INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI
BEFORE SHRI C. M. Garg, JUDICIAL MEMBER
and
SHRI M. BALAGANESH, Accountant Member

ITA No. 2041/Del/2019
(Assessment Year: 2010-11)

Repro Auto Pvt. Ltd, 177, W-7 Lane, Sainik Farms, New Delhi (Appellant) **PAN: AACCR6510R**	Vs.	ITO, Ward-21(2), New Delhi (Respondent)

Assessee by :	Sh. Ashok Kumar, CA
Revenue by:	Sh. Vivek Vardhan, Sr. DR
Date of Hearing	06/09/2023
Date of pronouncement	29/09/2023

O R D E R

PER M. BALAGANESH, A. M.:

1. The appeal in ITA No.2041/Del/2019 arises out of the order of the Commissioner of Income Tax (Appeals)-7, New Delhi, [hereinafter referred to as 'ld. CIT(A)', in short] in Appeal No. 10494/CIT(A)-7/Del/2017-18 dated 27.12.2018 against the order of assessment passed u/s 143(3)/ 147 of the Income-tax Act, 1961 dated 21.12.2017 (hereinafter referred to as 'the Act') dated 22.12.2018 by the Assessing Officer, Circle-1(1), Gurgaon (hereinafter referred to as 'ld. AO').

2. The assessee has raised the following grounds of appeal:-

> *"1. That on the facts and in the circumstances of the case, the learned Commissioner of Income Tax (Appeals)-7,New Delhi (hereinafter called the CIT(A) for short) erred in confirming an addition of Rs. 81,81,507/- to the total income of the appellant made by the learned Income Tax Officer Ward-21(2), New Delhi under the head of short term capital gains. To be more specific, on the facts and in the circumstances of the case the learned CIT (A) has erred in law:*

(a) in confirming the application of the provisions of section 50 C of the Income Tax Act, 1961 (hereinafter referred to as the Act) and thereby considering the value adopted by the stamp valuation authorities while computing the short term capital gain (deemed) from the transfer of leasehold rights in the plot of land allotted to the appellant assessee not considering and ignoring the various case laws cited by the assessee and by relying upon a case which had no relevance to the issue at hand and also in not considering the plea of the appellant assessee that (i) the value assessed for Stamp Duty purpose does not represent the true fair value of the property, (ii) the appellant assessee had a lot of financial burden/liability to discharge and was forced to make a distress sale and was not in a position to wait for a buyer who could offer better price and(iii) the concept of fair value cannot be invoked in case of a distress sale;

(b) in not considering and deciding upon the plea that the written down value of the block of assets in respect of buildings at the beginning of the previous year as provided in section 50 (1) (ii) of the Act has to be considered as the asset under consideration was a depreciable asset, and

(c) in not considering and deciding upon the plea for allowing indexing the cost of acquisition of the lease hold rights in the plot of land as provided by section 48 of the Act as the same was not depreciable and was held for more than three years and therefore a long-term capital asset."

2. That on the facts and in the circumstances of the case, the Ld. CIT(A) erred in confirming the disallowance of expenses amounting to Rs. 16,08,268/- made by the AO on the ground that no business was carried on as Gross Sales were declared as Nil ignoring the case laws referred by the appellant."

3. We have heard the rival submissions and perused the materials available on record. The assessee company was incorporated on 21.11.2003. The ld AO received an information from ACIT, Circle-27(1), New Delhi vide letter dated 13.12.2012 that assessee has sold property at Plot No. E-441, YK Riko Industrial Area, Chopanki, Tijara, area 4000 sq mtr for sale consideration of Rs. 75 lakhs during the FY 2009-10, the stamp duty value of the said property is Rs. 1,14,06,000/-. Preliminary enquiry was then conducted by the ld AO by issuing letter dated 02.02.2017 to the assessee. Further, an independent enquiry was conducted form the department's database and it revealed that the assessee company had not filed its return of income for AY 2010-11. Accordingly, the ld AO recorded reasons that income of the assessee had

escaped assessment and reopened the assessment of the assessee. The reopening u/s 147 of the Act is not under challenge before us. The assessee pleaded that an industrial plot was allowed to it on leasehold basis by Rajasthan State Industrial Development and Investment Corporation Ltd (A Rajasthan Govt. undertaking) (herein referred to RICO) on 30.03.2005. The evidence in this regard is enclosed at page 39 to 42 of the PB. This comprising of allotment letter for allotment of land for establishing of industry at Chopanki Industrial area. The assessee also enclosed the lease agreement entered on 15.03.207 with RICO which is enclosed page 43 to 53 of the paper book together with the site plan thereon. This industrial plot of land acquired of leasehold basis was sold by the assessee during the year under consideration for Rs. 75 lakhs. This fact is not in dispute. Seems the lease period for 99 years, the ld AO proceeded to treat the transaction of allotment of land on leasehold basis to the assessee as an acquisition made and consequential when the state industrial lease has been sold by the assessee, the same constitutes transfer on account of sale and accordingly the provision of section 50C of the Act also would come into operation if the sale consideration is less than the consideration fixed for the purpose of levy of stamp duty of the stamp duty authority. The ld AO proceeded to determine short term capital gain of sale above industrial plot by sale consideration figure of Rs. 1,14,06,000/- (in terms of section 50C of the Act). The assessee also gave the details of amount paid by it on account of lease as under:-

Financial year	Amount
2004-05	Rs. 6,60,000/-
5005-06	Rs. 23,18,168/-
2006-07	Rs. 2,18,790/-
2007-08	Rs. 27,535/-

4. The assessee also submitted that it had made construction of the super structure on the said leasehold of land allotted to it. The details of cost of construction are incurred by the assessee are as under:-

Financial Year	Amount
2006-07	Rs. 15 lakh
2007-08	Rs. 14,20,814/-
2008-09	Rs. 16,79,530/-

5. The assessee accordingly pleaded that the book value of the land and building as on 01.04.2009 stood of Rs. 75,32,143/- and same was sold at Rs. 75 lakhs and hence, there was no capital gain that assessed to the assessee. The ld AO did not agree to this contention of the assessee and observed that the assessee had not furnished any evidence in support of its claim for cost of the construction on the said property taken on lease. Accordingly, he proceeded to determine the short term capital gain as under:-

Sale consideration	Rs. 1,14,06,000/-
(-)Less cost of acquisition (6,60,000 + 2318168 + 218790 + 27535)	Rs. 3224493
Short term capital gain	Rs. 8181507/-

6. This action of the ld AO was upheld by the ld CIT(A).

7. At the outset the moot question is to be decided is as to whether the provision of section 50C of the Act *per se* could be applied for transfer of lease hold rate possessed by the assessee. This issue is no longer res integra in view of the decision of Hon'ble Bombay High Court in the case of CIT Vs. M/s. Green Hotels and Estate Pvt. Ltd in income Tax Appeal No. 735/2014 dated 24.10.2016. For the sake of convenience the said order is reproduced herein:-

> *"This appeal under Section 260A of the Income Tax Act, 1961 ("the Act") challenges the order dated 23 October 2013 passed by the Income Tax Appellate Tribunal ("Tribunal"). The impugned order relates to Assessment Year 200708.*
>
> *2. The Revenue urges the following question of law for our consideration :*
>
> > *"Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in upholding the order of the CIT(A) in deleting the addition of Long Term Capital Gain of Rs.80,58,000/on the ground that provisions of section 50C of the*

IT Act, 1961 were not applicable to transfer of land and building, being a leasehold property?"

3. The impugned order of the Tribunal has dismissed the Revenue's appeal from the order dated 15 June 2012 passed by the Commissioner of Income Tax (Appeals). The issue before the Tribunal was whether Section 50C of the Act would be applicable to transfer of leasehold rights in land and buildings. The impugned order of the Tribunal followed its decision in ***Atul G. Puranik vs. ITO*** *(ITA No.3051/Mum/2010) decided on 13 May 2011 which held that Section 50C is not applicable while computing capital gains on transfer of leasehold rights in land and buildings.*

4. Mr. Kotangale, learned Counsel for the Revenue, states that the Revenue has not preferred any appeal against the decision of the Tribunal in the case of ***Atul Puranik*** *(supra). Thus, it could be inferred that it has been accepted. Our Court in* ***DIT vs. Credit Agricole Indosuez 377 ITR 102*** *(dealing with Tribunal order) and the Apex Court in* ***UOI vs. Satish P. Shah 249 ITR 221*** *(dealing with High Court order) has laid down the salutary principle that where the Revenue has accepted the decision of the Court/Tribunal on an issue of law and not challenged it in appeal, then a subsequent decision following the earlier decision cannot be challenged. Further, it is not the Revenue's case before us that there are any distinguishing features either in facts or in law in the present appeal from that arising in the case of* ***Atul Puranik*** *(supra).*

5. In the above view, the question as framed by the Revenue does not give rise to any substantial question of law. Thus, not entertained.

6. Appeals dismissed. No order as to costs."

8. Hence, we hold that the sale consideration of transfer of lease hold rate should be considered only Rs. 75 lakhs. Further, we find that the industrial plot of land has been allotted to the assessee on 30.03.2005. The assessee has been making super structure incurring cost of construction in FY 2006-07 onwards. The entire property has been sold by the assessee on 08.10.2009. Hence, the land taken on lease is hold by the assessee for more than 3 years and consequentially eligible for benefit of indexation thereon. Hence, the resultant gain arising on its transfer would be long term capital gain. The building taken by the assessee been held less than three years and deprecation is also claimed

by the assessee thereon. Hence, the building taken would be determined based on dimming provision of section 50 of the Act. The facts of assessee incurring expenses towards cost of construction and claiming depreciation thereon is reflected in the financial statement of the assessee itself commencing from 2006-07, 2007-08 and 2008-09. Hence, there is no scope for rejection of claim of cost of construction of lower authorities.

9. With the above observation ground No. 1A, 1B And 1C are partly allowed.

10. The ground No.2 raised by the assessee is under challenge the disallowance of business expenses of Rs. 16,08,268/-.

11. We have heard the rival submissions and perused the materials available on record. The ld AO during the course of assessment proceedings asked the assessee to furnish the details of expenses claimed in the sum of Rs. 16,08,268/-. The assessee furnished the details of the same as under:-

> *"The assessee has claimed expenses of Rs. 16,08,268.00/- in Profit and Loss Account for the F.Y. under consideration. However, the assessee has not carried on any business during the year under consideration as Gross Sales have been declared as NIL by assessee and has also been submitted by assessee that it has not done any business during the year under consideration. Therefore, the expenses claimed by the assessee do not have nexus with earning of income from business and have been incurred for non- business purposes"*

12. The ld AO show cause the assessee as to why the aforesaid expenses should not be disallowed as during the year under consideration, the assessee has not carried on any business activity which is also evident from the profit and loss account whether sale or gross receipts shows at Rs. Nil. In reply the assessee submitted though as no business carried out during the year still the assessee is incurring certain expenses to repay its business obligation and making certain realization from its sundry debtors for recovery of old dues. The ld AO further disagreed with the plea of the assessee and proceeded to

disallow of expenditure of Rs. 16,08,268/- in the assessment. I believe that expense does not have any nexus with earning of income from business. This action was upheld by the ld CIT(A).

13. At the outset, we find that the expenses were not disallowed by the lower authorities of doubting its genuineness. The only grievance of the lower authorities is that since no business activity was carried out by the assessee during the year, the aforesaid expenditure cannot be said to be incurred for the purpose of business of the assessee. The ld AR rightly placed reliance before us on the decision of the Allahabad High Court I the case of CIT Vs. Rampur Timber and Tannery Co Ltd reported in 129 ITR 58. The question raised before the Hon'ble High Court is as under:-

> *"Whether, on the facts and in the circumstances of the case, having held that the assessee was not carrying on any business, the Tribunal was legally correct in allowing the entire expenses of Rs. 11,295 in the assessment year 1969-70, and Rs. 10,613 in the assessment year 1970-71, except in so far as it can be related to the income from property?"*
>
> *Para 6 to 10:-*
>
> *"6.The assesses took the matter to the Tribunal. The Tribunal confirmed the finding that in the year in question the assessee was not carrying on any business. It, however, held :*
>
> *"On the other hand, we are unable to accept the contention put forward on behalf of the department that, apart from the amounts allowed by the Appellate Assistant Commissioner no further expenditure was allowable to the assessee against income from other sources. The company has to exist as a company and it has to satisfy certain requirements of the company law., It is a sine qua non before it can earn any income from any source that the company should exist as a company. Similarly, there are certain expenses which can clearly be related to the source from which the income was earned. The legal expenses for instance were incurred because the Registrar of Companies threatened to discontinue registration of the company as a company. Moreover, the company had necessarily to try for the reduction of its liabilities and for profitable disposal of its assets. Just because these assets had ceased to be assets of the business, they did not cease to be sources of income or loss. The expenditure claimed by the assessee was claimed only for these purposes. We, therefore, direct that the whole of the expenditure claimed by the assessee for both the years should be allowed except in so far as it can be related to the income from property."*

7. Learned counsel for the department urged that the assessment for these two years were made under the residuary head " Income from other sources". Section 57 of the I.T. Act deals with deductions from the income chargeable under the head" Income from other sources". Clause (iii) provides for any other expenditure not being in the nature of capital expenditure, laid out or expended wholly and exclusively for the purpose of making or earning such income.

8. The Tribunal has on facts held that the expenditure claimed by the assessee was claimed only for these purposes, namely, for the purpose of keeping the company alive as a company and for the effective and profitable disposal of the assets of the erstwhile business. For the year 1970-71, the ITO had treated the written-off loan from Raza Textiles Distributing Company and old liabilities for teak wood supply as income from other sources. It is evident that the company had to exist as a company before it could be held liable for earning income because of the writing-off of the loan and because of the old persisting liabilities of the business which had been closed down. Ex hypothesi the expenditure incurred for retaining the status of the company, namely, miscellaneous expenses, salary, legal expenses, travelling expenses, etc., would be expended wholly and exclusively for the purpose of making or earning such income. A sum of Rs. 6,080 was claimed as revenue expense. This amount was paid as interest on a loan taken from the State Govt. The loan was an asset of the company and was retained as such. Payment of interest thereon would be clearly an expense falling within the purview of Clause (iii) of Section 57 of the I.T. Act.

9. Learned counsel for the department relied upon several decisions which interpret Clause (iii) of Section 57 and analogous provisions of the I.T. Act. They are all distinguishable on facts. For instance, in K. Mahesh v. CIT [1968] 70 ITR 240 (Mad), the question was whether the wealth-tax paid by the assessee on the net value of the stock owned by him was not an allowable expenditure. It was held that for an expenditure to come within the ambit of Section 57(iii) of the I.T. Act, 1961, it must be incidental to the making or earning of the income and there must be nexus between the character of the expenditure and the making or earning of income. This test is satisfied in the present case. The Tribunal has on facts found that the expenditure claimed by the assessee was for the profitable disposal of the assets of the company. The Tribunal has clearly excluded the expenditure relatable to the income from the property. We, therefore, do not find that the Tribunal committed any error in holding that the aforesaid sums were allowable as expenses for each of the two years in question.

10. We, therefore, answer the question referred to us in the affirmative, in favour of the assessee and against the department. The assessee will be entitled to costs which we assess at Rs. 200."

14. We further find a similar issue has come up for adjudication before Delhi Tribunal in the case of ITO Vs. Mokul Finance Pvt. Ltd reported in 110 TTJ 445 dated 13.07.2007, wherein, it is held as under:-

"5. Having given our careful consideration to the rival contentions and the material on record, we are inclined to uphold the conclusions arrived at by the CIT(A). As Dr. Gupta rightly contends, the assessee being an artificial juridical person, it needs to incur certain expenditure to keep itself afloat and have its continued existence. Unlike a natural person, a company can only operate through other natural persons--whether employees or others. It is not the case of the AO that the expenditure of the assessee company are excessive or unreasonable vis-a-vis its legitimate business requirements. The Hon'ble High Courts have consistently held that in the case of the corporate assessees such expenses have to be allowed as deduction irrespective of whether or not the assessee is engaged in active business and even if assessee has only passive incomes. The CIT(A) was, therefore, justified in his conclusions. That is, however, not the only reason why the disallowance made by the AO was unsustainable in law. We agree with Dr. Gupta's second line of argument as well. We find that the whole cause of action of disallowance of expenses is in the background of AO's observation that the assessee did not carry out any business transactions which at best was AO's finding about an activity of business not being functional in the relevant previous year. In our opinion, not carrying on business activity in a particular period cannot be equate with closure of business as it takes an unsustainably narrow view of the scope of cessation of a business. In the case of L.VE. Vairavan Chettiar v. CIT, their Lordships of Hon'ble Madras High Court were in seisin of a situation where the assessee had obtained an import licence for doing arecanut business but due to adverse conditions in market, he temporarily suspended the arecanut business for the assessment year in question. Nevertheless, he was maintaining the establishment and was waiting for improved market conditions in arecanut. It was thus an admitted position that no activities were carried out so far as this part of the business was concerned. On these facts, their Lordships took note of the position that "There is nothing on record to show that he completely abandoned or closed the business forever. On the other hand, his books of account revealed that he was meeting the establishment charges and interest payments as detailed in the accounts in the year of accounts". It was then observed that the question whether the business is being carried on must depend in each case on its own facts and not on any general theory of law. Their Lordships then referred to, with approval, Lord Summer's observation in IRC v. South Behar Railway Co. Ltd. (1925) 12 Tax Cases 657 that business is not confined to being busy; in many businesses long intervals of inactivity occur...." The concern is still a going concern though a very quiet one." After elaborate survey of judicial precedents on the issue, their Lordships concluded, in the light of, as noted above, the factual position that "there is nothing on record to show that he completely abandoned or closed the business forever. On the other hand, his books of account revealed that he was meeting the establishment charges and interest payments as detailed in the accounts in the year of account," that the loss in arecanut business, in which admittedly no activity was carried out during the relevant previous year, was to be set off against; assessee's business income in the year. As the ratio of the aforesaid judgment is summed up in the ITR headnotes at p. 115 of the report, "as the assessee was maintaining the establishment and waiting for the improved market

conditions in arecanuts and there was nothing to show, that he completely abandoned or closed the business forever, the business must be deemed to be continuing". In the light of this legal position, it would follow that unless there is some material on record to show that the assessee has completely abandoned the share dealing business, merely because there are no business transactions in the relevant previous year cannot be reason enough to come to the conclusion the business has come to an end. It could not thus be said; as was the case before the Hon'ble Madras High Court, that the assessee had "completely abandoned or closed the business forever". Unless the business is abandoned or closed and even if business is at a dormant stage waiting for proper market conditions to develop, the expenditure incurred in the course of such a business is to be allowed as deduction. For this reason also, the disallowance made by the AO was not justified, and the CIT(A) rightly deleted the same.

6. Ground No. 1 is thus dismissed."

15. In view of the above observation and respectfully following the judicial precedent relied upon herein above ground No. 2 of the assessee is hereby allowed.

16. Ground No. 3 raised by the assessee is general in nature and does not require any specific adjudication.

17. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 29/09/2023.

-Sd/-	*-Sd/-*
(C. M. Garg)	**(M. BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 29/09/2023
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi