

आयकर अपीलीय अधिकरण “SMC” न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL “SMC” BENCH, MUMBAI

श्री महावीर सिंह, न्यायिक सदस्य

BEFORE SRI MAHAVIR SINGH, JUDICIAL MEMBER

आयकर अपील सं./ ITA No. 5083/Mum/2018

(निर्धारण वर्ष / Assessment Year 2011-12)

आयकर अपील सं./ ITA No. 5084/Mum/2018

(निर्धारण वर्ष / Assessment Year 2012-13)

आयकर अपील सं./ ITA No. 5085/Mum/2018

(निर्धारण वर्ष / Assessment Year 2013-14)

आयकर अपील सं./ ITA No. 5086/Mum/2018

(निर्धारण वर्ष / Assessment Year 2014-15)

आयकर अपील सं./ ITA No. 5107/Mum/2018

(निर्धारण वर्ष / Assessment Year 2015-16)

Aditya Jyot Eye Hospital Pvt. Ltd. 153, Major Parameshwaran Road, Wadala (West), Mumbai-400 031	Vs.	The Income Tax Officer, Ward 6(1)-1 5 th Floor, Aayakar Bhavan, Mumbai
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
स्थायी लेखा सं./PAN No. AADCA2900R		

अपीलार्थी की ओर से / **Appellant by** : Ms. Chaitee Londhe, AR

प्रत्यर्थी की ओर से / **Respondent by** : Shri Rajat Mittal, DR

सुनवाई की तारीख / Date of hearing:	24.06.2019
घोषणा की तारीख / Date of pronouncement :	24.06.2019



**ITAs No. 5083, 5084, 5085,
5086 & 5107/Mum/2019**

आदेश / ORDER

**महावीर सिंह, न्यायिक सदस्य/
PER MAHAVIR SINGH, JM:**

These appeals of the assessee are arising out of the orders of Commissioner of Income Tax (Appeals)-12, Mumbai [in short CIT(A)], in Appeal Nos CIT(A)-12/IT-213/ITO-6(1)(1)/13-14, CIT(A)-12/ITO-6(1)(1)/294/15-16, CIT(A)-12/ITO-6(1)(1)/686/15-16, CIT(A)-12/ITO-6(1)(1)/B2-561/16-17, CIT(A)-12/ITO-6(1)(1)/C-141/17-18 vide order dated 08.05.2018, 15.05.2018. The Assessments were framed by the Income Tax Officer, Ward 6(1)(1) Mumbai (in short 'ITO/ AO') for the A.Ys. 2011-12, 2012-13, 2013-14, 2014-15 vide order dated 31.01.2014, 20.03.2015, 17.02.2016, 19.08.2016, 27.11.2017 under section 143(3) read with section 147 of the Income Tax Act, 1961 (hereinafter 'the Act').

2. The only common issue in these appeals of assessee is against the order of CIT(A) confirming the action of the AO in disallowing interest on bank loan for purchase of flat and also disallowance of depreciation on flat that was provided as residential accommodation to the Managing Director holding the same as non-business transaction. Facts and circumstances are exactly identical and also the issues are same in all the appeals. Hence, I will take the grounds from AY 2011-12 and decide the issue. For this assessee has raised the following three grounds in AY 2011-12: -



**ITAs No. 5083, 5084, 5085,
5086 & 5107/Mum/2019**

“1. On the facts and in the circumstances of the case, Ld. CIT(Appeals) erred in confirming the conclusion of the Assessing Officer that the flat purchased for providing residential accommodation to its Managing Director is a "Non-Business Transaction" of the appellant.

2. On the facts and circumstances of the case, the Ld. CIT (Appeals) erred in confirming the disallowance of interest of Rs. 24,18,057/- on the Bank loan for purchase of the flat that was provided as residential accommodation to the Managing Director.

3. On the facts and circumstances of the case, the Ld. CIT (Appeals) erred in confirming the disallowance of depreciation of Rs. 31,24,834/- on the flat that was provided as residential accommodation to the Managing Director.”

3. Briefly stated facts are that the assessee is engaged in the business of operating a Specialty Eye Care Hospital. The assessee purchase a residential flat during the financial year 2009-10 relevant to AY 2010-11 for providing residential accommodation to its Managing Director. According to AO, this transaction represents a non-business transaction and hence, the AO made disallowance of interest expenditure of Rs. 24,18,057/- incurred in respect of loan taken for purchase of these property and also disallowed the depreciation of Rs. 31,24,834/- claimed on this property. Aggrieved,



**ITAs No. 5083, 5084, 5085,
5086 & 5107/Mum/2019**

assessee preferred the appeal before CIT(A), who also relying on the order for AY 2010-11 of his predecessor confirmed the disallowance vide Para 16 to 18 as under: -

