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

BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER

ITA No.7177/M/2017
Assessment Year: 2014-15

DCIT 3(2)(1), Room No.608, Aayakar Bhavan, M.K. Road, Churchgate, Mumbai - 400020	Vs.	M/s. Marshall Produce Brokers Company Pvt. Ltd., 22/23, Jolly Maker Chamber NO.2, Nariman Point, Mumbai – 400 021 **PAN: AAACM7312G**
(Appellant)		(Respondent)

Present for:
Assessee by : Shri S.E. Dastur, A.R.
Revenue by : Shri Jothilakshmi Nayak, D.R.

Date of Hearing : 06.11.2019
Date of Pronouncement : 19.12.2019

O R D E R

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the Revenue against the order dated 08.09.2017 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2014-15.

2. In the first three grounds of appeal, the Revenue has challenged the order of Ld. CIT(A) wherein the Ld. CIT(A) has directed the AO to compute and allow the depreciation on the portion of property rented out in accordance with the provisions of section 38(2) of the Act.

3. The facts in brief are that the assessee is engaged in the business of brokerage business and it earns brokerage income by arranging charters vessels/tankers sailing in the international waters. The AO during the course of assessment proceedings observed that assessee has debited Rs.76,67,500/- on account of depreciation on commercial premises at business square 'A' Wing, 4th floor, Chakala, Andheri Kurla Road and accordingly asked the assessee to justify the use of property for business purpose and the claim of the depreciation thereon which was replied by the assessee vide letter dated 28.11.2016 stating that the said property at Andheri, Mumbai was acquired during the year with the intention of carrying on business. The assessee also submitted that the total property measured at 3745.2 sq. ft. out of which a part measuring 1500 sq. ft. has been given on rent to M/s. Dynacom Tankers Management Pvt. Ltd. and thus the area under utilisation of the company is 60% of the total area of the premises. The assessee submitted before the AO that the main intention behind purchase of the said property in Andheri was to use for the purpose of business and not for renting out. Since the plan of the company did not materialize, a part of the property was given on rent. However, the contentions of the assessee did not find favour with the AO and the AO came to conclusion that assessee has claimed depreciation even on that portion of the property which was let out during the part of the year. The assessee's contention would have been correct if the income received by way of renting had been offered to tax under the head income from business or profession. The AO rejected the claim of the assessee qua depreciation of Rs.76,67,500/- on ground that part of the

property was rent out and the remaining portion of the property was not used for the purpose of business and thus added the same to the income of the assessee.

4. The Ld. CIT(A), after considering the submissions and contentions of the assessee, during the course of appellant proceedings, partly allowed the appeal of the assessee by directing the AO as under:

> "The assessing officer is, therefore, directed to verify and compute depreciation on the impugned premises on basis of the portion not rented out in accordance with provisions of section 38(2) of the Act. The alternative plea of the appellant is accordingly allowed. These grounds are partly allowed."

The Ld. CIT(A) while allowing the appeal of the assessee on alternative ground came to the conclusion that the assessee is entitled to depreciation on part of the building which is used for the purpose of the business of the assessee in terms of provisions of section 38(2) of the Act.

5. The Ld. D.R. submitted before the Bench that the order of Ld. CIT(A) is wrong and against the facts of the case as the Ld. CIT(A) has not gone into the fact that whether the 60% of the portion of the property which was in the occupation of the assessee was not used for the purpose of business, so the depreciation was wrongly directed to be allowed in terms of provisions of section 38(3) of the Act and therefore the order of Ld. CIT(A) may kindly be reversed on this issue and that of the AO be restored.

6. The Ld. A.R., on the other hand, strongly opposed the arguments of the Ld. D.R. by submitting that the assessee has not been granted full relief as the Ld. CIT(A) has directed the AO

to allow depreciation on 60% portion of the premises whereas as a matter of fact even considering the fact that the 40% area which was rented out in a part of the area, the assessee should be allowed depreciation in respect of that period during which the premises remained vacant with the assessee. The Ld. A.R. submitted that it has been argued before the appellate authority that the premises were primarily acquired with intention to use same for the purpose of business ,however, when the planning as envisaged by the assessee did not get through, a part was leased out of commercial consideration and as prudent businessman. The Ld. A.R. submitted that the said asset formed part of the block of assets and the provisions of section 32 mandate for providing of depreciation on the block of assets. Therefore, the depreciation should be allowed on the entire asset. The Ld. A.R. submitted before the Bench that a conjoint reading of para 5.1.5 and 5.2.1 in the appellate order shows that the 60% of the premises remained in the possession of the assessee. The ld. AR contended that accordingly the Ld. CIT(A) has unequivocally recorded a finding of the fact that the 60% of the area was used for the purpose of business, therefore there is no force in the arguments of the Ld. D.R. that the asset has not been used for the purpose of business. The Ld. A.R., therefore, prayed that the order of Ld. CIT(A) may be modified to allow depreciation even in respect of 40% of the premises which were let out but was in the possession of the assessee for part of the year and was used by the assessee.

7. After hearing both the parties and perusing the material on record, we observe that the assessee acquired a property during

the year at Andheri for the purpose of using the same for his business. However, during the year a part of the property accounting for 40% was leased out for few months during the year. The assessee claimed depreciation on the entire property on the ground that the asset was acquired with the intention to use for the purpose of business of the assessee and in fact was used and only let out partly during the year. The arguments of the Ld. A.R. of the assessee were mainly that since it formed part of block of assets, therefore depreciation has to be allowed in terms of section 38(2) of the Act. After taking into consideration the facts of the case and rival contentions, we observe that Ld. CIT(A) has directed the AO to allow depreciation in terms of provisions of section 38(2) of the Act only in respect of 60% of the property which was stated to be used by the assessee during the year. We note that even the Ld. CIT(A) has given a finding that 60% of the property was used for the purpose of business in para 5.2.1. of the appellate order. Under these circumstances, we do not find any infirmity in the order of Ld. CIT(A) and accordingly upheld the same by dismissing the ground raised by the Revenue. Before parting ,we would like to state that the prayer of the assessee for modification of the order of Ld. CIT(A) in order to allow depreciation to the assessee in respect of remaining 40% of the property can not be considered as the assessee is in appeal before us. The ground is dismissed as the assessee is not in appeal before us against the order of ld CIT(A).

8. The issue raised in ground No.4 & 5 is against the deletion of addition of Rs.25,84,450/- by Ld. CIT(A) as made by the AO

on account of deemed income under the head “House Property” in respect of part of the premises which was in the possession of the assessee on the ground that same was not put to use in entirety for the purpose of business of the assessee.

9. The facts in brief are that the assessee purchased commercial premises in Andheri in May 2013 measuring 3745.2 sq. ft. Out of this property, the assessee leased out 15,00 sq. ft. in October 2013 and accordingly offered the same to tax. According to the AO, the property was usable from the date of purchase as the assessee taken the possession of the property and accordingly came to the conclusion that the income from the said property for the period commencing from the date of purchase to the date of actual letting out is taxable and calculated the deemed rent at Rs.37,45,200/- and after allowing a deduction of 30% and municipal tax of Rs.37,190/-, added Rs.25,84,450/- under the head house property.

10. In the appellate proceedings, the Ld. CIT(A) deleted the addition made by the AO on account of deemed let out value computed under section 23(i) read with section 22 of the Act by observing and holding as under:

> “5.2.1 This ground relates to addition of Rs. 25,84,4507- on account of deemed let out value as computed u7s 23(1) r.w. section 22 of the Act. As discussed under Ground No. 1 above, the appellant has let out 40% of the impugned property and 60% of the property has remained in possession of the appellant during the year. The assessing officer has computed "deemed let out" Js in accordance with provisions of section 23(1).
>
> 5.2.1 Under Ground no. 1 above, it has been held that the said 60% of the impugned not let out has to be considered as used for business and eligible depreciation has to be allowed thereon in accordance with provisions of section 38(2) of the Act. This being the case, provisions of section 22 & 23(1) will not apply to the said portion of the impugned property. Therefore, addition of Rs.25,84,450/-

> on account of deemed let out value computed u/s. 23 (1) r.w. section 22 of the Act is deleted. This ground of appeal is allowed."

11. The Ld. D.R. argued before us that the AO has rightly computed the deemed let out value of the property as the assessee has taken possession immediately on the purchase on May 2013 and the property was letable on the 1st day of purchase and therefore the deemed rent was rightly applied by the AO, however, left the issue to the discretion of the Bench as to how the rent is to be calculated as the deemed rent was calculated on the entire property.

12. The Ld. A.R., on the other hand submitted before the Bench that assessee has duly offered to tax the rent received of Rs.7,50,000/- under the head house property and a net income of Rs.5,25,000/- was declared under the head house property in respect of 1500 sq. ft. which accounts for 40% of the total property. The Ld. A.R. filed calculation of first addition made by the AO in respect of the house property by bifurcating the property into 40% and 60% and thus argued that the addition was made in respect of the entire property by ignoring the fact that the assessee has suo-moto returned income of Rs.5,25,000/- under the head "House Property" in respect of 1500 sq. ft. area let out during the year. The Ld. A.R. argued that the AO has wrongly made the addition in respect of the property which accounts for 60% of the total property and was in occupation of the assessee for business use as has been observed by Ld. CIT(A) during the course of appellate proceedings. Therefore, the Ld. A.R. prayed before the Bench that the addition on account of deemed letting value was rightly deleted by Ld. CIT(A) after appreciating the fact that the assessee

has already returned the income in respect of the let out area while the remaining area which was equal to 60% of the total area was used by the assessee for its business. The Ld. A.R., therefore, strongly defended the order passed by the Ld. CIT(A) and prayed before the Bench that the same may kindly be upheld.

13. After hearing both the parties and perusing the material on record, we observe that in this case the assessee has let out the part of the property which is 40% of the total property and after claiming standard deduction equal to 30% of the total rent returned Rs.5,25,000/- as income under the head "House Property". The remaining property measuring 2245.2 sq. ft. which accounts for 60% of the total property was in the possession of the assessee and was used for the purpose of business. We are quite convinced with the arguments put forward before us by the Ld. Counsel that whatever rent was received stands already offered to tax under the head "House Property" and therefore the AO has wrongly made the addition. We find merit in the contentions of the Ld. A.R. that Ld. CIT(A) has applied the provisions of section 23(1)(c) and thus deleted the addition. Clause (c) to sub section (i) to section 23 of the Income Tax Act provides that where the part of the property is let out and was vacant during the whole or any part of the previous year and owing to such vacancy the actual rent received on receivable by the owner in respect thereof is less than the sum referred to in clause (a) then the annual value of the such property shall be equal to rent received or receivable. The clause (a) to sub section (i) to section 23 of the Income Tax

Act provides that the ALV shall be deemed to be the sum for which the property might be reasonably be expected to let out from year to year. A conjoint reading of the above two sub clauses shows that the Ld. CIT(A) has rightly applied the provisions of section 23(i)(c) and deleted the addition made by the AO on account of deemed rental value. Under these facts and circumstances, we are inclined to uphold the order of Ld. CIT(A) by dismissing the ground raised by the Revenue.

14. The issue raised in ground No.6 is against the deletion of addition of Rs.1,51,58,515/- of Ld. CIT(A) as made by the AO under section 40A(2)(a) of the Act and the issue raised in ground No.7 is without prejudice to ground No.6.

15. The facts in brief are that the AO observed from the Profit & Loss Account that assessee has paid Rs.1,89,48,144/- as incentive to Shri Ashok Trehan, Director of the assessee company as remuneration and other benefits. The total incentive charged to the P&L Account was Rs.3,49,68,993/- out of which Rs.1,89,48,144/- was towards director's incentives which accounts for 54.18% of the total expenses claimed under the head incentives. The AO further observed that the said incentive was calculated @ 10% on the total turnover, the calculation whereof is given in para 6.2 of the assessment order. Accordingly, the assessee was called upon to justify the payment of such incentives to the director which was replied by the assessee vide letter dated 28.11.2016 wherein the assessee also submitted the details of recipientwise incentive which aggregated to Rs.1,60,20,849/- and is reproduced by the AO in page No.7 & 8 of the assessment order. The AO observed that the incentive

paid to another director was calculated @ 0.1% of the total turnover and thus a sum of Rs.1,32,000/- was paid. In view of that the AO noted that the payment made to Shri Ashok Trehan was excessive and unreasonable and thus allowed the incentive @ 2% thereby disallowing Rs.1,51,58,515/- out of the incentives to directors and added back to the income of the assessee.

16. In the appellate proceedings, the Ld. CIT(A) allowed the appeal of the assessee after taking into account the Board's circular No.6P dated 06.07.1968 which deals with the issue of disallowance of excessive or unreasonable expenses or payment to relatives. The Ld. CIT(A) further observed and held as under:

> "5.3.4 The scope of Section 40A(2) as explained by CBDT in Circular No. 6P, dated 6th July, 1968 clarified that while examining the reasonableness of expenditure, the Assessing Officer is expected to exercise his judgment in a reasonable and fair manner. It should be borne in mind that the provision is meant to check evasion of tax through excessive or unreasonable payments to relatives and associate concerns and should not be applied in a manner which will cause hardship in bona fide cases."

17. The Ld. D.R. vehemently submitted before us that the assessee has not furnished any complete details/information qua the commission paid and rate at which the same was paid before the AO whereas the same details were available before the Ld. CIT(A). Moreover, the Ld. D.R. submitted that the agreement dated 20.03.2009 on the basis on which the incentive and commission was paid to the director was not produced before the AO at all. Further, the facts as stated in the statement of facts filed along with the form No.35, the memorandum of appeal before the Ld. CIT(A) were not before the AO and thus violation of natural justice has taken place. The Ld. D.R. therefore prayed that the commission paid to the director Shri Ashok Trehan was excessive and unreasonable in view of the

fact that the commission to another director was paid @ 0.1% which worked out to Rs.1,32,000/-. The Ld. D.R., therefore, prayed that the order of Ld. CIT(A) is wrong and may kindly be reversed on this issue.

18. The Ld. A.R., on the other hand, strongly relied on the order of the Ld. CIT(A) by submitting that the Ld. CIT(A) has relied on the circular of the Board wherein it has been provided that while dealing with the issue of excessive and unreasonable payments to the relative ,the Income Tax Authority should bear in mind that these provisions are meant to check the tax evasion through the excessive and unreasonable payments to relatives and associated concerns and should not be applied in a manner which will cause hardships in the bonafide cases. The Ld. A.R. also filed before us a copy of letter dated 28.11.2016 filed during the course of assessment proceedings before the AO accompanying there with copy of acknowledgement of income tax returns of Shri Ashok Trehan for A.Y. 2014-15 which shows that the gross income was Rs.2,98,70,654/- and the net taxable income was Rs.2,97,60,650/- which proved beyond doubt that the rate of tax applicable to both the related parties i.e. payer and payee were at maximum rate and therefore there is no question of tax evasion and the Ld. CIT(A) has passed a very reasoned order. The Ld. A.R. also relied on the order of jurisdictional High Court in the case of CIT vs. Indo South Services Travel Pvt. Ltd. (2008) 219 CTR 562 (Bom.) wherein the Hon'ble Bombay High Court has held that where the sister concern was paying tax at a higher rate then the disallowance of excessive commission paid to sister concern was not justified as

there was no tax evasion. The said decision of the Hon'ble Bombay High Court has been followed in another decision of the Hon'ble Bombay High Court in CIT vs. V.S. Dempo & Co. Pvt. Ltd. (2011) 196 taxman 193 (Bom.) wherein it has been held that since the assessee as well as its subsidiary were under the same tax bracket,there was no question of diversion of funds by paying higher rate to the subsidiary company being paid incentive @ 10% which was calculated on the basis of turnover of the assessee company. The ld. AR submitted that the said payment of incentive to director has been accepted by the Revenue in the past even in the assessment proceedings as is apparent from the assessment order filed for A.Y. 2009-10 before the Bench during the course of hearing. The ld. AR therefore prayed before the bench that the order of ld. CIT(A) may kindly be upheld.

19. We note in this case the disallowance was made by the AO on the ground that the commission was excessive and unreasonable by comparing the same to the incentive paid to another director @ 0.1% and thus disallowed 8% of the commission paid to Shri Ashok Trehan. We further find that the rate applicable to the assessee and Shri Ashok Trehan was same and therefore there is no question of tax evasion. The Ld. CIT(A) has followed the Board's circular No.6P dated 06.07.1968 which clearly stated in para No.74 that the disallowance is to be made only where this payment to the related party results in tax evasion but in the present case there is no tax evasion as the rate applicable to both the parties is same. The case of the assessee is supported by the ratio laid down in two decisions

namely - CIT vs. Indo South Services Travel Pvt. Ltd. (supra) and CIT vs. V.S. Dempo & Co. Pvt. Ltd. (supra). Under these facts and circumstances, we are inclined to dismiss ground No.6 & 7 raised by the Revenue by upholding the order of Ld. CIT(A).

20. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 19.12.2019.

Sd/-	**Sd/-**
(Amarjit Singh)	**(Rajesh Kumar)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dated: 19.12.2019.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.