

**IN THE INCOME TAX APPELLATE TRIBUNAL,
BANGALORE BENCH 'C'**

**BEFORE SHRI VIJAYPAL RAO, JUDICIAL MEMBER
AND
SHRI JASON P BOAZ, ACCOUNTANT MEMBER**

ITA Nos.1209 & 1212/Bang/2014
(Asst. Years – 2004-05 to 2006-2007 & 2009-10)

M/s Consulate Constructions,
Unit No.102, Consulate I,
No.1, Richmond Road,
Bangalore. . Appellant
PAN – AACFC7082Q.

Vs.

The Asst. Commissioner of Income-tax,
Circle-1(1),
Bangalore. . Respondent

Appellant by : Shri Prashanth G.S, CA

Respondent by : Shri Sunil Kumar Agarwala, JCIT

Date of Hearing : 15-9-2015

Date of Pronouncement : 24-9-2015

ORDER

PER SHRI JASON P BOAZ, ACCOUNTANT MEMBER :

These appeals by the assessee are directed against the order of the Commissioner of Income-tax (Appeal) – I, Bangalore dated 30/6/2014 for asst. year 2004-05 to 2006-07 and 2009-10. Having

been heard together, these appeals are disposed off by way of this common order.

2. The facts of the case, briefly, are as under:

2.1 The assessee is firm engaged in the business of construction as builders and developers. For the concerned asst. years 2004-05 to 2006-07 and 2009-10, the details of returns of income filed, income returned, assessment orders, assessed income etc. are extracted hereunder:-

Asst. Year	Dt. Of filing of return of income	Income returned (Rs.)	Dt. Of Asst. Order	Assessed Income	Asst. order u/s
2004-05	25/10/2004	51,54,259	19/12/2011	76,19,152	143(3) rws 147
2005-06	31/08/2005	62,23,963	19/12/2011	69,27,019	143(3) rws 147
2006-07	18/10/2006	1,04,90,178	19/12/2011	1,08,59,147	143(3) rws 147
2009-10	31/7/2009	88,00,445	23/11/2011	81,15,523	143(3) rws 147
				----- 88,00,449/-	----- Protective u/s 143(3)

2.2 For asst. years 2004-05 to 2006-07, the returns were processed u/s 143(1) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') but not taken up for scrutiny. Subsequently, for the above three years, proceedings u/s 147 of the Act were initiated to bring to tax income from rental receipts declared by the assessee, under the head 'Business Income' for assessment as 'income from house property'. After recording reasons to this effect, the Assessing Officer issued notices u/s 148 of the Act which were duly served on the assessee. For the asst. year 2009-10, the case was taken for scrutiny by issue of notice u/s 143(2) of the Act.

2.3 The reasons recorded by the Assessing Officer, for initiating proceedings u/s 147 of the Act for asst. years 2004-05 to 2006-07 were given to the assessee and the assessee's objections thereto were considered and disposed off by the Assessing Officer in the body of the assessment orders for these three years. The assessment for these three years were completed u/s 143(3) rws 147 vide orders dated 19/12/2011, inter alia, assessing the income from lease rent as 'Income from house property', as against 'Business Income' declared by the assessee, by following the decision of the Hon'ble Apex Court in the case of Shambn Investments Pvt. Ltd., reported in 263 ITR 143.

For asst. year 2009-10, the assessment was concluded u/s 143(3) of the Act vide order dated 23/11/2011 wherein the rental receipts were assessed as Income from House Property at Rs.81,15,523/- and the same rental receipts were protectively assessed as 'Business Income' as declared by the assessee.

3. Aggrieved by the orders of the assessment for asst. years 2004-05 to 2006-07 dated 29/11/2011 and asst. year 2009-10 dated 23/11/2011, the assessee preferred appeals before the CIT(A)-I, Bangalore. The learned CIT(A) disposed off the assessee's appeal for the aforesaid 4 asst. years by way of a common order dated 30/6/2014. In the impugned orders, the learned CIT(A), upheld the Assessing Officer's action in treating the lease rental receipts as 'Income from House Property' and not 'Business Income' as declared by the assessee; and also upheld the action of the Assessing Officer on the issue of initiating assessment proceedings u/s 147 of the Act and issuing notices u/s 148 of the Act for asst. years 2004-05 to 2006-07.

4. Aggrieved by the orders of the CIT(A)-I, B'lore dated 30/6/2014 for asst. years 2004-05 to 2006-07 and 2009-10, the assessee is in appeal before the Tribunal.

4.1 For asst. years 2004-05 to 2006-07, the following common grounds of appeal have been raised and, we therefore extract only the grounds raised for the asst. years 2004-05 hereunder:

“1. The order of the learned authorities below in so far as they are against the appellant are opposed to law, weight of evidence, probabilities, facts of and the circumstances of the appellant’s case.

2. The appellant denies itself liable to be assessed on a total income of Rs.69,27,019/- as against the returned income of Rs.62,23,963/- under the facts and circumstances of the case.

3. Ground on validity of the reassessment proceedings:-

a. The notice u/s 148 of the Act is barred by limitation as it is issued after the expiry of four years and consequently the assumption of jurisdiction is bad in law.

b. The Notice issued is bad in law as proper sanction for reopening the case has not been obtained from the Jt. CIT before passing the order or having been obtained, the copy of the same has not been provided to the appellant. Consequently the orders passed suffer from the want of

jurisdiction under the facts and circumstances of the case.

c. The reopening of assessment is not based on any new tangible material on record which amounts to mere review of the existing facts is impermissible and unsustainable in the eyes of law. Reliance is placed on the decision of Delhi High Court in the case of Madhukar Khosla Vs. ACIT, reported in 367 ITR 165.

d. The assumption of jurisdiction is bad in law as the Notice under sec. 148 is merely based on suspicion and surmises and not based on factual foundation.

e. The assumption of jurisdiction is further bad in law as the reasons recorded are mere reason to suspect and not reason to believe on the facts of the case.

f. The mandatory condition for reopening is escapement of income which in the case instant is not satisfied as the impugned income was already declared by the appellant in the return of income filed on the facts of the case.

4. The authorities below erred in treating income from temporary letting out of commercial property of Rs.1,28,72,652/- as income from house property as against business income as declared by the appellant on the facts of the case.

5. *Without prejudice, the authorities below failed to appreciate that the conditions precedent to claim depreciation u/s 32 does not involve any distinction between fixed assets and stock in trade as mentioned by the CIT(A) on the facts of the case. Reliance on the decision of Supreme Court in the case of ICDS Ltd. Vs. CIT, reported in 350 ITR 527.*

6. *Without prejudice, the authorities below erred in not allowing deduction for depreciation of Rs.29,50,498/- as claimed by the appellant on the facts of the case.*

7. *Without prejudice, the authorities ought to have allowed depreciation of at least Rs.11,48,694/- in respect of the assets owned and used by the appellant in its business under the facts and circumstances of the case.*

8. *The action of the authorities below in not following the directions given by the Hon'ble jurisdictional tribunal in the appellant's own case for the assessment year 2002-03 is in violation of the principles of judicial discipline on the facts of the case.*

9. *The appellant denies itself to be levied interest u/s 234D of the Act. The calculation of interest u/s 234D of the Act is not in accordance with law since the method of*

calculation, the rate, period for which it has been charges is not discernible from the order of assessment.

10. Without prejudice, the interest u/s 234D of the Act is not leviable and requires to be waived off under the facts and circumstances of the case.

11. The appellant craves leave to add, alter, delete or substitute any of the grounds urged above.

12. In the view of the above and other grounds that may be urged at the time of the hearing of the appeal, the appellant prays that the appeal may be allowed in the interest of justice and equity.”

4.2 For asst. years 2009-10, the assessee has raised the following grounds:

“1. The order of the learned authorities below in so far as they are against the appellant are opposed to law, weight of evidence, probabilities, facts of and the circumstances of the appellant’s case.

2. The appellant denies itself to be assessed on a total income of Rs.81,15,523/- as against Rs.88,00,450/- under the facts and circumstances of the case.

3. *The appellant denies to be assessed on a sum of Rs.71,735267/- as income from house property as against the business income of Rs.78,58,194/- under the facts and circumstances of the case.*

4. *The orders passed by the authorities below are on a wrong appreciation of the facts and against the principles of natural justice under the facts and circumstances of the case.*

5. *The authorities below erred in treating income from temporary letting out of commercial property of Rs.1,09,08,828/- as income from house property as against business income as declared by the appellant on the facts of the case.*

6. *Without prejudice, the authorities below failed to appreciate that the conditions precedent to claim depreciation u/s 32 does not involve any distinction between fixed assets and stock in trade as mentioned by the CIT(A) on the facts of the case. Reliance on the decision of Supreme Court in the case of ICDS Ltd. Vs. CIT, reported in 350 ITR 527.*

7. *Without prejudice, the authorities below erred in not allowing deduction for depreciation of Rs.6,10,138/- as claimed by the appellant on the facts of the case.*

8. *The action of the authorities below in not following the directions given by the Hon'ble jurisdictional tribunal in the appellant's own case for the assessment year 2002-03 is in violation of the principles of judicial discipline on the facts of the case.*

9. *The appellant craves leave to add, alter, delete or substitute any of the grounds urged above.*

10. *In the view of the above and other grounds that may be urged at the time of the hearing of the appeal, the appellant prays that the appeal may be allowed in the interest of justice and equity."*

5. The grounds raised at SNo. 1,2,11 & 12 for asst. years 2004-05 to 2006-07 and at SNo. 1,2,9 & 10 for the asst. years 2009-10 are general in nature and not being urged before us in appellate proceedings are dismissed as infructuous.

6. At the outset of the hearing itself, the learned AR for the assessee submitted that the issues for consideration in these four

appeals for asst. years 2004-05 to 2006-07 and 2009-10 stand covered by the decision of the coordinate bench of this tribunal in the assessee's own case in ITA No.944 and 945/Bang/2011 dated 6/2/2015 for asst. years 2001-02 and 2003-04. The learned DR was also heard in the matter and supported the impugned orders of the learned CIT(A) on all the issues raised.

7. **Ground No.3(a) to 3(f) – Validity of Assumption of jurisdiction (for asst. years 2004-05 to 2006-07).**

7.1 In the course of hearings before us, the learned AR for the assessee, submitting that all issues in these appeals stand covered by the orders of the coordinate bench of the tribunal for asst. years 2001-02 and 2003-04 (Supra), did not urge these grounds. In this view of the matter, as the grounds raised by the assessee challenging the validity of assumption of jurisdiction by the AO in these three asst. years 2004-05 to 2006-07 were not urged, these grounds are rendered infructuous and, are accordingly dismissed. Consequently, ground at Sl. Nos. 3(a) to (f) raised for asst. years 2004-05 to 2006-07 stand dismissed.

8. Ground Nos. 4 to 9 for asst. years 2004-05 to 2006-07
Ground No. 3 to 8 for asst. year 2005-06

8.1 In these grounds the assessee had contended that the receipts from lease rentals ought to have been assessed as 'business income' as declared by the assessee and not as 'income from house property' as held by the authorities below. The learned AR submits that the coordinate bench of this tribunal in its order in ITA Nos. 944 and 945/Bang/2011 dated 6/2/2015 has remitted this matter to the file of the Assessing Officer for fresh consideration and adjudication of the issue of whether the lease rental receipts received by the assessee from its tenants is to be treated as 'business income' as claimed by the assessee or as 'income from property' as held by revenue.

8.2.1 We have heard the rival contention and perused and carefully considered the material on record, including the orders of the coordinate bench of this tribunal in the assessee's own case for asst. years 2001-02 & 2003-04 in ITA Nos. 944 & 945/Bang/2014 dated 6/2/2015. In that order, the co-ordinate bench, following the decision of another coordinate bench of this tribunal in the assessee's own case for asst. year 2002-03 in ITA No.1252/Bang/2007 dated 29/10/2008, set aside the orders of assessment for asst. years 2001-02 and 2003-04

bench to the file for fresh consideration and de-novo assessment holding as under at para 8.3.2 and 8.3.3 of its order:-

8.3.2 On a careful consideration of the facts and circumstances of the case and on appreciation of the rival contentions and material on record, we are of the considered view that, in the interest of equity and justice, the matter / issues with respect to whether the lease rental receipts received by the assessee from its tenants is to be treated and assessed as 'business income' as claimed by the assessee or as 'income from house property' as held by revenue, requires fresh consideration in the light of the observations in para 6 of the decision of the co-ordinate bench of this Tribunal in the assessee's own case for Assessment Year 2002-03. We, therefore, remit this matter to the file of the Assessing Officer for fresh consideration of this issue after affording the assessee adequate opportunity of being heard and to file details / submissions required which will be considered, in the light of our observations above. It is ordered accordingly. In this view of the matter, the grounds raised at S.Nos.4 and 5 are rendered infructuous and are accordingly dismissed.

8.3.3 We wish to make it clear that we have only set aside only the issue of assessment of lease rental receipts received by the assessee from its tenants, whether as 'income from house property' or 'business income', to

the file of the Assessing Officer in accordance with our observations in para 8.3.2 of this order (supra) and para 6 of the order of the co-ordinate bench of the Tribunal in the assessee's own case for Assessment Year 2002-03 (supra). In this view of the matter, we also make it clear that we are not adjudicating on the merits of this issue as raised by the assessee at grounds Nos.6 to 9 of these appeals.

8.2.2 Following the aforesaid decision of the coordinate bench of this tribunal in the assessee's own case for asst. years 2001-02 and 2003-04 in ITA Nos.944 and 945/Bang/2011 dated 6/2/2015 and on a careful consideration of the facts and circumstances of the case we are of the considered view that, in the interest of equity and justice, the matter/issue of whether the lease rental receipts received by the assessee from its tenants is to be treated and assessed as 'business income' as claimed by the assessee or as 'income from house property' as held by revenue, requires fresh consideration in the light of observations in para 6 of the decision of the co-ordinate bench of this tribunal in the assessee's own case for asst. years 2002-03 (Supra). We, therefore, remit the matter to the file of the Assessing Officer for fresh consideration of this issue after affording the assessee adequate opportunity of being heard and to file details and

submissions required, which will be considered in the light of our observations above. It is ordered accordingly. Consequently, the ground raised at SNo.4 of the assessee's appeals for asst. years 2004-05 to 2006-07 and ground No. 3 of the assessee's appeal for asst. years 2009-10 are allowed for statistical purposes.

8.2.3 We make it clear that we have only set aside the issue of assessment of lease rental receipts received by the assessee from its tenants, whether as 'business income' or as 'income from house property' to the file of the Assessing Officer in accordance with our observations in para 8.2.2 of this order (Supra), para 8.3.2 of the order of the coordinate bench in assessee's own case for asst. years 2001-02 and 2003-04 (Supra) and para 6 of the tribunals order in the assessee's own case for asst. years 200203 (Supra). In this view of the matter, we also make it clear that we are not adjudicating on the merits of this issue as raised by the assessee in grounds at SNo.5 to 9 for asst. years 2004-05 to 2006-07 and grounds at SNo.4 to 7 for asst. years 2009-10.

9. **Charging of Interest u/s 234D of the Act**

9.1 In the ground No.10 for asst. year 2004-05 and 2005-06 and ground NO. 9 for asst. year 2009-10, the assessee denies itself as being liable to be charged interest u/s 234D of the Act. The charging of interest is consequential and mandatory and the Assessing Officer has no discretion in the matter. This proposition has been upheld by the Hon'ble Apex Court in the case of Anjum H. Ghaswalla reported in 252 ITR 1 (SC) and we, therefore, uphold the action in charging the assessee the said interest. The Assessing Officer is, however, directed to recompute the interest chargeable u/s 234D of the Act, if any, while giving effect to this order.

6. In the result, the assessee's appeals for the asst. years 2004-05 to 2006-07 partly allowed for statistical purposes and the appeal for the asst. years 2009-10 is allowed for statistical purposes.

Order pronounced in the open court on **24th Sept, 2015.**

Sd/-
(VIJAYPAL RAO)
JUDICIAL MEMBER

Sd/-
(JASON P BOAZ)
ACCOUNTANT MEMBER

Vms.
Bangalore
Dated : 24/9/2015

Copy to :

1. The Assessee
2. The Revenue
3. The CIT concerned.
4. The CIT(A) concerned.
5. DR
6. GF

By order

Asst. Registrar, ITAT, Bangalore.