“16. I have considered the facts of the case, the assessment order and the written submission of the appellant. The AO disallowed the claims for deduction of depreciation on the residential flat at Dadar, interest expenditure on the loan taken for the purchase of the said residential property and electricity expenses incurred in respect of the said property on the ground that the said property which was provided to CMD of the appellant company cannot be considered to have been used for the purpose of the appellant's business based on the findings of the A.O. in the assessment order for A.Y.2010-11 when the flat was purchased by the appellant, since the facts remained the same for the present assessment year also. In this connection, it is pertinent to note that appeal filed by the appellant against the assessment order for A.Y.2010-11 has been decided against the appellant by the CIT(A)-12, Mumbai vide order dated 13.08.2015 in al No. CIT(A)-12/ITO-6(1)(1)/65/13-14. In the said decision, the CIT(A) upheld the g of the A.O. that the residential flat purchased by the appellant cannot be termed as the business asset of the



**ITAs No. 5083, 5084, 5085,
5086 & 5107/Mum/2019**

appellant and that the same was not used for the purpose of the appellant's business. The relevant part of the decision of the 01(A) for A.Y.2010-11 is reproduced as under: -

1. I have carefully perused both the written submission of the appellant and the assessment order of the A.O. It is seen that the flat was purchased purely for the personal use of the M.D., Dr. S. Natarajan. it/s the purchase of an asset, i.e. a residential house purely for his personal use. it is not meant for the common good of the other employees of the appellant company. it is definitely a transaction which cannot be termed as carried out for the "commercial expediency" of the appellant. Purchase of the flat by the appellant company has no business nexus with that of Dr. S. Nataranjan. Thus, it has been correctly held by the .4.0. that the flat purchased by the appellant has neither been exploited commercially for its own business nor it has any business nexus now in the present nor it can have in the future. The term for the purpose of business" in Section 37 of the I. T. Act explicitly means that it has to be meant for the purpose of



**ITAs No. 5083, 5084, 5085,
5086 & 5107/Mum/2019**

the trade and business of the appellant. Cost of the flat as capitalized in the books of the appellant is purely meant for the personal use and benefit of the M.D., Dr. S. Natarajan. It is not meant at all for the general good or benefit of the other employees. It is also seen that the M.D. holds majority of the shareholding i.e. 99% of the company and, therefore, single handedly he does all the decision making. He is the person who is in control of the affairs and business of the company. He is not answerable to anybody nor he receives any instructions from anybody. He is solely making all the decisions. The AO has carefully perused the minutes of the Board meeting and established that the M.D. was the sole authority in all matters of decision whatsoever. On the 19th May, 2008 when the Board Meeting took place, there was only one more Director present along with the M.D. when it was decided to purchase the flat. Thus, it is established that there is no employer-employee relation whatsoever as correctly held by the A.O. The earlier Managing Director, Mrs. Preeti Natarajan appears to be a family member



**ITAs No. 5083, 5084, 5085,
5086 & 5107/Mum/2019**

of Dr. S. Natarajan and Dr. Natarajan took over as M.D. when her term expired as M.D. Thus, it is seen that, 99% of the shareholding remains within the family itself. The Hon. Mumbai ITAT's order dated 26.10.2004 in the case of ACIT, Range 5(3), Mumbai vs Shukra Diamond Exports Ltd. in ITA No. 1053/M12002 quoted by the appellant is not at all applicable here in appellant's case. The Hon. Mumbai ITAT in page 12, para 2 of Shukra case has held as under:

"The Learned C7T(A) in appeal treated the income from the fiat as income from business and also allowed the depreciation on the following findings

"In this case, the premises are used for the business purpose, in so far as conferences and entertainment of foreign customers were going on there. This kind of usage of the property was for business purpose, and here, no personal element of Director was involved. As far as part premises used by the



**ITAs No. 5083, 5084, 5085,
5086 & 5107/Mum/2019**

Managing Director is concerned, the Managing Director is also an employee of the appellant company. Therefore, the premises held by the Managing Director is also devoted to business usage. Hence, from both the angles, the property is used for the purpose of business. Hence, depreciation is clearly admissible. The Assessing Officer is directed accordingly".

Thus, it is seen that the premises are used for the business purpose in the Shukra Diamond case and so the other issue like depreciation is to be allowed. But, here in the appellant's case such is not the case. The AO has very clearly established that the purchase of the residential accommodation is not for business.

17. *Consequently, the CIT(A) upheld the disallowance of the depreciation claimed in respect of the said residential flat by stating as under: -*

9.1 The Hon'ble Delhi High Court in the case of CIT vs. Modi Industries Ltd. (210 PR 1) and followed by Hon'ble Bombay



**ITAs No. 5083, 5084, 5085,
5086 & 5107/Mum/2019**

High Court in re. Shukra Diamonds Ltd. case, held that the subject property constitutes business asset of the Appellant, and it is entitled to depreciation. The Appellant also relied on Board Circular Ref. F.No. 10/14/66-IT(AI) dated 12.12.1966, wherein it has been clarified as under:

"On reconsideration therefore the Board have decided, in supersession of the instructions issued in their letter dt. the 29th February 1964, that fans, air-conditioners, refrigerators etc. Provided by the employer at the residence of the employees should be considered to have been used wholly for the purpose of the employer's business and full depreciation as may be admissible in accordance with the rules, should be allowed in the assessment of the employer. Where such assets have been installed on or before the 31 March 1965, development rebate may also be allowed in respect of these assets, if the rebate is otherwise admissible."



9.2 The Board Circular can be relied upon only, if, in the Appellant's case the subject premise is a business asset and so would qualify for depreciation. But, here it is held that it is not a business asset. Depreciation is not be allowed since the subject premises is not a business asset of the appellant company. Thus, Ps. 34,72,037/- is not allowed as depreciation. Depreciation on the subject property amounting to Rs. 34,72,037/- is not allowed as a deduction in computing the taxable income of the Appellant.

18. The CIT(A) also upheld the disallowance of the interest expenditure incurred on the loan taken for the purchase of the said residential flat by stating as under: -

Once the subject property is not held to be a business asset then automatically the loan availed for its acquisition does not constitute loan availed for the purpose of business. Thus, the interest cost of Ps. 24,62,2851- does not qualify for deduction as an expenditure. Thus, the A.O's finding is confirmed.



**ITAs No. 5083, 5084, 5085,
5086 & 5107/Mum/2019**

However, as stated by the appellant in its Ground of Appeal no. 4, it is seen that the amount of Ps. 22,72,715/- is not permissible to the Profit and loss account of the appellant. It's an undisputed fact that there can be no disallowability of the amount if it is not debited to P & L account. Disallowing the same amounts to double disallowance which is not permissible as per the requirements and provisions of IT Act, 1961. The A.O. is therefore, directed to verify this fact and then pass appeal order accordingly for this issue."

4. The CIT(A) held that this property purchase transaction does not constitute a business activity and the same has not been put to use of business of the assessee. Hence, the CIT(A) disallowed the interest as well as depreciation and finally held in Para 20 as under:

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"20. As the facts of the case for the present A.Y.2011-12 are the same as that of the A.Y.2010-11, by following the order of the CIT(A) for A.Y.2010-11, it is held that the residential flat at Dadar purchased by the appellant during the previous year relevant to



**ITAs No. 5083, 5084, 5085,
5086 & 5107/Mum/2019**

A.Y.2010-1 I does not constitute a business asset which has been put to use for the purpose of the appellant's business. Consequently, it is held that the depreciation claimed on the said residential property, the interest expenditure incurred on the loan taken for purchase of the said property and the electricity expenses incurred in respect of the said property cannot be considered to have been laid out wholly and exclusively for the purpose of the appellant's business.”

5. I find that this issue of interest disallowance and depreciation disallowance is squarely covered by the decision of co-ordinate Bench of this Tribunal in assessee's own case in ITA No. 5325/Mum/2015 for AY 2010-11 vide order dated 24.10.2018, wherein Tribunal vide Para 4 allowed as under: -

“4. Issue nos. 1 to 6 are inter-connected, therefore, are being taken up together for adjudication. Basically, the AO declined the claim of the assessee regarding purchase of the flat in sum of Rs.3,47,20,373/- along with ancillary claim. The assessee is a private company and purchased the flat at Dadar bearing no.602 in the building namely Ornate Galaxy, located at L.T. Road, Dadar (E), Mumbai. The assessee took the loan in sum of Rs.300 lacs and paying the installment along with interest. The assessee purchased the said



**ITAs No. 5083, 5084, 5085,
5086 & 5107/Mum/2019**

residential premises for the residence of CMD of the assessee company. The AO declined the claim of the assessee in view of provision u/s 2(22)(e) of the I.T. Act, 1961. The AO declined the claim of the assessee on the ground of that there was no business nexus between the residential premises and the assessee company. Dr. S. Natarajan was having 99% share in the company who also having owned the flat at Wadala. The AO also stated that the assessee company was running a eye care center in which there was no emergency, therefore, there was no need to purchase the flat for CMD. There was not employer and employee relationship with the CMD and the assessee company. The claim of the assessee was accordingly declined. In appeal, the CIT(A) has confirmed the order of the AO. The Ld. Representative of the assessee has argued that the assessee nowhere transferred the fund/amount to any other person, therefore, the application of provision u/s 2(22)(e) of the Act is totally wrong ,hence, the finding of the CIT(A) is liable to be set aside. It is also argued that the assessee can purchase the flat for his CMD where he can treat the patient of the hospital very conveniently when the residence is near to hospital, therefore, it is a business necessity, accordingly the finding of the CIT(A) is not justifiable. It is also argued that the loan was taken by assessee company and the claim in



**ITAs No. 5083, 5084, 5085,
5086 & 5107/Mum/2019**

connection with the loan was also denied wrongly and illegally, therefore, the finding of the CIT(A) is not justifiable. It is also argued that the AO cannot dictate his term and is not entitled to interfere in the business decision of the assessee company, therefore, the finding of the CIT(A) is not justifiable. It is also argued that the transaction if any can be considered as tax planning which is not against the law and facts, therefore, the finding of the CIT(A) is not justifiable in view of the law settled in Union of India Vs. Azadi Bachao Andolan 263 ITR 706 (SC), Madras High Court in M.V. Vallipan Vs. CIT 170 ITR 238 & Bhoruka Engg. Ltd. Vs. DCIT 356 ITR 25. However, on the other hand, the Ld. Representative of the Department has strongly relied upon the order passed by the CIT(A) in question. The factual position is not in dispute. The assessee purchased the flat bearing flat no.602, in the building namely Ornate Galaxy, located at L.T. Road, Dadar (E), Mumbai. No doubt, the assessee Dr. Natarajan is the CMD of hospital and is having 99% share of the assessee company. The flat is near to the hospital which facilitates the treatment of eye patient at any time. Even in the case of emergency the CMD can approach to the hospital promptly. In the instant case, the assessee did not transfer the fund to its director. The assessee took the bank loan to the tune of Rs.300 lacs and by adding some more funds,



**ITAs No. 5083, 5084, 5085,
5086 & 5107/Mum/2019**

purchased the flat bearing no.602, in the building namely Ornate Galaxy, located at L.T. Road, Dadar (E), Mumbai. It is purely the wish of the AO in which he desired that the Dr. S. Natarajan was having the flat at Wadala, therefore, the assessee company should not purchase the flat for CMD of the assessee company. The transaction is nowhere in contravention of the provision of any income tax act. The provision of Section 2(22)(e) of the Act is not applicable to the facts of the case. Moreover, there may be tax planning on the part of the assessee company but there is no violation of any provision of the Income Tax Act. The claim of the assessee is not liable to be declined. In this regard, we also find support of law settled in case titled as Union of India Vs. Azadi Bachao Andolan 263 ITR 706 (SC), Madras High Court in M.V. Vallipan Vs. CIT 170 ITR 238 & Bhoruka Engg. Ltd. Vs. DCIT 356 ITR 25. The assessee company neither transferred the funds outside the company nor to the director, therefore, the provision of Section 2(22)(e) of the Act is not applicable to the facts of the case. Accordingly, we set aside the finding of the CIT(A) in this regard. Since the finding given by lower authorities attracting the provision of Section 2(22) (e) of the Act is not justifiable, therefore, ancillary claim is also not liable to be declined. So far as disallowance of repayment of loan installment is concerned the CIT(A) has



**ITAs No. 5083, 5084, 5085,
5086 & 5107/Mum/2019**

deleted the disallowance subject to verification by the AO, we do not find any infirmity in the direction of CIT(A) for allowing verification. However, the claim of interest to the tune of Rs.24,62,285/- is revenue in nature, therefore, is liable to be allowed. Accordingly, we allow the claim of the assessee company for such interest expenditure on bank loan taken for the purpose of the assessee business. So far as the claim of depreciation is concerned, we are of the view that the assessee is entitled to claim the depreciation @ 5% of the total value of the purchase of Rs.34,72,037/-. The claim of the electricity charges has not been pressed by Ld. AR, therefore, the same is hereby dismissed being not pressed. Accordingly, the issues nos. 1, 2, 4 & 5 are hereby decided in favour of the assessee and against the revenue.”

6. As the facts and circumstances are exactly identical and the issue is same. Even, the property transaction question is the same and this property was purchased in FY 2009-10 relevant to A.Y. 2010-1. Respectfully following the Tribunal's order in assessee's own case for immediate preceding year, I delete both the disallowance and allow the appeal of the assessee.

7. Similar are the facts in ITAs No. 5084, 5085, 5086 & 5107/Mum/2018 for AYs 2012-13 to 2015-16 and the issue is exactly identical. Hence taking a consistent view in these years also,



ITAs No. 5083, 5084, 5085,
5086 & 5107/Mum/2019

I delete both the disallowances i.e. interest paid and depreciation on flat and allow the claim of the assessee.

8. In the result, all the five appeals of the assessee are allowed.

Order pronounced in the open court on 24-06-2019.

Sd/-

(महावीर सिंह /MAHAVIR SINGH)

(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 24-06-2019

सुदीप सरकार, व.निजी सचिव / Sudip Sarkar, Sr.PS

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. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai