

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

**BEFORE HON'BLE SH. SANDEEP GOSAIN, JM &  
HON'BLE SH. G. MANJUNATHA, AM**

आयकरअपीलसं./ I.T.A. No. 6635 & 6636/Mum/2017  
(निर्धारणवर्ष / Assessment Year: 2011-12 & 2012-13)

Berggruen Hotels Pvt. Ltd. Central Plaza, 6 <sup>th</sup> floor, CST Road, Kalina, Santacruz (E), Mumbai-400098.	<b>बनाम/ Vs.</b>	DCIT 12(1)(2) (present in charge –DCIT 14(1)(1), Aayakar Bhavan, Mumbai-400 020
स्थायीलेखासं ./जीआइआरसं ./PAN No. AACCB9701G		
(अपीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri Jay Bhansali, AR
प्रत्यर्थीकीओरसे/Respondent by	:	Shri Arvind Kumar, DR
सुनवाईकीतारीख/ Date of Hearing	:	19.01.2019
घोषणाकीतारीख / Date of Pronouncement	:	03.04.2019

आदेश / ORDER

**Per Sandeep Gosain, Judicial Member:**

The present two Appeals have been filed by the assessee against the order of Commissioner of Income Tax (Appeals)-20, Mumbai, dated 29.08.17 for AY 2011-12 and AY 2012-13 respectively.

2. Since the issues raised in both the appeals are identical, therefore, for the sake of convenience, these appeals are clubbed, heard and disposed of by this consolidated order.

**I.T.A. No. 6635/Mum/2017 (AY 2011-12)**

3. First of all we take up assessee's appeal in I.T.A. No. 6635/Mum/2017 (AY 2011-12).

4. The only ground raised by the assessee relates to challenging the order of Ld. CIT(A) in upholding the action of AO in not entertaining the additional claim for depreciation made by the assessee.

5. We have heard the counsels for both the parties at length and we have also perused the material placed on record as well as the orders passed by revenue authorities. As per the facts of the present case, assessee is engaged in the business of constructing, operating and management of budget hotels, etc. The assessee claimed depreciation in respect of a hotel. Subsequently, assessee

filed a revised return of income thereby withdrawing the claim of depreciation on the hotel and claimed deduction u/s 35AD. Thereafter during the course of assessment proceedings, the assessee again sought to withdraw the claim of deduction u/s 35AD and claimed depreciation as was claimed in the original return.

6. AO rejected the assessee's claim of depreciation by relying upon the decision of the Hon'ble Supreme Court in the case of *Goetze (India) Ltd Vrs. CIT (284 ITR 323)*. It was submitted by Ld. AR that the assessee had withdrawn its claim for deduction u/s 35AD as the assessee wanted to claim depreciation u/s 32 of the Act. However, realizing that the time limit for revised return has expired, the assessee was left with no other option than to file the revised return with the AO during the course of assessment proceedings. It was also submitted that assessee was not making any fresh claim which was to be considered by the AO on merits of the case. However, the assessee had withdrawn the deduction available to it by virtue of the provisions of the law. Consequent to withdrawal of the deduction u/s 35AD, the assessee was only

claiming the legitimate claim of depreciation u/s 32 of the Act which is otherwise allowable under the Act.

7. We notice that Ld. CIT(A) dismissed the claim of the assessee by holding that though the claim made in this ground of appeal was made in the original return. Since the claim was withdrawn by the assessee in the revised return of income, therefore, the original return of income ceased to exist once the revised return was filed. Hence, under these circumstances, the claim of the assessee was rejected by Ld. CIT(A).

8. We have gone through the judgments of Hon'ble Bombay High Court in the case of **CIT vrs. M/s Creative Garments Pvt. Ltd (ITA No. 1301 of 2014)** and **CIT Vrs. Pruthvi Brokers & Shareholders (2012) 23 taxman.com 23 (Bom)**, wherein it was held *that assessee is entitled to raise before appellate authorities additional grounds in terms of additional claims not made in return filed by it.*

9. Now as per the facts of the present case, the original return of income was filed on 29.09.11 declaring loss of Rs. 28,42,11,539/- without considering the deduction u/s 35AD. Later on, the assessee filed its first revised return of income on 30.03.13 claiming deduction u/s 35AD of the Act and subsequently, vide letter dated 31.03.14 had withdrawn its claim u/s 35AD by filing second revised return and requested the AO to reinstate the original return of income.

10. However, the AO as well as Ld. CIT(A) rejected the claim of the assessee. The Hon'ble Jurisdictional High Court in the case of *CIT vrs. M/s Creative Garments Pvt. Ltd (ITA No. 1301 of 2014)* and *CIT Vrs. Pruthvi Brokers & Shareholders (2012) 23 taxman.com 23 (Bom)*, had held *that assessee is entitled to raise before appellate authorities additional grounds in terms of additional claims not made in return filed by it.*

11. The basic principle of Tax Authorities is to ascertain the correct tax liability of the assessee in accordance with law. As per the facts, the assessee had not made any new claim.

Therefore, keeping in view the principles as laid down by the Hon'ble Jurisdictional High Court in the cases cited above, we are of the view that assessee is entitled to raise the additional claim if any. Hence under the above circumstances, we *set aside* the order of Ld. CIT(A) and *remit* the matter back to the file of AO with a direction to allow the assessee to withdraw its claim for deduction u/s 35AD of the Act and to decide the claim of the assessee by considering the claim of depreciation made by the assessee u/s 32 of the Act and thereafter pass afresh order.

It is needless here to mention that before passing afresh order of assessment, the AO shall provide sufficient opportunity of hearing to the assessee.

12. Before parting, we may make it clear that our decision to restore the matter back to the file of AO shall in no way be construed as having any reflection or expression on the merits of the dispute, which shall be adjudicated by the AO independently in accordance with law. With these directions, this ground of appeal raised by the assessee is **partly allowed for statistical purposes.**

13. Consequently, the appeal filed by the assessee stands **partly allowed for statistical purposes.**

**ITA No. 6636/Mum/2017 (AY 2012-13)**

14. Now we take up assessee's appeals in *ITA No. 6636/Mum/2017 (AY 2012-13)*. Since we have already decided the similar grounds of appeal in *ITA No. 6635/Mum/2017 for AY 2011-12* on merits. Therefore, following our own decision in *ITA No. 6635/Mum/17*, we apply the same findings in the present appeal in order to maintain judicial consistency which is applicable *mutatis mutandis*.

15. In the net result, both the appeals filed by the assessee stands **partly allowed for statistical purposes** with no order as to cost.

*Order pronounced in the open court on 3<sup>rd</sup> April, 2019.*

Sd/-  
(G. Manjunatha)  
लेखासदस्य / Accountant Member  
मुंबई Mumbai; दिनांक Dated :  
Sr.PS. Dhananjay

Sd/-  
(Sandeep Gosain)  
न्यायिकसदस्य / Judicial Member  
03.04.2019

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File  
आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)  
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai