

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH : KOLKATA

[Before Hon'ble Shri N.V.Vasudevan, JM & Shri M.Balaganesh, AM]

I.T.A Nos. 1058 & 1059/Kol/2011

Assessment Years : 2003-04 & 2004-05

DCIT, Circle-9, Kolkata

-vs- M/s Paceman Sales Promotion Pvt. Ltd.

[PAN: AABCP 5021 A]

(Appellant)

(Respondent)

I.T.A No. 916/Kol/2012

Assessment Year : 2006-07

DCIT, Circle-9, Kolkata

-vs- M/s Paceman Sales Promotion Pvt. Ltd.

[PAN: AABCP 5021 A]

(Appellant)

(Respondent)

C.O. Nos.59 & 60/Kol/2013

(Arising out of I.T.A Nos. 1058 & 1059/Kol/2011)

Assessment Years : 2003-04 & 2004-05

M/s Paceman Sales Promotion Pvt. Ltd. -vs- DCIT, Circle-9, Kolkata

[PAN: AABCP 5021 A]

(Cross Objector)

(Respondent)

For the Department : Shri Soumyajit Dasgupta, Addl. CIT Sr DR

For the Assessee : Shri R. Chowdhury, FCA

Date of Hearing : 23.11.2017

Date of Pronouncement : 01.12.2017

ORDER

Per Bench:

1. These three appeals by the Revenue and the Cross Objections by the assessee arise out of the separate orders of the Learned Commissioner of Income Tax (Appeals),

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Central-III, Kolkata [in short the Id CITA] in Appeal Nos. 09 & 10/CC-I/CIT(A)C-III/2009-10 dated 10.03.2011 and the Order of Ld. CIT(A)-VIII, Kolkata in appeal No. 219/CIT(A)-VIII/Kol/10-11 dated 15.03.2012 against the orders passed by the DCIT, Circle-9, Kolkata [in short the Id AO] under section 147/143(3) of the Income Tax Act, 1961 (in short “the Act”) dated 31.12.2008, 23.12.2010 respectively for the Assessment Years 2003-04 to 2004-05 & 2006-07 respectively.

2. At the outset, we find that the Cross Objections of the assessee for the Asst Years 2003-04 and 2004-05 are delayed by 361 days in filing before us. The Id AR drew support from the affidavit filed by the assessee stating that the earlier chartered accountant had not advised the assessee to prefer cross objections. Later there was a change of counsel and the present counsel had suggested to file cross objections before tribunal with a delay condonation petition. Hence the Id AR argued that the assessee acting as per the advise of the earlier counsel would amount to reasonable cause for the delay and in support of this, he placed reliance on the decision of *Delhi Tribunal in the case of ITO vs M/s Vishu Impex Pvt Ltd in ITA No. 2765/Del/2011 and ITA No. 3703/Del/2011 dated 31.12.2015*. In the said case, he argued that on similar set of facts, the Delhi Tribunal had condoned the delay in filing the appeal. In response to this, the Id DR vehemently objected for condoning the delay. We find that the facts before the Delhi Tribunal and facts before us are identical. We also find that the *Special Bench of Delhi Tribunal in the case of ACIT vs Vireet Investment Pvt Ltd reported in (2017) 58 ITR (Trib) 313 (Delhi) (SB) dated 16.6.2017* had also addressed the similar aspect of condoning the delay due to different advise given by the Chartered Accountant. In view of these decisions, we deem it fit to condone the delay in the facts and circumstances of the case. Accordingly, the cross objections of the assessee are admitted for adjudication for both the Asst Years 2003-04 and 2004-05.

3. The issues involved in Asst Years 2003-04 , 2004-05 and 2006-07 are identical in nature and hence are taken uptogether and disposed off by this common order for the sake of convenience. The facts of Asst Year 2003-04 are taken up for adjudication and the decision rendered thereon would apply with equal force for the Asst Years 2004-05 and 2006-07 also except with variance in figures.

4. The first issue to be decided in Asst Year 2003-04 is as to whether the Id CITA was justified in directing the Id AO to grant depreciation on 'Civil Work Station' and 'Erection and Fabrication Section' in the facts and circumstances of the case. The next interconnected issue is as to whether the Id CITA was justified in holding tha the rate of depreciation on Electrical Instalaltion was 25% and not 15% in the facts and circumstances of the case.

5. The brief facts of this issue is that the assessee is engaged in the business of manufacture of edible oils. The original return of income for the Asst Year 2003-04 was field by the assessee on 1.12.2003 delcaring loss of Rs 40,53,293/- and assessment u/s 143(3) of the Act was framed by the Id AO on 24.3.2006 accepting the returned loss. Later the assessment was reopened by issuance of notice u/s 148 of the Act for disallowance of depreciation on ' Civil Work Station' and 'Erection and Fabrication Section' on the ground that the said assets were not put to use and is retained under 'work in progress' in the balance sheet. Similarly the Id AO also observed that the assessee is not entitled for depreciation on Electrical Installation at the rate of 25% and is entitled for only 15%. The assessee filed written submissions in this regard before the Id AO explaining that these aspects were duly examined by the Id AO in the course of original assessment proceedings and there was nothing adverse observed by him on these two aspects. Moreover, it was also pleaded that the assessee had rightly claimed the depreciation on the assets in respect of assets installed in Asst Year 2002-03. Hence it was pleaded that the basis of reasoning for reopening itself is bad in law as it is based on incorrect assumption of facts. The Id AO however proceeded to disallow the depreciation amounting to Rs

10,87,314/- and Rs 1,02,84,592/- on assets classified as 'Civil Work Station' and 'Erection and Fabrication' respectively. Further the Id AO also disallowed Rs 2,11,448/- on the ground that excess depreciation on 'Electrical Installation' had been taken at 25% instead of 15%.

6. It was explained by the assessee that the nomenclature used in the financial statements should not be considered by the Id AO and the substance over form is to be seen. The Id AO tried to relate 'Civil Work Station' and 'Erection and Fabrication' shown under the head fixed assets to the Work in Progress and disallowed the depreciation claimed by the assessee on the said assets which are the integral part of plant and machinery. It was stated that the 'Civil Work Station' and 'Erection and Fabrication' which are reflected under the schedule of fixed assets of the audited annual accounts are related to the installation of machinery in the plant at the company factory at vill, Kalachhara, P.S -Chanditalla, Dist- Hooghly-712702. Therefore the same are integral part of machinery. Only for identification purposes, it has been accounted separately which are actually integral part of machinery. The books of accounts were duly audited under the relevant provisions of the Companies Act, 1956 and under the provisions of the Act herein. It was stated that the assessment for the year was made u/s 143(3) of the Act by the concerned Id AO after scrutiny of the books of accounts and in the process, all the documents / explanation as sought by the Id AO was duly produced before him. The claim of the Id AO that the abovementioned fixed assets were not put to use and are under Work in Progress is not justified due to the fact that without these assets, the assessee could not manufacture the goods and the assessment was made considering the manufacturing expenses as well as sale of finished products in respect of the relevant asst year and therefore it has been indirectly accepted by the Id AO that those assets were put to use and are integral part of the plant and machinery. It was further pleaded that manufacturing activities of refined edible oils and vanaspati is similar to that of chemical plants and having varieties of different processing vessels, intermediate tanks, ancillary machineries for steam generation, oil heaters, chilling plant, cold storage, pollution treatment plants, hydrogen gas producing section, byproducts

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treatment plants, etc. All these assets were put to use by the assessee in the previous year 2001-02 itself as the commercial production was started on 19.10.2001, relevant to Asst Year 2002-03. Certain additions were made subsequent to that date and the same were also capitalized in the books and depreciation claimed accordingly. The assessee even stated that during the financial year 2001-02, the project was completed for the commercial production and the assessee transferred the capital expenditure incurred till the date of commencement of commercial production to the respective fixed assets as under:-

				Amount Rs.
<i>Sl No.</i>	<i>Particulars</i>	<i>Balance as on 31.03.2001</i>	<i>Transferred to capital Ass ts as on 19.10.01</i>	<i>Balance as on 31.03.2002</i>
1	<i>Construction Work In Progress</i>	41002688.41	41002688.41	NIL
2	<i>Advance against Capital WIP</i>	5983724.00	3440090.14	2543633.86

6.1. The assessee also furnished the details of assets put to use during the previous year 2001-02 as under:-

			Amount Rs.
<i>Sl. No.</i>	<i>Particulars</i>	<i>Balance as on 31.03.2002</i>	
1	<i>Opening Balance of Assets as on 01.04.2001</i>	56137.50	
2	<i>Transferred from Capital Work in Progress put to use As on 19.10.2001 (Rs. 41002688.41 + 3440090.14)</i>	44442778.55	
3	<i>Further Addition to Fixed assets during the previous Year 2001-02</i>	58330826.66	
	<i>Total Assets put to use during the previous year 2001-02 (As per Annexure A to the Tax Audit Report For the A.Y. 2002-03)</i>	102829742.71	

6.2. It was further explained that 'Civil Work Section' is nothing but a part and parcel of plant and machinery as it includes the foundation work for installation of different machineries,

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vessels, drainage & other tanks / pits for pollution equipments , underground and civil tanks including wastewater separators etc, which are integral part of the plant and machinery. It was also explained that 'Erection & Fabrication' is also nothing but an integral part of plant and machinery as it includes the charges for material and also for labour to fabricate the vessels, to connect the vessels, boiler, chilling section, pollution section etc through various pipe line and establishing their control through various valvesm control equipment etc, without these, no production can be carried out. Further with the help of these and the isolated machineries and other sections can only be termed as manufacturing plant. The assessee also registered itself with the Sales Tax Authority in West Bengal dated 26.2.2001. The commencement of commercial production was done on 19.10.2001 which is evident from the certificate issued by the Directorate of Industries, West Bengal, certifying the said date. It was also submitted that in Asst Year 2002-03, the assessee claimed total depreciation of Rs 1,12,41,008/- on the above mentioned a sets, in the computation of total income and the same was allowed in the scrutiny assessment framed u/s 143(3) of the Act. It was explained that certain extension of plant and mach nery was under process, which was shown under different schedule as advance against capital work in progress. The assessee even gave the production details from the said unit as under:-

Quantity of finished goods produced during the previous year 2001-02 & 2002-03

<i>Particulars</i>	<i>F.Y.2001-02</i>	<i>F.Y. 2002-03</i>
<i>Production (Item wise)</i>	<i>Units (in MT.)</i>	<i>Units (in MT.)</i>
<i>Refined Oil</i>	<i>6522.920</i>	<i>22531.960</i>
<i>Vanaspati Oil</i>	<i>847.507</i>	<i>7152.026</i>
<i>Mustard Oil</i>	<i>-</i>	<i>-</i>
<i>Total</i>	<i>7370.427</i>	<i>29683.986</i>

6.3. It was also pleaded that the term 'Electrical Installation' is of wide import and should not merely be interpreted as fans, switchesm wiring etc and accordingly the disallowance of

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excess depreciation thereon @ 10% made by the Id AO is erroneous. Infact the assessee had done electrical installation which are integral part of plant and machinery as these are electrical equipments which were installed in the factory premises of the assessee. The assessee pleaded that heavy electrical installation such as electrical transformer, distribution panels, bus bars, switchgears, main switches, starters, electric motors and various other equipments and electric high voltage cables were installed. The same were categorized separately for accounting purposes under the head 'Electrical Installation' though they were part of plant and machinery and hence the same cannot be equated with switches, sockets, other fittings and fans etc and consequently cannot be grouped under the head 'Furniture & Fittings'.

7. The Id CITA deleted the disallowance of depreciation on 'Civil Work Section' and 'Erection & Fabrication' by observing as under:-

"6. I have carefully considered the submission of the appellant and also have perused the assessment order. The AO has not disputed the fact that the items included in the Civil Works Section and Erection & Fabrication are integral part of the plant and machinery situated in the assessee's factory at Vill. Kalchhara. He only stated that since the assets are situated at the site for capital work-in-progress these were not put to use and hence depreciation was not admissible. While so concluding he has apparently lost sight of the fact that the process of setting up the factory at the aforesaid address was completed in F.Y. 2001-02 i.e. A.Y. 2002-03. The commercial production has started during the A.Y. 2002-03 and return of income was filed for the A.Y. 2002-03 claiming total depreciation of Rs. 1,12,41,008/-. Thus, it is clearly evident that the site had work-in-progress till the middle of F.Y. 2001-02 and the balance of construction work in progress was the Appellant has stated that the balance of construction work in progress as on 31.03.2001 was Rs. 4,10,02,688/- which was transferred to capital assets a/c. on 19.10.2001. Only there was an advance against capital W.I.P. of Rs. 59,83,724/- out of which Rs. 34,40,090/- was transferred to capital assets as on 19.10.2001 and the balance was carried forward. These were advances made for purchase of machinery. Thus, the appellant started its commercial production since 19.10.2001 and the production details for the F.Y. 2001-02 and 2002-03 are as under:

Particulars	F.Y.2001-02	F.Y. 2002-03
Production (Item wise)	Units (in MT.)	Units (in MT.)
Refined Oil	6522.920	22531.960
Vanaspati Oil	847.507	7152.026
Mustard Oil	-	-
Total	7370.427	29683.986

6.1 From the above discussion it is crystal clear that the factory was the site for capital work-in-progress only upto 18.10.2001 and after that date the commercial production has started. After the commencement of commercial production various new plant and machinery have been added in different assessment year and they have been installed and put to use. The assets clubbed together as Civil Work Section and Erection and Fabrication are related to installation of new machineries and include the foundation work for installation different machineries, vessels, drainage for pollution equipment, underground and civil tanks including waste water separators etc. and fabrication of different vessels, intermediate connections and control equipment etc. There is no doubt that for the installation and proper working of the machinery and plant there works were absolutely essential. The A.O.'s conclusion that since the items under these two heads have been installed in a factory which was also the site for work-in-progress and hence they have not been put in use, is totally unfounded and based on surmise without appreciation of all the facts. The capital work-in-progress ceased to exist on commencement of commercial production as on 19.10.2001 and further addition to the assets are reflected in the capital assets account. Therefore, I hold that the assets described under the nomenclature 'Civil Works Section' and 'Erection & Fabrication' were an integral part of the installed plant & machinery and they have been put to use. Therefore, the A.O's action in disallowing depreciation on these assets are not justified as per law. The A.O is directed to delete the addition of Rs. 1,13,71,906/-."

7.1. With regard to disallowance of depreciation on 'Electrical Installation' amounting to Rs 2,11,448/- , the Id CITA deleted the disallowance by observing as under:-

"8. I have carefully considered the submission of the appellant and the reasoning of the A.O. given in the assessment order. The AO has simply brushed aside the assessee's explanation that electrical installation under by the assessee is in respect of heavy electrical machinery as not substantiated and unacceptable. Once the assessee submits an explanation regarding a claim made it is to be construed that he has discharged his onus. In case the AO feels that the explanation are not sufficient or not substantiated, it is his duty to ask the assessee to produce the details and evidences he requires. In this case the AO has not gone any further to examine the whole range of fact neither he has called for any further details but simply brushed aside the assessee's explanation as not satisfactory. Heavy electrical installation in a huge factory such as electrical transformers, distribution panels, bus bars, switch gears, electric high voltage cables can not be equated with electrical wiring, switches, other fittings and fans etc. as provided in note No. 5 to the Appendix-1 of Rule 5 of the Income Tax Rules. These are part of plant & machinery without which the plant can not operate. The mere fact that these have been clubbed under the nomenclature electrical installation does not make them simple electrical items like wiring, switches, fans etc.

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8.1 In view of the above I hold that the items shown under the head electrical installations are in fact heavy electrical machineries and are eligible for depreciation at the rate applicable to plant & machinery. Therefore, the addition of Rs. 2,11,488/- on this account is not justified and is directed to be deleted.”

8. Aggrieved, the revenue is in appeal before us on the following grounds:-

1. That on the facts and circumstances of the case the Ld. CIT(A) C-III, erred in holding that the installed machinery was put to use as the submissions made by the assessee during the course of assessment do not provide sufficient and required evidences in support of the fact that the machine was actually put to use.

2. That on the facts and circumstances of the case the Ld. CIT(A) C-III erred in holding that the installed machinery was put to use because while holding the decision, the Ld. CIT(A) had considered fresh and additional evidences (viz. Regn. Certificate from Sales Tax Authority, Certificate Directorate of Industries of West Bengal, certifying the date of commencement of commercial production etc.) which is contrary to Rule 46A of I.T. Rule, 1962.

3. That on the facts and circumstances of the case the Ld. CIT(A)C-III erred in holding that the rate of depreciation on Electrical Installation is 25% and not 15%.

4. That the appellant craves leave to add, alter, modify and/or withdraw any ground or grounds of appeal at the time of hearing.

9. We have heard the rival submissions. At the outset, we find that the factory at vill, Kalachhara, P.S.-Chanditalla, Dist- Hooghly-712702 had started its commercial production on 19.10.2001 and manufacturing had already commenced thereon. Infact the ld AO had already allowed depreciation on the said unit in Asst Year 2002-03 itself u/s 143(3) of the Act. Hence there is no reason to take a different stand during this year by stating that unit was not put to use during the year. The ld DR before us stated that the Sales Tax Registration Certificate was not submitted before the ld AO in assessment proceedings for Asst Year 2003-04 and to that extent it becomes an additional evidence filed before the ld CITA for which remand report was

not sought for by the Id CITA. Based on this , he justified the ground raised by the revenue for violation of Rule 46A of the IT Rules. We are not able to persuade ourselves to appreciate this argument of the Id DR as filing of Sales tax registration certificate is only to strengthen the argument of the assessee that production had already commenced in the Asst Year 2002-03. We hold that the Id CITA had given a categorical finding that the subject mentioned assets were duly put to use in the earlier asst year itself and depreciation was allowed in Asst Year 2002-03 by the Id AO and had dismissed the stand taken by the Id AO. We do not find any infirmity in the aforesaid finding of the Id CITA.

9.1. With regard to the disallowance of depreciation, the Id CITA had held that the assessee had installed heavy electrical equipments such as transformers, control panels, etc. and had categorized the same under the head 'Electrical Installations' shown separately in the balance sheet in schedule of fixed assets. It is not in dispute that the 'Electrical Installation' would fall under the broad head of 'Plant and Machinery'. We find that the Id AO without going into the books of accounts submitted before him at the time of assessment proceedings, had come to an erroneous conclusion that they were merely switches, fans, fittings etc so as to give the reduced rate of depreciation to the assessee. We find that the Id CITA had rightly deleted the disallowance made in this regard and accordingly find no infirmity in his order.

10. Accordingly, the Grounds raised by the revenue for the Asst Year 2003-04 are dismissed. This decision would apply with equal force for other revenue appeals for the Asst Years 2004-05 and 2006-07 also.

11. We find that in the Cross objections raised by the assessee for the Asst Years 2003-04 and 2004-05, the assessee had questioned the validity of assumption of jurisdiction for framing the re-assessment in the instant case. We do not find it necessary to address this issue as the relief

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has been already granted to the assessee on merits of the case and accordingly this legal issue is left open. Accordingly , the Cross Objections of the assessee are dismissed as infructuous.

12. In the result, the appeal of the revenue are dismissed and cross objections of the assessee are dismissed as infructuous.

Order pronounced in the Court on 01.12.2017

Sd/-
 [N.V. Vasudevan]
 Judicial Member

Sd/-
 [M.Balaganesh]
 Accountant Member

Dated : 01.12.2017
 SB, Sr. PS

Copy of the order forwarded to:

1. DCIT, Circle-9, Kolkata, Aayakar Bhawan, 5th Floor, P-7, Chowringhee Square, Kolkata-700069
2. M/s Paceman Sales Promotion Pvt. Ltd., 207, M.D.Road, Kolkata-700007.
- 3..C.I.T.(A)- , Kolkata 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
 Head of Office/D.D.O., ITAT, Kolkata Benches