IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH, BENGALURU

BEFORE SHRI A.K.GARODIA, ACCOUNTANT MEMBER
and
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No.2912/Bang/2017
(Assessment year: 2012-13)

Karnataka State Tourism Development
Corporation Ltd.
No.49, II Floor, West Avenue,
Khanija Bhavan,
Race Course,
Bengaluru-560001. ... Appellant
PAN:AACCK3563F

Vs.

Deputy Commissioner of Income-tax,
Circle 4(1)(1), ...
Respondent
Bengaluru.

AND
ITA No.2715/Bang/2017
(Assessment year: 2012-13)
(By Revenue)

Assessee by : Dr. P.V.Pradeep Kumar, Addl.CIT(DR).
Revenue by : Shri Satyanarayana Murthy, CA.

Date of hearing: 04/07/2019
Date of pronouncement: 02/08/2019

O R D E R

Per PAVAN KUMAR GADALE, JM:

These are cross-appeals filed by the assessee and the revenue against the order of the CIT(A), Bengaluru, passed u/s 143(3) and 250 of the Income-tax Act,1961 ['the Act' for short] for the assessment year 2012-13. Since the

appeals are filed against common order, for the sake of convenience, we shall take up the revenue appeal in ITA No.2715/Bang/2017 and the facts narrated therein.

2. The revenue has raised the following grounds of appeal:

1. "The Order of the Ld. CIT (A), in so far as it is prejudicial to the interest of the Revenue, is opposed to law and the fact and circumstances of the case.

2. On facts of the case, whether the Ld. CIT (A) is right in rendering the decision to charge Rs. 1/- per acre per year as against the rate prevailing within the vicinity @ 1,30,000/-per year per acre?

3. On the facts of the case, whether the Ld CIT(A) is correct in holding that the Revenue has taxed the notional amount of lease rent in the hands of the assessee.

4. On the facts of the case, the Ld CIT(A) ought to have appreciated that the lease rent in that area has become Rs. 1,11,000/- per acre per year in the year 2000 itself. Hence, the leased rent charged by the assessee from the KGA is very low.

5. On the facts of the case, whether the Ld CIT(A) is correct in holding that the Revenue has taxed the notional amount of lease rent in the hands of the assessee.

6. On the facts of the case, the Ld CIT(A) has given relief to the assessee by relying on the order of the ITAT in assessee's own case for AY 2007-08 & 2008-09 which has not been accepted by the Department and further appeal has been filed before the Hon'ble High Court of Karnataka, which pending for adjudication.

7. The order of the Ld CIT(A) is perverse to the extent of ignoring the basic fact of the case that the assessee has never approached the Govt. for revision of lease rent and has never invoked the power to cancel the lease agreement if the KGA was not ready to enhance the lease rent as per the market condition.

8. On the facts of the case, whether the Ld CIT (A) is right in allowing the additional evidences in allowing the appeal of the assessee u/s 40(a)(ia), without giving opportunity to the AO as per the requirement of Rule 46A of the IT Rules.

For these and other grounds that may be urged at the time of hearing, it is that the order of the CIT (A) in so far as it relates to the above grounds may be reversed and that the Assessing Officer may be restored.

3. Brief facts of the case are that the assessee is an undertaking fully owned by the State Government providing accommodation and transport facilities to domestic and international tourists and package tours, luxury tourist train and running hotels, filed the return of income on 30/09/2012 with loss of Rs.1,14,07,000/-. Subsequently revised return was filed on 29/3/2014 with loss of Rs.1,36,54,385/-. The case was selected for scrutiny and notices u/s 143(2) and 142(1) were issued. The Assessing Officer (AO) in the assessment proceedings found that the assessee is not entitled to carry forward of loss and the books of accounts are audited. The ld. AR made submissions on the disputed issues referred in para.3.2 of the assessment order. Ultimately the AO found that the assessee has filed provisional return of income merely for the benefit of claim of carry forward of loss and filed the return of income with inaccurate particulars and rejected the claim of carry forward of loss.

4. On the second disputed issue, the assessee has debited P&L Account with an amount of Rs.18,00,204/- towards prior period items whereas the assessee-company disallowed Rs.3,62,502/- in the computation of income and balance was claimed as allowable. AO considered the tax audit report and Form No. 3CD. Since the assessee has failed to provide any evidence of crystallization of liability and further accounting standards and matching principle concept, has

not been complied. Hence, the AO made disallowance of prior period expenditure.

5. The AO, on the third disputed issue on verification of annual report, found that 124 acres of land has been leased to Karnataka Golf Association for development of Golf Club and as per lease deed dated 25/7/1988 i.e. 30 years with annual rent of Rs.1 per acre. The AO found from the annual report that the assessee has earned huge income in the last year. Even though the Karnataka Golf Association is cash rich but is not paying any lease rent to the assessee-company. The AO also observed that the assessee-company did not press Karnataka Golf Club to make payment of lease rent. He further observed that value of land is over Rs.1100 crores and the company should have valued the same reasonable amount towards lease rental. On comparison of 5 acres of land adjacent to Karnataka Golf Club, the Royal Orchard was let out by the assessee company in the year 1992 for Rs.1,11,000/- per acre with annual increment. Therefore, considering the contradicting factors of capital value and comparable lease rental valued by the assessee-company, the AO estimated the lease rental for the year under consideration at Rs.1,30,000/- per acre being the base rate applied to Royal Orchard, where lease of Rs.1,11,000/- per acre is being collected by the assessee. Accordingly, AO made addition of lease rental in the hands of the assessee-company of Rs.1,61,20,000/-.

6. On the fourth disputed issue viz. AO made disallowance u/s 14A as the assessee has invested Rs.42060000 in shares as on 31/3/2012 and received dividend of Rs.6,30,900/- and also incurred expenditure of Rs.9770861/- on account of interest. The assessee filed details referred at para.6 whereas the AO considering the fact of disallowance applied rule 8D(2) and has worked out

disallowance u/s 14A aggregating to Rs.71,237/-. Similarly, the AO found that the assessee has interest income of Rs.26,09,934/- out of deposits received from the Department of Tourism with bank. The assessee had made provision towards interest payable to Department of Tourism. The AO found that interest paid to Department of Tourism is application of income and disallowed the expenses. Similarly, the AO has claimed certain expenditure in respect of renovation works and clarifications was filed on 31/3/2015 with detailed note of each claim of expenditure but the AO was not satisfied with submissions and found that expenses incurred are in the nature of renovation and upgradation of work and disallowed the claim of Rs.67,92,857/-.

7. The AO disallowed the claim of depreciation of Rs.2,08,486/- on KR Sagar unit whereas the assessee-company is the owner. Similarly, on the other disputed issue, the assessee has paid rent and royalty of Rs.603548 and 2493736 to BIAL and tax should have been deducted 10% of the amount whereas the assessee-company has deducted tax at the rate of 1.5%. But the AO considering facts and provisions made disallowance u/s 40(a)(ia) of the Act of Rs.38,08,141/-

8. On the last disputed issue with respect to belated deposit of employee's contribution of PF, ld. AR of the assessee submitted that the payments are not made within specified period but before due date of filing of return of income u/s 139(1) of the Act. But AO held that employees contribution is to be treated as income u/s 2(24)(x) and sec.36(vi) and determined the assessed income of Rs.2,51,09,936/- and passed the order u/s 143(3) of the Act dated 19/3/2015.

9. Aggrieved by the order, the assessee preferred an appeal with the CIT(A). Whereas the CIT(A), considering the grounds of appeal and submissions granted

relief. But In respect of disallowance u/s 14A interest income capitalization of expenses confirmed the action of the AO. Whereas the disallowance of depreciation, the CIT(A) found that the assessee has claimed depreciation on KR Sagar unit. But whereas CIT(A) relied on the assessee's own case and restricted to Rs.7,834/- In respect of disallowance u/s 40(a)(ia) for payments made towards rent and royalty to BIAL, the CIT(A) dealt on the submissions, where the assessee has filed on record certificate for non-deduction of tax referred at page.103 and therefore, considering the fact that the certificate has been issue on particular date has deleted the addition. The CIT(A), on disallowance of remittance of EPF and ESI applied the provisions of sec.36(1)(vii) of the Act and decision of the jurisdictional High Court and deleted the addition and partly allowed the appeal.

10. Aggrieved by the order of the CIT(A), the revenue has filed an appeal before the Tribunal. The learned DR argued on ground Nos.2 to 7 supporting the order of the AO that the AO was correct in making addition of lease rental whereas in assessee's own case for assessment years 2007-08 and 2008-09 and the revenue having not accepted the decision and has filed an appeal before the Hon'ble High Court of Karnataka which is pending and prayed for setting aside the order of the CIT(A) on this issue.

11. Contra, ld. AR supporting the orders of the CIT(A) and relied on the ITAT order.

12. We have heard both parties on the disputed issue of lease rent of land provided to Karnataka Golf Association. The CIT(A) at para 5.3 page 6 order has dealt which reads as under:

> "5.3 On this issue, the Income Tax Appellate 'Tribunal, Bengaluru, in the case of the appellant for asst. year 2007-08 and 2008-09 in ITA No. 456/Bang/2011 and ITA No. 1614/Bang/2013 has held that only income actually receivedcan be charged to tax and not notional income. Following the same for the year in question i.e., 2012-13 also„ actual income received is to be brought to tax and not notional income. Under such facts of the case, the addition made by the AO is hereby deleted."

We find that the learned DR could not controvert the findings of the CIT(A) with any new evidence or cogent material except relying on the order of the AO and mentioning that the appeal is pending before the jurisdictional High Court. Whereas the ld. AR supported the order with decision of Tribunal for the assessment years 2007-08 and 2008-09 we, considering the judicial precedents found that the CIT(A) has applied the co-ordinate bench decision and granted relief. Accordingly, we are not inclined to interfere with the order of the CIT(A) on this ground of appeal and uphold the same and dismiss the grounds of appeal raised by the revenue.

13. The learned DR argued on the second issue in ground Nos.8 and 9 where the CIT(A) admitted additional evidence without providing opportunity to the AO for verification.. The learned DR's contention that the assessee has submitted a certificate of non-deduction of tax u/s 197 w.e.f. 14/9/2011 which was not brought to the knowledge of the AO or no remand report was called on this aspects. Therefore, prayed that there is violation of provisions of 46A of the IT Rules and allow the ground of appeal.

14. Contra, ld. AR submitted that the assessee has received lower deduction certificate, being effective from 14/9/2011 and the same could not be submitted in the course of assessment proceedings and therefore the assessee has

deducted TDS at lower rate of 1.5% for the period from 14/9/2011 to 31/3/2012.

15. We have heard the rival submissions and perused the material on record. The learned DR's contention that the AO never verified the certificate of lower deduction of tax u/s 197 which is effective from 1/4/2011. We found strength in the submissions and on perusal of the assessment order at para.10, we found that there is no finding or submission by the assessee on this issue. Therefore, the AO made disallowance whereas in appellate proceedings, the CIT(A) accepted the lower deduction of tax certificate u/s 197 of the Act and assessee's submissions on this disputed issue and granted relief. Accordingly, we are of the opinion that the AO never had an opportunity to verify these facts along with evidence filed in the course of appellate proceedings. Accordingly, in the interest of justice, we restore this disputed issue for limited purpose for verifying and examining of the certificate and the assessee's submissions to the file of the AO and the assessee should be provided with adequate opportunity of hearing and shall co-operate in submitting information for early disposal of the case. Accordingly, ground of appeal of revenue is allowed for statistical purposes.

16. In the result, the revenue appeal is partly allowed for statistical purposes.

17. Now, we shall deal with assessee's appeal in ITA No.2912/Bang/2017. The assessee has raised the following grounds of appeal:

1. "On the facts and circumstances of the case, the learned Commissioner of Income Tax (Appeals) 2 erred in making disallowance under section 14A a sum of Rs.71,237/-without appreciating the fact that the assessee company has not incurred any expenditure towards earned exempt income and the investment made were out of surplus fund in prior years.

2. On the facts and circumstances of the case, the learned Commissioner of Income Tax (Appeals) 2 erred in disallowing a sum of Rs.26,09,934/- towards interest provision to the Department of Tourism on the ground that the same is in the nature of mere provision and has not been paid.

3. On the facts and circumstances of the case, the learned Commissioner of Income Tax (Appeals) 2 erred in not appreciating the fact that the expenses incurred towards renovation work only and no new rooms have been added and no new construction made and the expenditure incurred were revenue in nature and the same is allowable under section 37 of the Income Tax Act 1961.

4. On the facts and circumstances of the case the learned Commissioner of Income Tax (Appeals)-I erred in disallowing the prior period expenditure of Rs.27,80,946/- on the ground that no specific proof or justification has been provided.

WHEREFORE, for the detailed reasons mentioned above and which are going to be urged at the time of hearing, this authority may be pleased to allow the appeal.

Your appellant seeks leave to add, to amend any of the foregoing grounds as and when considered necessary at the time of hearing."

At the time of hearing, the ld. AR has not pressed the ground No.4 and made endorsement to this effect and the ground is dismissed as not pressed.

18. The effective grounds of appeal are Nos.1, 2 and 3. The first disputed issue argued by the ld. AR is that the CIT(A) erred in confirming the disallowance u/s 14A of Rs.71,237/- without considering the fact that no expenditure has been incurred for earning such income. The ld. AR also filed supporting documents in respect of disallowance made u/s 14A along with judicial decisions. The ld. AR's submission are that the assessee has made investment of Rs.42,06,000/- in earlier year in Jungle Lodges & Resorts and during current year dividend income of Rs.6,30,900/- was received and claimed as exempted. Further no expenditure has been incurred for earning such dividend income. The ld. AR submitted that the assessee has made investment out of surplus funds in Jungle Lodges & Resorts in the year 1985 and referred to Annual accounts. The ld. AR relied on the judicial decision and all the investment made in subsidiary company is for the purpose of business and no

expenditure has been incurred for maintaining investment in the subsidiaries whereas the learned DR supported the orders of the CIT(A).

19. We head rival submissions and perused the material on record. Though the ld. AR has been emphasizing on investments are made out of surplus funds available to the assessee and there is no clarity on the issue how assessee's surplus funds are utilized for investment in the subsidiaries or sister concerns. We are of the substantive opinion that when the Reserves & Surplus of the as. Company are more than investments, the disallowance u. 14 read with 8 D (2) (ii) shall not be attracted as per the decision of Jurisdictional High Court in the case of CIT Vs. Micro Labs 383 ITR 490 (Kar) and while calculating disallowance under Section 14 r.w. 8D(2)(ii). In calculating the average investments only those investments which yield exempt income has to be considered as per Special Bench decision of ITAT in the case of ACIT Vs. Vireet Investments P. Ltd. 165 ITD 27 (Del). Accordingly, we consider it proper to restore this issue to the file of the AO to adjudicate afresh in light of above judicial decisions and allow the ground of appeal of the assessee for statistical purposes.

20. On the second disputed issue reversal of interest income, the assessee has made provision towards interest payable to Department of Tourism Rs.26,09,934/- whereas the CIT(A) found that interest earned on the deposits claimed by the assessee as returned on request to Department of Tourism and the CIT(A) concurred with the finding of the AO that it is a mere provision at page 11, para 7.3. which reads as under:

> "7.3 There is nothing on record to show that any amount has been paid back during the year or in subsequent years uptil now i.e., 2017. In fact, there is a balance of Rs.2,83,80,157 in this account accumulated year after year (claimed as payable to Government, but neither paid nor demanded). Under such facts, creating such a provision where the basis on which it is quantified is also not clear as brought out in the assessment order cannot be allowed as an expenditure. This amount is also not an interest on loan from Government of Karnataka but interest earned on funds invested with bank as brought out by the Assessing officer in this case.
>
> This fact has not been considered in the orders of earlier years or by CIT (Appeals) in asst. year2013-14. Thus, the provision made out of interest earned from bank cannot be allowed as 'expenditure' on the basis of a mere provision only under facts of the case. The addition of the AO is upheld with this finding."

Even before us, nothing was brought on record by the assessee that there is actual payment of interest. Hence, we are not inclined to interfere with the order of the CIT(A) on this disputed issue and uphold his order and dismiss ground of appeal of the assessee.

21. The last ground of appeal is in respect of capitalization of revenue expenses. The CIT(A) has confirmed the addition made by the AO. The assessee has claimed an amount of Rs.67,92,877/- towards repair works of its hotel at various places and the details have been filed in the course of hearing. The contention of the ld. AR that there is no addition of new rooms and most of the work pertains to renovation work and is revenue in nature and the assessee is in

the business of providing tours and travels and expenses are incurred on its own properties which are revenue in nature and no new asset has come in to existence. The nature of expenses are in the nature of interior works, repairs, replacement of tiles bathroom fittings for business promotion which are already in existence. Further, the ld. AR submitted that these claims were accepted by the revenue for the assessment year 2013-14 and 2014-15 and supported with Annual Report. Whereas the CIT(A) observed that there is no clarity on the issues and hence confirmed the action of the AO. The ld. AR supported the stand with judicial decisions. The ld. AR relied on the decision of the jurisdictional High Court in the case of CIT vs. Rupesh Anand in ITA 254/2015 c/w ITA 255 256 & 257/2015 dated 21/10/2016.

Contra, learned DR supported the orders of the CIT(A).

22. We heard the rival submissions and perused material on record. Prima facie, the disputed issue envisaged by the ld. AR is in respect of claim of expenditure whether it is capital or revenue expenditure. We found that the assessee has made submissions before the lower authorities but on perusal of the assessment order, we found that the material filed in the hearing proceedings was not filed in the assessment proceedings and the test of functionality has to be conducted considering the nature of business operations and expenses. Accordingly, we remit entire disputed issue to the file of the AO to verify the material/evidence filed in the course of hearing and the judicial decisions and test check the claim and assessee should be provided with adequate opportunity of hearing and shall co-operate in submitting the information. We allow the grounds of appeal of the assessee for statistical purpose.

23. In the result, the assessee appeal is partly allowed for statistical purposes.

24. In the result, both the assessee appeal and the revenue appeal are partly allowed for statistical purposes.

Order pronounced in the open court on 02/08/2019.

Sd/-	Sd/-
(A.K.GARODIA)	(PAVAN KUMAR GADALE)
ACCOUNTANTMEMBER	JUDICIAL MEMBER

Place : Bengaluru
Dated : 02/08/2019

*Reddy gp / srinivasulu, sps

Copy to :

1 Appellant
2 Respondent
3 CIT(A)-
4 CIT
5 DR, ITAT, Bangalore.
6 Guard file

By order

Assistant Registrar
Income-tax Appellate Tribunal,
Bangalore