

IN THE INCOME TAX APPELLATE TRIBUNAL "A", BENCH MUMBAI
BEFORE SHRI D. MANMOHAN, VP
&
SHRI R.C.SHARMA, AM

ITA No.5434&5435/Mum/2011
(Assessment Year :2004-05 & 2005-06)

LIC Housing Finance Limited, 2 nd Floor, Bombay Life Building, 45/47, Veer Nariman Road, Fort, Mumbai-400023	Vs.	DCIT, Circle-2(2), Mumbai
PAN No. :AAACL 1799 C		
(Appellant)	..	(Respondent)

Revenue by : Shri Sanjeev Jain
Assessee by : Shri H.P.Mahajani

Date of Hearing : 14/08/2015
Date of Pronouncement 09/10/2015

ORDER

PER R.C.SHARMA (A.M):

These are the appeals filed by the assessee against the order of CIT(A) for the assessment years 2004-05 & 2005-06, in the matter of order passed u/s.143(3) r.w.s.147 of the Act.

2. Common grounds have been taken in both the years, therefore, both appeals were heard together and are now being decided by this consolidated order.

3. Rival contentions have been heard and record perused. The assessee is engaged in the providing long term housing finance and other financial activities. The original assessment was completed u/s 143(3). The assessment was reopened to tax excess deduction allowed u/s 36(1)(viii) and excess depreciation claimed. It was claimed by the assessee that it made disclosure of all material facts truly and fully not only with regard to the claim for deduction related to special reserve under Section 36(1)(viii) but also in respect of claim of depreciation. Hence, the

criterion of "reason to believe" that income has escaped assessment which is the essential precondition for reopening of assessment under Section 147 of the Act is not satisfied. It was also argued by Id. AR that there was complete disclosure of deduction claimed u/s 36(1)(viii), of Special Reserve created and withdrawn in each year Financial Statements, of the Special Reserve held, of the withdrawal of Rs.76 cr. in the respective year and of the depreciation claim and hence action taken by AO is nothing more than mere change of opinion. Reliance was placed on CIT vs Kelvinator India Ltd. (256 ITR 1) which has since been approved by Supreme Court Larger Bench (20-10 TIOL 06), IPCA Laboratories Ltd. Vs. Gajanand Meena (251 ITR 416).

4. With regard to deprecation Id. AR has placed reliance on the decision of Kolkata High Court in the case of Pressman Advertising & Marketing Ltd. reported in 142 Taxman 17 (Kol), Allahabad Bank v CIT (1992) 108 CTR (Cal) 186 : (1993) 199 ITR 664 (Cal) and submitted that reopening was not justified.

5. After considering the assessee's contention, the CIT(A) upheld the reopening against which assessee is in further appeal before us.

6. It was argued by Id. AR that the assessment has been reopened within 4 years. As per Id. AR the reopening was on two counts – withdrawal of excess deduction u/s.36(1)(viii) (applying the proviso to that clause limiting the quantum of deduction) and alleged excess claim for depreciation (by categorizing certain items of furniture and fixtures as

plant and machinery). As per Id. AR this is a case of change of opinion, there was no tangible material before the AO to come to a conclusion different from the one reached while passing order u/s.143(3). Our attention was invited to the assessment year wherein claim for deduction u/s.36(1)(viii) and claim for deduction u/s.32 in respect of plant and machinery were examined and allowed by the AO on the basis of material on record.

7. Further Id. AR also relied on the order of ITAT in the assessee's own case for the assessment year 2004-05, wherein in an appeal filed against the order passed u/s.263, the Tribunal held that the AO has taken one possible view and taxability of amount withdrawn from special reserve being the other side of deduction u/s.41(4A). Accordingly, the CIT was held to be not justified in initiating the proceedings u/s.263. As per Id. AR before the assessment was reopened the CIT has also examined the records in proceedings u/s.263 and did not find the claim u/s.36(1)(vii) contrary to the law.

8. Ld. AR contended that the disputed items of fixed assets are Air Conditioners, ECR, Printers, Typewriters, Mobile Phones, Refrigerators, Water coolers, Photocopier, EPBX, Fax, fixed assets schedule 5 shows classification of assets as furniture and fixtures and other equipment. Claim for depreciation was supported by Tax Audit Report. Claim for depreciation is clearly in accordance with the New Appendix to the IT Rules specifying rates of depreciation in terms of which the above items

can no way be classified as furniture and fixtures & fittings. In view of the above, Id. AR contended that in respect of both the issues, there was no tangible material before the AO other than the material already examined in the proceedings u/s.143(3) of the Act. Reliance was placed on the decision of Hon'ble Bombay High Court in the case of Asian Paints Ltd., 308 ITR 195, Idea Cellular Ltd., 301 ITR 407 and Cartini India Ltd., 314 ITR 275.

9. We have considered rival contentions and deliberated on the judicial pronouncements referred by lower authorities in their respective order and cited by Id. AR before us in the context of factual matrix of the case. From the record we found that the notice u/s 148 has been issued within four years from the end of the relevant assessment year. From the facts of the case, it can be concluded that there was prima facie case of escapement of income on account excess claim of deductions u/s 36(1)(viii) and there was also excess claim of depreciation allowance. As per the deeming provisions of clause (c) of Explanation 2 to section 147 the Assessing Officer was justified in reopening of earlier assessment. Hon'ble Bombay High Court in IPGA Laboratories vs DGIT(2001) 251 ITR 420(Bom) held that mistake gone unnoticed by the AO in the original order, is covered by the Explanation 2(iii) of section 147.

10. With regard to the merit of disallowance u/s.36(1)(viii) of the Act, Id. AR contended that the AO has restricted the claim to Rs.71,27,29,633/- as against Rs.91,00,00,000/- claimed by assessee. As per Id. AR

amendment to section 36(1)(viii) by the addition of the word maintained was prospective in operation and applied to Special Reserve created from AY 1998-99.

11. We have considered rival contentions. The assessee is a public company formed and registered in India with the main object of carrying on the business of providing long term finances for construction or purchase of houses in India for residential purposes and was eligible for deduction u/s. 36(1)(viii) to the extent of the lower of the following :-

- i. 40% of the profit derived from eligible business carried to the reserve a/c.
- ii. The aggregate of the. amount carried to reserve account does not exceed twice of the amount of share capital and of the general reserve.

As per the computation, the profit derived from the eligible 'business worked out to Rs.229,38,04,534/-, 40% of which was Rs. 91.75,21,814/-. The same amount was claimed as deduction u/s.36(1)(viii) of the Act. However, on perusal of the Schedule 2, it was noticed by AO that the assessee had carried only Rs.91,00,00,000/- to the reserve created for this purpose as required under section 36(1)(viii). Further on a perusal of Schedule 2 of the Balance sheet filed along with the Annual Report, share capital and general reserve, it was noticed as under :-

The share capital	Rs.74,99,63,475/-
The General Reserve	Rs.202,75,02,034/-
Total	Rs.277,74,65,509/-

Twice of the share capital and general reserve worked out to Rs.555,49,31,018/-. On perusal of the earlier years' records of the

assessee, it was noticed that the assessee carried to the reserve created u/s.36(1)(Viii) a sum of Rs.484,22,01,385/- upto 31.3.2003. As per proviso to clause (viii) of Sub-Section (I) of Sec.36, "where the aggregate of the amount carried to the such reserve account from time to time exceeds twice of the amount of the paid up share capital and of the General Reserve, no allowance under this clause shall be made in respect of such excess." In this case, the twice of the share capital and general reserve worked out to Rs. 555,49,31,018/- whereas the aggregate of the amount carried to such reserve works out to Rs. 484,22,01,385/-. Thus, during the year the assessee could claim deduction to the extent of Rs.71,27,29,633/- (555,49,31,018-484,22,01,385), whereas the assessee carried to Reserve an amount of Rs.91,00,00,000/- and claimed deduction to the extent of Rs.91,75,21,814/- which was Rs.20,4792,181/- (91,75,21,814-71,27,29,633) more than the allowable deduction works out u/s.36(1)(viii). The amount carried must necessarily mean amount carried and standing to the credit of Special Reserve Account. The amount carried to Reserve did not mean the credit balance in Reserve Account which is evident from the plain reading of the proviso to clause (viii) of sub-section I of section 36 which reads as under :-

"Provided that where the aggregate of the amounts carried to such reserve account from time to time exceeds twice the amount of the paid-up share capital and of and of the general reserves of the corporation or, as the case may be, the company, no allowance under this clause shall be made in respect of such excess."

12. Thus, we found that the Assessing Officer has correctly worked out the actual deduction allowable as per proviso to section 36(1)(viii) which

has been remained un-amended even after the amendment in the main section. The proviso provides for the modalities for working out the quantum of deduction according to which lower of 40% of the profit derived from eligible business carried to the reserve a/c and the aggregate of the amount carried to reserve account does not exceed twice of the amount of share capital and of the general reserve, has to be allowed as deduction. There is no infirmity in the conclusion drawn by the AO in the light of such provisions that the assessee had claimed excess deduction to the extent of Rs.20,47,92,181/-. For the purposes of working out the deductible amount, amount carried to reserve from time to time has to be considered. There is no dispute that the assessee did carry a sum of Rs 484,22,01,385/- to the reserve from 1.4.1997 till 31.3.2003. There is also no dispute that twice of the share capital and general reserve worked out to Rs. 555,49,31,018/-. The amendment in section 36(1)(vii) did not affect the proviso in which the word 'maintained' was never used.

13. Prior to amendment by finance act 1997 the provision of section 36(1)(viii) read as under:

(viii) [in respect of any special reserve created by a financial corporation which is engaged in providing long-term finance for, [industrial or [agricultural development in India or by a public company formed and registered in India with the main object of carrying on the business of providing long-term finance for construction or purchase of houses in India for residential purposes, an amount not exceeding forty per cent of the total income (computed before making any deduction under [this clause and] Chapter VI-A) carried to such reserve account.

Provided that the corporation [or, as the case may be, the company] is for the time being approved by the Central Government for the purposes of this clause:

Provided further that where the aggregate of the amounts carried to such reserve account from time to time exceeds [twice the amount of the paid-up share capital (excluding the amounts capitalised from reserves) of the corporation [or, as the case may be, the company], no allowance under this clause shall be made in respect of such excess.

14. Post amendment section 36(1)(viii) of IT.Act, 1961 read as under:

(viii) 38 [in respect of any special reserve created 39 [and maintained) by a financial corporation which is engaged in providing long-term finance for 40 [industrial or agricultural development or development of infrastructure facility in India or by a public company formed and registered in India with the main object of carrying on the business of providing long-term finance for construction or purchase of houses in India for residential purposes, an amount not exceeding forty per cent of the profits derived from such business of providing long-term finance (computed under the head "Profits and gains of business or profession" [before making any deduction under this clause)) carried to such reserve account.]

Provided that the corporation [or, as the case may be, the company] is for the time being approved by the Central Government for the purposes of this clause :)

Provided (further) that where the aggregate of the amounts carried to such reserve account from time to time exceeds [twice the amount of] the paid-up share capital 45 [and of the general reserves) of the corporation or, as the case may be, the company], no allowance under this clause shall be made in respect of such excess.

15. It may be noted that the second provision of section contains the method of aggregation of amounts carried to such reserve both pre amendment and post amendment period.

16. Following sub section (4A) was simultaneously inserted in section in section 41 of Income Tax Act,1961 by Finance Act,1997 w.e.f. 1.04.2008.

4A) Where a deduction has been allowed in respect of any special reserve created and maintained under clause (viii) of sub-section (1) of section 36, any amount subsequently withdrawn from such special reserve shall be deemed to be the profits and gains of business or profession and accordingly be chargeable to income-

tax as the income of the previous year in which such amount is withdrawn.

Explanation.-Where any amount is withdrawn from the special reserve in a previous year in which the business is no longer in existence, the provisions of this sub-section shall apply as if the business is in existence in that previous year.)

17. It may be noted that as per this amendment, any withdrawal from the reserve becomes taxable and the provision have been made that the reserve should be maintained.

18. The facts of the case are that the assessee created a special reserve in financial year 1989-90. The assessee withdraw following amounts from the reserve as per the details filed by the assessee during the course of hearing on 14.08.2015:

S.No.	Financial year	Amount
1	1996-97	4,00,00,000
2	2000-01	17,00,00,000
3	2001-02	20,00,00,000
4	2002-03	10,00,00,000
5	2003-04	25,00,00,000
Total		76,00,00,000

19. As per the provisions of section of 36(1)(viii) of Income Tax Act, 1961, the assessee can claim deduction up to 40% of its income by way of creation of reserve. Therefore, a limit was placed by the second proviso on the amount which can be transferred to the reserve. This limit is there in the section since the beginning. Otherwise the assessee will keep on depositing the amount in the reserve and withdrawing it simultaneously and can claim deduction up to 40 % of total income as envisage in the section 36(1) (viii) of Income Tax Act,1961.

20. In the instant case, it is not clear as to whether the assessee has excluded the amount withdrawn from the reserve as mentioned above in the aggregate of amounts carried to the reserve, there was excess deduction claimed by the assessee in AY 2004-05 and AY 2005-06 to the tune of Rs. 20.47 cr in AY 2004-05 and Rs 71.65 cr in AY 2005-06.

21. Furthermore, General Reserve as considered in the section cannot include any other reserve having specific objectives. Accordingly, we hold that the AO was justified in reworking the deduction u/s.36(1)(viii) with reference to share capital and general reserve.

22. However, as per the amended provision, assessee's eligibility for enhanced deduction is available only, if it is found that amount withdrawn out of the reserve had been offered for taxation u/s.41(4A). However, it is not clear from the record as to whether the amount so withdrawn by the assessee has been offered for tax. Therefore, we restore the matter back to the file of the AO for finding out the factual position and for deciding afresh. It is pertinent to mention here that appeal of the assessee decided by the Tribunal in an order passed u/s.263 with regard to the claim of deduction u/s.36(1)(vii) was based on the possible view taken by the AO. However, merit of the disallowance was not decided by the Tribunal. Therefore, it is not going to help the assessee in any way.

23. The next grievance of the assessee relates to disallowance of depreciation to the extent of Rs.32.29 lakhs on the plea assessee had

wrongly classified these assets are falling under the head furniture and fixtures, in the plant and machinery.

24. From the record we found that, the assessee had classified Air conditioners, ECR, Printers, Typewriters, Mobile Phones, Refrigerators, Water Coolers, Photocopiers, EPBX, Fax as machinery and plant and claimed depreciation @ 15%. As per AO these items could not be termed as machinery and plant and held that these items needed to be categorized in the head 'Furniture & Fittings' which is eligible for depreciation @ 10%. We have considered rival contentions. Assessee's claim of depreciation in respect of these items is in accordance with the New Appendix to the I.T. Rules. These are not furniture and fixtures. Accordingly, there is no merit in AO's action for treating same as furniture and fixture so as to reduce to rate of depreciation from 15% to 10%. The AO is directed to allow depreciation @15% on these items.

25. In the result, appeals of the assessee for both the assessment years are allowed in part, in terms indicated hereinabove.

Order pronounced in the open court on this 09/10/2015.

**Sd/-
(D.MANMOHAN)
VICE PRESIDENT**

**Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER**

Mumbai; Dated 09/10/2015

Pkm, नि.स/ PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Asstt. Registrar)
ITAT, Mumbai