

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "E", MUMBAI**

**BEFORE SHRI C.N. PRASAD, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA No.1163/M/2011
Assessment Year: 2006-07**

M/s. Trent Ltd., Bombay House, 2 nd Floor, 24, Homy Mody Street, Fort, Mumbai – 400 001 PAN: AAACL 1838J	Vs.	Additional CIT, Range – 2(3), Aayakar Bhavan, Mumbai
(Appellant)		(Respondent)

**ITA No.1727/M/2011
Assessment Year: 2006-07**

DCIT-2(3), R.No.555, Aayakar Bhavan, Mumbai	Vs.	M/s. Trent Ltd., Bombay House, 2 nd Floor, 24, Homi Mody Street, Fort, Mumbai – 400 001 PAN: AAACL 1838J
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Nitesh Joshi, A.R.
Revenue by : Shri V. Justin, D.R.

Date of Hearing : 25.06.2018
Date of Pronouncement : 27.08.2018

ORDER

Per Rajesh Kumar, Accountant Member:

The above titled appeals one by the assessee and the other by the Revenue have been preferred against the order dated 06.12.2010 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2006-07.

ITA No.1163/M/2011 (Assessee's appeal)

2. The various grounds raised by the assessee are as under:

“The Appellant submits that each of the following grounds of appeal is independent of and without prejudice to one another:

1) A) The Commissioner of Income Tax (Appeals) [CIT(A)] erred in confirming the disallowance made by Assessing Officer (AO) for depreciation claim of Rs.5,00,000/- on intangible assets - non-compete fees of Rs.20,00,000/- paid during Financial Year 2005-06 under the non-compete agreement.

B) Alternatively and without prejudice to the above, the CIT(A) erred in disallowing u/s 37(1) non-compete fees of Rs.20,00,000/- paid during Financial Year 2005-06, as not being expenditure laid out or expended wholly and exclusively for the purposes of appellant's business.

2) The CIT(A) erred in restoring disallowance made by AO u/s 14A r.w.r 8D of Rs.22,89,595/- incurred towards direct interest expenditure and Rs.86,52,415/- towards administrative expenditure back to the file of AO for his fresh adjudication and not accepting the disallowance offered by the appellant u/s 14A of Rs.37,29,108/- (being Rs.14,39,513/- towards administrative expenses and Rs.22,89,595/- towards interest expenses).

3) The CIT(A) erred in confirming the disallowance made by AO towards the amount amortized in respect of the appellant's Employees' Stock Option Scheme (ESOP) of Rs.64,75,000/- under section 37(1) of the Act.

4) A) The CIT(A) erred in not deciding Annual Letting Value of the premises at Taj building as per municipal valuation u/s 23(1)(a).

B) The CIT(A) erred in rejecting appellant's contention that fair market rent of the premises at Taj Building should be compared with the total sum received from letting of premises along with furniture hire charges.

The Appellant craves leave to add to, alter, amend, substitute and/or vary any of the above grounds of appeal before or during the course of hearing of the appeal.”

3. The issue raised in ground No.1A is against the confirmation of disallowance of Rs.5 lakhs by Ld. CIT(A) as made by the AO towards depreciation claimed on intangible assets on non-compete fee of Rs.20 lakhs paid during the financial year 2005-06.

4. The facts in brief are that the AO during the course of assessment proceedings observed that assessee has claimed depreciation of Rs.5 lakhs @ 25% on the amount of non compete fees paid to Shri Natraj Ramaiah and Mrs. Hemlatha Ramaiah separately of Rs.10,00,000/- each for not carrying out any business directly or indirectly or managing or advising as partner or associate or shareholder or director or set up the business being carried out presently by the firm i.e. of retailing and publication of books and magazines etc. The assessee during the year acquired share to the tune of 78% in the firm known as Landmark for a consideration of Rs.91.51 Cr comprising 3.90 cr in the form of capital and 87.61 Cr for acquiring the rights. The firm Landmark was reconstituted with the partners Shri Natraj Ramaiah and Mrs. Hemlatha Ramaiah continuing in the said partnership eve after the reconstitution vide reconstitution deed dated 30.08.2005 and the payment of non compete fee was duly evidenced by the non compete agreement dated 30.08.2005. According to the AO the said transaction was entered into by the assessee with the two partners of Landmark with the intent to avoid the capital gain and thus the transaction was entered into by way of non compete fee. According to the AO there was no need to pay the non compete fee in view of the fact that interest in the partnership M/s. Landmark who were carrying on the business of retailing and publication of books and magazines was already acquired by the assessee to the extent of 78% and thus disallowed the depreciation claimed. The Ld. A.R.

vehemently submitted before AO that the assessee acquired 78% of the interest in the partnership M/s. Landmark which was carrying on the business of retailing of publication of books and magazines and the assessee paid Rs.10 lakhs each to Shri Natraj Ramaiah and Mrs. Hemlatha Ramaiah as non compete fee vide separate agreements dated 30.08.2005 for not carrying on any similar business for a period of five years from the detailed agreement.

5. The Ld. A.R. submitted that this is a commercial right and will fall under the ambit of intangible assets and reasoned that the assessee rightly claimed the depreciation @ 25%. The Ld. A.R. submitted that the belief of the AO is fallacious and wrong for the reason that the AO disallowed the depreciation merely on a wrong notion that the assessee has 78% of the interest in the partnership in M/s. Landmark and therefore there was no need to pay the non compete fee to the existing partners in the partnership firm. The Ld. A.R. further argued that the Ld. CIT(A) has erroneously confirmed the order of the AO on the same belief that there was no need to pay the non compete fee to the existing partners. Whereas as a matter of fact, the assessee has paid non compete fee to the continuing partner in order to protect its interest to the tune of 78% in the business of M/s. Landmark which is a valuable commercial right. The Ld. A.R. also relied on three decisions namely;

“1. Principal CIT vs Zydus Wellness Ltd [2017] 81 taxmann.com 159
(Gujarat High Court)

2. CIT vs Ingersoll Rand International Ind. Ltd. [2014] 48 taxmann.com 349 (Karnataka High Court)
3. DCIT vs Bunge India (P.) Ltd. [2016] 70 taxmann.com 323 (Mumbai Tribunal)"

and submitted that the order of Ld. CIT(A) should be reversed and the AO should be directed to allow the depreciation @ 25%. Alternatively, the Ld. A.R. submitted that non compete fee is allowable under section 37(1) of the Act as expenditure being wholly and exclusively incurred for the purpose of business of the assessee and the same should be allowed in toto by relying on the decision of the Delhi High Court in the case of Eicher Ltd. vs. CIT (2012) 173 Taxman 251 (Delhi).

6. The Ld. D.R., on the other hand, relied on the order of authorities below and submitted that the payment of non compete fee was paid to the existing partners of M/s. Landmark and not to the retiring partners and therefore there was no question of competing with the same firm. The Ld. D.R. submitted that the decision relied by the Ld. A.R. is certainly applicable in the case of non compete fee but the payment in the present case is not a payment towards non compete fee but was given a colour of non compete fee by entering into separate agreements with two existing partners paying Rs.10 lakh to each partner which was nothing but to acquire the interest in the said partnership firm and therefore this was rightly disallowed by the AO. The Ld. D.R. further submitted that the Ld. CIT(A) has passed a very reasoned order after considering the contentions of the assessee and therefore the same should be affirmed.

7. We have heard the rival submissions of both the parties and perused the material on record including the decisions cited by the Ld. A.R. We find that in the present case the assessee acquired 78% of the interest in a firm known as M/s. Landmark which was engaged in the business of retailing and publishing the books and magazines. The assessee paid Rs.10 lakh each to two partners vide two separate agreements dated 30.08.2005 as non compete fee for not carrying on or competing with the firm for 5 years from the date of agreement. The assessee claims that the said payment was made as non compete fee in order to protect 78% of the business interest in the firm M/s. Landmark and therefore the reasoning given by the AO that payment to the existing partners has been made with an intent to avoid taxes is wrong, misleading and fallacious. After going through the non compete agreements dated 30.08.2005 and considering the facts that assessee acquired 78% of the interest in the partnership firm, we are of the firm view that any payment which is made for not competing with the firm for the period of five years is evidently falls within the ambit of non compete fee as the payment was made to protect the business interest of the assessee as the assessee's cost of investment in the said firm was Rs.91.51 crores which was made by way of capital contribution to the tune of Rs.3.9 crores and Rs.87.61 for acquiring the rights in the said partnership. In our opinion, the finding of the Ld. CIT(A) is fallacious and wrong and can not be sustained. In this case, the assessee has made

payment of non compete fee and rightly treated and classified under intangible assets and claimed depreciation thereon @25%. The case of the assessee is supported by a series of decisions as referred to above. In the said decisions it has been held that the depreciation has to be allowed on the non compete fee. Accordingly, we set aside the order of Ld. CIT(A) and direct the AO to allow the depreciation. The ground raised by the assessee is allowed.

8. Since we have already decided the issue on the main plea of the assessee, the issue raised in ground No.1B need not to be adjudicated.

9. The issue raised in ground No.2 is not pressed at the time of hearing by the Ld. Counsel of the assessee and therefore is dismissed as not pressed.

10. The issue raised in third ground of appeal is against the confirmation of disallowance of Rs.64,75,000/- by Ld. CIT(A) as made by the AO towards amortization in respect of Company's Employee Stock Options Scheme (ECOS) under section 37(1) of the Act.

11. The facts in brief are that the AO during the course of scrutiny proceedings observed that assessee has amortized Rs.0.64 crore in the P & L Account out of the stock options of 45,850 granted under the Employee Stock Options Scheme (ECOS) to senior manager and selected officers of the company the total cost of which was Rs.3.96 crores. The

assessee has appended note in the annual report to this extent that company has granted stock options under Employee Stock Options Scheme (ECOS), 2005 in accordance with the SEBI's guidelines and the accounting value of options is accounted as deferred employee compensation and is amortized on a straight line basis. The AO disallowed the claim of the assessee by holding that the expenditure in respect of ECOS is of capital in nature.

12. In the appellate proceedings, the Ld. CIT(A) dismissed the appeal of the assessee by observing and holding as under:

"8.3 I have considered the facts of the issue and the submissions made by the AR but do not find merit in them. The ESOP benefit is available to the employees since the value at which the shares are offered is much lower than the market price of those shares at that time. However, this does not involve any actual expenditure on the part of the company giving such benefit to the employees. In fact, such benefit only represents the opportunity cost to the company and not actual cost. Since there is no physical cost involved in allowing the employees the benefit of ESOP, there is no question of allowing any deduction to the appellant on that account. Hence, the disallowance made by the AO is confirmed albeit on a different footing. This ground is dismissed.

13. The Ld. A.R. vehemently submitted before us that any expenditure incurred by the assessee on granting of Employee Stock Options Scheme has been amortized as per the SEBI guidelines and the same is a revenue expenditure and was rightly claimed by the assessee. Therefore, the order of Ld. CIT(A) upholding said disallowance is fallacious and against the legal propositions as laid down by the various judicial forums. The Ld. A.R. relied on a series of decisions in defence of his arguments namely;

"1. PVP Ventures Ltd v. CIT [2012] 23 taxmann.com 286 (Madras-

High Court)

2. New Delhi Television Ltd. v. CIT [2017] 398 ITR 57 (Delhi High Court)
3. Biocon Ltd. v. DOT [2013] 35 taxmann.com 335 (Bangalore Tribunal) (SB)
4. M/s Accenture Services Pvt. Ltd. v. DCIT [2010] ITA/4540/MUM/08 (Mumbai Tribunal)

14. The Ld. D.R., on the other hand, relied on the order of authorities below.

15. Having heard the rival submissions of both the parties and considering the facts on record, we find that in this case the assessee has amortized the expenses in connection with Employee Stock Options Scheme as per SEBI guidelines and claimed the same as revenue expenditure which according to the AO was not correct and he disallowed the same by holding that same is of capital in nature which was also affirmed by the CIT(A). We are not in agreement with the conclusion drawn by the Ld. CIT(A) on this issue that the amortization of expenditure claimed by the assessee is not admissible as revenue in nature and the issue is settled by the various judicial forums. The case of the assessee is supported by a series of decisions referred to above by the Ld. A.R. We have perused all these decisions and found that the case of the assessee is squarely covered by ratio laid down in these decisions. In view of these facts and ratio laid down by the various judicial forums, we set aside the order of Ld. CIT(A) and direct the AO to delete the disallowance.

16. The issue raised in 4th ground of appeal is against the order of Ld. CIT(A) in deciding the annual letting value of the premises known as Taj Building as per section 23(1)(a) of the Act and also erred in rejecting the assessee's contention that fair market rent of the building should be compared with the total sum received from letting of premises along with furniture hire charges.

17. The facts in brief are that the assessee has entered into a Leave and License Agreement with M/s. Freight Systems (I) Pvt. Ltd. for a license fees amounting to Rs.94,392/- per month working out to Rs.11,32,704/- per annum. Simultaneously, the assessee also entered into a Hire Agreement of even date with the said company for monthly hire charges of Rs.3,06,774/- (i.e. Rs.36,81,288/- per annum) for use of furniture, fixture and other articles attached, installed/lying in the said premises. The assessee offered both the income under the head 'Income from house property'. However, the AO treated the lease rent as income from house property whereas the income from hire charges of furniture and fixtures was treated as income from other sources. While assessing the income from license fee, the AO rejected the ALV of Rs.11,32,704/- and determined the fair rent on the basis of comparable cases at Rs.35,50,000/-. The Ld. CIT(A) affirmed the order of AO so far as the estimation of ALV is concerned, however, allowed the hire charges of furniture and fixtures to be treated as part of the rental income of the assessee by observing and holding as under:

“9.4 However, there is no merit in the contention of the AR that the fair value placed by the AO in respect of the leased premises is incorrect. The provisions of section 23 clearly provide that the ALV of the property has to be considered to be the sum for which the property might reasonable be excepted to let from year to year or the actual rent received; whichever is higher. In the present case, the fair market value has been established by the AO to be much higher than the actual rent received. It is not the case of the appellant that the lease in question was subject to the rent control act and therefore the standard rent was to be considered. In such a scenario, as per the legal position obtaining, the AO was expected to arrive at reasonable rent expected from the said property. The contention of the AR that the AO was legally bound to consider the rateable value fixed by Municipal Authorities as the basis for working out the ALV is misplaced since the municipal valuation was only one of the criteria available with the AO to determine the reasonable rent expected from the said property. The AO has rightly placed reliance on a number of judicial pronouncements in his order to support that the adoption of municipal rateable value was not binding on him. Further, there is no merit in the AR's contention that the comparison by the AO with the benchmarked property was inappropriate. In fact, the AO has been very fair to have put a premium of only 20% on the residential roper1y, with which the impugned property was compared, to evaluate the potential rental of the commercial property in question. The impugned commercial property, as rightly observed by the AO is in a posh area and the AO has been very reasonable in estimating the sum for which the property might reasonably be expected to let from year to year. Hence, the action of the AO in estimating the ALV of this property at Rs.35,50,000/- is upheld. This limb of the ground is dismissed.”

18. The Ld. A.R. submitted before the bench that the AO has wrongly treated Taj Building as Taj Hotel by referring to the observations of AO in para 5.6 A4 at page No.4 of the assessment order. The Ld. A.R. further referred to para 5.6 A6 wherein the AO compared the Taj Building which is located at Fort, Mumbai with another building owned by the central government used for officer's residences known as Belvedere which is Breach Candy and thus pointed out that the whole exercise of the AO to find out the fair market rent was fallacious and full of anomalies as two buildings are at two different locations and therefore can not be compared. The

Ld. A.R. further pointed out that the agreement for the leave and license fee as well as the hire charges of furniture and fixture though entered into vide two separate agreements but even dated and were rented to the same party M/s. Freight Systems (I) Pvt. Ltd. and therefore the composite rent should be considered. The Ld. A.R. contended that the composite rent of the property comes to Rs.94/- per sq. ft. whereas the ALV determined by the AO was Rs. 72/- per Sq. Ft. and therefore the annual letting value as determined by the AO at RS.35,50,000/- was totally wrong and fallacious. The Ld. A.R. submitted that the annual letting value as per the provision of section 23(1) should be taken as the sum for which the property might reasonably be accepted to let out from year to year u/s 23(1)(a) of the Act or annual rent received u/s 23(1)(b) of the Act. Therefore, the Ld. A.R. submitted that in the present case the rent received should be assessed as the ALV and not the rent which is fixed by the AO on the fallacious comparison with those properties which are not at all comparable with the building of the assessee. The Ld. A.R. in defence of his argument relied on the following decisions:

9. MV. Sonavala v. CIT [1989] 42 Taxman 123 (Bombay High Court)
10. Smt. Smitaben N. Ambani v. Commissioner of Wealth [2009]323 ITR_104_ (Bombay High Court)
11. Tip Top Typography v. CIT [2014] 48 taxmann.com 191 (Bombay High Court)"

The Ld. Counsel submitted that the municipal valuation for Taj Building premises as shown in the property tax bill is Rs.1,31,300/- whereas the actual rent received for the premise is Rs.11,32,704/-. Therefore as against the municipal

valuation of Rs.1,31,300/- the actual rent received for the leased premises of Rs.11,32,704/- should be taken as the actual rent is higher than the municipal valuation. The Ld. A.R. alternatively submitted that if the composite of rent and hire charges for the furniture and fixtures are taken together that could be taken the ALV and in defence of his proposition the Ld. A.R. relied on the following decisions:

- “1. Shambhu Investment (P.) Ltd. vs. CIT (2003) 129 Taxman 70 (Supreme Court)
2. CIT vs. Shambhu Investment (P.) Ltd. “(2001) 116 Taxman 795 (Calcutta High Court)
3. Dudhsagar Investments (P) Ltd. vs. ACIT (2014) 110 DTR 0225 (Bombay High Court)
4. Shibani S. Bhowjani v. DCIT (2017) 166 ITD 488 (Mumbai Tribunal)”

19. The Ld. D.R., on the other hand, relied on the order of authorities below and submitted before the Bench that the AO is free to determine the ALV of the premises let out by the assessee where the fair rent is enormously low as compared with the market rate. The Ld. D.R. relied on the decision of Hon'ble Bombay High Court in the case of CIT vs. Tip Top Typography v. CIT [2014] 48 taxmann.com 191 (Bombay High Court) and ACIT vs. Virendra Jain in ITA No.2116/M/2012 A.Y. 2009-10. The Ld. D.R. finally prayed before the Bench that the order passed by the AO is well reasoned based on the comparable instances of the fair rent in the vicinity and was rightly upheld by the Ld. CIT(A) and therefore deserves to be sustained.

20. We have heard the rival submissions of both the parties and perused the material on record including the decisions cited by both the parties. We find that in the present case the

assessee has let out Taj Building which is located in D.N. Road, Fort, Mumbai to M/s. Freight Systems (I) Pvt. Ltd. The assessee entered into two agreements (i) for lease of premises dated 14.08.2003 at a monthly rent of Rs.94,392/- and (ii) even dated qua hire charges of furniture and fixtures on a monthly charges of Rs.3,06,774/-. The assessee showed both the incomes of rent as well as hire charges as income from house property on the premise that income received is towards the property and other embedded facilities though by way of two separate agreements. Therefore the sum is inseparable and has to be assessed together. Accordingly, the assessee showed Rs.11,32,704/- by way of rental and Rs.36,81,288/- towards hire charges of furniture and fixtures and other articles attached/insolvent lying in the said premises as income from house property. The AO does not agree to the treatment of the income by the assessee under the head income from house property and accordingly taken only the rentals under the head house property whereas hire charges from furniture and fixtures and other articles were treated as income from other sources. For the purpose of assessing the income from house property, the AO estimated the ALV at Rs.35,50,000/- by taking a comparable case of a government owned building meant for central government officers known as Belvedere nevertheless the building is located at a different location and after ascertaining the rent of the said property at @ Rs.60.50 per sq. ft. determined the market rate at Rs. 60.50 plus 30% of the said rate and thus ALV was fixed at Rs.72 per sq. ft. per month. The AO thus calculated the ALV

at Rs.35,50,000/-. The Ld. Counsel has also pointed out during the course of hearing that the building leased out by the assessee known as Taj Building was erroneously misconstrued by the AO as Taj Hotel and the whole process of determination of ALV went with wrong parameters and presumptions. We find merit in the submissions of the Ld. A.R. that the Belvedere, a government owned building at Breach Candy is not at all comparable as the two are located at different localities in Mumbai and thus we are in agreement with the arguments of the Ld. A.R. that the said estimation is fallacious and suffer from several infirmities. After perusal of provisions of section 23, we find that the annual value of any property has to be determined as per the provision of section 23(1)(a) or 23(1)(b). In the present case, the property is let out and therefore the rent received is Rs.11,32,704/- and the same has to be treated as ALV as the municipal valuation of the said premises is Rs.1,31,300/-. The case of the assessee is supported by the various decisions referred to and relied by the Ld. A.R. of the assessee during the course of hearing. In the case of M.V. Sonavala vs. CIT (supra) the Hon'ble Bombay High Court has upheld the order of the Tribunal wherein it has been held that annual value of the property is to be taken at an amount which is higher of the two i.e. rent received by the assessee in respect of different properties and not at their municipal rateable rate. In the present case, the municipal rate of valuation is below the actual rent received and therefore the actual rent has to be taken as ALV. In the case of CIT vs. Tip Top Typography (supra) the Hon'ble Bombay

High Court has held that the market rate in the locality is an approved method of determining the fair rental value but it is only when the AO is convinced and satisfied that the case before him is suspicious and determination by the parties is doubtful that he can resort to enquire about the prevailing rate in the locality. So the Hon'ble High Court has held that only in the event of suspicion and some manipulation, the AO can resort to make enquiries or comprehensive cases and not otherwise. We are, therefore, not in agreement with the conclusion drawn by the Ld. CIT(A) holding that the ALV determined on the basis of so called comparable cases which are not at all comparable due to the fact that there is no comparability between the two buildings at all and the locations and also in view of the fact that annual let out value is much lower than the actual rate received. The order of Ld. CIT(A) is set aside and AO is directed to accept the rent as shown by the assessee from the said property. Ground is allowed.

21. Since we have decided the issue of final letting value of the property in favour of the assessee the issue raised in ground No.4B qua treating the total of ALV should be compared with the fair market renting requires no adjudication.

22. In the result, appeal of the assessee is allowed.

ITA No.1727/M/2011 (Revenue's appeal)

23. The tax effect in this appeal is not exceeding Rs.20 lakhs and therefore the same is dismissed as not maintainable in terms of Board's Circular No.3/2018 (F.NO.279/MISC.142/2007-ITJ (PT)] dated 11.07.2018.

24. In the result, assessee's appeal is allowed and the Revenue's appeal is dismissed.

Order pronounced in the open court on 27.08.2018.

**Sd/-
(C.N. Prasad)
JUDICIAL MEMBER**

**Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER**

Mumbai, Dated: 27.08.2018.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.