

IN THE INCOME TAX APPELLATE TRIBUNAL  
BANGALORE BENCHES “ A ” BENCH: BANGALORE

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT  
AND SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER**

ITA No.2512/Bang/2019  
(Assessment Year: 2016-17)

M/s. Safina Hotels Pvt. Ltd.,  
84/85, Safina Plaza, Infantry Road,  
Bangalore-560 001  
PAN AACCS 5146G

....Appellant

Vs.

Dy. Commissioner of Income Tax,  
Circle 6(1)(1), Bangalore.

.....Respondent.

|              |                                  |
|--------------|----------------------------------|
| Assessee By: | Shri Tata Krishna, Advocate.     |
| Revenue By:  | Shri Kannan Narayanan, JCIT(D.R) |

|                         |             |
|-------------------------|-------------|
| Date of Hearing :       | 04.11.2020. |
| Date of Pronouncement : | 09.11.2020. |

**ORDER**

**PER SHRI CHANDRA POOJARI, A.M. :**

This appeal filed by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-6, Bangalore dt.31.10.2019 for the Assessment Year 2016-17.

2. The assessee has raised the ground with regard to depreciation claimed at Rs.20,40,391.

3. The facts of the case are that the assessee is a private limited company engaged in hotel business. The assessee filed Return of Income for the Assessment Year 2016-17 declaring loss of Rs.53,38,264 and the return was selected for scrutiny under CASS and notice Under Section 143(2) and 142(1) of the Act were issued. In compliance, the A.R. of the assessee appeared from time to time and furnished the details. The Assessing Officer issued show cause notice dt.5.12.2018 and called for the documents. The Assessing Officer passed the assessment order Under Section 143(3) by disallowing depreciation as per Companies Act on Motor Car of Rs.44,70,008 and legal and consultancy fees, professional fees, penalty and fines Under Section 37 of the Act aggregating to Rs.7,89,522. On appeal, the CIT (Appeals) confirmed the order of the Assessing Officer however he directed the Assessing Officer to disallow the depreciation as per the Income Tax Act, 1961 ('the Act') and not as per the Companies Act. Against this order, the assessee is in appeal before us.

4. The learned Authorised Representative submitted that lower authorities disallowed the depreciation only on the basis that the assessee has not engaged in the hotel business. It is submitted that the assessee incurred loss from F & O operations which is reflected in the assessee's financial statements under the head "Profits and Gains of Business or Profession" and allowed such loss set off against capital gains and other income. The learned Authorised Representative submitted

that in the assessment year under consideration the assessee engaged in Futures & Options (F&O). According to the learned Authorised Representative for granting the depreciation there was no necessity of having revenue from the assessee's hotel business and existence of revenue from hotel business is not a pre condition to claim depreciation Under Section 32 of the Act. He relied on the following judgments.

- CIT v. Rajendra Prasad Moody [ 1978] 115 ITR 519 (SC)
- Eastern Investments Ltd. v. CIT [1951] 20 ITR 1 (SC)
- Smt. Satish Bala Malhotra v. CIT [2017] 391 ITR 256 (Punjab 8s Haryana)
- CIT v. EKL Appliances Ltd. [2012] 345 ITR 241 (Delhi)
- CIT v. Darashaw & Co. (P.) Ltd [2014] 226 Taxman 193 (Bombay) (MAG.)
- CIT v. Ballarpur Industries Ltd. [2017] 85 [taxmann.com](http://taxmann.com) 13 (Bombay)
- CIT v. M. Ethurajan [2005] 273 ITR 95 (Madras)
- CIT v. Aspentech India (P.) Ltd. [2010] 187 Taxman 25 (Delhi),
- ADCIT v. Rajasthan Spg. & Wvg. Mills Ltd. [2005] 274 ITR 465 (Rajasthan)
- CIT v. Darashaw & Co. (P.) Ltd. [2014] 226 Taxman 193 (Bombay)(MAG.)
- Appa Rao v. CIT [ 1962] 46 ITR 511 (Mad)
- Mohamed Ghouse v. CIT [ 1963] 49 ITR 127 (Mad)
- Ormerods (India) Private Ltd. v. CIT [ 1959] 36 ITR 329 (Born)
- Chhail Behari Lal v. CIT [ 1960] 39 ITR 696 (All),
- CIT v. Dr. Fida Hussain G. Abbasi [ 1969] 71 ITR 314 (MP)
- M.N. Ramaswamy Iyer v. CIT [ 1969] 71 ITR 218 (Ker.)
- CIT v. Gopal Ch. Patnaik [ 1978] 111 ITR 86. (Orrisa)
- S.P.P.S. Systems (P.) Ltd. v. DCIT [2015] 154 ITD 465 (Hyderabad - Trib.)

4.1 The Id. AR submitted that the Assessing Officer is not justified in disallowing depreciation only for the reason that the assessee did not generate revenue from the hotel business. The assessee used the motor car for the purpose of business during the impugned financial year 2015-16.

4.2 The Appellant's total asset as on 31.03.2015 as per the audited financial statement is Rs.29 crores. The total asset was increased to 31.78 crores on 31.03.2016. The said motor car was used to its F&O operations and also to revive its hotel business. Hence it is submitted that the directors of the Appellant have used the car for to purpose of:

- F & O Operations
- To visit properties for revival of the hotel business.
- To attend board and annual general meeting and to meet auditors, bankers & company secretaries.

Hence the lower authorities are not justified in disallowing the depreciation on the motor car under Section 32 of the IT Act, solely based on their perverse observation that the appellant was not engaged in business.

4.3 Without prejudice to the above, the Lower Authorities have failed to appreciate that the appellant had carried on the business of operation of hotel in the past by taking the hotel property on lease and as the lessor took back the property, the appellant was endeavoring to take other hotel properties on lease, indicating continuance of hotel business.

4.4.1 The Id. AR relied on the order of Tribunal in Assessee's own case in ITA Nos.543 to 546/Bang/2013 for AYs' 2005-06, 2007-08, 2008-09 & 2009-10 has made following observations:

*“ The facts giving rise to the aforesaid issue in all these appeals are identical. The assessee is a company engaged in the business of running of hotel besides a consignment business of Suitcase and Travel Bag in the name & style of Samsonite. As already stated, it also receives income in the form of licence fees from letting of commercial space to various tenants on a daily, weekly, monthly and annual basis including the halls rented for exhibition. The assessee has constructed a composite structure consisting of a hotel and building complex on a land, which the assessee does not own. The assessee had taken the land on a perpetual lease in the year 1988 from Mr. Feroze Sattar Sait, who is also a director in the assessee and son of Mr. Abdul Sattar Sait, Managing Director of the assessee. The hotel and the building referred to earlier bears Door No.84/85, Infantry Road, Bangalore - 560 001. It is in the heart of city of Bangalore. It bears the name and style, 'Safina Plaza'. The structure constructed in the 1<sup>st</sup> Phase is the commercial complex consisting of Ground & First Floor which is let out to various tenants. The structure constructed in the 2nd Phase is the extension of the commercial complex consisting of Basement, Elevated Ground Floor to offset the gradient of the slope of the Road, First and Second Floors, including the hotel. The composite commercial complex consists of Basement, Elevated Ground Floor, First and Second Floors, including the hotel. The assessee's consignment business of Suitcase and Travel Bag in the name & style of Samsonite in also carried on in one of the shops on the ground floor.*

*In the previous year relevant to A. Y. 2009-10, the assessee received a licence fee of Rs.6,47,92,894. It may be clarified here that income from letting out in the business of running a hotel in the 1st & 2nd floors including the hotel is assessed under the head 'income from business' and there is no dispute on this aspect. The dispute is only with regard to licence fee received referred to above which is in the ground & 1st floors rented to various tenants on a daily, weekly, monthly and annual basis including the halls rented for exhibition. According to the Assessee, this income had to be assessed under the head 'income from business'.”*

4.4.2 He submitted that from the above observations of this Hon'ble Tribunal, it is an undeniable fact that the Appellant company was engaged in the Hotel business in past years. However, on 31.01.2014 (i.e. FY 2013-14/AY 2014-15), the lessor took back the long-leased property (since 01.04.1983) in which the Appellant was engaged in the hotel business. This had led to suspension of Appellant's hotel business which ran for more than three decades.

4.4.3. According to Id AR, the Assessee was endeavoring to take other hotel properties on lease to resume its hotel business. During this process of the

transitory disruption of the hotel business, the Appellant had to manage its assets (The total assets of the Appellant as on as on 31.03.2016 were Rs.31.78 crores). The Appellant was engaged in the F&O operations. It is pertinent to note that no person of prudence is expected to keep the funds idle in the course of its business.

4.4.4 He relied on the judgment in the case of CIT Vs. Kriti Resorts (P.) Ltd.

[2011] 243 CTR 341 , (Himachal Pradesh), it was held as under:

*“ The AO held that since the assessee had discontinued its Business since 1995 the income was not income from business but income from other sources and therefore the expenses claimed and depreciation brought forward could not be set off against the said income.*

**12.** *The first question which arises is whether the assessee can still be said to be in business or not. No doubt the hotel of the assessee was washed away and in that respect it can be said that it has not conducted any hotel business thereafter. However, the company does not cease to exist. The company is a juristic entity and incorporated under the Indian Companies Act. It will have to fulfil its obligations imposed upon it by the Companies Act till it is wound up. Therefore, some staff will have to be maintained. It cannot be said that the business has come to an end. In this behalf reference may be made to the judgment of the Madras High Court in CIT v. Vellore Electric Corporation Ltd.[2000] 243 ITR 529 (Mad) and a judgment of the Calcutta High Court reported in CIT v. Karanpura Collieries Ltd. [1993] 201 ITR 498 (Cal).*

*13. Therefore, once the company is in existence the assessee can seek depreciation. Reliance placed by the Revenue on the first proviso of s. 32(2) is totally misplaced. Therefore, as far as question No. 1 is concerned the same is answered in favour of the assessee and against the Revenue.”*

4.4.5. He also relied on the judgment in the case of DCIT E.India [Biz.Com](#) (P.) Ltd

[2014] 33 ITR(T) 265 (Delhi - Trib.), it was held as under:

*“ 6. In ground No. 2, the issue involved is deleting the addition made on account of not allowing depreciation of Rs. 44,324. The Assessing Officer disallowed the depreciation by holding that no business was carried out. The Commissioner of Income-tax (Appeals) allowed the appeal of the assessee by holding that the assessee was carrying on the business. Therefore, there is no question of disallowance of depreciation. After hearing both sides, we find that the learned Commissioner of Income-tax (Appeals) has rightly allowed the claim of the assessee. The assessee was very much in business. We find no merits in this ground of the Revenue's appeal.”*

4.4.6. Further he relied on the following judgments --

- i) Indian Railway Stations Development Corporation Ltd. v. PCIT [2019] 265 Taxman 11 (Delhi), it was held as under:

*“ The writ petitioner seeks the intervention of this Court to set aside an order of the Principal Commissioner of Income Tax [CIT] under Section 264 of the Income Tax Act, 1961. The petitioner is aggrieved by the assessment order made by the Assessing Officer (AO) for the assessment year (AY) 2013-2014, wherein the AO disallowed three items of expenditure claimed as deduction, i.e., depreciation, preliminary expenses, and employees' remuneration.*

.....

*14. The common thread of reasoning, which runs through these decisions cited by the assessee, is that in these cases there is no bright line that can be determinative as to when business commences. In case of the service sector, where the entity has involved itself in various kinds of steps, some*

*of which are preliminary to setting up the main substantial commercial venture, the linkage between these preliminary steps and nature of the ultimate activity may be a relevant factor to be taken into account. Therefore, Carefour dealt with this trading related aspect and stated that even certain kinds of preliminary steps, such as engaging in negotiation or employment of personnel, could be relevant even though actual activity might not be involved.*

