IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL (IT) NO.1734 OF 2017

Pr.Commissioner of Income Tax-3 ... Appellant
V/s.
M/s V.Hotels Limited ... Respondent

Mr.A.R.Malhotra with Mr.N.A.Kazi, Advocates for the Appellant.

Mr.Percy J. Pardiwalla, Senior Advocate with Mr.Atul K. Jasani, Advocates for the Respondent.

CORAM : UJJAL BHUYAN &
MILIND N. JADHAV, JJ.
DATE : SEPTEMBER 21, 2020

P.C.:-

1. Heard Mr.Malhotra, learned standing counsel, revenue and Mr.Pardiwalla, learned senior counsel alongwith Mr.Atul Jasani, learned counsel for the respondent/assessee.

2. This appeal has been filed by the revenue under section 260A of the Income Tax Act, 1961 (briefly"the Act" hereinafter) against the order dated 26th August, 2016 passed by the Income Tax Appellate Tribunal, Mumbai Bench "F",

Mumbai (referred to as "the Tribunal" hereinafter) in ITA No. 3190/Mum/2011 and ITA No.4216/Mum/2011, for the assessment year 2006-2007.

3. ITA No.3190/Mum/2011 was filed by the assessee whereas ITA No.4216/Mum/2011 was filed by the revenue.

4. The two appeals were heard by the Tribunal alongwith a number of appeals filed by the same parties for the assessment years 2005-2006, 2007-2008 and 2008-2009.

5. As already noted above, the present appeal relates to the assessment year 2006-2007.

6. The appeal has been preferred on the following two questions stated to be substantial questions of law:-

> "1. Whether on the facts and in the circumstances of the case and in law, Tribunal is justified in allowing depreciation of Rs.30,67,319.00 on Floor Space Index (FSI) @ 10% of total consideration, without appreciating that grant of additional FSI is not in the nature of any kind of assets until and unless the additional flooring/building is constructed, therefore, not eligible for depreciation in this case?
> 2. Whether on the facts and in the circumstances of the case and in law, Tribunal is justified in allowing depreciation amounting to Rs.4,88,08,717.00 on intangible assets as claimed by the assessee?"

7. During the hearing on February 12, 2020, there was consensus at the Bar that in so far question No.2 is concerned, the same has already been answered by this Court in the case of the assessee itself in Income Tax Appeal Nos.835 and 836 of 2016, decided on 17th December, 2018, the only difference being that at that stage the assessee was known as Tulip Hospitality Services Limited. It has been held that it is not a substantial question of law. Thereafter, learned counsel for the parties were heard on question No.1.

8. In so far question No.1 is concerned, the issue is whether Tribunal is justified in allowing depreciation of Rs.30,67,319.00 on the FSI @ 10% of total consideration.

9. Assessee is a company assessed under the Act. It is engaged in hoteliering business. For the assessment year under consideration, it filed its return of income disclosing loss of Rs.26,36,59,486.00. In the course of the assessment proceeding, Assessing Officer observed that the assessee had claimed depreciation of Rs.63,90,248.00 on FSI; on an opening written down value (WDV) of Rs.2,55,60,990.00, depreciation @ 25% was claimed. Assessee was asked to explain. Reply of the assessee was examined. In the assessment order dated 13th October, 2008 passed under section 143(3) of the Act, Assessing Officer rejected the said claim of the assessee and added back the said sum to the total income of the assessee. It was held thus:-

> "3.4 The reply of the assessee has been examined in the light of the provisions of Income Tax Act and the nature of payment for purchase of FSI.
> 3.5 The brief facts have been stated by the assessee. The assessee paid a premium of Rs.3,40,81,320/- to the Government of Maharashtra and BMC in lieu of grant of additional FSI of 10022.94 sq.mts. This additional grant of FSI was 0.476 times over and above the existing FSI of 1.5. Till date he assessee has paid only an amount of Rs.68,16,264/- to the Government and the balance amount of Rs.2,72,65,056/- is not yet paid.
> 3.6 With the grant of additional FSI, the assessee got the permission to increase the size of the total building by constructing additional floors or additional building to the extent of the FSI available. The grant of FSI is not in the nature of any asset. It is only a payment made to the government for increasing the building size. The FSI can be used only when the assessee chooses to construct the additional floors on its hotel. Thus, FSI is not in the nature of any right of any type.
> 3.7 Under the provisions of Income Tax Act, the assessee can claim depreciation only on the assets used in its business. By virtue of its nature, FSI in the very first instance is not a business asset. FSI will get converted into asset as and when additional floors or additional building is constructed. Therefore, the payment for FSI can only be included in the value of the building block as and when the same is utilized.
> 3.8 In view of the above discussions an amount of Rs.63,90,248/- is added back to the total income of the assessee company."

10. Thus, Assessing Officer took the view that grant of FSI was not in the nature of any asset. It was only a payment made to the government for increasing the size of the building. FSI can be used only when the assessee chooses

to construct the additional floors. FSI will get converted into asset as and when additional floors or additional building is constructed. Thus, payment for FSI can only be included in the value of the building block as and when the same is utilized. Therefore, the amount claimed as depreciation on above account was declined and the same was added back to the total income of the assessee.

11. Aggrieved by the above, assessee preferred appeal before the Commission of Income Tax (Appeals)-7, Mumbai, referred to hereinafter as "CIT(A)". On the above issue, CIT (A) noted that the reasons for disallowance was the same as in the immediately preceding assessment year i.e. assessment year 2005-2006 . CIT(A) further noted the way the issue was decided by him in the appeal for the immediately preceding assessment year. The same is extracted hereunder:-

> "I have considered the facts of the case. The appellant has paid during the year Rs.68,16,264/- only although the value of FSI is Rs.3,40,81,320/- and had claimed depreciation on whole amount @ 25% as intangible asset u/s.32(1)(ii). The question is, whether FSI is an intangible asset of 'similar nature of know how, patent, copyright, trade mark, licenses, franchises, etc.' as provided in section 32(1)(ii) of the Act to be eligible for depreciation under Income tax Act. The appellant, while arguing that FSI is a commercial right, has not explained to which of the items mentioned in the section 32(2)(ii) of the Act the FSI has a similar nature. Even if it is accepted as a commercial right which will improve the business interest of the assessee, in no way it is of similar nature of know how, patent, copyright, trade mark license franchise etc. Accordingly, the action of A.O. in

> disallowing the claim of depreciation u/s.32(2)(ii) of the Act amounting to Rs.85,20,330/- is upheld. However I accept that the amount spent is for the purpose of business and being of enduring nature, it will add value to the existing building as additional FSI will enable the company to add more floors over and above the existing structure. Since it relates to the building block of asset, the overall cost of the building block will increase by this amount. Accordingly the A.O. is directed to add the amount spent during the year i.e. Rs.68,16,264/- to the building block of asset and allow depreciation as per law."

12. Thus, while action of the assessing officer disallowing the claim of depreciation was upheld, it was however held that the amount spent was for the purpose of business and being of enduring nature, it would add to existing value of the building as additional FSI would enable the assessee to add more floors over and above the existing structure. Since it related to the building block of the asset, the overall cost of the building block would increase by the said amount. Accordingly, assessing officer was directed to add the amount spent during the year to the building block of asset and allow depreciation as per law.

13. CIT(A) vide the appellate order dated 7th March, 2011 followed the above decision. While the claim of depreciation on FSI as an intangible asset under section 32 (1)(ii) of the Act was not accepted, the payment was allowed to be added to the building block of asset for depreciation as per law.

14. As against such finding of CIT(A), appeals and cross-appeals were filed by the assessee and the revenue before the Tribunal. While taking up the appeal of the assessee i.e., ITA No.3190/Mum/2011 for the assessment year 2006-2007, Tribunal noted that the issue relating to disallowance of depreciation on FSI was decided by the Tribunal in the assessee's appeal for the assessment year 2005-2006. Therefore, by the common order dated 26th August, 2016, Tribunal held that the finding given in the assessee's appeal for the assessment year 2005-2006 would apply *mutatis muntandis* in the appeal for the assessment year under consideration. In the appeal of the assessee for the assessment year 2005-2006, Tribunal had held as under:-

> "16. We have considered the rival submissions and also perused the relevant finding in the impugned orders as well as entire gamut of facts as discussed above. During the year under consideration the assessee company has acquired certain rights in the form of 'additional FSI' from the Urban Development Department; Government of Maharashtra on its Hotel (Tulip Star Hotel), vide letter dated 01.12.2003. The said letter stated that on payment of requisite premium to the Government and the BMC, 'additional FSI' of 10022.94 sq.meters would be granted to the assessee which would be additional FSI of 0.476 over and above the existing FSI of 1.5. Subsequently, order from the Government was received on 04.08.2004 wherein the assessee had to make the payment of the premium to the Government and the BMC amounting to Rs.3,40,81,320/-. Such a payment was to be made under the installment Scheme. In pursuance thereof, the assessee paid its first installment of Rs.68,16,264/-. Thus, the assessee received the rights in the form of 'additional FSI' which has been capitalized in the books of

accounts. In the books of account, the assessee company had debited the whole amount of Rs.3,40,81,320/- in the Schedule of 'fixed assets' as "Floor Space Index" and a corresponding credit entry was made as a liability payable to Government/BMC. In the Balance sheet as on 31st March, 2005, under the Schedule "B" showing 'current liabilities and the provision', the assessee has shown the liability under the head "premium payable" at Rs.2,72,65,056/- (i.e., Rs.340,81,320 – Rs.68,16,264). The assessee had claimed depreciation @ 25% on the ground that it is a some kind of business or commercial rights, therefore, it falls within the realm and scope of "intangible assets" allowable for depreciation @ 25% under section 32(1)(ii). This has been negated by the Ld. CIT(A) on the ground that the FSI does not fall within the scope and ambit of section 32(1)(ii). However, he accepted the assessee's contention that, the amount spent for the business purpose will go to add to the value of the existing building as additional FSI, which will enable the assessee company to add more floors to the existing structure and it relates to building complex of assets. Thus, he directed to allow the depreciation applicable to the building, that is, @ 10%. However, he has restricted the said depreciation on the amount paid during the year Rs.68,16,264/- and not to the entire amount as payable to the Government.

17. As observed in the earlier part of our order, the Floor Space Index is the ratio of the total floor of the building on a certain location to the size of the land of that location. In other words, it is quotient of the ratio of the combined gross floor area of all the floors. Granting of 'additional FSI' gives the right to construct the additional floor/s on account of increase in Floor Space Index by virtue of DCR, 1991. Here in this case, it is undisputed fact as discussed above that the assessee received the additional FSI of 10022.94 sq.meters for which premium amount of Rs.340,81,320/- was payable to the Government/ BMC under the "installment scheme". The

assessee did pay the first installment of Rs.68,16,264/-, however, the balance installment/ payment has not been paid for many years as brought on record. Once the assessee has received the FSI, it has made the accounting entries in its books by debiting the entire amount of Rs.3,40,81,320/- on the asset side of the Balance sheet by debiting to the details of "Fixed Assets" and the corresponding liability of Rs.2,72,65,056 which remained unpaid (i.e., Rs.3,40,81,320 – Rs.68,16,264 = Rs.2,72,65,056) has been shown as premium payable for additional FSI to the Government/BMC. Once the entire amount has been debited to the fixed assets and has been brought in the Balance sheet in the Schedule of fixed asset, that is, to the block of a building, then depreciation *prima facie* has to be considered on the full amount debited i.e. Rs.3,40,81,320/-. Before us, the Ld. DR reiterated the finding of CIT(A) that the depreciation cannot be allowed on the whole of the amount, because the assessee had only paid the first installment of Rs.68,16,264/-. However we are unable to accept this contention, because once the assessee receives the right to construct extra floor/storey, it enhances the value/cost of the building and assessee under the principle of accounting has debited the entire amount of FSI right to the block of asset of the building by making a corresponding entry as 'liability' in the Balance-sheet. This can also be explained by way of an example; suppose, assessee would have taken a bank loan for paying the entire or balance premium (say Rs.2,72,65,056) on FSI to the Government/BMC, then assessee would have debited the entire amount to FSI account under the head 'fixed assets' and credited to the bank and disclosed it as its liability in the Balance sheet. Now, if assessee has paid the premium on installment scheme, then assessee would debit the whole amount on the asset side and make a credit to the vendor account by showing it as liability payable to him for the amount which remains to be paid. It is immaterial whether for many years that liability

> or installment has been paid subsequently or not. Once the corresponding liability in the accounts has been shown, then depreciation on the asset should be given irrespective of the fact that this year only part payment was made for the acquisition of that asset. Thus, we hold that assessee would be eligible for depreciation for the entire amount of Rs.3,40,81,320/- debited to the account of asset.
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> 18. Now, coming to the rate of depreciation, whether it has to be allowed @ 10% or 25%, we do not find any merits in the contention of the assessee that the additional FSI is a business or commercial rights falling within the realm and scope of 'intangible asset' within the scope of section 32(1)(ii). The FSI only relates to giving of the right to construct additional floor to the assessee which only goes to enhance the value or cost of the existing asset / building. It strictly pertains to the addition in the building only and, therefore, depreciation allowable would be at the rates applicable to the buildings only and for not some kind of intangible right u/s 32(1)(ii). Accordingly, we uphold the observation and order of the Ld. CIT(A) to the extent that the depreciation allowable would be on rates applicable to the building only that is, @ 10% and not @ 25% for some kind of intangible right. Thus in our conclusion, the assessee would be entitled to depreciation @ 10% on the whole of the consideration towards FSI of Rs.3,40,81,320/-. In view of our finding ground No.1 is treated as dismissed and ground No.2 is treated as allowed."

15. From the above, we find that the assessee had acquired certain rights in the form of additional FSI over and above the existing FSI subject to payment of premium. However, premium was to be paid under an installment scheme. First installment was paid by the assessee. On payment of first installment, assessee received the rights in the form of

additional FSI which was capitalized in the books of account. In the books of account, assessee had debited the entire premium amount in the schedule of fixed assets as FSI and a corresponding credit entry was made as a liability to be paid. This was also reflected in the balance sheet as the balance premium amount was shown as liability.

16. After noting that granting of additional FSI gave the right to construct additional floors to the assessee, Tribunal further noted about the entries in the books of account and the balance sheet. Thereafter, a view was taken that once the entire amount has been debited to the fixed assets and has been brought in the balance sheet in the schedule of fixed asset i.e. to the block of a building then depreciation would have to be considered on the full amount of premium debited. This is because once the assessee receives the right to construct extra floor it enhances the value of the building; assessee under the principle of accounting had debited the entire amount of FSI right to the block of asset of the building by making a corresponding entry as liability in the balance sheet. If assessee had paid the premium on installment scheme, then assessee would debit the whole amount on the asset side and make a credit to the vendor account by showing it as a liability payable by it for the amount which remained to be paid, irrespective of the number of years that liability remained pending. Once the corresponding liability in the accounts has been shown, the depreciation on the asset should be given irrespective of the fact that for that year only part payment was made for

acquisition of the asset. Therefore, Tribunal held that the assessee would be eligible for depreciation for the entire amount of premium debited to the account of the asset.

17. In so far rate of depreciation is concerned, Tribunal did not accept the contention of the assessee that the additional FSI is a business or commercial right falling within the realm and scope of intangible asset within the meaning of section 32(1)(ii) of the Act. FSI only related to giving of the right to construct additional floor to the assessee which enhances the value or cost of the existing asset/ building. It strictly pertains to addition to the building and therefore depreciation allowable would be at the rate applicable to the building and not for some kind of intangible right under section 32(1)(ii). Accordingly, the decision of CIT(A) to the above extent was upheld. Therefore, Tribunal held that the assessee would be entitled to depreciation @ 10% on the whole of the consideration towards FSI and not @ 25%.

18. On due consideration we are of the opinion that view taken by the Tribunal is a reasonable one, having regard to the provisions contained in sections 32 (1)(ii) and 43(6)(c) of the Act. That apart, we find that revenue had not questioned the finding of CIT(A) that the amount spent by the assessee would add to the value of the existing building as additional FSI would be available to the assessee; the amount spent was for the purpose of business and was of enduring nature; since it related to the building block of the asset, the overall cost of the building block would increase

by this amount; therefore CIT(A) directed the Assessing Officer to add the amount spent during the year to the building block of asset and allow depreciation as per law i.e. on the rate applicable to the building which is 10% and not 25%.

19. We find from the documents placed on record that the order of the CIT(A) was accepted by the revenue and a conscious decision was taken not to file further appeal. When the revenue sought to file cross-objection belatedly the same was dismissed on the ground of limitation. That apart, having not filed appeal against such decision of CIT (A), revenue cannot now raise a dispute as to percentage of depreciation. In the circumstances, we do not find any good ground to disturb the finding of the Tribunal on this point. Therefore, we are of the view that no substantial question of law arises from the order of the Tribunal on this issue.

20. Appeal is accordingly dismissed, but without any order as to cost.

21. This order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

(MILIND N. JADHAV, J.) **(UJJAL BHUYAN, J.)**

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