

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C" NEW DELHI

BEFORE SHRI S.V. MEHROTRA : ACCOUNTANT MEMBER
AND
SHRI C.M. GARG : JUDICIAL MEMBER

ITA nos. 282, 283 & 284//Del/2014

Asstt. Yrs: 2004-05, 05-06 & 2006-07

Gateway Impex Pvt. Ltd., Vs. DCIT, Circle 12(1),
Lotus Towers, Community Centre, New Delhi.
New Friends Colony, New Delhi.
PAN: AAACG 6562 C
(Appellant) (Respondent)

Appellant by : Sh. Santosh K. Aggarwal Adv. &
Sh. Pankaj CA
Respondent by : Shri Amrit Lal Sr. DR

Date of hearing : 18/07/2016.
Date of order : 25/07/2016.

ORDER

PER S.V. MEHROTRA, A.M:

These are assessee's appeals against separate orders of Id. CIT(A)-V, New Delhi, relating to A.Ys. 2004-05, 05-06 & 2006-07. All these appeals were heard together and are being disposed of by this composite order for the sake of convenience.

A.Y. 2004-05 (ITA 282/Del/2014):

2. Grounds taken by the assessee in its appeal are as under:

“1. That the order of the Commissioner of Income-tax (Appeals) - V, New Delhi, dated 22.10.2013, is wrong on facts and bad in law;

2. That the Commissioner (Appeals) erred in confirming the disallowance of expenses of Rs. 6,18,802/- out of the total expenses of Rs. 7,83,363/- for (i) Auditors Remuneration: Rs. 3,32,190/-, (ii) Legal and Professional Expenses : Rs. 2,97,424/-, (iii) Travel and Conveyance: Rs. 87,744/-, (iv) Rate and Taxes: Rs. 3,000/- and (iv) Bank Charges : Rs. 63,005/- on proportionate basis, holding that the same were incurred for the purposes of earning income by way of rent. He failed to appreciate that the said expenses were incurred for the purposes of the business of the Appellant;

3. That the Commissioner (Appeals) erred in confirming the disallowance of depreciation of Rs. 3,84,684/-. He erred in holding that there was no justification for capitalizing the proportionate lease rent for the area used for the installation of the Plant & Machinery to the block of. Plant & Machinery;

4. That the conclusions and inferences of the Assessing Officer and/or Commissioner (Appeals) are based on suspicions, conjectures, surmises and extraneous and irrelevant considerations;

5. That the reliefs prayed for may kindly be allowed and the order(s) of the Assessing Officer and/or Commissioner (Appeals) may kindly be quashed, set aside, annulled or modified;

6. That the aforesaid Grounds of Appeal are without prejudice to each other;

7. That the Appellant craves leave to vary, alter, amend or add to the aforesaid Grounds of Appeal before or at the time of hearing of the above appeal.

3. Brief facts of the case are that the assessee, in the relevant assessment year, was engaged in the business of developing of property and letting it to tenants. The assessee company had filed return of income declaring loss of Rs. 1,04,56,007/-. The AO required the assessee to file the copy of agreement for tenancy as well as for services/ maintenance. The AO noticed from the lease agreement that assessee was providing uninterrupted electricity and water supply, air conditioning/ heating systems, maintenance of building including water and sanitary pipes and facility of lift, etc. He further noticed that though all these services were mentioned in the lease agreement, the maintenance charges for maintaining these facilities were part of a separate agreement. On the basis of analysis of these agreements, the AO concluded that the revenue expenditure related to the services only, was to be considered for computing the business income of the assessee. He further observed that the main components of the assessee's activities was getting the rental income from the tenants. The AO noticed that assessee had claimed all the expenses against service income only. He concluded that expenses like rates and taxes, travel and conveyance, audit, etc., which were common for both the activities, rental as well as services, were to be allocated between the two. He has given the table of common expenses, which were to be allocated between rental income and service income as under:

S.No.	Details of expenses	Amount (In Rs.)
1	Auditors remuneration	332190
2	Legal and professional	1267174
3.	Travel and conveyance	87744

4.	Rates and taxes	3000
5.	Bank charges	63005
	Total	1753113

4. The AO, accordingly, made addition of Rs. 13,84,837/-.

5. The AO further noticed that assessee had claimed depreciation on plant & machinery on the ground that the same was used for the purpose of business. He noticed that besides claiming depreciation on lifts, windows cleaning system, HVAC, IBMS, uplift trolley and sound proofing system, the assessee had also made allocation of other preoperative expenses on proportionate basis. The AO, taking note of the fact that primary activity of the assessee was to derive rental income, though assessee was also rendering services, which was assessable as business income, considered the opening WDV pertaining to plant & machinery used for maintenance and services at Rs. 3,14,33,917/-, after considering the depreciation already claimed by the assessee. Further, considering the addition of asset during the year amounting to Rs. 4,76,696/-, the allowable depreciation to the assessee for its business income was computed at Rs. 79,77,653/- and since the assessee had claimed depreciation of Rs. 1,10,06,901/-, made a disallowance of Rs. 30,29,247/-.

6. Apropos first issue regarding allocation of common expenses, Id. CIT(A) allowed the assessee's claim as regards the professional fees paid to M/s Knight Frank (India) Pvt. Ltd. being services charges paid to them. However, he upheld the AO's action in appropriating the expenses relating to audit fees, travel and conveyance, rates and taxes and bank charges between rental income and service income.

7. Apropos the issue relating to depreciation, ld. CIT(A) confirmed the AO's action to the extent of disallowance of depreciation claimed by assessee relating to capitalized lease rent on the ground that the plant & machinery was installed at that part of the land and, therefore, the lease rent relating to that part of the land had to be capitalized. He, therefore, upheld the disallowance of depreciation on lease rent paid to DDA amounting to Rs. 3,84,684/-.

8. Being aggrieved, the assessee is in appeal before the Tribunal.

9. Ground nos. 1,4,5,6 & 7 are general in nature.

10. Ground no. 2: Apropos ground no. 2 ld. counsel for the assessee submitted that assessee's business is a composite business in the name of "Lotus Power Community Centre US Colony". He submitted that as far as disallowance out of legal and professional expenses to the extent of Rs. 2,97,424/- is concerned, the same has been towards accounting charges (Rs. 1,74,775/-) and legal charges (Rs. 1,22,649/-). He further submitted that as far as auditors' remuneration is concerned, the said expenditure was towards meeting statutory requirement of the company.

11. As regards rates and taxes, ld. counsel submitted that the amount was paid to Registrar of Companies for statutory compliance. Further, the bank charges were paid to the bank.

12. Ld. counsel further submitted that assessee on its own had disallowed expenses aggregating to Rs. 4,63,70,175/- out of the total expenses of Rs. 6,73,43,612/- and had claimed only Rs. 2,09,73,437/- out of which disallowances have been made by AO.

13. We have considered the submissions of both the parties and have perused the record of the case. There is no dispute that the income earned from rendering services to tenants has been assessed as business income and the primary source of assessee's activities was to earn rental income. It was assessed under the head "Income from house property", against which assessee got statutory deduction and, therefore no expenditure relating to earning of rental income could be allowed any further. Therefore, in principle, we agree with the AO's action that common expenditure had to be allocated between the rental income and service income.

14. Now we will consider to the specific items of expenditure which have been allocated by AO and confirmed by Id. CIT(A).

15. As far as auditors' remuneration is concerned, the said expenditure have to be incurred by assessee company to meet the statutory requirements. But since assessee was deriving income, both rental as well as service income, therefore, the entire auditors' remuneration could not be allocated only towards service income, because auditors have audited the rental income also, which was reflected in the P&L A/c. Therefore, AO as well as Id. CIT(A) were justified in proportioning this expenditure.

16. The second item is regarding accounting and legal charges. Before Id. CIT(A) the assessee had pointed out that accounting charges amounting to Rs. 1,74,775/- were paid to M/s Perfect Accounting System for writing the books for the year. Therefore, this had to be allocated between rental income and service income, because rental income has also been accounted for in the books of a/c.

17. As far as legal charges amounting to Rs. 1,22,649/- are concerned, before Id. CIT(A) the assessee had pointed out that the amount was paid to Associates Law Advisors, but it is not pointed out for which purpose the amount was paid. Therefore, both the lower revenue authorities rightly allocated this expenditure between rental income and service income.

18. As far as travel & conveyance expenses are concerned, we find that before Id. CIT(A) the assessee had pointed out that this amount was expense on day to day travelling of the officials of Knight Frank for maintenance and operation of common area. Therefore, this amount was directly attributable to the service income derived by assessee and hence could not be allocated between rental income and service income and had to be allowed in full against the service income.

19. As far as rates and taxes are concerned, merely because the amount has been paid to Registrar of Companies for statutory compliance, will not entitle the assessee to claim the entire expenditure against the service receipts, because against rental income statutory deduction has been allowed, which includes expenses incurred for all such statutory compliances.

20. As regards bank charges, since the assessee has not specifically pointed out that the same was paid to bank where only service income was deposited, therefore the same has to be allocated between rental income and service income.

21. In view of above discussion, the assessee's ground is partly allowed.

22. Ground no. 3: Apropos ground no. 3, the main contention of assessee is that lease rent paid to DDA has to be capitalized towards plant and

machinery used for business purposes, because that is a cost incurred for bringing an asset into operation. The submission is that the rent paid prior to commencement of the business has to be capitalized and depreciation is to be allowed on the same.

23. Assessee has relied on following decisions for the proposition that any expenditure incurred to put an asset to use is to be capitalized:

- Challapalli Sugars Ltd. Vs. CIT 98 ITR 167 (SC)
- CIT Vs. Food Specialities Ltd. 136 ITR 203 (Del.)
- Protien Products Ltd. 167 ITR 157 (Ker.)

24. After considering the submissions of both the parties, we are not inclined to accept the proposition advanced by the ld. counsel for the assessee for the simple reason that no depreciation is allowable in respect of cost of land in respect of which the lease rent was paid to DDA and, therefore, was to be capitalized. The lease rent paid could not be capitalized to the cost of land to plant & machinery but to the cost of the land. We, accordingly, uphold the order of ld. CIT(A) on this count.

25. In the result assessee's appeal is partly allowed.

A.Y. 2005-06 (ITA 283/Del/2014):

26. Grounds taken by the assessee in its appeal are as under:

1. *That the order of the Commissioner of Income-tax (Appeals) - V, New Delhi, dated 31.10.2013, is wrong on facts and bad in law;*
2. *That the Commissioner (Appeals) erred in confirming the disallowance of expenses of Rs. 13,00,437/- out of the total*

expenses of Rs. 16,30,221/- for (i) Auditors Remuneration : Rs. 55,1001/-, (ii) Legal and Professional Expenses : Rs. 15,40,509/-, (iii) Travel and Conveyance: Rs. 12,0601/- and (iv) Rate and Taxes: Rs. 22,552/- on proportionate basis, holding that the same were incurred for the purposes of earning income by way of rent. He failed to appreciate that the said expenses were incurred for the purposes of the business of the Appellant;

3. That the Commissioner (Appeals) erred in confirming the disallowance of depreciation of Rs. 2,88,513/- . He erred in holding that there was no justification for capitalizing the proportionate lease rent for the area used for the installation of the Plant & Machinery to the block of Plant & Machinery;

4. That the conclusions and inferences of the Assessing Officer and/or Commissioner (Appeals) are based on suspicions, conjectures, surmises and extraneous and irrelevant considerations;

5. That the reliefs prayed for may kindly be allowed and the order(s) of the Assessing Officer and/or Commissioner (Appeals) may kindly be quashed, set aside, annulled or modified;

6. That the aforesaid Grounds of Appeal are without prejudice to each other;

7. That the Appellant craves leave to vary, alter, amend or add to the aforesaid Grounds of Appeal before or at the time of hearing of the above appeal.

27. Ground nos. 1,4,5,6 & 7 are general in nature.

28. Ground no. 2: As far as auditors' remuneration is concerned, in view of the discussion made for AY 2004-05, as above, the order of Id. CIT(A), in proportioning the auditors' remuneration between rental income and service income, is upheld.

29. As far as legal and professional expenses is concerned, we find that as per the submission made before Id. CIT(A) it is evident that only accounting charges of Rs. 3,42,360/- were paid to M/s Perfect Accounting System for writing the books for the year. Therefore, this had to be allocated between rental income and service income, because rental income has also been accounted for in the books of a/c.

30. As far as legal charges amounting to Rs. 11,98,149/- are concerned, we find that the amount was paid to Associates Law Advisors, S.R. Batliboi & Co. ERNST & Young and CB Richard. The assessee has pointed out that these charges were paid for consultancy, taxation and business development and regulatory advisory and assistance services. Therefore, these expenses were not identifiable only to service income and had to be allocated between rental income as well as service income. Since the assessee has not pointed out for which purpose the amount was paid, therefore, as held in AY 2004-05, both the lower revenue authorities rightly allocated this expenditure between rental income and service income.

31. As far as travel & conveyance expenses are concerned, in view of our discussion on this issue for AY 2004-05, we hold that the expenses in question were to be allowed in full against the service income.

32. As far as rates and taxes are concerned, facts being identical as in AY 2004-05, the same course will follow herein also.

33. In view of above discussion, the assessee's ground is partly allowed.

34. Ground no. 3: Undisputedly the facts are identical to AY 2004-05. Therefore, in view of our discussion on this issue for AY 2004-05, the order of Id. CIT(A) on the issue in question is upheld.

35. In the result, assessee's appeal is partly allowed.

A.Y. 2006-07 (ITA 283/Del/2014):

36. Grounds taken by the assessee in its appeal are as under:

“1. That the order of the Commissioner of Income-tax (Appeals) - V, New Delhi, - dated 08.11.2013, is wrong on facts and bad in law;

2. That the Commissioner (Appeals) erred in confirming the disallowance of expenses of Rs. 1,01,401/- out of the total expenses of Rs. 1,23,4461- for (i) Auditors Remuneration: Rs. 56,1201-, (ii) Legal and Professional Expenses: Rs. 57,9861-, and (iii) Travel and Conveyance: Rs. 9,3401- on proportionate basis, holding that the same were incurred for the purposes of earning income by way of rent. -He failed to appreciate that the said expenses were incurred for the purposes of the business of the Appellant;

3. That the Commissioner (Appeals) erred in confirming the disallowance of depreciation of Rs. 1,29,8311- . He erred in holding that there was no justification for capitalizing the proportionate lease rent for the area used for installation of Plant & Machinery to the Block of Plant & Machinery;

4. That the Commissioner (Appeals) erred in confirming the disallowance of additional depreciation of Rs. 2,72,122/-;

5. That the Commissioner (Appeals) erred in confirming the charging of interest under Sections 234B of the Act;

6. That the conclusions and inferences of the Assessing Officer and/or Commissioner (Appeals) are based on suspicions, conjectures, surmises and extraneous and irrelevant considerations;

7. That the reliefs prayed for may kindly be allowed and the order(s) of the PI: sassing Officer and/or Commissioner

(Appeals) may kindly be quashed, set aside, annulled or modified;

8. That the aforesaid Grounds of Appeal are without prejudice to each other;

9. That the Appellant craves leave to vary, alter, amend or add to the aforesaid Grounds of Appeal before or at the time of hearing of the above appeal.

37. Ground nos. 1,6,7, 8 and 9 are general in nature.

38. Ground no. 2: Facts being identical to AY 2004-05, we direct that in respect of auditors remuneration; legal and professional expenses and travel and conveyance same course will follow as in AY 2004-05.

39. Ground no. 3: Facts on the issue in question being identical to AY 2004-05, we adopt the same view as in AY 2004-05.

40. Ground no. 4: Brief facts are that an amount of Rs. 2,72,122/- had been claimed as additional depreciation on purchase of DG set amounting to Rs. 13,60,612/- made in the block of plant & machinery and equipment. The AO disallowed this claim, inter alia, observing that as per clause (iia) to section 32 of the Act, such deduction is allowable if the assessee is engaged in the business of manufacture or production of any article or thing. He pointed out that since no activities were carried on by the assessee company, the assessee was not entitled to claim such deduction and, therefore, he disallowed a sum of Rs. 2,72,122/-. Ld. CIT(A) confirmed the addition.

41. Ld. counsel pointed out that assessee had purchased D.G. Set which was used for the purpose of business of providing services to the tenants. He pointed out that assessee had to provide electricity to the tenants as per service agreement executed with them and for that purpose only DG set was installed, which was used for generating electricity to be provided to

tenants when there was electricity or power failure. He pointed out that this was covered u/s 32(ia).

42. We have considered the submissions of both the parties and have perused the record of the case.

43. In order to properly appreciate the contention of ld. counsel for the assessee, we reproduce Section 32(ia) hereunder :

“(ia) in the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31st day of March, 2005, by an assessee engaged in the business of manufacture or production of any article or thing [or in the business of generation or generation and distribution of power], a further sum equal to twenty per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii) :

44. Bare perusal of the said section makes it clear that the basic ingredient of the section is that the assessee should be engaged in the business of manufacture or production of any article or thing or in the business of generation or generation and distribution of power. Admittedly, the assessee was not at all engaged in the generation or generation and distribution of power but had only installed DG set for providing electricity to the tenants at the time of power failure. The term ‘or in the business of generation or generation and distribution of power’ was inserted by the Finance Act, 2012 w.e.f. 1.4.2013. Prior to that the requirement was that the assessee should have been engaged in the business of manufacture or production of any article or thing. We fail to appreciate what article or thing the assessee produced so as to be entitled for additional depreciation as per section 32(ia). This section is meant for those assessees, who installed plant and machinery after 31.03.2005 for manufacture or production of any article or

thing. The assessee was not producing any such article or thing. It was only supplying electricity through D.G. Set installed by it. In the result this ground is dismissed.

45. Ground no. 5: Charging of interest u/s 234B is consequential.

46. In the result, assessee's appeal is partly allowed.

47. In the result all the appeals stand partly allowed.

Order pronouncement in open court on 25/07/2016.

Sd/-
(C.M. GARG)
JUDICIAL MEMBER
Dated: 25/07/2016.

Sd/-
(S.V. MEHROTRA)
ACCOUNTANT MEMBER

MP

Copy of order to:

1. Assessee
2. AO
3. CIT
4. CIT(A)
5. DR, ITAT, New Delhi.