

आयकर अपीलीय अधिकरण "E" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 3416/Mum/2013

(निर्धारण वर्ष / Assessment Year : 2006-07)

आयकर अपील सं./I.T.A. No. 3417/Mum/2013

(निर्धारण वर्ष / Assessment Year : 2007-08)

आयकर अपील सं./I.T.A. No. 3418/Mum/2013

(निर्धारण वर्ष / Assessment Year : 2008-09)

आयकर अपील सं./I.T.A. No. 3419/Mum/2013

(निर्धारण वर्ष / Assessment Year : 2009-10)

Trade Wings Limited, 18/20-K, Dubash Marg, Fort, Mumbai - 400 023.	बनाम/ v.	Income Tax Officer - Ward 2(3)(3), Aayakar Bhavan, M.K. Marg, Mumbai - 400 020.
स्थायी लेखा सं./PAN : AAAC4639F		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by	Shri S.C. Tiwari & Ms. Rutiya Pawar
Revenue by :	Shri Ritesh Misra, DR

सुनवाई की तारीख / **Date of Hearing** : 02-03-2016

घोषणा की तारीख / **Date of Pronouncement** : 30-05-2016

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

All the four appeals are filed by the assessee company against four separate orders passed by learned Commissioner of Income Tax (Appeals) for the assessment years 2006-07 to 2009-10. These appeals were heard together and we decide them by this combined order for the sake of convenience.

First we shall take up assessee company appeal in ITA No 3416/Mum/2013 for the assessment year 2006-07.

3. The grounds of appeal raised by the assessee company in the memo of appeal filed with the Income Tax Appellate Tribunal, Mumbai (hereinafter called "the Tribunal") read as under:-

“1. Learned Commissioner of Income Tax - Appeal {CIT-(A)} has erred in confirming levy of penalty of Rs. 1,27,660/- U/s 271(1)(c) of the Act. On the facts and circumstances of the case and in law, the penalty levied ought to be deleted.

2. Without prejudice to the above, the Ld CIT-(A) has further erred in confirming the levy of penalty u/s 271(1)(c) of the Act, on account of disallowance of depreciation of Rs. 1,67,426/- on account of rent from running business centers was assessed as "income from house property" as against business income computed by the appellant. On the facts and circumstances of the case and in law, the penalty levied on disallowance of depreciation to the extent of Rs. 1,67,426/- ought to be deleted.”

4. The brief facts of the case are that the assessee company is engaged in the business of money changing, travel arrangement, freight forwarding, business centre and insurance agent.

5. During the course of the assessment proceedings u/s 143(3) read with Section 143(2) of the Act , the A.O. noticed that the assessee company had claimed depreciation on fixed asset amounting to Rs. 18,05,436/- which included depreciation on additions to fixed assets at different branches. The A.O. asked the assessee company to furnish necessary documentary evidences regarding the fixed assets, but the assessee company failed to furnish necessary documentary evidences. The A.O. disallowed the claim of the depreciation of the assessee company to the extent of Rs. 2,79,591/- in

respect to additions to the fixed assets, vide assessment orders dated 23.12.2008 passed by the AO u/s 143(3) of the Act.

Similar , disallowance of depreciation on additions to fixed assets were also made for the assessment year 2005-06, however, since the assessee company has not adjusted the opening balance of the written down value of the fixed assets. Hence, the A.O. made further disallowance of Rs. 62,439/- on account of depreciation , with respect to fixed purchased in the assessment year 2005-06 for which evidences were not submitted by the assessee company for purchase of fixed assets in the assessment year 2005-06 and disallowance of depreciation was made by the AO in the assessment year 2005-06 , was added back the same to the income of the assessee company in this assessment year, vide assessment orders dated 23.12.2008 passed by the AO u/s 143(3) of the Act.

The A.O. further observed that the assessee company had declared Rs. 36,81,539/- under the head 'Income from business or profession' as business income which is in the nature of the rent from letting out of the residential premises, therefore, the A.O. treated the rental receipts as 'income from house property' by following the stand taken by the Revenue for the assessment year 2005-06. The A.O. further observed that the residential premises were used for accommodation and not for the business purpose. The A.O. accordingly disallowed the claim of depreciation amounting to Rs. 1,67,426/- on these rented accommodations as now these rental income are assessed to tax under the head 'Income from House Property' instead of under the head 'Income from Business or Profession' and added the same to the income of the assessee company and the total addition on account of depreciation was made to the income of the assessee to the tune of Rs. 5,09,456/- , vide assessment orders dated 23.12.2008 passed by the AO u/s 143(3) of the Act. The A.O. noted that the assessee company has concealed its income by

furnishing inaccurate particulars of taxable income and thereby initiated penalty proceedings u/s 271(1)(c) of the Act.

The assessee company filed first appeal before the learned CIT(A) in quantum assessment additions made by the AO as stated above which appeal was dismissed by learned CIT(A) vide orders dated 16.02.2010.

During the penalty proceedings u/s 271(1)(c) of the Act, the assessee company submitted that the documentary evidences in respect of the addition to the fixed assets could not be produced from its various branches spread all over the country. The assessee company submitted that the statutory auditors in their report u/s 44AB of the Act did not make any adverse comments regarding the details of additions to the fixed assets and penalty u/s 271(1)(c) of the Act cannot be levied merely on the reason that there were non-production of documentary evidences. The assessee company relied on the decision of Chennai Tribunal reported in Gem Granites (Karnatka) v. DCIT (2009)120 TTJ 992(Chennai. Trib.). The assessee company submitted that merely because the learned CIT(A) has confirmed the quantum assessment additions, penalty cannot be levied as the Revenue has to prove the onus that the assessee has concealed particulars of income or furnished in-accurate particulars of income. The assessee company submitted that the assessee company has brought forward losses, hence, the income is assessable u/s 115JB of the Act and under these circumstances no penalty u/s 271(1)(c) of the Act is leviable. The assessee company relied on the decision of Hon'ble Delhi High Court reported in CIT v. Nalwa Sons Investment Limited (2010) 327 ITR 543(Del. HC) wherein it was held that where the total income computed under regular provisions is less than book profit and assessment is made u/s 115JB of the Act, no penalty is exigible. The assessee company further submitted that the AO stated in its assessment orders u/s 143(3) of

the Act that depreciation will be allowed in respect of additions to the fixed assets on production of documentary evidences.

The A.O. after considering the submissions of the assessee company, rejected the contentions of the assessee company and held that the onus was on the assessee company to prove that the depreciation claimed was correct by filing relevant documents in the form of bills and vouchers, but the assessee company failed to do the same. The AO observed that even during the penalty proceedings u/s 271(1)(c) of the Act, the assessee company failed to produce the bills/vouchers in support of his claim of depreciation on the fixed assets. The A.O. relied on the decision of Hon'ble Supreme Court in the case of UOI v. Dharmendra Textiles Processors and Others v. UOI , (2008) 306 ITR 277 (SC). The AO further observed that the learned CIT(A) also confirmed the addition made by the A.O. in the quantum assessment as the assessee company could not produce the details/evidences of additions to the fixed asset. The A.O. observed that the assessee company is in the habit of not producing the details of additions in respect of fixed assets and the assessee company has filed inaccurate particulars of income which resulted into evading of tax liability. The A.O. relied on the decision of Hon'ble Kerala High Court in the case of CIT v. India Sea Food, (1976) 105 ITR 708(Ker.) and in the case of Gates Foam & Rubber Company, (1973)91 ITR 467 (Ker.-HC). The A.O. accordingly levied penalty u/s 271(1)(c) of the Act amounting to Rs. 1,71,482/- , vide penalty orders dated 31-03-2011.

6. Aggrieved by the penalty orders dated 31-03-2011 passed by the A.O. u/s 271(1)(c) of the Act, the assessee company filed first appeal before the learned CIT(A).

7. Before the learned CIT(A), the assessee company submitted that the tax auditors have verified and certified the additions to the fixed assets u/s 44AB

of the Act and it cannot be said that the assessee company has produced inaccurate particulars of income. The assessee company submitted that after the completion of the assessment proceedings u/s 143(3) read with Section 143(2) of the Act, the assessee company submitted the evidences for purchase of fixed assets and the disallowance has been reduced by the AO by passing rectification orders u/s 154 of the Act. The learned CIT(A) observed that the assessee company has failed to produce the documents with respect to the addition on fixed assets. The auditors certificate is not a conclusive factor as otherwise there was no requirement for legislature to give powers and duties to the A.O. to make scrutiny and assess the income of the assessee company. The learned CIT(A) observed that the addition to the income on account of depreciation has been made due to non production of evidences with respect to additions to the fixed asset.

With respect to the income declared from the rent received from letting out of residential premises which was given on rent for residential purposes and the assessee company declared the said rental income as business income and claimed depreciation is without any basis and hence the learned CIT(A) confirmed the penalty order passed by the A.O. u/s 271(1)(c) of the Act, vide appellate orders dated 15-03-2013 passed by the learned CIT(A)

8. Aggrieved by the appellate orders dated 15-03-2013 passed by the learned CIT(A), the assessee company is in appeal before the Tribunal.

9. The learned Counsel for the assessee company submitted that the depreciation claimed of Rs. 2,79,591/- has been disallowed by the A.O. for want of production of bills/vouchers . The learned Counsel submitted that the assessee company has got relief with respect to the assessment framed u/s 143(3) of the Act , vide rectification order passed by the AO u/s 154 of the Act by producing evidences with respect to additions of fixed assets before

the A.O. , whereby relief was granted by the AO of Rs. 1,30,191/- vide orders u/s 154 of the Act dated 27th August, 2012 and to that extent the assessee company is entitled for relief for penalty u/s 271(1)(c) of the Act. It was submitted by the learned Counsel for the assessee company that the assessee company is a leading travel agency having branches all over the country. The assessee company's business has been not doing well and there were losses suffered by the assessee company and hence the assessee company was not able to produce the bills/vouchers with respect to the fixed assets purchased during the year. The depreciation with respect to the fixed assets purchased in the earlier year has been disallowed to the extent of Rs. 62,439/-.

The learned Counsel submitted that the assessee company has declared the rental income as business income under the head 'income from business or profession' and claimed depreciation, which rental income has been brought to tax under the head 'income from house property' and hence claim of depreciation was not allowed. The ld. Counsel submitted that the learned CIT(A) has confirmed the orders of the A.O. in quantum assessment proceedings and income has been assessed to tax under the head 'income from house property'. The ld. Counsel submitted that the A.O. has relied on the decision of Zoom Communications Limited(2010) 191 taxman 179(Del) and Dharmendra Textiles Processors(supra). The ld. Counsel relied on the decision of Hon'ble Supreme Court in the case of CIT v. Reliance Petroproducts Pvt. Ltd. [2010] 322 ITR 158 (SC) and submitted that all particulars have been submitted and there is no concealment of income or furnishing of inaccurate particulars of income by the assessee company. The ld. Counsel also relied on the decision of the Hon'ble Supreme Court in the case of UOI v. Rajasthan Spinning & Weaving Mills [2009] 23 DTR 158 (SC) and other decisions of Hon'ble Bombay High Court in the case of CIT v. M/s S.M. Construction , ITXA No. 412 of 2013 Bom. HC and CIT v. Dalmia Dychem Industries Ltd.[2015] 279 CTR 0133 (Bom. HC) and the decision of

Hon'ble Rajasthan High Court in the case of Anoopgarh Kraya Vikraya Sahakari Samiti Ltd. v. ACIT, [2015] 374 ITR 0558 (Raj. HC).

10. The ld. D.R., on the other hand, submitted that the primary onus is on the assessee company to produce the evidences with respect to the purchase of fixed assets. The onus has not been discharged by the assessee company. He further relied upon the orders of authorities below and the decision of the Tribunal in the case of M/s Times Guaranty Ltd. v. ACIT in ITA No. 1681/Mum/2007 for the assessment year 1993-94 dated 10th October, 2014.

11. We have considered the rivals contentions and perused the material available on record and the case laws relied upon by both the sides. We have observed that the assessee company is in the business of travel agency having branches all over the country. The assessee company was incurring losses in its business and income has been stated to be brought to tax under the provisions of minimum alternate tax u/s 115JB of the Act. The assessee company had made claim for the purchase of fixed assets and assessee company has claimed depreciation on the said fixed assets. The quantum assessment was framed u/s 143(3) of the Act which has been confirmed by the learned CIT(A). The assessee company has accepted the quantum additions made in scrutiny assessment which was confirmed by learned CIT(A). The assessment order u/s 143(3) of the Act was also amended u/s 154 of the Act vide orders 12th August, 2012, whereby relief of Rs.1,30,191/- was granted by the AO vide orders u/s 154 of the Act dated 27th August, 2012. It is observed that the assessee company has not produced documentary evidence in support of its claim since earlier years whereby similar addition was made to the fixed assets. Similarly, it is observed that the assessee company has declared rental income as business income which is not accepted by the Revenue and brought to tax under the head 'Income from House Property'. The properties were given on rent for residential

purposes and godown. The assessee company has expressed its inability to produce the invoices with respect to the purchase of new fixed assets during the previous year relevant to the assessment and has claimed that it is due to losses incurred in the business of the assessee company which is spread across the country, it was not possible to collect the evidences from all the branches due to administrative reasons. In our considered view, it is incumbent on the assessee company to discharge the primary onus cast upon it by bringing on record the necessary evidences to sustain the claim which the assessee company has made by claiming deduction from income in the return of income filed with the Revenue which the assessee company was not able to produce before the authorities and hence the additions were rightly made by the AO in quantum assessment proceedings. The question before us is with respect to the leviability of the penalty u/s 271(1)(c) of the Act for furnishing of in-accurate particulars of income and whether the explanation offered by the assessee is bona-fide or not to take it out of clutches of penalty provisions u/s. 271(1)(c) of the Act. The assessee company explained that there is heavy loss incurred by the assessee in its business and even the tax is computed to be payable under the provisions of 115JB of the Act as against under the normal provisions of the Act. We have observed that the CBDT has come out with circular no 25/2015 dated 31-12-2015, whereby the CBDT stated that it is now a settled position that prior to 1-4-2016, where the income tax payable on the total income as computed under the normal provisions of the Act is less than the tax payable on the book profits u/s 115JB of the Act, then penalty under section 271(1)(c) of the Act, is not attracted with reference to additions /disallowances made under normal provisions. It is further clarified that in cases prior to 1-4-2016, if any adjustment is made in the income computed for the purpose of MAT, then the levy of penalty u/s 271(1)(c) of the Act, will depend on the nature of adjustment. The afore-stated circular is reproduced below:

“SECTION 115JB, READ WITH SECTIONS 115JA AND 271(1)(c), OF THE INCOME-TAX ACT, 1961 - MINIMUM ALTERNATE TAX - PENALTY UNDER SECTION 271(1)(c) WHEREIN ADDITIONS/DISALLOWANCES MADE UNDER NORMAL PROVISIONS OF THE SAID ACT BUT TAX LEVIED UNDER MAT PROVISIONS UNDER SECTIONS 115JB/115JC, FOR CASES PRIOR TO ASSESSMENT YEAR 2016-17

CIRCULAR NO.25/2015 [F.NO.279/MISC./140/2015/ITJ],

DATED 31-12-2015

Section 115JB of the Act is a special provision for levy of Minimum Alternate Tax on Companies, inserted by Finance Act, 2000 with effect from 1-4-2001.

2. Under clause (iii) of sub-section (1) of section 271 of the Act, penalty for concealment of income or furnishing inaccurate particulars of income is determined based on the "amount of tax sought to be evaded" which has been defined inter-alia, as the difference between the tax due on the income assessed and the tax which would have been chargeable had such total income been reduced by the amount of concealed income or income in respect of which inaccurate particulars had been filed.

3. In this context, Hon'ble Delhi High Court in its judgment dated 26-8-2010 in ITA No.1420 of 2009 [2010] 194 taxman 387 (Delhi) in the case of Nalwa Sons Investment Ltd. (available in NJRS as 2010-LL-0826-2), held that when the tax payable on income computed under normal procedure is less than the tax payable under the deeming provisions of section 115JB of the Act, then penalty under section 271(1)(c) of the Act

could not be imposed with reference to additions / disallowances made under normal provisions. The judgment has attained finality.

4. *Subsequently, the provisions of Explanation 4 to sub-section (1) of section 271 of the Act have been substituted by Finance Act, 2015, which provide for the method of calculating the amount of tax sought to be evaded for situations even where the income determined under the general provisions is less than the income declared for the purpose of MAT u/s **115JB** of the Act. The substituted Explanation 4 is applicable prospectively w.e.f. 1-4-2016.*

5. *Accordingly, in view of the Delhi High Court judgment and substitution of Explanation 4 of section 271 of the Act with prospective effect, it is now a settled position that prior to 1-4-2016, where the income tax payable on the total income as computed under the normal provisions of the Act is less than the tax payable on the book profits u/s **115JB** of the Act, then penalty under section 271(1)(c) of the Act, is not attracted with reference to additions / disallowances made under normal provisions. It is further clarified that in cases prior to 1-4-2016, if any adjustment is made in the income computed for the purpose of MAT, then the levy of penalty u/s 271(1)(c) of the Act, will depend on the nature of adjustment.*

6. *The above settled position is to be followed in respect of section 115JC of the Act also.”*

We have observed that the assessee company did raised this contention before the AO that in view of decision of Hon'ble Delhi High Court in the case of Nalwa Sons Investments Limited(supra) , the tax-payer is not liable to penalty u/s 271(1)(c) of the Act as the tax is payable on the income computed

u/s 115JB of the Act and not under the normal provisions of the Act as there are losses including carried forward of accumulated losses . The similar plea of non-leviability of penalty u/s 271(1)(c) of the Act on the grounds that the assessee company was charged to tax u/s 115JB of the Act owing to losses under the normal provisions of the Act was raised by the assessee company based on the decision of Hon'ble Delhi High Court in the case of Nalwa Sons Investments Limited(supra) before the AO, which contention was rejected by the AO at threshold in limine without any discussion and nothing is coming from the orders of the AO and records produced before us about the substantiation of the claim of the assessee. The assessee company abandoned this plea and did not raised this plea before the learned CIT(A) or in the grounds of appeal raised before the learned CIT(A) . The afore-said plea of non-leviability of penalty u/s 271(1)(c) of the Act as the assessee company was charged to tax u/s 115JB of the Act owing to losses under the normal provisions of the Act is raised by the assessee company before us based on the decision of Hon'ble Delhi High Court in the case of Nalwa Sons Investments Limited(supra) and in our considered view keeping in view the facts and circumstances of the case as emerging from the records before us , In the interest of justice this matter is to be set aside and restored to the file of the AO for de-novo determination of the issue after considering the replies of the assessee company and the evidences on merits regarding substantiation of the claim of the assessee company in the light of circular no 25/2015 dated 31.12.2015 issued by the CBDT . Needless to say that proper and adequate opportunity of being heard will be provided to the assessee company by the AO in accordance with principles of natural justice in accordance with law. In any case , we also hold that the assessee company will be entitled for getting relief on account of penalty levied u/s 271(1)(c) of the Act to the extent assessment order u/s. 143(3) of the Act stood modified by the orders u/s. 154 of the Act dated 27.08.2012 whereby the assessee

company got relief of Rs.1,30,191/- in quantum additions in scrutiny assessments u/s 143(3) of the Act. We order accordingly.

The assessee company had properties which were rented out for residential purposes. The assessee company has claimed the same as business income under the head 'Income from Business or Profession' while the AO has assessed the same under the head 'Income from House Property'. The assessee company has come forward and relied upon the 'object clause' in the Memorandum of Association of the assessee company to contend that the business of the assessee company was to let out and rent properties of the assessee company which is placed at page 16 of the paper book filed by the assessee company with respect to appeal for the assessment year 2008-09. The assessee company had submitted that the claim made by the assessee company was a right and bona-fide claim relying upon recent decision of Hon'ble Supreme Court in the case of Chennai Properties & Investments Ltd. v. CIT, [2015] 373 ITR 0673 (SC). The assessee company submitted that the assessee company made a bona fide claim by claiming of rental income as business income. The assessee company had submitted that the depreciation has been rightly claimed on these residential properties although the said claim has not been allowed by the Revenue authorities, which has also been accepted by the assessee company but that will not make the assessee company exigible to penalty u/s 271(1)(c) of the Act. The complete particulars of income were furnished was the contention of the assessee company. In our considered view and based on facts and circumstances of the case, the assessee company had given a bona-fide explanation to substantiate the claim of depreciation made by the assessee company with respect to the rented properties although the revenue has not accepted the explanation of the assessee company. In our considered view keeping in view facts and circumstances of the case, the assessee company's case is squarely covered by the decision of Hon'ble Supreme Court in the case of Reliance

Petroproducts Private Limited(supra) . In our considered view, the assessee company has not furnished inaccurate particulars of income making it liable for penalty u/s 271(1)(c) of the Act as the assessee company duly declared all the income earned on rental income albeit under the head 'Income from business or profession' although the claim of the assessee company did not found favour with the Revenue , will not make the assessee company exigible to penalty u/s 271(1)(c) of the Act as the explanation offered by the assessee company is bonafide and a plausible explanation albeit not accepted by the Revenue , keeping in view the decision of Hon'ble Supreme Court in the case of Reliance Petroproducts Private Limited(supra) and more so with the recent decision of Hon'ble Supreme Court in the case of Chennai Properties & Investments Ltd. v. CIT, [2015] 373 ITR 0673 (SC) , it could not be said that this claim of the assessee company to bring rental income as income from business as against income from house property was ex-facie wrong and unsustainable . Thus in view of our above stated discussions and reasoning as set-out above, we order deletion of penalty levied by the AO and confirmed by the learned CIT(A) on this ground. We order accordingly.

12. In the result appeal of the assessee company in ITA No. 3416/Mum/2013 for the assessment year 2006-07 is partly allowed as indicated above.

Now we shall take up assessee company's appeal in ITA No 3417/Mum/2013 for the assessment year 2007-08.

13. The grounds of appeal raised by the assessee company in this appeal read as under:-

“1. Learned Commissioner of Income Tax - Appeal {CIT -(A)} has erred in confirming levy of penalty of Rs. 2,24,468/- u/s 271(1)(c) of the Act. On the facts and circumstances of the case and in law, the penalty levied ought to be deleted.

2. Without prejudice to the above, the Ld CIT-(A) has further erred in confirming the levy of penalty u/s 271(1)(c) of the Act, on account of disallowance of depreciation of Rs. 3,24,092/- on account of rent from running business centers was assessed as "income from house property" as against business income computed by the appellant. On the facts and circumstances of the case and in law, the penalty levied on disallowance of depreciation to the extent of Rs. 1,67,426/- ought to be deleted.

3. Without prejudice to the ground no. 1 & 2 above, no penalty u/s 271(1)(c) of the Act, can be levied in respect of the disallowance made by the Assessing Officer, as the appellant had paid the tax on deemed income under the provision of section 115JB of the Act. On the facts and circumstances of the case and in law, the penalty levied ought to be deleted.”

14. Our decision in ITA No. 3416/Mum/2013 for the assessment year 2006-07 shall apply mutatis-mutandis to this appeal namely ITA No. 3417/Mum/2013 as the issue involved in both these appeals are identical. We order accordingly.

15. In the result appeal of the assessee company in ITA No. 3417/Mum/2013 for the assessment year 2007-08 is partly allowed as indicated above.

Now we shall take up assessee company's appeal in ITA No 3418/Mum/2013 for the assessment year 2008-09.

16. The grounds of appeal raised by the assessee company in this appeal read as under:-

“1. Learned Commissioner of Income - Tax (Appeals) (CIT-(A)) has erred in confirming the action of the Assessing Officer (AO) in reopening the assessment u/s 147 of the Income Tax Act, 1961 (Act) by holding that income has escaped assessment. There being no escapement of income and the assessment not having

been validly reopened, order passed u/s 143(3) read with section 147 of the Act ought to be quashed.

2. Learned CIT -(A) has erred in confirming the action of the AO in assessing income from renting office buildings of Rs.31,18,399/- as "Income from house property" instead of "Income from Business or Profession" on the ground that residential premises/godowns were let out for purely accommodation purpose and not for the purpose of running business centres. On the facts and circumstances of the case, the said rental income ought to be assessed under the head "Income from Business and profession".

3. The Ld CIT-(A) has erred in confirming the action of AO in disallowing depreciation amounting to Rs.42,014/- claimed by the appellant on certain additions made to fixed assets on the basis that proof of purchase was not submitted. On the facts and in the circumstances of the case, the disallowance made ought to be deleted.

4. The Ld CIT-(A) has erred in confirming the action of AO in making an ad-hoc disallowance of Rs.9,14,877/- being 10% of the general expenses of Rs.91,48,771/- on the ground of non production of supporting bills/ vouchers / ledger a/c. etc. On the basis of facts and in the circumstances of the case, the disallowance made ought to be deleted.”

17. The brief facts involved in this appeal are that the return of income was filed by the assessee company on 3rd October, 2008 with the Revenue declaring loss of Rs. 75,70,438/-. The return of income was processed by the Revenue u/s 143(1) of the Act on 25th June, 2009 accepting the returned income. Subsequently, the case of the assessee company was reopened and notice issued u/s 148 of the Act to the assessee company on 25th October, 2010 which was duly served on the assessee company after recording the following reasons:-

“Return of Income for A. Y.2008-09 has been filed on 03.10.2008 showing Nil income and claiming refund of Rs.20,51,024/-. The computation of income enclosed with return of income shows income from house property at Nil and income from business also at Nil. Current year's business loss of Rs.75,70,438/- has been claimed. The final accounts enclosed with the return of income shows that the assessee is in receipt of rent income of Rs.30,03,068/- (schedule K of P&L account). In this case in A. Y. 2007-08 the assessee had shown similar rental income of Rs.46,80,864/- under the head, 'Misc. Income' which was offered to tax 'under the head, 'business' and while computing the order u/s 143(3) this rental income was assessed as 'income from house property', which was claimed under the head business leading to the assessee disclosing a substantially lower income at Rs.NIL as against income assessed at Rs.13,30,275/-. The assessee filed an appeal against the assessment which was dismissed by the then CIT(A).

A similar situation existed in AY 2006-07 wherein the assessee had shown rental income of Rs.29,52,451/- under the head business income and depreciation was claimed on this property. The claim of income under the head business income was disallowed while assessing the income u/s 143(3) of the IT Act and the same was assessed under the head, house property at Rs.5,79,244/-.

In view of the above facts, I am of the opinion that income has escaped assessment within the meaning of Section 147 of the Act for which notice u/s 148 is being issued."

18. The assessee company vide letter dated 8th November, 2010 requested to consider the return of income filed with the Revenue on 3rd October, 2008 to be treated as a return of income filed in response to the notice issued u/s 148 of the Act . The assessee company also requested the AO to provide the reasons recorded for reopening of the assessment which was duly provided to the assessee company by the AO vide letter dated 30th November, 2010. On perusal of the P&L account of the assessee company, it was noticed by the AO that the assessee company has credited an amount of Rs. 30,03,068/- as rental income for residential premises. For the assessment years 2005-06 to

2007-08 similar receipts were treated by the Revenue as 'Income from house property' , and the same were confirmed by the learned CIT(A) in the first appeal filed by the assessee company. The assessee company was confronted as to why the same should not be disallowed as business receipts and be brought to tax under the head 'Income from house property'. Detailed break-up was given by the assessee company from where it was clear that the residential premises/godown were let out for purely accommodation purposes and not for the purpose of running business centers, thus as per the AO , the income from this activity falls under the head 'Income from house property'. The depreciation claimed by the assessee on such property was disallowed by the AO and added back to the business income of the assessee company. Accordingly, maintenance charges of Rs. 5,43,797/- was disallowed and added to the income of the assessee company and a sum of Rs. 37,06,221/- was assessed to tax as 'Income from house property' and brought to tax accordingly by the AO. However, standard deduction u/s 24 of the Act was allowed by the Revenue. A sum of Rs. 54,667/- incurred towards property tax debited to the P&L account was added to the business income of the assessee company and allowed as deduction under the head 'Income from house property' by the AO vide assessment orders dated 16.12.2011 passed by the AO u/s. 143(3) read with Section 147 of the Act.

Similarly, it was observed by the A.O. that the assessee company has claimed depreciation on fixed assets of a sum of Rs. 26,91,259/- which included depreciation on addition to fixed assets at various branches. The assessee company was asked to furnish the evidences of additions to fixed assets . The assessee company furnished the evidences, however, some of the bills were not produced and a total amount of depreciation of Rs. 42,014/- was disallowed by the AO and added back to the income of the assessee company which was agreed upon by the assessee company, vide assessment orders

dated 16.12.2011 passed by the AO u/s. 143(3) read with Section 147 of the Act.

It was further observed by the A.O. from the P&L account for year ended on 31st March, 2008 that the assessee company has debited an amount of Rs. 91,48,771/- under the head general expenses. The assessee company was asked to provide the documentary evidence to prove the genuineness of the general expenditure of Rs.91,48,771/- .The assessee company could not produced the details called for by the AO w.r.t. to claim of general expenditure of Rs.91,48,771/- . The assessee company submitted that the assessee company's business have many branches all over the country and there was an administrative inconvenience to collect the details from all the branches. The A.O., however, allowed to produce the documentary evidence as and when they are available before the expiry of the statutory time limit to rectify the assessment and 10% of the claim of the general expenses of Rs.91,48,771/- , amounting to Rs. 9,14,877/- was disallowed by the AO and added back to the income of the assessee company, vide assessment orders dated 16.12.2011 passed by the AO u/s. 143(3) read with Section 147 of the Act.

19. Aggrieved by the assessment orders dated 16.12.2011 of the A.O. passed u/s. 143(3) read with Section 147 of the Act. , the assessee company has filed its first appeal before the learned CIT(A).

20. The learned CIT(A) held that re-opening of the assessment was done within four years from the end of assessment year. No assessment has been made u/s 143(3) of the Act and an intimation u/s 143(1) of the Act is not an assessment order as has been held by Hon'ble Supreme Court in the case of ACIT v. Rajesh Jhaveri Stock Brokers (P) Ltd., (2007) 291 ITR 500(SC) . Income of the assessee has escaped assessment as per Explanation 2, clause

(c) (ii) of section 147 of the Act , as by showing rental income as business income, the income of the assessee company was made the subject of excessive relief under the Act . The A.O. has recorded the reasons and the same were provided to the assessee company. The A.O. has followed all the procedures for reopening of the assessment, hence, the action of the A.O. with respect to the reopening of assessment u/s 148 of the Act was held to be valid by the learned CIT(A) vide appellate orders dated 27.02.2013.

With respect to the treating rental income by the AO as 'income from house property' against the 'income from business' as shown by the assessee company, it was observed by the learned CIT(A) that for the assessment years 2005-06 to 2007-08 , similar receipts were treated as 'Income from house property' and the same were confirmed by the learned CIT(A) for the assessment year 2007-08. The learned CIT(A) held that letting out house property and godown cannot be treated as business income and the action of the A.O. to treat the rental income chargeable to tax under the head 'income from house property' was held to be valid by the learned CIT(A) vide appellate orders dated 27.02.2013.

With respect to the disallowance of depreciation of Rs. 42,014/-, the assessee company could not produce bills/invoices to establish the purchase of assets, on which depreciation was claimed. The assessee company submitted that it has given 97% of bills and vouchers which were produced and only small portion were not produced for which the A.O. cannot deny the assessee company's claim. The fixed assets have been verified by the auditors. The learned CIT(A) rejected the contention of the assessee company and held that it was incumbent on the assessee company to produce the documents/evidences which the assessee company failed to do so and hence the A.O. has rightly made the additions, as held by the learned CIT(A) vide appellate orders dated 27.02.2013.

With respect to the addition of Rs. 9,14,877/- being 10% out of general expenses of Rs.91,48,771/- , the assessee company submitted that the accounts were audited and the auditors have not made any objection. To support this contention, the assessee company relied upon the decision of Hon'ble Punjab & Haryana High Court in the case of CIT v. SSP Pvt. Ltd. The learned CIT (A), however, held that the auditors certificate cannot be accepted as the A.O. has been given statutory duties and powers to scrutinize and make the assessment. The learned CIT(A) relied upon the decision of Hon'ble Rajasthan High Court in the case of Jaipur Electro Private Limited v. CIT 134 CTR 237(Raj.) The learned CIT(A) held that the A.O. has the right and duty to enquire about the expenditure. The learned CIT(A) accordingly upheld the order of the A.O. vide appellate orders dated 27.02.2013.

21. Aggrieved by the appellate orders dated 27.02.2013 of the learned CIT(A), the assessee company is in appeal before the Tribunal.

22. The learned Counsel for the assessee company submitted that the case was reopened u/s 147/148 of the Act. The return of income was processed by the Revenue u/s 143(1) of the Act. The learned Counsel for the assessee company submitted that the assessee company has given written submission before the learned CIT(A) which may be taken on record vide paper book page No. 113 to 115 with respect to re-opening of the assessment u/s 147/148 of the Act. With respect to the second ground, the learned Counsel for the assessee company submitted that the assessee company's rental income from letting out residential premises and godown has been assessed to tax under the head 'Income from house property' instead of 'Income from business'. The learned Counsel for the assessee company submitted that the assessee company is running a travel agency and the properties owned and held by the assessee are let out for residential and godown purposes. The

A.O. erred in bringing to tax the rental income under the head 'income from house property', while the same is chargeable to tax under the head 'Income from Business or profession'. The assessee company is a part of Mittal Builders group. The assessee company bought these properties as investment pending realization of the property on sale. The assessee company has given the property on rent although the assessee company's main business is travel agency. The learned Counsel drew our attention to the Memorandum of the Association of the company wherein the object clause which is placed in paper book page 16, the activity of letting out of property is listed as one of the objects of the assessee company and the learned counsel for the assessee company contended that the assessee company is in the business of giving properties on rent. The learned Counsel for the assessee company relied upon the decision of Hon'ble Supreme Court in the case of Chennai Properties & Investments Ltd. v. CIT, [2015] 373 ITR 0673 (SC). Similar plea was raised before the learned CIT(A) that the assessee company is doing the business of renting properties. The learned Counsel submitted that the assessee company is a very old company incorporated in the year 1949 and the objects are placed in paper book page 16, whereby letting out of properties is listed as one of the objects for which company was formed and entitled to carry out business. The learned CIT (A) just followed the earlier year orders and rejected the claim of the assessee company

With respect to ground No. 3, the ld. Counsel for the assessee company submitted that the depreciation has been disallowed amounting to Rs. 42,014/-. The assessee company has produced 97% of the bills and vouchers and only 3% of the vouchers could not be produced. The learned counsel for the assessee company submitted that the assessee company's business is not doing well and incurring losses, hence the vouchers could not be collected from all the branches due to administrative difficulties.

With respect to the ground No. 4 regarding addition of Rs. 9,14,877/-, it was submitted that the ld. CIT(A) confirmed disallowance of 10% of the expenses as made by the AO, which disallowance is on very higher side and the assessee company requested for reduction/deletion of the additions so made by the Revenue.

23. The learned D.R. submitted that the assessee company has now claimed that it is letting out the properties as per the object clause incorporated in the memorandum, as claimed by the learned counsel for the assessee company and hence, the matter can be set aside to the file of the A.O. for examination and verification of this claim of the assessee company. The learned DR relied upon the orders of the authorities below.

24. We have heard the rival contentions and also perused the material available on record including case laws. We have observed that the assessee company is a travel agent having business all over the country. The assessee company is in losses as per the return of income filed with the Revenue. The assessee company has given eight properties on rent mainly for residential and godown purposes. The assessee company during the proceedings before us claimed that the decision of Hon'ble Supreme Court in the case of Chennai Properties & Investments Ltd.(supra) is squarely applicable in its case. The assessee's company's contention is that its main business as reflected in the object clause of Memorandum of Association is letting out of the properties, which object clause in Memorandum of Association of the company is placed in paper book page No. 16 filed with the Tribunal. In view of and in light of the decision of Hon'ble Supreme Court in the case of Chennai Properties & Investments Ltd. (supra), the claim and contentions of the assessee company needs examination and verification by the authorities below whether the assessee company is actually engaged in the business of letting out of properties or not?. In this regard based on the facts and circumstances of

the case and in the interest of justice, we deem it fit to set aside and restore the issue to the file of the A.O. for de-novo determination of the issue on merits after examination and verification of the claims and contentions of the assessee company that whether the assessee company is engaged in the business of letting out properties or not, in the light of decision of Hon'ble Supreme Court in the case of Chennai Properties and Investments Limited(supra). Needless to say that the assessee company be given sufficient and proper opportunity of being heard in accordance with principles of natural justice and in accordance with law. We order accordingly.

With respect to the claim of the assessee regarding disallowance of depreciation amounting to Rs. 42,014/- on purchase of new fixed assets whereby the assessee company failed to produce evidences to substantiate its claim of purchase of new fixed assets, we find that no documentary evidence has been produced by the assessee company to prove the genuineness of the purchases of new fixed assets. It is incumbent upon the assessee company to have produced the evidences to the satisfaction of the Revenue as the claim of deduction of the expenses in the return of income has been made by the assessee company and primary onus to prove its claim in return of income lay on the assessee company , which the assessee company failed to do so. In earlier years also, similar addition has been made and the assessee company has accepted these additions on confirmation of the additions by the learned CIT(A) after the first appeal stood dismissed by the learned CIT(A) against the quantum additions. In view of our above discussions and reasoning, addition of Rs.42,014/- towards disallowance of depreciation on purchase of new fixed assets , to the income of the assessee company needs to be confirmed/ sustained. We find no infirmity in the orders of the learned CIT(A) which we confirm/sustain. We order accordingly.

With respect to the addition of Rs. 9,14,877/- out of general expenses being 10% of the general expenses of Rs.91,48,771/- on account of failure of the assessee company to produce the documentary evidences, bills etc, we find that the assessee company is not able to produce the documentary evidences i.e. invoices and vouchers for such general expenditure incurred by the assessee company on the pretext that the assessee company's business is at many branches all over the country and there was an administrative inconvenience to produce these evidences and also owing to losses incurred by the assessee company. Since, the assessee company is not able to produce any detail with respect to the amount of general expenses of Rs. 91,48,771/- claimed by the assessee company in the return of income filed with the Revenue, the disallowance of 10% of the general expenses was made by the AO which was confirmed by the learned CIT(A) in the first appeal. It is incumbent upon the assessee company to have produced the evidence to the satisfaction of the AO , as the claim of deduction of the general expenses of Rs.91,48,771/- from the income of the assessee company in the return of income has been made by the assessee company and the primary onus to prove its claim in return of income lay on the assessee company , which the assessee company failed to do so in the instant case. In our considered view based on facts and circumstances of the case, the disallowance of 10% of general expenses is quite reasonable keeping in view peculiar facts and circumstances of the case and we confirm the afore-stated disallowance. We find no infirmity in the orders of the learned CIT(A) which we confirm/sustain. We order accordingly.

With respect to the contentions of the assessee company regarding re-opening of the assessment, we have observed that the assessee company filed its return of income which was processed u/s 143(1) of the Act. No scrutiny assessment was framed by the Revenue u/s 143(3) of the Act. The Revenue has reopened the assessment within four years from the end of the

assessment year. The reopening has been done based upon the rental income offered to tax as business income was brought to tax by the Revenue under the head 'Income from House Property' in the preceding year i.e. assessment year 2007-08 leading to income assessed at Rs.13,30,275/- as against the disclosure of substantially lower income at NIL . The assessee company filed appeal for the assessment year 2007-08 with the learned CIT(A) which was dismissed by the learned CIT(A). Similar and identical was the position for the assessment year 2006-07 with respect to the treatment of rental income and consequentially escapement of income . In our considered view, there is a tangible information/material which has come to the possession of A.O. having close nexus and live link with the formation of belief by the AO that income has escaped assessment based on which he has formed reason to believe that income has escaped assessment. Earlier, the Revenue has processed the return u/s 143(1) of the Act. No scrutiny assessment has been made u/s 143(3) of the Act. There is no opinion which was formed by the A.O. earlier and thus there is no question of any change of opinion. The reasons recorded were duly furnished to the assessee company by the Revenue. In our considered view, we do not find any irregularity or infirmity in the re-opening of the assessment by the Revenue in the instant case u/s 147/148 of the Act based on our discussions and reasoning above, hence, we uphold the decision of ld. CIT(A) in which we have found no infirmity. We order accordingly.

25. In the result , appeal of the assessee company in ITA No. 3418/Mum/2013 for the assessment year 2008-09 is partly allowed as indicated above.

Now we shall take up assessee company's appeal in ITA No 3419/Mum/2013 for the assessment year 2009-10.

26. The grounds of appeal raised by the assessee company in this appeal read as under:-

“1. The Learned Commissioner of Income - Tax (Appeals) (CIT-(A)) has erred in confirming the action of AO in assessing income from renting office buildings of Rs.44,03,310/- as "Income from house property" instead of "Income from Business or Profession" on the ground that residential premises /godowns were let out for purely accommodation purpose and not for the purpose of running business centres. On the facts and circumstances of the case, the said rental income ought to be assessed under the head "Income from Business or Profession .

2. The Ld CIT -(A) has erred in confirming the action of AO in disallowing depreciation amounting to Rs.43,628/- claimed by the appellant on certain additions made to fixed assets on the basis that proof of purchase was not submitted. On the facts and in the circumstances of the case, the disallowance made ought to be deleted.

3. The Ld CIT-(A) has erred in confirming the action of AO in disallowing depreciation of Rs.25,668/- on certain assets purchased in the previous year relevant to A. Y. 2008-09 on the ground that those additions were not verified for want of proof of acquisition; consequently, depreciation on the said assets is not allowable in the year under consideration. On the facts and in the circumstances of the case the disallowance made ought to be deleted.

4. The Ld CIT -(A) has erred in confirming the action of AO in making adhoc disallowance of Rs.18,73,118/- being 10% of the general expenses of Rs.1,87,31,181/- on the ground of non production of supporting bills/ vouchers/ledger etc. On the basis of facts and in the circumstances of the case, the disallowance made ought to be deleted.”

27. Our decision in ITA No. 3418/Mum/2013 for the assessment year 2008-09 on merits shall apply mutatis-mutandis to this appeal namely ITA No. 3419/Mum/2013 filed by the assessee as the issue involved in both these appeals on merits are identical. We order accordingly.

28 In the result , appeal of the assessee company in ITA No. 3419/Mum/2013 for the assessment year 2009-10 is partly allowed as indicated above.

29. In the result, four appeals of the assessee company in ITA no. 3416-3419/Mum/2013 for assessment years 2006-07 to 2009-10 are partly allowed as indicated above.

Order pronounced in the open court on 30th May , 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 30-05-2016 को की गई ।

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 30-05-2016

I

व.नि.स./ R.K., Ex. 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)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "E" Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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