

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A" : HYDERABAD
(THROUGH VIDEO CONFERENCE)**

**BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

I.T.A. Nos. 1233 & 1234/HYD/2014

Assessment Years: 2007-08 & 2008-09

M/s.Boulder Hills Leisure Private Limited, Hyderabad [PAN: AACCB5076C]	Vs	Deputy Commissioner of Income Tax, Circle-1(3), Hyderabad <i>Present Assessing Officer after restructuring of Income Tax Dept:</i> Deputy Commissioner of Income Tax, Circle-1(2), Hyderabad
(Appellant)		(Respondent)

For Assessee : Shri A.V.Raghuram, AR

For Revenue : Shri Sunil Kumar Pandey, DR

Date of Hearing : 24-03-2021

Date of Pronouncement : 06-05-2021

ORDER

PER S.S.GODARA, J.M. :

These two assessee's appeals for AYs.2007-08 & 2008-09 arise from the CIT(A)-II, Hyderabad's order(s) both dated 03-03-2014, passed in appeal Nos.0640 & 0641/CIT(A)-II, Hyd/2011-12; in proceedings u/s. 143(3) r.w.s.263 of the Income Tax Act, 1961 [in short, 'the Act'].

Heard both parties. Case files perused.

2. It transpires at the outset that assessee's identical sole substantive grievance challenges correctness of both the lower authorities' action disallowing depreciation claim(s) for the

precise reason that it had neither commenced its business nor the fixed assets had been kept as ready to use. The CIT(A)'s detailed discussion to this effect reads as under:

2. The facts and figures pertaining to A.Y.2007-08 and 2008-09 are as under:

Sl. No.	Asst. Year	Income or loss returned	Order u/s.	Date of order	Nature of additions
1	2007-08	Rs.(-) 3,88,81,784/-	143(3)	29.12.2009	Depreciation disallowed: Rs.3,60,93,017/-
2	2007-08		143(3) r.w.s.263	18.11.2011	Income from other sources: Rs.1,17,06,046/-
3	2008-09	Rs.(-) 5,09,79,421/-	143(3) r.w.s.147	18.11.2011	Income from other sources: Rs.55,33,162/-

3. The Grounds of Appeal for both the years are identical, but for figures. The Grounds of Appeal taken from A.Y. 2007-08 are as under:

- 1) The order of the Assessing Officer is erroneous both on facts and in law.
- 2) The Assessing Officer erred in holding that the appellant has not commenced its business in spite of the fact that the Golf Course was ready during the previous year.
- 3) The Assessing Officer failed to appreciate the fact that the appellant has invested a sum of Rs.64,69,40,081/- and kept ready the Golf Course for use and that receipt in such infrastructure project is not a criteria to hold commencement of business and thereby erred in holding that the business has not commenced.
- 4) The learned Assessing Officer erred in arriving at the figure of Interest income. Interest income as per the financial statements for the year ended 31.03.2007 is Rs.1,11,39,164. However, the learned AO has considered Interest income to be Rs.1,17,06,046 and consequently higher tax liability has arisen.
- 5) The AO erred in not allowing depreciation holding that there is no revenue from the Golf course without appreciating the fact that it was ready before the end of the previous year and that it is enough if the asset is ready for use and there is no requirement of having revenues from the same.
- 6) The assessee craves leave to add/alter any of the grounds of appeal on or before the date of hearing.

4. The assessment history for A.Y. 2007-08 is summarized as under:

- a) In order u/s.143(3), the Assessing Officer disallowed the depreciation of Rs.3,60,93,017/- on the ground that the assessee is not the owner of the land and the assets were not put to use for the purpose of business.
- b) The CIT-I, Hyderabad, passed order u/s.263 of the Income Tax Act, 1961, and set aside the assessment for the following reasons:

"Since the Assessing Officer failed to enquire into all these issues before hastily allowing the expenditure claimed and also the claim

of depreciation there is necessity for me to set-aside the assessment. The Assessing Officer also failed to examine the applicability of Apex Court's judgment in 227 ITR 172 in the case of M/s.Tuticorin Alkali Metals Ltd."

- c) Order u/s.143(3) r.w.s. 263 was passed treating the interest income on deposits prior to commencement of business as income from other sources.
- d) The order u/s.263 was appealed against and the Hon'ble ITAT, Hyderabad, in ITA No.746/Hyd/2011 dated 06.06.2012, dismissed assessee's appeal by holding as under:

*"9. We have heard the arguments of both the parties and perused the record as well as the order find that at page 17 of the paper book, the assessee in his return of income has claimed loss from business at Rs.50,020,948/- and has set off the other income of Rs.11,139,164/- under the head income from other sources and claimed a loss of Rs.38,881,784/-. The Assessing Officer in his order of assessment has disallowed claim of depreciation of Rs.3,68,93,017/- and determined loss of Rs.2788761/-. This loss of Rs.27,88,761/- has been arrived at after taking into account income of interest from deposits being 1,11,39,164/-. **It is to be noted that the assessee itself in the computation of income has claimed Rs.1,11,39,164/- under the head 'income from other sources'** and, hence, the applicability of the apex court judgment in 227 ITR 172 in the case of Tuticorin Alkalis chemicals has been rightly applied by the CIT in his order u/s.263. Hence, we confirm the order of the CIT passed u/s 263 and dismiss the assessee's appeal."*

5. The basic facts pertaining to the issues are -

- a) There was a Collaboration Agreement between Andhra Pradesh Industrial Infrastructure Corporation (APIIC), a State Government undertaking of Andhra Pradesh, and M/s.Emaar Properties PJSC, Dubai, dated 19.08.2003, to develop an integrated project for development of sub-projects, namely, (i) An integrated Convention Centre Complex; (ii) Golf Course with Recreational Club facilities; (iii) Housing and Commercial facilities.

- b) M/s.Emaar Properties PJSC, Dubai, incorporated a wholly owned subsidiary company in Mauritius in the name of M/s.Emaar Builders. This company in turn incorporated three companies as Special Purpose Vehicles (SPVs), namely (i) Emaar Hills Township Pvt. Ltd. (ii) Boulder Hills Leisure Pvt. Ltd. (iii) Cyberabad Convention Centre Pvt. Ltd.
- c) All the three projects should have been developed by M/s.Emaar Properties PJSC, Dubai. However, for regulatory and administrative convenience, three SPVs were assigned to execute the 3 projects as under:

	Name of the project	Name of the company
i)	integrated Convention Centre Complex	Cyberabad Convention Centre, Hyderabad.
ii)	Golf Course with Recreational Club facilities	Boulder Hills Leisure Pvt. Ltd.
iii)	Housing and Commercial facilities	Emaar Hills Township Pvt. Ltd.

- d) M/s. Boulder Hills Leisure Pvt. Ltd. is a joint venture with APIIC (holding 26%) and Emaar Holdings (holding balance 74%).
- e) The Government of Andhra Pradesh, through APIIC, had allotted more than 500 acres of land for the purpose of above three projects. Out of this 235 acres of land was allotted for Golf Course on leasehold basis for a period of 66 years.
- f) Lease deed dated 25.12.2005 was entered between APIIC and Boulder Hills Leisure Pvt. Ltd. (M/s.Emaar Properties PJSC, Dubai, and M/s.Emaar Holdings, Mauritius, were co-obligants to this lease deed). As per lease deed, the assessee M/s. Boulder Hills Leisure Pvt. Ltd. has to pay lease rent to APIIC as under:

2% of gross annual revenue for the first 33 years, and
3% of gross annual revenue for the later 33 years.

- g) As per the lease deed, the assessee has to develop 18-Hole Golf Course which was meant for people purchasing an Apartment, a Villa or a plot in

Housing and Commercial Complex to be developed by M/s.Boulder Hills Leisure Pvt. Ltd., which is one of the three projects mentioned above. The Golf Course was not meant for general public as per the original understanding. However, since the project of Housing and Commercial facilities was stuck due to varied legal cases, the Golf Course was opened for public in later years.

- h) As per the lease deed dated 25.12.2005, clause 5.8, the lessee (M/s.Boulder Hills Leisure Pvt. Ltd.) is entitled to sublet the premises as under:

"5.8. The Lessee shall be entitled during the Term to assign, sublease, licence, give on leave and licence, sublet or underlet the Demised Premises together with the structures thereon or any part or portion thereof, independent of the other portion or portions or any interest therein to separate parties and for this purpose APIIC shall assist the Lessee in demarcation of the portion or portions of the Demised Premises notwithstanding, the rent payable would be the specified % of the gross annual value generated by the golf course both by the lessee including its sub-lessee, licencees etc."

- i) There as an Assignment Deed dated 03.11.2006 between M/s.Boulder Hills Leisure Pvt. Ltd. (assignor) and M/s.Emaar MGF Land Pvt. Ltd., New Delhi (assignee). As per this deed, the assignee undertake to develop project of developing Golf Course and other facilities at its cost. The development of Golf Course and the club house would include the project management, design development, architectural control, construction, landscaping, operation and maintenance, sales and marketing, etc. As per clause 2.3(b), the construction period shall be three years from the date of obtaining of requisite statutory approvals or of any mutually agreed extension in writing between the parties. **This clearly indicates that the project was not started in November, 2006.**

- j) Clause 2.4.4. of Assignment Deed read as under:

"2.4.4. The Assignee undertakes to pay all expenses from the day after the execution of this Assignment Deed which shall include without limitation all expenses involved in and for obtaining

Project Building Plan approvals, permits, plans, licenses, permissions or sanctions from the concerned authorities, external development charges, license fees, renewal of licenses, internal development charges, all expenses payable for sanctioning of Project plans and completion etc."

k) Clause 3.6. of Assignment Deed read as under:

"3.6.1 Implementation of the Project:

The implementation of the Project shall specifically consist of the following:

- 3.6.1.1 Construction of Truck Infrastructure for the Project Land as per the Specifications mutually agreed upon.*
- 3.6.1.2 Construction and implementation of the Project on the Project Land at its cost and expense is subject to Clause 3.2.4 and Clause 3.2.5. The specifications of Golf Course is enclosed herein as Exhibit 5.*
- 3.6.1.3 Management, Operation and Maintenance of the Project is subject to Clause 3.2.4 and Clause 3.2.5.*
- 3.6.1.4 Excluding the time required for obtaining the requisite Statutory Approvals by the Parties as mentioned in Clause 3.3 & 3.6; herein above Project construction period inclusive of fit out period shall be three (3) years or any mutually agreed extension period in writing between the Parties."*

l) As per the Assignment Deed clause 3.1.3, **during the assignment period all building materials, other materials in the project land shall be considered the property of the assignee.**

m) As per clause 3.2.2, the assignee can create any charge on leasehold rights in favour of any financial institution/bank. Whereas the assignor cannot do so.

n) As per clause 3.2.4, the assignee is entitled to further assign, sub-lease, license, give on leave and license, sublet the project land.

o) The assessee receives yearly payment from M/s.Emaar MGF Land Pvt. Ltd., as under:

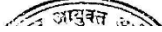
- 5% of gross annual revenue for the first 33 years
- 6% of gross annual revenue for the later 33 years

Accordingly the assessee will receive 5% of the revenues whereas M/s.Emaar MGF Land Pvt. Ltd., will receive 95% of the revenues.

p) The assessee received 5% of revenues of Rs.13.21 lakhs during the F.Y. 2008-09 and M/s.Emaar MGF Land Pvt. Ltd., received total revenues of Rs.2.64 crores out of which 5% of Rs.13.21 lakhs was given to the assessee.

6. The appellant repeated the submissions made by him before the Assessing Officer which are summarized as under:

- a) That part of the project was completed before the land was assigned to M/s.Emaar MGF Land Pvt. Ltd. What was assigned to M/s.Emaar MGF Land Pvt. Ltd., was for further development and for the remaining period of lease.
- b) That the appellant remained the owner of the Golf course already developed.
- c) That the CIT-I, Hyderabad, passed the order u/s.263 without considering the submissions made. The Hon'ble ITAT, Hyderabad, dismissed his appeal and the appeal before the Hon'ble A.P. High Court is pending as on date.
- d) That the interest income received was only Rs.1,11,39,164/- and not Rs.1,17,60,046/- as brought to tax by the Assessing Officer.
- e) That the depreciation is allowable even on leasehold land as per law. If the depreciation is not allowed, as the assessee is not the owner, then the entire expenditure is to be allowed as revenue expenditure. Reliance is placed on the decision of **CIT vs. Madras Auto Service (P) Ltd. 233 ITR 468.**
- f) Receipt of revenue is not the criteria to decide whether a particular asset was put to use or not. In the instant case, the Golf Course was ready to be used. Therefore, the depreciation is to be allowed based on the decision of Hon'ble ITAT, Special Bench of Ahmedabad, in the

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**case of Sardar Sarovar Narmada Nigam Ltd. vs. ACIT 78 DTR
172.**

g) As per the Articles of Association, one of the main objects is leasing. Since it has leased out the Golf Course, it has commenced its business. Therefore, depreciation is allowable.

7.1. The information on record is carefully examined. The company M/s.Boulder Hills Leisure Pvt. Ltd., was incorporated on 27.04.2005. There was a lease deed between Andhra Pradesh Industrial Infrastructure Corporation, a Government Undertaking, and the appellant on 28.12.2005. As per this deed, the appellant was supposed to develop a Golf Course alongwith a club on 235 acres of land leased by APIIC. On 03.11.2006 this land was assigned to M/s.Emaar MGF Land Pvt. Ltd., vide Assignment Deed dated 03.11.2006. The important clauses of this agreement are mentioned at 5(j). As per these clauses, it is evident that leasehold rights of the appellant on the land were transferred to M/s.Emaar MGF Land Pvt. Ltd., for a period of 66 years and M/s.Emaar MGF Land Pvt. Ltd., has practically substituted the appellant and acquired all the rights over the land. Further, as per this assignment deed, the details of property assigned is mentioned at annexure enclosed to the deed. As per this annexure, what was assigned to M/s.Emaar MGF Land Pvt. Ltd., was 235 acres of land, i.e., whatever is taken on lease from the Government (APIIC) was in turn assigned to M/s.Emaar MGF Land Pvt. Ltd. There is no mention of any constructed area or any other specifications in the Annexure to this Assignment Deed. Hence the appellant's plea that certain developments/works were carried out on the part of the land is not correct is not backed by any evidence. Further, as per clauses 2.3(b) and 2.4.4 of this deed, on the date of agreement, 03.11.2006, even the statutory permissions for developing the land were not taken which clearly means that the development/construction had not started by November, 2006. In these circumstances, the appellant's claim that crores of work was completed and was put to use before March, 2007 is devoid of any merit and is not supported by any evidence.



7.2. Depreciation schedule for A.Y. 2007-08 read as under:

Sl. No.	Description of Block	Opening WDV Rs.	Additions during the year		Sub Total Rs.	Depreciation		Closing WDV Rs.
			Below 180 days Rs.	180 days & above Rs.		Rate %	Amount Rs.	
I (A)	Leasehold Land # (Note)	3,40,75,000	-	-	3,40,75,000	0%	-	3,40,75,000
I (B)	Site Development	12,99,25,137	17,38,95,098	-	30,38,20,235	10%	2,16,87,269	28,21,32,966
II	Building	-	16,81,80,547	-	16,81,80,547	10%	84,09,027	15,97,71,520
III	Data Processing Equipment	43,750	12,000	-	55,750	60%	29,850	25,900
IV	Vehicles	-	2,89,25,598	4,73,280	2,93,98,878	15%	22,40,412	2,71,58,466
V	Plant & Machinery	-	4,56,42,546	19,95,599	4,76,38,145	15%	37,22,531	4,39,15,614
VI	Software	6,547	-	-	6,547	60%	3,928	2,619
Total		16,40,50,434	41,66,55,789	24,68,879	58,31,75,102		3,60,93,017	54,70,82,085

NOTE : LAND COST PAID TO APIIC HAS BEEN EXCLUDED FROM DEPRECIATION
NOTE : SITE DEVELOPMNET COSTS HAS BEEN CLUBBED WITH BUILDINGS

7.3. Depreciation schedule for A.Y. 2008-09 read as under:

Sl. No.	Description of Block	Opening WDV Rs.	Additions during the year		Sub Total Rs.	Depreciation		Closing WDV Rs.
			Below 180 days Rs.	180 days & above Rs.		Rate %	Amount Rs.	
I (A)	Leasehold Land # (Note)	3,40,75,000	-	-	3,40,75,000	0%	-	3,40,75,000
I (B)	Site Development	28,21,32,966	-	-	28,21,32,966	10%	2,82,13,297	25,39,19,670
II	Building	15,97,71,520	-	-	15,97,71,520	10%	1,59,77,152	14,37,94,368
III	Data Processing Equipment	25,900	-	-	25,900	60%	15,540	10,360
IV	Vehicles	2,71,58,466	-	-	2,71,58,466	15%	40,73,770	2,30,84,696
V	Plant & Machinery	4,39,15,614	-	-	4,39,15,614	15%	65,87,342	3,73,28,272
VI	Software	2,619	-	-	2,619	60%	1,571	1,048
Total		54,70,82,085	-	-	54,70,82,085		5,48,68,672	49,22,13,413

NOTE : LAND COST PAID TO APIIC HAS BEEN EXCLUDED FROM DEPRECIATION
NOTE : SITE DEVELOPMNET COSTS HAS BEEN CLUBBED WITH BUILDINGS

7.4. The nature of work involved here is to prepare the land suitable for Golf Course. The work involves removing of the boulders, excavations, laying of

lawn, etc. Not to tinker with the natural topography too much is also part of the agreement. It is pertinent to mention that as per I.T. Rules, as per depreciation schedule, no depreciation can be allowed on the nature of expenses claimed by the appellant. **Site development does not form part of depreciation schedule at all.**

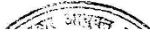
7.5. The APIIC is the owner of the land. The appellant has leasehold rights which were in toto were transferred to M/s.Emaar MGF Land Pvt. Ltd. Even if it is assumed that a person having leasehold rights can claim depreciation, in the present case the appellant is neither the owner nor the person having the leasehold rights. Over the period of time, the Hon'ble Courts have liberally interpreted granting of depreciation even on assets if the same are held on lease for longer period. As evident from the assignment deed, it is M/s.Emaar MGF Land Pvt. Ltd., who has all the rights over project as mentioned at clause 3.1.3 of Assignment Deed and is the beneficial owner. In the following cases, it was held that the beneficial owner is entitled for depreciation and not the legal owner:

Supreme Court in Mysore Minerals Ltd. vs. CIT (1999) 11 DTC 387 (SC) has held that the beneficial owner is entitled for the depreciation allowance.

CIT vs Sahney Steel & Press Works (P) Ltd. followed the Supreme Court judgment in R.B.Jodha Mal Kuthiala vs. CIT (1971) 82 ITR 570, held that the real test for depreciation was whether the assessee was entitled to property income and hence the owner should have been the person who could exercise the rights of the owner in his own right, not on behalf of registered owner.

In Smt.Kalarani vs. CIT (1981) 130 ITR 321 (P&H) it was held that if, in a given case it is found as a fact that the assessee is in occupation of the building for all intents and purposes except the sale deed in his favor, then he is liable to be taxed as owner.

7.6. In the instant case, M/s.Emaar MGF Land Pvt. Ltd., is the beneficial owner enjoying 95% of the revenues and has control over the assets. In fact during the appellate proceedings, the appellant was asked to submit the



assessment order in the case of M/s.Emaar MGF Land Pvt. Ltd., to verify whether M/s.Emaar MGF Land Pvt. Ltd., claimed any depreciation. However, the same was not submitted. The certificate given by the Project Consultant by name Davis Langdon and Seah, Bangalore, stating that Phase-I of the Golf Course was completed by October, 2006, is not backed by any evidence and is only self serving. On the other hand it is contradicting several clauses of assignment deed which reveal that project was not started even in November, 2006.

7.7. The appellant's claim that the depreciation should be allowed as the asset was ready to be used is also factually incorrect as evident from the Assignment Deed. The entire land of 235 acres was handed over to M/s.Emaar MGF Land Pvt. Ltd., for development of Golf Course. The appellant's claim that it is ready to be used as no evidence. Even if it is ready to be used, no depreciation can be claimed as held in the case of **CIT vs. Suhrid Geigy Ltd. (1982) 133 ITR 884 (Guj.)** wherein it was held that mere preparation for use cannot amount to use itself. Depreciation can be claimed only if it is used for business and this can happen only when production commences. In the case of **K.Sampath Kumar vs. CIT 158 ITR 25 (Mad.); CIT vs. Industrial Solvents and Chemicals (P) Ltd. 119 ITR 608 (Bom.)**. In these cases it was held that mere purchase and erection of Plant & Machinery cannot amount to commencement of business and business can said to have commenced only when the unit begins production.

7.8. With reference to income from other sources, the assessee credited income from other sources to the Profit and Loss Account and claimed various business expenses against it. As per the decision of Hon'ble Supreme Court in the case of **Tuticorin Alkali Chemicals & Fertilizers Ltd. vs CIT 227 ITR 172 (SC)**, all such expenses have to be capitalized. If there is any income from deposits, it has to be assessed as 'income from other sources'. No expenditure prior to commencement of business can be allowed as deduction against income from other sources.

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- 7.9. In summary, the depreciation is disallowed for the reasons -
- a) The asset 'site development' does not form part of depreciation schedule as per I.T. Rules;
 - b) The assessee is neither the owner nor the person having any leasehold rights on assets;
 - c) The assets were not used in the business;
 - d) Further, the income from other sources from Profit and Loss Account for A.Y. 2007-08 is Rs.1,17,60,046/- and for A.Y. 2008-09 is Rs.55,33,162/- which is correctly brought to tax by the Assessing Officer.

8. In the result, all the Grounds of Appeal for both the assessment years stand **dismissed**.

3. Learned authorised representative vehemently contended during the course of hearing that both the lower authorities have erred in law and on facts in treating the assessee as not eligible for the impugned depreciation claim pertaining to the corresponding fixed assets i.e., golf course in AYs.2007-08 and 2008-09. He further clarified that the assessee's appeal ITTA No.515/2012 raising the very issue against the tribunal's first round order in Section 263 proceedings holding to the contrary; is pending before the hon'ble jurisdictional high court and therefore, both these appeals deserve to be adjourned *sine die* so as to await final adjudication thereof. Mr.Raghuram lastly contended that the facts of the latter AY.2008-09 before us stand on a different footing since the assessee's golf course had been let out giving rise to the income derived therefrom in FY.2007-08.

4. Learned departmental representative has strongly supported the impugned depreciation allowance made in both the lower proceedings.

5. We have given our thoughtful consideration to the foregoing rival pleadings against and in support of the impugned depreciation disallowance. Ld.Counsel has been himself very fair in indicating at the outset that the issue of golf course being ready to use and operation thereof having been commenced in AY.2007-08 stands decided in Revenue's favour in the tribunal order (supra) and the tax appeal against the same is pending before the hon'ble jurisdictional high court. That being the case, we adopt judicial consistency and confirm the impugned depreciation disallowance. More so, in view of the fact that learned co-ordinate bench has already applied its mind and no evidence to the contrary has come from the taxpayer's side.

Coming to the assessee's case that it had derived receipts in FY.2007-08, Mr.Raghuram made a valiant attempt to refer to the paper book on record. It, however, transpired during the course of hearing that the said receipts pertain to the period from 01-04-2008 onwards relevant to AY.2009-10 only than covering the period from 01-04-2007 to 31-02-2008. We thus affirm both the learned lower authorities' action disallowing assessee's depreciation claim in the given facts and circumstances.

6. These two assessee's appeals are dismissed in above terms. A copy of this common order be placed in the respective case files.

Order pronounced in the open court on 6th May, 2021

Sd/-
(LAXMI PRASAD SAHU)
ACCOUNTANT MEMBER

Hyderabad, Dated: 06-05-2021
TNMM

Sd/-
(S.S.GODARA)
JUDICIAL MEMBER

Copy to :

1.M/s.Boulder Hills Leisure Private Limited, Boulder Hills Golf & Country Club, Opp: Indian School of Business, Manikonda Village, Gachibowli, Hyderabad.

2.The Dy.Commissioner of Income Tax, Circle-1(2), Hyderabad.

3.CIT(Appeals)-II, Hyderabad.

4.CIT-I, Hyderabad.

5.D.R. ITAT, Hyderabad.

6.Guard File.