

IN THE INCOME TAX APPELLATE TRIBUNAL
“D” BENCH, MUMBAI
BEFORE SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER &
SHRI S RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA Nos. 1899 & 1900/Mum/2021
(A.Ys: 2014-15 & 2017-18)

M/s. Real Gold Developers LLP 3, Narayan Bldg 23, LN Road, Dadar(E) Mumbai – 400014	Vs	ACIT, Range – 20(3) Piramal Chambers, Lalbaug,Parel, Mumbai-400012
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. :AAMFR2044P		
Appellant	..	Respondent

ITA No. 2231/Mum/2021
(A.Y: 2014-15)

ACIT, Range – 20(1) Room No. 615, 6 th Floor, Piramal Chamber, Mumbai – 400012.	Vs	M/s. Real Gold Developers LLP 3, Narayan Bldg 23, LN Road, Dadar(E) Mumbai – 400014
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. :AAMFR2044P		
Appellant	..	Respondent

Assessee by :	Mr.Malav .P. Sheth.AR
Revenue by :	Mr.T.Shankar .DR

Date of Hearing	26.04.2022
Date of Pronouncement	28.04.2022

आदेश / O R D E R

PER PAVAN KUMAR GADALE, JM:

These are the appeals filed by the assessee and the revenue against the different orders of National Faceless Appeal Centre (NFAC), Delhi for A.Y 2014-15 and A.Y.2017-18 passed u/s 143(3) and 250 of the Act.

Since the issues in these appeals are common and identical, hence they are clubbed, heard and consolidated order is passed.

For the sake of convenience, we shall take up assessee appeal in ITA No. 1899/Mum/2021, for A.Y 2014-15 as a lead case and facts narrated. The assessee has raised the following grounds of appeal.

1. *On the facts and circumstances of the case and in law, Ld CIT(A) erred in confirming the disallowance of the depreciation on helicopter to the extent 25% of total depreciation of Rs. 3,62,62,433/- i.e. Rs. 90,65,608/- by merely following the decision rendered by Ld CIT(A) for AY 2013-14 wherein it was held that the use of helicopter for non-business purpose by the director of the appellant cannot be ruled out. Disallowance made without appreciating the submissions of the appellant that helicopter is used for business purpose, is bad in law and needs to be cancelled.*

2. *On the facts and circumstances of the case and in law, Ld CIT(A) erred in confirming the disallowance of the*

expenses in connection with helicopter to the extent 25% of total expenditure of Rs. 19,03,242/- i.e. Rs. 4,75,810/- by merely following the decision rendered by Ld CIT(A) for AY 2013-14 wherein it was held that the use of helicopter for non-business purpose by the director of the appellant cannot be ruled out. Disallowance made without appreciating the submissions of the appellant that helicopter is used for business purpose, is bad in law and needs to be cancelled.

3. *On the facts and circumstances of the case and in law, Hon'ble ITAT, Mumbai in ITA No. 2733/M/2019, 'D' Bench, in appellant's case for AY 2013-14 has allowed entire depreciation on helicopter as well as expenses in connection with helicopter considering the same as genuine and thus, following the rule of consistency, disallowance of 25% depreciation on helicopter and 25% expenses in connection with helicopter needs to be cancelled for AY 2014-15 also.*

4. *The appellant craves leave to add, to amend, alter/delete and/or modify the above grounds of appeal on or before the final hearing.*

2. The brief facts of the case are that the assessee is engaged in the business of construction, development and real-estate and investments. The assessee has filed the return of income electronically for the A.Y 2014-15 on 28.01.2014 disclosing a total income of Rs.

1,54,13,770/- and the return of income was processed u/s 143(1) of the Act. Subsequently the case was selected for scrutiny and notice u/s 143(2) and 142(1) of the Act are issued. In compliance, the Ld. AR of the assessee appeared from time to time and the submitted the details and the case was discussed. On perusal of the financial statements the A.O. found that the assessee has claimed depreciation of Rs. 3,62,62,433/- on aero planes/ Helicopter and called for details and justification of the claim. In response to the notice, the assessee has filed the reply on 28.12.2016 as under:

We enclosed herewith log book explaining detail of travel, how many kilometres, how many hours and from which place to which place.

Since, the assessee is in the business of construction, development, real estate etc it is necessary to travel that is indicated for the purpose of the business.

As regards claim of depreciation, kindly note that, the entity Varva Aviation is only a consortium. The agreement itself shows that all the 4 members are stated as the co-owner. An asset is allowed to be held in the co ownership as per section 32. Since the assets are owned in co-ownership by contributing prorata amount towards the cost, the proportionate asset is reflected in the respective balance sheet and the expenses are also shared in the same proportion by each co-owner. Since the asset is co-

owned the depreciation as well as maintenance charges are allowable in the proportion in which the asset is co-owned. Section 32 allowing the depreciation on co-ownership is reproduced as under:

"32. (1) In respect of depreciation of-

(i) Buildings, machinery, plant or furniture, being tangible assets;

(ii) Know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998

Owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed"

In view of the above, the claim of depreciation and flying & maintenance charges as per the profit and loss account is allowable to assessee ".

3. Further the assessee has submitted that the helicopter is co-owned by other three co-owners. Therefore the maintenance and usage of the helicopter is restricted to co-owners. The assessee has partly owns the helicopter and has claimed the depreciation on pro-rata basis on the ownership and with regard to the usage of helicopter in the regular course, the A.O. found that for the A.Y 2013-14 the depreciation claim was disallowed. In the present year, the A.O. found that the assessee has failed to prove that the helicopter

was used for business purpose and disallowed the claim of depreciation.

4. The A.O. on perusal of the profit and loss account found that the assessee has debited flying & maintenance expenses consisting of insurance, pilots expenses, maintenance cost and administrative and office expenses aggregating to Rs.10,74,538/- and similarly, the establishment cost which includes aviation manage, hanger rent, office expenses and Misc Expenses aggregating to Rs. 8,28,704/-. The A.O. observed that the assessee has not used the helicopter for business purpose, and the depreciation claim was disallowed. Therefore on similar lines of non usage of helicopter, the flying & maintenance expenses and establishment expenses are disallowed and assessed the total income of Rs. 23,51,91,180/- and passed the order u/s 143(3) of the Act dated 30.12.2016.

5. Aggrieved by the order, the assessee has filed an appeal before the CIT(A). In the appellate proceedings the assessee has made submissions on the claim of expenses and depreciation. Whereas the CIT(A) has considered the grounds of appeal, findings of the

scrutiny assessment and the written submissions filed by the assessee on 02.08.2021 supporting the grounds of appeal. On the issue of disallowance of depreciation on the helicopter and flying & maintenance expenses and establishment expenses claim. The CIT(A) has considered the assessee's own case decision for the A.Y 2013-14 of his predecessor CIT(A) and has granted the relief by restricting the disallowance of depreciation @25% and flying & maintenance expenses and establishment expenses @ 25%. On the disputed issue of set off of and carry forward of deprecation, the CIT(A) has directed the A.O. to recompute the depreciation to be set off and carry forward for subsequent assessment year and partly allowed the assessee appeal. Aggrieved by the order of the CIT(A), both the assessee and revenue have filed an appeal before Honble Tribunal.

6. At the time of hearing, the Ld. AR submitted that the CIT(A) has erred in restricting the disallowance of depreciation on helicopter @ 25% irrespective of the fact that the assessee has used the helicopter for business purpose and the assumptions made by the CIT(A) is bad in law. Since the depreciation has been

restricted to @25%, the CIT(A) has erred in directing the A.O. to restrict the disallowance of expenditure towards the flying & maintenance expenses and establishment expenses to @ 25%. Further the Ld. AR submitted that for the A.Y 2013-14, where the CIT(A) has restricted claim to 25% of depreciation and flying and maintenance expenses and establishment expenses. On appeal by the assessee, the Hon'ble Tribunal has granted the relief and relied on the ITAT order and prayed for allowing the assessee appeal.

7. Contra the Ld. DR submitted that the revenue has filed the cross appeal and relied on the order of the Lower authorities.

8. We heard the rival submissions and perused the material on record. At the time of hearing the Ld. AR submitted that the CIT(A) has erred in restricting the depreciation on the helicopter to the extent of @ 25% and also restricting the flying and maintenance expenses and establishment expenses to the extent of 25% relying on the earlier year order of A.Y 2013-14. We find in the assessee's own case Honble Tribunal for A.Y 2013-14 in ITA No. 1940/Mum/2019 has dealt

at page 4 Para 6 of the order on the usage of helicopter for the purpose of business and expenses incurred is read as under:

6. The Ld. A.R. submitted before us that the helicopter was acquired on co-ownership basis as per the terms of MOU dated 24.02.2011 a copy of which is filed at page no. 57 of the paper book. The Ld. A.R. submitted that there has been a change in the co-ownership and as a result the MOU was amended on 23.12.2010 a copy of which is filed at page No.65 of the paper book. As per the clauses of MOU, helicopter was to be used only for business purposes. The Ld. A.R. submitted that the assessee has maintained the log book which contains the details of flying hours of helicopter, date, place and purpose of travel, name of the person travelling and duration of travel etc. The Ld. A.R. submitted that the helicopter was solely used for the purpose of business and it has booked expenditure of helicopter based on the number of hours it has been used by the assessee the details whereof are filed at page No.54 of the paper book. The Ld. A.R. submitted that the authorities below have not doubted the genuineness of the expenditure and even the facts furnished before the authorities below in the form of log book, MOUs and details contained therein. The Ld. A.R. also submitted that the finding of the AO that there is no income from the business of the real estate is also factually incorrect as the Ld. CIT(A) has recorded a finding to this effect. In any case, the Ld. Counsel submitted that non earning of income cannot be a ground for disallowance of expenditure incurred for the purpose of business. The Ld. A.R. submitted that Ld. CIT(A) has disallowed 25% of the expenditure debited in the profit & loss account merely on the ground that non business use of helicopter cannot be

ruled out. The Ld. A.R. submitted that assessee has furnished complete details of use of helicopter which showed that usage of helicopter for business purpose and the onus is on the department to prove that same is used for non business purpose more so when genuineness of the business expenditure and facts contained in the log book were accepted. The Ld. A.R. relied on the decision of Hon'ble Gujarat High Court in the case of Sayaji Iron and Engineering Co. vs. CIT (2002) 253 ITR 749 and submitted that the disallowance as sustained by Ld. CIT(A) may kindly be deleted.

9. In respect of disallowance of depreciation and expenses. The Honble Tribunal has dealt and deleted the disallowance at page 6 para 8 of the order read as under:

8. After hearing both the parties and perusing the material on record, we find that in this case the assessee has produced before the authorities below the copies of MOU and amended MOU after change in co-ownership and clauses therein that the helicopter shall be used for business purpose only. The assessee has also furnished log book containing the details of the travel place, date of travel, person travelling and purpose of travel and also the expenses have been claimed based on the number of hours, the helicopter was used by the assessee in its business. We find that the authorities below have not doubted the genuineness of the expenditure or the details as furnished by the assessee. Under these circumstances, we are not in a position to sustain the order of the ld CIT(A) and accordingly we modify the order of Ld. CIT(A) and direct the AO to allow the full amount of depreciation

*and maintenance expenditure as claimed by the assessee.
Ground No.1 & 2 are allowed.*

10. We find the facts of the present case are similar to earlier year as discussed in the above paragraphs. Accordingly, We follow the judicial precedence and direct the Assessing officer to delete the additions and allow the grounds of appeal in favour of the assessee.

ITA No. 1900/Mum/2021, A.Y 2017-18

11. As the facts and circumstances in this appeal is identical to ITA No. 1899/Mum/2021 for A.Y.2014-15 except the variance in figures. Therefore, the decision rendered in above paragraphs would apply mutatis mutandis for this appeal also. Accordingly, grounds of appeal of the assessee are allowed.

ITA No. 2231/Mum/2021, A.Y 2014-15

12. The revenue has raised the following grounds of appeal:

1. *"On the facts and in the circumstances of the case and in law, the Ld.CIT(A), NFAC has failed to appreciate the facts and erred in granting relief of Rs.2,71,96,825/- by way of restricting the disallowance of depreciation on helicopter at Rs.90,65,608/- which is 25% of the total amount claimed of Rs 3,62,62,433!-. During the year under consideration, the firm has shown credit of 4,04,79,542!-*

which is on account of lease income. Thus, no income whatsoever is attributable to the appellant's so called activity of construction, development and Real Estate and thus there is not an iota of doubt that the assessee was not engaged in any business activity during the year to become entitled for depreciation u/s 32(1) of the Income Tax Act, 1961.

2. *On the facts and in the circumstances of the case and in law, the Ld.CIT(A), NFAC has failed to appreciate the facts and erred in granting relief of Rs.8,05,904/- by way of restricting the disallowance of expenses on Flying & Maintenance at Rs.2,68,635/- which is 25% of the total amount claimed of Rs.10,74,538/-. In the absence of any business activity, the expenses claim to be incurred in connection with Flying & Maintenance of helicopter does not hold good.*

3. *On the facts and in the circumstances of the case and in law, the Ld.CIT(A), NFAC has failed to appreciate the facts and erred in granting relief of Rs.6,21,528/- by way of restricting the disallowance of expenses on Establishment at Rs.2,07,176/- which is 25% of the total amount claimed of Rs.8,28,704/-. In the absence of any business activity, the expenses claim to be incurred in connection with Establishment Expenses does not hold good.*

4. *The appellant prays that the order of Ld.CIT(A), NFAC on the above ground be reversed and that of the Assessing Officer be restored.*

5. *The Appellant craves leave to amend or alter any ground or add a new ground which may be necessary.*

13. The revenue has challenged on the relief granted by the CIT(A). The Ld. DR submitted that the CIT(A) erred in relying on the predecessor order and restricted the disallowance of depreciation to the extent @ 25% and disallowance of flying and maintenance expenses and establishment expenses to the extent @25% which is not in the accordance with the provisions of the Act and the CIT(A) has overlooked the facts and the Ld.DR supported the order of the Assessing officer.

14. We find the CIT(A) has dealt on these disputed issues at page 12 Para 6.2 read as under:

6.2 Grounds Nos. 2 & 3: I have perused the submissions made by the assessee and the documents submitted as regards the grounds raised. There was an identical issue in the assessee's own case for the A.Y 2013-14, wherein, the AO disallowed the depreciation claimed on the helicopter and related and Flight and maintenance expenses and Establishment expenses related to the Helicopter. The then CIT(A)-32, Mumbai adjudicated on the issue as under:

"I have considered the assessment order of A. O. and the submissions of the appellant, the appellant has acquired a helicopter, on co-ownership basis, along with three other concerns, through a consortium named Vania Aviation. The total cost incurred for the helicopter, including the preoperative cost of Rs. 143,29,6651-, is Rs.45,32,80,406/-. The appellant's one fourth share is

11,33,20,1021- and this amount has been shown as the cost of acquisition in the schedule of fixed assets on which depreciation of Rs.226,64,0201- has been claimed. The AO has disallowed the claim of depreciation of Rs. 226,64,0201- on the ground that the use of the asset for the purpose of appellant's business of real estate was not proved during the year. Further, the AO has disallowed the expense incurred on flying and maintenance, by the appellant and debited to the profit and loss account of Rs. 143,29,665/-, although the correct amount is Rs. 10,06,057/-. The disallowance of Rs. 143,29,6651-, which is part of the cost of the helicopter is part of the 25% share of appellant's cost of acquisition. So, the disallowance, if any, in respect of the expenditure on flying and maintenance is to be considered with respect to the amount of Rs, 10,06,0571- . 6.3 I find that the Helicopter has been acquired on co-ownership basis, in terms of the agreement /MOU dated 24.02.2011 but there has been a change in one of the co-owners and as per an addendum to the said MOU, Bermaco Energy System has withdrawn and Piramal Enterprises Ltd has been coopted in its place, w.e.f 23.10.2012, The cost of acquisition has been shared between the four co-owners @ 25% each and expenses on the flying and maintenance has also been shared on the basis of share / ownership! usage. I find that the helicopter has been used by the appellant firm during the year and being a co- owner it was eligible to claim depreciation on the cost of acquisition (one fourth share) and also the expenses on operations incurred during the year as reflected by the log details. The depreciation has been claimed at half the eligible rate, considering the date of Addendum to MOU i.e. 23.10.2012.

I find that the appellant firm has four partners, which are companies.

Although, the appellant has submitted that the helicopter was used by Mr. Vijay Parekh/ Mr, Paresh Parekh for attending business meetings and for surveying the land, no further details evidencing the business purpose was furnished. The use of the helicopter, for other than the stated purpose or for non-business purpose, by the directors of the partner companies cannot be ruled out. The appellant has also submitted that during the year it has earned income from business of real estate by way of receipt of compensation on TDRs purchased on 16.03.2012 from M/s Pilot Construction Pvt Ltd. Considering the entirety of facts and circumstances, I am of the considered opinion that disallowance of depreciation and expenditure on flying and maintenance, debited to the profit and loss account should be restricted to 25% of the amount claimed. Thus, the disallowance of depreciation on helicopter is restricted to Rs. 56,66,005/- and the disallowance of expenditure on flying and maintenance is restricted to Rs. 251,514/- and balance addition is deleted. Ground no. 3 is allowed and ground no,2 and 4 are partly allowed."

15 The Ld. AR submitted that against the sustainment of additions, on assessee appeal, the Hon'ble Tribunal has granted the relief discussed in the above paragraphs. Further the CIT(A) has considered the facts and provisions of the Act and the Ld.DR could not controvert the observations of the CIT(A) with any new cogent material or information to take a different view. Accordingly, we do not find any infirmity in the order of the CIT(A) on these disputed issues of granting

relief to assessee and uphold the same and dismiss the grounds of appeal of the revenue.

16. In the result, the appeals filed by the assessee are allowed and appeal filed by the revenue is dismissed.

Order pronounced in the open court on 28.04.2022

Sd/-
(S RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 28.04.2022

KRK, PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. Concerned CIT
5. DR, ITAT, Mumbai
6. Guard file.()

//True Copy//

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आदेशानुसार/ BY ORDER,

(Asst. Registrar)
ITAT, Mumbai