

**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH, BANGALORE**

**BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
and
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER**

ITA No.1549/Bang/2012
(Assessment year: 2008-09)

M/s.Cyber Park Develoment & Construction Ltd.
Plot Nos.76 & 77, Electronic Phase I,
Hosur Road,
Bangalore-560 100. ... Appellant
PA No.AACCC1113H

Vs.

Deputy Commissioner of Income-tax,
Circle 11(2),
Bangalore. ... Respondent

Appellant by : Shri Padamchand Khincha, CA.
Respondent by : Shri Sunil Kumar Agarwal, JCIT(DR).

Date of hearing : 12/05/2016
Date of pronouncement : 30/06/2016

ORDER

Per INTURI RAMA RAO, AM :

This is an appeal filed by the assessee directed against the order of the CIT(A)-I, Bangalore, dated 31/08/2012 for the assessment year 2008-09.

2. The assessee raised the following grounds of appeal:

1.1 The order passed by the learned Commissioner of Income Tax (Appeals) I, Bangalore to the extent prejudicial to the

Page 2 of 11

appellant is bad in law and liable to be quashed.

- 2.1 *The learned CIT(A) I, Bangalore has erred in confirming the disallowance of depreciation amounting to Rs. 28,06,462/- claimed under section 32(1)(ii) in respect of business or commercial rights held by the appellant.*
- 2.2 *On facts and in the circumstances of the case and law applicable, depreciation in respect of business or commercial rights is to be allowed as claimed in the return of income.*
- 2.3 *Alternatively and without prejudice, the learned CIT(A) I, Bangalore has erred in not allowing*
 - (i) *the entire amount as revenue expenditure;*
 - (ii) *at least, the proportionate amount based on the numbers of years of lease as revenue expenditure.*
- 3.1 *The learned CIT(A) I, Bangalore has erred in directing the Assessing Officer to make disallowance under section 14A in accordance with rule 81(2)(iii).*
- 3.2 *On facts and in the circumstances of the case and law applicable, disallowance under section 14A read with rule 81(2)(iii) as confirmed by the learned CIT(A) I, Bangalore is to be deleted in entirety.*
- 4.1 *In view of the above and other grounds to be adduced at the time of hearing, the appellant prays that the order passed by the learned CIT(A) I, Bangalore to the extent prejudicial to the appellant be quashed*

Or in the alternative

 - (i) *Depreciation amounting to Rs. 28,06,462/- be allowed as claimed;*
 - (ii) *Disallowance under section 14A as sustained by the learned CIT(A) be deleted.*

Page 3 of 11

3. Briefly, facts of the case are that the assessee is a company duly incorporated under the provisions of the Companies Act, 1956. It is engaged in the business of development and maintenance of infrastructure facilities for software and related sectors. Return of income for the assessment year under consideration was filed on 30/09/2008 disclosing a total income of Rs.9,51,25,818/-. The said return of income was taken up for scrutiny assessment and the assessment was completed u/s 143(3) [hereinafter referred to as 'the Act' for short][hereinafter referred to as 'the Act' for short] vide order dated 30/09/2010 at a total income of Rs.9,87,23,674/-. While doing so, the AO disallowed depreciation claim on leasehold property and also made disallowance of Rs.7,91,394/- under the provisions of sec.14A treating the expenses incurred towards earning of exempt income.

4. The factual matrix leading to the impugned additions is as under: As stated earlier, assessee-company is in the business of development, and maintenance of infrastructure facilities for software and related sectors. For this purpose, it had taken land on lease for a period of 66 years from Software Technological Park of India (STPI). In consideration of granting the leasehold rights, assessee-company had developed 42,665 sq.ft. of space for use by STPI in terms of agreement entered into by it with STPI. The cost of development of this space was treated as cost

of leasehold rights treating as intangible asset, depreciation was claimed on this. It is the contention of the assessee-company that leasehold rights is nothing but a commercial right falling within the definition of intangible assets as defined u/s 32(1)(ii) of the Act. In support of this, assessee-company has relied on the decision of the Tribunal in the case of *Ashoka Info (P) Ltd., vs. ACIT* (123 TTJ 77 and *Skyline Caterers Pvt. Ltd. Vs. ITO* in ITA No.2965/Mum/07). An alternative claim was made before the AO that in case depreciation was disallowed for any reason, expenditure incurred towards development of commercial space given to STPI may be allowed as revenue expenditure and placing reliance on the decision of the Hon'ble Karnataka High Court in the case of *CIT vs. HMT Ltd.* (203 ITR 820) and Hon'ble Supreme Court decision in *CIT vs. Madras Auto Services* (233 ITR 468). The above contentions of the assessee were rejected by the AO by holding that the rights acquired are in the nature of land which is of capital asset and does not qualify for allowance of depreciation and it is also capital expenditure and therefore, cannot be allowed as revenue expenditure.

As regards the disallowance of Rs.7,91,394/-, the assessee-company made a deposit in HDFC Mutual Funds. During the course of assessment proceedings, the AO noticed that the assessee earned dividend from HDFC Mutual Funds. He further noticed that the assessee borrowed funds on interest which paid interest of Rs.2,29,54,519/- and therefore, inferred that borrowed

funds have been utilised for the purpose of making investment in HDFC mutual funds and by applying the formula of total expenditure multiplied by exempted income divided by total income arrived at a disallowance of Rs.7,91,394/-. The assessee's contention that no borrowed funds were utilised was rejected by the AO.

5. Being aggrieved, appeal was filed before the CIT(A) who vide impugned order, confirmed the disallowance of depreciation in the following words:

"...It is the contention of the appellant that the rights in the undivided portion of the land in terms of the agreement with STPI constitute intangible asset and is in the nature of a business or a commercial rights and eligible for depreciation. The appellant relied on various judicial decisions which are distinguished by the A,O in his report dated 27.07.2012 and I agreed with the same. The appellant would be eligible for depreciation if the asset is in the nature of intangible asset as provided in section 32(1)(ii) of the Act relevant IT Rules and the same is in the nature of know how copyrights, patents, licenses, franchises etc., it may be seen from the descriptions of the items they are all in the nature of movable assets. Whereas in the present case the rights obtained by the appellant relating to the immovable landed property, therefore, the appellant is not eligible for any depreciation. In view of this, the nature of the asset held by the appellant is akin to the nature of immovable property and does not qualify for any depreciation the detailed reasons given by the A.O in his assessment order and the Remand Report are justifiable. Hence the action of the AO is confirmed. The alternative claim of the appellant that the expenditure should be allowed as revenue expenditure is also rejected as the said expenditure was not incurred during the period under consideration."

However, in respect of disallowance u/s 14A, the CIT(A) directed the AO to consider disallowance under rule 8D(2)(iii) of the IT Rules, 1962.

6. Being aggrieved, assessee-company is before us in the present appeal.

6.1 Learned AR of the assessee-company contended that leasehold right on land constitutes an intangible asset as defined under the provisions of section 32(1)(ii) of the Act. Therefore, the claim of depreciation is allowable in light of the Hon'ble Supreme Court's judgment in the case of *CIT vs. Smifs Securities Ltd.*(348 ITR 302)(SC). As regards disallowance u/s 14A, learned AR of the assessee contended that the AO is not justified in making disallowance without recording a finding as to how the claim of the assessee that no expenditure was incurred for earning exempt income is incorrect. He further contended that the provisions of rule 8D(2)(iii) are also not applicable to the facts of the present case as sec.8(1) is not applicable. When there was no application of provisions of sec.8(1), question of invoking rule 8DD(2)(iii) does not arise. He also relied on the decision of jurisdictional High Court in the case of *CIT vs. Canara Bank* in ITRC No.382/2010 C/W ITA No.381/2010 and *Canara Bank vs. Asst.CIT* (99 DTR 36)(Kar.) in the context of provisions of 80M of the Act.

6.2 On the other hand, learned DR contended that on the plain meaning of the word intangible, nature of asset cannot be tangible whereas in the present case leasehold rights on land are nothing but interest in land which is nothing but land therefore is not eligible for depreciation. As regards the applicability of provisions of sec.14A, he contended that no exempt income can be earned without incurring any expenditure and therefore applicability of rule 14A cannot be ruled out. He further argued that the case-laws relied upon by the learned AR of the assessee-company are in context of provisions of sec.80M. Therefore, the ratio laid down in those cases is not applicable to the facts of the present case. He thus prayed for sustenance of the addition made by the AO.

7. We heard rival submissions and perused material on record. Ground Nos.1.1 and 4.1 are general in nature and do not require adjudication.

7.1 Ground No.2 relates to disallowance of depreciation claim on leasehold rights of Rs.28,06, 462/-. In this ground of appeal, we are required to adjudicate whether the leasehold rights fall within the term and scope of expression 'intangible asset' as defined under the provisions of sec.32(1)(ii) of the Act. There is no dispute about the cost of acquisition. The only dispute is with regard to nature of the asset acquired. Whether leasehold rights

par take character of land or intangible asset. Intangible asset has been defined under section 32(1)(ii) of the Act as follows:

"Depreciation.

32. (1) In respect of depreciation of—

(i) buildings, machinery, plant or furniture, being tangible assets;

(ii) know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998,

Owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed –

.....ö

Thus, the term 'intangible assets' has been defined being know-how, patents, copy rights, trade marks, license, franchises or any other business or commercial rights of similar nature. Obviously, leasehold rights on land do not fall in the category of above categories. It does not fall even in residuary category of any other business or commercial rights of similar nature. Because the term 'rights of similar nature' qualifies that even to fall under residuary clause, it should be in the nature of above know-how, patents, copy-rights, trade marks license or franchise. Applying the rule of *ejusdem generis* even to fall within the residuary category it should be in the nature of rights enumerated above. Further, definition of the term 'immovable property' is given in sec.3(26) of the General Clauses Act and it is defined as follows:

Page 9 of 11

“Immovable property shall include land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to earth”

Right of enjoyment to immovable property under a lease is immovable property within the meaning given in sec.103 of the Transfer of Property Act. Under sec.105 of the Transfer of Property Act, a lease creates a right or an interest in the enjoyment of the land property. [*Jaswantsingh Mathurasinh & another vs. Ahmedabad Municipal Corporation & another* (1 (1992)SCC 5,page.12

7.2 Having referred to the above legal position, we hold that by virtue of lease only an interest in land is created which does not qualify for allowance e of depreciation.

8. Now, we will deal with the alternative claim of the assessee-company that the cost incurred on development of commercial space given to STPI should be allowed as a revenue expenditure, as mentioned above, the expenditure is incurred for acquiring interest in the land which is capital in nature. Therefore, the question of allowing it as revenue expenditure does not arise at all. Hence, this ground of appeal filed by the assessee-company is dismissed.

9. Ground No.3 of appeal relates to disallowance made under the provisions of sec.14A of the Act. It is the claim of the assessee-company that no expenditure was incurred for the purpose of earning dividend income of HDFC Mutual Fund. It was

contended that no interest bearing funds were utilised for the purpose of making investment in HDFC Mutual Funds. However, the AO, taking note of the negative balance in the bank, after making investment in mutual funds, inferred that borrowed funds were utilized. However, it is settled proposition of law that where common pool of funds were utilized for making investment should be inferred that investments are out of own funds. The AO has not rendered any finding whether the claim of the assessee is incorrect.

When the assessee-company had not incurred any expenditure, the question of disallowance u/s 14A does not arise as per law laid down by the Hon'ble Karnataka High Court in the case of *Canara Bank vs. Asst.CIT* (99 DTR 36)(Kar.). Therefore, this ground of appeal is remitted back to the file of the AO for fresh adjudication in accordance with law.

10. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 30th June, 2016

sd/-
(SUNIL KUMAR YADAV)
JUDICIAL MEMBER

Place : Bangalore
D a t e d : 30/06/2016

sd/-
(INTURI RAMA RAO)
ACCOUNTANT MEMBER

srinivasulu, sps

Copy to :

- 1 Appellant
- 2 Respondent
- 3 CIT(A)-II Bangalore
- 4 CIT
- 5 DR, ITAT, Bangalore.
- 6 Guard file

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore