

आयकर अपीलिय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

श्री डी. करुणाकरा राव, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA Nos.979 & 2115/PUN/2017
निर्धारण वर्ष / Assessment Years : 2011-12 & 2013-14

Shri Shriram Krishnaji Surve
Koyana Prasad, Opp. Krishna
Hospital, P. B. Road, Karad,
Satara - 415110

PAN : AEPPS6618R

.....अपीलार्थी / Appellant

बनाम / V/s.

Assistant Commissioner of Income Tax,
Satara Circle, Satara

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.2485/PUN/2017
निर्धारण वर्ष / Assessment Year : 2013-14

Assistant Commissioner of Income Tax,
Satara Circle, Satara

.....अपीलार्थी / Appellant

बनाम / V/s.

Shri Shriram Krishnaji Surve
Koyana Prasad, Opp. Krishna
Hospital, P. B. Road, Karad,
Satara - 415110

PAN : AEPPS6618R

.....प्रत्यर्थी / Respondent

Assessee by : Shri M.K. Kulkarni
Revenue by : Dr. Vivek Aggarwal &
Shri Pankaj Garg

सुनवाई की तारीख / Date of Hearing : 01-02-2019

घोषणा की तारीख / Date of Pronouncement : 25-04-2019

आदेश / ORDER**PER VIKAS AWASTHY, JM :**

In ITA No. 979/PUN/2017 the assessee has assailed the order of Commissioner of Income Tax (Appeals)-4, Pune dated 20-02-2017 for the assessment year 2011-12. ITA No. 2115/PUN/2017 by the assessee and cross appeal by the Revenue in ITA No. 2485/PUN/2017 are against the order of Commissioner of Income Tax (Appeals)-4, Pune dated 02-05-2017 for the assessment year 2013-14.

Since, the issues raised in these appeal are arising from same set of facts and similar grounds have been raised by the assessee in both the assessment years, these appeals are taken up together for adjudication and are being disposed of vide this common order. However, for the sake of convenience we will first take up the appeal of the assessee in ITA No. 979/PUN/2017 for assessment year 2011-12.

ITA No. 979/PUN/2017 (A.Y. 2011-12) – Assessee's Appeal

2. The brief facts of the case as emanating from records are : The assessee is an electrical contractor. During the period relevant to the assessment year 2011-12 the assessee purchased two properties viz.: (i) Studio Flat and (ii) properties situated at Trade Centre Bhosari, Pune. The assessee claimed depreciation on both the aforesaid properties. In scrutiny assessment proceedings the Assessing Officer disallowed assessee's claimed of depreciation on the ground that the assessee had not received the possession of studio flat till 31-03-2011 as substantial payment was outstanding on that date. As regards the other property situated at Trade Centre, Bhosari, Pune, the Assessing Officer observed that the assessee

has failed to furnish any documentary evidence that after taking possession, the property (shops) was put to use. Further, the Assessing Officer made disallowance of interest Rs.1,60,916/- u/s. 36(1)(iii) of the Income Tax Act, 1961 (hereinafter referred to as “the Act”).

Aggrieved by the assessment order dated 28-03-2014, the assessee filed appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) vide impugned order granted part relief to the assessee by allowing benefit of depreciation of property situated at Trade Centre Bhosari. Qua the other property i.e. Studio Flat the Commissioner of Income Tax (Appeals) upheld the findings of Assessing Officer. The Commissioner of Income Tax (Appeals) further rejected the assessee’s contentions against deleting of disallowance u/s. 36(1)(iii) and confirmed the addition. Now, the assessee is in second appeal before the Tribunal assailing the findings of Commissioner of Income Tax (Appeals) on following grounds :

- “1. On the facts and in the circumstances of the case and in law the Ld. CIT (A) was not justified in dismissing the claim of depreciation on the business asset which had entered into Block of Assets of the value of Rs.85,00,000/- and was statutorily presumed that it was in the possession of the assessee and was also put to use. The appropriate depreciation on WDV of Rs.85,00,000/- be allowed.
2. On the facts and in the circumstances of the case and in law the Ld. CIT (A) was not justified in confirming the rejection of the claim of Rs.1,60,916/- made u/s 36(1)(iii) of the Act as the assessee had ample interest free funds available with him and it is settled law that the interest so paid was out of interest free funds. Therefore, the claim of Rs.1,60,916/- be allowed.
3. The appellant craves to leave, add/amend or alter any of the above grounds of appeal.”

3. Shri M.K. Kulkarni appearing on behalf of the assessee submitted that the assessee had purchased studio flat for a total consideration of Rs.85,50,000/- from M/s. Amit Enterprises. The registered agreement to

sale was entered on 02-09-2010 and at the same time possession of the studio flat was also handed over to the assessee. The assessee paid Rs.30,00,000/- at the time of execution of agreement to sale. The balance amount of consideration was to be paid in installments. However, the assessee defaulted in payment of installments due to liquidity crunch. The installments were subsequently paid along with additional interest of Rs.4,68,082/-. The ld. AR contended that the said property was handed over to the assessee at the time of execution of agreement and the property was put to use immediately for business purpose. The ld. AR further submitted that since the property was in ready to use shape, no further extension or improvement etc. was required. The ld. AR submitted that once the property has been put to use and has been entered into block of assets, depreciation u/s. 32 has to be allowed.

3.1 In respect of ground No. 2 of the appeal relating to disallowance of Rs.1,60,916/- u/s. 36(1)(iii) of the Act, the ld. Counsel for the assessee submitted that the assessee has utilized own funds for the purchase of assets. The borrowed funds were utilized for funding the working capital requirements and the credit gap. A perusal of Balance sheet would show that own interest free funds of assessee are much more than the cost of acquisition of studio flat. It is a well settled law that where both interest bearing funds and interest free funds are available, a presumption would arise that investments are made out of interest free funds. In support of his contentions the ld. Counsel placed reliance on the following decisions :

- i. S.A. Builders Vs. Commissioner of Income Tax, 288 ITR 1 (SC);
- ii. Commissioner of Income Tax Vs. Reliance Utilities and Power Ltd., 313 ITR 340 (Bom.).

4. On the other hand Dr. Vivek Aggarwal representing the Department vehemently defended the impugned order. The ld. DR submitted that the assessee has failed to substantiate that the possession of studio flat was handed over to the assessee during the period relevant to the assessment year under appeal. The total cost of studio flat was Rs.85,00,000/- out of which the assessee had paid Rs.30,00,000/- only. More than 50% consideration was still outstanding. Under such circumstances it is difficult to presume that the possession of flat was handed over by the vendor M/s. Amrit Enterprises to the assessee. The assessee has not been able to show possession of flat was handed over to the assessee and that flat was put to use. Therefore, the assessee is not eligible for claiming deduction u/s. 32 of the Act.

4.1 In respect of ground No. 2 the ld. DR submitted that the assessee had utilized overdraft facilities from Vijaya Bank for funding the purchase of studio flat. The amount overdrawn from cash credit account by the assessee is equivalent to the payment made by the assessee for purchase of studio flat, therefore, direct nexus can be drawn between the borrowings and purchase of studio flat. The ld. DR prayed for dismissing the appeal of assessee.

5. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. The first ground of appeal of assessee is against the disallowance of depreciation on studio flat. The contention of the assessee is that the possession of flat was handed over to the assessee by the vendor at the time of execution of 'agreement to sale'. Further, the studio flat has been added to the Block of Assets, the assessee is eligible for claiming depreciation on the said flat.

As per provisions of section 32 of the Act the conditions mandatory for claiming depreciation are :

- i. The assessee must be owner of asset;
- ii. The asset must be used for business or profession; and
- iii. The asset must be used during previous year.

It is an undisputed fact that the assessee had entered into registered agreement for purchase of studio flat for a total consideration of Rs.85,00,000/-. The assessee paid Rs.30,00,000/- at the time of execution of agreement. Further, the Department has not disputed the use of flat for business purpose. Thus, in so far as condition Nos. (i) and (ii) are concerned, they are not in dispute. It is only the condition No. (iii), that the assessee has failed to show that the possession of studio flat was handed over to the assessee and flat was thereafter put to use is disputed by the Department. Admittedly, at the time of execution of 'agreement to sell' the assessee has paid little over 1/3rd of the total consideration. Since, substantial amount of consideration was outstanding, the authorities below had reasonable cause to believe that the possession of studio flat was not handed over to the assessee at the time of execution of agreement to sale. Further, the assessee had not placed on record any documentary evidence before the authorities below to show possession of flat. In the absence of any possession letter or any documentary evidence indicating possession of flat during the period relevant to the assessment year under appeal coupled with the fact that substantial consideration was still to be paid, the probability of assessee not having possession of studio flat is much stronger. Merely for the reason that the assessee had entered the flat in the Block of Asset for claiming depreciation would not make assessee eligible to claim depreciation unless the three conditions

mandated u/s. 32 of the Act are satisfied. Taking into consideration entirety of facts we are of considered view that the issue of depreciation on studio flat needs a revisit to the file of Assessing Officer for the limited purpose of ascertaining whether the possession of flat was handed over to the assessee by the vendor during the period relevant to the assessment year under appeal. The assessee is directed to produce relevant documents to show that the possession of flat was received by the assessee during the relevant period. If the assessee is able to show with the documentary evidence that the possession of studio flat was handed over to the assessee during the relevant period, the benefit of depreciation should be allowed to the assessee. The ground No. 1 of appeal is allowed for statistical purpose in the terms aforesaid.

6. In ground No. 2 of the appeal the assessee has assailed disallowance of interest u/s. 36(1)(iii) of the Act. The authorities below have disallowed payment of interest allegedly paid by the assessee for purchasing studio flat. The interest has been disallowed by the Revenue on the ground that the studio flat was never put to use by the assessee during relevant period, as the assessee was not having possession of flat. The contention of assessee is that own funds are much more than the funds utilized for purchase of studio flat, therefore, the presumption is own interest free funds were utilized for purchasing studio flat. In so far as the issue whether the possession of studio flat was handed over to the assessee by the vendor during the period relevant to the assessment year under appeal is concerned, the same has been restored back to the file of Assessing Officer for verification. If the assessee is able to show that the possession of flat was handed over to the assessee by the vendor during the relevant

period the assessee would be eligible for claiming depreciation and consequently, ground No. 2 of the appeal would become infructuous.

De hors the above situation, the assessee is seeking relief on the ground that own interest free funds of assessee are much more than the investment made for purchase of studio flat. We find that the similar contention was raised by the assessee before the authorities below. However, the same was rejected out rightly by the Assessing Officer, as well as, Commissioner of Income Tax (Appeals). The assessee has not furnished copy of Balance sheet before the Tribunal. The financials of assessee needs verification to accept the contentions of the assessee. Hence, to ascertain the financial status of the assessee, the ground No. 2 of appeal needs revisit to the file of Assessing Officer. If the own funds of assessee are sufficient to cover the investment made, no disallowance u/s. 36(1)(iii) is warranted. Needless to say that before deciding the issue, the Assessing Officer shall grant reasonable opportunity of hearing to the assessee, in accordance with law. Accordingly, ground No. 2 of the appeal is allowed for statistical purpose.

7. In the result, the appeal of assessee in ITA No. 979/PUN/2017 is allowed for statistical purpose.

ITA No. 2115/PUN/2017 (A.Y. 2013-13) – Assessee’s Appeal

8. The assessee in appeal has assailed the order of Commissioner of Income Tax (Appeals) on following grounds :

- “1) *On the facts and circumstances of the case and in law the Ld. CIT(A) was not justified in sustaining the addition made by the A.O. on account of denial of the claim of depreciation on building inomenclated Studio Building". The said building was a part of the Block of assets. The appellant was entitled to claim depreciation on the same. It be allowed accordingly.*

- 2) *On the facts and circumstances of the case and in law the Ld. CIT(A) was not justified in confirming the addition made by the A.O. under 36(1)(iii) of the Act. The appellant was entitled to claim the interest expenditure paid to Bank on loans raised. The loan was utilized for acquiring business asset. The provisions of S. 36(1)(iii) are not applicable. The disallowance be deleted.*
- 3) *On the facts and circumstances of the case and in law the Ld. CIT(A) was not justified in confirming the addition made by the A.O. of Rs.5,00,000/- under section 68 of the Act. Since all the parameters of Genuineness, identity and creditworthiness of lenders was proved beyond doubt there was no occasion to invoke S. 68 for making addition. The addition be deleted.*
- 4) *On the facts and circumstances of the case and in law the levy of interest u/s 234B and 234C is not justified.*
- 5) *The appellant craves to leave, add/amend or alter any of the above grounds of appeal.”*

9. The ld. Counsel for the assessee submitted that the ground Nos. 1 and 2 of the appeal are identical to grounds raised in the appeal by the assessee in ITA No. 979/PUN/2017 for assessment year 2011-12 and are emanating from same set of facts.

10. In respect of ground No. 3 the ld. Counsel for the assessee submitted that the assessee had taken unsecured loan Rs.5,00,000/- from Shri Nitin Ramchandra Gavand. The assessee had furnished confirmation letter and copy of PAN Card of creditor. Thus, the assessee had discharged his onus of proving identity, creditworthiness and genuineness of transaction. However, the Assessing Officer brush aside the documents filed by the assessee and made addition of Rs.5,00,000/- as unexplained cash credit u/s. 68 of the Act. The ld. Counsel for the assessee furnished copy of bank statement of Shri Nitin Ramchandra Gavand to show his creditworthiness. The ld. Counsel pointed that amount of Rs.5,00,000/- was advanced by the Shri Nitin Ramchandra Gavand through banking channel on 07-09-2012. The amount was credited to the bank account of assessee on the

same date. The ld. Counsel submitted that the assessee has proved the creditworthiness of the creditors and genuineness of the transaction, therefore, the addition of Rs.5,00,000/- should be deleted.

11. The ld. DR admitted that ground Nos. 1 and 2 of the appeal by the assessee are identical to the one raised by the assessee in ITA No. 979/PUN/2017. As regards the ground No. 3 of the appeal the ld. DR vehemently defended the findings of Commissioner of Income Tax (Appeals) in confirming the addition of Rs.5,00,000/- u/s. 68 of the Act. The ld. DR submitted that the assessee has failed to discharge his onus to prove the genuineness of the transaction and creditworthiness of the creditors.

12. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. Both the sides are unanimous in admitting that the ground Nos. 1 and 2 are identical to the grounds raised in ITA No. 979/PUN/2017. We find that the facts and the grounds of appeal are identical to the one we have already adjudicated in the appeal of assessee for assessment year 2011-12 in ITA No. 979/PUN/2017. The findings given by us in appeal by the assessee in ITA No. 979/PUN/2017 would *mutatis mutandis* apply to the ground Nos. 1 and 2 in the present appeal. Accordingly, the ground Nos. 1 and 2 of the appeal are allowed for statistical purpose in the same terms.

13. In ground No. 3 of the appeal the assessee has assailed the addition of Rs.5,00,000/- u/s. 68 of the Act. The assessee had taken unsecured loans of Rs.5,00,000/- from Shri Nitin Ramchandra Gavand. The addition was made as the assessee failed to show creditworthiness of the creditor and the genuineness of transaction. Though, the assessee had furnished

confirmation from the creditor and the copy of PAN Card and Voter ID Card of the creditor to prove the identity, the assessee was asked to furnish copy of income tax returns and bank statement of creditors. However, the assessee failed to furnish the same. Now, before the Tribunal the assessee has furnished copy of bank statement of Shri Nitin Ramchandra Gavand to show his creditworthiness. A perusal of said bank statement shows that he was having sufficient balance in his account with Bank of Baroda, Chandavarkar Road, Mumbai. It is not a case that equivalent amount was deposited in the bank account of Shri Nitin Ramchandra Gavand just before the amount was credited to the account of assessee. The amount of Rs.5,00,000/- was transferred from the bank account of Shri Nitin Ramchandra Gavand to the bank account of assessee with Vijaya Bank on 07-09-2012. Corresponding entries in bank account of both the parties prove transaction. Thus, we do not find any reason to sustain the addition u/s. 68 of the Act. The assessee has been able to prove the identity, creditworthiness and genuineness of transaction. Accordingly, addition of Rs.5,00,000/- u/s. 68 of the Act is deleted and ground No. 3 of the appeal is allowed.

14. In ground No. 4 of the appeal, the assessee has assailed levy of interest u/s. 234B and 234C of the Act. Levy of interest u/s. 234B and 234C is consequential and mandatory, hence, ground No. 4 raised in appeal by the assessee is dismissed being devoid of any merit.

15. The ground No. 5 is general in nature, hence, requires no adjudication.

16. In the result, the appeal of assessee is partly allowed in the terms aforesaid.

ITA No. 2485/PUN/2017 (A.Y. 2013-14) – Department’s Appeal

17. The Revenue in appeal has assailed the order of Commissioner of Income Tax (Appeals) on following grounds :

- “1. *On the facts and in the circumstances of the case, the Commissioner of Income tax (A), has erred in giving relief of Rs.43,11,765/- on account of depreciation on vacant premises situated at Trade Centre, Bhosari, Pune by relying on the decision of CIT(A) in assessee's own case for A.Y. 2011-12?*
2. *On the facts and in the circumstances of the case, the Commissioner of Income tax (A), has erred in giving relief of Rs.43,11,765/- on account of depreciation on vacant premises situated at Trade Centre, Bhosari, Pune without appreciating the fact that during survey action u/s 133A in assessee's said premise, it was observed that said premises was not put to use by the assessee with reference to Sec 32(1) of the Act.*
3. *For these and such other grounds as may be urged at the time of hearing, the order of the CIT(A) may be vacated and that of the Assessing Officer be restored.*
4. *The appellant craves leave to add, amend, alter or delete any of the above grounds of appeal during the course of appellate proceedings before the Hon'ble Tribunal.”*

18. The Id. Counsel for the assessee submitted that the Revenue has accepted the order of Commissioner of Income Tax (Appeals) in assessment year 2011-12. Having accepted the findings of Commissioner of Income Tax (Appeals) in allowing the benefit of depreciation to the assessee on the property situated in Trade Centre, Bhosari, Pune, the Revenue cannot challenge the depreciation claimed by the assessee on same set of facts in subsequent assessment year. The findings of Commissioner of Income Tax (Appeals) have attained finality.

19. On the other hand the ld. DR vehemently defended the assessment order and prayed for reversing the findings of Commissioner of Income Tax (Appeals) in allowing depreciation on the vacant properties situated at Trade Centre, Bhosari, Pune.

20. Both sides heard. Orders of the authorities below perused. The Revenue in ground Nos. 1 and 2 of the appeal has assailed the findings of Commissioner of Income Tax (Appeals) in allowing depreciation on the properties of the assessee situated at Trade Centre, Bhosari, Pune. A perusal of assessment order for assessment year 2011-12 reveals that the depreciation on aforesaid property was disallowed by the Assessing Officer. The assessee challenged the same in appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) allowed the benefit of depreciation on the aforesaid properties. The Revenue thereafter did not challenge the findings of Commissioner of Income Tax (Appeals) and accepted the same. Thus, the issue was settled and the assessee enjoyed the benefit of depreciation on the properties situated on Trade Centre, Bhosari, Pune for the assessment year 2011-12 and 2012-13. Now, the Revenue in assessment year 2013-14 cannot disallow assessee's claim of depreciation on said property which was already accepted by the Department in the immediately preceding two assessment years. We do not find any reason to interfere with the findings of Commissioner of Income Tax (Appeals) on this issue. Accordingly, ground Nos. 1 and 2 of the appeal by the Revenue are dismissed.

21. The ground Nos. 3 and 4 are general in nature, hence, require no adjudication.

22. In the result, the appeal of Revenue in ITA No. 2485/PUN/2017 is dismissed.

23. To sum up, the appeal of assessee in ITA No. 979/PUN/2017 is allowed for statistical purpose, appeal of assessee in ITA No. 2115/PUN/2017 is partly allowed and the appeal of Revenue in ITA No. 2485/PUN/2017 is dismissed.

Order pronounced on Thursday, the 25th day of April, 2019.

Sd/-	Sd/-
(डी. करुणाकरा राव/D. Karunakara Rao)	(विकास अवस्थी / Vikas Awasthy)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 25th April, 2019.

RK

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-4, Pune
4. The Pr. Commissioner of Income Tax-3, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच, पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति // True Copy//

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary,
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune