

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH KOLKATA

**BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND Dr. MANISH BORAD, ACCOUNTANT MEMBER**

**ITA.475/Kol/2023
Assessment Year: 2011-12**

Rajatgiri Oil Industries Unit No. 4 (5 th Floor), Block-M, New Alipore Market Complex, Somnath Lahiri Sarani, New Alipore-700053. (PAN: AADFR7140K)	Vs.	ACIT, Circle-28, Kolkata. 2, Gariahat Road (South), West Bengal-700068.
(Appellant)		(Respondent)

Present for:

Appellant by : Shri Somnath Banerjee, Advocate
Respondent by : Shri B. K. Singh, JCIT, Sr. DR

Hearing concluded on : 14.12.2023
Date of Pronouncement : 07.02.2024

ORDER

Per Sanjay Garg, Judicial Member:

This appeal filed by the assessee is against the order of the Ld. Commissioner of Income Tax (Appeals) (hereinafter referred to as "CIT(A)", National Faceless Appeal Centre (NFAC), Delhi dated 02.02.2023.

2. Grounds of appeal taken by the assessee are reproduced as under:

"1. On the facts and in the circumstances of the case and in law the C.I.T.(A) erred in holding that there is no infirmity found in reopening the assessment u/s 147 thereby dismissing ground No.1 and 2 related to validity of reopening the assessment u/s 147 of the I. T. Act.

2 On the facts and in the circumstances of the case and in law the C.I.T.(A) erred in disallowing depreciation Rs.32,11,389/- which may kindly be deleted.

3. On the facts and in the circumstances of the case and in law the C.I.T.(A) erred in confirming the addition of Rs.3,90,371/- on account of commission/professional consultancy income."

3. We have heard rival submissions and gone through the materials available on record. We note that all the present issues in this appeal are squarely covered by the Tribunal order in ITA Nos.334 to 337/Kol/2023 dated 05.02.2024 in assessee's own case, wherein the Co-ordinate Bench of this Tribunal has held and observed as under:

"5. Assessee is a partnership firm consisting of two partners viz., Shri Lokenath Bhattacharya and Shri Somnath Bhattacharya having equal shares in profit and loss of the firm. Assessee filed its return of income on 07.09.2009 reporting total income of Rs.1,84,45,230/-. The return was processed u/s. 143(1) dated 19.01.2011. Subsequently, case of the assessee was taken up by issuing notice u/s. 148 on 31.03.2016 after recording reasons for the issue of such notice. In the proceeding u/s. 148 read with 147 Ld. AO observed that assessee has claimed depreciation of Rs.32,78,068/- under section 32 of the Act on assets forming part of the block of assets i.e. buildings.

5.1. Further, Ld. AO noticed that during the course of assessment under section 143(3)/147 for A.Y.2013-14 and for the A.Y. 2010-11, the assessee had claimed depreciation on those buildings for which the assessee had also declared rental income under section 22 to 27 of the Act. The Ld. AO noticed with regard to the Land and Building at Hyderabad that the assessee has declared rental income and the said property was in-fact obtained under development agreement without incurring any cost. The assessee was claiming depreciation on the collector value of the said property. Hence, the assessee's share was in fact acquired by it without incurring any cost. Accordingly, claim of the assessee was rejected by the AO in the AYs 2010-11 and 2013-14.

5.2. According to the Ld. AO, as the assessee had shown rental income from the properties, no deduction other than those mentioned in section 22 to 27 of the Act can be allowed. Hence, the depreciation is not available under these sections. The contention of the assessee with regard to change of opinion was not accepted as in the case of the assessee, summary assessment was completed u/s 143(1). The Ld. AO had reopened the case for assessment by issuing notice u/s 148 on the basis of assessee's ITR for AY 2009-10, the completed assessment orders of A.Y. 2010-11, AY 2013-14 and Form 26AS for AY 2009-10.

5.3. Also, in reasons recorded by the AO, one of the reason was on the escapement of commission income declared in ITR as against reported in Form 26AS. According to the Ld. CIT(A), assessee in its submission admitted that necessary directions to be issued to the Ld. AO for passing order u/s 154. Hence, assessee's admission, with regards to the non offering of commission income, proved that the belief of the Ld. AO regarding escapement of Income on the commission income was correct. Ld. CIT(A) held that Ld. AO had enough material on record i.e. ITR of the appellant, completed assessment orders for AY 2010-11, AY 2013-14 and Form 26AS etc, to form the belief.

5.4. Before the Ld. CIT(A), assessee also contended that appeals for AYs 2010-11 and 2013-14 had been filed on the same issue and are pending and, therefore, no reassessment proceedings could be initiated for AY 2009-10 on

the same issue until the final outcome of those appeals. Ld. Counsel made detailed submission on this legal issue emphasizing on the change of opinion aspect for the action of Ld. AO. Assessee also claimed that issue relating to depreciation on block of assets had been examined by the Ld. AO in the original assessment proceedings and hence, opinion formed on this issue is nothing but change of opinion.

5.5. After considering the submissions made by the assessee, Ld. CIT(A) arrived at his findings to hold that case of the assessee was of return processed u/s. 143(1) and not a complete scrutiny assessment wherein none of the issues noted in the reasons to believe were considered. Thus, he disregarded the theory of change of opinion contested by the assessee. He also noted that reasons recorded included escapement of commission income declared in the return as against shown in Form 26AS. On this issue, he noted that assessee itself has admitted for necessary direction be issued to the Ld. AO for passing order u/s. 154 so as to include the commission income which remained to be offered in the return. Ld. CIT(A) also noted that intimation u/s. 143(1) was issued against which no appeal was filed by the assessee and thus there was no dispute which was pending at the appellate stage. Thus, considering all these contentions and submissions, Ld. CIT(A) held that belief of the AO regarding escapement of income was correct and he had enough material on record viz., return of the assessee, assessment orders for AY 2010-11 and 2013-14, form 26AS to form his belief. He thus, dismissed the legal ground raised by the assessee on the validity of assessment made u/s. 147.

6. From the above, we note that in determining whether the commencement of reassessment proceeding is valid or otherwise, it is only to be seen that there was prima facie some material on record on the basis of which AO can reopen the case. The sufficiency or correctness of the material is not a thing to be considered or questioned at this stage. Accordingly, we do not find any infirmity in the proceedings initiated u/s. 148 of the Act and assessment made u/s. 147 thereafter by the Ld. AO. Ground no.1 for AY 2009-10 and 2010-11 are dismissed.

7. Now, we take up the common issue in respect of disallowance of claim of depreciation on building which is relevant to all the four appeals before us.

8. Assessee had claimed depreciation of Rs.32,78,068/- in AY 2009-10 as reported in its audited financial statement. These claims relate to the following properties:

- (a) Land and building at Hyderabad.
- (b) Office premises (flat No. 3C, Rajhans, 6, Hastings Park Road, Kolkata
- (c) Office premises (flat No. 3D, Rajhans, 6, Hastings Park Road, Kolkata
- (d) Office premises at Hyderabad.

9. While disallowing the claim of depreciation on the above stated properties, Ld. AO observed that these properties were not used for the purpose of business of the assessee. Ld. AO also noted in respect of land and building at Hyderabad (property at Sl. No. (a) that the assessee had declared rental income in its return of Rs.68,74,281/- from this property under the head "Income from House Property" falling u/s. 22 to 27 of the Act. According to the Ld. AO, Part C of Chapter IV of the Act contains charging and computation part

of income from house property. The said part "C" of Chapter IV of the Act is a complete code in itself and no deduction other than those mentioned in section 22 to 27 can be granted while computing income from house property. Accordingly, deduction for depreciation is not available under these sections against the rental income from the aforesaid property. Ld. AO thus rejected the claim of assessee in respect of the depreciation in respect of this property.

9.1. Ld. AO also noted that assessee has obtained the said property under development agreement. According to him, no cost of acquisition has been incurred by the assessee for acquisition of asset since depreciation is to be allowed on the actual cost incurred as mandated u/s. 32 read with section 43(6) and 43(1) and explanation (4) to section 43 of the Act. Assessee was the owner of the land over which the building was developed by the developer as per the development agreement. Assessee was allotted 50% of the built up area and the remaining 50% of the built up area was retained by the developer. According to Ld. AO, the collector value and its stamp cost has been taken as cost of acquisition for which no evidence has been placed on record. The total collector value including the stamp value was at Rs.4,69,06,460/- and share of the assessee at 50% came to Rs.2,34,53,230/- which has been taken in the books of accounts, that is, the cost of acquisition on which depreciation has been charged.

9.2. According to the Ld. AO, the said property was obtained under development agreement by the assessee and collector value does not represent the actual cost incurred by the assessee. Ld. CIT(A) while dealing with this issue observed that if the contention of the assessee is accepted that the land was owned by it and the said asset was obtained in lieu of price of land, in that situation, only the price or value of the land can be considered to be the cost of 50% developed property obtained by it. According to him, assessee has valued the entire developed property and taken 50% of such value for claiming depreciation. Mere entry in the books of account and the collector value, more importantly, for the entire developed property to claim depreciation on the same was rejected.

10. Before us, Ld. CIT, DR on this issue asserted that finding of the Ld. AO in respect of rental income declared by the assessee itself on this property under the head income from house property has not been controverted by giving any proof or otherwise. According to him, the claim of depreciation on this property is not allowable since rental income from the said property has been computed by applying the provisions to section 22 to 27 wherein standard deduction is allowed.

11. We have heard the rival contentions and note that it is an uncontroverted fact that assessee has declared rental income from the said property in its return at Rs.68,74,281/- under the head "Income from House Property". We note that Part C of Chapter IV of the Act contains charging and computation part of income from house property which is the complete code in itself and no deduction other than those mentioned in section 22 to 27 of the Act can be granted for computing the income of the property. Accordingly, claim of deduction towards depreciation on the said property u/s. 32 is not available. We thus, do not find any reason to interfere in the finding given by the Ld. CIT(A) in this respect, upholding the disallowance on claim of depreciation made by the Ld. AO on this property.

11.1. While holding this, we note that Ld. Counsel had referred to the decision of Coordinate Bench of ITAT, Kolkata in the case of Nilgiri Oil & Allied Industries in ITA No. 939/Kol/2016 dated 14.02.2018. From the perusal of

the said decision, it is observed that the issue involved was in respect of invoking the revisionary proceedings u/s. 263 of the Act. This order was subjected to Miscellaneous Application vide MA No. 78/Kol/2018. While disposing the Misc. Application, Coordinate Bench noted that assessee has not shown any rental income from this property, fact of which was not controverted by the Ld. DR and, therefore, this property qualified for depreciation as it fell in the block of assets. The Coordinate Bench thus, partly allowed the Misc. Application upholding the jurisdiction to invoke revisionary proceedings. In the present case before us, assessee has reported income from the said property under the head "Income from House Property". Thus, only standard deduction can be given while computing income from house property u/s. 22 to 27 and depreciation u/s. 32 cannot be allowed on the same.

12. Now, we take up the disallowance of depreciation on the remaining three properties at Sl. No. (b), (c) and (d) listed above. In respect of these three properties, the main contention of the Ld. AO was that these properties were not being used for business purposes but were meant for residential use and were accordingly used for residential purpose only. According to Ld. AO, assessee had not proved the actual use of all these building for the purpose of business even though these assets have been reported as business assets in the books of account. In order to ascertain the veracity of claim made by the assessee in respect of these three properties, ld. AO deputed an Inspector to verify their actual use. Ld. AO had also called for opinion from Kolkata Municipal Corporation in respect of the relevant properties against which Kolkata Municipal Corporation informed that the said properties were being used for residential purposes. Ld. AO also further noted that there was no trade license obtained by the assessee in respect of conducting business from these premises. Even in the first appellate proceeding, Ld. CIT(A) observed that assessee could not submit any corroborative evidence to establish fact that assessee was earning its business or maintaining office from these properties. Ld. CIT(A) upheld the finding of the Ld. AO which was based on the reprot presented by Inspector on his enquiry and the letter of the Kolkata Municipal Corporation and that the properties were not applied for commercial use.

12.1. Before us, Ld. Counsel reiterated the submissions made before the authorities below. He submitted that accounts of the assessee proves that the business had been conducted and income derived therefrom is recorded in the books and that the auditor has also certified these books of account. He pointed out that from the accounts, it is clear that the assessee had conducted business from all the premises and, therefore, depreciation os to be allowd on the same. Ld. Sr. DR placed reliance on the orders of authorities below.

13. We have heard the rival contentions and perused the material available on record. We take note of the fact that the properties stated herein form part of the block of assets on which depreciation has been claimed u/s. 32 of the Act. In order to justify the claim of depreciation, the asset is ought to be used for the purpose of business. Ld. AO enquired about the fact of usage of these properties in the business and conducted the required enquiries with the help of deputing an Inspector and calling of information from Kolkata Municipal Corporation. Ld. CIT(A) also gave adequate opportunities to the assessee to establish with cogent material about the use of these properties for the purpose of conducting the business. Assessee has repeatedly harped on its submission that accounts of the assessee proves that the business has been

conducted from all these premises. Assessee has also placed on record certain bills relating to electricity and maintenance charge forming part of the paper book, which in our understanding do not, in any way, establish the fact of usage of these properties for the purpose of business. Such expenses are incurred even when these properties are used for residential purpose. We also note that assessment year 2009-10 was not subjected to scrutiny assessment but only the return was processed u/s. 143(1) of the Act even though assessee had contended that predecessor AO had concluded the original assessment, holding these properties as business properties after considering the audited accounts and the other particulars. Such a contention made by the assessee is devoid of merit.

14. Considering the facts on record and in absence of any cogent material brought on record to demonstrate conduct of business from these properties except for submitting certain documents relating to electricity and maintenance expenses as well as the discussion made above, we do not find any reason to interfere with the finding given by the Ld. CIT(A) to uphold the disallowance of claim of depreciation on these three properties. Accordingly, grounds taken by the assessee in this respect are dismissed.

15. We now take up ground no.2 raised by the assessee in AY 2010-11 and 2013-14 in respect of disallowance of depreciation and enhancement of rent from Katedan Godown. Along with this, we also take up ground no.3 in AY 2010-11 and 2013-14 and ground no.1 in AY2016-17 pertaining to enhancement of rent and estimation of rental income. Admittedly, it is undisputed that assessee has reported rental income from Katedan Godown against which it has claimed depreciation also. Ld. AO has treated the godown rent as income from house property by allowing 30% standard deduction. Further, Ld. AO has noted that the rental receipts had remained same when compared with the preceding years and, therefore, considering the general trend of annual increment in the rentals has enhanced it by 10%. Ld. CIT(A) has upheld the findings given by the Ld. AO and has confirmed the addition and disallowance made in this respect.

16. Before us, Ld. Counsel for the assessee did not make any submission to rebut the findings and observations of the authorities below. In respect of estimation of rental income, the issue of usage of the properties by the assessee and subsequent claim of depreciation on them has already been held against the assessee as discussed in the preceding paragraphs. It has been noted that assessee did not use the properties for its business and failed to substantiate the claim by producing any documentary evidence to establish that these were used for the purpose of business. Our observations and findings in this respect are already noted above. In view of these observations and findings, the estimation of rent on the said properties and disallowance of depreciation and maintenance charges which have been upheld by Ld. CIT(A), we do not find any reason to interfere on the said finding and accordingly, upheld the addition and disallowance made in this respect. Accordingly, grounds taken in this respect are dismissed.

17. Grounds in respect of addition made towards commission/professional consultancy income are vide ground no. 3 for AY 2009-10 and treatment of commission received by the assessee as income from other sources instead of business income are vide ground no. 4 in AYs 2010-11 and 2013-14. In AY 2013-14, assessee has also contested in the same ground no. 4 for treatment of interest income on FDR etc. On this issue as well as all other grounds, we have already noted that Ld. Counsel of the assessee has made no

submissions either oral or written in the course of hearing. We have perused the orders of authorities below and material available on record.

17.1. Assessee has submitted in the proceedings before the authorities below that clause 4 of its partnership deed provides for conduct of business for earning trade commission and thus claimed commission income as business income. Ld. AO had enquired from the assessee to prove with documentary evidence at same services had been rendered to the parties from whom commission income has been received. However, assessee could not furnish any documentary evidence in this respect and thus, Ld. AO treated it as income from other sources, which has been upheld by Ld. CIT(A). In respect of addition of professional consultancy receipt for AY 2009-10, nothing was brought on record to reconcile the income as reported in Form 26AS and as reported by the assessee in its return because of which the addition was sustained. Before us also, nothing is placed to verify the veracity of claim made by the assessee except for reference made before the authorities below clause contained in partnership deed which provides for earning of trade commission by the assessee.

17.2. Considering the facts on record and the observations made by authorities below, we do not find any reason to interfere with the same and upheld the treatment so made and addition made in this respect.”

4. Since facts are identical and issues are common and Ld. Counsel for the assessee could not controvert the findings of the Ld. CIT(A) by producing any cogent reason, we respectfully following the decision of the coordinate bench of this Tribunal dated 05.02.2024 dismiss all the grounds raised before us.

9. In the result, appeal of the assessee is dismissed.

Order is pronounced in the open court on 07th February, 2024

Sd/- (Dr. Manish Borad)
Accountant Member

Sd/- (Sanjay Garg)
Judicial Member

Dated: 07th February, 2024

JD, Sr. P.S.

Copy to:

1. The Appellant:
 2. The Respondent.
 3. CIT(A), NFAC, Delhi
 4. CIT
 5. DR, ITAT, Kolkata Bench, Kolkata
- //True Copy//

By order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata