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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA 926/2015**

COMMISSIONER OF INCOME TAX-I ..... Appellant
Through: Mr. Raghvendra Singh, Advocate

Versus

BRAWN PHARMACEUTICALS LTD. ..... Respondent
Through: Mr. Pranjal Srivastava, Advocate

CORAM: JUSTICE S.MURALIDHAR
JUSTICE CHANDER SHEKHAR

O R D E R

% 04.05.2017

Dr. S. Muralidhar, J

1. Mr. Avadh Kaushik, learned counsel for the Respondent, seeks and is discharged from appearing on behalf of the Respondent.

2. Mr. Pranjal Srivastava, Advocate has entered appearance on behalf of the Respondent.

3. This is an appeal by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act') against the order dated 25th April, 2014 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 4867/Del/2010 for the Assessment Year ('AY') 2005-2006.

4. Admit. The following question is framed for consideration:

> "Whether on the facts and in the circumstances of the case the ITAT was right in giving the benefit of Section 32 (1) (iii) of the Act to the Assessee?

5. The Assessee filed its return for the AY in question declaring a loss of Rs. 38,55,463/-. By the assessment order dated 26th November 2008, the Assessing Officer ('AO') made an addition of Rs. 71,12,659/- to the taxable income, thereby rejecting the claim of the Assessee that it was entitled to write off the said sum under the head 'assets written off.'

6. In the appeal filed before the Commissioner of Income Tax (Appeal) [CIT(A)], the Assessee *inter alia* contended that the loss on account of writing off was liable to be allowed. Recourse was taken to Section 32 (1) (iii) of the Act. The CIT(A) accepted this submission and held that the Assessee would be entitled to write off the said sum. The CIT (A) noted that "The depreciation chart shows two blocks i.e, Building (5%) block and Air handling System (25%) which were on a rented premises." Since the Assessee had closed the said line of business, it had to write off the assets in its Profit & Loss Account ('P&L Account'). Consequently, the CIT(A) deleted the addition made by the AO.

7. The Revenue then carried the matter in appeal to the ITAT. By the impugned order, the ITAT dismissed the appeal by holding as under:

> "(i) The claim of the assessee clearly falls within the scope of S. 32 (1) (iii). The part of the amount realized by the assessee has been offered to tax. The balance of the amount pertaining to the block had no realizable value, has not been disputed by the assessing officer. The difference is allowable u/s 32(1)(iii).
> (ii) Ld. Assessing officer has not doubted the genuineness of the claim and disallowed it only holding the loss to be capital in

nature. Therefore, the doubt raised by the ld. DR does not emerge from the order of assessing officer.

(iii) Reliance placed on Hon'ble Kerala High court judgment in the of *CIT v. Cooperative Wholesale Society* (supra) is not applicable to the facts of the case as the assessment order in question is A.Y. 1972-73 which is prior to the amended scheme of block of assets."

8. At the outset, it requires to be noticed that the Assessee is not a power generation company. In order to appreciate whether the claim by the Assessee regarding writing off the assets in terms of Section 32(1)(iii) is available to it, it is necessary to set-out the relevant portions of Section 32 as under:

"32. (1) In respect of depreciation of

(i) buildings, machinery, plant or furniture, being tangible assets;

(ii) know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998, owned, wholly or partly, by the assessee 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.

…

iii) in the case of any building, machinery, plant or furniture in respect of which depreciation is claimed and allowed under clause (i) and which is sold, discarded, demolished or destroyed in the previous year

(other than the previous year in which it is first brought into use), the amount by which the moneys payable in respect of such building, machinery, plant or furniture, together with the amount of scrap value, if any, fall short of the written down value thereof."

9. It is seen that there are two sub-clauses '(i)' under Section 32(1). The first sub-clause (i) generally talks of deprecation being available in respect of tangible assets, like "buildings, machinery, plant or furniture". However, the operative portion actually concerning the deductions that would be allowed in respect of such deprecation is spelt out in the second sub-clause (i). The second sub-clause (i) applies only to "undertaking engaged in generation or generation and distribution of power..." This is crucial because Section 32 (1) (iii) makes an express reference to "building, machinery, plant or furniture in respect of which depreciation is claimed and allowed under clause (i) and which is sold, discarded, demolished or destroyed in the previous year..." Clearly, the only sub-clause (i) under which the deprecation could be claimed and allowed is second sub-clause (i) and not the first sub-clause (i).

10. This position becomes even clearer when a reference is made to the decision of this Court in ***Commissioner of Income Tax v. Zoom Communication Pvt. Ltd., (2010) 327 ITR 510 (Del).*** The facts in that case were more or less similar. There, the Assessee was not a power generation company and was engaged in the business of audio and video equipments. That Assessee, too, debited its P&L Account under the head 'equipment written off'. The question that arose was whether the above writing off of the amount with reference to Section 32(1)(iii) of the Act was permissible.

Negating the contention of the Assessee, this Court held in ***Commissioner of Income Tax v. Zoom Communication Pvt. Ltd.*** (*supra*) as under:

> "8. As regards the amount claimed on account of unusable and discarded assets, the Tribunal, in our view, was entirely incorrect in taking the view that the deduction claimed by the assessee was admissible to it under section 32(1)(iii) of the Income-tax Act, though not as a revenue expenditure. Section 32(1)(iii) of the Act provides for deduction, in the case of any building, machinery, plant or furniture, in respect of which depreciation is claimed and allowed under clause (i) and which is sold, discarded, demolished or destroyed in the previous year (other than the previous year in which it is first brought into use), of the amount by which money payable in respect of such building, machinery, furniture, together with the amount of scrap, if any, falls short of the written down value thereof. Thus, this clause would apply only in the case of machinery, plant, etc., in respect of which depreciation has been claimed and allowed under clause (i). If the plant/machinery is such, to which the provisions of clause (i) do not apply, no deduction in respect of such plant or machinery, etc., can be claimed under clause (iii).
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> 9. Clause (i) of sub-section (1) of section 32 relates to assets of an undertaking engaged in generation and/or distribution of power. Admittedly, the assessee-company was not engaged in generation and for distribution of power, during the relevant year. Thus, the provisions of clause (i) of sub- section (1) of section 32 do not apply in respect of the assets claimed to have become unusable and written off. Therefore, it cannot be disputed that the assessee had no justification to claim this amount of Rs. 13,24,539 as a revenue expenditure."

11. The Court also notices that the Hyderabad Bench of the ITAT has adopted a similar approach in ***Deputy Commissioner of Income-Tax, Circle 3(1), Hyderabad v. SAMKRG Pistons & Rings Ltd. [2009] 34 SOT 401(HYD.)***.

12. The Court is, therefore, unable to concur with the view taken by the ITAT, which, in turn, affirmed the view of the CIT(A) that the claim of the Assessee fell within the scope of Section 32 (1) (iii) of the Act. This is based on an erroneous reading of the provision as explained by this Court hereinbefore.

13. Consequently, the question farmed is answered in the negative i.e. in favour of the Revenue and against the Assessee. The impugned orders of the CIT(A) and the ITAT on the issue are hereby set aside. The addition made by the AO is restored. The appeal is allowed but, in the circumstances, with no order as to costs.

S.MURALIDHAR, J

CHANDER SHEKHAR, J

MAY 04, 2017
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