

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DEHRADUN BENCH, NEW DELHI)**

(Through Video Conferencing)

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER

Dr. B.R.R. KUMAR , ACCOUNTANT MEMBER

ITA No. 743/Del./2018, A.Y. : 2014-15

Asstt. Commissioner of Income Tax, Circle-2, Dehradun	Vs	M/s. Uttaranchal Jal Vidyut Nigam Ltd. 'Ujjwal', Maharani Bagh GMS Road, Dehradun
(APPELLANT)		(RESPONDENT)
(PAN : AAGFD8733R)		

Revenue by : Sh. N.S. Jangpangi, CIT- DR

**Assessee by : Sh. Rakesh Gupta, Adv. & Sh. Somil
Aggarwal, Adv.**

Date of Hearing: 10.11.2021	Date of Pronouncement: 1 .12.2021
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O R D E R

PER Dr. B.R.R.KUMAR, ACCOUNTANT MEMBER:

This appeal has been filed by the assessee against the order of the Id. CIT(A-Dehradun, dated 04/12/2017.

2. At the time of creation of UJVNL, certain assets and liabilities had been transferred from UPJVNL vide Notification issued by the Govt. of India. The AO noticed that the assessee took over the assets on transferred from UPJVNL but for the liability side did not take over the loans transferred in full form UPJVNL. In the balance sheet the assessee has taken a reconstruction reserve amounting to Rs. ***** which is stated to be equal to the difference of assets-liabilities including capital reserved. When the assessee was queried regarding the same and after discussion, the AO found that the liability side of balance sheet of the assessee was still not settled, i.e. the loan amount transferred by UPJVNL to UJVNL was still under

dispute and there was no clarity as on date with regard to the nature of liability i.e. reconstruction reserve.

3. Hence, the then AO had concluded that the assessee had only taken over the assets for which the liabilities were not ascertained till date. This implied that on date the assessee had the assets without the corresponding liability, i.e. in fact, the assets have been taken over by UJVNL from UPJVNL free of cost. Hence, the depreciation was disallowed u/s 32 of the I.T. Act, which worked out at Rs. "YYYYY/-" as per provisional accounts produced by the assessee.

4. The instant appeal of the revenue involved only one issue of depreciation.

Depreciation:

5. This issue stands adjudicated by the order of ITAT in ITA No.5724/Del/2015 dated 31-05-2021. The operative portion of the said order is reproduced for ready reference:-

"These are second round of appellate proceedings before us. Briefly stated, the facts of the case are that for the year under consideration a return declaring total income of Rs.8,94,85,800/- was filed by the assessee on 29th October 2004. Assessment was framed u/s 143(3) of the Income Tax Act, 1961 (hereinafter called 'the Act') on 22nd December 2006 assessing total income of the assessee at Rs 40,67,51,498/-. Being aggrieved, the assessee filed an appeal before Ld. CIT (A). The Ld. first appellate authority, vide order dated 30th December 2008, allowed part relief. Assessee filed a further appeal before this Tribunal (ITAT). A coordinate Bench, vide order dated 25th February 2011 in ITA No. 1174/DEL/2009, set aside the matter with the following directions:

"5. We have duly considered the rival contentions and gone through the record carefully. No doubt, audited accounts for this assessment year as well as earlier assessment years are relevant material for determining the true income of the assessee. In the absence of such accounts, it is difficult to determine the taxable income of the assessee. Assessing Officer has made a major disallowance in

respect of depreciation claim because of this anomaly. It is also true that auditor of the assessee has to be appointed by learned CAG but to our mind, assessee should have persuaded the learned CAG to get the auditor appointed in time. If we look into the negligence at the end of assessee vis a vis the punishment in the shape of tax liability then the punishment is disproportionate to the negligence. Therefore, in the interest of justice, we are of the opinion that assessee deserves one more opportunity to plead all the issues on the basis of the audited accounts before the Assessing Officer. We allowed the appeal of assessee set aside the order of revenue authorities below and remit all the issues taken up in the assessment order before the assessing officer for readjudication. We direct the assessee to cooperate with the Assessing Officer and submit the requisite details. We further direct the assessee that it should remain vigilant for getting its accounts audited in the subsequent assessment years."

2.1 Post the set aside by this Tribunal, fresh assessment proceedings were initiated by the AO. The AO again made a disallowance of depreciation of Rs 29,95,08,702/- and assessed the total income of the assessee at Rs 38,89,94,500/-. In this regard, vide order dated 28th March 2013, it has been held by the AO as under:

"During the year under consideration it is noticed that the opening WDV for the assets for A.Y. 2004-05 do not tally with the closing WDV for A.Y.2003-04. Hence for the purpose of coming to the amount to be disallowed for depreciation on assets taken over at the time of inception free of cost, the following method is being adopted. For the additions made during the year, the depreciation permissible under the I.T. Act, 1961 is to be allowed, as in the previous years there is no addition to the fixed assets as per the Schedule submitted. The balance depreciation claimed in the profit and loss account is to be disallowed and is to be added back to the taxable income for the year. The depreciation on additions made during the year comes to Rs.2,44,07,898/-. After application of the rates as per I.T. Act 1961, and the assessee has debited an amount of Rs.32,39,16,600/-. The depreciation amounting to Rs.29,95,08,702/- which is the balance is therefore, disallowed and added back to the taxable income of the assessee."

2.2 Aggrieved again, the assessee filed an appeal before the Ld. first appellate authority. The Ld CIT (A) has extensively recorded the facts of the case and has found merit in claim made by the assessee. The appeal has been allowed by adjudicating as under:

"The Id. AR has challenged this action on the ground that claim of depreciation on old assets has been consistently allowed in the past at Appellate stages and thus should be allowed this year also. Some of the submissions may be extracted : That Uttaranchal Jal Vidyut Nigam Ltd. (UJVNL) was incorporated on 12-2-2001 by Government of Uttaranchal for management of running generating stations, development and construction of new hydropower projects in the State of Uttaranchal. The Central Government vide its order dated 5-11- 2001 transferred all hydro power plants located in the State of Uttaranchal to UJVNL. Although the company took the financial & administrative control of the plants immediately thereafter with effect from 9-11-2001, the Transfer Scheme for transfer of values of assets & liabilities has not been finalized. In absence of any transfer scheme, Nigam has derived its provisional opening balances, on the basis of information available with it received from UPJVNL, to complete its accounts. The difference between opening balances of Assets & liabilities has been shown as Reconstruction Reserve under Capital Reserve in the Balance Sheet pending finalization of Transfer Scheme. From the perusal of the Balance Sheet of UPJVNL it will be clear that there was total Fixed Assets as on 31-3-2001 is Rs.998.92 crores, out of which 682.05 crores was received out of demerger of UPJVNL vide notification letter dated 5-11- 2001 correspondingly the depreciation upto that date has also been accounted for in our accounts, as such the depreciation on the written down value as on 9-11- 2001 was considered by UJVNL. Since these Assets represented share capital in the Balance sheet of UPJVNL hence it cannot be said that these assets have been obtained free of cost from UPJVNL. The difference of Assets and Liabilities have been shown as reconstruction reserve under the Capital Reserve in the Balance Sheet. As such this would be a demerger for the purpose Income Tax Act 1961. In case of demerger only a portion of the assets and liabilities of the company are assigned to the demerged company which in this case did not involve any payment of cash and shares for the assets and liabilities transferred from UPJVNL to UJVNL. Hence it may be stated that both the share capital as well as reserves including the reconstruction reserve which belongs to subscriber of the share capital I.e., in this case the State of Uttaranchal had been utilized for getting the assets. The Ld. Commissioner of Income Tax Appeal-I, Dehradun, has also given due relief on account of depreciation on fixed assets while disposing of appeals for the following Assessment Years.

A.Y.	Appeal No.	Date of Order
2002-03	283/DDN/2007-08	30-12-2008
2003-04	057/DDN/06-07	14-8-2007
2004-05	340/DDN/06-07	30-12-2008

2005-06	284/DDN/07-08	30-12-2008
2007-08	139/DDN/2009-10	27-12-2011
2008-09	68/DDN/2010-11	31-01-2012
2009-10	328/CIT(A)-1/2011-12	30-03-2012
2011-12	16/ CIT(A)/DDN/14-15	30-03-2015

The Ld. CIT (A) has also held that the assessee would be entitled to claim of depreciation on assets transferred from UP Jal Vidyut Nigam Limited to UJVNL. Copy of the orders are enclosed herewith as Annexure 1 to 8.

It may be brought to your kind notice that for the AY 2005-06 most of the relief was allowed by the Ld. Commissioner of I. Tax Appeals, as such no appeal was filed by the assessee for the aforesaid Assessment Year. However, the department had filed an appeal before the Hon'ble ITAT against the order of CIT(A)-1. Dehradun for the aforesaid A.Y. 2005-06 only on one ground I.e., for allowing depreciation on fixed assets acquired from UPJVNL, the aforesaid appeal of the department has been dismissed by the Ld. ITAT New Delhi on 13th August, 2009, due to non approval of COD (Committee of Dispute). As per our knowledge no appeal has been filed so far, against the aforesaid order of the Hon'ble ITAT, moreover the above proceedings are also time barred by limitation, hence the order of the Ld. CIT (A) is final. Copy of the order of Hon'ble ITAT is enclosed herewith as Annexure 9.

4.2 The findings of Ld. AO and the averments of the Ld. AR have been considered. A perusal of the facts reveal that on demerger the assets were divided in a fixed ratio and needless to say, the cost of the same (WDV as on that date) was duly accounted for by both the entities. Thus, it is difficult to understand how it can be said that the assets were acquired free of cost. In any case there have been a succession of Appellate orders (as mentioned in the extract of submissions above) which have allowed the claim of depreciation. Following those orders the claim is allowed for this year also with the direction that the closing value of WDV for AY 2003-04 shall be adopted from the audited accounts of that year and taken as opening value for the present year as per audited accounts for AY 2004-05. This ground is accordingly allowed with the deletion of addition of Rs.29,95,08,702.

3.0 Being aggrieved, revenue in appeal before us now. During the course of appellate proceedings, the Ld DR vehemently supported the disallowance made by the the AO. However, when specifically questioned, the Ld DR was unable to rebut the conclusions recorded by the Ld CIT (A) that when the Central Government, vide its order dated 5th November 2001, had transferred all hydro power plants located in the State of

Uttaranchal to the assessee, it had recognized the assets in its balance sheet and for the value of assets taken over consideration was paid by the assessee through issuance of share capital. Hence, it cannot be said that these assets have been obtained free of cost by the assessee.

4.0 On the other hand, the Ld AR supported the reasoning given by the Ld CIT (A).

5.0 We have carefully considered the facts of the case and the material available on record. In our considered opinion the conclusions recorded by the Ld. CIT (A) merit to be upheld. The situation arising in the present case is what has been recognized as a demerger in terms of explanation 4 to section 2(19AA) of the Income Tax Act. The AO has disallowed depreciation on the ground that the assessee had received assets free of cost from the Government of Uttaranchal. The action of the AO in disallowing depreciation is not as per law. As per settled accounting principles, every rupee invested in the business has a cost. The cost of borrowing from the bank is known to the business depending on the rate of interest but that does not mean that the capital introduced in the form of shareholders fund has no cost. In the present case, assets generating hydro power have been received by the assessee from the demerger of UP Jal Vidyut Nigam along with corresponding liabilities which it owns to the Uttaranchal Government and others. This liability represents nothing but the cost of the assets received on demerger. The assessee is entitled to depreciation on the written down value of these assets which been prescribed in Explanation 2B of section 43(6) of the Income Tax Act, 1961. The assessee is, therefore, entitled to depreciation. Somewhat similar situation arose in case of M/s Bharat Sanchar Nigam Limited (BSNL) when it got incorporated in 2000. Prior to BSNL's incorporation, the telecommunication services were being provided by Government of India, Ministry of Communication through its two departments, namely Department of Telecommunication Services and Department of Telecommunication Operation. The AO in case of BSNL referred to the capital structure of the BSNL to draw an inference that the cost of assets was being met by the general reserve as reflected in the capital structure of the company. As per AO, a sum equal to the general reserve would be required to be reduced from the cost of the assets in terms of Explanation 10 of Section 43(1) of the Act. This has been negated by the Hon'ble Delhi High Court vide order dated 09th May 2013 reported in 355 ITR 188(Del) by observing as under:

"26. The scheme of hiving off the business of telecom services by Government of India to a corporate entity entailed incorporation of a wholly owned government company (i.e, the petitioner company) and the transfer of the business as a going concern along with all its assets and liabilities to the company. The net assets were transferred at book value, which was agreed to be at least Rs 63,000/-

Crores and in consideration of this the petitioner company accepted a liability of Rs 7500 Crores and issued both equity and preference share capital of the face value of Rs 5000 Crores and Rs 7,500 Crores, respectively. The balancing figure was reflected as reserves which is an integral part of the shareholders funds. The Government of India has transferred the assets to the petitioner company at their book value i.e., the value at which the said assets are reflected in the books of DTS and DTO and the book value of the Government of India's holding in the petitioner company as shareholder and a creditor aggregates the book value of the assets transferred. The configuration of the capital structure of the petitioner has no impact on the value of the Government's holding in the petitioner company as reserves of a company are subsumed in the book value of its capital. We find no basis, at all, for the Assessing Officer to surmise that reserves represent a subsidy, grant or reimbursement from which the cost of assets of the petitioner company are met and the whole consideration received by the Government of India for transfer of business is limited to the value of loans and the face value of the shares issued to the Government of India. A reserve represents the shareholders' fund and may be utilized in various ways including to declare dividends or for issuing bonus shares. There is no plausible reason to assume that the value of shareholders' holding in a company is limited to the face value of the issued and paid up share- capital and the reserves represent a subsidy or a grant or a reimbursement by the shareholders from which directly or indirectly the cost of the assets in the hands of a company are met. We are thus of the view that the reasons as furnished by the Assessing Officer for reopening the assessments could not possibly give rise to any belief that income of the petitioner had escaped assessment and proceedings initiated on the basis of such reasons are liable to be quashed."

6. We have gone through the entire contents and the history of the assessee. In this case, the assets have been transferred from Uttar Pradesh Government (UPJVNL) to Uttaranchal Government (UJVNL). There is no claim of the depreciation twice by both the Governments. The de-merger led to division of assets in a fixed ratio and the same was duly accounted for both the entities as per the written down value (WDV) as on that date. The depreciation on de-merger cannot be a forgone benefit owing to de-merger, which is the result of state reorganization. Hence, we decline to interfere with the reasoned order of the Ld. CIT (A).

7. In the result, the appeal of the revenue is dismissed.

Order pronounced in open court on 1st day of December, 2021.

Sd/-

(AMIT SHUKLA)
JUDICIAL MEMBER

Sd/-

(Dr. B.R.R.KUMAR)
ACCOUNTANT MEMBER

Binita

Dated : 1/12/2021

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A), New Delhi.
- 5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.