

**आयकर अपीलीय अधिकरण "A" न्यायपीठ मुंबई में।**

**IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI**

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री एन. के. प्रधान लेखा सदस्य के समक्ष ।

**BEFORE SRI MAHAVIR SINGH, JM AND SRI NK PRADHAN, AM**

**आयकर अपील सं./ ITA No. 1183/Mum/2018**

**(निर्धारण वर्ष / Assessment Year 2012-13)**

The Dy. Commissioner of Income Tax, Circle 15(1)(1), Mumbai Room No. 470, 4 <sup>th</sup> Floor, Aayakar Bhavan, Mumbai.	Vs.	Abeinsa Business Development Pvt. Ltd. 540-A, A.J. House, Marol Maroshi Road, Marol, Andhri (E), Mumbai-400 059
<b>(अपीलार्थी / Appellant)</b>	..	<b>(प्रत्यर्थी / Respondent)</b>
<b>स्थायी लेखा सं./PAN No. AAGCA6110N</b>		

अपीलार्थी की ओर से / <b>Appellant by</b>	:	Shri Anadi Varma, DR
प्रत्यर्थी की ओर से / <b>Respondent by</b>	:	Shri Rajendra Deshpande, AR

सुनवाई की तारीख / <b>Date of hearing:</b>	08-05-2019
घोषणा की तारीख / <b>Date of pronouncement :</b>	08-05-2019

**आदेश / ORDER**

**PER MAHAVIR SINGH, JM:**

This appeal filed by the Revenue is arising out of the order of Commissioner of Income Tax (Appeals)-24, Mumbai [in short CIT(A)], in appeal No. CIT(A)-24/ACIT-15(1)(1)/IT-362/2016-17, dated 21.11.2017. The Assessment was framed by the Asst. Commissioner of Income Tax, Circle-15(1)(1), Mumbai (in short ACIT/ITO/ AO) for the A.Y. 2012-13 vide order dated 06.04.2015 under section 143(3) of the Income Tax Act, 1961 (hereinafter 'the Act').



2. The only issue in this appeal of Revenue is against the order of CIT(A) in holding that unabsorbed depreciation is not loss but allowance under section 32 of the Act under the head unabsorbed depreciation and not hit by the provisions of section 79 of the Act. For this Revenue has raised following two grounds: -

*“1. On the facts and in the circumstances of the case and in law, the 14. CIT(A) erred in holding that the unabsorbed depreciation is not a loss but allowance under section 32 of the Act and directing the Assessing Officer to verify and allow the set off of brought forward losses of Rs. 10,90,40,397/- to the extent of unabsorbed depreciation, ignoring the vital fact that the share holding of the assessee changed beyond 51% and the original beneficiaries are no more the beneficiaries of the losses incurred during their period, and the subsequent beneficiary company cannot be entitled to the losses incurred by the earlier beneficiary company.*

*2. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in holding that the unabsorbed depreciation is not a loss but allowance under section 32 of the Act and directing the Assessing Officer to verify and allow the set off of brought forward losses of Rs. 10,90,40,397/- to the extent of unabsorbed depreciation, ignoring the decision in the case of CIT Vs. Shri Subhalaxmi Mills Ltd. 143 ITR 863 (Guj), wherein it is held that as far as depreciation allowance is concerned, the provision of section 79 cannot apply to unabsorbed depreciation allowance.”*



3. We have heard the rival contentions and gone through the facts and circumstances of the case. Briefly stated facts are that the assessee claim carry forward of business losses on account of set off of brought forward business losses including unabsorbed depreciation of Rs. 10,90,40,397/-, which was not allowed by the AO for the reason that the share holding pattern of the assessee company has changed up to 99.99% of the shares which was originally held by Abener Engineering & Construction, LLC it transferred to its 100% holding company Abener Energia, S.A. thus although transfer of shares during the year there was no change in the ultimate beneficiary shareholder which continue to be ultimate holding of Abener Energia, SA. Admittedly during the year under consideration the shareholding of the assessee company has changed beyond 51% as is mentioned in section 79 of the Act, here in the present case the change is up to 99.99% specifically, wherein Abener Energia, SA holding 99.99% of shares as originally held by M/s Abener Engineering & Construction, LLC as on 31.03.2012. The AO therefore, disallowed the carry forward of business losses of Rs. 10,90,40,397/- including the unabsorbed depreciation of Rs. 59,26,702/-. Aggrieved, assessee preferred the appeal before CIT(A). The CIT(A) relying on the decision of Hon'ble Supreme Court in the case of CIT vs. Subhulaxmi Mills Ltd. (2001) 249 ITR 795 (SC) vide order dated 20.09.1995 directed the AO to delete the disallowance of unabsorbed depreciation loss of Rs. 59,26,702/- after verification. For this, the CIT(A) observed as under: -

*“In this case, the shareholding of the assessee has changed entirely to the extent of 99.99% and hence, the provisions of section 79 of the Act are squarely applicable. Whilst the ultimate holding remains within the group. as held in various judicial pronouncements cited above, the corporate veil*



*cannot be lifted to see the ultimate owner. The losses are allowed to be carried forward u/s. 79 only if the beneficial shareholders are the same in the year in which the loss is incurred as well as the year in which the loss is carried forward.*

*Having said the above, I am of the view that the AO has rightly not allowed the carry forward of the losses.*

*The assessee has raised a without prejudice ground that the unabsorbed depreciation should be allowed as the same is not covered within the purview of section 79 of the Act.*

*The Hon'ble Apex Court in the case of CIT vs. Subhulaxmi Mills Ltd. [249 ITR 795] has held that section 79 of the Act applied only to business loss and not to unabsorbed depreciation. This principle has been subsequently followed in plethora of decisions.*

*The assessee has submitted that of the loss disallowed to be carried forward of Rs.10,9040,397, unabsorbed depreciation was Rs.59.26,702. I am of the view that unabsorbed depreciation is not a loss but allowance u/s 32 of the Act. Accordingly, I hereby hold that the assessee be allowed the carry forward of losses to the extent of unabsorbed depreciation after due verification is made by the AO. This ground of appeal is partly allowed."*

Aggrieved, now Revenue is in appeal before us.



4. We have heard the rival contentions and gone through the facts and circumstances of the case. We find that the CIT(A) has only directed the AO to delete the set off of unabsorbed depreciation of Rs. 59,29,702/- and not the set off of brought forward business losses of Rs. 10,90,40,397/-. We are of the view that this issue is squarely covered by the decision of Hon'ble Supreme Court in the case of Subhulaxmi Mills Ltd. (supra), wherein it is held as under: -

*"3. So far as question No. 2 is concerned, the question is whether in applying section 79 of the Act, only the business loss should be taken into account and not the unabsorbed depreciation or unabsorbed development rebate. The High Court has answered the question saying that when section 79 speaks of loss, it does not include unabsorbed depreciation or unabsorbed development rebate. We agree with the High Court."*

5. Respectfully following the same, we are of the view that the CIT(A) has rightly directed the AO to delete the disallowance of unabsorbed depreciation and hence, we find no infirmity in the order of CIT(A). The appeal of Revenue is dismissed.

6. **In the result, the appeal of Revenue is dismissed.**

Order pronounced in the open court on 08.05.2019.

Sd/-

(एन. के. प्रधान/ NK PRADHAN)

(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह / MAHAVIR SINGH)

(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 08.05.2019.

सुदीप सरकार, व.निजी सचिव / Sudip Sarkar, Sr.PS

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai