

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "D" MUMBAI**

**BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND  
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 526/MUM/2017  
Assessment Year: 2013-14**

M/s Degustibus Hospitality Pvt. Ltd., 8 <sup>th</sup> floor, Baktawar Building, Near SakharBhavan, Nariman Point, Mumbai-400021.	Vs.	DCIT-5(1), AayakarBhavan, M.K. Road, Mumbai-400020.
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**PAN No. AABCD3674P**

**Appellant**

**Respondent**

Assessee by	: Mr. Sunil A. Desai, AR
Revenue by	: Mr. D.G. Pansari, DR

Date of Hearing	: 11/07/2019
Date of pronouncement	: 04/10/2019

**ORDER**

**PER N.K. PRADHAN, AM**

This is an appeal filed by the assessee. The relevant assessment year is 2013-14. The appeal is directed against the order of the Commissioner of Income Tax-10, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143(3) of the Income Tax Act 1961, (the 'Act').

**2. The 1<sup>st</sup> ground of appeal**

On the facts and In the circumstances of the case and in law, the Appellant contends that the Ld. CIT (A) erred in confirming disallowance of

depreciation claim of Rs.45,66,996/- without appreciating the nature of business of the appellant.

3. Briefly stated, the facts of the case are that the assessee filed its return of income for the assessment year (AY) 2013-14 on 30.09.2013 declaring income of Rs. Nil. During the course of assessment proceedings, the Assessing Officer (AO), on examination of the depreciation schedule found that the appellant has claimed depreciation of Rs.9,13,39,920/- on civil works by classifying it under the block 'plant & machinery' and claimed depreciation on civil works @ 15% instead of the allowable depreciation @ 10%. In response to a query raised by the AO to explain the above, the appellant submitted that civil works form a part of 'plant and machinery' and hence depreciation @ 15% has been claimed.

However, the AO was not convinced with the above explanation of the assessee because it is eligible for depreciation only @ 10% as the nature of job is civil works. Therefore, he disallowed the excess claim of depreciation of Rs.45,66,996/-.

4. In appeal before the Ld. CIT(A), the assessee contended that it is in the business of hospitality i.e. running restaurant business which provide facilities and services like restaurant, bar room, music, floor dance, banquet hall which are intended to attract customers. It also claimed that the interior, colour scheme and other civil work is made out with a definite purpose, considering the nature of business of the assessee.

However, the Ld. CIT(A) was not convinced with the above explanation of the assessee for the reason that the civil works narrated by the assessee either fall under 1(2)-building or II-furniture and fittings mentioned at para -A of New Appendix -1 of Depreciation Schedule which are eligible for depreciation at 10% but not under 'plant & machinery' which is eligible for 15%. Thus he confirmed the disallowance of Rs.45,66,996/- made by the AO.

5. Before us, the Ld. counsel for the assessee files a copy of the decision in *CIT v. Konadia Cold Storage* (1975) 100 ITR 155 (All), *CIT v. Taj Mahal Hotel* (1971) 82 ITR 44 (SC), *CIT v. Dr. B. Venkata Rao* (2000) 243 ITR 81 (SC), *CIT v. Navodaya* (2004) 271 ITR 173 (Ker) and *DCIT v. Astra Idl Ltd.* (2001) 247 ITR 564 (Karn.).

The Ld. counsel submits that in *Kanodia Cold Storage* (supra), it is held that building used in cold storage is plant and entitled to higher depreciation; in *Taj Mahal Hotel* (supra), it is held that the sanitary fittings in hotel fall within the definition of plant and plant includes whatever apparatus or instruments used by businessmen in carrying on his business ; in *Dr. V. Venkata Rao* (supra), the nursing home building is held to be plant considering the nature of business of the assessee ; in *Navodaya* (supra), it is held that the assessee is engaged in the business of production of Cinematographs Films and the assessee's studio building is held to be plant ; in *Astra Idl Ltd.* (supra), it is held that the building used for manufacture of medicines with separate sections for each process constituted as plant and not building.

6. On the other hand, the Ld. Departmental Representative (DR) submits that based on facts, the Ld. CIT(A) has rightly confirmed the disallowance of excess claim of depreciation by the appellant.

7. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

Admittedly, the appellant is in the business of hospitality i.e. running restaurants which provide facilities and services like restaurant, bar room, music, floor dance, banquet hall which are intended to attract customers. The interiors, colour scheme and other civil work is made out with a definite purpose, considering the nature of business of the assessee.

The nature of works delineated above clearly indicate that it falls in the category of 'Buildings' either under I (2) or II - 'Furniture & Fittings' mentioned at part-A of New Appendix-I of Depreciation Schedule. Such nature of work is not ascertainable from the case laws relied on by the Ld. counsel mentioned above, and therefore the present case is distinguishable from the case laws relied on by the appellant. Further, considering the nature of works, we find that the Ld. CIT(A) has rightly restricted the depreciation to 10%. Thus the 1<sup>st</sup> ground of appeal is dismissed.

8. The 2<sup>nd</sup> ground of appeal

On the facts and in the circumstances of the case and in law, the Appellant contends that the Ld. CIT (A) further erred in restricting deduction of brought

forward loss while Computing income u/s 115JB to Rs.147,74,430/- instead of Rs.213,51,017/-claimed by the appellant thereby making addition of Rs.65,76,587/-.

9. The AO observed that the assessee has paid taxes u/s 115JB as taxable income became Nil, after set off of brought forward business losses. The assessee has calculated book profits after adjustment of Rs.9,22,65,668/- (in the original return) and Rs.3,58,07,722/- (in the revised return) to the net profit shown in the P&L account for the financial year (FY) 2012-13, as per Explanation-1 of sub-section (1) of section 115JB of the Act.

In response to a query raised by the AO to explain it, the appellant filed a working of deduction of Rs.9,22,65,668/- claimed u/s 115JB and explained that the brought forward loss as per books of account is Rs.2,13,51,017/- and unabsorbed depreciation is Rs.7,09,14,681/- thus aggregating to Rs.9,22,65,698/-. Before the AO, it was contended that assessee has inadvertently reduced total brought forward loss including depreciation and this being a mistake needs to be corrected while assessing income u/s 115JB of the Act.

However, the AO was not convinced with above reply of the assessee for the reason that as per Annexure V filed by the assessee *vide* letter dated 22.02.2016 and further verified from records that the brought forward loss as per books of account is Rs.1,47,74,430/-. The claim of loss of Rs.65,76,587/- is not business loss but depreciation loss. Hence, the AO concluded that as per Explanation 1 of sub-section (1) of

section 115JB, the taxable income is Rs.1,90,40,335/- (Rs.3,38,14,765/- minus Rs.1,47,74,430/-).

10. In appeal, the Ld. CIT(A) observed that the appellant has claimed more deduction of both brought forward business loss as well as unabsorbed depreciation totalling to Rs.9,22,65,698/- originally. This consists of brought forward business loss of Rs.2,13,51,017/- and depreciation loss of Rs.7,09,14,680/-. As per provisions of section 115JB (2)(iii), the appellant is allowed to claim whichever is less. Therefore, in the revised computation, the assessee has furnished the details and agreed for deducing only Rs.2,13,51,017/- from book profits of Rs.3,38,14,765/-. The Ld. CIT(A) further noted that the AO also found that even the loss of Rs.2,13,51,017/- is wrong as it includes depreciation loss of Rs.65,76,587/- which needs to be removed while working out brought forward business loss. Accordingly, the AO worked out the brought forward loss at Rs.1,47,74,430/- and worked out taxable income u/s 115JB at Rs.1,90,40,335/- (Rs.3,38,14,765/- minus Rs.1,47,74,430/-) instead of Rs.1,24,63,748/- (Rs.3,38,14,765/- minus Rs.2,13,51,017/-). Thus the Ld. CIT(A) confirmed the above action of the AO.

11. Before us, the Ld. counsel for the assessee submits that as per the working of deduction of Rs.922,65,698/- claimed u/s 115JB of the Act, the brought forward loss as per the books of account is Rs.213,51,017/- and the unabsorbed depreciation is Rs.709,14,681/- aggregating to Rs.92,265,698/-. Therefore, keeping in mind the provisions of section

115JB(2)(iii), the amount of brought forward or unabsorbed depreciation whichever is less is to be reduced from the book profit. It is stated that it was an inadvertent mistake and after correction the total income under provisions of section 115JB shall be Rs.124,63,748/- (Rs.338,14,765/- minus Rs.213,51,017/-) on which tax liability of Rs.23,05,793/- will arise. It is stated that the AO has not considered the loss for FY 2008-09. Reliance is also placed on the order of the Tribunal dated 06.05.2019 in assessee's own case for AY 2010-11 and 2011-12 in ITA No. 523 & 524/Mum/2017.

On the other hand, the Ld. DR supports the order passed by the AO and then confirmed by the CIT(A).

12. We have heard the rival submissions and perused the relevant materials on record. We find that section 115JB provides that in computing book profit, the amount of "loss" brought forward or unabsorbed depreciation, whichever is less as per books of account, shall be reduced from the net profit. For this purpose, "loss" does not include depreciation and therefore, in a case where an assessee has shown profit in a year, but after adjustment of depreciation, it results in loss, no adjustment in book profit is allowed.

In the instant case, the details of loss of Rs.2,13,51,017/- claimed by the assessee needs verification by the AO. Therefore, we set aside the order of the Ld. CIT(A) on the above issue and restore the matter to the file of the AO for passing an order after verification and giving

reasonable opportunity of being heard to the assessee. We direct the assessee to file the relevant details/documents before the AO. Thus the 2<sup>nd</sup> ground of appeal is allowed for statistical purposes.

13. In the result, the appeal is partly allowed.

**Order pronounced in the open Court on 04/10/2019.**

Sd/-  
(SAKTIJIT DEY)  
JUDICIAL MEMBER

Sd/-  
(N.K. PRADHAN)  
ACCOUNTANT MEMBER

Mumbai;

Dated: 04/10/2019

*Rahul Sharma, Sr. P.S.*

**Copy of the Order forwarded to :**

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

//True Copy//

BY ORDER,

(Sr. Private Secretary)  
**ITAT, Mumbai**