IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI PAVAN KUMAR GADALE, JM

ITA No. 3450/Mum/2016

(Assessment Year 2009-10)

ITA No. 3451/Mum/2016

(Assessment Year 2010-11)

SI Group India P. Ltd. Formerly known as SI Group India Ltd. Plot No.2/1 TTC Indl area, Thane Belapur, Navi Mumbai-400 703 **(Appellant)**	Vs.	Asst. CIT (LTU)2 29th Floor, Centre-1 World Trade Centre Cuffe Parade Mumbai-400 005 **(Respondent)**

PAN No. AAACH7232L

Assessee by	:	Shri Naresh Kumar, AR
Revenue by	:	Shri H.N. Singh, CIT (DR)

Date of hearing: 18.10.2022
Date of pronouncement : 16.01.2023

O R D E R

PER PRASHANT MAHARISHI, AM:

01. These are the two appeals of the same assessee namely SI Group India Private Limited [formerly known as SI Group India Limited] for A.Y. 2009-10 and 2010-11 against the order passed u/s. 263 of the Income Tax Act by the CIT(Large Taxpayer Unit), Mumbai dated 29.03.2016 for both years.

02. Assessee has raised in ITA No. 3450/MUM/2016 & ITA No. 3451/MUM/2016 raising following grounds of appeal:

"GROUND I:

1.1. On the facts and in circumstances of the case and in law, the Commissioner of Income tax (Large Taxpayer Unit), Mumbai ("the CIT") erred in invoking the jurisdiction u/s. 263 of the Income Tax Act, 1961 ("the Act") on the alleged ground that the assessment order passed by the Assistant Commissioner of Income tax (LTU), Mumbai ("the AO") u/s. 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 ("the Act") was erroneous to the extent of the expenditure on catalyst claimed as revenue expenditure u/s. 37(1) of the Act and depreciation claimed u/s. 32(1) of the Act on Technical Know-how and Embedded Process Technology of Rasal Unit.

1.2. The Learned CIT erred in not appreciating the fact that the AO had already applied his mind during the course of assessment proceedings by raising specific queries and accepting the details and replies filed by the Appellant on the said issues raised u/s. 263 of the Act and as such the order passed by the AO would not be held as erroneous.

1.3. The Learned CIT further erred in not appreciating the fact that the AO had allowed Appellant's claim by taking a plausible view and as such the order of the AO was not erroneous.

1.4. The Appellant prays that it be held that the order passed by AO was not erroneous in so far as prejudicial to the interest of revenue and as such the same would not be revised u/s. 263 of the Act.

WITHOUT PREJUDICE TO THE GROUND I;

GROUND II:

2.1. On the facts and in circumstances of the case and in law, the Learned CIT erred in directing the AO to disallow the expenditure claimed by the Appellant of Rs. 16,79,325/- incurred for the acquisition of catalyst by treating it as capital expenditure on the alleged ground that the consumption of the catalyst was spread over more than a year.

2.2. The Learned CIT erred in not appreciating the fact that the expenditure incurred on the said catalyst was a deferred revenue expenditure which would not be treated as capital expenditure merely because the benefit out of such expenditure was enduring in nature.

2.3. The Appellant prays that it be held that the expenditure on catalyst be treated as a revenue expenditure and as such deductible u/s. 31 or u/s. 37(1) of the Act.

WITHOUT PREJUDICE TO THE GROUND I;

GROUND III:

3.1. On the facts and in circumstances of the case and in law, the Learned CIT erred in directing the AO

to examine the claim of the Appellant for the deduction of depreciation u/s. 32(1) of the Act on Technical Know-how and on Embedded Process Technology used in Rasal Unit on the alleged ground that the Appellant had failed to establish the existence and the user in respect of the said assets.

3.2. The learned CIT erred in not appreciating the fact that the Technical Know-how was acquired in the form of knowledge for manufacturing PTBP/PTOP/DTBP chemicals and the same was not destroyed in the fire accident.

3.3. The learned CIT further erred in not appreciating the fact that Schenectady Specialities Asia Pvt. Ltd. had developed the embedded process technology which was used by the Appellant to rebuilt the Plant in F.Y. 2005-06 relevant to the assessment year 2006 07.

3.4. The Appellant prays that it be held that the claim of depreciation u/s. 32(1) be allowed on the said assets."

03. Briefly, facts recorded from A.Y. 2009-10 show that assessee is a company engaged in manufacturers of organic chemicals. It filed its return of income on 24.09.2009 declaring a loss of ₹25,05,29,231/- as per normal computation provisions of income and book profit u/s. 115JB of the Act was shown at ₹Nil.

04. The above return of income was picked up for scrutiny. As assessee has entered into international

transactions reference was made to the Ld. Transfer Pricing Officer to determine the Arm's Length Price of international transactions. By order dated 28.01.2013, ld TPO passed order u/s. 92CA (3) of the Act, an adjustment of ₹45,78,73,000/- was made. Consequently, the draft order was passed on 28.02.2013. Assessee filed objection before the DRP-2, Mumbai on 29.11.2013 wherein the transfer pricing adjustment was modified to ₹10,97,84,000/-. Consequent to that, assessment order u/s. 143(3) r.w.s. 144C (13) was passed determining total income of the assessee at loss of ₹ 14,28,98,820. The ld. AO

a. Disallowed ₹30,22,002/- being expenditure incurred u/s. 35(1)(iv) of the Act.

b. Disallowance u/s. 14(A) was determined at ₹2,79,011 against exempt income earned by the assessee.

c. Certain sundry balances were written off , so an addition of ₹1,40,823/- was made thereon.

d. There were certain differences and mismatch in Form No. 26AS accordingly, addition of ₹ 2,20,870/- was made.

05. The ld. CIT examined the records of the assessment and noted that

i. Assessee in it books of accounts has debited to profit and loss account expenditure as deduction on catalyst over period of its life. The portion of expenditure related to unexpired life is carried forward in the books. However, for the purpose of computation of income, assessee claimed the entire expenditure as onetime expenses in the year of purchase/ issue to production itself treating it revenue expenditure. This was allowed by the ld. Assessing Officer despite assessee itself considered that catalyst had enduring benefit spread over for several years. Accordingly, revenue expenditure claimed by the assessee of ₹16,79,325/- is not correct. It could have been depreciated as plant & machinery at the rate of 15%. Therefore, the incorrect allowance of capital expenditure resulted into under assessment by ₹ 14,27,428/-.

ii. It was further stated that assessee is carrying forward capital work-in-progress representing purchase of technical know-how since September 2002. This amount pertains to an erstwhile unit, which merged with the assessee since September 2002 whereas the assessee has commenced production in December 2005. It was continuing as the depreciable asset in the block of assets. The capital work-in-progress was destroyed in an accident in September 2000 and no part was under insurance claim. Despite destruction, assessee was claiming depreciation on the same and it is allowed

by the ld. AO. As the assets have already destroyed the depreciation of ₹72,65,473/- is wrongly allowed to the assessee. Accordingly, notice u/s. 263 of the Act was issued to the assessee at 25.02.2016.

06. The assessee explained the issue to the ld.CIT, However the order was passed u/s 263 of the Act

i. That catalyst expenditure is capital in nature, only appropriate depreciation is to be allowed, and therefore, order of the ld.AO is erroneous and prejudicial to the interest of the revenue.

ii. With respect to the depreciation on know-how destroyed in fire. The ld. AO was directed to examine the claim of depreciation on those assets. Accordingly, the order passed by the ld.AO was held to the prejudicial to the interest of the revenue and AO was directed to modify the same.

07. Assessee aggrieved with the same submitted that

i. The issue of deduction of catalyst expenditure was examined by the ld. AO starting with the A.Y. 2006-07 to 2008-09 where the query was raised and the ld.AO allowed the claim of the assessee. Only in A.Y. 2009-10, despite AO allowing the same, the ld. CIT has invoked the provision of 263 of the Income Tax Act. It is not the case of the ld.CIT that AO has not examined the same. The ld.AR put to our

attention the queries raised by the AO on the same issue for A.Y. 2006-07 to 2010-11 where in assessment order passed u/s. 143(3) of the Act allowing the claim of the assessee. It was submitted that the ld.AO has applied his mind on the issue for several years, and has correctly allowed the above expenditure. He is submitted that mere CIT holding a different view does not empowered him to invoke provisions of Section 263 of the Act.

ii. It was further submitted that identical issue of catalyst expenditure and its allowability of revenue expenditure has been decided by the co-ordinate bench in case of JCIT vs. Tirumalai Chemcials Ltd 9 SOT 744 wherein the catalyst were held to be a revenue expenditure

iii. merely because in the books of accounts Expenditure were shown as deferred expenditure the deduction could not have been disallowed in the Income Tax as expenditure is purely revenue in nature. Reliance was placed on the decision of the Hon'ble Supreme Court that wherever two equally valid views are possible and ld.AO has taken one of the views, provisions of Section 263 of the Act cannot be invoked as held by the Hon'ble Supreme Court in CIT vs. Max India 295 ITR 282. In this case, there is a view available in favor of the

assessee as decided in the case of Tirumalai Chemcials.

iv. It was further stated that when the claim of the assessee is allowed for A.Y. 2006-07 onwards till A.Y. 2008-09, all those orders passed u/s. 143(3) of the Act, after proper inquiry by the ld. Assessing Officer remaining undisturbed, only for A.Y. 2009-10 and 2010-11 The ld. CIT took action u/s 263 of the Act, It is violating the principles of consistency.

v. On the second ground of depreciation, claim of technical know-how, it was submitted that the detail note on the process technology was already submitted before the co-ordinate bench. It was submitted that the fact is that the plant that was claimed to be have been used for production was destroyed in fire in September, 2000. Subsequently, in F.Y 2005-06, the plant was reconstructed and commercial production started.

vi. It was submitted that order of the ld. PCIT clearly shows that he has directed to withdraw depreciation on building plant and machinery and not depreciation on technical know-how.

vii. Further, the CIT in Para No. 7 directed to withdraw depreciation on technical know-how.

viii. Thus, notice was issued to withdraw deprecation on building, plant and machinery, the order u/s 263 of The Act directed the Ld AO to withdraw depreciation on technical know-how, ld. AO while passing the order u/s. 143(3) pursuant to direction u/s. 263 of the Act has withdrawn depreciation on plant, building and machinery amounting to ₹72,65,473/-.

ix. It was further stated that the order of the CIT passed u/s. 263 is not on the issue, on which show cause notice was issued, further the incorrect allowance on depreciation of technical know-how was not put to the notice of the assessee and therefore the order of CIT u/s. 263 is not sustainable.

x. It was further submitted that for A.Y. 2006-07 the query was raised by the AO, assessee filed its reply and after considering the whole issue for A.Y. 2006-07, depreciation was allowed. Therefore, revision proceedings for 2009-10 are not sustainable on this issue.

xi. It was further stated that the claim of depreciation on embedded processed technology and technical know-how was not interfered for A.Y. 2007-08 & 2008-09.

xii. It was further stated that individual assets were added to the block of assets during the F.Y.

2005-06, depreciation was claimed and allowed. The individual assets have lost its identity once those are part of the block of assets and separate written down value cannot be determined of individual assets.

xiii. It was further stated that the claim of depreciation is required to be examined in the first year of its claim, therefore, in subsequent years; it could not have been disturbed.

xiv. It was further stated that since the ld.AO does not have power to deny depreciation on building, plant and machinery or technical know-how this year, consequently, the ld.CIT also does not have the power to withdraw the claim. Therefore, it was stated that the order of the ld.CIT is not sustainable in law.

08. The ld. AR submitted that for A.Y. 2010-11, the provision of Section 263 of the Act was invoked only with respect to the claim of expenditure on catalysts. The arguments of the AR are similar for that year too.

09. The ld.CIT DR vehemently supported the order of the ld. CIT. It was stated that when in the books of accounts assessee has treated the catalyst expenditure as deferred revenue expenditure, there is no reason that those expenditure should be allowed to the assessee as revenue expenditure in

one year. He submitted that there cannot be two treatments of the same items qua revenue and capital expenditure in the books or Income Tax. It was submitted that there are no two different definition of revenue expenditure and capital expenditure in the companies act or Income tax Act; therefore, it should apply similarly to the Income Tax Act and Companies Act.

010. With respect to the depreciation on technical know-how, he relied upon order of the ld. PCIT. Accordingly, he argued that the order of the ld. PCIT is correct.

011. We have carefully considered the rival contentions and perused the orders of the lower authorities. The ld. PCIT on examination on the record of the A.Y. 2009-10 has directed the ld. AO to disallow (i) catalysts expenditure which was claimed by the assessee as deferred revenue expenditure to the amortize over life of the catalyst as treated in its books of accounts. In the computation of total income, assessee has claimed the total expenditure of catalysts in the year, which it is issued to production line. Claim of the assessee is that is allowable as revenue expenditure as soon as it is issued to production because once catalysts is issued and used for production, it is not reusable, on this basis same has been claimed as expenditure in that year. It is not the first year, where the assessee has

followed the above treatment. Same treatment is been carried on being employed by assessee for A.Y. 2006-07, 2007-08 and 2008-09. For these above three A.Ys., claim of assessee is allowed in the year in which catalysts are issued for production. There is no action u/s. 263 or u/s. 147 of the Act disturbing above claim for both this year. Claim of the assessee found to be incorrect in A.Y. 2009-10 and 2010-11 only. For A.Y. 2009-10, claim of the assessee was inquired by the ld.AO vide query letter dated 13.06.2011 vide Para No. 24. The AO asked the details of manufacturing process in which the catalyst is used and why the expenses on catalyst should be allowed in computing the total income even though the same has been amortized in the books of accounts and the life of catalyst is more than 2 years. This was replied by the assessee by the letter dated 18.12.2012 by submitting the detailed note on catalyst. Based on this, ld.AO allowed the claim of the assessee. It is also apparent that in earlier years the ld.AO raised similar kind of query and has allowed the claim of the assessee.

012. Whether catalyst expenditure is a revenue expenditure and is allowable in the year in which it is issued to production line, It was held that they have merely used as consumables, is decided in favour of assessee in following judicial precedents:-

i. JCIT vs. Tirumalai Chemicals Ltd in 25 CCH 281

ii. DCIT V Aditya Birla Nuvo Limited 67 taxmann.80

iii. Cibatul Limited V DCIt 118 taxman 28 (Ahd)

013. No judicial precedent was shown to us that consumables are capital expenditure and those are not allowable in the year of use in production line. Thus, the view taken by the LD AO is a plausible and sustainable view. Further, the identical view has been taken by the learned assessing officer of the detailed examination in earlier years. In those years, the view taken by the learned assessing officer was not found to be erroneous. There is no reason demonstrated before us that for assessment year 2009 – 10 the order of the learned assessing officer is erroneous various for assessment year 2006 – 07 until 2008 – 09 that order is free of any error. However, we do not have any hesitation that when the judicial precedents are in favour of the assessee that consumables are revenue expenditure and are allowed to the assessee as deduction in the year in which those are put in line of production, Therefore, the order of the learned assessing officer passed after due enquiry about such claim, cannot be held to be erroneous.

014. On the second issue of allowability of depreciation on technical know-how, the fact shows that the assessee company has claimed depreciation on PTBP and DTBP which was forming part of the block of assets since assessment year 2006 – 07. The projects for development of the above plants were initially taken by an entity, which subsequently merged with the assessee company. Therefore, the technical know-how was purchased by the earlier company, which was appearing as capital work in progress in the books of that entity till the date of amalgamation with the assessee company in September 26, 2002. During the assessment year 2003 – 04 that entity amalgamated with the assessee company and the capital work in progress of that company was also taken over by the assessee. The above capital work in progress represented the expenses incurred on finance cost, operating expenses, excise duty, salaries et cetera which were not existing in the form of any tangible form. However, in September 2000, fire took place and the plant and machinery were damaged. The assessee claimed subsequently depreciation on that plant and machinery, therefore the learned and CIT was of the view that when the asset itself is not in existence, the assessee is not entitled to any depreciation. However the fact clearly shows that the above plants were rebuilt in 2001, based on technical feasibility it was held to be utilizable. The above

plant was rebuilt in financial year 2005 − 06 and the same was capitalizing the books of accounts. Thereon, depreciation was allowed since then. From the above plant production was also made which was also disclosed from financial year 2005 − 06 to financial year 2008 − 09. In view of this, it was stated that the technical know-how has been used and is eligible for depreciation. Thus on the above basis the assessee is eligible for depreciation on the above technical know-how. All depreciation schedules for respective assessment years starting from financial year 2005 − 06 onwards are available on file itself. We also carefully gone through the notice issued under section 263 of the act dated 25/2/2016. In paragraph number 3.1 the learned CIT is referring that depreciation allowed on building and plant and machinery is not correct for assessment year 2009 − 10 where such assets were already destroyed in September 2000. The order passed under section 263 dated 29/3/2016; in paragraph number 7, the learned PCIT is referring the claim of depreciation on know-how. The assessment order passed by the learned assessing officer under section 143 (3) read with section 263 of the income tax act dated 29/7/2016 resulted into disallowance of disallowance of depreciation amounting to ₹ 7,265,473/− which included the depreciation on building and plant and machinery. Thus, the learned assessing officer did not disallow the depreciation

only on technical know-how but the building and plant and machinery completely. Even otherwise, the reason for the show cause notice was different then the conclusion arrived at by the learned PCIT. There is no notice/show cause/opportunity to the assessee to explain the depreciation on technical know-how. Even as such, the claim of the depreciation was directed to be disturbed on the basis of user test. The fact shows that capitalization of asset was in earlier years, depreciation is allowed in those years, production has been made from that plant, and the user test is satisfied. Thus, we do not find any error in allowing depreciation to the assessee on the above technical know-how.

015. Accordingly, we do not find any error in the order of the learned assessing officer by allowing the claim of assessee of revenue expenditure of catalyst as well as depreciation on technical know-how for assessment year 2009 – 10. Accordingly, the revisionary order passed under section 263 of the act by the Commissioner of income tax (large taxpayer unit) is not sustainable and hence quashed.

016. For assessment year 2010 – 11, the learned PCIT revised the assessment order on the issue of the deduction of expenditure on catalyst in the year in which it is put into production line. The facts are identical to the one of the issue in assessment year 2009 – 10. Therefore for the similar reasons,

wherein we have held that the catalyst expenditure is allowable to the assessee in the year in which it has been issued to the production line is consumable, we quash the revisionary order passed by the learned CIT under section 263 of the act for assessment year 2010 – 11 on 29/3/2016.

017. Accordingly revisionary orders passed under section 263 of the act for assessment year 2009 – 10 and 2010 – 11 are quashed, appeals of the assessee are allowed.

Order pronounced in the open court on 16.01.2023.

Sd/-	Sd/-
(PAVAN KUMAR GADALE)	(PRASHANT MAHARISHI)
(JUDICIAL MEMBER)	(ACCOUNTANT MEMBER)

Mumbai, Dated: 16.01.2023
Uday Mugal, Stenographer
Copy of the Order forwarded to:

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

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai