

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH : KOLKATA

[Before Hon’ble Shri N.V.Vasudevan, JM & Shri M.Balaganesh, AM]

I.T.A No. 2049/Kol/2014

Assessment Year : 2005-06

Primarc Story Venture Pvt Ltd
(Formerly Tiger Commerce Pvt Ltd)
[PAN: AABCT 8460 B]
(Appellant)

-vs-

ACIT, Circle-3, Kolkata

(Respondent)

For the Appellant : Shri Manish Tiwari, AR

For the Revenue :Shri David Z. Chowngthu, Addl. CIT, Sr. DR

Date of Hearing : 21.11.2017

Date of Pronouncement : 06.12.2017

ORDER

Per M.Balaganesh, AM

1. This appeal by the assessee arises out of the order of the Learned Commissioner of Income Tax (Appeals) -I, Kolkata [in short the Id CITA] in Appeal No. 668/CIT(A)-I/C-3/2007-08 dated 12.08.2014 against the order passed by the ACIT, Circle-3, Kolkata [in short the Id AO] under section 143(3) of the Income Tax Act, 1961 (in short “the Act”) dated 31.12.2007 for the Assessment Year 2005-06.

2. The first issue to be decided in this appeal is as to whether the Ld. CIT(A) was justified in confirming the disallowance of depreciation in the sum of Rs. 8,20,000/- by the Ld. AO, in the facts and circumstances of the case.

3. The brief facts of this issue is that the assessee purchased a showroom comprising of land and building at No. 8, Elgin Road on outright basis for Rs. 3,28,00,000/-. The assessee claimed depreciation on the entire sum of Rs. 3,28,00,000/- at the rate applicable to building. The Ld.AO sought for bifurcation of the total consideration towards land and building separately in view of fact that the assessee is not entitled for depreciation on land portion. The assessee replied that no such bifurcation is possible in view of fact that the entire showroom was purchased by the assessee on outright basis. This reply not being satisfactory, the Ld. AO attributed 50% of the consideration amounting to Rs. 1,64,00,000/- towards land and disallowed depreciation thereon at 5% in the sum of Rs. 8,20,000/- (1,64,00,000 * 5%) in the assessment. This action was upheld by the Ld. CIT(A). Aggrieved, the assessee is in appeal before us on the following grounds:

1.i) That on the facts and circumstances of the case, Ld. CIT(A) has erred in relying the judgment in CIT vs Alps Theatre, 65 ITR 377 (SC) since the assessee purchased showroom at 8, Elgin Road on outright basis and the purchased consideration did not show any bifurcation for land cost.

ii) That on the facts and circumstances of the case Ld. CIT(A) is wrong in confirming the action of the Assessing Officer who disallowed Rs. 8,20,000/- towards depreciation allowance on showroom at 8, Elgin Road.

4. We have heard the rival submissions. We find that the Ld. AR apart from reiterating the submissions made before the lower authorities placed reliance on the decision of the Co-ordinate Bench decision of this Tribunal in the case of ITO vs. M/s Shree Banke Behari Enterprises Pvt. Ltd. in I.T.A. No. 350/Kol2013 for assessment year 2009-10 dated 26.08.2016 in support his arguments. We find the fact before this Tribunal in the aforesaid case are as under:

“8. It was observed by the AO that Column no. 14 and Annexure A are missing from the Tax Audit Report with regard to the depreciation. On demand, assessee has

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provided the annexure showing the details of depreciation claimed by it on two properties i.e. "Ownership flat" @5% and "ownership shop" @ 10%. Here AO observed that depreciation has been claimed on land as well which is not allowed. Assessee submitted that price paid was for specific area of built up space. Nothing was paid specifically for land and thus depreciation is allowed on entire value. However, the AO relying on the judgment of Hon'ble Supreme Court in the case of CIT Vs. AIPS Theatre 65 ITR 377 and ITAT Bench Delhi in the case of DCIT Vs Capital Car Private Limited reported 114 ITD 286 (Delhi) has assumed the one third value of property as land and thus disallowed the proportionate depreciation on both the property amounting to Rs. 2,65,903/- (114648.00 plus 1,51,255)."

It has been held by this Tribunal as under:

"11. We have heard the rival contentions and perused the materials available on record. At the outset, we find that assessee claimed to have made the investment in the aforesaid properties by paying composite amount. However, this fact has not been brought on record by Ld. AR whether it was composite payment for the land & building. In the instant case the AO has relied in the order of CIT Vs. AIPS Theatre 65 ITR 377 and DCIT Vs Capital Car Private Limited reported, supra for disallowing the depreciation. However in our view the facts were different in that case because the value for the building and land was separately available but this is not so in the present case. The details of the Hon'ble Supreme Court decision stand as under :

"This question arose out of the following facts : The respondent, M/s Alps Theatre, hereinafter referred to as 'the assessee', carries on business as exhibitor of films. The ITO initiated proceedings under s. 34(1)(b) of the Indian IT Act, 1922, on the ground that in the original assessment depreciation was allowed on the entire cost of Rs. 85,091 shown as cost of the building which included Rs. 12,000 as cost of land. The ITO, by his order dt. 22nd Feb., 1959, recomputed the depreciation, excluding cost of land. The assessee appealed to the AAC. The AAC upheld the order of the ITO. The assessee then appealed to the Tribunal which accepted the appeal. In accepting the appeal it observed as follows :

"You cannot conceive of a building without the land beneath it. It is not possible to conceive of a building without a bottom. What s. 10(2)(vi) of the Act says is that depreciation will be allowed on the building. The word "building" itself connotes the land upon which something has been constructed. It was, therefore, wrong on the part of the authorities below to exclude the value of the land upon which some construction was made. The true meaning of the word 'building' means the land upon which some construction has been made. The two must necessarily go together."

From the above details it is clear that the facts are different with the instant case. Similar facts were there in the case of DCIT Vs Capital Car Private Limited reported. However we find that on similar facts where the rates of the building are composite with the land then the Hon,ble Tribunal of Bangalore has decided the issue in favour of

the assessee in the case of CIT Vs. Rajesh Exports Ltd. (2006) 9 SOT 28. The relevant extract is reproduced below:-

“Where the assessee purchase a building and the purchase price (as per sale deed) is a composite one (sale deed does not indicate the prices of land and building separately), then no distinction at least in the consideration paid to the vendor can be made and the entire amount is qualified for depreciation. However, if there is a clear cut identity in respect of price paid to the land and building (i.e. sale deed indicates price of land and building separately), then depreciation is available only on the building.”

In the instant case, the ld. AR has not brought produced the details of the payment of the composite payment. But he requested to restore the issue to the AO for verification and the ld. DR raised no objection if the same is restored to the AO. Therefore, in the interest of justice and fair play we restore this matter to the file of AO with the direction that in case the assessee has made the composite payment for the purpose of aforesaid properties, then the depreciation as per the order of Ld. CIT(A) should be allowed. Hence, this ground of Revenue’s appeal is allowed for statistical purpose.”

Respectfully following the same, we deem it fit and appropriate to remand this issue to the file of the Ld. AO with direction to the assessee to furnish the evidence in support of bifurcation of consideration towards land and building. We agreed with the fact that the assessee is not entitled for depreciation on the land portion. Hence, bifurcation of the consideration into land and building separately becomes necessary, for which purpose we are remanding this issue to the file of Ld. AO. Accordingly, ground no. 1 raised by the assessee is allowed for statistical purposes.

5. The next issue to be decided in this appeal is as to whether the Ld. CIT(A) was justified in confirming the disallowance of Rs. 76,732/- and Rs. 40,000/- made u/s 40a(ia) of the Act, in the facts and circumstances in the case.

6. The brief facts of this issue is that the Ld. AO observed that the assessee had made payment of Rs. 76,732/- to M/s Crossword Book Stores Ltd. and Rs. 40,000/- to the Times Internet without deduction of tax at source and accordingly disallowed the same u/s 40a(ia) of the Act. Before the Ld. CIT(A), the assessee pleaded that the assessee is engaged in the business of real estate and apart from this, it has a franchisee license of

the book stores “ Crossword” which is located at No. 8, Elgin Road, Kolkata. It was pleaded that this amount of Rs. 76,732/- represents Crossword Book Reward Programme Card printing charges on which no tax is liable to be deducted u/s 194C of the Act. In other words, it was pleaded that the same represents purchase of printing cards and not printing charges and hence is not liable for deduction of tax at source.

7. With regard to payment of Rs. 40,000/- to the Times Internet it was submitted that the aggregate payments made thereon was less than 50,000/- during the year and there was no single payment which was made more than Rs. 20,000/- in a day. Accordingly, no deduction of tax at source u/s 194C of the Act is warranted thereon.

8. The Ld. CIT(A) observed that no details of the nature of payments in respect of Rs. 76,732/- together with supporting evidences were submitted by the assessee except making an oral statement thereon. Accordingly, he confirmed the disallowance of Rs. 76,732/- made u/s 40a(ia) of the Act. Similarly, with regard to payment of Rs. 40,000/- to the Times Internet he observed that the assessee has not established with evidences that provision of 194C of the Act are not applicable to this payment. Accordingly, he upheld the disallowance made u/s 40a(ia) of the Act. Aggrieved, the assessee is in appeal before us on the following grounds:

2.a) That on the facts and circumstances of the case, Ld. CIT(A) is wrong in confirming disallowance of Rs. 76,732/- u/s 40a(ia) without appreciating the explanation regarding non-deduction of TDS from payments to M/s Crossword Bookstore Ltd.

b) That on the facts and circumstances of the case, Ld. CIT(A) is wrong in confirming disallowance of Rs. 40,000/- u/s 40a(ia) without appreciating the explanation regarding non-deduction of TDS from payment to M/s Times Internet.

9. We have heard the rival submissions. We find that the Ld. AR reiterated the submissions made before lower authorities. Alternatively Ld. AR pleaded that this issue be remanded to the file of the ld AO for examination in the light of Second proviso to section 40a(ia) of the Act to the effect that in case if the payees have included this subject mentioned payments in their respective returns then the assessee should not be invited with disallowance u/s 40a(ia) of the Act. It was further pleaded that the amendment brought in thereon in section 40a(ia) second proviso of the Finance Act, 2012 has been held to be retrospective in operation by the decision of Hon'ble Delhi High Court in the case of Ansal Land Mark Township Pvt. Ltd. reported in 377 ITR 635. In response to this argument, the Ld. DR fairly agreed for setting aside this issue to the file of the Ld. AO. Accordingly, we remand this issue to the file of the Ld. AO to decide the same in the light of the second proviso to section 40a(ia) of the Act and in the light of decision rendered by the Hon'ble Delhi High Court (supra). Accordingly, ground no. 2 raised by the assessee is allowed for statistical purposes.

10. Ground no. 3 raised by the assessee is general in nature and does not require any specific adjudication.

11. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the Court on 06.12.2017

Sd/-
[N.V. Vasudevan]
Judicial Member

Sd/-
[M.Balaganesh]
Accountant Member

Dated : 06.12.2017

SB, Sr. PS

ITA No.2049/Kol/2014
Tiger Commerce Pvt. Ltd.(Now Primarc Story
Venture Pvt. Ltd.

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Copy of the order forwarded to:

1. Tiger Commerce Pvt. Ltd.(Now Primarc Story Venture Pvt. Ltd.), 6A, Elgin Road, Kolkata, West Bengal-700020
2. ACIT, Circle-3, P-7, Chowringhee Square, Kolkata-700069
- 3..C.I.T.(A)- , Kolkata 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches