

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "C" KOLKATA**

Before **Shri N.V.Vasudevan, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

| |
|--|
| ITA No.350/Kol/2013 Assessment Year :2009-10 |
|--|

| | | |
|---|-------------|---|
| ITO Ward-7(3), P-7, Chowringhee Square, R.No. 17, 5 th Floor, Kolkata- 700 069 | V/s. | M/s Shree Banke Behari Enterprises Pvt. Ltd. 37, Shakespeare Sarani, Kolkata-700 017 [PAN No.AADCS 6914 C] |
| अपीलार्थी /Appellant | .. | प्रत्यर्थी/Respondent |

| | |
|--------------------------------------|---------------------------------|
| अपीलार्थी की ओर से/By Appellant | Shri Uday Kumar Sardar, JCIT-DR |
| प्रत्यर्थी की ओर से/By Respondent | Shri S.M.Gupta, AR |
| सुनवाई की तारीख/Date of Hearing | 04-07-2016 |
| घोषणा की तारीख/Date of Pronouncement | 26-08-2016 |

आदेश /ORDER

PER Waseem Ahmed, Accountant Member:-

This appeal by the Revenue is arising out of order of Commissioner of Income Tax (Appeals)-VIII, Kolkata in appeal No.172/CIT(A)-VIII/Kol/11-12 dated 14.12.2012. Assessment was framed by ITO Ward-7(3), Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 13.12.2011 for assessment year 2009-10. Grounds raised by Revenue per its appeal are as under:-

"1. That on the fact and circumstances of the case and in law the Ld. C.I.T.(A)-VIII, Kolkata has erred in not appreciating the fact that the

*assessing officer has rightly computed the value of closing stock where the assessee did not furnish the qualitative analysis of closing stock and as such is coming under the ambit of section 145 of the IT Act, 1961 and deleted the addition of Rs.30,37,993/- under the head “**Undisclosed Sales**” holding that the calculation of valuation of closing stock is not done properly by the Assessing Officer as well as arbitrarily held that the assessee has shown the value of closing stock at a price more than average cost.*

*2. That on the fact and circumstances of the case and in law the Ld. CIT(A)-VIII, Kolkata has erred in deleting the addition under the head “**Depreciation on an ownership flat**” for Rs.1,14,648/- and “**Depreciation on an ownership shop**” for Rs.1,51,255/- in not considering the decision of the Hon'ble Supreme Court in CIT – vs – AIPS Theatre (1967) 65 ITR 377 (SC) in its proper perspective.*

3. The appellant craves leave to ad, alter or abrogate any ground of appeal at the time of hearing.”

Shri S.M. Gupta, Ld. Authorized Representative appeared on behalf of assessee and Shri Uday Kumar Sardar, Ld. Departmental Representative appeared on behalf Revenue.

2. First issue raised by the Revenue is that Id. CIT(A) erred in deleting the addition made by the AO on account of undisclosed sales amounting to Rs. 30,07,993/-.

3. The AO during assessment proceedings observed the assessee has not filled column 28A of tax audit report with regard to the closing stock. Later, on demand of the AO, the assessee has produced details of stock with quantity as well as amount which is as under:-

“The following is the details of the stock for the accounting year 2008-09 of the company

| | | |
|-------------------------|------------------|----------------------------|
| <i>1. Opening stock</i> | <i>2982 pcs</i> | <i>Rs.24,30,650/-</i> |
| <i>2. Purchases</i> | <i>21482 pcs</i> | <i>Rs.3,72,95,387/-</i> |
| <i>3. Sales</i> | <i>18880 pcs</i> | <i>Rs.3,27,51,391.91/-</i> |
| <i>4. Closing stock</i> | <i>5584 pcs</i> | <i>Rs.1,10,95,279/-</i> |

It was observed by the AO that the qualitative analysis of the stock has not furnished, therefore the cost of each item of the stock cannot be determined. Accordingly the AO applied the average pricing method and worked out cost of the goods sold on the basis of per saree which comes to Rs. 1516.45 (2,86,30,758/- 18880 =1516.45). The cost of goods sold was worked out at Rs. 2,86,30,758.00 (24,30,650+3,72,95,387-1,10,95,279.00). The AO further applied this average rate of per saree to determine the value of the closing stock in terms of quantity by dividing the value of closing stock with the average rate which comes out 7319 pieces of sarees (1,10,95,729/1516.45= 7319). As per the AO the closing quantity of the saree should have been 7319 but the assessee has shown the same at 5584 pieces of saree as closing stock. So the difference of 1734 is shortage of stock which the assessee has sold outside the books. The value of undisclosed sale of 1734 pieces of sarees comes to Rs.30,07,993/-. The AO accordingly has added it to the income of the assessee as undisclosed sales.

4. Aggrieved assessee preferred an appeal to Id. CIT(A) who deleted the addition made by the AO by observing that the method of valuation adopted by the assessee is consistent. It cannot be rejected merely because it will hamper the revenue. AO has not found any actual defect in the valuation of closing stock. AO has not found any defect in the books of accounts. Even if the average cost method is applied then also the AO calculation is not done properly and closing stock, 5584 pieces of sarees @ 1624 per piece = 90,68,416/- on the average price of the opening stock and purchases during the year(24,30,650 + 3,72,95,387=3,97,26,037.00/ 24464). While assessee has shown the closing stock valuing 1,10,95,279/-.

Being aggrieved by the order of Id. CIT(A) Revenue is in appeal before us.

5. Before us both the parties relied on the order of authorities below as favourable to them. Ld. AR submitted paper book which is running pages from 1 to 81.

6. We have heard the rival contentions and perused the materials available on record. From the aforesaid discussion we find that the AO raised the issue for the undisclosed sale due to non-availability of information with regard to the quantitative details of the opening stock, purchases and sales, closing stock along with their respective values in the tax audit report. During the proceedings the details were furnished by the assessee but the AO rejected the same and worked out the undisclosed sale as discussed above. At the outset, we find that AO has made the addition on surmise and conjecture without pointing out any defect in the audited financial statement. The AO has failed to bring any defect in the submission of the assessee. In the case of deviation of the Accounting standard the AO should have rejected the books of accounts but he chose not to do so. In view of above we find no infirmity in the order of Ld. CIT(A). Accordingly, we uphold the same. Ground raised by Revenue is dismissed.

7. Next issue raised by Revenue is that Id. CIT(A) erred in deleting the addition made by the AO on account of depreciation charged on buildings.

8. It was observed by the AO that Column no. 14 and Annexure A are missing from the Tax Audit Report with regard to the depreciation. On demand, assessee has provided the annexure showing the details of depreciation claimed by it on two properties i.e. "**Ownership flat**" @5% and "**ownership shop**" @ 10%. Here AO observed that depreciation has been claimed on land as well which is not allowed. Assessee submitted that price paid was for specific area of built up space. Nothing was paid specifically for land and thus depreciation is allowed on entire value. However, the AO relying on the judgment of Hon'ble Supreme Court in the case of CIT Vs. AIPS

Theatre 65 ITR 377 and ITAT Bench Delhi in the case of DCIT Vs Capital Car Private Limited reported 114 ITD 286 (Delhi) has assumed the one third value of property as land and thus disallowed the proportionate depreciation on both the property amounting to Rs. 2,65,903/- (114648.00 plus 1,51,255).

9. Aggrieved, assessee preferred an appeal to Id. CIT(A) who has deleted the addition made by the AO by observing that AO has assumed one third of the cost as land cost but there is no any material to support his findings. When price of land and building is not identifiable then and payment is a composite payment entire payment will be allowed for depreciation.

Being aggrieved by the order of Id. CIT(A) Revenue is in appeal before us.

10. Before us Ld. DR relied on the order of AO whereas Ld. AR relied on the order of Ld. CIT(A).

11. We have heard the rival contentions and perused the materials available on record. At the outset, we find that assessee claimed to have made the investment in the aforesaid properties by paying composite amount. However, this fact has not been brought on record by Ld. AR whether it was composite payment for the land & building. In the instant case the AO has relied in the order of CIT Vs. AIPS Theatre 65 ITR 377 and DCIT Vs Capital Car Private Limited reported, *supra* for disallowing the depreciation. However in our view the facts were different in that case because the value for the building and land was separately available but this is no so in the present case. The details of the Hon'ble Supreme Court decision stand as under :

"This question arose out of the following facts : The respondent, M/s Alps Theatre, hereinafter referred to as 'the assessee', carries on business as exhibitor of films. The ITO initiated proceedings under s. 34(1)(b) of the Indian IT Act, 1922, on the ground that in the original assessment depreciation was allowed on the entire cost of Rs. 85,091

shown as cost of the building which included Rs. 12,000 as cost of land. The ITO, by his order dt. 22nd Feb., 1959, recomputed the depreciation, excluding cost of land. The assessee appealed to the AAC. The AAC upheld the order of the ITO. The assessee then appealed to the Tribunal which accepted the appeal. In accepting the appeal it observed as follows :

"You cannot conceive of a building without the land beneath it. It is not possible to conceive of a building without a bottom. What s. 10(2)(vi) of the Act says is that depreciation will be allowed on the building. The word "building" itself connotes the land upon which something has been constructed. It was, therefore, wrong on the part of the authorities below to exclude the value of the land upon which some construction was made. The true meaning of the word 'building' means the land upon which some construction has been made. The two must necessarily go together."

From the above details it is clear that the facts are different with the instant case. Similar facts were there in the case of DCIT Vs Capital Car Private Limited reported. However we find that on similar facts where the rates of the building are composite with the land then the Hon,ble Tribunal of Bangalore has decided the issue in favour of the assessee in the case of CIT Vs. Rajesh Exports Ltd. (2006) 9 SOT 28. The relevant extract is reproduced below:-

"Where the assessee purchase a building and the purchase price (as per sale deed) is a composite one (sale deed does not indicate the prices of land and building separately), then no distinction at least in the consideration paid to the vendor can be made and the entire amount is qualified for depreciation. However, if there is a clear cut identity in respect of price paid to the land and building (i.e. sale deed indicates price of land and building separately), then depreciation is available only on the building."

In the instant case, the Id. AR has not brought produced the details of the payment of the composite payment. But he requested to restore the issue to the AO for verification and the Id. DR raised no objection if the same is restored to the AO. Therefore, in the interest of justice and fair play we restore this matter to the file of AO with the direction that in case the assessee has made the composite payment for the purpose of aforesaid properties, then the

depreciation as per the order of Ld. CIT(A) should be allowed. Hence, this ground of Revenue's appeal is allowed for statistical purpose.

12. Third issue in this appeal of Revenue is general in nature and does not require any separate adjudication.

13. **In the result, Revenue's appeal stands partly allowed for statistical purpose.**

Order pronounced in the open court 26/08/2016

Sd/-
(न्यायिक सदस्य)
(N.V.Vasudevan)
(Judicial Member)
Kolkata,

Sd/-
(लेखा सदस्य)
(Waseem Ahmed)
(Accountant Member)

*Dkp

दिनांक:- 26/08/2016 कोलकाता ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-ITO Ward-7(3), P-7, Chowringhee Square, R.No.17, 5th Fl, Kol-69
2. प्रत्यर्थी/Respondent-M/s Shree Banke Behari Enterprises Pvt. Ltd., 37, Shakespeare Sarani, Kolkata-700 017
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।