

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E' NEW DELHI**

**BEFORE SHRI R.K.PANDA, ACCOUNTANT MEMBER
&
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No.-3526/Del/2017
(Assessment Year: 2012-13)**

DCIT Circle-16(1), Room No. 312, C.R.Building I.P.Estate New Delhi	Vs.	Maha Seer Hotel & Resorts P. Ltd. 43-B, Block, Middle Circle, Connaught Place New Delhi PAN : AADCM9908M
Appellant		Respondent

**Assessee by: Sh. KVSR Krishna, CA
Revenue by: Shri Rinku Singh, Sr.DR**

Date of Hearing	26.12.2018
Date of Pronouncement	14.02.2019

ORDER

PER SUDHANSHU SRIVASTAVA, J.M.:

This appeal is preferred by the department against order dated 14.01.2016 passed by the Ld. CIT (Appeals)-6, New Delhi for assessment year 2012-13.

2. Brief facts of the case are that the assessee company is engaged in the business of Restaurant Operations. The return of income for the captioned year was filed declaring total income at Rs. 3,84,75,905/- including capital gains of Rs. 9,38,76,911/-. The

case was selected for scrutiny under CASS and the assessment was completed u/s 143(3) of Income Tax Act, 1961 (hereinafter referred to as 'the Act') at an income of Rs. 11,22,50,350/- after making the following additions/ disallowances :-

- i. Expenditure on renovation of registered office treated as capital expenditure by the AO - Rs. 4,89,31,561/-
- ii. Expenditure treated as pre-operative expenditure by the AO - Rs. 62,18,433/-
- iii. Disallowance of commission and legal expenses paid for sale of land - Rs. 1,08,14,436/-
- iv. Cost of improvement of asset (land) disallowed by the AO - Rs. 79,66,050/-
- v. Interest on late payment of TDS disallowed - Rs. 52,983/-.

2.1 Aggrieved, the assessee approached the Ld. CIT (Appeals) against the disallowances/additions and the Ld. CIT (Appeals) partly allowed the assessee's appeal by holding as under :-

- i. The addition of Rs. 4,89,31,561/- being renovation expenses of registered office treated as capital expenditure was partly allowed by the Ld. CIT (Appeals) by confirming the disallowance to the tune of Rs. 81,31,868/- on assessee's own acceptance and also by upholding the balance disallowance by holding that the same was capital expenditure. The Ld. CIT (Appeals), however, directed

the AO that depreciation should be allowed to the assessee on the amount of expenditure capitalized.

ii. With regard to the disallowance of Rs. 62,18,433/- being disallowance made by the AO by holding that the impugned expenses were pre-operative in nature, the Ld. CIT (Appeals) deleted the disallowance by holding that the impugned expenditure was not pre-operative in nature and had been incurred for the purpose of carrying on business.

iii. With respect to the disallowance of expenses amounting to Rs. 1,08,14,436/- being expenditure incurred in connection with the transfer of long term capital asset (land), the Ld. CIT (Appeals) held that the expenditure had been incurred by the assessee to enable it to sell the land and, therefore, such expenditure was allowable u/s 48 of the Act. This amount was also deleted.

iv. With respect to the disallowance of Rs. 79,66,050/- being expenditure incurred on cost of improvement relating to the land sold, the Ld. CIT (Appeals) again decided in favour of the assessee by holding that the expenditure had been incurred towards improvement by the assessee from the period April 2007 to March 2011 and the same was evidenced from the evidence/s furnished by the assessee.

2.2 Aggrieved by the aforesaid findings of the Ld. CIT (Appeals), the department is now in appeal before the ITAT and has raised the following grounds of appeal :-

“1. Whether on facts and in circumstances of the case, the Ld. CIT (A) is legally justified in deleting the disallowance of Rs. 62,18,433/- u/s 37(1) of the Income Tax Act, 1961 (the Act) without considering a fact that the assessee had failed to discharge its onus to prove that it had actually carried out any business operation during year under consideration?

2. Whether on facts and in circumstances of the case, the Ld. CIT (A) is legally justified in deleting the disallowance of Rs. 62,18,433/- u/s 37(1) of the Act by solely relying on self-serving and new claim of the assessee that ‘registration certificate of establishment’ and ‘liquor permit’ from Goa Govt agencies were obtained during the year and without recording verifiable findings that the actual business operation of the assessee was started during the year?

3. Whether on facts and in circumstances of the case, the Ld. CIT (A) is legally justified in deleting disallowance of Rs. 62,18,433/- by accepting self-serving new claims and documents filed by the assessee even when the assessee had not fulfilled conditions as laid down under Rule 46 A of the Income Tax Rule, 1962 (the Rule) and without providing opportunity of being heard to the AO in this regard? -

4. *Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in deleting disallowance of Rs. 1,08,14,436/- without considering the findings of fact recorded by the AO that the assessee had failed to prove that the payment was actually incurred in connection with sale of land only by relying on self-serving claim of the assessee and a fact that payment was actually made along with TDS and without recording findings of fact that the payments were actually incurred on legal fee and commission in relation to the sale of land?*

5. *Whether on facts and in circumstances of the case, the Ld. CIT (A) is legally justified in deleting disallowance of expense of Rs. 79,66,050/- being cost of improvement in relation to the land sold without considering the findings of facts recorded by the AO solely by relying on the remand report wherein the AO had only informed the claim of the assessee as per assessment record but without certifying correctness of the claim?*

6. *That the appellant craves leave to add, alter, amend or forego any ground(s) of the appeal raised above at the time of the hearing.”*

3.0 The Ld. Sr. Departmental Representative submitted that ground nos. 1, 2 and 3 of the department's appeal were related and challenged the action of the Ld. CIT (Appeals) in deleting the disallowance of Rs. 62,18,433/- u/s 37(1) of the Act without considering the fact that the assessee had failed to discharge its onus to prove that it had actually carried out any

business operation during the year under consideration. The Ld. Sr. DR drew our attention to the observations to the Assessing Officer as contained in pages 10 and 11 of the assessment order and submitted that as against the expenditure of Rs. 62,18,433/- debited by the assessee in its profit and loss account for the year, the gross receipts of the assessee company were only Rs. 2,40,907/- and, therefore, it was very much evident that the assessee was not engaged in any business activity during the year and was only attempting to claim pre-operative expenditure as revenue expenditure. The Ld. Sr. DR also drew our attention to the fact that the notice issued u/s 133(6) of the Act to M/s. Coros Restaurant, from whom the receipts have been said to have been received, was also returned by the department with the remarks 'refused'. It was also submitted that no remand report had been called by the Ld. CIT (Appeals) in respect of this expenditure prior to deleting this disallowance.

3.1 With respect to ground no. 4 pertaining to deletion of disallowance of Rs. 1,08,14,436/- pertaining to expenditure allegedly incurred by the assessee in connection with sale of the land, the Ld. Sr. Departmental Representative submitted that the Assessing Officer has given a categorical observation

in the assessment order that in spite of ample opportunities having been provided to the assessee company, it had failed to provide party wise details of commission and legal expenses paid to the various parties in connection with the sale of land. The Ld. Sr. DR also drew our attention to the observation of the AO that the assessee had failed to deduct tax at source on such commission and legal charges.

3.2 With respect to ground no. 5 pertaining to a deletion of disallowance of Rs. 79,66,050/- pertaining to alleged cost of improvement claimed by the assessee with respect to the land sold, the Ld. Sr. DR submitted that the assessee company had failed to substantiate as to how the expenditure claimed by the assessee improved the value of the capital asset. It was submitted that this expenditure related to supervision of the capital asset and, therefore, they did not enhance the value of the capital asset. The Ld. Sr. DR also highlighted the fact that the assessee had failed to provide details along with the supporting evidences in respect of expenditure claimed as having been incurred towards the cost of improvement.

3.3 The Ld. Sr. Departmental Representative prayed that the department's appeal be allowed by setting aside the order of

the Ld. CIT (Appeals) and restoring the order of the Assessing Officer.

4.0 In response, the Ld. Authorised Representative placed extensive reliance on the findings and observations recorded by the Ld. CIT (Appeals) and submitted that the Ld. CIT (Appeals) had adjudicated in favour of the assessee after duly considering the facts of the case as well as the settled legal position. He also drew our attention to the Restaurant Operating Agreement entered into between the assessee and M/s. Coros Restaurant wherein it had been provided that the agreement was to come into force from 12th October, 2011 and, therefore, the AO was incorrect in holding that the business operation of the assessee company had not commenced so as to treat the impugned expenditure of Rs. 62,18,433/- as pre-operative expenditure. The Ld. Authorised Representative also submitted that the notice u/s 133(6) of the Act could not be served on M/s. Coros Restaurant as the party had vacated the premises.

4.1 With respect to Ground nos. 4 and 5, the Ld. Authorised Representative placed extensive reliance on the findings of the Ld. CIT (Appeals).

4.2 It was prayed that the department's appeal deserved to be dismissed.

5.0 We have heard the rival submissions and have also perused the material on record. As far as the department's grounds 1, 2 and 3 challenging the deletion of disallowance of Rs. 62,18,433/-, being alleged pre-operative expenses, are concerned, it is seen that the Ld. CIT (Appeals) has noted that he has duly considered the audited profit and loss account for year under consideration as well as has also considered the agreement entered into by the assessee with M/s. Coros Restaurant for the purpose of operating the restaurant and which has come into operation with effect from 12.10.2011. The Ld. CIT (Appeals) has also noted that he has also gone through the VAT payment receipts which proved that the business operations had commenced with effect from 12.10.2011. It has also been noted by the Ld. CIT (Appeals) that the assessee company was existence since 15 July, 2004 and further that the assessee had proper license/s for opening and running of restaurant in Goa. In the proceedings before us the department has vehemently argued that this disallowance was incorrectly deleted by the Ld. CIT (Appeals) and it has also been submitted by the Ld. Senior DR that no remand report

had been called for by the Ld. CIT (Appeals). However, after going through the case records and the paper book filed by the assessee, we find that the Ld. CIT (Appeals) had not admitted any additional evidence while disposing of this ground of the assessee's appeal before him and the documents which have been relied upon by the assessee before him were before the AO also. Thus, the mischief of Rule 46A of the Income Tax Rules, 1962 will not come into play in this case and we hold that the Ld. CIT (Appeals) was entirely justified in relying upon these documents. We also note that the department has not been able to point out any inaccuracy in the categorical findings recorded by the Ld. CIT (Appeals) on this issue. It is an undisputed fact that the agreement to operate the restaurant came into effect from 12.10.2011 and as per the terms of the said agreement, the assessee has duly shown the gross receipts of Rs. 2,40,097/- in its profit and loss account. The assessee has also made payments towards VAT dues in this regard. We also note that it is not the allegation of the AO that this expenditure was not incurred and the only reason for the disallowance was the impression of the AO that no business activity had been carried out by the assessee. However, facts indicate otherwise. Therefore, we hold that the

Ld. CIT (Appeals) was justified in deleting this disallowance of Rs. 62,18,433/-. Ground nos. 1, 2 and 3 of the department's appeal stand dismissed.

5.1 Coming to ground no. 4 of the department's appeal which challenges the action of the Ld. CIT (Appeals) in deleting the disallowance of Rs. 1,08,14,436/- pertaining to expenditure incurred in connection with the sale of land, the Ld. CIT (Appeals) has examined this issue in pages 15, 16 and 17 of the impugned order. It is seen that in Para 3.3.3 of the impugned order, the Ld. CIT (Appeals) has observed that the AO had made an incorrect observation that relevant details were not filed by the assessee before the AO in this regard. It has been stated by the Ld. CIT (Appeals) that the details regarding brokerage / commission, advocate fees, travelling expenses etc. had been duly filed before the AO along with the copy of invoices as well as TDS Certificates before the AO. It has also been noted by the Ld. CIT (Appeals) that the fact that these details had been filed before the AO has been accepted by the AO in his remand report. Before us, the department could not substantiate with cogent evidence, as to how, this expenditure was not allowable when the same was evidenced by voluminous documents in the shape of invoices etc. in this

regard. Here also it is not the case of the AO that such expenditure has not been incurred at all. In addition there is also a confirmation note from one Mr. Nathu Bhai N.Kotecha to whom the commission was paid for effecting the sale. Therefore, in absence of any evidences leading to the contrary, we find no reason to interfere with the findings of the Ld. CIT (Appeals) on the issue. Accordingly ground no. 4 also stands dismissed.

5.2 The next ground i.e. ground no. 5 pertains to deletion of disallowance of Rs. 79,66,050/- being cost of improvement relating to land. In this regard, the Ld. CIT (Appeals) has observed that although no evidence was furnished before the AO in this regard, the assessee had furnished evidences before him and the Ld. CIT (Appeals) has also mentioned that, vide remand report dated 3rd Jan, 2017, the AO has confirmed that the assessee company had engaged labourers in Goa for development and supervision of its land from the period April, 2007 to March 2011. It has been held by the Ld. CIT (Appeals) that the expenditure incurred towards the improvement of land would include safeguarding the property from any deterioration and that the same would be eligible to be treated as cost of improvement. However, a perusal of the remand

report dated 03.01.2017 shows that the Ld. CIT (Appeals) has misinterpreted the observations of the AO in as much as the AO has only stated that as per the assessment records the assessee company had engaged labourers in Goa for development and supervision of land for the period April 2007 to March 2011. However, the observations of the AO in the assessment order have not been duly considered by the Ld. CIT (Appeals). The AO has observed in the assessment order that the assessee company had failed to justify as to how the expenditure improved the value of the capital asset. The Ld. CIT (Appeals) has not recorded a finding on this aspect but has simply relied on the comments of the AO in the remand report. Accordingly, on facts, it is our considered opinion that the issue needs to be re-examined by the Ld. CIT (Appeals) and he is directed to record a finding as to whether or not the impugned expenditure of Rs. 79,66,050/- resulted in improving the cost of the asset. The issue is restored to the file of the Ld. CIT (Appeals) for adjudicating the issue afresh after proper examination/verification of the claim of the assessee and after giving due opportunity to the assessee to present its case. Accordingly, ground no. 5 stands allowed for statistical purposes.

5.3 Ground no. 6 is general in nature and needs no adjudication.

6.0 In the final result appeal of the department stands partly allowed for statistical purposes.

Order pronounced in the open court on 14.02.2019.

Sd/-
(R.K.PANDA)
ACCOUNTANT MEMBER

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Dated: 14.02.2019
BR

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

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ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	12/02/2019
Date on which the typed draft is placed before the dictating Member	13/02/2019
Date on which the typed draft is placed before the Other Member	13/02/2019
Date on which the approved draft comes to the Sr. PS/PS	14/02/2019
Date on which the fair order is placed before the Dictating Member for pronouncement	14/02/2019
Date on which the fair order comes back to the Sr. PS/PS	14/02/2019
Date on which the final order is uploaded on the website of ITAT	14/02/2019
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	