

**IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI
BEFORE SRI MAHAVIR SINGH, JM AND SRI MANOJ KUMAR AGGARWAL, AM**

ITA No. 2823/Mum/2012

(A.Y:2006-07)

Income Tax Officer 8(2)(3) Room No. 213/216A, 2 nd Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020	Vs.	Niyman Mall Management Co. Pvt. Ltd. Knowledge House, Shyam Nagar, Off. Jogeshwari Vikhroli, Link road, Jogeshwari (E), Mumbai-60
Appellant	..	Respondent
PAN No. AACCN0043P		

ITA No. 2742/Mum/2013

(A.Y:2007-08)

ITA No. 2744/Mum/2013

(A.Y:2009-10)

Income Tax Officer 8(2)(3) Room No. 213/216A, 2 nd Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020	Vs.	Niyman Mall Management Co. Pvt. Ltd. Knowledge House, Shyam Nagar, Off. Jogeshwari Vikhroli, Link road, Jogeshwari (E), Mumbai-60
Appellant	..	Respondent

CO No. 141/Mum/2016

(Arising in ITA No. 2823/Mum/2012 for AY 2006-07)

Niyman Mall Management Co. Pvt. Ltd. Knowledge House, Shyam Nagar, Off. Jogeshwari Vikhroli, Link road, Jogeshwari (E), Mumbai-60	Vs.	Income Tax Officer 8(2)(3) Mumbai Room No. 213/216A, 2 nd Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020
Appellant	..	Respondent

Revenue by	..	Shri Suman Kumar, DR
Assessee by	..	Shri Dinkle H. Hariya, AR

Date of hearing	..	05-10-2017
Date of pronouncement	..	11-10-2017



ORDER

PER MAHAVIR SINGH, JM:

These three appeals by Revenue and one Cross Objection (in short CO) by assessee are arising out of the orders of Commissioner of Income Tax (Appeals)-19, Mumbai [in short CIT(A)] in appeal Nos. CIT(A)-19/IT.03/8(2)(4)/08-09, CIT(A)-17/IT-654 & 264/2009-10 & 2011-12 dated 10-02-2012, 14.01.2013. The Assessments were framed by Income Tax Officer ward 8(2)(4), Mumbai (in short ITO or AO) for the Assessment Years 2006-07, 2007-08, 2009-10 vide order dated 30-12-2008, 24-12-2009, 30-11-2011 under section 143(3) of the Income Tax Act, 1961 (hereinafter 'the Act').

2. The first common issue in these three appeals of Revenue contest the order of CIT(A) holding that the receipts from business center and service charges are business income instead of income assessed by Assessing Officer (in short AO) as from house property i.e. rental income. The Revenue has raised following ground in AY 2006-07: -

"1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in holding that Business Centre Service charges of Rs 1,47,71,318/- should be treated as "Business Income" instead of "Income from house Property", without appreciating the facts of the case."

We take facts from AY 2006-07 and decide the issue for the reason that the facts and circumstances are exactly identical in all the three years.

3. Briefly stated facts are that the AO, during the course of assessment proceedings, on perusal of profit and loss account noticed



that the assessee has credited in the profit and loss account the following items of income: -

“1. <i>Business Centre Service Charges</i>	<i>Rs 1,47,71,318/-</i>
2. <i>Interest on fixed deposits</i>	<i>1,74,321/-</i>
<i>Total</i>	<i>1,49,45,639/-.”</i>

4. The AO noticed that the assessee has also debited various expenses against these receipts including interest and finance charges. The assessee have entered into an agreement i.e. business conducting agreement dated 06-05-2005 with Pantaloon Retail (India) Limited for a period of 27 years in respect of premises consisting of the entire ground floor totaling admeasuring 19469/- sq. ft. built up area being building name “R Mall” constructed on survey No. 272 part, city survey No. 639 and 639/I to 7, situated at L.B.S. Marg, Mulund (West), Mumbai. During the course of hearing in the scrutiny proceedings, the assessee was asked as to why the receipt of Rs. 1,47,71,318/- which are claimed to have been received on account of ‘Business Service Centre Charges’ from Pantaloon Retail (India) Limited should not be assessed as ‘Income from House Property’ instead of ‘Income from Business’ as claimed by the assessee. The AO also noticed that the assessee company has obtained a loan of Rs.13,21,07,007/- from Dewan Housing Finance Limited (DHFL) for acquisition of the above stated premises i.e. “R Mall” at Mulund, West Mumbai. The AO vide notice under section 133(6) required the DHFL to file the documents relating to the said loan who furnished the following documents: -

“1. *Copies of the documents furnished by the above company in connection with the finance provided by DHFL.*



2. *Copy of the ledger account of the assessee company for the year ended 31.03.2006 and 31.03.2007.*

3. *Copies of the TDS Certificate issued by the party determining therein the interest and TDS amount.”*

5. The AO after going through the documents noted that the assessee vide declaration cum undertaking dated 26-05-2005, clause 3 referred Pantaloon Retail (India) Limited as “tenant” and not as “Business Conductor”. The AO also noticed from power of attorney dated 26-05-2005 duly executed by the assessee in favour of DHFL, that while referring to the business conducting agreement dated 06-05-2005, the assessee declared that Pantaloon Retail (India) Limited is, *“liable / obliged to pay monthly rent to us every month for the full period and now the said company is paying to us (net) monthly rent of Rs. 13,62,830/-“*. After going through the other details i.e. business conducting agreement dated 06-05-2005, the AO was of the view that the business receipts by the assessee are in the nature of rental receipts and accordingly assessed the same under the head of income from house property. Similar is the position in AY 2007-08 in ITA No. 2742/Mum/2013 and also in 2008-09 in ITA No. 2744/Mum/2017. Aggrieved, assessee preferred the appeal before CIT(A). The CIT(A) after going through the decision of Hon’ble Supreme Court decision in the case of Shambhu Investment (P) Ltd. vs CIT (2003) 263 ITR 143 (SC) treated the business center receipts as business income by observing in Para 4.3 as under: -

“4.3. 1 have carefully considered the facts of the case, the submissions of the appellant, assessment order. The A.O. has given importance to the words used in documents furnished to bank to conclude that receipts were rent. The appellant's submission



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that this cannot be sole criteria for construing the income received from income from house property is accepted. Where a receipt is a business receipt or a receipt for mere letting out of an immovable property would depend on facts of the case. Applying the ratio laid down in CIT Vs. Shambhu Investment (P) Ltd. 263 ITR 143 [SC]. If property is let out, with intention to have rental income it would be assessable as income from house property. On the other hand if the primary object is to exploit property by complex commercial activities, the income from the same should be considered as business income. The business conducting agreement between the appellant and PRIL is operative for a period of 27 years and is to commence on May 2005. During this period the conductor is granted the permissive use of services and facilities provided in the premises by the appellant. The conductor has no right of occupancy but only limited access for the purpose of business activity during hours of day fixed in the agreement. The premises are in control of the appellant. The appellant had to provide services as per the agreement for which personnel on permanent basis are to be employed. Hence, management and administration of the mall vested with the appellant. Thus, the appellant was a property manager rather than a passive owner. The property was treated as a business asset which was exploited by rendering commercial services in a systematic and organized manner. Respectfully following decisions in PFH Mall and Retail Management Ltd Vs. ITO (103 ITD 337) (Kol.) Jesco Corporation Ltd. Vs. ACIT (31



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SOT 131) (MUM.) Harvinder Pal (HIF)DCIT (122 TTJ 163) (Mum) it is held that the business center receipt of Rs,1,47,71,318/- is treated as business income. In the result this ground of appeal is allowed.”

Revenue is in appeal before tribunal in all the three years.

6. At the outset, the learned Sr. DR stated that recently Hon'ble Supreme Court in the case of Raj Dadarkar & Associates vs ACIT (2015) 373 ITR 673 (SC), held that wherever there is an income from leasing out of premises and collecting rent, normally such an income is to be treated as income from house property, in case provisions of Section 22 of the Act are satisfied with primary ingredient that the assessee is the owner of the said building or lands appurtenant thereto. Section 22 of the Act makes 'annual value' of such a property as income chargeable to tax under this head. How annual value is to be determined is provided in Section 23 of the Act. 'Owner of the house property' is defined in Section 27 of the Act which includes certain situations where a person not actually the owner shall be treated as deemed owner of a building or part thereof. In the present case, the appellant is held to be "deemed owner" of the property in question by virtue of Section 27(iib) of the Act. On the other hand, under certain circumstances, where the income may have been derived from letting out of the premises, it can still be treated as business income if letting out of the premises itself is the business of the assessee. In view of the above the learned Sr. DR requested for setting aside of these three appeals to the file to the AO to deciding the issue on the receipts earned by assessee whether the same is business income or income from house property. On the other hand, the learned Counsel for the assessee, Dinkle H. Hariya, Chartered Accountant could not contest or distinguish the decision of Hon'ble Supreme Court.



7. In view of the above facts and circumstances, we are of the considered view that let the matter be restored back to the file of the AO for deciding the issue in term of the decision of Hon'ble Supreme Court in the case of Raj Dadarkar & Associates (*supra*). The AO will examine the factual aspects of the case and will decide the issue after considering this judgment and other judgments as cited by assessee if any. Accordingly, this issue of the Revenue's appeal is allowed for statistical purposes.

8. The next issue in ITA No. 2742 & 2744/Mum/2013 for AY 2007-08 and 2009-10 is as regards to the order of CIT(A) holding that the interest on fixed deposits with bank as business income whereas assessed by AO as income from other sources. The facts and circumstances are exactly identical in both the years and hence we will take up the ground from ITA No.2742/Mum/2013 for AY 2007-08 and the grounds reads as under: -

"1. On the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in holding the rental receipts as Business Receipts without considering that the assessee has received the rent for allowing user of the property and not for carrying out any systematic activity which is the pre-condition for business.

2. On the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in holding the rental receipts as Business Receipts without considering that the assessee was providing security system, cleaning and maintenance, lighting, repair and maintenance of lifts, provision and management of parking space, firefighting equipment and insurance of the property as per Schedule A of the rent agreement, which represent



running and maintenance expenses for the property and regular amenities and facilities for occupants including tenants

3. *On the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in holding the rental receipts as Business Receipts by relying on the decision of the Bombay High Court in the case of CIT Vs. Runwal Developers Pvt. Ltd. without appreciating that in the case cited supra, business conducting fees and business facility charges collected from the occupants were treated as rent and held taxable under the head Income from House Property and hence, the reliance is misplaced.*

4. *On the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in holding the rental receipts as Business Receipts by relying on the decision of the ITAT in the case of MIs. Krishna Land Developers Pvt. Ltd. without appreciating that the facts of the said case are completely distinguishable from the facts of the present case as in that case the issue was whether rental receipts of STP are eligible for deduction-under section 80IA(4)(iii) of the Act.*

5. *On the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in holding interest on fixed deposits with bank and interest on Income tax refund as Business Receipts without appreciating that such interest whereas the latter has no connection with the business, the former has no immediate nexus with the assessee's business.”*



9. Ground No. 1 to 4 is the common ground as was in AY 2006-07. Since, we have already restored the matter to Ld. AO, these grounds stands allowed for statistical purposes.

10. Ground No. 5 is related with treatment of interest on FDR earned by the assessee. Briefly stated facts are that the AO during the course of assessment proceedings noticed from the P & L Account that the assessee has disclosed interest on fixed deposits at Rs. 1,98,803/- and treated the same as income from business. The AO treated the same as income from other sources as interest income on fixed deposit cannot be business of the assessee and hence he taxed the same as income from other sources. Aggrieved, assessee preferred he appeal before CIT(A).

11. The CIT(A) after going through the submissions of the assessee held that these fixed deposits with the company are kept for taking loan which was used for the purpose of business. Hence, he treated the same as business income by observing in Para 7.2 of his appellate order as under: -

“7.2 I have considered the submissions of the appellant and the order of the AO. The appellant had kept a fixed deposit with the bank to take loan which was used for the purpose of business. Hence, the interest on the Fixed Deposit is also for the purpose of business. Therefore, the interest income received is a business income and therefore the ground of appeal of the appellant is allowed.”

Aggrieved, Revenue came in second appeal before Tribunal.

12. We have heard the rival contentions and gone through the facts and circumstances of the case. Before us, the learned Sr. DR stated that these fixed deposits has nothing to do with loan from the bank and even



CIT(A) has not provided any nexus of this FDRs with loan taken for the purposes of construction. Even otherwise, according to the learned Sr. DR this is income from other sources. Before us, the learned Counsel for the assessee stated that as far as the interest on 'fixed deposit with DHFL is concerned, it is stated that the interest arose out of the said fixed deposit, which the assessee had kept with the said bank for the purpose of availing loan facilities from the said bank. As already mentioned above, the assessee had procured loan from DHFL for its business purpose. For procuring the loan, the assessee had to compulsorily keep fixed deposit as margin money with the bank. The assessee's bankers insisted that the assessee should keep sufficient amounts with them so as to enable them to disburse the loan to the assessee against the security of the said deposits. Thus, it is out of business compulsions that the assessee had to deposit money in fixed deposit and incidentally, earn interest thereon. According to assessee, the sole and exclusive purpose was to meet compelling business requirement. The interest income had direct and proximate connection with the business of the assessee.

13. We find that this argument made by the learned Counsel for the assessee has neither been examined by AO nor by CIT(A) and this is not examined whether this FDRs has any nexus with loan taken for the purpose of business. Accordingly, we restore this matter back to the file of the AO to give finding on the submissions of the assessee. This issue of Revenue's appeal is set aside to AO and consequently, allowed for statistical purposes.

14. So far as CO No. 141/Mum/2016 arising out of ITA No. 2823/Mum/2012 for the AY 2006-07 is concerned, the same is time barred by 1132 days. At the outset, the learned Counsel for the assessee filed condonation petition supported by affidavit stating the reasons for delay, the reasons given in Para 4 to 10 reads as under: -



“4. I say that the department filed an appeal under section 250 of the income tax act, 1961 (“the Act”) before the Hon’ble Tribunal against the appellate order on 26.04.2012. However, Niyman Mall was not served with a copy of this appeal memo. Therefore, when the appeal was fixed for hearing on 24.06.2013, this fact was pointed out before the Hon’ble Tribunal and the appeal was adjourned accordingly.

5. I say that Niyman mall thereafter pursued matter with the AO. It appears that the appeal memo was, thereafter handed over to Mr. Nishikant Bharti, Accounts Assistant of a group company –future market Networks Ltd., somewhere in July 2013 when he was visiting Aayakar Bhavan for some other work and he happened to the visit the AO.

6. Accordingly, the last day for filing the Cross objection before the Hon’ble Tribunal was within thirty days thereafter. However, for the reasons recorded herein below, the Cross objection was filed on 7th September, 2016.

7. I say that during the material time, Niyman Mall’s entire records were in total disarray and Niyman Mal did not have the relevant papers concerning this appeal. In view of this, Niyman Mall had requested the AO for inspection and copies of the relevant papers vide letter dated 15.01.2014.

8. I say that the said appeal papers were received by a clerical staff of a group company and were kept with general assessment file along with other papers after the receipt of the said appeal



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papers. However, the same could not be attended to since there has been a constant turnover of employees in the group. In fact, in the last two years, there have been unprecedented changes in various employees/ managerial positions in the group. There was no dedicated staff of the company looking after its taxation matters.

9. *After receipt of the appeal papers, the same, alongwith the entire assessment file, were handed over to Mr. Govind Rathi, who is the DM Accounts and Finance of Future Market Networks Ltd. a group company. He was requested to look after Niyman Malls appeal also. In view of this, coupled with the fact that he was also pre-occupied with other work as well, the appeal papers remained to be taken cognizance of, especially when it did not involve Future Market Networks Ltd's appeal.*

10. *It will be pertinent to mention here, that in the immediate subsequent years, viz. AY 2007-08 and AY 2009-10, the CIT(A) was pleased to allow the interest expenses, considering it as business expenditure. Further, in case of a group concerns, M/s Nishta Mall Management Co. Pvt. Ltd., similar disallowance was also deleted by the Ld. CIT(A). Under the circumstances, as in all other and subsequent years, the interest expenditure stood allowed, through sheer inadvertence, the disallowance of interest for this was also considered as allowed by oversight and was, accordingly, lost sight of."*



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15. When it was pointed out to the learned Counsel for the assessee, what happened after July 2013 till date of filing of cross objection on 07-09-2016, she stated that these appeals papers were misplaced along with general assessment file and could not be traced for last 2 years but no reasonable cause was adduced as it is evident from the affidavit filed before us. She relied on various case laws, but we could not find any reasonable cause by the assessee which is the essence of all the case laws cited by the assessee. Accordingly, this cross objection do not deserve admission. Finally, the three appeals of Revenue are allowed for statistical purposes and the CO of the assessee is dismissed.

16. In the result, appeals of Revenue are allowed for statistical purposes and the CO of the assessee is dismissed.

Order pronounced in the open court on 11-10-2017.

Sd/-
(MANOJ KUMAR AGGARWAL)
ACCOUNTANT MEMBER

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Mumbai, Dated: 11-10-2017

Sudip Sarkar /Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT (A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//
BY ORDER,
Assistant Registrar
ITAT, MUMBAI