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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ITA 129/2012

CIT

..... Appellant

Through: Ms Vibhooti Malhotra, Senior
Standing Counsel for the Revenue
with Mr Anjinkya Tiwari and Mr
Siddharth Manocha, Advocates.

versus

ELEL HOTEL & INVESTMENT LTD

..... Respondent

Through: Mr S. Ganesh, Senior Advocate with
Mr Muneesh Malhotra, Mr Ajay
Wadhwa and Mr Sandeep Gupta,
Advocates.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE TALWANT SINGH

ORDER

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20.08.2019

1. This is an appeal by the Revenue against an order dated 5th August, 2011 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 918/Del./2010 for the Assessment Year ('AY') 2006-07.

2. While admitting this appeal by the order dated 22nd August, 2013, the following substantial questions of law were framed:

“(i) Whether the Income Tax Appellate Tribunal was right in holding that the respondent-assessee is entitled to depreciation on Rs.30.86 crores @ 10 % as building?

(ii) Whether the Income Tax Appellate Tribunal was right in holding and setting aside the findings of the Assessing Officer

that income shown by the assessee as business income should be taxed as income from house property or as income from other sources?

[The contention of the respondent-assessee that the Assessing Officer had not examined and objected to depreciation as building will be also decided while examining the aforesaid question No.(i)].”

3.The material facts necessary for the purposes of present appeal are that the Respondent Assessee was the owner of a hotel known as Sea Rock at Band Stand, B.J. Road, Bandra (West), Mumbai managed by ITC Limited under a Hotel Operator Agreement effective from 1st July, 1986 up to 15th May, 2005. After 11th May, 2005, the hotel was being managed by Hotel Claridges Private Limited (‘HCPL’) under another Hotel Operator Agreement between the Assessee and HCPL.

4. For the AY in question, the Assessee filed its return on 21st October, 2006 declaring a loss of Rs.39,39,710/-. The Assessee being covered under Section 115-JB of the Income Tax Act, 1961 (‘Act’), it paid an aggregate tax of Rs.9,15,785/- on book profit under the aforementioned provision.

5. A search took place under Section 132 of the Act in the Suresh Nanda Group of Companies on 28th February, 2007. Pursuant thereto, the Assessing Officer (‘AO’) issued a notice to the Assessee on 9th September, 2008 under Section 153-A of the Act for reopening of proceedings. Pursuant to the notice, the Assessee filed a return of income declaring a loss of Rs.5,08,73,700/-. This difference in the return of income was attributed to the changed claim of depreciation. Whereas in the original return, the

depreciation was claimed to the tune of Rs.3,08,93,616/-, the claim increased in the return filed pursuant to the notice under Section 153-A of the Act to Rs.7,78,27,608/-

6. The AO passed an assessment order on 31st December, 2008 under Section 143 (3) read with Section 153-A of the Act assessing the total income of the Assessee at Rs.2,85,42,450/-, as against the returned loss of Rs.5,08,73,700/-. Against the aforementioned assessment order, the Assessee filed an appeal before the Commissioner of Income Tax (Appeals) [‘CIT (A)’]. During the course of the proceedings before the CIT (A), the Assessee was allowed to raise a ground that the amount paid by it to ITC Limited at the time of termination of the agreement with ITC Limited, ought to be allowed, as a revenue expenditure. In the order dated 30th December, 2009, the CIT (A) came to the following conclusions:

“6.3.2. Based on the above discussions, ground No. 3 is decided as under:

- (a) There was existence of business during the year.
- (b) An income of Rs.2,02,67,668/- on account of royalty accrued to the appellant during the year and the same has to be added towards its total income (though not added by AO.)
- (c) The hotel building has been used for the purposes of business during the year and therefore depreciation is allowable.
- (d) The claim of payment made to ITC Ltd as revenue expenditure cannot be allowed.
- (e) The claim of acquiring intangible asset by way of payment of Rs.30.86 crores to ITC Ltd cannot be allowed.

(f) The payment made to ITC Ltd of Rs.30.86 crores has rightly been capitalized by the appellant towards hotel building and depreciation @ 10% applicable to the hotel building has to be allowed as was claimed by the appellant in original return of income.”

7. Aggrieved by the above order, both the Assessee and the Revenue filed appeals before the ITAT, which were disposed of by a common impugned order (which incidentally was also common to the appeals for the AY 2005-06). It is seen from paragraph 24.6 of the impugned order of the ITAT that the counsel for the Assessee made three ‘without prejudice’ arguments before it in the following order of preference:

- (a) The expenditure is revenue in nature;
- (b) The expenditure is for acquiring an intangible asset; and
- (c) The payment is made for improving the title of the hotel building.

8. The discussion on the aspect whether the payment made to ITC Limited was capital in nature starts from paragraph 24.11 of the impugned order. The ITAT came to the conclusion that since on account of the aforementioned payment to ITC Limited “the Assessee’s business acquired a new lease of life” it could “only be held to be an expenditure of capital in nature”.

9. The ITAT then proceeded to consider the second alternative plea that the payment had led to acquisition of intangible asset. The ITAT in the impugned order came to the conclusion that “the payment cannot be said to be for acquisition of any intangible asset”. It appears that the ITAT, in view

of its finding that the expenditure was capital in nature, did not consider it necessary to answer the first of the three submissions of the Assessee, viz., that the expenditure was revenue expenditure and should be allowed as such.

10. Even when the above questions of law were framed before this Court by the order dated 22nd August 2013, it appears that no specific question as such was framed on this aspect.

11. However, it is pointed out by Mr S. Ganesh, learned Senior Counsel appearing for the Assessee, that if Question (i) is to be answered in favour of the Revenue i.e. by holding that the ITAT was in error in holding that the Assessee was entitled to depreciation on Rs.30.86 crores at 10% as building then the corollary would be that the said expenditure has to be treated as revenue expenditure.

12. On the other hand, Ms Vibhooti Malhotra, learned Senior Standing Counsel appearing for the Revenue, submits that the ITAT did not have an occasion to actually examine whether the expenditure could at all be claimed as a revenue expenditure. She points out that without examining how the Assessee treated the amount in the original return filed by it i.e. the return filed prior to the return pursuant to the notice under Section 153-A of the Act, the ITAT could not have come to a conclusion, one way or the other.

13. It must be noticed at this stage that according to the Assessee, it made a claim of depreciation at 10% on the sum of Rs.30.86 treating as building, both in its original return as well as in the return filed pursuant to the notice

received under Section 153-A of the Act. However, the alternative plea that this was revenue expenditure or that it was for acquisition of an intangible asset was raised by it for the first time before the CIT (A).

14. The Court finds merit in the contention that this aspect of the matter, viz., if the expenditure is not to be treated as 'capital expenditure', then it will have to be treated as 'revenue expenditure' was perhaps not addressed in the manner it should have been treated by the ITAT. On this aspect, therefore, the Court considers it appropriate to remit the matter to the ITAT for decision afresh on the treatment to be accorded to the expenditure incurred by the Assessee of the aforementioned sum of Rs.30.86 crores and whether in particular, it should be treated as a 'revenue expenditure' or as 'capital expenditure'. The Court makes it clear that it has not expressed any view one way or the other on the respective contentions of the Revenue or the Assessee on the issue, and, it will be open to the ITAT, after examining the entire records, including the original return filed by the Assessee to come to a fresh decision independent of its earlier decisions and any observations in the instant order.

15. As far as the Question (ii) is concerned, the Court is of the view that the findings both of the CIT (A) as well as the ITAT are consistent that the only business of the Assessee was its hotel business and, therefore, the income shown by the Assessee should be treated as income from house property and not as income from other sources. Consequently, Question (ii) is answered in the affirmative i.e. in favour of the Assessee and against the Revenue.

16. The appeal i.e. ITA No. 918/Del/2010 is restored to the file of the ITAT for deciding the specific issue mentioned in para 14 of this order afresh in accordance with law. The appeal shall be listed for directions before the ITAT on 11th September, 2019. The ITAT will make endeavour to dispose of the appeal as expeditiously as possible and in any event within a period of six months from the date of receipt of a copy of this order.

17. The appeal is disposed of in above terms.

S. MURALIDHAR, J.

TALWANT SINGH, J.

AUGUST 20, 2019
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