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IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Chandra Poojari, AM & Shri George George K, JM

ITA No.411/Coch/2016 : Asst.Year 2009-2010
ITA No.412/Coch/2016 : Asst.Year 2009-2010

The Asst.Commissioner of Income-tax, Circle 1 Non-Corporate, Kochi.	Vs.	M/s.Janapriya Builders C/o.Sri Thomson Thomas M/s.Elias George & Co., Chartered Accountants HIG Avenue, Gandhi Nagar, Kochi-682 020. **PAN : AAEFJ3205C**
(Appellant)		(Respondent)

Appellant by : Sri.M.V.Rudran, Addl.CIT-DR
Respondent by : Smt.Preetha S.Nair

Date of Hearing : 19.03.2018		**Date of Pronouncement : 22.03.2018**

O R D E R

Per George George K., JM

These appeals at the instance of the Revenue are directed against two orders of the Commissioner of Income-tax (Appeals), both dated 30.06.2016. The relevant assessment year is 2009-2010.

2. Common issue is raised in these appeals, hence they were heard together and are being disposed of by this consolidated order.

3. Identical grounds are raised in these appeals and they read as follows:-

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"1. The Order of the Commissioner of Income tax (Appeals-II), Kochi, in appeal No.ITA-92B/NC/Cir.1(1) / CITA)-II/2015-16 dated 30-06-2016, is opposed to law, facts and circumstances of the case.

2. Whether on the facts and circumstances of the case, the learned CIT(A) was right in allowing Diesel expenses which are not an admissible expenditure under section 23 to 27 of the Act?

3. The learned CIT(A) ought to have appreciated that gross rent as per lease agreement is assessable under the Income Tax Act.

4. The learned CIT(A) erred in granting relief to the assessee on the basis of supplementary deed produced by the assessee which however, was not produced before the Assessing Officer.

5. Though the tax effect in respect of the order exceeds the prescribed limit of Rs.10 lakhs, the case also satisfies the condition listed in para 8(iii) of the Circular No.21/2015 as the issue involved is on the basis of Revenue Audit Objection which was accepted by the Department.

6. For these and other grounds that may be urged at the time of hearing, it is requested that the order of the Commissioner of Income tax (Appeals) may be set aside and that of the Assessing Officer restored."

4. The brief facts of the case are as follows:-

4.1 The assessee is a firm having income from house property. For the assessment year 2009-2010, the return of income was filed on 01.10.2009 admitting a total income of Rs.1,45,84,800. The assessment u/s 143(3) of the I.T.Act was completed vide order dated 30.12.2011, wherein the total

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income was assessed at Rs.1,54,08,981. In the assessment completed, the assessee's claim of deduction towards diesel expenditure amounting to Rs.67,83,906 was partly disallowed by restricting the allowance only to 2/3rd of the claim. The relevant portion of the A.O.'s order in restricting the claim of diesel expenditure in the assessment completed u/s 143(3) of the I.T.Act reads as follow:-

> *"Out of the total amount, the assessee claimed that they have received only Rs.2,77,26,937 only and remaining amount will be offered as income as and when it is received and the amount deducted by the tenant towards Diesel expenditure of Rs.67,83,906/- as per the agreement entered has been considered. The assessee has not furnished any confirmation letter from the tenant i.e. M/s.Pantaloon India Retail Limited till date for the Diesel Expenditure claimed. After taking into consideration of the fact mentioned in the Lease Deed, it is proposed to disallow 1/3rd of the Diesel Expenditure claimed of Rs.67,83,906/- and the balance amount of Rs.45,22,604/- is allowed towards Diesel Expenditure."*

4.2 Subsequently, notice u/s 148 of the I.T.Act was issued proposing to reopen the order passed u/s 143(3) for the reason that the A.O. while completing the assessment u/s 143(3) of the I.T.Act had disallowed only 1/3rd of the diesel expenditure claimed. The A.O. was of the view that the diesel expenditure is not an allowable expenditure u/s 23 to 27 of the I.T.Act. The objections raised by the assessee was rejected by the A.O. and reassessment was completed vide order dated

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14.03.2015 wherein the entire diesel expenditure claimed as an expenditure was disallowed.

4.3 The assessee had filed an appeal as against the order u/s 143(3) and also against the order of reassessment passed u/s 143(3) r.w.s. 147 of the I.T.Act. The CIT(A) disposed off both the appeals vide separate orders (both dated 30.06.2016). The CIT(A) held that when the property was let out to the tenant, viz., M/s.Pentaloon India Retail Limited, there was no electricity connection from Tamil Nadu Electricity Board. The CIT(A) noticed that it was the responsibility of the assessee-landlord to provide the electricity connection and the tenant had incurred diesel generator expenditure for running its store. The CIT(A) noticed that diesel expenditure was reduced and the net amount was paid to the assessee. Therefore, it was concluded by the CIT(A) that the diesel expenditure was an allowable deduction and allowed the appeal of the assessee by holding the entire expenses of Rs.67,83,906 is to be allowed as a deduction. The CIT(A) has also referred to the supplementary agreement entered into between the assessee-landlord and the tenant M/s.Pentaloon India Retail Limited, wherein it was undertaken by the assessee that the electricity board connection till it is received, the monthly rent payable would vary depending upon diesel expenditure incurred by the tenant.

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5. Aggrieved by the order of the CIT(A), the Revenue has filed the present appeals before the Tribunal. The learned Departmental Representative strongly relied on the grounds raised and contended that the diesel expenditure is not an allowable expenditure as per the provisions of the Act, while computing the house property income.

6. The learned AR, on the other hand, relied on the findings of the CIT(A) and has also filed confirmation from M/s.Pentaloon India Retail Limited. In the confirmation letter of the tenant, it is stated that they have deducted Rs.67,83,9005.73 from the rent payable by it to the assessee-firm for the financial year 2008-2009 towards additional cost of generating part through diesel generator.

7. We have heard the rival submissions and perused the material on record. The assessee firm had entered into a lease deed agreement dated 27.04.2007 with M/s.Pentaloon India Retail Limited for renting out its premises on the first, second and third floors and another lease deed dated 27.04.2007 for renting out its fourth floor of the said premises to the same party. Since electricity connection from the Tamil Nadu Electricity Board was not obtained on time, the assessee had entered into a supplementary agreement with the tenant on 15.07.2008, whereby the assessee had agreed for deduction from rent the expenses incurred by the tenant for generating electricity by using diesel generator. As rightly pointed by the learned DR, diesel expenses are not admissible expenditure

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u/s 23 to 27 of the I.T.Act. However, in peculiar fact of the instant case, the moot point to be examined is whether by virtue of supplementary agreement dated 15.07.2008, the net rental receipt of the assessee is only the amount reduced by the diesel expenditure incurred by the tenant. This fact can be verified by examining the bank statements of assessee, where the rental income is credited. If only the net amount is credited in the bank of the assessee (i.e. rent minus the diesel expenses), the annual letting value of property to the extent of the value of diesel expenses incurred would not have accrued to the assessee as income by virtue of the supplementary agreement dated 15.07.2008. On the contrary, if the assessee had received the total rent and thereafter paid over the diesel expenditure incurred by tenant, it may only tantamount to application of income received by the assessee. These facts have not been examined by the CIT(A) nor the A.O. The Assessing Officer in the assessment completed u./s 143(3) had disallowed 1/3rd of the total diesel expenditure for the reason that there was no confirmation from the tenant for incurring the diesel expenses. In the reassessment completed u/s 143(3) r.w.s. 147 of the I.T.Act, 2/3rd of the diesel expenditure, which was allowed in the assessment completed u/s 143(3) of the I.T.Act, was disallowed. The assessee, on our directions, have now produced the confirmation of the tenant stating therein they have paid the rent minus the diesel expenses incurred by it. We notice that the crucial supplementary agreement dated 15.07.2008 was not produced before the A.O. Since, confirmation letter now

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produced before us and supplementary agreement was not before the A.O., in the interest of justice and equity, the matter needs to be examined afresh by the A.O. The A.O. shall dispose of the matter as expeditiously as possible, after affording a reasonable opportunity of hearing the assessee. It is ordered accordingly.

8. In the result, the appeals filed by the Revenue are allowed for statistical purposes.

Order pronounced on this 22nd day of March, 2018.

Sd/-	Sd/-
(Chandra Poojari)	**(George George K.)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Cochin ; Dated : 22nd March, 2018.
Devdas*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT, Kochi.
4. The CIT(Appeals)-II, Kochi.
5. DR, ITAT, Cochin
6. Guard file.

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin