 2006

We may mentions at the outset that some of the issues raised in this appeal as well as other connected appeals have already been decided in ITA No. 1018 of 2005. Leaving those issues aside, the learned counsel for the parties accepted the position that the questions that survive for consideration in this appeal on which notice was issued, is as under:

"1) Whether the Income Tax Appellate Tribunal was correct in law in allowing the amount of Rs.3.76 Crores (wrongly written by ITAT as 3.76 lacs) being capital expenditure not represented by any assets to the assessee?

2) Whether the Income Tax Appellate Tribunal was correct in law in treating the amount of Rs.3.76 Crores as revenue expenditure?"

3. As is clear from the aforesaid questions formulated, a sum of Rs.3.76 Crores spent by the assessee is treated as 'revenue expenditure' and not 'capital expenditure'. The assessee in the return in question filed for the Assessment Year 1995-96 had amortized the total expenditure spread over a period of five years and one fifth thereof, i.e., Rs.3.76 Crores was claimed as deduction for the Assessment Year in question.

4. The genesis of this claim is found in the following facts:

In the relevant years, the assessee was a Government sector undertaking (which has since been disinvested). It had entered into an arrangement with another public sector corporation, viz., National Thermal Power Corporation (NTPC). The NTPC had its power plant at Korba. The assessee also put up its power plant at that place for generation of electricity for its aluminum plaint. It did not create separate facilities for coal handling, demineralization unit for water, facility for using HED and HFO Oils including creating system for coal carrying etc. Since the expenditure for creating these systems were huge, it was thought, as a matter of business prudence, to share the above facilities available with NTPC at Korba. It was decided to contribute a sum of Rs.22.68 Crores to NTPC as its share of capital expenditure for sharing common facilities created by NTPC at Korba. The above infrastructure facilities were created on the land belonging to NTPC and ownership and title of the same vested with NTPC. On the aforesaid sum of Rs.3.76 Crores contributed by the assessee, the assessee had claimed depreciation till the Assessment Year 1991-92. However, the assessee decided to change the accounting policy and to write off the balance expenditure of Rs. 15.07 Crores over a period of five years, i.e., at the rate of Rs.3.76 Crore per year. This was necessitated because of the suggestion and direction given by the Comptroller and Auditor General (CAG) to the assessee to follow the guidelines stipulated by the Institute of Chartered Accounts of India (ICAI) under the guidance Note No. 10. The assessee accordingly received clarification from the ICAI for amortizing the balance expenditure of Rs.15.07 Crores and to claim the same over a period of five years.

5. In essence, this expenditure was spread over, treating as same as deferred revenue expenditure, to be claim in five years time because of the enduring nature of the benefit received with the contribution of the aforesaid amount to NTPC.

6. The Assessing Officer (AO) disallowed the claim on the ground that the same was not covered under the provision of Section 82 of the Income Tax Act (hereinafter referred to as 'the Act'). According to the AO, the money was contributed towards capital expenditure, incurred by the NTPC in laying infrastructure facilities for coal handling supply. By doing so, the assessee had obtained a long duration usage of permanent assets and therefore, was not a revenue /business expenditure.

7. The CIT(A) in appeal preferred by the assessee repelled the aforesaid approach of the Assessing Officer. According to the CIT(A), even after this money, the assessee had not acquired the ownership of any tangible assets so as to be entitled for the claim of depreciation. According to the CIT(A), the entire expenditure of Rs.15.07 Crores was incurred wholly and exclusively for the conduct of business. It was very essential for the business. The Department had itself allowed Rs.7.61 Crores (Rs.22.68-15.07 Crores) in the earlier years and thus it could not take contrary view that this expenditure was no allowable. Therefore, even if it was not allowed under Section 32 of the Act, as there was no ownership of the assets vested in the assessee, claim was allowable under Section 37 of the Act as a business expenditure. At the same time, as the expenditure was to provide an enduring benefit, it could spread over a period of five years. In this manner, claim of Rs.3.76 Crores for the Assessment Year in question was allowed by the CIT (A) in the following words:

"5.12 On a careful consideration of the facts and the judicial pronouncement quoted above, there remains no doubt that the claim has to be admitted in fact what has happened is that the entire expenditure of Rs.15.04 Crores which remained has been disallowed. The case of the Department is not that the expenditure was not wholly and reclusively necessary for the conduct of the business. In fact the facts narrated above clearly justify the expenditure which was very essential for the business. The Department had itself allowed rs.7.61 crores (Rs.22.68 - Rs.15.07 crores) in the earlier years. Having done that, the Department cannot take a contrary view that the expenditure is not allowable. Even if it is not allowed u/s 32 saying that there was nor(sic. no) ownership of the asset, it has to be allowed nonetheless. The decisions cited above would very much favour the assessee and make the expenditure allowable u/s 37 of the Art but since that expenditure did provide an enduring benefit, it was sought to be written over a period of five years. This was done on the advice of the Institute of Chartered Accountants and under the guidance of C&AG to which the appellant could not have taken any exception. The Hon'ble Supreme Court in the case of *Madras Industries Investment Corporation Ltd. Vs. CIT (1997) 225 ITR 802* held that ordinarily revenue expenditure which is incurred wholly and exclusively for the purpose of business must be allowed in its entirely in the year in which it is incurred. It could not be spread over several year even if the assessee has written it off in his books over a period of five years. However, the facts may justify an assessee to separate and claim it over a period of ensuing years. In fact, allowing the entire, expenditure in one year might give distorted picture of the profits of a particular year. If there is a continuing benefit over a number of years, the liability should also be spread over that period. On a consideration of these facts and circumstances of the case, the A.O. is directed to allow the expenditure of Rs.3.76 Crores for the year under consideration."

The Tribunal has upheld this deduction.

8. The submission of Ms. P.L. Bansal, learned counsel appearing for the Revenue, is that the expenditure in question was of capital nature in the hands of NTPC and even the assessee itself claimed depreciation thereupon at normal rates, treating it as capital expenditure till the Assessment Year 1991-92. Therefore, there was no reason now to amortize this expenditure and claim the same over a period of five years. She also submitted that the change of accounting policy would be of no avail to the assesses, as that change was actuated by the provisions of the Companies Act, whereas the AO was to deal with this expenditure applying the provisions of the Income Tax Act. She further submitted that there was no concept of 'deferred revenue expenditure'. She referred to the judgment of the Supreme Court in the case of *Travancore Cochin Chemicals Ltd. Vs. Commissioner of Income Tax, Kerala, 106 ITR 900*, as per which such an expenditure had to be treated as capital expenditure. She further submitted that there was a provision for amortizing the expenditure only under Section 3.5D of the Act and the situation contemplated therein was not applicable in the instant case.

9. Mr. M.S. Syali, learned Senior counsel appearing for the assessee, on the other hand, relied upon the reasons given by the CIT (A) as well as the Tribunal. His submission was that since no asset was created in Favour of the assessee, it could not be treated as capital expenditure. The expenditure was revenue in nature and rightly classified as business expenditure under the provisions of Section 37 of the Act. Instead of claiming the entire expenditure in one year, it was decided to claim it over a period above years as it was derivative of enduring benefit, which was permissible on the application of principle of 'matching concept'. In addition to the judgment referred to by the CIT(A) in his order, he also referred to the judgments of this Court in *Hindustan Times Ltd. Vs. Commissioner of Income-tax, 122 ITR 977 and Commissioner of Income Tax Vs. Saw Pipes Ltd., 208 CTR 476*

10. After considering the arguments of both the counsel and going through the matter, we find no infirmity in the approach adopted by the Tribunal in the impugned order affirming the decision of the CIT (A). First and foremost question which would require consideration is as to whether the expenditure in question is revenue or it is capital expenditure. The CIT (A) has referred to various judgments of the Supreme Court and other High Courts including jurisdictional Courts, as per which such expenditure is to be treated as revenue/business expenditure. These judgments are discussed in the following manner:

> "5.7 Reference was invited to the observations of Supreme Court in the case of *CIT vs. Madras Auto Services Limited reported in Vol. 99 of Taxman at a Page 580* wherein it was held that one assessee by expending money, created an asset of an enduring nature. However, the asset so created did not belong to the assessee. In such a situation, the Courts have held that the expenditure was for better carrying on of the assessee and could be allowed as revenue expenditure, looking to the circumstances of each of those cases. Thus in *Lakshmiji Sugar Mills Co. P. Ltd. Vs. CIT (1971) 82 ITR 376 (SC)* the assessee company was carrying on the business of manufacture and sale of sugar. In paid to the Cane Development Council certain amounts by way of contribution for the construction and development of roads between various sugarcane producing centres and the sugar factories of the assessee. The roads remained the property of the Government. This court held that the expenditure was not of a capital nature and had to be allowed as an admissible deduction in computing the profits of facilitating the running of the assessee's motor vehicles and other means employed for transportation of sugarcane to its factories.

5.8 In the case of *L.H. Sugar Factory & Oil Mills Pvt. Ltd. vs. CIT (1980) 125 ITR 293/4 Taxman 5 (SC)*, the assessee was carrying on the business of manufacture and sale of sugar. It had its factory in UP. The assessee paid a contribution towards meeting the cost of construction of roads in the area around its factory under it sugarcane development scheme. The question was whether this amount was deductible in computing the assessee's profits. The Court held that it was. Because although he advantage secured was of long duration, it was not and advantage in the capital field because not tangible or intangible asset was acquired by the assessee nor was there any addition to or expenses of

the profit making apparatus of the assesses. The amount was contributed for the purpose of facilitating the business of the assesses and making it more efficient and profitable. It was, therefore, revenue expenditure.

5.9 In the case of *CIT Vs. Associated Cement Cos. Ltd. (1988) 172 ITR 257/38 Taxman 110 (SC)* the respondent company entered into an agreement to supply water to the municipality and provide water pipelines as also to supply electricity for street lighting and put up a transmission line for that factory to the railway station. The amounts expended for these purposes were held to be revenue expenditure since the installations and accessories were the assets of the municipality and not of the assessee. The expenditure, therefore, did not result in creating any capital asset for the company. The advantage secured by the respondent was immunity from liability to pay municipal rates and taxes for a period of 15 years. This Court said that had these liabilities been paid, the payments would have been on revenue account.

Therefore, the advantage, secured was in the field of revenue and not capital.

5.10 In the case of *CIT Vs. Bombay Dyeing & Mfg. Co. Ltd. (1996) 219 ITR 521/85 Taxman 396 (SC)*, the company contributed to the State Housing Board certain amounts for construction of tenements for its workers. The tenements remained the property of the Housing Board. It was held that the expenditure was incurred wholly and exclusively on the welfare of the employees and, therefore, constituted legitimate business expenditure. As the assessee company acquired no ownership right in the tenements, this Court said that the expenditure was incurred merely with a view to carry on the business of the company more efficiently by having a contended LABOUR FORCE."

11. The expenditure incurred by the assessee in making payments to Municipality to lay new cables, which were to belong to Municipality, was treated as business expenditure and not capital expenditure by this Court in Hindustan Times Ltd. (supra). This judgment has been followed in Saw Pipes Ltd. (supra).

12. Case of Travancore Cochin Chemicals Ltd. (supra) relied upon by the learned counsel for the Revenue would have no application in the instant case. In that case itself, the Supreme Court clearly opined that each case depends upon its own facts. This judgment has been explained by the Supreme Court itself in its later judgment reported as *L.H. Sugar Factory* and *Oil Mills (P) Ltd., Pilibhit Vs. CIT, UP, Lucknow, 125 ITR 293* observing that the aforesaid judgment is to be confined to its own fact as is clear from the following passage:

> "We would make the same observation in regard to the decision in Travancore-Cochin Chemicals case (supra) and say that decision must be confined to the peculiar facts of that case, because Lakshmiji Sugar Mills' case (supra) admittedly bears a closer analogy to the present case than the Travancore-Cochin Chemicals' case and if at all we apply the method of arguing by analogy, the decision in Lakshmiji Sugar Mills case (supra) must be regarded as affording us greater guidance in the decision in the present case then the decision in Travancore-

> Cochin Chemicals' case (supra). Moreover, we find that the parenthetical clause in the test formulated by Lord Cave L.C. in Antherton's case (supra) was not brought to the attention of this Court in Travancore-Cochin Chemicals' case with the result that this Court was persuaded to apply that test as if it were an absolute and universal test regardless of the question applicable in all cases irrespective whether the advantage secured for the business was in the capital field or not. We would therefore prefer to follow the decision in Lakshmiji Sugar Mills' case (Supra) and hold on the analogy of that decision that the amount of Rs.50,000 contributed by the assessee represented expenditure on the revenue account."

13. While narrowing down its scope in earlier judgment in Travancore Cochin Chemicals Ltd. (supra), the Supreme Court in that case held that contribution made by the assessee towards part of cost of construction of rates in area around factory wholly and exclusively let out for business was business expenditure and not capital expenditure. This judgment was followed by Madras High Court in *Commissioner of Income-tax, Tamil Nadu Vs. Tractors and Equipment Ltd. and Ors., 133 ITR 147* adopting the ratio of L.B. Sugar Factory and Oil Mills (P) Ltd., Pilibhit (supra) in preference to Travancore Cochin Chemicals Ltd. (supra).

14. Further, the concept of amortizing of expenditure or principle of 'matching concept' had not taken roots by then. Such a principle has been evolved in latter case taken note of above.

15. Thus, once we hold that expenditure in question was of revenue nature, the moot question would be as to whether it could be allowed over a period of five years. That has been permitted in the aforesaid judgment of the Supreme Court. We are, thus, of the opinion that no doubt till 1991-92, the part of the expenditure was allowed every year. It was loosely called as depreciation. What can be said is that the revenue expenditure was allowed every year at the rates on which depreciation is allowed. Since this was wrong practice adopted, the C&AG rightly advised the assessee to change the accounting method to bring it in tune with ICAI guidelines. What is done now from the Assessment Year in question is that it is the correct step as it should have been taken in accordance with law and therefore, this could have been deprecated and claimed disallowed totally as done by the AO.

We thus hold answer to the question in favour of the assessee and against the Revenue and therefore, dismiss this appeal.

ITA No.659/2007 and 1484/2006

16. Two issues which are raised in this appeal pertain to:

a) Whether the Tribunal was justified in allowing the respondent/assessee to raise additional grounds?

b) Whether the Tribunal was justified in allowing depreciation on non-operating plant and machinery?

Reg: a) Whether the Tribunal was justified in allowing the respondent/assessee to raise additional grounds?

The impugned order of the Tribunal would disclose that the assessee was permitted to raise the additional grounds for which it filed applications dated 31.07.2002 and 22.08.2005. According to the assessee, the grounds raised could be adjudicated on the facts which were already available on record and the matters related to the entire tax proceedings of the assessee for the Assessment Year(s) under consideration. The departmental representative had opposed the prayer for admission of additional grounds contending that the assessee ought to have raised these grounds in the original grounds of appeal. The Tribunal was of the opinion that the issues sought to be raised in the additional grounds arise out of the tax proceedings of the assessee for the Assessment Year under consideration on the facts necessary for adjudication on these additional grounds already available on the record. This was the basis for allowing the applications. The Tribunal also referred to the judgment of Bombay High Court in the case of *Ahmedabad Electricity Supply Co. Vs. Commissioner of Income Tax, 199 ITR 351* and that of the Supreme Court in the case of *NTPC Vs. CIT, 229 ITR 383*

17. In NTPC (supra), the Supreme Court held that the Income Tax Appellate Tribunal had the necessary jurisdiction to allow the additional grounds and decide such questions in exercise of its powers under Section 254 of the Act. It laid down the parameters under which such a power could be exercised. As per the Supreme Court if the facts are available on record, i.e., found by the Income Tax Authorities and those have bearing on the tax liability of the assessee, the Tribunal had the necessary jurisdiction to examine a question of law which arose from such facts. The relevant portion of the judgment laying down this principle is as under:

> "Under Section 254 of the Income-tax Act, the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under Section 254 only to decide the grounds which arise from the order of the Commissioner of Income-tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier.

In the case of *Jute Corporation of India Ltd. vs. CIT (1991) 187 ITR 688*, this Court, while dealing with the powers of the Appellate Assistant Commissioner observed that an appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income-tax Officer. This Court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The Appellate Assistant Commissioner must be satisfied that the ground raised was *bona fide* and that the same could not have been raised earlier for good reasons. The Appellate Assistant Commissioner should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also."

18. Ms. Bansal, learned counsel appearing for the Revenue, did not dispute the aforesaid legal position relating to the power of the Tribunal. However, her objection against the order of the Tribunal is that the Tribunal had not recorded any reasons in support of its decision. She further submitted that new claims were made in the garb of reasoned additional grounds which was not permissible. She referred to the judgment of this Court in the case of *Maruti Udyog Ltd. Vs. ITAT & Ors. (2000) 244 ITR 303* to buttress the aforesaid submissions wherein this Court held that such an order of the Tribunal has to be a reasoned or speaking order.

19. It is not correct to say that the Tribunal has not given reasons. An pointed out above, the Tribunal has not only referred to the judgments of the Supreme Court and Bombay High Court interpreting the powers of the Tribunal under Section 254 of the Act, it also specifically stated that the issues, which were sought to be raised in the additional grounds arise out of tax proceedings of the assessee for the Assessment Year under consideration and also the facts that were necessary for adjudication on these additional grounds were available on record. In fact, as we notice hereinafter, when the Tribunal dealt with those additional grounds, it took into consideration the facts which were already on record and the issues also related to the Assessment Year under consideration. To demonstrate this, it is not necessary to take up for discussion all the additional grounds. Following examples would suffice, as the position in respect of other additional grounds remain the same.

One additional ground was in the following terms:

> "That the prior period expenses claimed by the assessee in subsequent year but disallowed by the Assessing Officer on the ground that the expenses did not pertain to that year ought to have been allowed by the Assessing Officer during the year under appeal."

It is clear from the above that the assessee had claimed prior period expenses in subsequent year, but in that subsequent year, the Assessing Officer had disallowed it did not pertain in that year. In these circumstances, the plea of the assessee was that since these expenses pertain to the year under question, they should be allowed at least in this year. It was also pointed out that the mistake committed by the assessee was that these expenses of prior period were added back by the assessee in its return of income on the misconceived notion on the part of the counsel when the return of the income was filed. It was also explained that the assessee follows mercantile system of accounting and as per this system, these expenses did accrue as a liability to the assessee during the previous year and thus allowable as deduction as per law. It is clear from the aforesaid that facts were available on record and the additional ground arose out of tax proceedings for the Assessment Year under consideration. The Tribunal was of the opinion that for proper adjudication of the tax liability of the assessee in accordance with law, the issue needed remand back to the Assessing Officer for fresh consideration. Naturally, this additional ground was allowed after satisfying that it fulfilled the legal requirements for admissionability of such a ground in view of principle laid down in the case of NTPC (supra).

20. Another ground, which was allowed to be raised by the assessee as under:

> "That the taxes and duties amounting to Rs.11,67,997/- disallowed by the Assessing Officer in assessment year 1995-96 and paid during the year under appeal deserves to be allowed under Section 43B of the I.T. Act, 1961."

The assessee had paid taxes and duties, which were disallowed in the Assessment Year 1995-96. These, were, however, paid during the year in question. Therefore, the assessee was contending that these should be allowed under Section 43B of the A.ct for this year. Reason for not allowing this amount as deduction in Assessment Year 1995-96 was that though the tax and duties debited to Profit and Loss Accounts in the Assessment Year 1995-96, but it was paid subsequently. Submissions of the assessee that since it was paid in the year in question, in this year it should be allowed. Again both the conditions for raising this additional ground stood satisfied, viz., ground related to the tax proceedings of the assessee for the Assessment Year under consideration and the necessary facts were also available on record.

We are, therefore, of the opinion that the additional grounds are rightly allowed and considered by the Tribunal and answer the question against the Revenue.

Reg: b) Whether the Tribunal was justified in allowing depreciation on non-operating plant and machinery?

21. The Assessing Officer had disallowed the depreciation amounting to Rs.1,96,875/- on the alleged non-operating plant and machinery. As per the AO, plant and machinery was not used on this year and therefore, depreciation there upon was not allowable. The Tribunal, however, allowed this claim, as the same was allowed by it in the ease of the assessee itself for the Assessment Years 1999-2000 and 2001-02. Against that decision of

the Tribunal, the assessee has filed ITA No.1484/2006. Since reasons are contained in that order of the Tribunal, we may spell out those reasons at this juncture.

22. There was no dispute that the machinery in question was not put to use during the previous year. At the same time, the machinery in question formed part of block of assets. Predicating on this, the submission of the assessee was that once an asset merges into the block of assets, it loses its identity. Thus the user of individual asset is not required and relevant factor would be the use of block asset. This contention of the assessee has been accepted by the Tribunal, taking aid of the judgment of the Mumbai Bench of the Tribunal in the case of *Nathini Steels Ltd. Vs. Dy. Commissioner of Income Tax, (1996) 50 TTJ 240* and the decisions of some other Benches. The discussion in the order of the Tribunal proceeds as under:

> "From a perusal of the aforesaid provisions, it is evident that a reference has been made particularly to the block of assets as such and there is nothing in the said provisions to interpret that the use of individual asset is a requirement of law for claiming the depreciation. As a matter of fact, the new scheme of block of assets has been introduced in the stature from April 1, 1988, to simplify the position regarding depreciation allowance and in the case of *Nathini Steels Ltd. vs. Dy. CIT (1996) 56 TTJ 240*, the Bombay Bench of the Income-tax Appellate Tribunal has summarized the effects of the said new scheme after reviewing the relevant amendments brought out in the Act as under:
>
> "The effect of all these amendments is that in the case of a running concern, which has expanded or installed new plant and machinery, there is no need of separate computation of deprecation allowance as also separate computation in case of sale or demolition of such assets. The individual working of the machinery also is not necessitated as the new assets falling within the block gets added to the written down value. The effect of all these is that under the new system, even when all the assets of the block are sold, if the block has a positive balance (the moneys payable being less than the written down value), depreciation continues to be allowable even if the asset is no more in existence. Similarly, if only some assets forming part of a block are sold and if the sale proceeds of these assets wipe out the entire value of the block no depreciation would be available even though some assets of the block continue to be used for business purpose. Therefore, the new scheme as introduced does not require use of individual assets for the grant of depreciation.
>
> The Legislature also has fully taken into account the possibility of some assets enjoying depreciation without really being put into use. In such a case, when such asset is sold, then the moneys payable in respect of the assets sold exceeding the actual cost would be taxable as short-term gains and not as long-term gains as under the old law. Therefore, there is no likelihood of the assessee using the new scheme as means to avoidance of tax. The new scheme is self-contained and there can be no loss to the Revenue in the ultimate analysis."

23. To put in nutshell, as per the Tribunal, once a particular asset falls within the block, it is added to the written down value and the depreciation is to be allowed on the block assets. Thus individual asset loses its identity. In these circumstances, whether individual asset is put to use in a particular year or not is of no consequence inasmuch as the requirement of law is to establish the use of concerned block of assets and not the use of particular equipment individually.

24. Challenging the aforesaid reasoning of the Tribunal, the argument of Ms. Bansal was that Section 32 of the Act, which deals with depreciation enumerates two conditions, viz.:

a) The assesses should be the owner of the assets; and

b) The assets should be used in the particular in which depreciation is claimed.

She submitted that this was the substantive provision containing the aforesaid conditions which were to be necessarily fulfilled before acquiring eligibility to get depreciation under the said provision of law. Section 43 of the Act, on the other hand, which deals with block of assets, is a procedural provision providing for computation. Section 41 of its own cannot be read in isolation disregarding the pre-requisite stipulated in sub-section (1) of Section 31, the substantive provision.

25. Mr. M.S. Syali, learned Senior Counsel appearing for the Revenue, on the other hand, submitted that once the scheme for allowing depreciation contained in various provisions of the Act is understood by harmoniously construing those provisions, it would be clear that the approach of the Tribunal was correct in law. Section 32, after omitting those portions which are not relevant for us, reads as under:

> "32. (1) [In respect of depreciation of -
>
> (i) building, machinery, plant or furniture, being tangible assets;
>
> (ii) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial right of similar nature, being intangible assets acquired on or after the 1st day of April, 1998, owned wholly or partly, by the assesses and used for the purposes of the business or profession, the following deductions shall be allowed-]
>
> [(i) in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the assessee as may be prescribed;]
>
> (ii) [in the case of any block of assets, such percentage on the written down value thereof as may be prescribed.]"

Likewise relevant portions of Section 43 are reproduced below:

"Definitions of certain terms relevant to income from profits and gains of business of profession.

(6) "written down value" means-

a) in the case of assets acquired in the previous year, the actual cost to the assessee;

b) in the case of assets acquired before the previous year, the actual cost to the assessee less all depreciation actually allowed to him under this Act, or under the Indian Income-tax Act, 1922(11 of 1922), or any Act repealed by that Act, or under any executive orders issued when the Indian Income-tax, 1986 (2 of 1886), was in force;

[Provided that in determining the written down value in respect of buildings, machinery or plant for the purposes of clause (ii) of sub-section (1) of section 32, "depreciation actually allowed" shall not include depreciation allowed under sub-clauses (a), (b) and (c) of clause (vi) of sub-section (2) of section 10 of the Indian Income-tax Act, 1922 (11 of 1922), where such depreciation was not deductible in determining the written down value for the purposes of the said clause (vi);]

c) in the case of any block of assets.-

(i) in respect of any previous year relevant to the assessment year commencing on the 1st day of April, 1988, the aggregate of the written down values of all the assets falling within that block of assets at the beginning of the previous year and adjusted.-

(A) by the increase by the actual cost of any asset falling within that block, acquired during the previous year;

(B) by the reduction of the moneys payable in respect of any asset falling within that block, which is sold or discarded or demolished or destroyed during that previous year together with the amount of such reduction does not exceed the written down value as so increased."

Section 2(11) reads as under:

"As per the above definition, "block of assets" means (i) ground of assets, (ii) which falls within a class of assets, being building, machinery, plant or furniture, (iii) in respect of which the same percentage of deprecation is prescribed.

26. We may also reproduce Rule 5 of the Income Tax Rules, which deals with depreciation is extracted below:

"5. (i) Subject to the provisions of sub-rule (2), the allowance under clause (ii) of sub-section (1) of Section 32 in respect of depreciation of any block of assets shall be calculated at the percentages specified in the second column of the Table in Appendix 1 to these rules on the written down value of such block of assets as are used for the purposes of the business or profession of the assessee at any time during the previous year.

[(1A) The allowance under clause (i) of sub-section (1) of section 32 of the Act in respect of depreciation of assets acquired on or after 1st day of April, 1997 shall be calculated at the percentage specified in the second column of the Table in Appendix IA of these rules on the actual cost thereof to the assessee as are used for the purposes of the business of the assessee at any time dining the previous year:

Provided that the aggregate depreciation allowed in respect of any asset for different assessment years shall not exceed the actual cost of the said asset:"

Provided further that the undertaking specified in clause (1) of sub-section (1) of section 32 of the Act may, instead of the depreciation specified in Appendix IA, such option is exercised before the due date for furnishing the return of income under sub-section (1) of section 139 of the Act,

a) for the assessment year 1998-99, in the case of an undertaking which began to generate power prior to 1st day of April, 1977; and

b) for the assessment year relevant to the previous year in which it begins to generate power, in case of any other undertaking:

Provided also that any such option once exercised shall be finalised and shall apply to all the subsequent assessment years.]

(2) Where any new machinery or plant is installed during the previous year relevant to the assessment year commencing on or after the 1st day of April, 1988, for the purpose of business of manufacture or production of any article or thing and such article or thing -

a) is manufactured or produced by using any technology (including any process) or other know-how developed in, or

b) is an article or thing invented in, a laboratory owned or financed by the Government or a laboratory owned by a public sector company or a University or an institution recognized into his behalf by the Secretary,

Department or Scientific and Industrial Research, Government of India,

Such plant or machinery shall be treated as a part of block of assets qualifying for depreciation at the rate of [40] per cent of written down value, if the following conditions are fulfilled, namely:-

(i) the right to use such technology (including any process) or other know-how or to manufacture or produce such article or thing has been acquired from the owner of such laboratory or any person deriving title from

(ii) the return furnished by the assessee for his income, or the income of any other person in respect of which he is assessable, for any previous year in which the said machinery or plant is acquired, shall be accompanied by a certificate from the Secretary, Department of Scientific and Industrial Research, Government of India, to the effect that such article or thing is manufactured or produced by using such technology (including any process) or other know-how developed in such laboratory or is an article or thing invented in such laboratory; and

(iii) the machinery or plant is not used for the purpose of business of manufacture or production of any article or thing specified in the list in the Eleventh Schedule to the Act.

Explanation: For the purposes of this sub-rule.-

(a) "laboratory financed by the government" means a laboratory owned by anybody [including society registered under the Societies Registration Act, 1860 (21 of 1860)], and financed wholly or mainly by the Government;

(b) "public sector company" means any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (3 of 1956), to be a University for the purposes of that Act."

27. Prior to the introduction of new concept of block of assets with effect from 01.04 1988, the depredation used to be claimed separately on each asset. The Legislature found that this was a cumbersome procedure leading to various difficulties. This necessitated introduction of the concept of block of assets and allowability of depreciation on such a block.

28. The rationale behind such a provision is contained in Circular No. 469 dated 23.09.1986 issued by the Central Board of Direct Taxes (CBDT):

"After referring to the Budget Speech of the Finance Minister wherein reference was made to the proposal Lo introduce a system of allowing depreciation in respect of block of assets instead of the present system of depredation on individual assets, at paragraph 6.3 the Board stated as follows:

> "As mentioned by the Economic Administration Reforms Commission (Report No. 12, para. 20), the existing system in this regard requires the calculation of depreciation in respect of each capital asset separately and not in respect of block of assets. This requires elaborate book-keeping and the process of checking by the Assessing Officer is time consuming. The greater differentiation in rates, according to the date of purchase, the type of asset, the intensity of use, etc., the more disaggregate has to be the record keeping. Moreover, the practice of granting the terminal allowance as per section 32(1)(iii) or taxing the balancing charge as per section 41(2) of the Income-tax Act, necessitate the keeping of records of depreciation already availed of by each asset eligible for depreciation. In order to simplify the existing cumbersome provisions, the Amending Act has introduced a system of allowing depreciation on block of assets. This will mean the calculation of lump-sum amount of depreciation for the entire block of depreciable assets in each of the four classes of assets namely, building, machinery, plant and machinery."

29. Relying upon this rationale for introducing the new concept, the Mumbai Bench of the Tribunal in the case of *Artic [1999] 68 ITD 462* opined that when a new asset is added in the block of assets in respect of which same date of depreciation is prescribed, it was necessary that that should be used in a business carried on by the assessee, in the following manner:

> "This shows that the main object of introducing the block of assets concept was only to reduce time and effort spent in detailed record maintenance. While giving effect to this object, there could have been no justification or warrant for prescribing a condition that the new asset, in addition to being an asset in respect of which the same rate of depreciation is prescribed as in the case of the other assets within the class, should also be used in a business carried on by the assessee. In the case of a building, the new building purchased should be one in respect of which the same rate of deprecation, as is prescribed in respect of the other building's, has been prescribed by the rules. If the assessee carries on a business, in that case he would also be eligible for an allowance on account of deprecation at that rate. in the case of an assessee who does not carry on a business, the result would be that he would not be entitled to any allowance on account of deprecation in respect of the asset. If at a future date he decides to commence a business, he would be entitled to the deprecation allowance in respect of the new asset, provided he satisfies the authorities that the new asset was used in that business."

This view is followed by Mumbai Special Bench of the Tribunal in the case of *Chhabria Trust Vs. Assistant Commissioner of Income Tax, 264 ITR 12*.

30. The aforesaid discussion would demonstrate that view taken by the Tribunal in the instant case is in consonance with similar view of various Benches of the Tribunal. Learned counsel for the Revenue could not point out any decision of the Tribunal or the High Court, which has taken contrary view.

31. After going through these decisions of the various Benches of the Tribunal and the schematic intention behind the provisions relating to depreciation contained in the aforesaid provisions, we are inclined to affirm the view taken by the Tribunal in the instant case. While doing so, we have in mind the rationale and purpose for which the concept of block asset was introduced by the amendment in the provisions of the Act, as reflected in the Circular dated 23.09.1988 of the CBDT. Intention behind these provisions is apparent. Once the various assets are clubbed together and become block asset within the meaning of Section 2(11) of the Act, for the purpose of deprecation it is one asset. Every time, a new asset is acquired, it is to be thrown into the common hotchpotch, i.e., block asset on meeting the requirement of depreciation allowable at the same rate. The value of the block asset increases and the depreciation is to be given on the aforesaid value, which is to be treated as written down value. Individual assets lose their identity from that very moment it becomes inseparable part of block asset insofar as calculation of depreciation is concerned. Fusion of various assets into the block asset gets disturbed only when eventuality contained in clause (iii) of Section 32 takes place, viz., when a particular asset is sold, discarded or destroyed in the previous year (other than the previous year in which first brought in use). Even in that event, the amount by which the moneys payable in respect of that particular building, machinery, etc. together with the amount of scrap value is to be deducted from total written down value of the 'block asset'.

32. Once we understand and appreciate this scheme contained in the aforesaid provisions, it is not possible to accept the contention of the learned counsel for the Revenue that unless a particular asset is used for the purpose of business or provision, depreciation is not allowed. No doubt, as per Section 32(1) of the Act, in order to be entitled to claim depreciation, the asset is to be owned by the assessee and it is also to be used for the purpose of business or profession. However, the expression "used for the purpose of business" when applied to block asset would mean use of block asset and not any specific building machinery, plant or furniture in the said block asset as individual assets have lost their identity after becoming inseparable part of the block asset. That is the only manner in which various provisions can be harmonized.

33. Once we look into the provisions of this angle, answer to the argument of the learned counsel for the Revenue predicated on second proviso to Section 32 shall also be provided. It was her submission that if a particular asset is acquired after 30th September during the previous year and is put to use for a period of less than 180 days in the previous year, the deduction under sub-section (1) of Section 32 is restricted to 50% of amount admissible. On that basis, she had argued that requirement of user of individual asset remains intact. Answer to this argument is that this would be the position in the first year when the particular asset is acquired. With the user, it would meet the requirement of Section 32. In the subsequent years, it is the use of block asset, which becomes the yardstick and not the individual asset already acquired in the earlier years, other than the previous year in which it is first brought into use.

34. In the instant case, the PSL equipment was purchased and put to use by the assessee in previous year relevant to the Assessment Year 1990-91 and the same had entered into the block asset in that year. It thus lost individual identity for the allowance of

depredation in that year. Since it is not in dispute for the year in question and block of assets was used, the assessee was rightly given the benefit of deprecation in the years in question. The question stands answered against the Revenue.

ITA No. 657/2007

35. The issues raised in this appeal relate to the following aspects:

(i) Leave encashment;

(ii) Depreciation allowed on non-operating plant and machinery; and

(iii) Additional grounds raised by respondent in ITAT, whether allowed or not.

36. The issues at Serial Nos. (ii) and (iii) already stand covered by the discussion in the aforesaid appeals. Thus, we take up the issue at Serial No. (1) viz., leave encashment. We may point out that the Assessing Officer had disallowed the provision on ascertained liabilities alleging that the same related to the earlier years. The assessee had, during the Assessment Year in question, made the provision for leave encashment for the first time on the basis of AS-15, the provision relating to the liability till 31.03.1996. This was done keeping in view the accounting standard-15 issued by the ICAI. It is not in dispute that the Apex Court in the case of *Bharat Earth Movers Vs. Commissioner of Income Tax, Karnataka, 245 ITR 428* has held that provision for leave encashment on the basis of actuarial variation is on unascertained liability and not a contingent liability. The only dispute raised by the Department was that in respect of earlier year to which the provision was made, this cannot be allowed. The Tribunal negatived this contention taking note of the fact by relying upon the judgment of the Supreme Court in Bharat Earth Movers (supra). The relevant discussion in this behalf is a under:

> "The question is whether the liability pertaining to leave of earlier years is prior period expenses and disallowable as such. Since the provisioning amount to change in method of accounting in respect of leave encashment liability, in the year of change the assessee is bound to incur extra expenses, one in relation to actual payment during the year and the other in relation to provision for earlier year. However, in the year of change, such provision has to be allowed, as such, liability is accounted for the first time. The changed method is followed consistently thereafter. The Tribunal in the case of Bharat Commerce and Industries (supra) in para 18 held thus:
>
> In connection with aforesaid ground No.9, is one more aspect which has to be mentioned. Relevant facts are that the assessee company incorporated change in its method of accounting only with effect from previous year under consideration. Thus, for calendar year 1973 (namely, the previous year relevant to the assessment year 1974-75), the assessee company followed its old method of accountant so far as its liability to encash accumulated privileged leave of permanent employees on discontinuance of their services is concerned. In other

> words, as for calendar year 1973 and up to that previous year inclusive, the assessee company used to claim deduction on account of actual payments made by the assessee on such encashment as aforesaid. For the previous year under consideration, the assessee company made a provision for payment of Rs.26,03,071/- for the previous year under consideration, also adopted an argument that since the assessee's normal method of accounting was mercantile method, in any case the assessee in the assessment year under consideration would not be entitled to deduction to the extent of Rs.7,69,318/- a pertaining to earlier previous year. If we may say so the argument is entirely misplaced. It has to be kept in mind that the assessee is not claiming deduction in question on the basis of any outgoing as such irrespective of the general method of accounting being mercantile or cash, but the deduction in question is being claimed only on the basis of provision. When such is the case, then obviously the liability, as freshly worked out in the accounting or the previous year under consideration for the first time, has to be taken into consideration. Similarly, in assessments of incomes of subsequent previous years, fresh adjusted liability form year to year would have to be taken into account. The revenue's contention fails. We hold the assessee to be entitled to deduction of Rs.27,03,071/-."

37. We are, therefore, of the opinion that no question of law arises on this aspect.

ITA No.1670/2006

38. Two questions sought to be raised in the case relate to depreciation on asset not owned by the respondent, i.e., payment made to NTPC and the additional grounds allowed by the ITAT, which have already been answered above.

Another ground relates to exclusion of excise duty for purchase of calculating total turnover for Section 80HHC of the Act. This is covered against the Revenue in a judgment by the Supreme Court in the case of *Commissioner of Income Tax, Coimbatore Vs. Lakshmi Machine Works, 290 ITR 667*.

39. Therefore, no substation question of law arises in this case.

ITA No.1671/2006

40. The issue raised in this appeal relates to the deferred revenue expenditure incurred on generator repair and crylotie. The Tribunal has allowed the expenditure by observing as under:

> "21. The assessee had a captive power plant at Korba for consumption of power plant for factory for production of aluminum the power plant is managed by *NTPC Limited*. During the P.Y. the assessee incurred an expenditure of Rs.4,26,48,395/- on replacement of certain parts and accessories. The expenditure was incurred through NTPC Ltd. The assessee claimed 1/5th of these expenses as a revenue expenditure and 4/5th of expenditure to be claimed over the next four

succeeding AYs. Similarly there was a break down in December, 1996 in one of the units of the Captive power plant became solidified and contaminated due to accidental break down in December, 1996. In June 1997 when the captive power plant was restarted the aforesaid crylotie expenses were incurred in order to resume production of captive power. The assessee claimed 1/5th of these expenses as revenue expenses of the P.Y. and deferred the remaining 4/5th expenses to be claimed over the succeeding 4 A.Ys. The Assessing Officer held the expenditure to be of a capital nature and disallowed the claim of the assessee. The CIT(A) held that the expenditure was of revenue nature.

22. We have heard the Ld. DR who relied on the order of the Assessing Officer. We are of the view that the expenditure in question were of the nature of repairs and were rightly considered as a revenue expenditure. As far as the repairs to generator is concerned it was of replacement of parts and accessories. So also the expenditure on crylotie was to enable the same to resume production. The fact that the assessee claimed 1/5th of the expenses cannot lead to the conclusion that the expenditure was of a capital nature. We are of the view that the CIT(A) was fully justified in allowed the claim of the assessee. Order of the CIT (A) does not call for any interference and the same is confirmed and this ground of appeal of the Revenue is dismissed."

41. The issue stands covered by the judgment of this Court in the case of *Commissioner of Income Tax Vs. M/s. Sunbeam Auto Ltd. in ITA No. 1399 of 2006 (decided on 11.09.2009)*. Therefore, no question of law arises in this case.

ITA No.1439/2008

42. The only question which survives for consideration in this appeal relates to the provision for bad debts, written back. The assessee had reduced an amount of Rs.69.24 lakhs from its total income on account of provision no longer required, written back and credited to Profit and Loss Account. The assessee had explained that it had not been making provisions for bad debts over the years, which had been offered for taxation. The provision made in relation to the past revenue and it was felt by the assessee that some of the provisions made earlier were no longer required and in these circumstances, the aforesaid amount was written back and credited to the Profit and Loss Account. The AO asked the assessee to reconcile the amount of Rs.69.24 lakhs with respect of past years where it had offered the tax. The reason for adding back this amount to the total income by the AO was that though the assessee had furnished bifurcation of this amount, no reconciliation had been given with respect of the past years where such provisions had been offered for the taxation in the past year. However, before the CIT(A) such a reconciliation was admittedly furnished by giving necessary details and on that basis CIT(A) allowed the relief. Taking note of these facts, the Tribunal observed as under:

"72. We have considered the facts of the case and rival submissions. We find that the assessee had accumulated huge provisions amounting to about Rs.57.95 crore in respect of bad debts. It was stated that in none of the years, the amount was claimed as expenditure. This fact could have been very easily verified by the AO

by having excess to record of some or all the years under question. Further, it was stated that this provision was reduced by an amount of Rs.69.24 lakh and the profit and loss account was credited by an identical. Thus, in computation of income, the amount of Rs.69.24 lakh had to be reduced. The case of the learned DR was that either the action of the AO may be confirmed or the matter may be remanded to him for further verification. We are of the view that no useful purpose would be served by remanding the matter to the AO. Further, the claim of the assessee that the impugned amount of about Rs.57.95 crore was not claimed in the respective years, has not been controverted either in the assessment order or by the learned DR. Therefore, we do not find any such error in the order of the learned CIT(A), which requires correction on our behalf. Thus, this ground is also dismissed."

Thus no question of law arises in this appeal also.

ITA Nos. 1487/2006, 1593/2006, 1486/2006, 1592/2006 and 323/2009

43. The question sought to be raised in these appeals have been taken care of in the foregoing discussion.