

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'F' NEW DELHI**

**BEFORE SAKTIJIT DEY, JUDICIAL MEMBER
AND
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

ITA No.3987/Del/2019
Assessment Year: 2008-09

M/s. Vatika Hotels Pvt. Ltd., 621A, Devika Tower, 6 Nehru Place, New Delhi	Vs.	DCIT, Circle-17(1), New Delhi
PAN :AABCI2522B		
(Appellant)		(Respondent)

Appellant by	Sh. C.S. Agarwal, Sr. Advocate Sh. D.B. Jain, CA
Respondent by	Sh. Vijay Kataria, Sr.DR

Date of hearing	09.05.2022
Date of pronouncement	29.06.2022

ORDER

PER SAKTIJIT DEY, JM:

Captioned appeal by the assessee arises out of order dated 08.02.2019 of learned Commissioner of Income Tax (Appeals), New Delhi, pertaining to assessment year 2008-09.

2. The assessee has raised the following grounds:

- “1. That the learned CIT(A) has erred both on facts and in law in upholding the validity of initiation of proceedings, despite the fact that the proceedings u/s 147 of the Act had been initiated only to ‘examine’ and ‘verify’ the return of income. In the absence of any satisfaction recorded in the note of satisfaction that, any income of

the assessee had escaped assessment, no valid proceedings could have been initiated.

2. *That the learned CIT(A) has failed to appreciate that unless there is an escapement of an income and in the absence of any such material in support thereof, no valid proceedings in law could have legally been initiated, to examine or to make investigation or to make verification of the return of income. Thus the proceeding initiated by the learned AO by invoking the provisions of section 147 of the Act were since beyond the scope of provisions of section 147 of the Act, ought to have been quashed.*
3. *That the learned CIT(A) has failed to appreciate that the assessee had admittedly incurred expenditure of Rs. 30,24,673/- (representing administrative cost) & Rs. 19,31,538/- (operational expenses) aggregating to Rs. 49,56,211/- in the course of business and after having setup its business, the expenditure incurred was allowable as a business loss. The learned CIT (A) should have thus directed such an expenditure incurred, to be allowed.*
4. *That the learned CIT(A) has failed to appreciate that the aforesaid expenditure aggregating to Rs.49,56,211/- since represented recurring revenue expenditure, ought to have been held as allowable resulting into a business loss. The loss was thus to be carried forward, to be set off against business income of the succeeding year.*
5. *That in any case and without prejudice, the learned CIT(A) having held that the aforesaid expenditure incurred represented capital expenses, ought to have directed the AO to capitalize the said sums under the head 'Building' in the Block of assets and ought to have directed the AO to allow depreciation u/s 32 in accordance with law.*
6. *The learned CIT(A) has erred in overburdening his order by referring to judgments, which have no application to the facts of the case and are distinguishable. The reliance placed by the learned CIT(A) on the judgments is thus misplaced.*

3. At the time of hearing, Sh. C.S. Aggarwal, learned senior counsel appearing for the assessee, on instructions, submitted that except ground nos. 3, 4 and 5, which are on merits, the other

grounds challenging the validity of reopening of assessment under section 147 of the Act are not to be pressed.

4. In view of the aforesaid submissions of learned senior counsel appearing for the assessee, ground nos. 1, 2 and 6 are dismissed as not pressed.

5. The issues raised in ground nos. 3, 4 and 5 are interconnected and relate to claim of expenditure of Rs.49,56,211/-.

6. Briefly the facts are, the assessee is a resident company engaged in the business of running and managing of hotels, resorts, motels, restaurants, cafeteria, beer house, pub, refreshment room, guest house, banquets etc. For the assessment year under dispute, assessee filed its return of income on 30.09.2008 declaring loss of Rs.58,53,911/-. Subsequently, the assessee filed a revised return of income declaring loss of Rs.49,56,211/-. During the assessment proceeding, on examination of the financial statements of the assessee, the Assessing Officer observed that the assessee has debited an amount of Rs.49,56,211/- comprising of personnel expenses of Rs. 30,24,673/- and operating expenses of Rs.19,31,538/-. Being of the view that the assessee has not yet started its business

operation and has not generated any income, the Assessing Officer treated the expenditure claimed as pre-operative expenses, hence, not allowable. Against the disallowance so made, the assessee preferred an appeal before learned Commissioner (Appeals). However, learned Commissioner (Appeals) endorsed the view of the Assessing Officer. Further, he held that expenses prior to commencement of business should be treated as capital expenses.

7. Before us, learned senior counsel appearing for the assessee submitted that assessee's business has been set up. Merely because there was no operational income, the expenditure claimed cannot be disallowed. Proceeding further, he submitted, expenses claimed by the assessee are routine expenses, such as, salary paid to the employees of the company, which have to be incurred by the company for the purpose of business. Thus, he submitted, the expenses incurred has to be allowed and the loss resulting as a consequence should be carried forward. Further, he submitted, similar expenses incurred by the assessee in the preceding assessment year, i.e., assessment year 2007-08, has been allowed by the departmental authorities. Without prejudice, he submitted, if the expenditure incurred is to be treated as capital expenditure, as has been held by learned Commissioner (Appeals), the Assessing

Officer may be directed to allow depreciation. In support of his contention, learned counsel relied upon the following decisions:

1. *CIT vs. Dhoomketu Builders & Developments Pvt. Ltd.*, 216 Taxman 76 (Del.)
2. *Western Vegetable Products Ltd. Vs. CIT*, 26 ITR 151 (Bom.)
3. *Sarabhai Management Corporation Ltd. Vs. CIT*, 102 ITR 25 (Guj.)
4. *Saurashtra Cement and Chemicals Ltd.* 91 ITR 170 (SC)
5. *CIT Vs. L.G. Electronics (I) Ltd.* 282 ITR 545 (Del.)
6. *CIT Vs. Hughes Escorts Communications Ltd.*, 311 ITR 253 (Del.)
7. *Carefour WC & C India P. Ltd. Vs. Dy. CIT [2014] 368 ITR 692 (Delhi);*
8. *Omniglobe Information Tech India (P.) Ltd. Vs. CIT [2014] 369 ITR 1 (Delhi);*
9. *Indian Railway Stations Development Corporations Ltd. Vs. Pr. CIT [2019] 107 taxmann.com 79 (Delhi)*
10. *Challapalli Sugars Ltd. Vs. CIT*, 98 ITR 167
11. *Chhabirani Agro Industrial Enterprises Ltd. Vs. CIT*, 191 ITR 226

8. Learned Departmental Representative strongly relied upon the observations of the Assessing Officer and learned Commissioner (Appeals).

9. We have considered rival submissions in the light of the decisions relied upon and perused the materials on record. It is evident, certain expenses stated to be in the nature of administrative and operation expenses were claimed as deduction by the assessee. The Assessing Officer disallowed assessee's claim solely on the ground that neither the assessee has started operation of its business, nor has shown any income from business. This view of the Assessing Officer has been accepted by learned Commissioner (Appeals).

10. Before us, it is the specific contention of learned Senior Counsel appearing on behalf of the assessee that the business of the assessee has already been set up, though, no income has been generated. However, he has submitted that generation of income is not a criteria for allowing expenditure. While advancing such argument, learned Senior Counsel has heavily relied upon the order passed by learned Commissioner (Appeals) in assessee's own case in assessment year 2007-08 and submitted that under identical factual position, learned Commissioner (Appeals) has allowed assessee's claim of expenses. For the sake of clarity, we reproduce the relevant observations of learned Commissioner (Appeals) in this regard while deciding assessee's appeal for assessment year 2007-08:

“12. Ground No. 5 reads as under:

“5. That the Learned Assessing Officer has erred in not allowing current year loss of Rs.83,66,583/- and brought forward loss of Rs.16,891/- in accordance with the provisions of the law.”

13. The AR filed detailed written submissions in this regard which are as under:

“Ground Number -5: The assessee claimed in the computation of income a sum of Rs.16,891/- as brought forward loss to be carried over in respect of assessment year 2006-07. A copy of order for the assessment year 2006-07 is being enclosed herewith, with the request to kindly allow to the assessee the loss to be carried over to subsequent years.”

14. The AO is hereby directed to allow the current and brought forward losses in accordance with the provisions of the Act.

“Accordingly, Ground No. 5 is allowed in principle.”

11. Keeping in view the submissions of learned Senior Counsel for the assessee and the decision of learned Commissioner (Appeals) in assessment year 2007-08, as discussed above, we direct the Assessing Officer to verify the status of similar expenditure claimed by assessee in assessment year 2007-08, in pursuance to the directions of learned Commissioner (Appeals), and thereafter decide the issue keeping in view the ratio laid down in the decisions cited before us by learned counsel for the assessee.

12. As regards without prejudice submission of learned Senior Counsel appearing for the assessee that, in case, the expenditure is held as capital expenditure, depreciation should be allowed, it is necessary to observe, learned Commissioner (Appeals) while deciding the issue in the impugned assessment year did observe that the pre-operative expenditure incurred by the assessee has to be treated as capital expenditure. However, his order is silent on allowability of depreciation. Therefore, in case, the expenditure claimed by the assessee is to be treated as capital expenditure, the Assessing Officer must consider assessee's claim of depreciation in accordance with law.

13. At this stage, we must observe, in the submissions made before us, learned Senior Counsel appearing for the assessee has submitted that the depreciation has to be allowed in the assessment year, wherein, the assets are put to use. In this regard, he has submitted, in case of the assessee assets were put to use in assessment year 2011-12. Thus, he submitted that depreciation has to be allowed to the assessee in assessment year 2011-12. In support of such contention, learned Senior Counsel has relied upon the decision of Hon'ble Supreme Court in case of M/s. Wipro Finance Ltd. Vs. CIT (Civil Appeal No.6677 of 2008, dated 12.04.2022). The Assessing Officer is directed to examine the aforesaid aspect in the light of ratio laid down by the Hon'ble Supreme Court in case of M/s. Wipro Finance Ltd. (supra) after factually verifying assessee's claim regarding the use of assets. Thus, grounds are allowed for statistical purposes.

14. In the result, the appeal is partly allowed for statistical purposes.

Order pronounced in the open court on 29th June, 2022

Sd/-
(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Dated: 29th June, 2022.
RK/-

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi