

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ 'डी', अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
“ D ” BENCH, AHMEDABAD

समक्ष श्री एन.के.बिल्लैया, लेखा सदस्य एवं सुश्री मधुमिता रॉय, न्यायिक सदस्य ।
BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER &
MS. MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No.1799/Ahd/2016
(निर्धारण वर्ष / Assessment Year : 2012-13)

The ACIT Circle-5(2) Ahmedabad	बनाम/ Vs.	M/s.River View Hotels River View Building Nehru Bridge West End Corner Navrangpura Ahmedabad
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAGFR 6981 B		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से/ Appellant by :	Ms.Vashundhara Upmanyu, CIT-DR
प्रत्यर्थी की ओर से/Respondent by :	Shri P.M. Patel, AR

सुनवाई की तारीख / Date of Hearing	23/04/2018
घोषणा की तारीख/Date of Pronouncement	06/06/2018

आदेश / O R D E R

PER Ms. MADHUMITA ROY – JM:

The instant appeal filed by the Revenue is directed against the order of the Commissioner of Income Tax(Appeals), Ahmedabad-5 [CIT(A) in short] dated 21/04/2016 arising out of the assessment order

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under S.143(3) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") dated 27.03.2015 for the Assessment Year (AY) 2012-13.

2. The sole ground has been raised by the Revenue in its appeal reads as under:-

(1) The Ld.CIT(A) has erred in law and on facts in deleting the addition of Rs.6,30,72,180/- made on account of disallowance of deduction u/s.35AD as the assessee firm does not fulfill the criteria to avail the deduction u/s.35AD of the I.T.Act.

3. The short facts of the case are that the assessee-firm is engaged in the business of hotel. The year under scrutiny was the first year of commencement of its hotel business. During the year under scrutiny, it had achieved turnover of Rs.52,81,068/- and had business loss of Rs.3,02,96,276/-. The assessee has claimed deduction u/s.35AD of the Act. It is relevant to mention that the assessee has commenced its operation of business w.e.f. 17.11.2011 under the brand name "always" River view Hotel. The assessee thereafter applied for categorization as three-star hotel before the Ministry of Tourism under the aegis of Government of India on 07.06.2013. Such classification as a three-star hotel, was awarded by a letter dated 24.09.2013 issued under the signature of the Regional Director, Ministry of Tourism for the period of 11.09.2013 to 10.09.2018.

4. The AO rejected the claim of deduction as made by the assessee on the premise that the star certificate issued by the Tourism Department dated 24.09.2013 is beyond AY 2012-13.

5. The Ld.CIT(A) allowed the appeal preferred by the assessee against such order allowing the deduction as prayed for by the assessee under S.35AD of the Act on 21.04.2016.

6. Against the said order dated 21.4.2016 passed by the CIT(A), the Revenue has come up in appeal before us.

7. The Ld.AR relied upon the order passed by the CIT(A) and also reiterated the submissions made before the Ld.CIT(A) and prayed for deduction as mentioned hereinabove u/s.35AD of the Act.

On the other hand, the Ld.DR vehemently objected to the submission made by the Ld.AR and relied upon the order passed by the AO in disallowing the deduction claimed by the assessee.

8. We have heard both the parties. We have also perused the relevant material available on record. We have gone through the orders of the Ld.CIT(A) and Ld.AO as well. The AO rejected the claim of the

assessee since the star certificate issued by the Tourism Department dated 21.09.2013 is beyond AY 2012-13.

9. The moot question in this case is this that as to whether the assessee is entitled to deduction u/s.35AD as prayed for. Section 35AD of the Act which reads as follows:-

Deduction in respect of expenditure on specified business.

35AD. (1) An assessee shall be allowed a deduction in respect of the whole of any expenditure of capital nature incurred, wholly and exclusively, for the purposes of any specified business carried on by him during the previous year in which such expenditure is incurred by him :

Provided that the expenditure incurred, wholly and exclusively, for the purposes of any specified business, shall be allowed as deduction during the previous year in which he commences operations of his specified business, if—

- (a) the expenditure is incurred prior to the commencement of its operations; and
- (b) the amount is capitalised in the books of account of the assessee on the date of commencement of its operations.

(1A) [***]

(2) This section applies to the specified business which fulfils all the following conditions, namely :—

- (i) it is not set up by splitting up, or the reconstruction, of a business already in existence;
- (ii) it is not set up by the transfer to the specified business of machinery or plant previously used for any purpose;
- (iii) where the business is of the nature referred to in sub-clause (iii) of clause (c) of sub-section (8), such business,—
 - (a) is owned by a company formed and registered in India under the Companies Act, 1956 (1 of 1956) or by a consortium of such companies or by an authority or a board or a corporation established or constituted under any Central or State Act;

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- (b) has been approved by the Petroleum and Natural Gas Regulatory Board established under sub-section (1) of section 3 of the Petroleum and Natural Gas Regulatory Board Act, 2006 (19 of 2006) and notified by the Central Government in the Official Gazette in this behalf;
- (c) has made not less than [such proportion of its total pipeline capacity as specified by regulations made by the Petroleum and Natural Gas Regulatory Board established under sub-section (1) of section 3 of the Petroleum and Natural Gas Regulatory Board Act, 2006 (19 of 2006)] available for use on common carrier basis by any person other than the assessee or an associated person; and
- (d) fulfils any other condition as may be prescribed;

[(iv) where the business is of the nature referred to in sub-clause (xiv) of clause (c) of sub-section (8), such business,—

- (A) *is owned by a company registered in India or by a consortium of such companies or by an authority or a board or corporation or any other body established or constituted under any Central or State Act;*
- (B) *entity referred to in sub-clause (A) has entered into an agreement with the Central Government or a State Government or a local authority or any other statutory body for developing or operating and maintaining or developing, operating and maintaining, a new infrastructure facility.]*

[(3) Where a deduction under this section is claimed and allowed in respect of the specified business for any assessment year, no deduction shall be allowed under the provisions of ³³[[section 10AA](#) and] Chapter VI-A under the heading "C.— *Deductions in respect of certain incomes*" in relation to such specified business for the same or any other assessment year.]

(4) No deduction in respect of the expenditure referred to in sub-section (1) shall be allowed to the assessee under any other section in any previous year or under this section in any other previous year.

(5) The provisions of this section shall apply to the specified business referred to in sub-section (2) if it commences its operations,—

- (a) on or after the 1st day of April, 2007, where the specified business is in the nature of laying and operating a cross-country natural gas pipeline network for distribution, including storage facilities being an integral part of such network; [***]

on or after the 1st day of April, 2010, where the specified business is in the

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- [(aa) nature of building and operating a new hotel of two-star or above category as classified by the Central Government;
- (ab) on or after the 1st day of April, 2010, where the specified business is in the nature of building and operating a new hospital with at least one hundred beds for patients;
- (ac) on or after the 1st day of April, 2010, where the specified business is in the nature of developing and building a housing project under a scheme for slum redevelopment or rehabilitation framed by the Central Government or a State Government, as the case may be, and which is notified by the Board in this behalf in accordance with the guidelines as may be prescribed; [***]]
on or after the 1st day of April, 2011, where the specified business is in the nature of developing and building a housing project under a scheme for affordable housing framed by the Central Government or a State Government, as the case may be, and notified by the Board in this behalf in accordance with the guidelines as may be prescribed;
- [(af) (ae) on or after the 1st day of April, 2011, in a new plant or in a newly installed capacity in an existing plant for production of fertilizer; [***]]
- [(af) on or after the 1st day of April, 2012, where the specified business is in the nature of setting up and operating an inland container depot or a container freight station notified or approved under the Customs Act, 1962 (52 of 1962);
- (ag) on or after the 1st day of April, 2012, where the specified business is in the nature of bee-keeping and production of honey and beeswax;
- (ah) on or after the 1st day of April, 2012, where the specified business is in the nature of setting up and operating a warehousing facility for storage of sugar; [***]]
- [(ai) on or after the 1st day of April, 2014, where the specified business is in the nature of laying and operating a slurry pipeline for the transportation of iron ore;
- (aj) on or after the 1st day of April, 2014, where the specified business is in the nature of setting up and operating a semi-conductor wafer fabrication manufacturing unit, and which is notified by the Board in accordance with such guidelines as may be prescribed ; [***]]
- [(ak) on or after the 1st day of April, 2017, where the specified business is in the nature of developing or operating and maintaining or developing, operating and maintaining, any infrastructure facility; and]
- (b) on or after the 1st day of April, 2009, in all other cases not falling under [any

of the above clauses].

(6) The assessee carrying on the business of the nature referred to in clause (a) of sub-section (5) shall be allowed, in addition to deduction under sub-section (1), a further deduction in the previous year relevant to the assessment year beginning on the 1st day of April, 2010, of an amount in respect of expenditure of capital nature incurred during any earlier previous year, if—

- (a) the business referred to in clause (a) of sub-section (5) has commenced its operation at any time during the period beginning on or after the 1st day of April, 2007 and ending on the 31st day of March, 2009; and
- (b) no deduction for such amount has been allowed or is allowable to the assessee in any earlier previous year.

[(6A) Where the assessee builds a hotel of two-star or above category as classified by the Central Government and subsequently, while continuing to own the hotel, transfers the operation thereof to another person, the assessee shall be deemed to be carrying on the specified business referred to in sub-clause (iv) of clause (c) of sub-section (8).]

(7) The provisions contained in sub-section (6) of [section 80A](#) and the provisions of sub-sections (7) and (10) of [section 80-IA](#) shall, so far as may be, apply to this section in respect of goods or services or assets held for the purposes of the specified business.

[(7A) Any asset in respect of which a deduction is claimed and allowed under this section shall be used only for the specified business, for a period of eight years beginning with the previous year in which such asset is acquired or constructed.

(7B) Where any asset, in respect of which a deduction is claimed and allowed under this section, is used for a purpose other than the specified business during the period specified in sub-section (7A), otherwise than by way of a mode referred to in clause (vii) of [section 28](#), the total amount of deduction so claimed and allowed in one or more previous years, as reduced by the amount of depreciation allowable in accordance with the provisions of [section 32](#), as if no deduction under this section was allowed, shall be deemed to be the income of the assessee chargeable under the head "Profits and gains of business or profession" of the previous year in which the asset is so used.

(7C) Nothing contained in sub-section (7B) shall apply to a company which has become a sick industrial company under sub-section (1) of section 17 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), during the period specified in sub-section (7A).]

(8) For the purposes of this section,—

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- (a) an "associated person", in relation to the assessee, means a person,—
- (i) who participates, directly or indirectly, or through one or more intermediaries in the management or control or capital of the assessee;
 - (ii) who holds, directly or indirectly, shares carrying not less than twenty-six per cent of the voting power in the capital of the assessee;
 - (iii) who appoints more than half of the Board of directors or members of the governing board, or one or more executive directors or executive members of the governing board of the assessee; or
 - (iv) who guarantees not less than ten per cent of the total borrowings of the assessee;
- (b) "cold chain facility" means a chain of facilities for storage or transportation of agricultural and forest produce, meat and meat products, poultry, marine and dairy products, products of horticulture, floriculture and apiculture and processed food items under scientifically controlled conditions including refrigeration and other facilities necessary for the preservation of such produce;
- [(ba) "*infrastructure facility*" means—
- (i) *a road including toll road, a bridge or a rail system;*
 - (ii) *a highway project including housing or other activities being an integral part of the highway project;*
 - (iii) *a water supply project, water treatment system, irrigation project, sanitation and sewerage system or solid waste management system;*
 - (iv) *a port, airport, inland waterway, inland port or navigational channel in the sea;*]

(c) "specified business" means any one or more of the following business, namely :—

 - (i) setting up and operating a cold chain facility;
 - (ii) setting up and operating a warehousing facility for storage of agricultural produce;
 - (iii) laying and operating a cross-country natural gas or crude or petroleum oil pipeline network for distribution, including storage facilities being an integral part of such network;
 - [(iv) building and operating, anywhere in India, a [hotel] of two-star or above category as classified by the Central Government;
 - (v) building and operating, anywhere in India, a [hospital] with at least

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- one hundred beds for patients;
- (vi) developing and building a housing project under a scheme for slum redevelopment or rehabilitation framed by the Central Government or a State Government, as the case may be, and notified by the Board in this behalf in accordance with the guidelines as may be prescribed;]
 - [(vii) developing and building a housing project under a scheme for affordable housing framed by the Central Government or a State Government, as the case may be, and notified by the Board in this behalf in accordance with the guidelines as may be prescribed ;
 - (viii) production of fertilizer in India;]
 - [(ix) setting up and operating an inland container depot or a container freight station notified or approved under the Customs Act, 1962 (52 of 1962);
 - (x) bee-keeping and production of honey and beeswax;
 - (xi) setting up and operating a warehousing facility for storage of sugar;]
 - [(xii) laying and operating a slurry pipeline for the transportation of iron ore;
 - (xiii) setting up and operating a semi-conductor wafer fabrication manufacturing unit notified by the Board in accordance with such guidelines as may be prescribed ;]
 - developing or maintaining and operating or developing, maintaining
 - [(xiv) and operating a new infrastructure facility;]
- (d) any machinery or plant which was used outside India by any person other than the assessee shall not be regarded as machinery or plant previously used for any purpose, if—
- (i) such machinery or plant was not, at any time prior to the date of the installation by the assessee, used in India;
 - (ii) such machinery or plant is imported into India from any country outside India; and
 - (iii) no deduction on account of depreciation in respect of such machinery or plant has been allowed or is allowable under the provisions of this Act in computing the total income of any person for any period prior to the date of installation of the machinery or plant by the assessee;
- (e) where in the case of a specified business, any machinery or plant or any part thereof previously used for any purpose is transferred to the specified business

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and the total value of the machinery or plant or part so transferred does not exceed twenty per cent of the total value of the machinery or plant used in such business, then, for the purposes of clause (ii) of sub-section (2), the condition specified therein shall be deemed to have been complied with;

- (f) any expenditure of capital nature shall not include [*any expenditure in respect of which the payment or aggregate of payments made to a person in a day, otherwise than by an account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account, exceeds ten thousand rupees or*] any expenditure incurred on the acquisition of any land or goodwill or financial instrument.]

10. The assessee in order to avail the benefit of section 35AD of the Act has to fulfill the conditions being (i) expenditure incurred prior to commencement of its operation and (ii) the amount is capitalized in the books of accounts of the assessee on the date of its operation.

The admitted facts are this that -

- (a) First application was made to the Indian Tourism Department, Mumbai along with application fees of Rs.8000/- and by DD No.6222292 dated 16.08.2011.
- (b) Further online application/compliance vide our letter dated 23.04.2012.
- (c) Indian Tourism Det. Vide the letter dated 29.05.2012, informed further compliance in respect of classification of our hotel under 3 star categories.
- (d) Thereafter the assessee firm addressed letter to Tourism Dept. vide letter dated 07.06.2013 in compliance of their letter and

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requesting to grant 3 star category to the assessee firm from the date of operation.

(e) The Indian Tourism Dept. carried out inspection of our hotel on 16.08.2013 for classification under 3 star categories.

(f) After observing all formalities and procedures the Tourism Dept. of India issued 3 star category certificates for five years.

(g) In spite of our repeated request and personal follow up with tourism dept. they issued certificate of 3 star category w.e.f. 11.09.2013 and valid upto 10.09.2018

There is no procedure to issue the star rating certificate from the date of application retrospectively and is issued on and from the date of signing of the certificate but it also does not mean that the hotel was operated for lower than three star category from the date of application till the issuance of three-star rated certificate. Naturally, in order to get the certificate, the assessee has designed the hotel rooms and all other amenities according to the terms and conditions specified for three-star hotel.

As per provisions of section 35AD, the expenditure incurred wholly and exclusively for the purpose of any specified business shall be allowed as deduction during the previous year in which he commences operations. Accordingly, the assessee-firm commenced its specified

business during the previous year relevant to AY 2012-13 and thus it claimed entire capital expenditure as deduction u/s.35AD in AY 2012-13.

Clause (IV) (C) of Sub-section (8) of section 35AD of the Act stipulates that “building and operative anywhere in India a hotel of two-star or above category as classified by the Central Government”. There is no such time limit of obtaining star certificate is prescribed in the above clause. The only requirement is to build an operation of two or more star hotel classified by Central Government. The AO misconstrued the said clause and observed that “in order to avail the benefit of a three star category hotel, the assessee was required to be classified as a three-star category hotel in the year of operation as the benefit of this can only be given to a two and above star hotels. As the assessee does not fulfill this criteria, deduction claimed by the assessee is hereby withdrawn”.

The Ld.CIT(A), on the other hand, allowed the appeal preferred by the assessee against the said order dated 27/03/2015. As per the provisions of section, any capital expenditure incurred by the assessee prior to the commencement of operations of the new unit shall be allowed as deduction in the previous year in which the assessee commences the operation of offices as new specified business if the assessee has capitalized the amount of expenditure in its books of accounts on the date of commencement of operation of the specified business which is present in the case in hand. Furthermore, the assessee

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commenced its business on 17.11.2011 and he applied for the star classification certificate on 07.06.2013 which was granted by the concerned department on 24.09.2013 with effect from 11.09.2013 till 10.09.2018. In fact, the application was made by the assessee in due time, inspection was conducted by the concerned department and ultimately certificate was issued. There is no fault on the part of the assessee to apply and/or obtain the said certificate so far delay is concerned nor there any time limit specified for obtaining such certificate in this Statute. The assessee thus fulfills the criterion prescribed under the Statute and is entitled to deduction on capital expenditure incurred by him prior to the commencement of its operation and therefore we find no infirmity in the order passed by the Ld.CIT(A) and thus we uphold the same. Revenue's appeal on this ground stands dismissed. Consequently, addition/disallowance made by the AO is hereby deleted.

11. In the result, Revenue's appeal is dismissed.

This Order pronounced in Open Court on	06 /06/2018
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Sd/-
एल.के.बिल्लैया
(लेखा सदस्य)
(N.K. BILLAIYA)
ACCOUNTANT MEMBER
Dated / 05 /2018

टी.सी.नायर, व.नि.स./T.C. NAIR, Sr. PS

Sd/-
सुश्री मधुमिता रॉय
(न्यायिक सदस्य)
(Ms.MADHUMITA ROY)
JUDICIAL MEMBER

Pronounced on 6/6/18
Sd/- Sd/-
(AS) (MR)
AM JM

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-Ahmedabad-5
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad