

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'C' BENCH,
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No. 3387/DEL/2019
[A.Y 2015-16]

M/s Ishwar Builders Pvt. Ltd
B - 26-27, Community Centre
Janakpuri, New Delhi

Vs. The Dy. C.I.T
Circle - 12(2)
New Delhi

PAN: AABCI 5607 F

(Applicant)

(Respondent)

Assessee By : Shri I.P. Bansal, Adv
Shri Vivek Bansal, Adv

Department By : Shri S.N. Meena, Sr. DR

Date of Hearing : 03.12.2019
Date of Pronouncement : 04.12.2019

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal by the assessee is preferred against the order of the Commissioner of Income Tax [Appeals] - 4, New Delhi dated 15.02.2019 pertaining to assessment year 2015-16.

2. Ground No. 1 is general in nature and needs no separate adjudication.

3. Ground No. 2 relates to the addition of Rs. 63.36 lakhs added by the Assessing Officer as rental income by adding security deposit.

4. Ground No. 3 relates to the disallowance of Rs. 65,22,615/- on account of depreciation and interest on capital.

5. Briefly stated, the facts of the case are that the assessee filed its return of income on 23.09.2015 declaring total loss of Rs. 20,61,555/-. Return was selected for scrutiny assessment under CASS and accordingly, statutory notices were issued and served upon the assessee.

6. During the course of scrutiny assessment proceedings and on perusal of the audit report and financial notes, the Assessing Officer found that the assessee has declared rental income only for six months and has not declared rental income for the balance six months. The assessee was asked to justify its stand.

7. In its reply, the assessee referred to clause 26 of the Audit Report and pointed out that the tenants M/s Micronutrient Initiative and M/s Micronutrient Initiative India's liaison office did not pay rent to the company for six months and filed a suit for recovery of the security deposit without giving possession of the property. It was also pointed out that the appellant company has also issued notice for non payment of rent to the said tenants. It was explained that since the matter is subjudice, no provision for rent for six months has been made.

8. After considering the reply of the assessee, the Assessing Officer once again sought explanation asking the assessee to explain as to why the security amount of Rs. 63.36 lakhs should not be added towards the balance rent.

9. In its reply, the assessee stated that the security deposit cannot be adjusted against unrealised rent as there is no clause in the lease deed whereby security deposit can be adjusted against the unrealised rent.

10. This reply of the assessee did not find any favour with the Assessing Officer who was of the firm belief that the security deposit should have been adjusted towards unrealised rent and referring to the relevant clauses of lease agreement, the Assessing Officer added a sum of Rs. 63.36 lakhs.

11. The assessee carried the matter before the ld. CIT(A) but without any success.

12. Before us, the ld. AR brought to our notice the decision of the Hon'ble High Court of Delhi in assessee's own case in CS(COMM) 75/2016 IA 1588/2016 and pointed out that the Hon'ble High Court, vide order dated 06.04.2016 decreed in favour of the assessee and against the tenant with the direction that the property should be handed over to the assessee.

13. It is the say of the ld. counsel for the assessee that it was not possible for the assessee to adjust the security deposit as the litigation was pending before the Hon'ble High Court and further, the security deposit was not adjustable against the unrealized rent as the tenants also filed suit for recovery of security deposit. The ld. counsel for the

assessee further pointed out that in Assessment Year 2016-17, when the litigation was finally decided by the Hon'ble High Court of Delhi, the assessee has returned Rs. 63.36 lakhs as its income and, therefore, there is no revenue leakage.

14. Per contra, the ld. DR supported the findings of the Assessing Officer and read the relevant part of the assessment.

15. We have carefully perused the orders of the authorities below and have also gone through the decisions of the Hon'ble High Court of Delhi in litigation between the assessee and its tenants. It is true that the security deposit could not have been adjusted against the unrealised rent. There is no dispute that the rent for six months received by the assessee has been properly disclosed in its return of income. The tenants stopped paying rent from October 2014 and the dispute went to the Hon'ble High Court of Delhi.

16. We are of the considered opinion that since the tenants have filed suit before the Hon'ble High Court for recovery of security deposit, then the assessee could not have adjusted the security deposit towards its unrealised rent. We further find that in A.Y 2016-17, the

assessee has included Rs. 63.36 lakhs in its profit and loss account after the decision of the Hon'ble High Court of Delhi. In our considered opinion, the action of the Assessing Officer is not acceptable and since the ld. CIT(A) has upheld the action of the Assessing Officer, both the lower authorities have erred in making the addition and sustaining the addition. Considering the facts of the case in totality, addition of Rs. 63.36 lakhs is unwarranted and deserves to be deleted. Accordingly, Ground No. 2 is allowed.

17. Ground No. 3 relates to the disallowance of depreciation on car amounting to Rs. 45.31 lakhs and interest on car loan amounting to Rs. 19.91 lakhs.

18. A perusal of the assessment order shows that these amounts have been disallowed by the Assessing Officer solely on the ground that during the year under consideration, the assessee did not carry out any business activity. The disallowance was confirmed by the ld. CIT(A).

19. Before us, the ld. counsel for the assessee stated that it is incorrect to say that the assessee did not carry out any business activity during the year under consideration. The ld. counsel for the

assessee pointed out that the assessee company is engaged in the business of construction, development of land etc and during the year under consideration, the assessee did invest in agricultural land at Chandan Hola, Delhi. It is the say of the ld. counsel for the assessee that there being a lull in the business, it cannot be said that the assessee had no intention to carry on business and it is not the case of the Revenue that the assessee has closed out its business activities.

20. The ld. DR supported the findings of the Assessing Officer. It is the say of the ld. DR that the Assessing Officer has considered all the issues raised by the counsel and, therefore, there is no error or infirmity in the findings of the Assessing Officer and the ld. CIT(A).

21. We have given thoughtful consideration to the orders of the authorities below. In our considered opinion, depreciation has been claimed by the assessee on the written down value of the asset which means that in earlier years, the asset was used for the purposes of business. Nowhere the Assessing Officer has brought any material evidence on record to suggest that there is a closure of business activities. On the contrary, we find that in furtherance of its business

activities, the assessee has further advanced Rs. 65 lakhs towards land at Chandan Hola, Delhi which means that the assessee was, in fact, carrying out business activities during the year under consideration.

22. The Hon'ble High Court of Delhi in the case of Capital Bus Service 123 ITR 404 has held that the only condition for allowability of depreciation is that the business should not have been closed out once for all and that the assessee should demonstrate that hopes of the business being revived are alive and real.

23. In light of the decisions of the Hon'ble High Court as mentioned elsewhere, the assessee was in fact, engaged in furtherance of its business activities and, therefore, it cannot be said that the assessee has closed down its business once for all. Therefore, the assessee is eligible for claim of depreciation.

24. Similarly, interest on car is also coming from earlier years as the money was borrowed in earlier years. Therefore, in our humble opinion, there cannot be any disallowance for want of any business activity as the assessee was very much engaged in its business

activities. The Assessing Officer is accordingly directed to delete the addition of Rs. 65,22,615/-. Accordingly, Ground No. 3 is allowed.

25. In the result, the appeal of the assessee in ITA No. 3387/DEL/2019 is allowed

The order is pronounced in the open court on 03.12.2019.

Sd/-

**[SUCHITRA KAMBLE]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 03rd December, 2019

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	