

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

**BEFORE SHRI RAVISH SOOD (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 180/MUM/2018
Assessment Year: 2013-14**

Intercon Real Estate Developers Pvt. Ltd., 89, 3 rd floor, Ararat Building, Nagindas, Master Road, Fort, Mumbai-400023.	Vs.	Income Tax Officer-2(2)(2), Mumbai, Room No. 549/577, 5 th floor, Aayakar Bhavan, M.K. Road, Mumbai-400020.
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PAN No. AABCI2136B

Appellant

Respondent

Assessee by	:	Mr. Devendra Jain, AR
Revenue by	:	Mr. Abi Rama Kartikiyen, & Mr. Rignesh K. Das, DR

Last Date of Hearing	:	19/07/2019
Date of pronouncement:		15/10/2019

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-5, 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 grounds of appeal filed by the assessee read as under:

1. Disallowance of Rs.2,11,50,000/- towards Compensation paid by treating the same as Capital Expenditure:

- i. The AO and Ld. CIT(A) have erred in facts and in law by treating the revenue expenditure (compensation paid) as capital expenditure without considering the facts and circumstances which is contrary to law.
- ii. The Ld. CIT(A) ought to have considered that the compensation paid was a revenue expenditure, the purpose of payment being to end the litigation and ensure regular flow of income.
- iii. The Ld. CIT(A) ought to have considered that the appellant was already the legal owner of the premises and therefore the payment of compensation has not resulted into acquisition of any capital asset.

3. Briefly stated, the facts of the case are that the assessee had purchased the 1st floor, 2nd floor, and mezzanine floor of the building known as 'Kwality House', Mumbai. Ground floor of the building is owned by M/s Modern Restaurant. M/s Orion Advertisers were given advertising rights for putting hoardings on the top floor of the building and rent for advertising rights were received by M/s Modern Restaurant. Since the assessee's company was the owner of the 2/3rd part of the said building, it claimed 2/3rd rent receipt from M/s Modern Restaurant.

M/s Modern Restaurant was earning all income from hoardings of the said building space from M/s Orion Advertisers. Assessee was not getting any income on the above. Therefore, the assessee filed a case in the Hon'ble Bombay High Court against M/s Orion Advertisers for getting rights of the building space for earning future income and the Court directed M/s Orion Advertisers to deposit the rent amount in the Court till the disposal of the case.

As the case was pending for a long time, the assessee and M/s Modern Restaurant settled the dispute by executing a consent terms and as per it, the assessee had to pay compensation of Rs.2.35 crores and in lieu of the payment, the assessee became entitled for 2/3rd part of the building space, thereby earning the hoarding income for future.

In the assessment, the Assessing Officer (AO) noted that the assessee filed the case only for securing rights of building space for earning future income and hence this expenditure is of enduring nature. The contentions of the assessee that the above expense was incurred solely to settle the dispute with M/s Modern Restaurant was not acceptable to the AO because the dispute was started by the assessee for rights of earning income from building space from the said building in future. Therefore, the AO held the compensation paid of Rs.2.35 crores to be capital in nature and disallowed it. However, the AO allowed depreciation @ 10% on it.

4. In appeal, the Ld. CIT(A) held that :

“When we examine this details M/s Modern Restaurant who was holding the ground floor of the building was also having position for placement of the hoardings in the top floor of the building though this position may be adverse position by the M/s Modern Restaurant, so they are enjoying the rights and the rents for the hoarding fixed on this floor. So M/s Modern Restaurant has a right which it was enjoyed, this right is a right placement of the hoarding on the top floor, this right has to be treated as a capital asset as per section 2(14) of the Income Tax Act, 1961 “Capital Asset means property of any kind held by an assessee whether or not connected with his business or profession”. This means M/s Modern Restaurant was holding certain rights for the top

floor of the building, if the top floor is rented then only they will receive the rent. Here M/s Modern Restaurant adversely possessing this top floor creating their rights to themselves, this right is a capital nature, so compensation paid to acquire this 2/3rd of the right is of capital in nature. Here appellant has rights of all acquire this rent then only renting this right, here acquire the rental income so according to me, the AO is right in holding this compensation paid to the M/s Modern Restaurant as a capital expenditure. Here, appellant acquired by paying this compensation 2/3 right of this top floor which later only after acquiring this right he can rent this property. So, the AO considering the compensation as capital expenditure is justified and AO allowing 10% of depreciation on the above capital expenditure is upheld. Here it was to be mentioned that above referred case laws are totally distinguished of facts and not applicable to this case. Hence, AO's addition Rs.2,11,50,000/- is upheld. The ground of appeal is dismissed."

5. Before us, the Ld. counsel of the assessee filed a Paper Book (P/B) containing (i) extract of Note 20-'Other Expenses' of Financial Statement, (ii) extract of Note 16-'Revenue from Operations along with break up', (iii) purchase agreement dated 04.06.2004, (iv) consent terms between the appellant company and Modern Restaurant and (v) consent terms between M/s Orion Advertisers and the appellant company.

Further, reliance is placed by him on the decision in *All India Reporter Ltd. v. CIT* (1963) 49 ITR 196 (Bom), *State of Tamil Nadu v. C.H. Simpson* (1992) 197 ITR 237 (Mad) and *Mahavir Prasad & Sons v. CIT* (1945) 13 ITR 340 (Lah). Relying on the above decisions, the Ld. counsel submits that the compensation paid of Rs.2,11,50,000/- is revenue expenditure and thus allowable.

6. On the other hand, the Ld. Departmental Representatives (DRs) submit that M/s Modern Restaurant was the owner of all the three floor of the building named "Kwality House". Thereafter, M/s Modern Restaurant sold two floor out of the three floor [1st and 2nd floor] and retained ground floor of the said building. Subsequently, the assessee purchased the 1st and 2nd floor from the third party. M/s Modern Restaurant was earning all income from hoardings of the said building space from M/s Orion Advertisers. The assessee was not getting any income from the building space from the said building. Hence, the assessee filed case in the Bombay High Court against M/s Orion Advertisers for getting rights of the building space for earning future income and Court directed M/s Orion Advertisers to deposit the rent amount in the Court till the disposal of the case. The Ld. DRs thus argue that the assessee filed the case only for securing rights of building space for earning future income and as the case was pending for a long time, the assessee and M/s Modern Restaurant settled the dispute by executing a consent terms and as per the consent terms, the assessee had to pay compensation of Rs.2.35 crores and in lieu of the payment, the assessee became entitled for 2/3rd part of building space, thereby earning the hoarding income for future. Thus it is explained by the Ld. DRs that the assessee paid the above amount for securing the income from building space used for hoarding in future and hence this expenditure being enduring in nature has been rightly affirmed by the CIT(A) as capital expenditure.

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

Let us discuss the case-laws relied on by the Ld. counsel. In *All India Reporter Ltd.* (supra), the assessee is a public limited company incorporated under the provisions of the Indian Companies Act. The business carried on by the company, *inter alia*, is printing, publishing and conducting All India Reporter, and to print, publish and sell any work, to start a newspaper and to work as book sellers. One Bhagirathdas holding 12 shares of Rs.100 each filed a petition u/s 439 of the Indian Companies Act on September 21, 1956, for winding up of the company. In his petition, he prayed that the assessee-company be wound up by and under the directions of the Court ; that a Court liquidator or some other fit and proper person be appointed liquidator of the company with all necessary powers under the provisions of the Companies Act ; that pending the hearing and final disposal of the petition, the Court liquidator may be appointed the provisional liquidator of the company to take charge and possession of, collect and protect the assets of the company with all necessary powers under the Companies Act. The petition was founded on the allegations that Mr. V. V. Chitale, the Managing Director of the Company, was managing the affairs of the company in such a way as to monopolise the company's affairs for the individual benefit of himself and the members of his family ; that Mr. V.V. Chitale, in gross abuse of his fiduciary position as the managing director, had fraudulently taken out of the funds of the company a sum of Rs.10,00,000/- for transferring to his own pocket under cover of an investment in the shares of another concern of his own. The assessee-company contested the petition for winding up and in defending itself had incurred an expenditure of Rs.23,236/- with

relevant previous year to the assessment year 1957-58 and a sum of Rs.12,250/- in the relevant previous year to the assessment year 1958-59. Ultimately, there was a compromise in the case. In its assessment for the two years, the assessee-company claimed these two amounts as deductions in computation of its income of these two relevant assessment years. The Income Tax Officer (ITO) rejected this claim of the assessee. On appeal to the Appellate Assistant Commissioner (AAC), the claim of the assessee was allowed by him, on the ground that the expenditure was incurred wholly and exclusively for the purpose of the business. Against the said decision of the AAC, the Department took an appeal before the ITAT. The Tribunal allowed the appeal. In its view, the expenditure incurred by the assessee related to a proceeding, which affected the whole structure of the assessee's profit-making apparatus, which affected not a part or entirety of the assets of the business but on the other hand, it affected the whole existence of the assessee as such and therefore, it was not allowable as a deduction. In further appeal, the Hon'ble High Court held that :

“15. Now here the expenditure incurred by the assessee company is for the purpose of defending itself in an application was for compulsory winding up filed by one of the shareholders. The application was for compulsory winding up of the company by the court. It is not in dispute that the object of the shareholder in filing the petition was to put an end to the business of the company, to have its assets realised by a liquidator and the proceeds therefrom distributed amongst its shareholders. It is to prevent this that the company had opposed the petition. Now, the company is formed for doing the aforesaid business. It exists for that purpose and no other. If an end is put to the company, the company cannot run its business. An expenditure incurred

to prevent that, in our opinion, is an expenditure incurred by the company to enable it to run the business and earn profits by running its business. The expenditure, therefore, is an expenditure wholly and exclusively laid out for the purpose of the business and is, therefore, allowable under section 10(2) (xv) of the Income-tax Act. The facts of the present case, in our view, fall within the rule in Morgan's case (supra). In the view, which we are taking, we find support in a decision of the Punjab High Court in Commissioner of Income-tax v. Jagatjit Distilling & Allied Industries Ltd. [1961] 41 ITR 328, where the expenditure incurred by a company in defending itself in a petition filed by shareholders for winding up was allowed as a permissible deduction under section 10(2) (xv) of the Indian Income-tax Act.”

7.1 In *C.H. Simpson* (supra), it is held that “legal expenses incurred by the assessee to protect the source of his income or the title to his business or to preserve and maintain his business must be regarded as expenditure wholly and exclusively for the purpose of his business and, therefore, allowable as a deduction for the purpose of computing the profits for income tax purposes.”

7.2 In *Mahabir Prasad & Sons* (supra), the question was the following :

“Whether legal expenses incurred in defending a pre-emption or other suit relating to immovable property, acquired as a capital asset for business purposes, is expenditure in the nature of capital expenditure within the meaning of section 10(2)(xii), Income Tax Act, as amended in 1939. Muhammad Munir, J speaking for the Hon’ble High Court held :

“the title of a purchaser may be attacked on several grounds and the right to pre-empt is only one of them. The essential point is that the plaintiff of the pre-emption suit sought to disposes the assessee from his

business premises, and the grounds on which he sought to dispossess him are wholly immaterial, the eventual decision being in favour of the assessee. The expenditure has so far been incurred only once but there is no guarantee that it may not recur, though it is not likely to recur in connection with a suit for pre-emption. It is as necessary for a businessman to protect his business premises as his stock-in-trade, and I do not see any distinction in principle between litigation expenses incurred to defend the business premises and those incurred to defend the stock-in-trade. Both are incurred wholly and exclusively for the purposes of the business and do not result in the acquisition, improvement or alteration of a capital asset. For these reasons, my view is that the expenditure incurred was a revenue expenditure and not a capital expenditure.”

7.3 In the instant appeal, the assessee has shown hoarding/shooting income of Rs.12,190,787/- as a part of ‘revenue from operations’ as on 31.03.2013. The break-up of the above income is compensation from Orion Advertisers of Rs.1,13,90,787/- and other hoarding income of Rs.8,00,000/-.

It has shown Rs.23,500,000/- as part of other expenses as on 31.03.2013. In the note, it is mentioned that compensation for hoarding income of Rs.23,500,000/- shown as other expenses represents compensation paid to M/s Modern Restaurant in terms of consent terms in Suit No. 555 of 2004 before the Bombay High Court dated 29.11.2012.

In view of the above accounts, it is not a case of expenditure in defending the suits as in *All India Reporter Ltd.* (supra) ; legal expenses

incurred by the assessee to protect the source of his income or the title to his business or to preserve and maintain his business as in *C.H. Simpson* (supra) ; legal expenses incurred in defending a pre-emption or other suit relating to immovable property as in *Mahabir Prasad & Sons* (supra). Therefore, the present case is distinguishable from the case laws relied on by the Ld. counsel.

7.4 However, it is well-settled that in considering the allowability or otherwise of payment on account of compensations, the primary question to be decided first is whether the payment is a capital expenditure in the hands of the person paying. If so, it is not allowable under the provision of section 37(1) of the Act. If on the other hand, the expenditure is of revenue character, the same will be allowable. Secondly, in order to see whether a payment is by way of business expenditure admissible under these provisions, the test is whether the payment can be related wholly and solely to the business expediency. It must be such as commercial men would be justified in spending for their business without taking any extraneous matters into consideration.

In *Cannanore Spinning & Weaving Mills Ltd. v. CIT* (1961) 42 ITR 528 (Ker), it is held that where the payment of compensation reflects a genuine and *bona fide* settlement and is not actuated by generosity or any indirect or improper motive and is dictated by considerations of commercial expediency and for benefit of the company, such payment is an expenditure laid out wholly and exclusively for the purposes of the business.

We find that in the instant case, neither the AO nor the Ld. CIT(A) has looked into the above aspects. Relating to it, are the documents like (i) purchase agreement, (ii) the deed of assignment (iii) consent terms between the appellant-company and Modern Restaurant, (iv) consent terms between M/s Orion Advertisers and the appellant company, (v) the order dated 11.03.2008 passed by the Bombay High Court in C.A. No. 1197 of 2007.

Thus considering the above aspects, we set aside the order of the Ld. CIT(A) and restore the matter to the file of the AO to make a *de-novo* order in the light of above position of law and after examining the above documents and giving reasonable opportunity of being heard to the assessee. We direct the assessee to file the above documents before the AO.

8. In the result, the appeal is allowed for statistical purposes.

Order pronounced in the open Court on 15/10/2019.

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

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

Mumbai;

Dated: 15/10/2019

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,

(Assistant Registrar)
ITAT, Mumbai