

IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, MUMBAI

BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER AND
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No.2734/Mum./2019
(Assessment Year : 2010-11)

M/s. Mohit Diamonds Pvt. Ltd.
BC-7011, Bharat Diamonds Bourse
G-Block, Bandra Kurla Complex
Bandra (East), Mumbai 400 051
PAN - AAACM2843A

..... Appellant

v/s

Dy. Commissioner of Income Tax
Central Circle-3(2), Mumbai

..... Respondent

ITA No.6330/Mum./2019
(Assessment Year : 2011-12)

M/s. Mohit Diamonds Pvt. Ltd.
BC-7011, Bharat Diamonds Bourse
G-Block, Bandra Kurla Complex
Bandra (East), Mumbai 400 051
PAN - AAACM2843A

..... Appellant

v/s

Asstt. Commissioner of Income Tax
Central Circle-3(2), Mumbai

..... Respondent

Assessee by : Shri B.V. Jhaveri
Revenue by : Shri Salil Mishra, CIT-DR

Date of Hearing - 23.02.2022

Date of Order - 02/05/2022

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeals have been filed by the assessee challenging the impugned orders dated 27.02.2019 and 26.07.2019, passed by the learned Commissioner of Income Tax (Appeals)-51, Mumbai ("*learned CIT(A)*"), under section 250 of the Income Tax Act, 1961 ("*the Act*") for the assessment years 2010-11 and 2011-12.

2. Since both the appeals pertain to the same assessee and the main issue pertaining to claim of depreciation is common in both the appeals, therefore, these appeals were heard together as a matter of convenience and are being adjudicated by way of this consolidated order. Further, we have elaborately mentioned only the facts for assessment year 2010-11 for the sake of brevity.

ITA no.2734/Mum./2019 **Assessment Year - 2010-11**

3. In this appeal, the assessee has raised following grounds: -

"1. The Commissioner of Income Tax (Appeals), Mumbai vide order dated 27th February, 2019 erred in allowing depreciation of Rs.48,17,491/- as against the claim of depreciation of Rs.65,61,664/- as per the return of income.

2. The Commissioner of Income Tax (Appeals), Mumbai failed to appreciate that the assessee company has taken the units on lease for a period of 95 years from SEEPZ Authority, Mumbai and therefore, the assessee company is the owner of the units constructed by SEEPZ and hence it has claimed depreciation @ 10% on the cost of the units paid by it for taking on lease @ 10%.

3.The Commissioner of Income Tax (Appeals), Mumbai failed to appreciate that the assessee company was the lessee of the said units for a period of 95 years and therefore, it is entitled to the claim of depreciation on cost of the said units.

4. The order of the Commissioner of Income Tax (Appeals), Mumbai erred in holding that the assessee paid proportionate cost of the land on which the building was constructed by the SEEPZ."

4. The only issue arising in assessee's appeal for assessment year 2010-11 is with regard to claim of depreciation on units leased to assessee.

5. The brief facts of the case pertaining to this issue as emanating from the record are: The assessee is engaged in the business of manufacturing and trading of diamond studded jewellery. For the assessment year 2010-11, the assessee e-filed its return of income on 23.03.2013 declaring total income of Rs. Nil. A search and seizure action under section 132 of the Act was carried out in the case of M/s Mohit Diamond Group on 13.09.2011 and the assessee company was covered under the provisions of section 153A of the Act. Accordingly, notice under section 153A was issued on 29.11.2012. By the Indenture of Sub-Lease dated 13.08.2010 between the Development Commissioner, SEEPZ, **Special Economic Zone ("SEZ")**, the lessee, and the assessee company, the sub-lessee, the units bearing Nos. 301 to 304 on 3rd floor of the building known as SEEPZ++, Tower-II were allotted to the assessee company by MIDC (the lessor) on the recommendation of the Development Commissioner, SEEPZ, for the consideration of Rs. 8,24,30,300. The premises were allotted to the

assessee for a period of 95 years with a right to renew for a further period of 95 years subject to conditions.

6. During the course of assessment proceedings, it was noticed that assessee has claimed depreciation on the building taken on lease and similar depreciation was also disallowed by the Assessing Officer during assessment proceedings for assessment year 2006-07. Following, similar approach, the Assessing Officer vide order dated 31.03.2015 passed under section 153 r/w section 143(3) r/w section 144C(1) of the Act, for the year under consideration, inter-alia, disallowed the claim of depreciation of Rs. 65,61,664 in respect of the building taken on lease by the assessee during financial year 2006- 07 at SEEPZ++ Tower-II, Mumbai on the basis that assessee is not the owner of the building. Further, Assessing Officer allowed lease rent expenses of Rs. 10,52,188 (i.e. Rs. 9,99,57,844 divided by 95 years).

7. In appeal before the learned CIT(A), it was submitted that assessee is the owner of the said units on the third floor of the building as it pays all the taxes in respect of the said units which the owner of the units pays. It was further submitted that exclusive possession of the units were given to the assessee company for the period of 95 years, against which the assessee company has paid one-time consideration of Rs. 8,24,30,300 and the yearly ground rent of Re. 1/-. It was further submitted that assessee has a right of renewal of lease for a further period of 95 years, and

therefore, the consideration paid by the assessee company is capital nature by which assessee company has acquired the rights in the said units for a substantial period of 95 years and, therefore, the assessee company, which is the owner of the said units, is entitled to claim depreciation under section 32 of the Act.

8. The learned CIT(A) vide impugned order dated 27/02/2019, after considering remand report of the Assessing Officer **and assessee's reply** thereto, inter-alia, held that assessee is entitled to claim depreciation on the cost of construction of the said 4 units taken on an extended period of lease from MIDC. The learned CIT(A) further held that the assessee is not entitled to depreciation on the component of land in the total consideration paid for the said 4 units. Accordingly, the CIT(A) came to the conclusion that the total consideration paid, inclusive of stamp duty, of Rs. 9,99,57,844 can be said to be comprising of land cost component of Rs. 2,65,31,668 and the cost of construction of Rs. 7,34,26,176. In coming to the aforesaid conclusion, the learned CIT(A) took note of the stamp duty rate of proportionate land during the relevant period of acquisition of the said 4 units of Rs. 836.1 sq.ft. Accordingly, the learned CIT(A) directed the Assessing Officer to recompute the eligible quantum of depreciation in respect of the said 4 units taken on extended period of lease from MIDC. Being aggrieved by the partial disallowance of depreciation, the assessee is in appeal before us.

9. During the course of hearing, Shri B.V. Jhaveri, learned Authorised Representative ("*learned A.R.*") submitted that assessee paid consideration of Rs. 8,24,30,300 as cost for buildup space and same did not include the cost of land. The learned A.R. submitted that there are 72 occupants of the **7 Storey Tower and assessee's units are on third floor.** By referring to various clauses of (i) lease deed dated 28/06/2005 entered into between MIDC, the lessor, and Development Commissioner, SEEPZ, SEZ, the lessee; and (ii) indenture of sub-lease dated 13/08/2010 entered into between Development Commissioner, SEEPZ Special Economic Zone, the lessee, and the assessee, the sub-lessee, the learned A.R. submitted that the entire consideration paid by the assessee was for the cost of 4 units. The learned A.R. also submitted that the assessee company was neither eligible for the proportionate plot of land nor was allotted any proportionate plot of land along with the four units and therefore the question of claiming depreciation on proportionate plot of land does not arise. The learned A.R. also relied on few decisions in support of its submission that the entire indenture of sub - lease must be read as a whole document and the substance over the form of the transaction and content of the document must be interpreted/understood as a whole.

10. On the other hand, Shri Salil Mishra, learned Departmental Representative ("*learned D.R.*") submitted that MIDC had constructed the buildings which were ultimately given on lease to the assessee and therefore the ownership of these buildings is only with MIDC. Learned D.R.

submitted that assessee has only right to use the building and therefore the learned CIT(A) wrongly appreciated the fact and allowed depreciation on building. In short rebuttal, learned A.R. submitted that the department's appeal against the order passed by the learned CIT(A) for the year under consideration was dismissed on the ground of low tax effect and therefore the decision of learned CIT(A) to the extent depreciation on cost of construction of building was allowed, is final.

11. We have considered the rival submissions and perused the material available on record. In the present case, lease deed dated 28/06/2005 was entered into between MIDC (lessor) and Development Commissioner Seepz SEZ (lessee). As per the lease deed, which is also forming part of the paper book from pages 36 to 47, it is evident that 16 acres of land was transferred by the Government of Maharashtra to the lessor/MIDC for the purpose of encouraging the export industries in India and earning foreign exchange on the export by various kinds of industrial units including gems and jewellery unit and information technology/hardware units, to be situated at the said land. Further, MIDC was authorised to carry out development work of carving out plots and construction of building to accommodate the industrial units, which are export oriented. As per the lease deed, land and buildings were leased to the lessee/Development Commissioner, Seepz, SEZ. The lessee was further authorised to sub-lease the buildings or any part thereof to the allottees listed in schedule A and B.

12. As the assessee was one of the allottee under schedule A to the aforesaid lease deed, indenture of sub – lease dated 13/08/2010 was entered into between Development Commissioner, Seepz Special Economic Zone (the lessee) and the assessee (the sub-lessee). Copy of Indenture of sub-lease is from page 48 to 80 of the paper book. Upon perusal of sub-lease deed, it is evident that the two buildings were constructed by MIDC at its cost and expenses and having ground and seven floors and comprising a total 72 units with facilities of open / basement car and scooter parking. The assessee was allotted unit No. 301 to 304 on third floor of Tower – II admeasuring 26168 sq.ft. As a consideration, the assessee paid a sum of Rs. 8,24,30,300 being the premium of the said units. The sub-lease deed further provides as under:

"AND WHEREAS the Lessor and Lessee have agreed to demise the said Unit Nos. 301 to 304 on the 3rd floor to sub-lessee together with the said proportionate land under the Tower No.II in Seepz++ in the Marol Industrial Area within the village limits of Vyrawali, Parajapur, admeasuring 26168.32 sq.ft. or thereabouts and more particularly described Thirdly in the schedule here under written subject to condition that the sub – lessee/s of the Tower No. II shall immediately from the Association of the unit holders of the said building for the upkeep, management, safety etc. of the said building after handing over the possession of the unit to the sub – lessees by the Lessor which shall however remain subject to the overall control of lessee."

13. The sub-lease deed also provides as under:

"1. on consideration of the premises and sum of Rs. 8,24,30,300 (Rupees eight crores twenty four lakhs thirty thousand three hundred only) paid by the Sub-Lessee to the Lessee as cost of the units and the various facilities and variety of concessions made available to the Sub-Lessee and rent hereby reserved and the covenants and agreements on the part of the Sub Lessee hereinafter contained, the Lessor & Lessee to hereby demise all that unit Nos. 301 to 304 on the 3rd Floor in Tower-II admeasuring 26168.32 sq.ft. (2432 sq.mtrs) or thereabouts hereinafter referred to as the said premises and more particularly described Thirdly in the First schedule hereunder written TO HOLD the said units

hereunder expressly demised onto the Sub- lessee for the term of 95 years computed from the date of 28th June 2005 and renewable for further term of 95 years on payment of premium and paying therefore the yearly rent during the said term onto the Lessor/Lessee the said yearly ground rent of Rs.1/- in advance being concessional rent without any deduction whatsoever.”

14. From the conjoint reading of the aforesaid clauses of sub-lease deed, it is evident that the 4 units were allotted to the assessee for a term of 95 years, which was renewable for a further term of 95 years. It is also evident that the consideration of Rs. 8,24,30,300 paid by the assessee and yearly rental of Re. 1/- was not only in respect of the said 4 units but was also for various other facilities which were built by MIDC at its cost and expenses. Further, the lease for the term of 95 years which is further renewable for another 95 years, in the present case, is a perpetual lease. Being a perpetual lease i.e. 95 years + 95 years, the assessee is nothing less than an owner of the units allotted to it. Therefore, the consideration paid by the assessee can reasonably include not only the cost of construction of the building but also the cost of proportionate land. This conclusion is also supported by the clause of sub-lease referred herein above, which specifically provides that the said 4 units were allotted to the assessee together with the proportionate land under the Tower No.II in Seepz++. Further, the nominal yearly ground rental of Re.1/- charged to the assessee is at concessional rate in order to promote export industries in India. Otherwise, property having such an area i.e. 26168 sq.ft. at SEZ location fetch a very high rent. The reliance placed by the learned A.R. on judicial precedents to support its submission that the agreement should be

read as a whole rather supports the fact that the consideration paid by the assessee was not only for the cost of construction of the 4 units but the same also included cost of proportionate land. To this extent, we do not find any infirmity in the impugned order passed by the learned CIT(A). Further, for bifurcating the consideration amongst the aforesaid two components, the learned CIT(A) has placed reliance on the stamp duty rate of proportionate land during the relevant period of acquisition of the said 4 units, which also we find to be quite reasonable, as only about 35% of the consideration was treated as cost of proportionate land. In view of the above, we find no infirmity in the order passed by the learned CIT(A) granting partial depreciation to an extent of Rs. 48,17,491 as against Rs. 65,61,664 claimed by the assessee. As a result, grounds raised by the assessee in appeal for assessment year 2010-11 are dismissed.

15. In the result, appeal by the assessee being ITA No. 2734/Mum/2019 is dismissed.

ITA no.6330/Mum./2019
Assessment Year – 2011-12

16. In this appeal, the assessee has raised following grounds: –

"1. The Commissioner (Appeals) erred in upholding the order of the AO in disallowing depreciation of Rs.55,09,476/- on industrial galas used by the assessee company for its business.

2. The Commissioner of Income Tax (Appeals), Mumbai failed to appreciate that the assessee company has taken the units on lease for a period of 95 years from SEEPZ Authority, Mumbai and therefore, the assessee company is the owner of the units constructed by SEEPZ and hence it has claimed depreciation @ 10% on the cost of the units paid by it for taking on lease @ 10%.

3. *The order of the Commissioner (Appeals) is bad in law and without jurisdiction as it is contrary to his own orders in the case of the assessee company for A.Ys. 2007-08 and 2010-11 (both dated 27th February, 2019) wherein the ground regarding depreciation on industrial galas is partly allowed in the identical circumstances.*

4. *The Commissioner (Appeals) erred in not allowing depreciation on cost of construction of industrial galas, which is part and parcel of the total consideration paid by the assessee company, as per his orders for A.Ys.2007-08 & 2010-11 dated 27th Feb., 2019.*

5. *The Commissioner (Appeals) erred in not following the decision of the Bombay High Court in the case of Alpana Talkies (139 TTR 1055) wherein the Court held that though the land on which the premises was constructed belong to the Lessor, however, since the new premises constructed was of the ownership of the assessee till the completion of the extended period of lease, the assessee was entitled to claim depreciation on the cost of construction of the new premises.*

6. *The Commissioner (Appeals) ought to have bifurcated the total consideration into 'cost of construction' and 'land cost' and allowed the depreciation on the cost of construction as held by him in his orders for A.Y. 2007-08 and 2010-11.*

7. *The order of the Commissioner (Appeals) dismissing the Ground nos.1 & 2 of the appeal is bad in law and without jurisdiction*

8. *The Commissioner (Appeals) erred in not considering that the A.O. erred in computing the total income at Rs.7,85,58,198, because the A.O. started with the wrong figure of total income as per computation at Rs.7,39,14,164."*

17. In this appeal for assessment year 2011-12, insofar as grounds pertaining to claim of depreciation on units leased to the assessee under sub-lease deed, the basic facts are identical to the assessment year 2010-11. However, in this year, the learned CIT(A), inter-alia, confirmed the disallowance of depreciation made by the Assessing Officer on the ground that the assessee is not the owner of those units. Being aggrieved by the said impugned order dated 26/07/2019 passed by the learned CIT(A), the assessee is in appeal before us.

18. As, we have upheld the order passed by the learned CIT(A) for assessment year 2010-11 granting partial depreciation, we direct the

Assessing Officer to similarly grant depreciation to the assessee in assessment year 2011-12 only on the cost of construction of the said units. As a result, grounds No. 1-7 raised in assessee's appeal are partially allowed.

19. As regards ground No. 8 raised in assessee's appeal, the assessing officer is directed to compute the total assessable income after taking into consideration correct figure of total income as per the computation filed by the assessee along with the return of income. As a result, ground No. 8 raised in assessee's appeal is allowed.

20. In the result, appeal by the assessee being ITA No. 6330/Mum/2019 is partially allowed.

Order pronounced in the open court on

AMARJIT SINGH
ACCOUNTANT MEMBER

SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED:

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

*M/s. Mohit Diamonds Pvt. Ltd.
ITA No.2734/Mum./2019
ITA No.6330/Mum./2019*

*Pradeep J. Chowdhury
Sr. Private Secretary*

By Order

Assistant Registrar
ITAT, Mumbai