IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI CHANDRA POOJARI, AM & GEORGE GEORGE K., JM

I.T.A. No.216/Coch/2018
Assessment Year : 2013-14

Gateway Distriparks (Kerala) Ltd., Door No. 26/1804, Chakiat House, Subramaniam Road, Willington Island, Kochi-682 003. [PAN:AACCG 6616P]	**Vs.**	The Assistant Commissioner of Income-tax, Circle-1(2), Kochi
(Assessee-Appellant)		**(Revenue-Respondent)**

Assessee by	Shri P.M. Veeramani, CA
Revenue by	Smt. A.S. Bindhu, DR

Date of hearing	14/08/2018
Date of pronouncement	28/08/2018

O R D E R

Per CHANDRA POOJARI, ACCOUNTANT MEMBER:

This appeal filed by the assessee is directed against the order of the Pr. CIT, Kochi dated 23/03/2018 and pertains to the assessment year 2013-14.

2. The assessee has raised the following grounds:

> 1. Order of the Commissioner of Income Tax is against law. Commissioner of Income Tax is not justified in passing revision order under section 263 on an issue which was examined and considered by the assessing officer while completing the original assessment. Commissioner of Income tax failed to note that in response to the question raised during the course of assessment, your appellant had furnished the copies of the lease deed, allotment letter and connected papers and also furnished its explanation for the claim of depreciation vide its letter dated 10.2.2016.

When the AO has allowed the depreciation on intangible assets after due application of mind, the view taken by the assessing authority is one of the possible views. In such cases, the Commissioner cannot invoke the provisions of section 263 of the Act.

2. Commissioner of Income tax is not correct in invoking revision under section 263 on the ground that the assessing officer has not considered the issue since there was no discussion on the same in the records. The assessing officer had called for the lease deed, allotment letter also and the explanation from the appellant before passing the assessment order allowing the depreciation on intangible asset. When the assessing officer was satisfied that the return filed by the appellant was in accordance with law, he was under no obligation to justify as to why was he satisfied. He was under no obligation in law to give reasons. Hence, the revision order passed by the Commissioner of Income tax is not in accordance with law.

3. The one time non-refundable lease premium was paid to Cochin Port Trust to enable the appellant to carry on the business Container Freight Station, subject to the conditions laid down by the Cochin Port Trust. Thus the payment was for obtaining the right to carry on business of container freight station. The term 'Right’ is not defined in the Act.’ 'Right' means an interest which is legally protected. The lease hold rights in the land enables the assesse to carry out development activities on the land, construct buildings for its Container Freight Station business which are business or commercial rights. The lease hold rights thus gives the holder a right to undertake business activities in the said land and it was specifically granted for establishing and carrying on business of Container Freight Station, Thus, there was no error in the order passed by the assessing officer and hence the revision order of the Commissioner of Income tax is not correct.

For these and such other grounds that may be urged at the time of hearing, it is prayed that the order of Commissioner of Income Tax under section 263 be set aside .

3. The facts of the case are that the assessee is a company carrying on business as Container Freight Station. It filed its Return of Income on 06.09.2013 admitting a Total Income at a loss of Rs.(-) 1,90,31,953/-. Scrutiny assessment for the Assessment Year 2013-14 was completed under Section 143(3) of the Income Tax Act, 1961 on 10.02.2016 accepting the loss returned.

3.1 From perusal of records by CIT, it was noticed that the Assessment Order under Section 143(3) of the Act dated 10.02.2016 passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of revenue for the reason mentioned below :

> *'The Assessee was allotted 2.58 hectares of land by Cochin Port Trust for setting up the Container Freight Station (CFS) on lease for 30 years from 28.10.2010 to 28.10.2040. lease agreement dated 15.03.2011, the Assessee-Company had paid lease premium for the land taken from Cochin Port Trust and treated such with the provisions of Section 32(1)(ii) of the Act. As per the provision of Section 32(l)(ii) of the Act, the intangible assets such as knowhow, patents, copyrights, trademarks, licenses, franchises or any other business or commercial right of similar nature are eligible for depreciation at the rate of 25% of the Act. The premium paid to Cochin Port Trust was for use of land for the purpose of Assessee's business of CFS and the same was not for acquiring any business or commercial rights of similar nature mentioned in section 32(1)(ii) of the Act. Therefore, the depreciation claimed on lease premium paid ought to have been disallowed'.*

3.2 Accordingly, a show-cause notice under Section 263 dated 02.03.2018 was issued by CIT to the Assessee proposing for revision of assessment under Section 263 of the Income Tax Act.

3.3 In response, the authorized representative of the assessee filed a letter on 13.3.2018 before CIT wherein it was *inter-alia* stated that *'when the AO has allowed the depreciation on intangible assets after due application of mind, the view taken is one of the possible views. Hence provisions of Section 263 cannot be invoked... the one-time non-refundable lease premium was paid to Cochin Port Trust to enable the assessee to carry on the Container Freight Station...*

payment was for obtaining the right to carry on business of CFS... 'Right' is not defined in the Act... assessing officer has taken one of the possible views while completing the assessment... there is no error in the assessment order.'

3.4 The CIT considered the submissions made by the Assessee and from a perusal of the records, it was noticed that the above aspect regarding chargeability of depreciation on Container Freight Station was not considered while framing the Assessment Order. The intangible assets eligible for depreciation at the rate of 25% mentioned in Section 32(1)(ii) comprise of know-how, patents, copyrights, trademarks, licenses, …. or any other business or commercial rights of similar nature. From the reply submitted by the assessee, the CIT observed that the payment made cannot be regarded as an 'asset of similar nature' in the line of intangible assets mentioned in the Section. According to the CIT, there was also no discussion about this aspect in the records which makes it clear that theis issue was not considered by the AO during the course of assessment proceedings and while passing the impugned Assessment Order. The CIT held that the above omission by the Assessing Officer in the Assessment Order is erroneous in so far as it is prejudicial to the interests of Revenue. Therefore, the CIT set aside the order of the Assessing Officer on the above issue for *de novo* examination and to pass a speaking order in accordance with law as per time limit specified under Section 153 of the

Income Tax Act, after affording due opportunity to the assessee. The proceedings u/s. 263 of the Act was thus disposed of.

4. Against this, the assessee is in appeal before us. The Ld. AR submitted that the assessee had furnished the copies of the lease deed, allotment letter and connected papers and also furnished its explanation for the claim of depreciation vide its letter dated 10.2.2016. The Ld. AR submitted that AO had allowed the depreciation on intangible assets after due application of mind. The Ld. AR relied on the judgment of the Kolkata High Court in the case of CIT vs. JL Morrison India Ltd (366 ITR 593) wherein while quashing revision order under section 263, it has held that as under:

> *"87. The Assessing Officer was required to examine the return filed by the assessee in order to ascertain his income and to levy appropriate tax on that basis. When the Assessing Officer was satisfied that the return filed by the* assessee *was in accordance with law, he was under no obligation to justify as to why was he satisfied. On the top of that the Assessing Officer by his order dated March 28, 2008, did not adversely affect any right of the assesses nor was any civil right of the assessee prejudiced. He was as such under no obligation in law to give reasons.*
>
> *88. The fact, that all requisite papers were summoned and thereafter the matter was heard from time to time coupled with the fact that the view taken by him is not shown by the Revenue to be erroneous and was also considered both by the Tribunal as also by us to be a possible view, strengthens the presumption under clause (e) of section 114 of the Evidence Act. A prima facie evidence, on the basis of the aforesaid presumption, is thus converted into a conclusive proof of the fact that the order was passed by the Assessing Officer after due application of mind.*

Hence, the Ld. AR submitted that the revision of the assessment order on the ground that AO has considered the issue only because there is no discussion about this aspect on the records is not correct.

4.1 The Ld. AR submitted that the finding of the Commissioner of Income tax that the one- time lease premium was towards use of land , or in other words, it was in the nature of rent and hence the AO was not correct in granting the depreciation on the same treating the premium paid as an intangible asset. The Ld. AR relied on the CBDT Circular 35/2016 dated 13th October 2016, which after considering various decisions rendered by the High Courts which were accepted by the department "*clarified that lump sum lease premium or one time upfront lease charges , which are not adjustable against periodic rent, paid or payable for acquisition of long term leasehold rights over land or any other property are not payments in the nature of rent within the meaning of section 194 I of the Act.".* Hence , it was submitted that the finding of the Commissioner that the one-time lease premium was towards use of land was not correct and hence revision order should be quashed

4.2 The Ld. AR submitted that the one time non-refundable lease premium was paid to Cochin Port Trust to enable the company to carry on the business Container Freight Station, subject to the conditions laid down by the Cochin Port Trust. Thus the payment was for obtaining the right to carry on business of

container freight station. According to the Ld. AR, the term 'Right' is not defined in the Act and 'Right' means an interest which is legally protected. It was submitted that the lease hold rights in the land enables the company to carry out development activities on the land, construct buildings for its Container Freight Station business which are business or commercial rights. It was submitted that the lease hold rights thus gives the holder a right to undertake business activities in the said land and it was specifically granted for establishing and carrying on business of Container Freight Station. According to the Ld. AR, container freight station is part of an inland port and for this proposition, he relied on the judgment of the Madras High Court in the case of CIT vs. A.L. Logistics Pvt. Ltd. (2015) (374 ITR 609).

4.3 The Ld. AR relied on the judgment of the Supreme Court in the case of Techno Stocks and Shares Ltd vs CIT (327 ITR 323) wherein it was held that *'the right of membership was a "business or commercial right" and could be said to be owned by the* assessee *and used for business purposes in terms of section 32(l)(ii) . The right of membership, which included the right of nomination, was a "licence" or "akin to a licence" which was one of the items which fell in section 32(l)(ii) . The right to participate in the market had an economic and money value. It was an expense incurred by the assessee which satisfied the test of being a "licence" or "any other business or commercial right of similar nature" in terms of section 32(l)(ii)'.*

4.4 The Ld. AR relied on the decision of the ITAT Mumbai bench in the case of Mumbai International Airport Private Ltd vs Additional CIT (ITA 7507/Mum/2011 dt.14/02/2014) wherein it was held that "*payment of upfront fee to Airport Authority of India has created capital assets in the form of license to develop and modernize the airport and collect charges as per terms and conditions as prescribed under the agreement which is an intangible asset to the assessee entitled for depreciation'.* Hence, it was submitted that there was no error in the assessment order in allowing the depreciation as claimed by the assessee.

4.5 The Ld. AR relied on the judgment of the Bombay High court in the case of CIT v LIC Housing Finance Ltd (367 ITR 458) wherein it was held that merely because the Assessing Officer adopts one of two views possible and that has resulted in loss of revenue it cannot be treated as erroneous order prejudicial to the interests of the Revenue unless the view taken is unsustainable in law. The Ld. AR relied on the judgment of the Supreme Court in the case of Malabar Industrial Co. Ltd. vs. CIT (243 ITR 83), wherein the Apex Court had dealt with power u/s 263 and held that it is only when an order was erroneous then the section would be attracted. An incorrect assumption of facts or an incorrect application of law would satisfy requirement of rendering order erroneous. When two views are possible the department ought not to exercise the powers u/s 263 as the view taken is not prejudicial to interest of the Revenue. Phrase "prejudicial to interests of Revenue" u/s 263 was to be read in conjunction with

expression "erroneous" order passed by A.O. It was submitted that merely because, AO had adopted one of two views possible and that had resulted in loss of Revenue, it cannot be treated as erroneous order prejudicial to interest of Revenue unless view taken by the AO was unsustainable in law. The Ld. AR submitted that it is settled law that it is always open to the CIT under the provisions of section 263 to make a detailed inquiry with regard to any issue that may seem doubtful, but while passing the order under section 263, he has to make a clear and firm decision that the order passed by the AO is either erroneous or to be prejudicial to the interests of the Revenue but neither has been found in the present case. The Ld. AR relied on the decision of Allahabad High Court in CIT vs Metro and Metro (404 ITR 304). Accordingly, he prayed that the order of Commissioner of Income tax under section 263 may be set aside.

5. On the other hand, the Ld. DR relied on the order of the CIT and also submitted that premium on lease also is not entitled for depreciation. Further, he relied on the judgment of the Bombay High Court in the case of CIT vs. Heredilla Chemicals Ltd. (1997) (225 ITR 532) wherein it was held that premium paid on leasehold land is not includible in the cost of the building constructed thereon for allowance of depreciation.

6. In reply to this, the Ld. AR submitted that the judgment relied upon by the Ld. DR is relating to the assessment year 1975-76 and thereafter, there was an amendment from 1st April 1998 whereby section 32(1) (ii) was inserted to the statute book, as per which the assessee was entitled for depreciation.

7. Regarding validity of invoking of jurisdiction u/s. 263 of the Act by the CIT, Section 263 of the Income-tax Act seeks to remove the prejudice caused to the revenue by the erroneous order passed by the Assessing Officer. It empowers the Commissioner to initiate suo moto proceedings either where the Assessing Officer takes a wrong decision without considering the materials available on record or he takes a decision without making an enquiry into the matters, where such inquiry was prima facie warranted. The Commissioner is well within his powers to treat an order as erroneous on the ground that the Assessing Officer should have made further inquiries before accepting the wrong claims made by the assessee. The Assessing Officer cannot remain passive in the face of a claim, which calls for further enquiry to know the genuineness of it. In other words, he must carry out investigation where the facts of the case so require and also decide the matter judiciously on the basis of materials collected by him as also those produced by the assessee before him. The Assessing Officer was statutorily required to make the assessment under Section 143(3) after scrutiny and not in a summary manner as contemplated by Sub-section (1) of Section 143. The Assessing Officer is therefore, required to act fairly while accepting or

rejecting the claim of the assessee in cases of scrutiny assessments. The Assessing Officer should protect the interests of the revenue and to see that no one dodged the revenue and escaped without paying the legitimate tax. The Assessing Officer is not expected to put blinkers on his eyes and mechanically accept what the assessee claims before him. It is his duty to ascertain the truth of the facts stated and the genuineness of the claims made in the return. The order passed by the Assessing Officer becomes erroneous when an enquiry has not been made before accepting the genuineness of the claim which resulted in loss of revenue.

7.1 In the present case, the assessee claimed depreciation on lease premium which is required to be examined by the Assessing Officer. He is under obligation to examine as to whether depreciation on it is allowable u/s. 32(1)(ii) of the Act. It appears that the same was not enquired into and no proper efforts were made to find out whether the claim of the assessee is proper or not. Without making any enquiry at all to ascertain whether it was allowable, the Assessing Officer accepted the assessee's claim. As such, the income of the assessee was assessed at lower level by allowing excessive relief to the assessee. The failure on the part of the Assessing Officer to make necessary enquiry rendered the assessment order erroneous and it resulted in loss to the revenue, which makes the assessment order prejudicial to the interests of the Revenue. The CIT had observed in his order that it is to be decided by the Assessing

Officer after fresh examination. Hence, the order of the CIT cannot be held as erroneous. The CIT's approach was correct. The CIT had only observed that no proper enquiry has been made that resulted in erroneous order and it resulted in loss of revenue. Hence the Assessing Officer has to pass the order after hearing the assessee. Therefore, the CIT exercised his power conferred u/s. 263 of the Act in setting aside the assessment and remanded the case back to the file of the Assessing Officer to make enquiry into the issue and decide the same. As such, the CIT remitted the issue back to the file of the Assessing Officer for de novo consideration. Accordingly, this ground of appeal of the assessee is dismissed.

8. Regarding the merit of allowability of the claim of depreciation on lease premium, initially, the issue relating to allowability of depreciation on stock exchange membership card came up before the Bombay High Court in the case of CIT vs. Techno Shares & Stocks Ltd. (2010) (323 ITR 69) wherein the issue was decided against the assessee. Thereafter, the issue travelled to the Supreme Court wherein the Supreme Court reversed the above judgment of the Bombay High Court reported in 327 ITR 323 and held that depreciation should be allowed on stock exchange membership card since it is an intangible asset eligible for depreciation. Thus, according to the Ld. AR, tenancy rights fall within the ambit of expression "any other business or commercial rights of similar nature" as employed in defining "intangible assets".

8.1 We are not convinced with the contention advanced on behalf of the assessee. The manifest reason is the following definition of the term "intangible" asset given in Explanation (3) to section 32(1) :-

> "(b) intangible assets, being know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature".

A bare perusal of the definition of intangible assets on which depreciation is available u/s 32 makes it clear that the intangible assets so classified are know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature. We are reminded of the rule of nosticur a sociis which simply means that the general words associated with the specific words draw their meaning from the company they keep. This rule has been quoted with approval by the Hon'ble Supreme Court in several judgments including CIT VS. Venketaswara Hatcheries (1999) 237 ITR 174 (SC), Stonecraft Enterprises VS. CIT (1999) 237 ITR 131 (SC) and Aravinda Paramilla Works Vs. CIT (1999) 237 ITR 284 (SC). Going by this rule, the expression "any other business or commercial rights" as employed in the definition of "intangible" assets as per the above Explanation, must mean only the intangible assets similar to those which precede it, that is, "know-how, patents, copyrights, trade marks, licences, franchises". The former category of intangible assets includes such assets with which the business is directly carried on. In other words, these are intangible assets by which either the permission to carry on the business or

manufacture is received or are used for the manufacture or the sale of the products manufactured. Such intangible assets directly facilitate the profit earning activity. On the other hand, the tenancy rights have no significance whatsoever either with a right to manufacture or actual manufacture of the products or their sale carrying brand name or logo. Tenancy rights simply provide a place at which manufacturing or administrative activity is pursued. A businessman can carry on manufacturing at any place or rendering any service but the business cannot be carried on without licence, or without specific know-how, copy right, or trade mark etc. Reverting to the present case, only an intangible asset of the nature of know-how, patents, copyrights, trademarks, licences, franchises etc. can be brought within the ambit of "any other business or commercial right". The legislature has made its intention crystal clear by the use of words "of similar nature" immediately after the words "any other business or commercial rights". This makes the position beyond any shadow of doubt that "any other business or commercial rights" would only be such which are of the nature of know-how, patents, copyrights, trade marks, licences, franchises etc. As noticed supra, there is a vast difference between know-how, patents, copyrights, trade marks, licences, franchises etc. on one hand and tenancy rights on the other, we are of the considered opinion that tenancy rights cannot be construed as "intangible" assets falling within the meaning of Explanation 3 to section 32(1). The reliance of the ld. AR on the judgment of the Hon'ble Supreme Court in Techno Shares (supra) is of no consequence. In that case the

question was whether depreciation can be granted on the Bombay Stock Exchange Membership card. As the ownership of such Membership Card is sine qua non to conduct the business on the floor of stock exchange, the Hon'ble Supreme Court held it to be an intangible asset eligible for depreciation. Such Membership card is a permission to do the business as share broker akin to `licence' and not a place for carrying on such business akin to `tenancy right'. In our considered opinion, this judgment does not advance the case of the assessee any further. Similarly, with regard to the order of the Tribunal in the case of Mumbai International Airport (P) Ltd. (supra), as there is contrary order in the case of Dabur India Ltd. vs. ACIT (145 ITD 175 (Mumbai). The order of the Tribunal in the case of Mumbai International Airport (P) Ltd. was passed on 14/02/2014 without considering the order of the Tribunal in the case of Dabur India Ltd. which was delivered on 23rd August, 2013. To sum up, we hold that since the tenancy right cannot be treated as an intangible asset, there is no question of allowing depreciation on it. We, therefore, approve the view taken by the CIT on this issue. This ground of appeal of the assessee is dismissed.

9 In the result, the appeal filed by the assessee is dismissed.

Order pronounced in the open Court on this 28th August, 2018.

sd/-	sd/-
(GEORGE GEORGE K.)	(CHANDRA POOJARI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Place:
Dated: 28th August, 2018

GJ

Copy to:

1. Gateway Distriparks (Kerala) Ltd., Door No. 26/1804, Chakiat House, Subramaniam Road, Willington Island, Kochi-682 003.
2. The Assistant Commissioner of Income-tax, Circle-1(2), Kochi.
3. The Pr. Commissioner of Income-tax, Kochi.
4. D.R., I.T.A.T., Cochin Bench, Cochin.
5. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Cochin