

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

**BEFORE,**

**SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER  
AND  
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER**

**ITA No.3259/Del/2015  
(ASSESSMENT YEAR 2010-11)**

**ITA No.3208/Del/2015  
(ASSESSMENT YEAR 2011-12)**

M/s Sanya Hospitality Private Limited D-13, Defence Colony New Delhi PAN-AALCS 5780P <b>(Appellant)</b>	Vs.	DCIT Central Circle-21 New Delhi  <b>(Respondent)</b>
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Appellant by	Mr. Baldev Raj and Sh. Manish Upneja, CAs
Respondent by	Sh. T. James Singson, CIT- DR

Date of Hearing	07/08/2023
Date of Pronouncement	17/08/2023

**ORDER**

**PER YOGESH KUMAR U.S., JM:**

Both appeals by Assessee are filed against the common order of Learned Commissioner of Income Tax (Appeals)-16, New Delhi ["Ld. CIT(A)", for short], dated 31/03/2015 for Assessment Years 2010-11 and 2011-12 respectively.

2. Grounds taken in both appeals are as under:

**ITA No.3259/Del/2015 (A.Y 2010-11)**

"1. Whether the CIT (A) has erred in confirming the rejection of the claim of carry forward of un-absorbed depreciation of Rs.15,82,50,014/- by wrongly relying upon the provisions of section 139(3) of the Act, which claim of carry forward being covered under the provisions of section 32 (2) of the Act and not 139 (3) of the Act, hence the disallowance is bad in law & facts of the case.

2. Whether the CIT (A) has erred in confirming the disallowance Rs.2,16,45,449/- being the depreciation on land computed by AO by estimating the cost of land out of the total consolidated cost of "Hotel Building Complex" by segregating the total cost into the estimated cost of "Hotel Land" & "Hotel Building, while the "Hotel Building Complex was purchased at a consolidated value vide a Registered Deed without any mention of separate cost of "Hotel Land", hence the reduction of depreciation claim by Ld. AO is bad in law & facts of the case.

3. The Ld. CIT (A) has erred in not dealing with the third ground of appeal reproduced as under:

"That without prejudice to above Ground of Appeal and in consideration of the following case facts-

That the return of income was filed with following facts –

➤ Business Loss	:Rs.52,30,679/-
The C/f of the same was not claimed u/s 139 (3) of the Act, since return was filed after prescribed due date u/s 139 (1) of the Act).	
Un-absorbed Depreciation	:Rs.15,82,50,014/-
to be carried forward	
(The claim of un-absorbed depreciation is Covered u/s 32 (2) of the Act and not 139 (3), hence its c/f was claimed, accordingly in the return of income.	
ii) Out of total depreciation in para (i) above, claim of depreciation dis-allowed by AO:	Rs.2,16,45,449/-
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iii) Remaining claim of un-absorbed depreciation to be c/f	Rs.13,66,04,565/-
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On above case facts, the Ld. AO grossly erred:

- *Firstly, erred in making the dis-allowance of the claim of carry forward of un-absorbed depreciation under in-applicable section 139 (3), while c/f of un-absorbed depreciation is covered u/s 32 (2) of the Act and is allowable.*
- *Secondly, erred in making the dis-allowance of the claim of c/f of un-absorbed depreciation Rs.15,82,50,014/- (as in para (1) above instead of Rs.13,66,04,565/- (as in para iii) above.*
- *Thirdly, erred in computing the taxable income for the year at Rs.2,16,45,449/- (being the disallowed part of depreciation as in para ii above) which is subject to reduction from the claim of un-absorbed depreciation for the year to be c/f as in para (i) to (iii) above.*

*Hence the stand of AO is bad in law and facts of the case*

*4. That the appellant craves leave to add, amend, delete or alter any one or more of the aforesaid grounds of appeal before or at the time of hearing of the appeal.”*

**ITA No.3208/Del/2015 (A.Y 2011-12)**

*“1. Whether the CIT (A) has erred in confirming the rejection of the claim of carry forward of un-absorbed depreciation of Rs.45,75,24,715/- (inclusive of b/f claim of Rs.15,82,50,015/- by wrongly relying upon the provisions of section 139(3) of the Act, which claim of carry forward being covered under the provisions of section 32 (2) of the Act and not 139 (3) of the Act, hence the disallowance is bad in law & facts of the case.*

*2. Whether the CIT (A) has erred in confirming the disallowance Rs.4,11,26,450/- being the depreciation on land computed by AO by estimating the cost of land out of the total consolidated cost of "Hotel Building Complex" by segregating the total cost into the estimated cost of "Hotel Land" & "Hotel Building, while the "Hotel Building Complex was purchased at a consolidated value vide a Registered Deed without any mention of separate cost of "Hotel Land", hence the reduction of depreciation claim by Ld. AO is bad in law & facts of the case.*

*3. The Ld. CIT (A) has erred in not dealing with the third ground of appeal reproduced as under:*

*"That without prejudice to above Ground of Appeal and in consideration of the following case facts-*

That the return of income was filed with following facts –

- *Business Loss* :Rs.3,02,39,961/-  
The C/f of the same was not claimed u/s 139 (3) of the Act,  
since return was filed after prescribed due date u/s 139 (1) of the Act).
- *Un-absorbed Depreciation* : :Rs.29,92,74,700/-  
to be carried forward for the year plus  
unabsorbed depreciation b/f Rs.15,82,50,015/-  
(The claim of un-absorbed depreciation is  
covered u/s 32 (2) of the Act and not  
139 (3), hence its c/f was claimed,  
accordingly in the return of income.
- ii) Out of total depreciation in para (i) above,  
claim of depreciation dis-allowed by AO: Rs.4,11,26,450/-  
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- iii) Remaining claim of un-absorbed depreciation  
to be c/f Rs.25,81,48,250/-  
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On above case facts, the Ld. AO grossly erred:

- *Firstly, erred in making the dis-allowance of the claim of carry forward of un-absorbed depreciation under in-applicable section 139 (3), while c/f of un-absorbed depreciation is covered u/s 32 (2) of the Act and is allowable.*
- *Secondly, erred in making the dis-allowance of the claim of c/f of un-absorbed depreciation Rs.29,92,74,700/- (as in para (1) above instead of Rs.25,81,48,250/- (as in para iii) above.*
- *Thirdly, erred in computing the taxable income for the year at Rs.4,11,26,450/- (being the disallowed part of depreciation as in para ii above) which is subject to reduction from the claim of un-absorbed depreciation for the year to be c/f as in para (i) to (iii) above.*

Hence the stand of AO is bad in law and facts of the case”.

4. That the appellant craves leave to add, amend, delete or alter any one or more of the aforesaid grounds of appeal before or at the time of hearing of the appeal.”

3. Brief facts of the case are that, the assessee filed return of income u/s 139(1) income at Rs. NIL. The assessment order came to be passed u/s 143(3) of the Act by disallowing the claim of depreciation on land of Rs. 2,16,45,449/-. Aggrieved by the assessment order dated 28/03/2013, the assessee preferred an appeal before the CIT(A), the Ld. CIT(A) vide order dated 31/03/2015, confirmed the disallowance of Rs. 2,16,45,449/- being depreciation on land computed by the A.O. by estimating the cost of the land out of the total consolidated cost of hotel building complex. Aggrieved by the order of the CIT(A) dated 31/03/2015 the assessee preferred the present appeal on the grounds mentioned above.

4. Ground No. 1 is regarding rejection of the claim of carry forward of unabsorbed depreciation of Rs. 15,82,50,014/-. The Ld. Counsel for the assessee vehemently submitted that the Ld. CIT(A) committed error in rejecting the claim of carry forward unabsorbed depreciation, the assessee has only carry forward unabsorbed depreciation and business loss to the tune of Rs.3,02,39,961/- was never carried forwarded, thus, Rs. 15,82,50,015/- was unabsorbed depreciation for Assessment Year 2010-11 which has been erroneously rejected by the authorities. The assessee has taken us through the paper book and submitted that the Ground No. 1 deserves to be allowed.

5. Per contra, the Ld. Departmental Representative submitted that the during the assessment proceedings the assessee has claimed loss of Rs. 15,82,50,014/- which has been disallowed as the return filed by the assessee was belated one and it is not specifically forth coming whether the loss claimed by the assessee is unabsorbed depreciation or the business loss. Therefore submitted that, the Ground No. 1 requires to be rejected.

6. We have heard both the parties and perused the material available on record. It is found from the record that the assessee suppose to file its return of income u/s 139(1) of the Act on or before 30<sup>th</sup> September, 2010 but the assessee had filed return of income on 28/01/2013, further it is also observed that though the assessee Ld. AR contended that assessee has not claimed business loss and the claim of assessee was unabsorbed deprecation, but it is found that as per the assessment order, the 'assessee had claimed loss of Rs. 15,82,50,014/-', and it is not coming forth clearly as to the loss claimed by the Assessee was either business loss or unabsorbed depreciation. Therefore, in our opinion, the issue involved in Ground No. 1 requires to be adjudicated afresh by the A.O. Accordingly, the issue involved in the Ground No. 1 of the Assessee's appeal remanded to the file of the A.O. for de-novo adjudication with a direction to the assessee to substantiate its claim of unabsorbed depreciation. Accordingly, the Ground No. 1 of the assessee is partly allowed for statistical purpose.

7. Ground No. 2 regarding disallowance of Rs.2,61,45,449/- being depreciation on land computed by A.O. by estimating the cost of land out of the total consolidated cost of 'hotel building complex'. The Ld. CIT(A) has aggregated total cost into estimated cost of land and hotel building. The Ld. Counsel for the assessee vehemently submitted that the entire hotel building complex was purchased at consolidated value vide a registered deed without any mention of separate cost of hotel land, therefore, the reduction of depreciation made by the A.O. is bad in law.

8. Per contra, the Ld. Departmental Representative submitted that the assessee had purchased land along with the building, the hotel complex is constructed on 1.9903 acres of land and the cost of the 'hotel complex' along with the building was Rs.197,39,24,155/- further based on the information provided by the assessee himself that the cost of land @ Rs. 43,29,09,957/- at Rs. 42,000/- per square yard which was based on the circle rate published by competent authority, therefore, the assessee is not qualified for the depreciation on the land.

9. The Ld. Departmental Representative relied on the findings of the Lower Authorities and prayed for dismissal of the Ground No. 2.

10. We have heard both the parties and perused the material available on record. During the assessment proceedings the A.O. made disallowance of depreciation of land in following manners:-

*“During the year under consideration the assessee has purchased hotel complex situated at B block, Shushant Lok Phase-1, Sector-27, Gurgaon. The total cost of the hotel complex was for Rs. 197,39,24,155/-. From the perusal of conveyance deed dated 01.07.2009 it is noticed that the said hotel complex is constructed on 1.9903 acres of land. It is further noticed that on the said cost of hotel complex of Rs. 197,39,24,155/-. The assessee has claimed depreciation @ 10% amounting to Rs. 9,86,96,208/-. Vide this office letter dated 27.02.2013 the assessee was required to give bifurcation of land and building as land does not qualifying for depreciation. The assessee vide his reply dated 08.03.2013 has furnished the cost of land at Rs. 43,29,09,957/- @Rs. 42,000 per sq. yard based on circle rate published by the concerned authority. The assessee has also included the cost of stamp duty proportionately. Since the land does not qualify for depreciation, Rs. 2,16,45,449/- is disallowed being 50% of the amount calculated @ 10% as the assessee has put to use the said hotel for business purposes for a period less than 180 days.”*

11. The assessee filed appeal before the CIT(A), the Ld. CIT(A) has confirmed the disallowance made by the A.O. and observed that “the land cost are not being eligible for depreciation was rightly covered out of the total consideration for the purpose of depreciation u/s 32 of the Act”. During the year under consideration, the assessee purchased a built-up hotel building complex for Rs. 197,39,24,155/- and claimed depreciation of Rs. 99,86,96,208/- at 10% on the purchase of hotel building complex. During the assessment proceedings, the A.O. bifurcating the cost of hotel building complex into the land and building

and disallowed depreciation of Rs. 2,16,45,499/- out of the total depreciation claimed in the 'building complex'. It is the specific case of the assessee that the building complex purchased in a composite sale agreement, wherein a particulars of payment mentioned in a standalone consideration with no bifurcation made between the amount attributable to the value of the land and that of the value of the building and therefore no segregation required to be made between the land and building for the purpose of depreciation u/s 32 of the Act. We have gone through the conveyance deed produced by the assessee along with the paper book wherein the land and building constructed on the building are specifically bifurcated, the page No. 7 of the conveyance deed reads as under:-

*"Now, therefore, in consideration of the recitals and mutual covenants, representations and warranties and for the consideration paid by the Vendee to the Vendor mentioned herein and on terms and conditions set forth hereinafter, this Conveyance Deed witnesses as follows.*

- 1. That the Vendor hereby sells/ conveys/ transfers to the Vendee by way of sale all the piece of land/Plot admeasuring 1.9903 acres, with the building and structure standing thereon, known as the 'Courtyard by Marriott, Gurgaon comprising of ground plus fourteen floors, admeasuring 28,427.77 square feet on the ground floor, 12,994.09 square feet on the first floor, 8703.09 square feet on the second floor, 8703.09 square feet on the third floor, 8703.09 square feet on the fourth floor, 8703.09 square feet on the fifth floor, 8376.69 square feet on the sixth floor, 8703.09 square feet on the seventh floor, 8703.09 square feet on the*

*eighth floor. 8703.09 square feet on the ninth floor, 8703.09 square feet on the tenth floor. 8576.70 square feet on the eleventh floor, 8703.09 square feet on the twelfth floor. 8703.09 square feet on the thirteenth floor and 8703.09 square feet on the fourteenth floor and collectively admeasuring 1,53,909.26 square feet (equal to 14.298.52 square metres); with three level basements underneath including the Plot, the landscape thereon and appurtenant to the Hotel together with all the things permanently attached thereto or standing thereon and all privileges, easements, profits, advantages, rights and appurtenances whatsoever to the said land and other premises or any part thereof belonging or anywise appertaining thereto. And all the estate, rights, title, interest, use, possession, benefit, claim and demand whatsoever at law or otherwise of the Vendor to the said piece of land and the premises hereby conveyed and every part thereof. To have and to hold the same unto and to the use and benefit of the Vendee absolutely and forever for a lumpsum amount of Rs.171,00,00,000/- (Rupees one hundred seventy one crores only) (hereinafter referred to as the 'Sale Consideration'). On this date hereof, the Vendee has paid the entire sale consideration thereof as follows:"*

12. Further in the said conveyance deed dated 17/07/2019, it is admitted by the parties thereon that the assessee had acquired the ownership for the plots at measuring 1.9903 acres (equal to 15 caan 19 marlas) and also acquired ownership over the building constructed thereon. Though the parties for the conveyance deed have not specified the actual amount paid to the land and the building separately, the land and building are separately identifiable by

going through the recitals of the sale deed. Apart from the same, the assessee himself for the purpose of registration of the conveyance deed, paid stamp duty proportionately to the building and to the land. Further, the assessee himself vide his reply dated 08/03/2013 had furnished the cost of land as Rs. 43,29,09,957/- @ Rs.42,000/- per square yard.

13. Even the land despite forming part of composite unit does not merge with the building per-se and the land retains its independent identity. Merely because the parties have not specified the separate value of the land and building in the conveyance deed for the reasons based known to them, the same would not enable an Assessee to claim the depreciation on the land on which the assessee is not eligible to claim the depreciation. If the assessee is allowed to claim the depreciation on the land in the manner contended by the assessee herein, which would promote the mischief of not specifying the value separately which is basis on which valuation is normally done and which could possibly lead to creation of loophole by deliberately not mentioning value of the land and building and by way of paying composite value to the land and building only to claim depreciation contrary to the law. Therefore, in our considered opinion, the assessee is not eligible for depreciation on land cost as per Section 32 of the Act.

14. In so far as, the judicial pronouncements relied by the assessee are concerned, since, the assessee himself has bifurcated the value of the land and the building during the registration of conveyance deed and the stamp duty

has been collected by State Government based on the circle rate on the value of the land and the building which are identifiable separately, the judicial pronouncements relied by the assessee are not applicable to the present case, Thus, we find no merit in the Ground No. 2 of the assessee, accordingly, we dismiss the Ground No. 2 of the assessee.

12. The assessee has not pressed the Ground No. 3, accordingly, Ground No. 3 is dismissed not pressed.

13. In the result, the Appeal of the assessee in ITA No. 3259/Del/2015 (A.Y 2010-11) is partly allowed for statistical purpose.

**ITA No. 3208/DEL/2015 A.Y 2011-12**

14. Even in the present appeal, the Ground No. 1 is regarding rejection of claim of carry forward of unabsorbed depreciation. Considering the fact that the assessee had not specified loss claimed by the assessee as either business loss or unabsorbed depreciation in the return filed by the assessee, since, we have remanded the similar issue to the file of the A.O. in Assessment Year 2010-11, finding the parity, the issue involved in the Ground No.1 of the present Appeal is also remanded to the file of the A.O. for de-novo adjudication with a direction to the assessee to substantiate its claim of unabsorbed depreciation, accordingly Ground No. 1 of the assessee is partly allowed for statistical purpose.

15. The Ground No. 2 is regarding disallowance of depreciation on land computed by the A.O. by estimating the cost of land out of the total consolidated cost of hotel building complex. We have already dealt with the said issue for the Assessment Year 2010-11 in ITA No. 3259/Del/2015 and held that the assessee is not eligible for depreciation on land cost and dismissed the Ground No. 2 in Assessment Year 2010-11, by finding the parity and applying the law, *mutatis mutandis* applies to AY 2011-12 and we find no merit in Ground No. 2, accordingly, the Ground No.2 of the Assessee is dismissed.

16. The assessee has not pressed the Ground No. 3, accordingly, Ground No. 3 of the assessee is dismissed that as not pressed.

17. In the result, Appeal in ITA No. 3208/Del/2015 (A.Y 2011-12 is partly allowed for statistical purpose.

Order pronounced in open Court on 17<sup>th</sup> August, 2023

Sd/-  
**(N.K. BILLAIYA)**  
**ACCOUNTANT MEMBER**

Dated: 17/08/2023

*Pk/R.N, Sr ps*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-  
**(YOGESH KUMAR U.S.)**  
**JUDICIAL MEMBER**

ASSISTANT REGISTRAR  
ITAT, NEW DELHI

