

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'SMC' अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" BENCH, AHMEDABAD
(Conducted through Virtual Court)
BEFORE SHRI RAJPAL YADAV, VICE-PRESIDENT
AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

ITA No.1138/Ahd/2019

निर्धारण वर्ष/ Asstt.Year : 2016-17

| | | |
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| Sanjay Bharkat Kumar Shah 37/A, Vasantkunj Society New Sharda Mandir Road Paldi, Ahmedabad. PAN : ABVPS 5484 J | Vs. | ITO, Ward-5(3)(2) Ahmedabad. |
|--|-----|---------------------------------|

| | | |
|--------------------|--|--------------------|
| (Applicant) | | (Responent) |
|--------------------|--|--------------------|

| | |
|---------------|----------------------------|
| Assessee by : | None |
| Revenue by : | Shri Kamlesh Makana, Sr.DR |

सुनवाई की तारीख/Date of Hearing : 10/11/2021

घोषणा की तारीख /Date of Pronouncement: 08/12/2021

आदेश/ORDER

PER RAJPAL YADAV, VICE-PRESIDENT:

Assessee is in appeal against order of the ld.CIT(A)-5, Ahmedabad dated 31.5.2019 passed for the Asstt.Year 2016-17.

2. Assessee has raised seven grounds of appeal. However, sole issue for adjudication arises from the above grounds is that the ld.CIT(A) has erred in confirming finding of the ld.AO that the impact fee levied by the municipal authority of Rs.5,19,051/- is penal in nature, and accordingly denied as expenditure and added the same to the total income of the assessee.

3. Brief facts of the case are that the assessee is an individual and engaged in business of export of software and trading in derivatives. He filed his return of income on 24.9.2016 declaring total income at Rs.8,08,840/-. Assessee carried out his business activities at the rented premises of M/s.Weather Crafts Ltd. at UGF 36, Citi Centre, C.G. Road, Navrangpura, Ahmedabad. As per the agreement with the said company, the assessee has to bear fees, taxes and other cost or any other charges. Further, since the assessee was using rented premises, he had paid impact fee of Rs.5,19,051/- on the property as required by the City Centre Owners Association on behalf of the owner. The assessee has made provision of the above but ultimately he has recovered Rs.2,40,193/- from the owner and claimed expenditure of Rs.2,78,858/-. However, the Id.AO did not accept this submission of the assessee. He was of the view that since the assessee was not owner of rental premises and impact fee being penal in nature levied by the municipal authority for regularizing illegal construction, and expenditure being capital in nature, the assessee has no *locus* to claim benefit of the same. The Id.AO accordingly did not allow the claim of the assessee, and added the same to the total income of the assessee. Dissatisfied with order of the Id.AO, assessee preferred appeal before the Id.first appellate authority, before whom, the assessee filed written submissions, which reads as under:

“The order of assessment dated 26/12/2018, is passed by Learned ITO Ward 5(3)(2), Ahmedabad adding Rs 519,051/-towards disallowance of Impact Fee.

The addition is disputed on the following grounds:

The Assessee has occupied the office premises at Ground Floor GF (31) and Upper Ground Floor (GF 36) of City Centre, CG. Road, Navrangpura, Ahmedabad 380009, in capacity as Tenant.

Lease agreement with the owner Weather Crafts Limited, for the premises is placed as Annexure 1 on Page Number 01 to 04 of Paper Book for your immediate reference.

The amount payable to City Centre Properties Owners Association as per notice issued and received by the said association.

The said association, through elected committee members, is in charge of up-keeping and maintenance of the entire City Centre office premises.

Copies of notices issued and received from the said association are enclosed as Annexure 2 on Page_Number_05_to 06 of Paper Book for your immediate reference.

The Assessee has accounted for the said expenses in its books of account to the tune of Rs.519,051/-, However the Assessee has claimed and also recovered Rs 240,193/- from the owner of the premises and balance of Rs 278,858/- is claimed the said as a revenue expense under Section 30 of the Income tax Act. The statement of impact fee and other expenses are set out in Annexure 3 on Page Number 07 to 07 of Paper Book for your immediate reference. The table is also produced hereunder for ready reference;

*Statement of Impact Fee and Other Expenses for Office GF 31 and UGF 36 at City Centre for the Previous Year 2015-16
GF31*

| <i>Particulars</i> | <i>Total Payable</i> | <i>Already Paid</i> | <i>Balance</i> |
|------------------------------|----------------------|---------------------|----------------|
| <i>Impact Fee</i> | <i>4000</i> | <i>4000</i> | <i>0</i> |
| <i>Parking Fee</i> | <i>182930</i> | <i>45375</i> | <i>137555</i> |
| <i>Administrative charge</i> | <i>18693</i> | <i>5445</i> | <i>13248</i> |
| | <i>205623</i> | <i>54820</i> | <i>150803</i> |

UFG 36

| <i>Particulars</i> | <i>Total Payable</i> | <i>Already Paid</i> | <i>Balance</i> |
|------------------------------|----------------------|---------------------|----------------|
| <i>Impact Fee</i> | <i>16000</i> | <i>8000</i> | <i>8000</i> |
| <i>Parking Fee</i> | <i>463469</i> | <i>125625</i> | <i>337844</i> |
| <i>Administrative charge</i> | <i>47947</i> | <i>15075</i> | <i>32872</i> |
| | <i>527416</i> | <i>148700</i> | <i>378716</i> |

Total

| <i>Particulars</i> | <i>Total - Payable</i> | <i>Already Paid</i> | <i>Balance</i> |
|---|------------------------|---------------------|----------------|
| <i>Impact Fee</i> | <i>20000</i> | <i>12000</i> | <i>8000</i> |
| <i>Parking Fee</i> | <i>646399</i> | <i>171000</i> | <i>475399</i> |
| <i>Administrative charge</i> | <i>66640</i> | <i>20520</i> | <i>46120</i> |
| | <i>733039</i> | <i>203520</i> | <i>529519</i> |
| <i>Difference or Mistake of casting in books vis a vis total of notices</i> | | | <i>10468</i> |
| <i>Provision in books of Account</i> | | | <i>519051</i> |
| | | | |
| <i>Less: Claimed from Owner of Premises i. e. Weather Crafts Ltd.</i> | | | <i>240193</i> |
| <i>Claimed in Profit and Loss Account as Expenses</i> | | | <i>278858</i> |

The Learned AO has disallowed the said expenses observing in Para 7 as follows:

Para 7 Impact Fee

During the year under consideration on perusal of balance sheet of the Assessee it is observed that the Assessee has credited its balance sheet by

an amount of Rs 519,051/- under the head "Provision of Impact Fee". However on the other side of the balance sheet i.e. is asset the Assessee has not shown any assets owned by the company against which impact fee is to be paid by the Assessee. Therefore the Assessee vide notice dated: 17.12.2018 was issued a Show Cause as to why the provision made under the head of Impact Fee should not be disallowed and be added to your total income. The relevant part is re-produced hereunder;

Please find the following and showcause why the same should not be added /disallowed accordingly;

| | | | |
|---|---------------|-------------------------|---|
| 1 | Rs.5,19,051/- | Provision of Impact fee | The impact fee is born by the owner of the property and there is no corresponding assets shown in the balance sheet of the Prodigy System Software. The same is required to be added under section 68 of the Act. |
|---|---------------|-------------------------|---|

Against the above, the Assessee has replied vide letter dated: 20.12.2018, which is put on record. The reply of the Assessee has been gone through judicially but the same is not acceptable. The Assessee vide submission had stated that he had been using rental premises for his business and he had paid impact fee on the property as per the Rent Agreement. This contention of the assessee has been found completely baseless and unjustified due to following reasons:-

1. Impact fee is levied by the Municipal Authority or the competent authority on the "owner of the property" whenever they do not follow the prescribed rules/laws / parameters set up by the authorities looking after regulation of construction of the properties. The actually is the "Compounding Fee" levied by the Municipality or the Competent Authority on the owner with sole intent of regularizing the "illegal" construction. Such payment is a onetime payment to be paid by the owner only. Such payments are capital expense only and have to be capitalized in the books of account of the owner. Even the bills are raised in the name of owners. The owner also takes the benefit of such cost for the purpose of capital gains indexation. In the case, the Assessee relied upon the copy of rent agreement which even does not specifically mention that as per the agreement it was to be borne by the tenant.

2. *Impact fees are actually in the nature of penalty For removing the defect to the title of the property. Since, the title of the property belongs to the owner it has to be added to the title of the property of the owner. The tenant has nowhere comes in picture with regard to the title of the property.*

3. *Since, the nature of payment for removing the defect to the title of the property is of penal nature, it is also not allowable for the owner as per provisions of Section 37 of the Act.*

In view of the above it is evident that the claim made by the Assessee was not admissible as per law. Hence, the same is disallowed and added to the total income of the Assessee of Rs.519.051/-.

No disallowance under section 68 as it was the basis of SCN

It is evident that the AO proceeded with a belief the amount has to be disallowed under section 68 as unexplained Credit in the books of account of the Assessee. The Show cause notice is issued to add amount of Impact Fee under section 68 of the Act, as Un-explained in absence of asset in the balance sheet of the Assessee.

However vide letter of reply dated: 20/12/2018, the assessee has explained to Learned ITO the nature of expenses alongwith Rent Agreement and Notice of demand from the City Centre Properties Owners Association. The Assessee explained the it was liable to pay expenses related to rented premises under the provisions of Rent Agreement, as tenant. Thus nature of expenses and related Credit is explained, referred to in the Show Cause Notice.

Once the nature of credit is explained, the Learned AO, without providing any further opportunity to the Assessee, has passed order presuming and stating that the expenses should be capitalized by the Owner of the Premise and same should be claimed while calculating Capital Gain on Sale / Transfer of the Property.

This reasoning and observation of Learned AO for disallowance of expenses claimed by the Assessee, under section 30 of the Act, is entirely irrelevant. The amount is paid by the Assessee for its own business as explained in detailed I the letter dated 20.12.2018. Same is re-produced hereunder for your reference;

Reply of Assessee

2 Provision for Impact Fee:

In this connection, I would like to submit that I am running the business of software development and for that business I have kept office owned by Weather Crafts Limited at UGF 36, City Centre, C.G. Road, Navrangpura, Ahmedabad for monthly rent of Rs. 75, 000/-.

Since I am developing software on behalf of US clients, I have to keep office open almost 24 hours and that is the reason why....

a. I have hired office in heart of the city so that my staff commuting time gets reduced.

b. I have committed rental tenure of nearly 3 years so that I can work uninterruptedly as I have to focus on delivering timely service to my foreign clients.

c. I have agreed to bear all taxes and fees levied by Government or Association as per para 6 of Agreement for the sole reason that my work may not get hindered for want of proper infrastructure or other shortcomings.

d. I have reserved myself only to carry out current repair and maintenance of rented premises to provide hassle free work atmosphere to my staff.

/ appreciate that normally impact fees as stated in your notice is borne by owner but for the reason stated above, I have agreed to bear all such expenses, taxes, charges and fees for smooth and uninterrupted working and hence, I have claimed the expenses considering of "repair" nature for tenant and debited to Profit and Loss Account. This is my contractual obligation & a revenue expense.

Further, as decided by Honorable Courts, expenses incurred whether on capital account or revenue account by Tenant should be considered as "Repairs" u/s.30 (a) (i) and same should be allowed as revenue expenses.

I attach here-with the relevant case laws for your reference.

Thus the claim of assessee is under section 30 of the Act, same is reproduced hereunder for your ready reference;

Rent, rates, taxes, repairs and insurance for buildings:

30. In respect of rent, rates, taxes, repairs and insurance for premises, used for the purposes of the business or profession, the following deductions shall be allowed—

(a) where the premises are occupied by the assessee—

(i) as a tenant, the rent paid for such premises; and further if he has undertaken to bear the cost of repairs to the premises, the amount paid on account of such repairs;

(ii) other-wise than as a tenant, the amount paid by him on account of current repairs to the premises;

(b) any sums paid on account of land revenue, local rates or municipal taxes;

(c) the amount of any premium paid in respect of insurance against risk of damage or destruction of the premises.

Explanation.—For the removal of doubts, it is hereby declared that the amount paid on account of the cost of repairs referred to in sub-clause (i), and the amount paid on account of current repairs referred to in sub-clause (ii), of clause (a), shall not include any expenditure in the nature of capital expenditure.

It is submitted that the Assessee is a tenant and amount of Impact Fee and Parking Charges and Administrative expenses are borne in capacity as Tenant. Thus amount is allowable as Rent under Section 30 of the Act. The Learned AO has grossly erred in considering same as Un-explained expenses and further as capital expenses incurred for an on behalf of the Owner.

The Assessee has explained in detail business expediency and reasons for owing the expense and justified the expense for the purpose of the business. The Learned AO, has not considered the claim of Assessee for deduction under section 30 and straight away concluded that these are capital expenses of owner. This indicates the biased and prejudice mind of the AO. The order is vitiated on this ground.

The Assessee has incurred only Part of the Total Expense of Rs 519,051/-. It is evident that the Assessee has claimed Rs 273,858/- i.e. Part of Impact fee of Rs 8000/-, Part of Parking Charges of Rs 475,399/- and Part of Administrative Charges of Rs 46120/- in capacity of Tenant under the Rent Agreement with Owner of the Premises. In the Profit and Loss Account of the Assessee, assessee has claimed Rs. 278,858/- only and not Rs 519.051/-, as disallowed by the Learned /TO.

Part of the said expense Rs 240,193/- is borne by the Owner of the Premises. The same is evident from Ledger Account A.M. C. Impact Fee Expenses. The same is enclosed as Annexure 4 on Page Number 8 to 8 of Paper Book for your immediate reference.

Thus there is no basis for disallowance of Rs 519,051/- when assessee has claimed only Rs 278,858/- as an expense in its Profit

and Loss Account. The balance amount is reimbursed by the Owner of the premises, thus it has effectively incurred and claimed only net amount of Rs 278,858/-. The Learned ITO grossly erred in disallowing figure appearing in Balance sheet her than referring to profit and loss account of the Assessee. Profit and Loss Account of the Assessee is enclosed as Annexure Son Page Number 09 to 10 of Paper Book for your immediate reference.

The last contention of the Learned AO, to disallow the said expenses, is that the said expenses are disallowable under Explanation 1 to Section 37(1) of the Income tax Act. Section 37 is re-produced here-under for your reference;

37. (1) Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession".

Explanation 1.—For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure.

*Explanation 2 **** (Irrelevant portion of the section is stroked off)*

However the payment of Impact fee as illegal expenses or an expenses to cover up offence is not correct as concluded by number of Income tax Appellant Tribunals and difference High Courts.

The Hon'ble ITAT Surat has decided the matter in favour of Assessee on identical facts, in the matter of Shree Khodiyar Corporation Surat vs ACIT Circle 3 Surat (Appeal ITAT 1901/Ahd/2009) ITAT 25th September 2009. The copy of the Judgment is enclosed as Annexure 6 on Page Number_11 to 13 of Paper Book for your immediate reference. The decision of the Hon'ble ITAT is based on several other judgments mentioned in the decision. The Hon'ble ITAT has passed order allowing impact fee expenses, following decision of various other Judicial Authorities.

The decision of Hon'ble Mumbai ITAT Bench A, in case of ACIT Central Circle 21, Mumbai vs layer Exports P Ltd. Reported in

[2017] 88 Taxmann.com 620 (Mumbai ITAT), is also in favour of Assessee. The Hon'ble ITAT Mumbai has passed a details and speaking order in favour of Assessee observing that...

The entire amount incurred on the construction of the property was legal, genuine and in accordance with law and therefore, admissible as business expenditure (Refer Annexure 7 on Page Number 14 to 14)

Further Hon'ble Delhi High Court, in the matter of Commissioner of Income tax Delhi -IV vs Hi Lines Pens Private Ltd. reported in [2008] 175 Taxman 132 (Delhi), on identical facts, decided the matter in favour of Assessee. Refer Annexure 8 on Page Number 15 to 19.

Thus it is clear and settled law that Impact fee is an allowable business expenses and not illegal expense or an expense in relation to offence committed by the Assessee.

In the present matter before us, it is also evident that the Assessee is not owner or developer of the office premises. The premises is old building and it is occupying the premises to carry on its business activity. Thus there is no allegation that assessee has committed any illegal or offensive act.

It is also evident from the communication from City Centre Owners Association that out of Total amount payable of Rs 519051/-, impact fee amounts to Rs 8000/- only. Further the /Assesses has only contributed part of the said expenses. Thus even otherwise the Impact fee is of Rs 8000/- only. The balance amount is towards Parking Charges and Administrative Expenses. These expenses do fall in the purview of section 37 (1) of the Act and do fall outside the purview of Explanation 1 to Section 37(1).

Under the circumstances, your good office is requested to take into account all the above submissions and pass the speaking order on merit of the case and oblige.

Thanking you,

*For Sanjav Shah
CA Kalpesh Shah
M/sPR Shah & Associates
Chartered Accountants
(Partner/Authorised Representative)*

*End:
Letter of Authority
Paper Book
(Annexure 1 to 8 Page 1 to 19)*

*To
The Commissioner of Income Tax
CIT Appeals-5,
Aayakar Bhavan,
Near Sachin Tower, Room No 504,
5th floor, Vastrapur,,
Ahmedabad
Respected Sir,*

*Sanjay Shah - PAN: ABVPS 5484J
Reg: Assessment Year: 2016-17
Sub: Appeal against Assessment order of under Section 143 (3) of
the Act
Written Submissions - 2*

Respected Sir,

Apropos hearing in the above appeal matter, please find enclosed herewith following, as provided by the client, for your kind consideration and perusal;

*1.
Translation of Notice by Association to the Assesses:
English Translation of Notice dated 14/05/2015 issued by the City Centre Property Owners Association, in Gujarati to Members of the Association, for GF 31 and UGF 36 is Annexure 9 (Page Number 20 to 21 of Paper Book).*

This translation is done by the undersigned and same is true and correct translation of Gujarati Version of the said notices, to the best of my knowledge and belief. These are notices by the Association in Gujarati to the member of the association which was Annexure 2 (Page 5 to 6) of Paper Book of Letter dated: 11th April 2019.

2.

Payment of Impact Fee:

Audited Annual Report of the Association for the year 2015-16 is enclosed, as Annexure 10 (Page 22 to 26) wherein inter-alia, Payment of Impact Fee Rs 20,43,385/- (Rupees Twenty Lakh Forty Three Thousand Three Hundred and Eighty Five) is reported on the Expense side by the Association.

Hope above is as per your requirements.”

5. The Id.CIT(A) has gone through submissions of the assessee, but did not find favour, and rejected the same.

6. In response to the notice of hearing, no one has come present on behalf of the assessee.

7. With the assistance of the Id.DR, we have gone through the record carefully. Municipal authorities have levied an impact fee, and such expenses were to be borne by owner of the assessee's premises. The Revenue was of the view that this expenditure is penal in nature, and therefore, hit by *Explanation-1* appended to section 37 of the Act. On the other hand, explanation of the assessee is that in order to run business, it was a necessary expenditure linked with the tenancy agreement. Hence, it is allowable under section 30 of the Act. It was also contended that impact fee is not a penal in nature, it is a compensatory. The assessee has made reference to decision of ITAT, Mumbai Benches in the case of Mumbai Vs. Layer Exports P.Ltd., (2017) 88 taxmann.cm 620. Similarly, he relied upon the decision of ITAT, Surat Bench in ITA No.1901/Ahd/2009. In all these decisions, fees levied by the municipal authorities for

regularization of minor irregularities in compliance of bye-laws at the end of owner have been allowed as deduction. In the present case, it is pertinent to note that though municipal authorities have imposed an impact fee of Rs.5,19,051/-, and the assessee has made provision of this amount also, but ultimately, assessee has recovered Rs.2,40,193/- from his owner and only claimed expenditure of Rs.2,78,858/- whereas the AO has disallowed total amount of impact fee. The expenditure claimed by the assessee is only Rs.2,78,858/-. This fact has duly been submitted by the assessee in his submission as discernible from the submissions noted above. Therefore, it is not justifiable at the end of the AO to make an addition of Rs.5,19,051/- as against claim of Rs.2,78,858/-. In the present case, the assessee was under obligation to bear the expenditure as per the tenancy agreement. Therefore, we are of the view that the ld.CIT(A) has erred in disallowing claim of the assessee. We allow this ground and delete the impugned addition of Rs.5,19,051/-.

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

Order pronounced in the Court on 8th December, 2021 at Ahmedabad.

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

Sd/-
(RAJPAL YADAV)
VICE-PRESIDENT

Ahmedabad; Dated 08/12/2021