IN THE INCOME TAX APPELLATE TRIBUNAL DELHI

(DELHI BENCH 'H' : NEW DELHI)

BEFORE SH. SHAMIM YAHYA, ACCOUNTANT MEMBER
AND
SH. ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.9825/Del/2019, A.Y. 2016-17

M/s. Radisson Hospitality Marketing (India) Pvt. Ltd. First Floor, Block-A, Plot No. 61, Chimes, Sector-44, Gurgaon, Haryana-122003	Vs.	Asstt. CIT, Circle 5(2), New Delhi
(APPELLANT)		**(RESPONDENT)**

Assessee by	Sh. R.K.Kapoor, CA
Revenue by	Sh. Sunil Kumar Yadav, Sr. DR

Date of hearing:	15.12.2022
Date of Pronouncement:	21.12.2022

ORDER

PER ANUBHAV SHARMA, JM:

The appeal has been filed by the Assessee against order dated 21.10.2019 passed in appeal no. 10447/18-19 for assessment year 2016-17, by the Commissioner of Income Tax (Appeals)-2, New Delhi (hereinafter referred to as the First Appellate Authority or in short 'Ld. F.A.A.') in regard to the appeal before it arising out of assessment order dated 28.12.2018 u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') passed by Circle-5(2), New Delhi (hereinafter referred as Ld.Assessing officer or in short Ld. AO).

2. The facts of the case are that the assessee/ appellant is a company incorporated under the Companies Act, 1956 and engaged in the business of providing sales and marketing and reservation support services to Carlson Rezidor Group's affiliated hotels. It filed return of income and declared income of Rs. 3,31,40,680/-. Case was taken for scrutiny assessment and statutory notice u/s 143(2) of the Act was issued. Ld. AO inquired as to why half of the depreciation that is Rs. 4,82,865/- claimed by the assessee should not be disallowed in the light of the fact that assets are jointly held by M/s. Carlson Hotels (South Asia) Pvt. Ltd.. The assessee vide reply dated 26.12.2018 submitted that assets are held/ utilized jointly with a sister concern as they share same premises for conducting business operations and accordingly the assets are capitalized in the proportion of ownership and therefore proportionate depreciation has been claimed. Ld. AO however, disallowed the depreciation with following relevant findings :-

> *"3.* ***Incorrect depreciation claim:***
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> *From the perusal of the books of accounts of the assessee, it was found that the fixed assets shown in Note 9 of Notes to Accounts of the audited financial statements of the assessee for the year ended 31.03.2016 were jointly owned by the assessee and M/s Carlson Hotels (South Asia) Pvt. Ltd. However, both the assessee as well as M/s Carlson Hotels (South Asia) Pvt. ltd. have claimed depreciation on these assets.*
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> 3.1 *As per Section 32 of the Act, it is important that the asset on which depreciation is being claimed should be owned by the assessee and should have been put to use in the business of the assessee. The assessee, vide notice under section 142(1) of the Act dated 12.12.2018 was asked to explain as to why should part of this depreciation not be disallowed as the assets were owned jointly by two parties. A show cause notice dated 22.12.2018 was also issued to the assessee giving it final opportunity to bring evidences in support of its claim. However, in its reply dated 20.12.2018 the fact*

that the assets were held jointly between the two aforementioned entities was denied by the assessee. Eventually, this fact was admitted by the assessee in their letter dated 27.12.2018.

3.2 *However, no evidence has been brought forth by the assessee to show that the depreciation has not been claimed twice. There are no details of which assets were purchased and used jointly. In absence of any evidence to believe otherwise, it is assumed that the assets were owned jointly by the assessee and M/s Carlson Hotels (South Asia) Pvt. Ltd. in equal proportion. As a result, half of the depreciation claimed as expense in the Return of Income, that is, Rs. 4,82,865/- (50% of Rs. 9,65,729/-) is hereby disallowed and added back to the income of the assessee.*

(Addition Rs. 4,82,865/-)

3. In appeal the assessee filed a written submission along with paper book and additional evidence in the form of lease agreement for sharing of premises, list of assets purchased by the assessee and agreement with sister concern for sharing of expenses on premises and fix assets. The same were made subject of remand report from ld. AO and were admitted under Rule 46A by the Ld. CIT(A) and Ld. CIT(A) was not satisfied with the claim and declined the same in following findings :-

"8.4 The appellant without purchasing these assets, is showing them in the books of accounts and claiming depreciation at 50 %.

On this basis, the AO has strongly opposed the claim of depreciation on the assets.

8.5 The submission of the AO has been considered. The above mentioned asset was purchased by the sister concern and was reflected in appellant's books on shared basis. As per sec. 32, depreciation is allowable to the owner of the asset. In this case, the owner of the asset is the sister concern and not the appellant.

8.6 The sharing of assets may be an internal arrangement evidenced by a mutual agreement but it is not helpful in allowance of depreciation as per legal provision of Sec. 32. Allowance of depreciation on shared basis on a particular asset is not supported by the legal provisions. It will also set a wrong precedence and will create complication in future. Sharing of assets being an internal arrangement, may be done at their own end. Accordingly, as per Sec. 32, depreciation is allowable on this asset to the sister concern which has purchased the asset and not to the appellant in spite of showing the assets in the books.

8.7 The appeal in the case of sister concern for the same assessment year has been decided allowing full depreciation for the assets purchased. In view of these facts and legal provisions, the grounds are ruled against the appellant."

4. The assessee is in appeal raising following grounds :-

"1) That the order of CIT(A) u/s 250 dated 21.10.2019 upholding the reduction in claim of depreciation is bad in law and on facts of the assessee's case.

2) That the Ld. AO has grossly erred in determining the total income of the assessee which was uphold by CIT(A) at Rs. 3,36,23,545/-against the returned income of Rs. 3,31,40,680/- under normal provisions of the Act by reducing the claim of depreciation u/s 32 of the Act, amounting to Rs. 4,82,865/-on wholly illegal, erroneous and untenable grounds.

3) That the Ld. AO/CIT(A) has grossly erred in law and on facts and circumstances of the assessee's case in disallowing 50% of depreciation on fixed assets amounting to 4,82,865/-,

a) *By not appreciating that the premises was used for the business of the assessee and Carlson Hotels (South Asia) Pvt. Ltd. on a shared basis of area occupied by both the entities; and*

b) *By not appreciating that the cost of the fixed assets capitalized in the books of assessee was in the proportion of ownership warranting no further disallowance.*

c) *By not appreciating that on facts claim of depreciation has been correctly computed only on the proportionate share of assets capitalized in assessee's books of accounts.*

4) That the Ld. AO/CIT(A) has failed to consider the lease agreement and misinterpreted the law by holding that 100 % depreciation shall be allowed to the other co owner of the assets which has also claimed only proportionate claim.

5) That the addition made of disallowance of 50% of total depreciation is adhoc and irrational, and is based on conjectures & surmises accordingly, is prayed to be deleted.

6) The charging of interest u/s 234D is bad in law and is prayed to be deleted.

7) That the penalty proceedings-initiated u/s Sec 271(l)(c) are on wholly illegal and untenable grounds since there is no furnishing of inaccurate particulars of income, by the assessee.

8) The aforesaid grounds of appeal are without prejudice to one another.

9) The appellate craves the leave to add, amend or alter all or any of the grounds of appeal."

5. Heard and perused the record.

6. Ld. AR made submission with regard to the facts as narrated above. It was submitted that before Ld. CIT(A), evidence was submitted to demonstrate that there is no extra claim of depreciation. Amounts of common assets are being capitalized in the books of accounts in the defined ratio and the depreciation is also being claimed in the respective portion of the assets capitalized in the books of accounts. It was submitted that assets are jointly held and only respective shares of assets being accounted for in the books of accounts of each assessee. It was submitted that depreciation is allowable in case of fractional ownership and reliance in this regard was placed on the judgment of Hon'ble Supreme Court of India in ***Seth Banarasi Das Gupta vs. CIT [1987] 166 ITR 783 (SC), Mysore Minerals Ltd. vs. CIT [1999] 106***

Taxman 166 (SC) & I.C.D.S. Ltd. vs. CIT , Mysore [2013] 29 taxmann.com 129 (SC). It was also submitted that in the sister concern's case having been allowed in the appeal to the extent of 100% depreciation the Ld. AO has only given effect to the extent of 50%, therefore also amount of Rs. 4,82,865/- remains disallowed till date. Which should be settled in favour of the appellant. Along with the written submissions Ld. AR filed the copy of order dated 21.10.2019 in case of sister concern passed by Ld. CIT(A) and an order u/s 250/143(3) of the Act dated 18.4.2022 in case of sister concern is also placed on record.

6.1 On the other hand, Ld. DR submitted that there is no error in the findings of Ld. Tax Authorities below.

7. Appreciating the matter on record, at the outset, it can be observed that the Ld. First Appellate Authority while passing the impugned assessment order on 21.10.2019 had also decided appeal bearing no. 10446/18-19 of the sister concern of the present appellant and allowed the ground of the sister concern's appeal observing that having purchased the assets the sister concern is entitled for full depreciation on the assets. However, Ld. AO interpreted it in some other way, while passing order u/s 250/143(3) of the Act and same is not matter of present *lis*. What is material is that Ld. CIT(A) has allowed full depreciation on the assets in favour of the sister concern and as accordingly observed in case of assessee/ appellant also in para no. 8.7 of order of Ld. CIT(A).

8. Further, it can be observed that assessee does not dispute the fact that only one asset is the subject matter of dispute and the same was purchased by sister concern. The invoice is in the favour of the sister concern thus, the de-facto and de-jure owner happens to be the sister concern. Merely because it has allowed to be share it to the sister concern, the assessee/ appellant, that does not give any right, title or interest in the nature of ownership to the assessee so as to be entitled for claim of depreciation u/s 32 of the Act. Said section

provides that to claim depreciation assessee should be the owner of the asset and the asset must be used for the purposes of business or profession. Here in the case in hand both the requirements are not fulfilled as assessee is not the owner of the asset and the asset is not used for the purpose of business or profession of the owner, which is the sister concern but was used for the purpose of business of the appellant which was not the owner.

9. The judgment which Ld. AR has relied are distinguishable and rather are against the assessee. In **Seth *Banarasi Das Gupta*** case Hon'ble Supreme Court while considering the question whether benefit of Section 10(2)(vi) of the Indian Income Tax Act, 1922 corresponding to Section 32(1) of the Act of 1961, would be admissible to assessee, where assessee is fractional owner of asset had held that no such claim can be made.

10. The judgment **in Mysore Minerals Ltd. vs. CIT [1999] 106 Taxman 166 (SC)** was in regard to the property in which the assessee had received the possession but sale deed was not executed. There was no dispute of two persons jointly claiming to be in fractional ownership and accordingly claiming fractional depreciation. Rather in this judgment it is observed in para 12 and 13 as follows :-

> *"12. In P.K Badiani v. CIT[1976] 105 ITR 642 the Supreme Court has observed that allowance for depreciation is to replace the value of an asset to the extent it has depreciated during the period of accounting relevant to the assessment year and as the value has, to that extent, been lost, the corresponding allowance for depreciation takes place.*
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> *13. An overall view of the above said authorities show that the very concept of depreciation suggests that the tax benefit on account of depreciation legitimately belongs to one who has invested in the capital asset, is utilizing the capital asset and thereby loosing gradually investment caused by wear and tear, and would need to replace the same by having lost its value fully over a period of time."*

11. In the matter of **I.C.D.S. Ltd. vs. CIT, Mysore [2013] 29 taxman.com 129 (SC)** Hon'ble Supreme Court was dealing with the case where the assessee company was engaged in the business of hier-purchase, leasing and real estate and the dispute was with regard to depreciation of vehicles which assessee had purchased directly from manufacturers. Again there was no dispute with regard to fractional ownership. Hon'ble Supreme Court in para no. 19 had observed as follows :-

> *"19. We may now advert to the first requirement i.e. the issue of ownership. No depreciation allowance is granted in respect of any capital expenditure which the assessee may be obliged to incur on the property of others. Therefore, the entire case hinges on the question of ownership; if the assessee is the owner of the vehicles, then he will be entitled to the claim on depreciation, otherwise, not."*

12. The aforesaid judgments cited and as discussed above only fortified the observations and opinion of this Bench, that by merely entering into an agreement or understanding of user of a asset, a License may be created in favour of user, however, that does not vest the user with the interest of any nature akin to owner for the purpose of Section 32(1) of the Act. So also no claim of depreciation beyond the law is allowable on mutual understanding between the owner and the user. The grounds raised have no substance. **The appeal of assessee is dismissed.**

Order pronounced in the open court on 21st December, 2022.

Sd/-	**Sd/-**
(SHAMIM YAHYA)	**(ANUBHAV SHARMA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Date:- 21 .12.2022

Binita, SR.P.S

Copy forwarded to:
1. Appellant
2. Respondent

3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI