IN THE ITAT DELHI BENCH 'C'

Assistant Commissioner of Income-tax

v.

Hindustan Fertiliser Corpn.Ltd.

IT Appeal Nos. 2045 & 3318 (DelHI) of 2012

[Assessment years 2007-08 & 2008-09]

January 11, 2013

ORDER

ITA Nos.2787 & 2788/Del/2012 :

G.D. Agrawal, Vice-President – These appeals by the assessee are directed against the separate orders of learned CIT(A) dated 30.03.2012 and 10.04.2012 for the assessment years 2006-07 & 2007-08 respectively.

2. The common ground raised by the assessee in both these appeals reads as under:-

Grounds in ITA No.2787/Del/2012:-

"1. The ld. CIT(A) has erred in holding that since block of assets that of (i) office building (5%), (ii) Factory buildings (10%), (iii) roads and culvers (5%), (iv) water system, drainage and sewerage (5%), (v) office appliance (25%) have not been put to use depreciation is not to be allowed.

2. Ld. CIT(A) has erred on facts in holding that disallowance depreciation of all assets have been made in AY 2004-05 as well.

3. The appellant craves the consent to add, modify, amend or delete any of the ground of appeal at the time of hearing."

Grounds in ITA No.2788/Del/2012:-

"1. The ld. CIT(A) has erred on law and on fact in making disallowance of depreciation on plant and machinery Rs.50,05,446/- only on the ground that assessee has not under taken any manufacturing activity.

2. The reliance placed on judgment of Mumbai Bench of ITAT by the ld. DCIT, Circle-12(1), New Delhi, in the assessment order has not been considered by ld. CIT(A).

3. The appellant craves the consent to add, modify, amend or delete any of the ground of appeal at the time of hearing."

3. At the time of hearing before us, it is stated by the learned counsel that the assessee is a Government of India undertaking. It is engaged in the business of manufacture of fertilizer. Due to heavy losses, the company had stopped the manufacturing activity since earlier years. During the accounting year relevant to assessment year under consideration, the Assessing Officer disallowed depreciation on several assets, viz., building, roads and culverts, water system, office appliances etc. That in AY 2004-05, the assessee had claimed the depreciation on all the assets including plant & machinery. The total depreciation claimed by the assessee was Rs. 2,67,00,734/-. That the Assessing Officer disallowed the depreciation only on plant & machinery because the assessee company had stopped the manufacturing activity. However, the depreciation on other assets viz., building, office appliances, roads and culverts, drainage system etc. was allowed. Out of the total depreciation of Rs. 2,67,00,734/-, only a sum of Rs. 2,03,93,699/- was disallowed. That the assessee accepted the view of the Department taken in AY 2004-05 and in the year under consideration, did not claim depreciation on plant & machinery but claimed on other assets which were allowed by the Assessing Officer in AY 2004-05. However, in the year under consideration, the Assessing Officer, taking a different view than the view taken in AY 2004-05 disallowed depreciation on all the assets. He, therefore, submitted that the disallowance of depreciation should be deleted.

4. The learned DR, on the other hand, relied upon the orders of the authorities below. He stated that from the copy of the assessment order for AY 2004-05 filed by the assessee, it is evident that the Assessing Officer disallowed the depreciation on plant & machinery. Though he allowed the depreciation on some assets but the description of the assets on which the depreciation is allowed is not evident from the assessment order. Therefore, the order for AY 2004-05 cannot be made as a basis for allowing the depreciation on various assets claimed in the year under consideration. He further stated that since the assessee has not carried out any manufacturing activity which was its main business, it is evident that no assets were used for the purpose of business and therefore, the disallowance of entire depreciation is fully justified.

5. We have carefully considered the arguments of both the sides and perused the material placed before us. Admittedly, the facts of the year under consideration and assessment year 2004-05 are identical. In AY 2004-05, the Assessing Officer allowed depreciation on certain assets while in the year under consideration, he disallowed the depreciation on all the assets. In our opinion, when the facts are identical, the Assessing Officer is not justified in taking a view inconsistent with the view taken by the Department in AY 2004-05. In fact, the assessee did not claim the depreciation on the assets on which the depreciation was disallowed by the Revenue in AY 2004-05. If the Assessing Officer has to take a different view than the view taken in earlier years, on the identical facts, then there has to be a specific reason there for. We do not find mention of any such specific reason in the order for the year under consideration. In view of the above, we deem it proper to set aside the orders of the authorities below on this point and restore the matter to the file of the Assessing Officer. We order accordingly and direct the Assessing Officer to allow depreciation on the assets on which depreciation was allowed in AY 2004-05. Needless to mention that he will allow adequate opportunity of being heard to the assessee while giving effect to this order.

ITA Nos.3318/Del/2012 & 2045/Del/2012 :-

6. The only ground raised in these appeals by the Revenue read as under:-

Ground in ITA No.3318/Del/2012 :-

"Whether ld. CIT(A) was correct on facts and circumstances of the case and in law in deleting the disallowance of Rs.7,95,70,400/- made by the AO on account of payment made to employees under Voluntary Separation Scheme (VSS)."

Ground in ITA No.2045/Del/2012 :-

"Whether ld. CIT(A) was correct on facts and circumstances of the case and in law in deleting the disallowance of Rs. 25,84,000/- made by the AO on account of payment made to employee under Voluntary Separation Scheme u/s 35DDA(1)."

7. At the time of hearing before us, it is stated by the learned DR that during the financial year 2006-07, relevant to assessment year 2007-08, the assessee made a payment of Rs. 9,94,63,000/- under the Voluntary Separation Scheme (VSS). On the above scheme, the provisions of Section 35DDA were applicable and therefore, the Assessing Officer, following the provisions of Section 35DDA, allowed 1/5th of the payment made under VSS in the year under consideration. The learned CIT(A) directed the Assessing Officer to allow the entire payment on the ground that Section 35DDA presupposes that there should be continuance and existence of business for the next five years and the scheme is not voluntary but compulsory. He stated that both the above views of the learned CIT(A) are not correct. There is no condition under Section 35DDA that there should be continuance and existence of business in the next five years, though, as a matter of fact, the assessee company remains in existence in the next five years. He further submitted that the scheme of VSS was voluntary in nature and merely because the Government stated that any person who did not opt for VSS would be retrenched will not make the scheme involuntary. He, therefore, submitted that on the facts of the case, Section 35DDA was clearly applicable.

8. The learned counsel for the assessee, on the other hand, relied upon the order of the learned CIT(A) and stated that the Government has taken the decision to close the business of manufacturing of fertilizer. Therefore, the scheme of VSS was mandatory in nature and not voluntary. If any employee had not opted for VSS, then he would have been compulsorily retrenched. Thus, the scheme was compulsory and not voluntary. Therefore, Section 35DDA was not applicable. He further submitted that under similar scheme, the payments were made in earlier years which was duly allowed by the Revenue. He also stated that during the year under consideration, there is a huge loss and despite the above disallowance, the assessed income is loss of Rs. 25.62 crores. Therefore, there would be no loss to the Revenue if the amount of VSS is allowed in the year under consideration instead of allowing 1/5th of the payment in the five years.

9. We have carefully considered the arguments of both the sides and perused the material placed before us. Section 35DDA reads as under:-

"35DDA. (1) Where an assessee incurs any expenditure in any previous year by way of payment of any sum to an employee [in connection with] his voluntary retirement, in accordance with any scheme or schemes of voluntary retirement, one-fifth of the amount so paid shall be deducted in computing the profits and gains of the business for that previous year, and the balance shall be deducted in equal instalments for each of the four immediately succeeding previous years."

10. From the above, it is evident that for applicability of Section 35DDA, the following conditions are to be satisfied:-

(*i*) The assessee incurs any expenditure in any previous year;

(*ii*) The expenditure should be by way of payment of any sum to the employee; and

(*iii*) The payment should be in connection with the voluntary retirement in accordance with any scheme of voluntary retirement.

11. In the case of the assessee, there is no dispute that during the previous year relevant to the assessment year under consideration, the assessee had incurred the expenditure by way of payment to its employees. It is also not in dispute that the payment was under the scheme framed by the employer. Thus, there is no dispute with regard to fulfillment of condition Nos.(i) and (ii). The only dispute by the assessee is that the scheme was not voluntary but compulsory in nature. Though the scheme has not been placed before us but by the name of the scheme "Voluntary Separation Scheme", it appears that the same is voluntary and not compulsory. Moreover, in the order of learned CIT(A), following finding of fact has been recorded:-

"the Govt. of India has decided to close the business and the scheme is not voluntary in nature, it is compulsory and is to be opted by all the employees and if it is not availed by certain employees then in that circumstance those employees will be compulsorily retrenched."

12. The learned counsel for the assessee has affirmed the above finding of fact recorded by the learned CIT(A). From the above finding, it cannot be said that the scheme was not voluntary. If the scheme is compulsory, there is no question of any option to the employees. It may be a different thing that the government persuaded or pressurized all the employees to accept the scheme giving threat of retrenchment. However, so far as the nature of scheme is concerned, it is voluntary because only when a scheme is voluntary, there is question of anybody opting to avail or not to avail. Therefore, we hold that the scheme was voluntary and condition No.(iii) for applicability of Section 35DDA was duly fulfilled. From the perusal of Section 35DDA, we do not find any condition that there should be continuous existence of business for the next five years. It is only the presumption and inference of the learned CIT(A) which does not find anywhere in the provisions of Section 35DDA. In view of the above, we hold that on the facts of the assessee's case, Section 35DDA is clearly applicable in respect of payment under VSS. It was also contended by the learned counsel that in the earlier year, the Revenue itself has allowed the deduction. However, the copy of the assessment order of the earlier years has not been placed before us and we do not know whether the applicability of Section 35DDA was considered in those years. In the year under consideration, the applicability of Section 35DDA was considered by the Assessing Officer and he directed the allowance of deduction as per Section 35DDA.

After considering the facts of the year under appeal and legal position, we find that Section 35DDA is squarely applicable in the assessment year 2007-08. We, therefore, reverse the order of learned CIT(A) on this point and direct the Assessing Officer to allow deduction as per Section 35DDA. As a consequence, we also direct the Assessing Officer to allow the deduction in subsequent years in accordance with the provisions of Section 35DDA.

13. Both the parties have agreed that facts of AY 2008-09 in ITA No.2045/Del/2012 are similar to the facts for AY 2007-08, therefore, whatever view is taken in the Revenue's appeal for AY 2007-08 would be squarely applicable for AY 2008-09. For the detailed discussion in paragraph No.12 above, we reverse the order of learned CIT(A) on this point for this year also and direct the Assessing Officer to allow deduction under Section 35DDA. We also direct him to give consequential effect in the subsequent four years.

14. In the result, the assessee's appeals are deemed to be allowed for statistical purposes while the appeals of the Revenue are allowed.