



ITA No.3141/Mum/2018
Biryas Finance & Investment P.Ltd.
Assessment Year-2014-15

आयकरअपीलीयअधिकरण“बी” न्यायपीठमुंबईमें।
IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH, MUMBAI

श्रीशक्तिजीतदे, न्यायिकसदस्यएवं
श्रीमनोजकुमारअग्रवाल, लेखासदस्यकेसमक्ष।
BEFORE SHRI SAKTIJIT DEY, JM AND
SHRI MANOJ KUMAR AGGARWAL, AM

आयकरअपीलसं./I.T.A. No.3141/Mum/2018
(निर्धारणवर्ष /Assessment Year:2014-15)

Biryas Finance and Investments Pvt. Limited C/o V.Vaidyanathan & Co. D-704, Neelkanth Business park Nathani Road, Vidyavihar (W) Mumbai-400 086.	बनाम/ Vs.	Income Tax Officer-Ward-2(1)(1) Aaykar Bhavan, M.K. Road Mumbai-400 020.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. AAACB-4171-G		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri V. Vaidyanathan-Ld. AR
प्रत्यर्थीकीओरसे/ Respondent by	:	Ms. Samatha Mullamudi-Ld.Sr.DR

सुनवाईकीतारीख/ Date of Hearing	:	30/09/2019
घोषणाकीतारीख / Date of Pronouncement	:	13/11/2019

आदेश / ORDER

Manoj Kumar Aggarwal (Accountant Member):-

1. Aforesaid appeal by assessee for Assessment Year [AY] 2014-15 contest the order of Ld. Commissioner of Income-Tax (Appeals)-4, Mumbai,



ITA No.3141/Mum/2018
Biryas Finance & Investment P.Ltd.
Assessment Year-2014-15

[in short referred to as 'CIT(A)'], *Appeal No. CIT(A)-4/e-filing/102/ITO-2(1)(1)/2016-17* dated 15/03/2018 on following grounds of appeal:-

1. First Ground of Appeal relates to considering the surplus on sale of property under section 50.

On the facts and in the circumstances of the case and in law, the learned CIT (A)-4 while passing the Appellate Order did not appreciate the fact that the assessee has not availed of depreciation in any of the years including the year of assessment which is prerequisite condition for considering the block of assets as depreciable and hence cannot be considered u/s. 50.

2. Second Ground of Appeal relates to the Disallowance of expenses relating to the property incurred to make the same eligible for sale.

Without prejudice to the first ground on the facts and in the circumstances of the case and in law, the learned CIT (Appeals) -4 while passing the Appellate Order did not allow the expenses incurred for renovation, clearance of liability against the property tax and legal expenses preparing the documents for sale.

3. Third Ground of appeal relates to the Disallowance of Administrative Expenses incurred against the income

On the facts and in the circumstances of the case and in law, the learned CIT (A) - 4 while passing the Appellate Order did not consider the genuine operating expenses to be allowed against the income.

The Appellant Company, therefore, prays the order of the learned assessing officer / CIT (Appeals) be amended to allow deductions / reliefs claimed above.

The Appellant Company also craves leave to add to, alter and / or amend any of the foregoing grounds, if and when necessary.”

We have heard and considered the rival submissions and perused relevant material on record including documents placed in the paper-book.

2.1 Facts on record would reveal that the assessee being resident corporate assessee stated to be engaged in investment in real estate was assessed for year under consideration u/s 143(3) on 27/12/2016 wherein the income of the assessee was determined at Rs.90.53 Lacs as against returned income of Rs.14.30 Lacs e-filed by the assessee on 30/09/2014.

2.2 During assessment proceedings, it transpired that the assessee sold one immovable property for Rs.170 Lacs on 30/10/2013. The assessee



reflected gain on sale for Rs.37.33 Lacs in the Profit & Loss Account. The perusal of block of asset in the Balance Sheet revealed that the assessee was having only one property under the block *Buildings*. The said asset was depreciable asset and therefore, since the entire block was exhausted, the provisions of Sec. 50 were found to be applicable to the facts of the case. Accordingly, the gain on sale of premises, in the opinion of Ld. AO, was to be taxed as Short-term Capital Gains (STCG) and expenses of Rs.70.40 Lacs claimed against sale of the property were to be disallowed. The assessee furnished working of short-term capital gain for Rs.0.33 Lacs, which has already been extracted at para 6.2 of the quantum assessment order. The cost of the property, net of depreciation, was shown by the assessee to be Rs.99.25 Lacs. The assessee claimed direct expenditure & indirect expenditure of Rs.33.41 Lacs & Rs.36.99 Lacs respectively against the sale of the property and submitted that the administrative expenses were to be capitalized with the property sold and the same were allowable expenditure. However, rejecting the same, Ld. AO opined that the property was held not as an investment but as a fixed-asset against which administrative expenditure, directors' / employee's remuneration aggregating to Rs.36.99 Lacs could not be allowed since these expenditures were not incurred wholly and exclusively in connection with transfer of asset. Regarding direct expenditure of Rs.33.41 Lacs, the assessee could not submit conclusive evidence to support his claim and accordingly, the same were also not allowed to the assessee. The plea that the efforts of directors to sell the property were compensated through a



ITA No.3141/Mum/2018
Biryas Finance & Investment P.Ltd.
Assessment Year-2014-15

remuneration of Rs.34.34 Lacs was also not found to be acceptable since there was practically no activity in the company except leasing-out of property. Finally, the short-term capital gains were computed at Rs.75.98 Lacs, being difference in sale value of Rs.170 Lacs and Written Down Value of the premises for Rs.94.01 Lacs as on 01/04/2013.

2.3 The assessee, in the alternative, contended that the expenses disallowed in working of STCG may be allowed as business loss which was also rejected in view of the fact that the assessee did not carry out any business activity during the year but earned only the rental income which was not the main business activity of the assessee. Finally, the income was determined at Rs.90.53 Lacs which, *inter-alia*, comprised-off of Income from house property for Rs.15.69 Lacs and Short-term capital gains for Rs.75.98 Lacs. The business loss of Rs.1.13 Lacs was allowed to be set-off against the same.

3. The Ld. CIT(A), upon further appeal, confirmed the stand of Ld. AO by observing as under: -

7.2 The appellant in its submission has referred and reproduced the provision of Section 50 and 50A and has accordingly contended that provision of Section 50 are applicable only in case depreciation was availed in respect of these assets under the Act. The assessee contended that they have disclosed the property as part of the fixed assets in their accounts for A.Y. 2013-14 and 2014-15. It was further submitted that in the return from A.Y. 2013-14, the assessee had taken the rent income as income from house property and had accordingly disallowed the depreciation under the companies Act, and had not claimed the depreciation as per the Income-tax Act. In the consequences, it has been contended that the provision of Section 50 and Section 50A will not be applicable and the asset cannot be classified as depreciable asset.

7.3 I have carefully considered the facts of the case, oral contentions and written submission of the assessee, discussion of the AO in the assessment order and material available on record. It is seen from the submission made before the Assessing Officer by the assessee vide their letter dated 25.04.2016, that the questioned property which is



ITA No.3141/Mum/2018
Biryas Finance & Investment P.Ltd.
Assessment Year-2014-15

at Ground Floor, Oval house, situated at British Hotel Lane, Fort, Mumbai -400023, was purchased by the assessee on 31.12.2010 for the cost of Rs.85 lacs. The assessee in the submission has referred to the provision of Section 50 and 50A and has contended that the provision of Section 50 are applicable only in the case where depreciation has been availed in respect of the asset under the Act. It is further submitted by the assessee that the said property was disclosed as part of the fixed assets in his account for A.Y. 2013-14 and 2014-15. However, what has been done after 31.12.2010 till March 2012 has not been submitted by the assessee with any details. It is further, the submission made by the assessee before the Assessing Officer that various expenses, such as brokerage, electrical work, ground floor work expenses, interest, parking value, professional charges, registration charges, stamp duty expenses totalling to Rs.19,46,547/- were capitalised by them in the books of accounts, and duly capitalised value of the property has been reflected at Rs.1,04,46,547/-. Under these facts and circumstances, it is clear that the property is the business asset of the company and may be for the reasons that only in the period relating to A.Y. 2013-14, when it was given on rent, the corresponding depreciation has been disallowed in the computation of income as the income from said property was offered under the head "Income from House Property". No details whatsoever, have been given by the assessee in respect of the period prior to the Assessment Year 2013-14 as what status the property had etc. It is also seen from notes forming part of financial statement that the said asset has been reflected in the schedule of fixed asset as building under lease and 5% depreciation has been claimed and reflected therein for the year under 31st March 2013. Nothing has been mentioned for the period ending 31st March 2012 and the period ending 31st March 2011 in respect of the said property. Under these facts and circumstances the contention of the assessee that the provision of Section 50 cannot be applied in their case, is not found to be acceptable. Accordingly, the application of Section 50 by the AO and working out of the short term capital gain after reducing the WDV as on 01.04.2013 is found to be justifiable and is accordingly upheld. This ground of appeal is accordingly dismissed.

8. Ground No. 3: This ground relates to disallowance of expenses incurred on the property and cost of improvement thereof.

8.1. The assessee has incurred direct expenses of Rs.33,41,029/- and has claimed the same as cost of improvement towards property sold by it, which was the issue under consideration in the ground no. 2 of this appeal. The AO has applied provision of Section 50 of the Act and accordingly has disallowed the assessee's claim of direct expenses of Rs.33,41,029/-.

8.2. The assessee has submitted that the property was on lease for quite some time and tenant had to be vacated. There was heavy damage and brokerage to the property which was to be repaired and made suitable before it could be sold. It was further submitted that there was certain expenses like property tax of earlier years, legal expenses, BEST deposits and brokerage incurred for the property and these expenses totalling to Rs.33,41,029/- were claimed against the sale proceed. The assessee has further relied upon certain decision to contend that incidental expenditure is required to be allowed while working out the capital gain.



8.3. I have carefully considered the facts of the case, oral contentions and written submission of the assessee, discussion of the AO in the assessment order and material available on record. While adjudicating the ground of appeal no. 2 above, the application of Section 50 have been found to be justifiable and has been upheld. Once the provision of Section 50 are found to be applicable, there is no reason to work out the computation as per the provision of Section 48 of the Act and thereby allowing the incidental expenses, which are incurred in relation to the property transferred. It is further noted here that the assessee has claimed property tax of earlier years as incidental expenses at Rs.10,45,779/-. Without prejudice to the finding that in the case of the assessee, provisions of Section 50 of the Act are applicable in respect of such expenses it is stated that property tax of earlier years would be allowable in the earlier years either as business expenses, if business was run by the assessee or income from house property, if the resultant income has been shown as house property by the assessee. Accordingly, such expenses claimed to be incidental, cost of improvement of the property for working out the capital gain u/s.48 is not found to be justifiable. The assessee has claimed repair and renovation expenses of Rs.14,37,500/-. AO in the assessment order has clearly observed that at para 6.4 that assessee has not submitted conclusive evidence in support of such claim of expenditure. The assessee further claimed legal expenses of Rs.5,04,750/- and brokerage of Rs.3,40,000/- without any evidences. The aforesaid factual observations have been just mentioned here for the sake of clarity, however, they do not merit any consideration as the action of the AO in respect of the gains earned from the property sold have been held to be taxable u/s.50 of the Act. This ground of appeal is accordingly dismissed.

9. Ground No. 4.: The assessee by this ground contends that it is carrying out business activity of preparing the property to be suitable for disposal by making suitable modification etc.

9.1 The Assessing Officer in the assessment order has mentioned that assessee has claimed Employee Benefit Expenses of Rs.34,34,852/-, administrative expenses of Rs.2,64,676/- and direct expenses relating to the sale of property at Rs.33,41,029/-. All these expenses have been debited against the sale proceeds of Rs.1.7 crore of a property sold by the assessee during the year under consideration. The AO in the assessment order has observed that there is no conclusive evidence submitted for the direct expenses of Rs.33,41,029/- and the Employee Benefit Expenses, Admin Overheads are also not fully allowable as the assessee during the year has not carried out any business activity and has only lease rental income under the head "revenue". Portion of such income has been shown as rental income under the head "income from house property" which were incidental to the business income of the assessee. The assessee has also shown sale of premises under the head "income in profit and loss account" and from the whole facts it was evident that during the year assessee has not carried out any business activity, however, assessee was claiming expenses as Employee Benefit Expenses of Rs.34,34,852/- and other expenses of Rs.5,11,261/- despite no business activity. Taking a fair view, the AO observed that certain expenses which are mandatory for running of the business that is legal and



ITA No.3141/Mum/2018
Biryas Finance & Investment P.Ltd.
Assessment Year-2014-15

professional fee of Rs.57,500/- and payment to auditors of Rs.56,180/- totaling to Rs.1,13,680/- was allowed and the remaining expenses of Rs.38,32,433/- debited to P/L account disallowed.

9.2 The assessee contended that it was running the business and was entitled to claim the full loss as disclosed in the P&L account, and that the directors remuneration have been duly disclosed in the return of income of the directors and have been offered to tax.

9.3 I have carefully considered the facts of the case, oral contentions and written submission of the assessee, discussion of the AO in the assessment order and material available on record. It is seen from the appeal that such ground is limited to the aspect that the appellant was carrying on business activity during the year. Nothing more has been said or stated or raised as a point or a issue in the grounds of appeal. In this regard it is stated that even the Assessing Officer has observed that the assessee was the maintaining entity as a business entity and for that purpose expenses like "legal and professional fee" and "auditors fee" have been allowed by the AO. There was hardly any activity done by the assessee except the sale of the property and in such view of the matter there cannot be any expenses like Employee Benefit Expenses that to the tune of Rs.34,34,852/-. The contention of the assessee that the directors remuneration have been offered to tax in the hands of the directors does not lend any support to the cause of the assessee, as for deduction of such expenses in the hands of the assessee, the same should be wholly and exclusively incurred for the purpose of business carried out by the assessee and not for any other reason. There is no specific premise given u/s.37 of the Act, that when the payment is made to the directors, may not be even for the purposes of business and are not incurred wholly and exclusively for the purposes of business, still the same has to be allowed. The AO has allowed an amount of Rs.1,13,680/- out of the other expenses claimed at Rs.5,11,261/- for keeping the status afloat of the business entity of the appellant. Accordingly, no interference is considered, called for in the action of the AO, and therefore, the ground raised is accordingly dismissed.

Aggrieved, the assessee is under appeal before us.

4. Upon due consideration, we find that the fact that the immovable property, which was sold by the assessee during the year under consideration, was part of block of asset *Building* remain uncontroverted before us. The assessee during assessment proceedings as well as appellate proceedings could not establish that the said property was not part of block of asset and depreciation against the same was never claimed



in earlier years. As rightly noted by learned first appellate authority, the assessee could not brought on record the factual position, in this regard, for the year ending 31/03/2011 as well as for the year ending 31/03/2012. Similar is the position before us since despite being specifically directed, the assessee could not demonstrate this fact and bring on record sufficient material to demonstrate that depreciation was never claimed against the said property since its acquisition. Therefore, we find no reason to differ with learned first appellate authority on this point and concur with the conclusion that resultant gains were rightly brought to tax as short-term capital gains u/s 50. Ground No.1 stand dismissed.

5. So far as the claim of direct expenditure of Rs.33.41 Lacs is concerned, the same consist of following items: -

No.	Description of Expenses	Amount (Rs.)
1.	Property Tax- earlier years	10,45,779/-
2.	Repairs & Renovation	14,37,500/-
3.	Legal Expenses	5,04,750/-
4.	Brokerage	3,40,000/-
5.	Best Deposit	13,000/-
	Total	33,41,029/-

The property tax as well as Best deposit, as rightly held by first appellate authority, could not be held to be part of cost of acquisition of the property. The same could also not be termed as cost of improvement or expenditure incurred wholly and exclusively in connection with transfer of property. Therefore, the same has rightly been disallowed. So far as the other expenditure is concerned, we find that the assessee failed to adduce sufficient documentary evidences to substantiate the same. Keeping in view



ITA No.3141/Mum/2018
Biryas Finance & Investment P.Ltd.
Assessment Year-2014-15

the principal of natural justice, we deem it fit to provide another opportunity to the assessee to substantiate his claim with documentary evidences before Ld. AO. Therefore, for the said limited purpose, the matter stand restored back to the file of Ld. AO with a direction to the assessee to substantiate that expenditure in the nature of Legal expenses, brokerage, Repairs & Renovation qualified for deduction from sale of property. Ground No. 2 stand partly allowed for statistical purposes.

6. The last ground pertains to allowance of indirect expenditure of Rs.36,99,728/- which consist of employee's benefit expenses of Rs.34.34 Lacs and administrative overheads of Rs.2.64 Lacs, as business expenditure u/s 37(1). As rightly held by lower authorities, these expenditures could not be allowed from sale of property under the head capital gains since these costs could not be termed either as cost of acquisition / improvement or expenditure incurred wholly and exclusively in connection with transfer of property. However, it is noted that the assessee was a corporate entity and it has to incur bare minimum expenditure to maintain its corporate personality despite the fact that no business activity was being carried out by the assessee. Therefore, on factual matrix, we deem it fit to restore the matter back to Ld.AO to reconsider the allowability of these expenditures with a direction to the assessee to substantiate the fact that the same fulfilled the conditions of Section 37(1). Ground No.3 stand partly allowed for statistical purposes.

7. In the result, the appeal stands partly allowed for statistical purposes.



ITA No.3141/Mum/2018
Biryas Finance & Investment P.Ltd.
Assessment Year-2014-15

Order pronounced in the open court on 13th November, 2019.

Sd/-
(Saktijit Dey)

न्यायिकसदस्य / **Judicial Member**

Sd/-
(Manoj Kumar Aggarwal)

लेखासदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 13/11/2019
Sr.PS:-Jaisy Varghese

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.