IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' B ' Bench, Hyderabad

Before Smt. P. Madhavi Devi, Judicial Member
AND
Shri S.Rifaur Rahman, Accountant Member

ITA No.488/Hyd/2016
(Assessment Year: 2011-12)

M/s SPI Cinemas Pvt. Ltd Nellore 524003 PAN: AABCC 7343 L	Vs	Addl. Commissioner of Income Tax, Range-13 Hyderabad

For Assessee : Shri S.R. Patnaik
For Revenue : Shri K.J. Rao, DR

Date of Hearing: 26.10.2016
Date of Pronouncement: 30.11.2016

O R D E R

Per Smt. P. Madhavi Devi, J.M.

This is assessee's appeal for the A.Y 2011-12. In this appeal, the assessee is aggrieved by the order of the CIT (A)-6, Hyderabad, dated 28.10.2016 in confirming the disallowances and the consequential additions made by the AO. The assessee has raised 3 grounds of appeal and also sub-grounds there under. At the time of hearing, the learned Counsel for the assessee submitted that the only relevant grounds for adjudication are as under:

"Ground No.2. That having regard to the facts and circumstances of the case and in law, the learned CIT (A) and the learned AO has erred in holding the following expenditure as capital in nature:

i)	Interior Decoration & POP Wall design	Rs.2,45,90,564
ii)	Interior Decoration & POP Wall design (Fall Ceiling)	Rs. 21,97,004
iii)	Electrical Maintenance & Installation	Rs. 48,60,079

iv)	Stamp duty for the registration of licence deed	Rs. 57,19,700

Ground No.2.5.1:- That the learned CIT (A) and the learned AO erred in holding that the registration charges incurred for registering the licence agreement amounting to Rs.57,19,700 as capital expenditure.

Ground No.3:-. That the learned CIT (A) and the learned AO erred in disallowing the additional depreciation claimed by the assessee amounting to Rs.90,23,900 towards the windmill".

2. It was also submitted that all the other grounds are arguments in support of these grounds and hence need no specific adjudication.

3. Brief facts of the case are that the assessee company, which is engaged in the business of exhibition of feature films, running canteens, vehicle parking, advertising space or time, and sale of power, gaming revenues etc., filed its return of income on 29.09.2011 admitting total loss of Rs.2,11,99,644. During the assessment proceedings u/s 143(3) of the Act, the AO called for various details in support of its claims. The details have been filed by the assessee. AO observed that during the financial year relevant to the A.Y 2011-12, the assessee has started a new mall by name ESCAPE Cinemas and major part of the expenditure under the head "Repairs & Maintenance" is related to the construction of the new mall. In response to the AO's query about the allowability of the said expenditure and the nature of such expenditure, assessee submitted that the expenditure was incurred towards interior design etc. and therefore, is revenue in nature and that these expenses did not create any asset as the

interiors in the Theatre Complexes have a very short life and they are changed regularly. The AO, however, observed that this expenditure cannot be treated as revenue expenditure as it is incurred for new complex and not for any repairs and maintenance. Therefore, the AO treated it as capital expenditure and allowed depreciation thereon. Further, he also observed that the assessee has incurred an expenditure of Rs.57,19,700 towards registration of lease deed for the above theatre complex and he treated this expenditure also as capital expenditure.

4. Further, the AO also observed that during the year, the assessee has installed a new Suzion 1.5 MW WEG windmill and put it to use for a period of less than 180 days and depreciation thereon have been claimed at 40% being 50% of the eligible rate of depreciation. He observed that the assessee has also claimed additional depreciation u/s 32(1)(iia) of the Act @ 10% stating that the assessee is engaged in manufacture of food items in its canteen at the theatre complex. Observing that the windmill is not relevant for manufacture of food items and that the assessee has not used the mill for manufacture of food items, the AO disallowed the claim and brought it to tax. Aggrieved, the assessee preferred an appeal before the CIT (A) who confirmed the order of the AO and the assessee is in second appeal before us.

5. The learned Counsel for the assessee reiterated the assessee's contentions raised before the authorities below and submitted that the following is the expenditure incurred for furnishing of the Escape Cinemas and is claimed under the head "repairs and maintenance":

a	Interior Decoration & POP Wall	Rs.2,45,90,564

	design	
b	False ceiling and cleaning charges	Rs.21,97,004
c	Electrical Maintenance & Installation	Rs.48,60,079
d	Stamp duty for the registration of License Agreement	Rs. 57,19,700
	Total	Rs.3,73,67,347

5.1 He submitted that the assessee had entered into a Leave and Licence Agreement with the owner of the mall for maintaining the 'Multiplex Cinema' in a small portion of the mall and the assessee is not in the possession of the entire mall. He submitted that the licensor had provided a full functional premises and the assessee was given licence to operate only in a limited portion of the mall and therefore, according to him, the decision of the Hon'ble Supreme Court in the case of Ballimal Naval Kishore vs. CIT reported in 224 ITR 414 (S.C) is applicable to the facts of the case before us. He also placed reliance upon the following other decisions for the proposition that the expenditure incurred towards interior decoration so as to make the premises functional and to make it suitable for the business of the assessee is revenue expenditure:

a) Hon'ble Madras High Court in the case of CIT vs. Amrutanjan Finance Ltd reported in (2014) 363 ITR 135 (Mad.)

b) Hon'ble Madras High Court in the case of Thiru Arooran Sugars Ltd vs. DCIT (T.C. No.197 of 2005 dated 26.7.2011).

c) Hon'ble Supreme Court in the case of Gobind Sugar Mills Ltd vs. CIT reported in (1998) 232 ITR 319 (S.C).

d) Hon'ble Supreme Court in the case of MN Clubwala v. Fida Hussain Saheb & Ors reported in (1965) S.C 610

5.2 For the proposition that merely because the expenditure has been incurred on a new leased premises, it does not mean that the same amounts to capital expenditure and different treatment should be given, the assessee relied upon the following decisions:

a) Hon'ble Supreme Court in the case of Sohan Lal Naraindas v. Laxmidas Raghunath Gadit reported in (1971) 3 SCR 319.

b) Hon'ble Bombay High Court in the case of CIT vs. Reliance Industrial Infrastructure Ltd reported in (2015) 234 Taxman 256 (Bom)

c) Hon'ble Gujarat High Court in the case of CIT vs. Laxmi Talkies reported in (2006) 151 Taxman 99 (Guj.)

d) Hon'ble Bombay High Court in the case of CIT vs. Indian Petrochemicals Corporation Ltd reported in (2015) 233 Taxman 89

e) ITAT in the case of NMDC Ltd vs. JCIT reported in (2015) 68 SOT 199.

6. Without prejudice to the above contention, the learned Counsel for the assessee also submitted that the expenditure incurred by the assessee towards interior decorations as detailed above, are in the nature of temporary structures and therefore, is eligible for higher depreciation @ 100% as per Rule 5 of the Income Tax Rules, 1962. In support of his contention, he placed reliance upon the decision of the Hon'ble Madras High Court in the case of CIT vs. Amrutanjan Finance Ltd reported in (2014) 363 ITR 135 (Mad.) wherein the Hon'ble High Court placed reliance upon its earlier judgment in the case of Thiru Arooran Sugars Ltd vs. DCIT. Further, the learned Counsel for the

assessee also brought to our notice that the issue is covered in favour of the assessee by the order of the ITAT in the assessee's own case for the A.Ys 2003-04 to 2006-07.

7. The learned DR, on the other hand, supported the orders of the authorities below.

8. Having regard to the rival contentions and the material placed on record, we find that the assessee has entered into a Leave & License Agreement dated 29.7.2009 to set up and effectively manage the world class multiplex theatre facility in the mall belonging to the licensor. Thus, it can be seen that a part of the mall has been licensed to the assessee to set up and maintain a Multiplex Theatre complex and the period of license is 18 years from the date of liability for payment of licence fees. The assessee is also authorized to create the infrastructure necessary for setting up and maintaining the theatre and to carry on commercial operations. In this process, the assessee has incurred expenditure towards interior decorations & POP wall design, false ceiling & cleaning charges, electrical installation & maintenance. The stand of the Revenue is that the assessee is setting up a new theatre and therefore, is creating an asset of enduring benefit and therefore, the entire expenditure should be treated as capital expenditure. However, we find that the assessee has taken the premises on leave and license basis, for a period of 18 years. The expenditure incurred by the assessee initially against the above items cannot be said to be expenditure incurred for creating any asset and that too for getting an enduring benefit. The assessee cannot run the Theatre without the necessary infrastructure. The interior decorations, false ceilings, electrical installation &

maintenance can be of no use to the assessee whenever the assessee vacates the premises. The Hon'ble Supreme Court in the case of CIT vs. Madras Auto Services P Ltd reported in (1998) 233 ITR 468 (S.C) was dealing with the case of an assessee who had demolished the existing structures and constructed a new building to suit its business at its own expense in terms of lease agreement and the Hon'ble Supreme Court has held that since the asset created by the assessee by spending the amount did not belong to the assessee, but the assessee got a modern premises at a lower rent thus saving considerable revenue for the next 39 years, the expenditure should be treated as revenue expenditure.

9. The Hon'ble Telangana & Andhra Pradesh High Court in the case of CIT vs. Coromandel Fertilizers Ltd reported in (2014) 367 ITR 132, has also considered similar situation and has clearly brought out the distinction between the capital and revenue expenditure in Para 8 and 9 thereof as under:

> *"**8.** For instance, if the owner of an immovable property incurs expenditure even for otherwise temporary structures or fixtures like partition, in his building, it is capable of being treated as capital expenditure, since the structure, though temporary would become part of the permanent asset, and thereby, becoming an enduring addition. In contrast, if the premises are taken on lease, and for better use thereof, the lessee makes certain arrangements such as making partitions or arranging electricity supply to suit the business needs, it may not be treated as addition of assets of enduring nature. The reason is that when the lessee vacates the premises, he would be at liberty to take away all the fixtures arranged by him, and in such event the fixtures cannot be treated as permanent assets, independent of the building. Similar instances can be cited.*
>
> ***9.** The respondent in the instant case is a lessee of a building. The business premises naturally needed certain alterations and works of arranging partitions extending electricity supplies carpeting, wherever needed was arranged. Curiously enough, even while claiming that the expenditure is revenue in nature the respondent claimed depreciation on it. The assessing authority treated it as capital expenditure and has even allowed depreciation, in accordance with law.*

10. In the case of CIT vs. Infosys Technologies Ltd reported in (2012) 349 ITR 588 (Karn.), the Hon'ble Karnataka High Court has considered that the premises taken on lease by the assessee and the repairs that were carried out was for the purpose of the business to improve the ambience of office was revenue in nature as there was strict competition in the business of the assessee and the expenditure could not at all be said to be capital expenditure. It was held that mere fact that the premises has been taken on lease for six years would not by itself render the expenditure as capital in nature.

11. The Coordinate Bench of this Tribunal at Bangalore in the case of Emdee Apparels v. ACIT (ITA Nos.576 & 577/Bang/2011) dated 21st September, 2012, to which one of us i.e. J.M. is the signatory, has also considered that in a situation where an assessee who is already in the business of retail trading of Reebok Footwear and shoes and is opening a new outlet in a different location for the said purpose, mere opening of a new showroom, cannot be said to be starting of a new business and the expenditure of civil and electrical work incurred in leasehold premise cannot be held to be of enduring benefit. It was also held that the quantum of expenditure cannot determine the nature of the expenditure.

12. In the case of Joy Alukkas India (P) Ltd vs. ACIT, the Hon'ble Kerala High Court has held that the refurnishing, repairs and improvement expenses incurred by the assessee at premises taken on lease is revenue expenditure, since the improvement

made by the assessee were temporary in nature and could not be retrieved by the assessee at the end of lease.

13. The Coordinate Bench of this Tribunal in assessee's own case for the A.Ys 2003-04 to 2006-07 has considered the case of the assessee wherein the assessee has taken on lease a theatre complex consisting of five cinema theatres and has incurred substantial charges towards interior design, modernization, changing of floor tiles, fall ceiling, landscaping, chairs, earth filling etc., and the Tribunal has held that in view of the fact that the assessee has incurred the expenditure for repair and maintenance of building taken on lease for carrying on its business, it did not create any capital asset and the expenditure so incurred was to be allowed as revenue expenditure u/s 30(a)(i) of the Act.

14. Taking all the above decisions and the facts of the case into consideration, it is clearly seen that the assessee is into the business of setting up and running cinema theatres and in the earlier years, the assessee has carried out similar activities which has been considered by the AO as capital expenditure. ITAT has considered the factual and legal matrix of the case and has held the expenditure to be revenue expenditure. The decisions relied upon by the learned Counsel for the assessee also supported the case of the assessee. In view of the same, Ground of Appeal No.2 is allowed.

15. As regards Ground No.2.5.1 relating to the treating of registration charges for lease deed as capital in nature, the

learned Counsel for the assessee has placed reliance upon the following decisions:

a) The Hon'ble Himachal High Court in the case of CIT v. Gopal Associates reported in (2009) 222 CTR (HP) 307.

b) Hon'ble Bombay High Court in the case of CIT vs. Reliance Industrial Infrastructure Ltd reported in (2015) 61 Taxman 407 (Bom.)

c) Hon'ble Supreme Court in the case of M/s. M.N.Clubwala & Anr vs. Fida Hussain Saheb & Others (Civil Appeal No.151 of 1963) dated 3.2.1964

d) Hon'ble Supreme Court in the case of Sohan Lal Naraindas v. Laxmidas Raghunath Gadit (Civil Appeal No.2443 of 1966) dated 8.1.1971.

16. The learned DR has relied upon the orders of the authorities below and submitted that the assessee, though initially entered into leave and license agreement for a period of 18 years only, the assessee has been continuing in the said premises even till date and therefore, clearly it is in the nature of capital expenditure.

17. Having regard to the rival contentions and the material on record, we find that the Hon'ble Supreme Court in the case of M/s. M.N. Clubwala & Anr (cited Supra) has considered the distinction between a lease and a leave and licence agreement and has held that the legal possession of the property taken on leave and licence must be deemed to have been with the landlords and not with the licence holders and the right of the licence holders was only to the exclusive use of the premises during the fixed hours and nothing more. It was held that the intention of the parties was of paramount importance to decide the nature of the expenditure.

18. Similarly, in the case of Sohan Lal Naraindas (cited Supra), it was held that the intention of the parties to an instrument, must be understood from the terms of the agreement and the surrounding circumstances and that the description given by the party may be evidence of the intention but is not decisive. It was held that the crucial test in each case is whether the instrument is intended to create or not to create an interest in the property which is the subject matter of the agreement and if it is in fact intended to create an interest in the property, it is a lease, if it does not, it is a licence.

19. In the case before the Hon'ble Bombay High Court in the case of CIT vs. Reliance Industrial Infrastructure Ltd (cited supra), the assessee therein has taken land on lease for a period of 30 years and the amount paid as stamp duty in respect of lease deed executed by the assessee with the lessor, was claimed as revenue expenditure as such expenditure was incurred for the purpose of carrying on the business. AO held that the stamp duty paid should be spread over the entire life of lease as deferred revenue expenditure. The Hon'ble High Court held that since the stamp duty amount have been paid on lease for the purpose of carrying on assessee's business, the amount of stamp duty had to be allowed as revenue expenditure in nature in the year of payment.

20. In the case of Gopal Associates (cited Supra), the Hon'ble Himachal Pradesh High Court was considering the nature of the incurred expenditure on stamp duty and registration charges at the time of execution of lease agreement for taking of

land on lease for Fruit Processing Plant for 7 years and the Hon'ble High Court has held it to be in the nature of revenue expenditure. The above decisions, therefore, clearly hold that the expenditure incurred towards registration charges of leave and licence agreement is in the nature of the revenue expenditure and has to be allowed in the year of execution of the leave and licence agreement. Respectfully following the same, we allow the assessee's ground of appeal No.2.5.1.

21. As regards Ground No.3 with regard to the claim of the additional depreciation u/s 32(1)(iia) of the Act, it is the case of the assessee that the assessee is manufacturing food items in its canteen maintained with the theatre and therefore, the assessee is entitled to the additional depreciation. According to the learned Counsel for the assessee, there is no condition attached for making the claim of additional depreciation that there has to be a connection between the manufacturing and the machinery acquired for generation of power and therefore, even if there is no connectivity between the windmill and the food manufacturing unit of the assessee, the assessee is entitled to the additional depreciation. In support of this contention, he placed reliance upon the following decisions:

a) CIT vs. Hi Tech Arai Ltd reported in (2010) 321 ITR 477 (Mad)

b) CIT vs. Atlas Export Enterprise reported in (2015) 373 ITR 414 (Mad.)

c) VTM Ltd v. CIT reported in (2009) 319 ITR 336 (Mad.)

d) CIT v. Texmo Precision Castings reported in (2010) 321 ITR 481 (Mad.)

22. The learned DR, however, supported the orders of the authorities below and has also brought out the purpose of the relevant section i.e. 32(1)(iia) of the Act and submitted that the assessee should have utilized the new machinery for manufacturing of goods or things and further that the canteen run by the assessee cannot be considered as manufacturing of food items.

23. Having regard to the rival contentions, we deem it fit and necessary to reproduce the relevant portion of the section 32 as it was for the financial year 2010-11 hereunder:

"Section 32(1)(iia):

Depreciation.

32. (1) In respect of depreciation of—

(*iia*) in the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31st day of March, 2005, by an assessee engaged in the business of manufacture or production of any article or thing a further sum equal to twenty per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (*ii*) :

24. On a literal reading of the above provision, it is clear that where an assessee is engaged in the business of manufacture or production of any article or thing, has acquired and installed any new plant or machinery after 31.03.2005, it is entitled to the additional depreciation equal to 20% of the actual cost of such machinery or plant. The assessee has relied upon the decisions of the Hon'ble Madras High Court in the case of CIT vs. Hi Tech Arai Ltd reported in (2010) 321 ITR 477 (Mad) & CIT vs. Atlas Export Enterprise reported in (2015) 373 ITR 414 (Mad.) in support of its claim. In both the cases, the assessees therein were into

manufacture of oilseeds and textiles respectively and by taking the same into consideration, the Hon'ble High Court has held that the assessees therein are entitled to the additional depreciation u/s 32(1)(iia) of the Act and has held that there is no requirement that the new machinery acquired and installed should have any operational connectivity to the article or thing that was being manufactured by the assessee. In the case before us, the claim of the assessee is that it is running a canteen in the Cinema Theatre and therefore, is manufacturing food items and hence is eligible for additional depreciation u/s 32(1)(iia) of the Act. Running a canteen cannot be said to be manufacturing of an article or thing. Therefore, the claim of the assessee is not tenable. Hence, ground of appeal No.3 is rejected.

25. In the result, assessee's appeal is partly allowed.

Order pronounced in the Open Court on 30th November, 2016.

Sd/-	**Sd/-**
(S.Rifaur Rahman)	**(P. Madhavi Devi)**
Accountant Member	**Judicial Member**

Hyderabad, dated 30th November, 2016.

Vinodan/sps

Copy to:

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4 Pr. CIT – 6 Hyderabad
5 The DR, ITAT Hyderabad
6 Guard File

By Order