

आयकर अपीलिय अधीकरण, न्यायपीठ – “B” कोलकाता,
*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “B” KOLKATA*

Before **Shri Aby.T Varkey, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.2097-2100/Kol/2013
Assessment Years :2004-05 to 2006-
07 & 2009-10

ACIT, Circle-30, 2, Gariahat Road(S), Kolkata-68	V/s.	M/s Tapasya Enterprises 11A, Palm Avenue, Kolkata-19 [PAN No.AADFT 1366 M]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

आवेदक की ओर से/By Assessee	None
राजस्व की ओर से/By Respondent	Shri Saurabh Kumar, Addl. CIT-DR
सुनवाई की तारीख/Date of Hearing	05-10-2017
घोषणा की तारीख/Date of Pronouncement	13-10-2017

आदेश /ORDER

PER BENCH:-

These four appeals by the Revenue are directed against the different orders of Commissioner of Income Tax (Appeals)-XIV, Kolkata dated 16.04.2013, 17.04.2013 & 25.04.2013. Assessments were framed by ACIT, Circle-3/JCIT, Range-3 Kolkata u/s 143(3) r.w.s 147 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide their orders dated 16.04.2013, 07.12.2011, & 13.12.2011 for assessment years 2004-05 to 2006-07 & 2009-10 respectively.

2. At the time of hearing none appeared on behalf of assessee though several notices were issued through RPAD. So we decided to hear the

present appeals after hearing the Id. DR and without the appearance of assessee or by Ld.AR.

3. Since common grounds are involved in all the appeals of Revenue except figures, therefore, they were heard together and are being disposed of by way of this common order for the sake of convenience. Revenue's appeal in ITA No.2097/Kol/2013 for assessment year 2004-05 is treated as lead case, the grounds raised by the Revenue reads as under:

"1) Whether on the facts and circumstances of the case, the Ld. CIT(A) was right in law as well as on facts in ignoring the fact that assessee had no real estate business and as such business expenses claimed against house property income was not allowable u/s 24 of the Act.

2) Whether on the facts and circumstances of the case, the Ld. CIT(A) was right in law as well as on facts in ignoring the fact that as per lease agreement with tenants, rental income was separate from car parking fees, furniture lease etc. and thence standard deduction u/s.24 of the Act on this receipt was on allowable.

3) That the appellant craves leave to add, alter, modify, include or delete any of the above grounds of appeal."

4. First issue raised by Revenue in this appeal is that Ld. CIT(A) erred in deleting the disallowance made by Assessing Officer for the business expenses including the depreciation in view of the fact that assessee carried no business activity.

5. Briefly stated facts are that assessee is a partnership firm and deriving its income from the letting out of property. The assessee is the owner of two properties which are located in Bangalore and Delhi respectively. The Bangalore property was completely let out on rent and its income was declared under the head "house property". Similarly, assessee let out part of the property located in Delhi on rental basis and part of the property was being used as administrative office. The income from the partly let out property i.e. Delhi property was also offered to tax under the head "house property".

5.1 The assessee besides house property income also claimed to carry on the business of building construction as evident from object clause of Partnership deed which reads as under:-

"That the business of the firm is and shall be to deal in Real Estate, let out properties act as commission agent, builders, reltors, cultivator, grower,

producer, harvester, importer, exporter, trader, act as wholesalers, commission agents etc. of agriculture produce, commodity, crops, herbs and allied agricultural activities. However, the partners, may by mutual consent, take up any other line of trade.”

The assessee in its balance-sheet as on 31.03.2004 has shown advance payment for certain properties at ₹1,17,20,000/- only. The assessee in its profit and loss account has claimed expense of ₹31,41,251/- including the depreciation in respect of Delhi property and other fixed asset for ₹22,53,751/- only.

5.2 Therefore, the assessee in its income tax returns shown the income as detailed under:-

Sl.No.	Particulars
1	Income under the head house property
2	Loss under the head business and profession
3	Income under the head other source

The assessee in its computation of income claimed the loss of ₹31,41,251/- under the head “business and profession” which was set off against the income from house property / other sources. However, during the course of assessment proceedings, AO observed that the expense claimed under the head business and profession are not eligible for deduction in view of that assessee carried no business activity in the year under consideration as well as in the subsequent year also. Accordingly, AO called upon assessee to explain as to why expense claimed under the head “business and profession” should be allowed as deduction and consequently setting off the same from house property income. In compliance thereto, assessee submitted that it is engaged in the business of real estate development and for the running of its business it has incurred expenses such as salary, conveyance, painting, stationery, electricity, office maintenance, telephone etc. Besides the above, it has also claimed the depreciation of ₹22,53,751/- which is a statutory allowance u/s. 32(1) of the Act. Simply, the assessee has not shown any

income under the head “business or profession” cannot be the basis of ruling out the existence of any business. However, the AO disallowed the claim of assessee by observing that it has already claimed expenditure against the rental income u/s. 24 of the Act and in fact, all expenses claimed by assessee under the head “business or profession” are actually incurred against the rental income. Thus, AO disallowed the claim of ₹31,41,251/- and added to the total income of assessee.

6. Aggrieved, assessee preferred an appeal before Ld. CIT(A). The assessee before Ld. CIT(A) submitted that it has constituted the Deed of Partnership with effect from 10.01.2003 to carry on the real estate business. The assessee for real estate business has advanced money for the plots/ lands for ₹1,17,20,000/- which has been duly disclosed in its balance-sheet as on 31.03.2004. The assessee further submitted that all the expenses claimed by it was incurred in connection with the business only. During the course of assessment proceedings, AO nowhere has doubted the genuineness of such expenses but erred in treating the same as non-business expense. The AO erred treating the same as incurred against the house property income. Ld. CIT(A) after considering the submission of assessee deleted the addition made by the AO by observing as under:-

“... .. it is seen that the real estate business is one of the dominant activities mentioned in the deed of partnership. It is also seen that the appellant has used its Vasant Vihar property of New Delhi for the purpose of its real estate business. From this Vasant Vihar property, the appellant has run his office for maintaining its real estate business. It is also found that the assessing officer has lost sight of the fact that the appellant firm has given advances for properties being lands and plots to GS ide and Dynasty Prop. P.L. amounting to Rs.17,20,000/- and Rs.1 Cr. Respectively. The aforesaid advances are reflected in the audited accounts of the appellant. This fact itself indicates that the appellant is in the business of real estate development in this regard, it is well settled principle that business is nothing more than continuous course of activities and for commencement of business, all the activities which go to make up the business need not be started simultaneously. As soon as an activity which is the essential activity in the course of carrying on the business is started, the business must said to have commenced. In the present case, the appellant gave advances for acquisition of land for its business and Delhi property has been used by the appellant as its administrative office for its real estate business. On these facts, in the light of the judgment of Hon'ble Calcutta High Court in the case of Tetrun Commercial Ltd. 261 ITR 422 (Cal),

it can be held that the business of real estate of the appellant has commenced in the aforesaid judgment, the Hon'ble Calcutta High Court has held that in the business of real estate, there are three stages. One is the acquisition of land and the other is the process of construction of building and the third is the actual distribution or sale of the building. There is no requirement in law that deduction for expenditure in course of business can be granted only against income. Nonetheless, it is not the case that the appellant has not earned any income, it has earned interest income from parking of surplus funds. It is an established fact that the business activities have been done and business has commenced.

In para-14 of the said decision, judgment of Gujarat High Court in the case of CIT v. Sourashtra Cement & Chemical Industries Ltd. referred wherein also it was held that all the activities which go to make up a business need not be started simultaneously in order that business may commence. The business would commence when the activity which is first in point of time and which must necessarily precede all other activities is started. In 102 ITR 25 (Guj) took the same view and held that business commences with the fiat activity for acquiring by purchase or otherwise, immovable property. There may be an interval between the setting up of the business and the commencement of the business. In CIT v. Sarabhai Management Corporation Ltd., 192 ITR 151 (SC), the decision of the Gujarat High Court was affirmed and went a step ahead that even the activities at preparatory stage is also admissible.

Respectfully following the decision of the Hon'ble Gujarat High Court, cited supra, and the decision of the Hon'ble Calcutta High Court, it is held that the expenses claimed by the appellant, are allowable. It also a fact that the assessing officer has not doubted the bona fide of the expenses claimed by the appellant. It is also an undisputed fact that the Delhi property on which depreciation has been claimed, is owned by the appellant and it has been used to run its office by the apape. Therefore, not only the expenses claimed by the appellant are allowable but also the depreciation claimed by it for its Delhi office, is allowable; as the said office has been used by the appellant for running its business of real estate. The claim of depreciation of the assessee relates to property at E-14/17, Vasant Vihar, New Delhi, owned by the assessee. all the fixed assets of the assessee are also installed at the office premises of the assessee as is evident from their very nature and these have been used for conducting the business of the firm. Hence it is held that the claim of depreciation of the appellant is admissible. Accordingly, the assessing officer is directed to delete the disallowance of Rs.31,4,251/- claimed as business expenses which is inclusive of depreciation. Accordingly, the ground No.5 of the appeal is allowed.”

The Revenue, being aggrieved, is in appeal before us.

7. Before us Ld. DR stated that the assessee-firm was established on 10.01.2003 but it has not carried out any business activities till 31.03.2009. The assessee till 31.03.2009 has only shown advance for the purchase of

properties. It was also contended that the assessee in the AY 2009-10 has shown the rental income for Rs. 13,50,80,731.00 but no business activity. Thus the Id. DR apprehended that the assessee out of rental income is making investment in the properties and earning rental income. At the same the assessee is showing the investment as advances in the financial statement in order to justify its business activity. Thus the assessee in garb of business is claiming expenses in order to reduce the taxable income. Eventually the assessee is claiming double benefit by way of claiming the expenses under section 24 of the Act as well as under business head.

Besides the above the Id. AR further submitted that the fact whether the advance shown by the assessee represents as investment made by the assessee or as stock-in-trade in the books has not been verified by Ld. CIT(A) during his appellate stage. Ld. DR further submitted that assessee has not carried out any business activities since inception till 31.03.2009 and no record is also available for the subsequent years. Thus, in view of the fact that Ld. DR submitted that assessee has not carried out any business activity and therefore the expense claimed by it under the head "business or profession" needs to be disallowed. He heavily relied on the order of AO.

8. We have heard Ld. DR and perused the material available on record including the order of Authorities Below. In the instant case, assessee derived its income under the head "house property, business & profession and income from other sources." According to the AO the assessee has not carried out any activity under the head "business or profession during the year under consideration as well as subsequent year. Therefore, the business expenses claimed by it cannot be allowed as deduction. However, Ld. CIT(A) rejected the finding of AO on the ground that assessee-firm has given advance for the purchase of property which evidences that business of assessee is in existence.

8.1 It is the disputed fact that no income whatsoever has been shown by the assessee in the financial year which beginning from 2003-04 to 2005-06 and 2008-09 as evident from the order of Authorities Below. It is also disputed

fact that assessee has shown various advances in its balance-sheet for the purchase of property as evident from the order of Authorities Below. But the disallowances were made by AO on the ground that there is no business activity carried out by assessee. Now the issue arises before us to adjudicate whether there is any business activity of the assessee or not. In our considered view it is a question of fact to establish whether the business of assessee is in existence or not. If yes it is very much eligible for deduction of the expense incurred by assessee. We note that the Id. CIT-A has simply accepted on the submission of the assessee and has come to the conclusion that the assessee is doing business activity. But no contrary evidence has been brought on record to prove the existence of business of assessee in the appellate order except a finding that assessee has made advance for the purchase of property. In our considered view, the advance shown by assessee does not ipso facto prove that assessee is carrying on business. Thus in our considered view the fact that the assessee is running a business needs to be established. Therefore in the light of above discussion, we are inclined to set aside the impugned order and restore the issue back to the file of Ld. CIT(A) with a direction to find out the question of fact as to whether the business of assessee is in existence or not. While doing so, the Ld. CIT(A) shall give a due and fair opportunity of hearing to the assessee as well as call for the remand report from the AO in accordance with law and shall decide the matter by way of a speaking order in accordance with law. Hence, this ground of Revenue's appeal is allowed for statistical purpose.

9. In the remaining issues it was agitated by the Revenue that the rental income from the letting of car parking and furniture should not be treated as income under the head house property. In this regard we find that these ground do not call for any adjudication at this stage because the matter is already restored back to the file of Ld. CIT(A) for deciding the issue afresh after providing reasonable opportunity of being heard to assessee. Thus this

issue also remitted back to the AO for fresh adjudication in accordance with the law.

10. In the result, Revenue's appeal is allowed for statistical purpose.

Coming to Revenue's appeal in ITA No. 2098-2100/Kol/2013 for AYs 05-06 to 06-07 & 09-10.

11. In the remaining appeals, since the facts are exactly identical, Ld. DR agreed whatever view taken in the above appeal (ITA No.2097/Kol/2013) may be taken in these appeals also, we hold accordingly.

12. In the result, appeals of Revenue stand allowed for statistical purpose.

13. **In combine result, Revenue's appeals stand allowed for statistical purpose.**

Order pronounced in the open court 13/10/2017

Sd/-
(Aby. T. Varkey)
(Judicial Member)
Kolkata,

Sd/-
(Waseem Ahmed)
(Accountant Member)

*Dkp

दिनांक:- 13/10/2017 कोलकाता ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक/Assessee-M/s Tapasya Enterprises 11A, Palm Avenue, Kolkata-19
2. राजस्व/Revenue-ACIT, Circle-30, 2, Gariahat Roaad(S), Kolkata-68
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

Sr. Private Secretary, Head of
Office/DDO
आयकर अपीलीय अधिकरण,
कोलकाता ।