

## **Brokerage exp. to identify a tenant for under construction building couldn't be allowed under sec. 37(1)**

**Summary – The Pune ITAT in a recent case of Angelica Properties (P.) Ltd., (the Assessee) held that where brokerage expenses were incurred by assessee real estate company for finding tenant for its building which was under construction and the lease arrangement with tenant was to commence only after construction, the claim of expenses under section 37(1) was not maintainable.**

### **Facts**

- The assessee, a company was engaged in the business of construction and development of IT Park and Hotels, etc.
- For the relevant assessment year, the assessee filed a return of income declaring loss, which was subject to scrutiny assessment under section 143(3).
- The Assessing Officer observed that in the profit and loss account, the assessee had debited an expenditure on account of brokerage and commission, on which the assessee explained that it had paid the said amount for finding a tenant for its building which was still under construction.
- On the date of leave and license agreement the building sought to be leased out was not complete and, thus, lease was to commence on the date when building was ready.
- The assessee had not received any lease rent during the relevant assessment year but in subsequent assessment year, assessee had started receiving lease income which was declared in the return of income of subsequent year as income from house property.
- The assessee justified the claim of such brokerage expenses incurred as revenue expenditure however, the Assessing Officer rejected the claim of assessee by holding that such expenditure had no nexus with the trading receipt of the assessee either during the year under consideration or even in the ensuing year because such income was declared in subsequent year as income from house property.
- On appeal before the Commissioner (Appeals), Commissioner (Appeals) also confirmed the view of the Assessing Officer.
- On appeal:

### **Held**

- In the instant case, the claim of the assessee is that it has incurred expenditure on payment of brokerage and commission for finding a tenant for its building, which was still under construction. Although, the lease agreement is dated 24-5-2007, i.e., a date falling within the previous year relevant to the assessment year under consideration, however, the commencement of the lease is stated to be only post-completion of the building, which has happened in the subsequent assessment year. The assessee has received the lease rentals also in the subsequent assessment

year when the lease arrangement actually commenced. It is also not in dispute that the lease rentals have been declared in the subsequent year as 'income from house property'. During the year under consideration, the expenditure towards brokerage and commission for finding tenant for the said building is claimed as 'revenue expenditure' deductible in terms of section 37(1).

- The phraseology of section 37(1) *inter alia* prescribes that the expenditure should be laid out or expended wholly and exclusively for the purposes of business. In the instant case, the issue canvassed by the assessee is that it is in the business of construction and development of IT Park and Hotels and its business model envisaged that before selling the building/IT Park constructed by it, it finds a tenant for the same and thereafter sells it to the ultimate customer along with the tenancy arrangements. Therefore, it is sought to be justified that the activity of finding a tenant for the building under construction is an activity for the purposes of business and thus the expenditure is allowable in terms of section 37(1). In so far as the proposition sought to be canvassed by the assessee is concerned, it cannot be disputed in principle, so however, what is required to be examined is as to whether under the facts and circumstances of the present case, such a proposition enables the assessee to support its claim of deductibility of expenditure of Rs. 164,69,459 under section 37(1) during the year under consideration. Factually, it is evident that the building which is sought to be leased out is still under construction during the year and even the lease agreement in question has not commenced during the year under consideration. Therefore, it is only after the completion of the building and commencement of the lease agreement that the proposition canvassed by the assessee can be tested.
- For the present, having regard to the facts and circumstances of the case, the impugned expenditure can at best be taken as a part of the cost of construction and development of the building, which the assessee has sold in the subsequent years. Notably, the cost of development and construction of building in question has been shown as capital work-in-progress by the assessee in its balance sheet, since it was incomplete and under construction. The claim of the assessee that the said expenditure was allowable as 'revenue expenditure' in terms of section 37(1) during the year under consideration is not well founded, having regard to the facts and circumstances of the case. Thus, on this aspect assessee has to fail.