

**IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH : BANGALORE**

**BEFORE SHRI A. K. GARODIA, ACCOUNTANT MEMBER AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA No. 525/Bang/2018
Assessment year : 2014 – 15

M/s Mantri Developers Private Limited, #41, Mantri House, Vittal Malya Road, Bangalore – 560001 PAN : AAACG4009N	Vs.	DCIT Circle – 4 (1) (2), Bengaluru
APPELLANT		RESPONDENT

Assessee by	:	Shree V. Srinivasan, Advocate
Revenue by	:	Shree Muzaffar Hussain, CIT DR
Date of hearing	:	09.09.2020
Date of Pronouncement	:	27.10.2020

ORDER

PER ARUN KUMAR GARODIA, A. M.:

This appeal is filed by the assessee and the same is directed against the order of learned CIT (A) – 4 Bengaluru dated 30.11.2017.

2. The Grounds raised by the assessee are as under:-

1. *The orders of the authorities below in so far as they are against the appellant, are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.*

2. *The learned CIT[A] is not justified in upholding the disallowance in respect of depreciation claimed by the appellant on the building known as "Business ® Mantri" at Pune to the extent of Rs.9,65 57 179/- holding that the appellant has not put the*

aforesaid asset to use during the year under appeal under the facts and in the circumstances of the appellant's case.

3. The learned CIT[A] is not justified in upholding the disallowance of Rs.6,05,41,088/- being interest claimed paid u/s.36[1][iii] of the Act in respect of the amounts borrowed for construction of the building holding that the appellant has not put the building to use during the year under appeal under the facts and in the circumstances of the appellant's case.

3.1 Without prejudice to the above, the learned CIT[A] ought to have appreciated that the proviso to sec. 36[1][iii] of the Act has no application to the capital borrowed by the appellant for the building "Business @ Mantri" at Pune as the said capital borrowed was not in connection with extension of business and hence, the interest ought to have been allowed.

4. The learned CIT[A] is not justified in upholding the A.O.'s refusal to deduct a sum of Rs. 6,73,97,716/- from out of the taxable income being the deemed dividend that was erroneously reported by the appellant in the return of income under the facts and in the circumstances of the appellant's case.

5. Without prejudice to the right to seek waiver with the Hon'ble CCIT/DG, the appellant denies itself liable to be charged to interest u/s 234-B, of the Act, which under the facts and in the circumstances of the appellant's case and the levy deserves to be cancelled.

6. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs.

3. In course of hearing, learned AR of the assessee submitted that although in ground No. 2 and 3, the issue involved is different because in Ground No. 2, the grievance of the assessee is about disallowance of Depreciation of Rs. 965,57,179/- on the building known as "Business @

Mantri “at Pune and in Ground No. 3, the grievance of the assessee is about disallowance of interest of Rs. 605,41,088/- u/s 36 (1) (iii) in respect of funds borrowed for construction of the same building known as “Business @ Mantri” at Pune but the basis of both these disallowances is same by alleging that the said building was not put to use by the assessee in the present year. He submitted that Final Completion Certificate of the building is dated 24.09.2013 as per the certificate issued by Pune Municipal Corporation available on page 64 of the paper book (photocopy of the original in vernacular) and on page 65 of the paper book is the translated copy in English. He submitted that there are several judicial pronouncements in which it is held that for interpretation of the term “Used for the purpose of business”, it is enough if the asset is ready for use and actual use is not a precondition. In this regard, he placed reliance on the following judgments, copy available in case Law Paper Book.

- (a) CIT vs. Chamundeswari Sugar Limited, 309 ITR 326 (kar.),
- (b) CIT vs. E. I. H. Ltd., 54 DTR 249 (Cal.),
- (c) CIT vs. Oswal Agro Mills Pvt. Ltd., 341 ITR 467 (Del.),
- (d) CIT vs. Premier Industries (India) Ltd., 323 ITR 672 (M. P.)

4. At this juncture, this was a query of the bench as to when the building was let out. In reply, it was submitted by the learned AR of the assessee that the building in question was let out as per Lease Deed dated 31.01.2013, copy available on pages 92 to 169 of the paper book. He pointed out that on page 96 of the paper book, it is specified that the Lease commencement date is 31.01.2013 and the term of lease is 15 years expiring on 30.01.2028 and on page 97 of the paper book, it is specified that the Rent Commencement Date is 01.08.2013 (or occupation by the Lessee, whichever is earlier) for the First and Third Tranches and it is 01.07.2014 (or occupation by the Lessee, whichever is earlier) for the Second Tranche. At this juncture, this was the query of the bench as to why, no rental income is declared by the assessee in the present year and why it is not brought to tax by the AO also when rent commencement date is 01.08.2013. In reply, learned AR of the assessee submitted that such detail is not readily available with him and he will file written submissions along with evidence in this regard within three days and accordingly, he filed Memo of Clarification on 11.09.2020 along with Deed of Cancellation of Lease Deed between the assessee company and HSBC Software Development (India) Private Limited dated 12.07.2013. For ready reference, we reproduce the contents of this Memo of Clarification for ready reference, it reads as under:-

“I, V. SRINIVASAN, Advocate and Authorised Representative of the above appellant, beg to submit that during the course of hearing, the Hon'ble Bench desired the undersigned to file a submission / clarification on the reasons as to why the appellant has not offered to tax the notional rent from M/s.HSBC Software Development [I] Pvt. Ltd., [hereinafter for short "HSBC"] from August, 2013 to March, 2014 in terms of the lease deed dated 31/01/2013 and in this connection, and under instructions from the above appellant, I beg to submit

the following for the kind consideration of the Hon'ble Bench as under:-

1. *It is true that the appellant has entered into a lease agreement dated 31/01/2013 with M/s. HSBC, which is placed at **page 92 to 169 of the Paper book**. In terms of the said agreement, the lease commencement date as per clause [I] at page [96] is 31/01/2013. Furthermore, in terms of the said lease agreement, the rent commencement date was from 01/08/2013. As per the lease agreement and based on the fit-out clause wherein it was agreed that the lessee shall not pay to the lessor lease rent but shall be liable to pay the electricity charges during the fit-out period [See page [101]], the learned A.O. and CIT[A] had taken the view that the building was not ready as the fit out period had not commenced during the year as the appellant itself had borne the electricity charges. It was always the appellant's case that the building was ready to use since it had received the occupancy certificate dated 24/09/2013 itself. In course of hearing, the Hon'ble Bench desired to know why notional rent was not offered to tax by the appellant based on the lease agreement dated 31/01/2013.*

2. *It is submitted that the appellant did not receive any rent as per the aforesaid lease agreement dated 31/01/2013 entered into with M/s. HSBC, which came to be cancelled vide deed of cancellation dated 12/07/2013, a copy of which is enclosed herewith as Annexure-1. The relevant clause of the deed of cancellation dated 12/07/2013 is reproduced below for the sake of facility:*

"C. Due to diverse reasons and circumstances including revised terms negotiated between HSBC and MDPL, which the parties were unable to execute in a mutually beneficial way, as discussed between the Parties over a meeting dated 17th April, 2013, held in Pune attended by Mr. Paul Ward, Mr. Mukesh Hemrajani, Mr. Sushil Mantri and Mr. Juggy Marwaha. In lieu of the above both parties agreed, therefore that it would not be feasible or possible for the Parties to proceed with the transaction contemplated under the said Lease Deed and the

Parties hereto have mutually and amicably agreed to cancel / terminate the said Lease Deed".

3. *In as much as the lease deed entered into by the appellant with M/s HSBC was cancelled, there was no income during the year from the building at Pune which is ready for use as evidenced by the Occupancy Certificate dated 24/09/2013 [Placed at page 65 of Paper Book] and electricity bills from October 2013 [Placed at pages 84 to 89 of Paper Book]. Hence, no notional rent or real rent arises in the appellant's case for the year under appeal based on the lease deed dated 31/01/2013 from 1st August 2013.*

4. *It may also be mentioned here that subsequently, the appellant has entered into a lease agreement with M/s.Vodofone India Services Pvt. Ltd., dated 12/02/2015 [See pages 170 to 238 of Paper Book] and the appellant has offered the rental income to tax during the assessment year 2015-16."*

5. As against this, learned DR of the revenue supported the assessment order and the order of CIT (A). He pointed out that in para 4.4 of the assessment order, it is noted by the AO that the building was leased out to M/s HSBC Software Development India Pvt. Ltd. on 30.01.2013 on the condition that all the relevant statutory approvals and construction of the building is completed. He pointed out that the tenant could not occupy the building in the present year because the assessee could not get relevant approvals and the building was occupied by the lessee (a different Lessee) only in AY 2015 – 16. He submitted that under these facts, it is clear that the building in question was not put to use in the present year and therefore, the claim of the assessee for depreciation and interest is not allowable in the present year.

6. We have considered the rival submissions. We find that although a Lease Deed is executed between the assessee company and M/s HSBC Software Development India Pvt. Ltd. on 30.01.2013 but the same is cancelled

on 12.07.2013 i.e. before Rent Commencement Date is 01.08.2013 and before the Final Completion as per Final Completion Certificate dated 24.09.2013 issued by Pune Municipal Corporation available on pages 64 and 65 of the paper Book. Under these facts, this Lease Deed date 31.01.2013 was although not acted upon but it makes it clear that the assessee company was making efforts to lease out this building since 31.01.2013 i.e. before the completion of the building on 24.09.2013 and therefore, this claim of the assessee has merit that the building in question was although not actually used on 24.09.2013 but it was ready to use from this date i.e. 24.09.2013. Under these facts, we examine the applicability of various judgments on which reliance is placed by the learned AR of the assessee as noted above.

7. The first judgment cited by him is the judgment of Hon'ble Karnataka High Court rendered in the case of CIT vs. Chamundeswari Sugar Limited (Supra). As per the facts noted in first para of this judgment, it is noted that in that case, the assessee company was running a sugar factory and as per the mandate of Pollution Control Board, the assessee in that case, installed certain Pollution Control Machinery and claimed depreciation to the extent of value of the machinery installed but the AO disallowed this claim because he found that the Machinery that was installed was found to be defective during the trial runs. This disallowance of depreciation was deleted by CIT (A) and tribunal

in that case by holding that since the Machinery was installed and merely because it did not effectively function is not a valid ground to reject the claim of depreciation. An appeal was filed by the revenue before the Hon'ble Karnataka High Court in that case. Under these facts of that case as noted above, Hon'ble Karnataka high Court decided the issue in favour of the assessee and its relevant para is reproduced hereinbelow for ready reference from page 2 of the case law Paper Book.

The interpretation of "used for the purpose of business" by the hon'ble Supreme Court in the decision cited lays down that machinery should be installed. The observation of the hon'ble Supreme Court does not deal with a situation when the machinery installed becomes defective and does not function, in such case whether it could be said that machinery was not used for the purpose of business.

The purport and object of law relating to depreciation as envisaged under section 32 of the Income-tax Act, 1961, has to be meaningfully interpreted, consistent with the object. When the assessee bona fide installs any machinery and to his misfortune, it becomes defective and non-functional, it cannot be said that it is not put into use for the purpose of business may be the installation might have entailed the loss to him. Nonetheless, such a situation cannot be called as the one where the machinery was not put into use for the purpose of business. Hence, the view taken by the Tribunal in granting depreciation is sound and proper.

8. In that case, Hon'ble Karnataka High Court followed a judgment of Hon'ble apex court rendered in the case of Liquidators of Pursa Ltd. Vs. CIT as reported in 25 ITR 265 and reproduced a relevant para of that judgment of

Hon'ble apex court and for ready reference, we also reproduce that para from page 2 of the case law Paper Book.

The State is in appeal against the order of depreciation. Sri M. V. Seshachala, learned counsel for the appellants relied on the decision of the hon'ble Supreme Court in *Liquidators of Pursa Ltd. v. CIT* [1954] 25 ITR 265. At page 272, the following observation is made by the hon'ble Supreme Court :

"Indeed, the position has been made clear and placed beyond any doubt by the subsequent amendment of 1946 which added the word 'such' in clause (vii). The words 'used for the purposes of the business' obviously mean used for the purpose of enabling the owner to carry on the business and earn profits in the business. In other words, the machinery or plant must be used for the purpose of that business which is actually carried on and the profits of which are assessable under section 10(1). The word 'used' has been read in some of the pool cases in a wide sense so as to include a passive as well as active user. It is not necessary, for the purposes of the present appeal, to express any opinion on that point on which the High Courts have expressed different views. It is, however, clear that in order to attract the operation of clauses (v), (vi) and (vii) the machinery and plant must be such as were used, in whatever sense that word is taken, at least for a part of the accounting year. If the machinery and plant have not at all been used at any time during the accounting year no allowance can be claimed under clause (vii) in respect of them and the second proviso also does not come into operation."

9. Hence, it is seen that as per this Judgment of Hon'ble apex court, "the words "used for the purpose of business" mean used for the purpose of enabling the owner to carry on business and earn profits in the business. If we apply this test in the present case, we find that when the building in question was certified to be ready for use as per Final Completion Certificate of the

building dated 24.09.2013 issued by Pune Municipal Corporation available in the paper book, it should be accepted that this event i.e. issue of Final Completion Certificate of the building dated 24.09.2013 issued by Pune Municipal Corporation enabled the owner of the building i.e. the present assessee to carry on business and earn profits in the business and this fact that the Lease Deed dated 31.01.2013 was cancelled before the date of completion and second lease deed is dated 12.02.2015 only, cannot determine the date of use of the building for the purpose of business as 12.02.2015 which is the date of actual use. It is very important to note that as per section 32 (1) of Income Tax Act, this is not the requirement that the asset should be actually used in business but the requirement is this that the asset is used for the purposes of the business. This is not in dispute that the assessee is in the business of leasing out building and once the building is completed, it is being used for the purposes of the business. The concept of ready to use is available in the Income Tax Act also because we find that as per section 22 & 23 of Income Tax Act, the provisions are as under:-

“Income from house property.

Section 22:- The annual value of property consisting of any buildings or lands appurtenant thereto of which the assessee is the owner, other than such portions of such property as he may occupy for the purposes of any business or profession carried on by him the profits of which are chargeable to income-tax, shall be chargeable to income-tax under the head "Income from house property".

Annual value how determined.

Section 23. (1) For the purposes of [section 22](#), the annual value of any property shall be deemed to be—

- (a) the sum for which the property might reasonably be expected to let from year to year; or
- (b) where the property or any part of the property is let and the actual rent received or receivable by the owner in respect thereof is in excess of the sum referred to in clause (a), the amount so received or receivable; or
- (c) where the property or any part of the property is let and was vacant during the whole or any part of the previous year and owing to such vacancy the actual rent received or receivable by the owner in respect thereof is less than the sum referred to in clause (a), the amount so received or receivable:

Provided that the taxes levied by any local authority in respect of the property shall be deducted (irrespective of the previous year in which the liability to pay such taxes was incurred by the owner according to the method of accounting regularly employed by him) in determining the annual value of the property of that previous year in which such taxes are actually paid by him.

Explanation.—For the purposes of clause (b) or clause (c) of this sub-section, the amount of actual rent received or receivable by the owner shall not include, subject to such rules as may be made in this behalf, the amount of rent which the owner cannot realise.

(2) Where the property consists of a house or part of a house which—

- (a) is in the occupation of the owner for the purposes of his own residence; or
- (b) cannot actually be occupied by the owner by reason of the fact that owing to his employment, business or profession carried on at any other place, he has to reside at that other place in a building not belonging to him,

the annual value of such house or part of the house shall be taken to be *nil*.

(3) The provisions of sub-section (2) shall not apply if—

- (a) the house or part of the house is actually let during the whole or any part of the previous year; or
- (b) any other benefit therefrom is derived by the owner.

(4) Where the property referred to in sub-section (2) consists of more than ²⁹[one house]—

- (a) the provisions of that sub-section shall apply only in respect of ³⁰[one] of such houses, which the assessee may, at his option, specify in this behalf;
- (b) the annual value of the house or houses, ³¹[other than the house] in respect of which the assessee has exercised an option under clause (a), shall be determined under sub-section (1) as if such house or houses had been let.

(5) Where the property consisting of any building or land appurtenant thereto is held as stock-in-trade and the property or any part of the property is not let during the

whole or any part of the previous year, the annual value of such property or part of the property, for the period up to ³²[one year] from the end of the financial year in which the certificate of completion of construction of the property is obtained from the competent authority, shall be taken to be *nil*.

10. As per these provisions, even if the building is not actually let out and the assessee is not occupying the same for the purpose of business, Annual Value of the building is to be estimated at the sum for which the property might reasonably be expected to let from year to year and it is brought to tax. Hence, actual use is not a precondition to bring the property to tax under the head Income from House Property. Section 22 is not applicable in a case where the property is occupied by the assessee for business purpose and we find that in the present case, the property is ready on 24.09.2013 but still, the AO has not brought its Annual Value to tax in the present year under the head Income from House Property and this also indicates in our opinion that the AO also accepts silently that the building in question is occupied by the assessee for business purpose and he states this objection only that it was not put to use in the present year because actual let out has happened subsequently. Hence, by respectfully following the judgments noted above, we hold that the AO should allow the claim of depreciation on this basis that the building was put to use for the purposes of the business on 24.09.2013 i.e. the date of completion and keeping this in mind that the assessee was already in the hunt for lessee and keeping this also in the mind that this is not the case

of the AO or CIT (A) that income from this house property is taxable under the head income from house property and not under the head income from business because had it been the case of the AO or CIT (A), Annual Value would have been brought to tax and deduction would have been allowed of interest u/s 24 and only depreciation would have been disallowed.

11. Now we decide the issue about allowability of interest u/s 36 (1) (iii). For disallowance of interest, the AO has invoked the provisions of the proviso to section 36 (1) (iii) and the argument of the learned AR of the assessee is this that if depreciation is allowable, interest is also allowable. As per learned CIT (A) also, for the same reasons due to which he has confirmed the disallowance of depreciation, he has confirmed the disallowance of interest also and no new or different reason is given by him for confirming the disallowance of interest. In our considered opinion also, the requirement of section 32 and proviso to section 36 (1) (iii) is similar and once, we hold that the building was put to use and depreciation is allowable, the conditions specified in this proviso to section 36 (1) (iii) also gets satisfied and interest is also allowable from the date of completion of the building i.e. 24.09.2013 in the present case. Accordingly, we delete the disallowance of interest also and Ground Nos. 2 and 3 are allowed.

12. As per Ground No. 4, the issue raised is about addition of Rs. 673,97,716/- as Deemed Dividend u/s 2 (22) e of the I T Act. In course of hearing, it is submitted by the learned AR of the assessee that the assessee itself offered this income for tax but before the AO, the assessee requested to the AO to exclude it from taxable income but since, this request of the assessee was without filing valid revised return of income, the AO did not accept it by following the Judgment of Hon'ble apex court rendered in the case of Goetze (India) Ltd. Vs. CIT as reported in 284 ITR 323 and learned CIT (A) also followed the same judgment and upheld the assessment order on this issue without deciding the issue on merit. He submitted that this judgment does not impinge upon the powers of CIT (A) and tribunal to decide the claim on merit in respect of claim made by the assessee without filing revised return. He submitted that this issue should be restored to CIT (A) for a decision on merit. Learned DR of the revenue supported the orders of the lower authorities.

13. We have considered the rival submissions. We find force in the submissions of the learned AR of the assessee that the learned CIT (A) should have decided this issue on merit instead of upholding the assessment order by following the Judgment of Hon'ble apex court rendered in the case of Goetze (India) Ltd. Vs. CIT (Supra). Accordingly, we set aside the order of CIT (A)

on this issue and restore this matter back to CIT (A) for a decision on merit.

Ground No. 4 is allowed for statistical purposes.

14. In the result, this appeal of the assessee is allowed in the terms indicated above.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,

Dated: 27th October, 2020.

/NS/*AKG

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore.