

आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई ।
IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, CHENNAI

श्री ए. मोहन अलंकामणी , लेखा सदस्य एवं श्री जी. पवन कुमार, न्यायिक सदस्य के समक्ष

BEFORE SHRI A.MOHAN ALANKAMONY, ACCOUNTANT MEMBER
AND SHRI. G. PAVAN KUMAR, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No.960/Mds/2015
निर्धारण वर्ष /Assessment year :2011-2012

M/s. OM Shakthy Hospitalities
Pvt. Ltd,
T.S. 64, Sidco Industrial Estate,
Guindy, Chennai 600 032.

Vs. The Deputy Commissioner of
Income Tax
Central Circle III(1)
Chennai.

[PANAABCO 0105A]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by

: Shri.N. Anush Shanker, C.A.

प्रत्यर्थी की ओर से /Respondent by

: Shri. R. Clement Ramesh Kumar, CIT.

सुनवाई की तारीख/Date of Hearing

: 26-05-2016

घोषणा की तारीख /Date of Pronouncement

: 28-06-2016

आदेश / O R D E R

PER G. PAVAN KUMAR, JUDICIAL MEMBER:

The appeal filed by the assessee is directed against order of the Commissioner of Income-tax (Appeals)-18, Chennai in ITA No.201/2014-15, dt 28.01.2015 for the assessment year 2011-2012

passed u/s.143(3) and 250 of the Income Tax Act, 1961 (herein after referred to as 'the Act').

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

- 1. The Learned CIT (A) has erred in upholding the order of the A.O. when the A.O. had wrongly made disallowance of expenditure, which was rightfully allowable under section 30 to section 37 of the Income tax Act.*
- 2. The Learned CIT (A) erred in upholding the disallowance made by the learned A.O, in spite of the appellant submission that the expenses were incurred during the trial period, which is after the construction period.*
- 3. Notwithstanding the above and without prejudice to the above, while holding that the expenditure incurred are of the nature incurred during the construction period, the Learned CIT (A) erred in not holding that the said expenditure is to be treated as Capital in nature and should have directed the Ld. A.O. accordingly”.*

3. The Brief facts of the case are that the assessee company was incorporated on 16.02.2008 in the financial year 2007-08 and in the Hotel business and filed Return of income on 30.09.2011 with loss of ₹2,33,84,423/- and case was selected for scrutiny and notice u/s.143(2) of the Act was issued. A questionnaire was issued u/s.142(1) of the Act. In compliance, the Id. Authorised Representative of assessee appeared from time to time and submitted details. The Id. Assessing Officer on perusal of the profit and loss account found that assessee has claimed loss of ₹2,33,84,423/- under

the head "Profit and Gains of Business or Profession" and is claimed to be carry forward for subsequent assessment year as the assessee company acquired the assets and are put to use. The Hotel RR INN, Tirunelveli, owned by assessee company was inaugurated on 02.05.2011. The disputed issue being the Id. Assessing Officer is of the opinion that the hotel was since inaugurated on 02.05.2011 falling in the financial year 2011-2012 relevant to assessment year 2012-2013, it is clear that the assessee did not carry on hotel business in the previous year and the claim of expenditure ₹2,31,20,691/- being bank charges and interest ₹1,36,65,460/-, Selling Expenses ₹1,81,295/-, Operational Expenses ₹4,37,645/- and Administrative Expenses ₹91,43,665/- cannot be allowed. The Id. Authorised Representative explained that expenses are pertaining to the operations of the hotel and referred in schedule 13 under operational expenses includes electricity, kitchen and gas cylinder charges. The claim being the Hotel has commenced its trail run with the facilities and was already setup and irrespective of fact, the inauguration took place in subsequent financial year. The Id. Assessing Officer relied on the decision of *CIT vs. Paem Hotel Pvt. Ltd 209 ITR 616(Bom)* and formed an opinion on perusal of the expenditure on each segment and discussed at page 4 of the order and concluded that the nature of expenditure claimed by

the assessee company in the profit and loss account incurred during construction of Hotel but not incurred for running the Hotel Business and not allowed the claim under the head " Profit and Gains of Business or Profession" as per the provisions of Sec. 28(1) of the Act and forfeited the carry forward of Business loss of ₹2,33,84,423 /- and passed order u/s.143(3) of the Act dated 31.03.2014. Aggrieved by the order, the assessee filed an appeal before Commissioner of Income Tax (Appeals).

4. In the appellate proceedings, the Id. Authorised Representative argued the grounds and explained the facts of the case and relied on the judicial decisions and emphasized that a unit cannot be set to have setup unless it is ready to discharge the functions for which it is setup. The expenditure incurred by the assessee company pertaining to the Hotel business and was ready to commence its operation. The Id. Commissioner of Income Tax (Appeals) considered the grounds, submissions, findings of the Assessing authority and concluded at para 7.1 of his order observing that the expenditure incurred by the assessee is during construction of hotel and not for running the hotel, though the assessee has admitted certain sum of income on scrap sales. With these findings, the Id. Commissioner of Income Tax (Appeals) has concurred with the opinion of the Id.

Assessing Officer and dismissed the appeal of the assessee. Aggrieved by the order, the assessee assailed an appeal before Tribunal.

5. Before us, the Id. Authorised Representative reiterated the submissions made in the assessment and appellate proceedings and relied on the judicial decisions. The contention of the Id. Authorised Representative that Commissioner of Income Tax (Appeals) erred in upholding the order of the Id. Assessing Officer for not allowing the claim of expenditure incurred by the assessee during trail period after construction period. Further, if expenditure has to be treated as capital in nature the same should have been directed to the Id. Assessing Officer and the Id. Commissioner of Income Tax (Appeals) has overlooked the decisions of Apex Court. The Id. Authorised Representative filed a copy of Memorandum of Association and statutory Audit report for the period 2010-2011 with judicial decisions supporting the case. Further, argued that the assessee company has incurred substantial amounts for operation and invested in fixed assets and the expenditure incurred on operational and administrative works are to be allowed u/s.37(1) of the Act and interest on borrowed capital be allowed as deduction u/s.36 (1)(iii) of the Act and emphasized on the definition of previous year u/sec. 3 of the Act and

provisions of sec. 37(1) of the Act. The expenditure incurred by the assessee company falls within the provisions and was incurred wholly and exclusively for the purpose of business. The fact that the assessee company Hotel was inaugurated on 02.05.2011 being auspicious date to commence sales. The activities of the business need not start simultaneously and the assessee company has incurred expenditure in the previous year though inauguration has taken place in next financial year. The assessee company did completed construction of the Hotel during previous year 2010-2011 and there is a distinction between setting up of business and commencement of business and always the commencement succeeds after setting up of business and prayed for allowing the appeal.

6. Contra, the Id. Departmental Representative relied on the orders of Assessing authority and argued that the proceedings are distinct and relied on the lower authorities findings and vehemently opposed the grounds.

7. We heard the rival submissions, perused the material on record and judicial decisions cited. The Id. Authorised Representative contentions are focussed on the business of the assessee company which is already setup and the expenditure is incurred before

commencement of commercial operations and these operational expenditure are in the nature of Revenue and to be allowable u/s.37(1) of the Act. The Id. Authorised Representative demonstrated by filing paper book were the main objects of the assessee is to "carry on the business of hotels, restaurant, motels, running cafeterias, caterers, taverns with facilities, such as permit rooms, refreshment rooms, lodging house keepers, licence victuallers and drive-on-restaurants, motel holiday camp, leisure center, caravan site, café beer house, boarding and lodging house keepers, clubs, baths, dressing room, laundries, reading, writing and newspaper rooms, libraries, grounds and place of amusements and recreation, sport, entertainment and apartment house proprietors". The assessee company was incorporated under the Companies Act in the year 2008 and Id. Authorised Representative drew attention to the Income Tax return filed for the assessment year 2011-12 and the statement of total income computed based on statutory Audited Accounts for the period from 01.04.2010 to 31.03.2011 and the assessee company has disclosed in schedule -10 other income ₹7,374/- pertains to sale of scrap. Further claimed expenditure under four headings, bank charges and interest, selling expenses, operational and administrative expenses and carry forward as Business loss. The definition of setup of business

in the common understanding is different. But actually when the business is established and is ready to commence operations, it is termed as business is setup and all the expenses incurred after setting up of business and before commencement of business are Revenue in nature and to be allowed. The Id. Authorised Representative produced ledger accounts copies of expenditure including work in progress to substantiate the claim that maximum infrastructure has been Built for the Hotel and the business is set up. Further on a query from the Bench, the Id. Authorised Representative substantiated the claim of business setup in previous year and filed a letter of the Asst. Commissioner, Thatchanallor Ward Office, Tirunelveli Dist, No.E1/3730/2010, dated 02.06.2010 issued for underground licence and also permission of Food Adulteration licence. The Id. Departmental Representative objected to the fresh evidence filed out of assessment records and the Id. Assessing Officer was deprived to verify the document and satisfying with genuineness of Business operations are setup. So, considering the apparent facts, material on record and the fresh evidence filed, we set aside the issue to the file of the Id. Assessing Officer to verify the evidence filed before Tribunal that the business has been setup and expenditure being Revenue in

nature and we remit the entire issue to the file of the Id. Assessing Officer for fresh consideration.

8. In the result, the appeal of the assessee is allowed for statistical purpose.

Order pronounced on Tuesday, the 28th day of June, 2016 at Chennai.

Sd/-

(ए. मोहन अलंकामणी)

(A. MOHAN ALANKAMONY)

लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(जी. पवन कुमार)

(G. PAVAN KUMAR)

न्यायिक सदस्य /JUDICIAL MEMBER

चेन्नई/Chennai

दिनांक/Dated:28th June, 2016.

KV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF