

आयकर अधीकरण, “डी+आयपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL ‘D’ BENCH, CHENNAI

श्री चंद्र पूजारी, लेखा सदस्य एवं श्री धुवु आर.एल रेडी, न्यायिक सदस्य के समक्ष

**Before Shri Chandra Poojari, Accountant Member &
Shri Duvvuru RL Reddy, Judicial Member**

आयकर अपील सं./I.T.A.No.189/Mds/2017

अंशदायन वर्ष/Assessment Year:2011-12

M/s. Ceebros Hotels Pvt. Ltd.,
No. 19/1, %Sukriti+, III Cross Road,
R.A. Puram, Chennai 600 028.
[PAN : AAACC3051E]

Vs. The Deputy Commissioner of
Income Tax,
Company Circle 1(3),
Chennai.

(अपीलाथ /Appellant)

(आयथ /Respondent)

अपीलाथ का ओर से / Appellant by : Shri S.Sridhar, Advocate

आयथ का ओर से/Respondent by : Shri Pathalavath Peerya, CIT

सुनवाई का ताराख/ Date of hearing : 14.03.2017

घोषणा का ताराख /Date of Pronouncement : 09.06.2017

आदेश /O R D E R

PER DUVVURU RL REDDY, JUDICIAL MEMBER:

This appeal filed by the assessee is directed against the order of the Id. Commissioner of Income Tax (Appeals) 1, Chennai dated 03.01.2017 relevant to the assessment year 2011-12, wherein, the assessee has raised two grounds viz, (i) the Id. CIT(A) has erred in sustaining the disallowance of the claim of deduction under section 35AD(5)(aa) of the Income Tax Act, 1961[Act+ in short] and (ii) the Id. CIT(A) erred in restricting higher depreciation.

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Case are that the assessee is engaged in the business of civil construction and hospitality. It has filed the return of income on 29.09.2011 admitting a loss of ₹.56,92,36,737/- and book profit under section 115JB of the Act at ₹.9,99,20,223/- and paid tax on the same. The return filed by the assessee was processed under section 143(1) of the Act on 28.12.2012 determining a demand of ₹.1,84,790/-. Subsequently, the case of the assessee was selected for scrutiny and notice under section 143(2) of the Act was issued. After considering the submissions of the assessee, the assessment under section 143(3) of the Act was completed on 24.03.2014 determining the total income at ₹.11,53,06,636/- by making disallowance of ₹.78,17,85,770/- under section 35AD(5)(aa) of the Act being expenses incurred in creating and establishing the eligible asset i.e., hotel [The Rain Tree].

2.1 During the year, the assessee company has commenced its operation in the hotel (The Rain Tree) situated at Mount Road, Chennai. The entire hotel building (₹.40,05,09,377/-) and other assets amounting to ₹.78,17,85,770/- was capitalized during the year. The assessee company claimed deduction under section 35AD(5)(aa) of the Act in respect of the whole of the expenditure of capital in nature incurred for the business of The Hotel Rain Tree, Mount Road. Consequently, the assessee has claimed a loss in the return of income amounting to ₹.56,92,36,737/-.

proceedings, the assessee was directed to provide sufficient proof in respect of the Investment allowance claimed under section 35 of the Act. In response to the same, the assessee furnished copy of the letter from India Tourism, Chennai dated 30.05.2011 in Ref No. Indtour/Chennai/HRACC/10(TN)/11/71 wherein the Regional Director & Convenor, HRACC South has certified the star classification stating that Rain Tree, Mount Road, classified under 'Three' Star category w.e.f. 10.05.2011. The assessee also submitted an enclosure certified by Regional Director, South, vide letter dated 28.04.2010, wherein it is acknowledged that the assessee's application for star category is under process and consideration. Since, in the submission made by the assessee, the assessee has been granted the 'Three' Star Category only w.e.f. 10.05.2011 relevant from Financial Year 2011-12, clarification was sought from Regional Director & Convenor, India Tourism vide notice under section 133(6) dated 26.07.2013 directing him to clarify whether the assessee has been classified by the Central Government as 'Two' star or above category for the financial year 2010-11. In reply to the same, the Assistant Director (for Regional Director, South) vide letter In Indtour/Chennai/HRACC/2013(TN)/G dated 13.08.2013 has categorically stated that "M/s. Rain Tree, Mount Road, 636 Anna Salai, Teynampet, Chennai, has not been issued star classification under any category by this office for the period from 01.04.2010 to 31.03.2011".

is not been classified in 'two' Star or above category during the financial year 2010-11 (the year in which the business of the hotel rain tree has commenced), which is the pre-requirement for claiming deduction under section 35AD of the Act, by providing copy of the letter dated 13-08-2013 from Assistant Director, India Tourism, the assessee was show caused as to why the investment allowance claimed under section 35AD of the Act should not be disallowed.

2.4 In response to the above, vide letter dated 17.03.2014, the assessee has submitted as under:

“The assessee is a company and admittedly is running a three star category hotel at 636, Anna Salai, Teynampet, Chennai 600 018 and far the Assessment year 2011-12, the assessee company claimed a deduction u/s 35AD(5)(aa) of the Act amounting to Rs.78,17,85,770/- in the computation of taxable total income.

The statute permits claim of such deduction which mainly comprised of capital expenditure incurred for creating the specified asset/property and on the facts of the case the claim of such deduction in the computation of taxable total income is proper and justified. The specified business had commenced their operations on 09.07.2010, as reflected in the financial statements. The first condition of commencement of the operations of the specified business is accordingly satisfied on the factual matrix of case.

The approvals for running the specified business were obtained from various governmental authorities inasmuch as one such approval for star category recognition with the Indian tourism, Chennai working under ministry of tourism, Government of India is required while deciding the issue relating to the claim of such deduction in the computation of taxable total income.

The second condition prescribed in the section under consideration so as to give decision on the correctness of the claim of such deduction in the computation of taxable total income for the Assessment Year 2010-11 is the

ation of category two star or above by the Central
ness/asset.

On the facts of the case, the application to the India Tourism being the competent authority under the Central Government for issuing such classification was filed on 19.04.2010 with all required details and enclosures including the approvals obtained from various other authorities. After scrutiny of the application, the southern regional office had issued a letter dated 22.04.2010 indicating/informing the assessee about the spot inspection of the members of the approving committee on 27.04.2010. In fact after inspection another letter dated 28.04.2010 was received by the assessee from India Tourism indicating the processing/ consideration of the application filed for categorization of the specified business as three star hotel.

The India Tourism had issued the star classification order dated 30.05.2011 under the reference no. INDTOUR/CHENNAI/HRACC/2010(TN)/1171 and the assessee was accordingly classified as a three star hotel.

The ACIT, has proposed for the disallowance of the said claim of deduction on the plain and literal reading of the said section and the assessee is pleading for grant of such deduction on the following various grounds:

a) The star category classification obtained in the next Assessment Year would relate back to the date of application/the date of commencement of operations of the eligible business. Admittedly, the date of filing of the application as well as the date of commencement of the operations of the eligible business as mentioned in the preceding paragraphs would fall in the previous year relating to the Assessment Year under consideration.

b) the belated issuance of the star category classification order would not stand in the way for obtaining the necessary benefit as envisaged in the provisions under consideration inasmuch as the commencement of the operations of the eligible business is the only visible condition for making such claim in the computation of taxable total income.

c) the condition of obtaining the star category classification order in the Assessment Year under consideration is not prescribed for the eligibility to make such claim in the computation of taxable total income inasmuch as the claim of the assessee is examined by the Assessing Officer after selecting the return of income for scrutiny at a later point of time and hence on the date of examination of such claim by the Assessing Officer, star category classification order is available to support the plea of the assessee for the

claim for deduction in the computation of taxable income. The letter issued by the India Tourism on the recognition of the star category with reference to the period is not relevant for considering the claim under consideration.

d) In any event, the legal theory of substance over form would rescue the assessee on the interpretation of the provisions under scrutiny inasmuch as the operations of the eligible business had commenced in the previous year relating to the Assessment Year under consideration and the said fact being not disputed, the belated furnishing of the certificate by the India Tourism should relate back to the date of application/date of commencement of the operations of the eligible business in view of the legal consequence/implication.

e) The purposive legislation relating to the statutory provisions under consideration should be reckoned and having not disputed the commencement of the operations of the eligible business in the previous year relating to the Assessment Year under consideration, the technical approach to defeat the legislative purpose in not granting such deduction on the facts of the case is arbitrary and not sustainable in law.

f) The delay in obtaining the star category classification order was not attributable to the assessee and hence as a legal implication, the date of order should be considered as relating back to the date of application/date of commencement of the operations of the eligible business in the previous year relating to the Assessment Year under consideration”.

2.5 After considering the submissions of the assessee, the Assessing Officer has observed that the investment allowance is available only in the year of commencement of operation of a new hotel and since the assessee has commenced the operations of the hotel at Mount Road, during the year 2010-11, the Assessing Officer has held that the assessee is not eligible to claim the investment allowance for the assessment year 2011-12 as star category classification was awarded to the assessee only w.e.f. 10.05.2011.

the matter in appeal before the Id. CIT(A). After considering the submissions of the assessee, the Id. CIT(A) confirmed the disallowance made under section 35AD(5)(aa) of the Act.

4. On being aggrieved, the assessee is in appeal before the Tribunal. By reiterating the submissions as made before the authorities below, the Id. Counsel for the assessee has submitted that the assumption of obtaining star category classification for making such claim of deduction is not legally as well as factually correct on the plain reading of the said sub clause, there is no such prescription/condition so as to become eligible for such deduction. The assumption of non existing condition in this regard as well as in conducting cross verification with the India Tourism is, therefore, irrelevant of the consideration of the claim of the said deduction in the computation of taxable total income. The sub clause mandates the existence of the building and operating a new hotel as per the standards prescribed for according star category inasmuch as the crucial words used in the statute is in the nature of and not as per and the language of the said sub clause would fortify our claim on the facts of the case. The operation of the new hotel as per the three star category facilities is not disputed on the facts and in the circumstances of the case and therefore the mis-reading of the provisions under consideration has resulted in the present attempt/ proposal of the Assessing officer for making the disallowance of the said deduction In the

come. The assessee is eligible for investment allowance under section 35AD(5)(aa) of the Act, if the assessee commences its operations on or after the 1st day of April, 2010, where the specified business is in the nature of building and operating a new hotel of two star or above category as classified by the Central Government. When the commencement of new hotel on or after 01.04.2010 was not disputed, filing of application for star category classification before India Tourism, the competent authority under the Central Government and scrutiny of the application and its acknowledgement by the competent authority are also not disputed, star category classification awarded by the India Tourism to the assessee was not disputed, the Assessing Officer was not legally and factually correct to make the disallowance and pleaded for deleting the disallowance made on this account. On the other hand, the Id. DR strongly supported the orders of authorities below.

5. We have heard both sides, perused the materials available on record and gone through the orders of authorities below. The assessee has claimed investment allowances under section 35AD(5)(aa) of the Act for the entire hotel building and other assets amounting to .78,17,85,770/-, which was capitalized during the year and also the said hotel commenced its operation. In this case, the expenditure capitalized by the assessee was not in dispute. To get the star category classification, the assessee filed the application to

e competent authority under the Central Government for issuing such classification on 19.04.2010 with all required details. After scrutiny of the application, the Southern Regional office has issued a letter dated 22.04.2010 indicating/informing the assessee about the spot inspection of the members of the approving committee on 27.04.2010. The inspection of the hotel was carried out on 27.04.2010 and it was found that the hotel was not fully functional. After inspection by the Approving Committee, another letter dated 28.04.2010 was received by the assessee from India Tourism indicating three star classification of the hotel is under process and consideration. Subsequently, vide letter dated 02.08.2010, the assessee has informed the India Tourism, Chennai that the hotel was soft opened on 09.07.2010 and would be fully operational by October, 2010 and requested to inspect the hotel. At the strength of application of the assessee dated 19.04.2010, and subsequent request dated 02.08.2010, the hotel was inspected by HRACC (South) on 22.04.2011 and without pointing out any discrepancy, the assessee was recommended by classification under three star category. In this case, admittedly, after visit of the Approval Committee on 27.04.2010, the application for star category classification was not rejected by the India Tourism. Belated visit of HRACC and issuance of classification order after obtaining concurrence from the Ministry of Tourism, Govt. of India, New Delhi are procedural delay, for which the assessee cannot held responsible. Once, the hotel become fully operational and

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... offered to tax and the Department has not disputed. Whatever expenditure incurred by the assessee, for acquiring the asset in the form of hotel was capitalized.

5.1 The intention of Legislation for introduction of provisions of section 35AD of the Act was to replace profit-linked incentives by investment-linked incentives and the benefit was extended to various businesses w.e.f. 01.04.2010 and the said investment allowance is available only in the year of commencement of operation of a new business. The Department has not disputed the operation of the new hotel of the assessee in the financial year 2010-11 because, the Department has accepted the income, which was offered to tax. Once the Department has accepted the income of the assessee from hotel business, which was newly established and become fully operational in the year 2010, then the assessee is very much eligible for claiming investment allowance. If we accept to the contention of the Assessing Officer that the assessee was granted star category classification only on 10.05.2011, the Assessing Officer should not have accepted the income of the assessee offered to tax, which was earned in lieu of star category of the hotel. Once the application for star category classification dated 17.04.2010 was not rejected by the India Tourism and even after inspection on 22.04.2011, the HRACC has not found any discrepancy and very well recommended for classification under 3 star category, we find no

the assessee has, vide its letter dated 02.08.2010 informed about the fully operational of the Hotel to the India Tourism and it was the delay on the part of HRACC to inspect the Hotel before end of the financial year for which the assessee cannot be penalized. Under these facts and circumstances, the disallowance made under section 35AD(5)(aa) of the Act stands deleted and directed the Assessing Officer to allow the investment allowance as claimed by the assessee and accordingly recompute the income.

6. The next ground raised in the appeal of the assessee is that the Id. CIT(A) has erred in sustaining the restriction of the claim of depreciation on plant & machinery as well as building. In the computation statement, the assessee has not claimed depreciation on the asset capitalized towards the New Hotel since the assessee had claimed investment allowance under section 35AD of the Act. Since the Assessing Officer has not allowed investment allowance, he allowed depreciation on the asset @ 15% on building [.40,05,09,377/-] and @ 10% on plant and machinery [.38,12,76,393/-].

6.1 On appeal, the assessee has claimed higher depreciation. The Id. CIT(A) has observed that there was no material before the Assessing Officer to suggest that the building and plant and machinery were eligible for

being considered as a plant, he dismissed the

ground raised by the assessee.

6.2 We have heard rival contentions. The Assessing Officer has allowed depreciation on the asset @ 15% on building and @ 10% on plant and machinery. Before the Id. CIT(A), the assessee has claimed higher depreciation for hotel. However, the Id. CIT(A) confirmed the order of the Assessing Officer. Before us, the Id. Counsel for the assessee has vehemently argued that the assessee should be allowed higher depreciation. However, the assessee has not furnished any material evidencing eligibility of higher depreciation. As per New Appendix I [Effective from assessment year 2006-07 onwards] to Part A Tangible Assets, provided in the Income Tax Rules,1962, the eligible rate of depreciation for tangible assets of building are as under:

I. Building:

	Block of assets	Depreciation allowance as percentage of written down value
(1)	Buildings which are used mainly for residential purposes except hotels and boarding houses	5
(2)	Buildings other than those used mainly for residential purposes and not covered by sub-items (1) above and (3) below	10
(3)	Buildings acquired on or after the 1 st day of September, 2002 for installing machinery and plant forming part of water supply project or water treatment system and which is put to use for the purpose of business of providing infrastructure facilities under clause (i) of sub-section (4) of section 80IA	40
(4)	Purely temporary erections such as wooden structures	40

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of depreciation allowable under Income Tax Rules,, we are of the considered opinion that the Assessing Officer has rightly allowed the 10% depreciation on building, which was confirmed by the Id. CIT(A). Thus, we find no reason to interfere with the order passed by the Id. CIT(A) on this issue and accordingly, the ground raised by the assessee is dismissed.

7. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced on the 09th June, 2017 at Chennai.

Sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Sd/-
(DUVVURU RL REDDY)
JUDICIAL MEMBER

Chennai, Dated, the 09.06.2017

Vm/-

आदेश क० प्रतिलिपि अर्पण/Copy to: 1. अपीलार्थी/Appellant, 2. प्रत्यर्थी/Respondent, 3. आयकर आयुक्त (अपील)/CIT(A), 4. आयकर आयुक्त/CIT, 5. वित्तीय प्रबंधक/DR & 6. गाडफ़ाईल/GF.