Hospital isn't an 'Industrial Undertaking' for purpose of carry forward of unabsorbed dep. in case of amalgamation

Summary – The Bangalore ITAT in a recent case of Healthcare Global Enterprises Ltd, (the Assessee) held that A hospital cannot be considered as an industrial undertaking under section 72A(7)(aa) and, thus, where amalgamating company was carrying on business of establishing and operating medical service centres, assessee's claim for carry forward of unabsorbed depreciation under section 72A, was rightly rejected by authorities below

Expenditure incurred by assessee in relation to increase in share capital being in nature of capital expenditure, could not be allowed as deduction under section 37(1)

Facts

- During relevant year, the Assessing Officer rejected assessee's claim of carry forward of unabsorbed depreciation under section 72A on ground that amalgamating company namely 'B' Ltd. was not an industrial undertaking as per provisions of said section.
- The Commissioner (Appeals) upheld the order of Assessing Officer.
- On second appeal:

Held

- From the provisions of section 72A, it comes out that in order to hold that the accumulated loss and the unabsorbed depreciation of the amalgamating company shall be deemed to be the loss of the amalgamated company, it has to be seen that it is the case of amalgamation of a company owning an industrial undertaking as has been defined as per clause (*aa*) of sub-section (7) of section 72A. As per this definition, it has to be seen that the undertaking should be engaged in manufacture or processing of goods. An undertaking to be considered as an industrial undertaking, the total activities of the undertaking should be that of manufacturing or processing of goods and even if the undertaking is engaged in some other activities also, the primary activity of the said undertaking should be that of manufacturing or processing of goods. As per the judgment of High Court rendered in respect of merger of 'B' Ltd. with the assessee company, it is noted that this company 'B' is having main object to carry on the business of establishing, developing, leasing, managing, operating and running of medical service centers such as nursing care homes, hospitals, polyclinics, health resorts, health clubs, in-patient and out-patient wards, laboratories, therapy units, theaters and allied consultation centers etc. amongst others.
- The assessee has furnished certain additional evidence being copy of order passed by the Commissioner of Central Excise. It was submitted that as per this order, it was held by the

Commissioner of Central Excise that in respect of FDG cleared by the assessee company, excise duty is payable. It was submitted that even excise duty is payable on some products being sold by the assessee and, therefore, it has to be accepted that the assessee is engaged in manufacture of goods or processing of goods.

- Regarding this contention, it is found that even if it is held that the assessee is engaged in small activity of some manufacturing also, it cannot be said that the assessee is an industrial undertaking because, as per the definition of term industrial undertaking as per clause (*aa*) of sub section (7) of section 72A, the primary activity of the assessee undertaking should be of manufacture and processing of goods and merely because a supporting or ancillary activity is such, it cannot be said that it is an industrial undertaking. Hence, even after considering the additional evidence, the assessee does not get any help.
- In the case of *Asstt. CIT* v. *Apollo Hospitals Enterprises Ltd.* [2008] 171 Taxman 397 (Mad.) the issue before High Court was the same as in the present case as to whether the hospital can be considered as an industrial undertaking under clause (*aa*) of sub-section (7) of section 72A. In that case, a scheme was approved to amalgamate 'DHCL', running a Hospital with the assessee company, *i.e.*, Apollo Hospitals Enterprises Ltd. and the issue in dispute was regarding the set off of unabsorbed depreciation on account of amalgamation of DHCL with Apollo Hospitals Enterprises Ltd. and it was held by High Court that neither Apollo Hospitals Enterprises Ltd. nor DHCL are industrial undertaking within the meaning of section 72A and, therefore, the set off of unabsorbed depreciation is not allowable. Following this judgment of High Court, the order of Commissioner (Appeals) cannot be interfered. Accordingly, this ground of assessee's appeal is rejected.