*15. Keeping this principle in mind, this Court is of the opinion that the petitioner's activity, which it claims to be preliminary steps towards the fulfillment of the purpose, which is embodied in the MoU and extracts of which have been reproduced above, clearly indicates that it had set up its business and that these steps were for the ultimate fulfillment of its purposes, which was the preparation of development plans leading to the projects ”*

ii) PCIT v. Babul Products (P.) Ltd. [2018] 257 Taxman 100 (Gujarat), it was held as under:

*“ 2. We have heard Mrs Mauna Bhatt, learned advocate appearing on behalf of the revenue. So far as proposed question no.(a) is concerned, learned Assessing Officer disallowed the depreciation claimed by the assessee of Rs.34,03,491/- on the ground that the factory of the assessee is closed, and therefore, the assessee is not using the assets for which the depreciation was claimed, and therefore, the assessee shall not be entitled to the depreciation under Section 32 of the Income Tax Act. However, considering the fact that the assessee was in business however could not run the factory in the year under consideration because of the stay order granted by the Court and even otherwise, the business of the assessee was*

*continued, and therefore, the learned Tribunal allowed the claim of the assessee of depreciation under Section 32 of the Income Tax Act by observing that it cannot be said that the assessee stopped /closed the business, we are in complete agreement with the view taken by the learned Tribunal.”*

iii) *Mula Pravara Electric Co-op. Society Ltd. v. DCIT [2018] 173 ITD 313 (Pune - Trib.), it was held as under:*

*“ 14.5 Legal Scope on discontinuation of business - Assessee's intention: After considering the case of the assessee and the Revenue on the issue of intention Vs. discontinuation of business, we have perused the said decisions relied on by both the parties.*

*iv) In the case of Vikram Cotton Mills Ltd. (supra) the Hon'ble Supreme Court held that where an assessee leases its assets and the intention of the assessee is not to discontinue the business but to lease out the assets for a temporary period as a part of their exploitation, the lease rent derived from letting out the assets is assessable as business income and not as income from other sources.*

*v) In the case of CIT v. National Mills Co. Ltd. [1958] 34 ITR 155 (Born.) the Hon'ble Supreme Court held that company under liquidation having leased its plant and machinery, it could not be said that business of company ceased in the face of clear findings of Tribunal and income from leasing could be set off against past losses.*

*vi) In the case of Shri Lakshmi Silk Mills Ltd. (supra), the Hon'ble Supreme Court that where a manufacturer, being unable to use his plant gainfully, lets it out temporarily for making profits for that business, the plant so let out does not cease to be a commercial asset of the manufacturer and the income earned by letting it out is chargeable as business income under sec.10 of 1922 Act.*

vii) *In the Case of Vellore Electric Corporation Ltd. (supra), the Hon'ble Madras High Court held that there was no discontinuation of assessee's business while it was challenging the acquisition of its undertaking by State Government and the matter was pending in the court; all the expenses incurred by assessee in running the establishment during that period are allowable as deduction.*

viii) *In the case of L. Ve. Vairavan Chettiar v. CIT [1969] 72 ITR 114, the Hon'ble Madras High Court held that if a person carries on two or more distinct businesses, the profits or losses of all of them ought to be added together and the aggregate sum would represent his profits or gains in the business.*

ix) *In the case of Lahore Electric Supply Co. Ltd. (supra), the Hon'ble Supreme Court observed as under (HELD PORTION).*

*"None of the above grounds led to the conclusion that the company intended to canyon business. The mere fact that the company had not gone into liquidation would not establish that it had the intention to do business. There was further no question of the company's going into liquidation in the accounting years, for, during that time it had not received from the Government the entire amount due to it as compensation for the said acquisition. At the relevant time the company was not possessed of any commercial undertaking. It was unnecessary to go into the question whether an expression of an intention to resume business in vacuo would amount to carrying on business. It was sufficient for the purpose of this case to state that even an intention to resume business had not been established.*

*Therefore, the business was closed and the company had not established an intention to resume it. That would be enough to show that no business was carried on and it would be irrelevant to enquire whether the business was permanently closed.*

*The facts that the company had to pay the Government half share of the profits between 27-11-1942, and 5-9-1946 and that it had to return to the consumers the*

*deposits made by them would not indicate that it was carrying on a business. It would be laying down strange law to hold that where a business had in fact ceased to be run, it must be deemed as continuing because the outstanding liabilities of that business had not been liquidated. Business as contemplated by section 10 is an activity capable of producing a profit which can be taxed. Payment of outstanding liabilities was not an activity which could ever produce such a result. It could not be said, therefore, that because liabilities of a closed business were outstanding, it had to be held that either the business was continuing or that an intention to resume business must be inferred. Hence, the company had ceased to carry on business, and the Tribunal's conclusion to the contrary was incorrect."*

*These ratios of various decisions/judgments support the case of the assessee and the claims need to be allowed in favour of the assessee. We order accordingly. Further, on the other objection of the AO on the orders of MERC/APTEL about their closure order, we find the same are unsustainable in view of subsequent developments till 2016 on the decision of MERC and APTEL. Therefore, we dismiss the same too.*

*Therefore, all these undisputed facts, in our view, support the existence of "intention" to do business of power distribution. Unlike in the case of Lahore Electric Supply Co. Ltd. (supra) where mere clearing of outstanding liabilities is only defense from 'Revenue' in support of intention for continuation of business activity, the case on hand and its facts distinguishes the facts of other case. Further, we find the judgment in the case of Vellore Electric Corpn. Ltd. (supra) is very close to the facts of the present one under consideration so long as the takeover decision of the Court is concerned. But the basis of actions of the present assessee keeps the assessee on a different pedestal. Therefore, the business of the assessee cannot be held to be a discontinued one. All the administrative expenses have to be allowable as business expenditure.*

*Therefore, we find it difficult to conclude that the assessee does not have any intention to continue the business of power distribution. Accordingly, the Ground No.1 raised by the assessee is allowed.*

*Whether the Expenses debited to Profit and Loss Account constitute business expenditure eligible for claim of deduction u/s.37 of the Act.*

4.4.7 He submitted that the revenue has no role to decide when a businessman should continue or discontinue his business. When the Appellant has a clear intention to continue its hotel operation, the Lower Authorities cannot consider the same as terminated. During the interim period of search of new hotel properties, the Appellant can be engaged in the F&O operations. The Lower Authorities cannot disallow depreciation solely for the reason that during the impugned year the Appellant was not engaged in hotel business but was engaged in F&O operations.

4.4.8 For the above proposition he relied on the judgment in the case of S.A. Builders Ltd. vs. CIT, [2007] 288 ITR 1(SC), it was held as under:

*“ 34. We agree with the view taken by the Delhi High Court in CIT v. Dalmia Cement (Bharat) Ltd. [2002] 254 ITR 377 that once it is established that there was nexus between the expenditure and the purpose of the business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize its profit. The income tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own view point but that of a prudent businessman. As already stated above, we have to see the transfer of the borrowed funds to a sister concern from the point of view of commercial*

*expediency and not from the point of view whether the amount was advanced for earning profits.*

4.4.9 The ld. AR also relied on the following decisions:

- i. Hero Cycles (P.) Ltd. v. CIT [2015] 379 ITR 347 (SC);
- ii. Sasson J.David & Co. P.Ltd. v. CIT (1979) 118 ITR 261 (SC);
- iii. CIT vs. Walchand and Co. (P.) Ltd., [ 1967] 65 ITR 381(SC);
- iv. CIT vs. Panipat Woollen & General Mills Co. Ltd., [ 1976] 103 ITR 66(SC)
- v. CIT v. British Paints India Ltd. [1991] 188 ITR 44 (SC)
- vi. Vipin Kumar Khanna v. CIT [2001] 251 ITR 7822 (Delhi)
- vii. CIT vs. Dalmia Cement P. Ltd., (2002) 254 ITR 377(Del)
- viii. PCIT v. Reebok India Company [2018] 409 ITR 587 (Delhi)
- ix. CIT v. Raghuvir Synthetics Ltd [2013] 354 ITR 222 (Gujarat)
- x. Q PCIT v. Chain House International (P.) Ltd. [2018] 98 [taxmann.com](http://taxmann.com) 47 (Madhya Pradesh)
- xi. John Laing International Ltd. v. DCIT [2013] 145 ITD 145 (Delhi Trib.)
- xii. Km. Preeti Singh v. ITO [2019] 176 ITD 137 (Delhi - Trib.)

5. According to the ld. AR, the assessee is entitled depreciation since the assessee fulfilled the conditions laid down in Section 32 of the Act. The assessee's impugned asset on which depreciation claimed was included in the block of assets. Further it was submitted that the Assessing Officer having granted the maintenance expenditure of Car, it is not proper to disallow the depreciation on the same Car. He relied on the following judgements :

- i) CIT Vs. Malayalam Plantations Ltd. (1964) 53 ITR 140 (SC)*
- ii) CIT Vs. Delhi Safe Deposit Co. Ltd. (1982) 133 ITR 756 (SC)*
- iii) CIT Vs. Lawrence D'Souza (2011) 203 Taxman 200 (Kar)*
- iv) Hirsh Bracelet India (P) Ltd. Vs. ACIT (2019) 178 ITD 601 (Bang – Trib)*
- v) Sai Fragrance & Flavours (P) Ltd. Vs. ACIT (2018) 169 ITD 235 (Mum-Trib).*

5.1 Further it was submitted that even the assessee has discontinued hotel business it is necessary to use the Car by the Director of the assessee company and there will be wear and tear which is in the nature of depreciation for which the assessee is entitled for depreciation.

6. On the other hand, the learned Departmental Representative submitted that there was no revenue from the hotel business during the year under consideration and there is no question of allowing any business expenditure and condition laid down in Section 32 are not fulfilled and the assessee is not entitled for depreciation.

7. We have heard both the parties and perused the material on record. In the assessment year under consideration, the assessee's hotel business is not in operation however the assessee is existing, the assessee is earning income from dividend, interest on deposits, gains on securities, Short Term Capital Gains and Long Term Capital Gains and income from F & O and the same was offered to tax.

More so, the assessee claimed Car maintenance expenditure and duly allowed by the Assessing Officer. However depreciation on Car was not allowed by the Assessing Officer on the reason that the assessee's hotel business is not in operation and not earned any revenue from hotel business. As pointed out by the learned Authorised Representative in the case of CIT Vs. Kriti Resorts (P) Ltd. 243 CTR 341 (Himachal Pradesh) when the business is not in operational, the assessee can also claim depreciation. In the case before the Hon'ble High Court of H.P., the assessee has not conducted any hotel business due to washed away of all assets of the hotel by flood. However the company was existing. Accordingly, the Hon'ble High Court of Himachal Pradesh held that since the company is in existence, the assessee was maintaining some staff, the assessee could claim depreciation Under Section 32(2) of the Act. In the present case also, the assessee company is in existence under the Companies Act and it has to fulfill various statutory compliances and it is not disputed that the assessee is earning income from F & O business and other sources. The same was offered for tax. Unless and until the assessee is ceased to exist, the assessee is entitled for depreciation on assets which was included block of assets. For granting depreciation, it is not mandatory for assessee to have revenue from Hotel Business. In the present case, the Assessing Officer himself has allowed maintenance of Car expenditure however disallowed depreciation on the same which is not correct. In our opinion,

the assessee is entitled for depreciation as per Income Tax Act which has to be granted. We allow the appeal of the assessee.

8. In the result, the appeal of the assessee is allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-

**(N.V. VASUDEVAN)**  
**VICE PRESIDENT**

Sd/-

**(CHANDRA POOJARI)**  
**ACCOUNTANT MEMBER**

Dated: 09.11.2020.

\*Reddy GP

Copy to

1. The appellant
2. The Respondent
3. CIT (A)
4. Pr. CIT
5. DR, ITAT, Bangalore.
6. Guard File

By order

Assistant Registrar  
Income-tax Appellate Tribunal  
Bangalore