

IN THE INCOME TAX APPELLATE TRIBUNAL  
PUNE BENCH, 'A' PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND  
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

ITA No.435 & 436/PUN/2023  
Assessment Years : 2016-17 & 2017-18

|   |     |                         |
|---|-----|-------------------------|
| Classic Citi Investments Private Limited,<br>36/3B, The Westin Hotel,<br>Koregaon Park, Annexe Mundhwa Road,<br>Ghorpadi, Pune - 400 001<br>Maharashtra<br>PAN : AABCC7550P | Vs. | ITO, Ward-1(2),<br>Pune |
| Appellant   |     | Respondent              |

Assessee by Shri Sanket Joshi  
Revenue by Shri Keyur Patel

Date of hearing 18-09-2023  
Date of pronouncement 21-09-2023

आदेश / ORDER

PER R.S. SYAL, VP :

These two appeals by the assessee are directed against the separate orders, both dt. 07-03-2023, passed by the CIT(A) in National Faceless Appeal Centre (NFAC), Delhi u/s.250 of the Income-tax Act, 1961 (hereinafter also called 'the Act') in relation to the assessment years 2016-17 & 2017-18. We have clubbed these appeals for disposal on account of some common issues.

A.Y. 2016-17 :

2. The first modified ground raised by the assessee is in relation to confirmation of disallowance of Rs.4,38,87,662/-.

3. Briefly stated, the facts of the case are that the assessee is engaged in the business of hotels and earning income from leasing of Business plaza. Return was filed declaring total income at Nil. During the course of assessment proceedings, the Assessing Officer (AO) observed that the assessee had claimed certain deduction towards Repair and Maintenance in respect of capital assets. The AO opined that such amount was required to be capitalized as it was in respect of renovation of buildings. The assessee, on requisition, furnished the details. The AO, on their perusal, observed that some of such expenses claimed were not supported by any vouchers/bills. He segregated such total of expenses into two parts, viz., one part which he capitalized and granted depreciation and the other part was ignored from capitalization for which no vouchers were available. Such total disallowance worked out to Rs.4,38,87,662/- comprising of two components, namely, Rs.3,89,70,818/- which was the net amount capitalized by the AO after depreciation and the remaining amount of Rs.49,16,804/- which was not capitalized for lack of necessary evidence. The assessee remained unsuccessful before the Id. CIT(A).

4. We have heard the rival submissions and gone through the relevant material on record. It is seen that the total gross amount of disallowance is in respect of capital expenses of buildings, which

was treated by the assessee as revenue. The AO held such gross amount to be capital expenditure not eligible for deduction as revenue. The assessee did not dispute the capital nature of such expenditure as determined by the AO. This shows that the disallowance of Rs.3.81 crore, net of depreciation from such capital expenditure, does not require any interference. The only issue pressed is with reference to amount of Rs.49,16,804/-, which was not allowed by the AO to be capitalized for the lack of details. The ld. AR submitted that necessary details were furnished before the AO, who failed to examine the same. Similar stand was reiterated before the ld. CIT(A) as well. It is observed from the impugned as well as the assessment order that the AO has not specifically referred to the detail of Rs.49,16,804/-, whose supporting bills were not available. In contrast, the ld. AR submitted that all the bills are available, which can be explained before the AO. Considering the entirety of the facts and circumstances of the case, we are of the considered opinion that it would be in the fitness of things if the impugned order on this issue is set-aside and the matter is restored to the file of the AO. We order accordingly and direct the AO to first cull out the detail of Rs.49,16,804/- and then give an opportunity to the assessee to place on record its supporting vouchers. If the assessee succeeds in producing the necessary

evidence, then the amount should be allowed to be capitalized subject to depreciation. In the otherwise scenario, the disallowance should be confirmed to that extent. Needless to say, the assessee will be allowed a reasonable opportunity of hearing.

5. Ground No.2 of the appeal is against the confirmation of addition of Rs.1,15,13,136/- made by the AO towards notional rent in respect of its self-occupied units. The facts apropos this ground are that the assessee had two units under the Business plaza, which remained vacant throughout the year. On being called upon to explain as to why the annual rental value of such two units at 5<sup>th</sup> and 7<sup>th</sup> floor respectively should not be taxed, the assessee furnished some explanation. After taking note of such explanation and details, the AO observed that the 5<sup>th</sup> floor was having vacant area of 5071 sq.ft. and the full 7<sup>th</sup> floor was having vacant area of 12456 sq.ft. The assessee relied on the Tribunal order in the case of *Sachin R. Tendulkar Vs. DCIT (2018) 195 TTJ 241 (Bom.)* to contend that no disallowance be made as the assessee was making attempts for letting out the property, Not convinced, the AO computed the annual rental value from these two floors by arriving at reasonable rent of Rs.1,64,47,337/-. After allowing standard deduction @30%, he made the addition of Rs.1,15,13,136/-. No relief was allowed in the first appeal.

6. We have heard the rival submissions and gone through the relevant material on record. It is undisputed that the two floors of the Business plaza were capital assets of the assessee, which remained vacant fully/partly throughout the year. Section 23(1)(a) provides for the determination of the Annual Value of any property, being, the sum for which the property might reasonably be expected to let from year to year. Clause (c) of section 23(1) provides that where the property or any part of it is let and remains vacant during the whole or any part of the previous year and owing to such vacancy the actual rent received or receivable by the owner is less than the sum referred to in clause (a), the amount so received or receivable shall be taken as annual value of the property. This provision mandates that, firstly, the property should have been let out in the past and secondly, in the year under consideration it remains fully or partly vacant. When these two conditions are cumulatively fulfilled, then, instead of considering rent which is expected to be realized from let out as the annual value of the property in terms of section 23(1)(a), the amount actually received or receivable is substituted as annual value in terms of section 23(1)(c). The Id. AR was fair enough to accept the position.

7. Reverting to the factual scenario, it is noted that the 7<sup>th</sup> floor of the assessee having 12456 sq.ft. area remained vacant throughout

the year. The Id. AR has brought to our notice that this floor was given on rent to Kenersys India Pvt. Ltd. on 24-06-2011 and the period of lease was three years. Such lease expired in November, 2014. Though the assessee kept on making attempts for leasing out this property, but could not find a suitable lessee. This shows that the 7<sup>th</sup> floor was fully let out in the earlier three years, but was fully vacant from November, 2014 covering the full year under consideration. In this scenario, the annual value of 7<sup>th</sup> floor in terms of section 23(1)(c) has to be taken as Nil, provided the contention of the assessee that it was let out in the past, is correct. It is seen that no such contention was taken before the AO. In such circumstances, we deem it necessary to set aside the impugned order and remit the matter to the AO for examining the assessee's contention about the 7<sup>th</sup> floor having been let out in the three earlier years. If the contention turns out to be true, then no annual value should be computed for the year under consideration in respect of 7<sup>th</sup> floor. Needless to say, the assessee will be allowed a reasonable opportunity of hearing for proving its case.

8. As regards the 5<sup>th</sup> floor, the Id. AR fairly admitted that the vacant area of 5071 sq.ft., was not let out in the past. The provisions of section 23(1)(a) get triggered without recourse to section 23(1)(c) and as such, the annual value of such property needs to be

determined. The AO computed the annual value of the 5<sup>th</sup> floor by considering the rent realized by the assessee from other floors. However, it is worth mentioning that the Hon'ble Bombay High Court in *Smt. Kokilaben D. Ambani vs. CIT (2014) 90 CCH 0257 MumHC* vide its judgment dated 11.9.2014 has held that while determining the annual value in respect of properties which are subject to Rent Control Legislation and in case where the standard rent has not been fixed, the AO shall determine the same in accordance with the relevant Rent Control Legislation. If the fixed rate is less than the standard rent, then the fair rent shall be taken as Annual Letting value. Turning to the facts of the case, we find that the necessary details as to whether the property was subject to Rent Control Legislation or the amount of standard rent etc. are not available on record. In such circumstances, we set-aside the impugned order on this score and remit the matter to the file of the AO for re-computing the annual letting value of the 5<sup>th</sup> floor u/s.23(1)(a) in the hue of the above decision of the Hon'ble Bombay High Court. Needless to say, the assessee will be allowed reasonable opportunity of hearing.

9. Ground No.3 is against the confirmation of addition of Rs.3,00,87,960/- made by the AO u/s.56(2)(viiia) of the Act. The facts anent to this issue are that the assessee purchased 1,00,000

Equity shares of Diana Buildwell Limited (Diana) from Indiabulls Real Estate Pvt. Ltd. holding 66% Equity shares and ABIL Hospitality Pvt. Ltd. (ABIL) (a related concern) holding 34% Equity shares of Diana. Total share capital of Diana was 1,00,000 shares with face value of Rs.10/- each. The assessee entered into MOU dt. 17-07-2015 with Indiabulls for transfer of 66000 Equity shares of Diana for a total consideration of Rs.83.48 crore at valuation of Rs.12,648.94 per share. Similarly, the assessee entered into MOU dt. 21-07-2015 with ABIL for transfer of 34000 Equity shares at value of Rs.11,764.70 per share. The assessee submitted valuation report in respect of Equity shares to Diana having the fair market of shares at Rs.11,680.00 per share under Discounted Cash Flow (DCF) method. The AO held that the shares acquired by the assessee from ABIL were undervalued at Rs.11,764.70 per share as against the rate of Rs.12,648.94 per share charged from Indiabulls. Invoking the provisions of section 56(2)(viiia), he held that the differential amount of Rs.884.94 per share as applied to 34000 shares, was liable to be added to the assessee's income. That is how, the addition of Rs.3.00 crore and odd was made by the AO, which came to be echoed in the first appeal. Aggrieved thereby, the assessee has come up in appeal before the Tribunal.

10. The facts are not in dispute that the assessee acquired 66000 Equity shares of Diana from Indiabulls Rs.12,648.94 per share and 34000 shares from ABIL at Rs.11,764.70 per share. The point in dispute is about the applicability of section 56(2)(viia) to the facts and circumstances of the case. The assessee made out a case that the shares acquired by it were above the fair market value, which was determined under the DCF method. On the other hand, the AO has went with the proposition that the amount charged from ABIL was less than that charged from Indiabulls and hence the assessee was liable to be visited with the provisions of section 56(2)(viia).

11. We advert to the mandate of section 56(2)(viia), which provides where a firm or a company, not being a company in which the public are substantially interested, receives any shares for consideration, which is less than its aggregate fair market of the value by an amount exceeding Rs.50,000/-, the aggregate fair market value of such property exceeding such consideration shall be taken as income under this provision. Explanation given under this clause defines the 'fair market value' of shares to have the same meaning as assigned to it in Explanation to clause (vii). In turn, clause (vii) of section 56(2) defines the 'fair market value' of a property other than immovable property to mean: 'the value determined in accordance with the method as may be prescribed'.

The method has been prescribed in Rules 11U and 11UA. Rule 11UA(1) deals with valuation of various types of assets. Insofar as the valuation of unlisted equity shares and securities is concerned, clause (c) of Rule 11UA(1) is applicable. Clause (c), in turn, has two sub-clauses. We are concerned with the sub-clause (b) of Rule 11UA(1)(c), which deals with the fair market value of unquoted equity shares. A mechanism has been provided in this rule to determine the fair market value on the valuation date. The relevant part of rule, which is applicable to the year under consideration, provides for determining the fair market value of unquoted Equity shares by dividing (A-L) by (PE) and then multiplying it with (PV). The narrations have been given for the alphabets used in the rule, namely, A, L, PE & PV. It is only the valuation as determined under the unamended Rule 11UA(1)(c)(b), as applicable to the year under consideration, which has to be considered for applying the mandate of section 56(2)(viiia) of the Act. In that view of the matter it is crystal clear that the benchmark for the application of this provision is the value so determined as per the rule and not the value as computed by the assessee under DCF method or the value as taken note of by the AO at Rs.12,648.92, being, higher purchase price of shares from India bulls *vis-à-vis* that from ABIL. Since the mandate of Rule 11UA, which is obligatory for section 56(2)(viiia),

has not been considered, we are of the opinion that it would be just and fair if the impugned order on this score is set-aside and the matter is restored to the file of the AO. We order accordingly and direct him to compute the fair market value of equity shares of Diana under Rule 11UA(1)(c)(b) and thereafter consider the applicability of section 56(2)(viia) to that extent. It goes without saying that the assessee will be allowed reasonable opportunity of hearing in such fresh application of section 56(2)(viia) of the Act.

12. Ground No.4 of the assessee's appeal is against the confirmation of disallowance of Rs.1,52,29,448/- made by the AO u/s.14A r.w. rule 8D. Succinctly, the facts of this ground are that the assessee offered disallowance u/s.14A to the tune of Rs.69,096/-. The AO observed that the assessee had exempt income of Rs.68,51,775/-. He took note of value of investments made by the assessee in Equity instruments and in partnership firm as on 31-03-2015 and 31-03-2014 and proceeded to work out the amount of disallowance under Rule 8D by taking the average value of such investments. Under clause (ii) of Rule 8D(2), he computed the disallowance at Rs.1,21,29,773/- and under clause (iii) being, 0.5% of the average value of investments, at Rs.30,99,675/-, which totaled up to Rs.1,52,29,448/-. The Id. CIT(A) sustained the disallowance.

13. The first component of disallowance is the amount of interest incurred by the assessee as relatable to the exempt income. The disallowance was computed by multiplying the average value of investments yielding exempt income with the amount of expenditure by way of interest and then dividing it by the average value of assets as appearing in the balance sheet. The average value of investment for this purpose is required to be considered by taking only such investments as yielded exempt income and not the investments which did not give rise to any exempt income during the year. The AO has taken the average value of total investments by considering both, the investment in Equity shares of Diana that did not yield any exempt income and also investment in partnership firm that resulted into exempt income during the year under consideration. The Hon'ble Delhi High Court in *ACB India Ltd. vs. CIT (2015) 374 ITR 108 (Del)* has held that the average value of investments, for the purposes of Rule 8D(2)(iii), should be confined to those securities in respect of which exempt income is earned and not the total investments. Similar view has been taken by the Special Bench of the Tribunal in the case of *ACIT vs. Vireet Investments (P) Ltd. (2017) 165 ITD 27 (Del) (SB)*. The *ratio* of these decisions apply directly to rule 8D(2)(ii) as well. In that view of the matter, the investment in Equity shares of Diana needs to be

excluded both from the opening and closing balances of investments for working out the average value of investments to find out the amount of interest to be disallowed under Rule 8D(2)(ii). Similar is the position regarding the applicability of Rule 8D(2)(iii), which talks of making disallowance at 0.5% of the average of the value of investments, income from which does not form part of total income. The AO has again considered investment in shares of Diana also for computing the average value of investments for the purpose of making disallowance under clause (iii) of Rule 8D(2) of the Act. In view of the afore referred precedents, we set aside the impugned order to this extent and remit the matter to the file of the AO for re-computing the disallowance under Rule 8D(2)(ii) and (iii) by considering only such investments in calculating the average value of investments, which yielded exempt income during the year.

14. The last issue raised in this appeal is against the confirmation of disallowance u/s.32 towards depreciation on the fixed assets for the assessment year under consideration which were purchased in assessment years 2009-10, 2010-11 and 2011-12. Both the sides are in agreement that this is a recurring issue and the Tribunal for the immediately preceding assessment year and earlier years has sent the matter back to the file of the AO for deciding in conformity with the decision taken in earlier years. We also follow the same.

2017-18 :

15. The first issue raised in this appeal is against the confirmation of addition of Rs.11,11,320/- towards notional rent in respect of one vacant unit at the 10<sup>th</sup> floor having area of 2520 sq.ft.

16. The ld. AR submitted that this unit was also let out in the earlier years and hence the AO erred in determining the annual value of this property u/s.23(1)(a). However, it was also conceded that the factum of such unit having been let out in the earlier years was not brought to the notice of AO, as is the case for the immediately preceding A.Y. 2016-17. Following the view taken hereinabove, we set-aside the impugned order on this score and remit the matter to the file of the AO for deciding it in the light of directions given in our above order for the A.Y. 2016-17.

17. The only other issue which survives in this appeal is against the confirmation of disallowance u/s.32 with reference to certain fixed assets purchased in A.Yrs. 2009-10, 2010-11 and 2011-12. Again, both the sides fully concur that the facts and circumstances of this ground are also similar to the one decided in the preceding years including the immediate preceding assessment year. Following the view taken hereinabove, we set-aside the impugned order on this score and send the matter to the file of the AO for deciding it in consonance with the direction given.

18. In the result, the appeal for the A.Y. 2016-17 is partly allowed and that for the A.Y. 2017-18 is allowed for statistical purposes.

Order pronounced in the Open Court on 21<sup>st</sup> September, 2023.

Sd/-  
(PARTHA SARATHI CHAUDHURY)  
JUDICIAL MEMBER

Sd/-  
(R.S.SYAL)  
VICE PRESIDENT

पुणे Pune; दिनांक Dated : 21<sup>st</sup> September, 2023  
सतीश

**आदेश की प्रतिलिपि □ ग्रेषित/Copy of the Order is forwarded to:**

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The respondent
3. The Pr.CIT concerned
4. DR, ITAT, 'A' Bench, Pune
5. गार्ड फाईल / Guard file.

**आदेशानुसार/ BY ORDER,**

**// True Copy //**

Senior Private Secretary  
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

|     |  | Date       |       |
|-----|--|------------|-------|
| 1.  | Draft dictated on                                | 18-09-2023 | Sr.PS |
| 2.  | Draft placed before author                       | 20-09-2023 | Sr.PS |
| 3.  | Draft proposed & placed before the second member |            | JM    |
| 4.  | Draft discussed/approved by Second Member.       |            | JM    |
| 5.  | Approved Draft comes to the Sr.PS/PS             |            | Sr.PS |
| 6.  | Kept for pronouncement on                        |            | Sr.PS |
| 7.  | Date of uploading order                          |            | Sr.PS |
| 8.  | File sent to the Bench Clerk                     |            | Sr.PS |
| 9.  | Date on which file goes to the Head Clerk        |            |       |
| 10. | Date on which file goes to the A.R.              |            |       |
| 11. | Date of dispatch of Order.                       |            |       |

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