THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E', NEW DELHI

Before Sh. N. K. Saini, AM and Sh. K. N. Chary, JM

ITA No. 1729/Del/2014 : Asstt. Year : 2004-05
ITA No. 2160/Del/2014 : Asstt. Year : 2009-10
ITA No. 5937/Del/2013 : Asstt. Year : 2010-11

Niagara Hotels & Builders Pvt. Ltd., G- 6 & 7, Vikram Tower, 16, Rajendra Place, New Delhi-110008	Vs	ACIT, Circle-13(1)/ Income Tax Officer, Ward-13(2), New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AAACN0188P		

Assessee by : Sh. Shaily Gupta, CA &
Sh. Divyam Mittal, CA
Revenue by : Sh. S. P. Gupta, Sr. DR

Date of Hearing : 14.09.2017		**Date of Pronouncement : 13.12.2017**

ORDER

Per N. K. Saini, AM:

These three appeals by the assessee are directed against the separate order dated 30.12.2013 and 22.08.2013 of ld. CIT(A)-XVI, Delhi.

2. Since, the issue involved is common in all these appeals which were heard together so these are being disposed off by this consolidated order for the sake of convenience and brevity.

3. First we will deal with the appeal in ITA No. 5937/Del/2013 for the assessment year 2010-11. Following grounds have been raised in this appeal:

"1. That the Commissioner of Income Tax (Appeals) erred on facts and in law in confirming that rental income of Rs.36,80,802 earned by the appellant from letting of terrace floor/ roof was assessable under the head "Income from other sources", as opposed to "Income from house property" returned by the appellant.

1.1 That the Commissioner of Income Tax (Appeals) erred on facts and in law in consequently confirming disallowance of deduction of Rs, 11,04,250 claimed by the appellant under section 24(a) of the Act.

2. That the Commissioner of Income Tax (Appeals) erred on facts and in law in not appreciating that the disallowance of Rs. 2,27,379 made by the assessing officer on account of construction expenses of Vikram Tower had resulted in double disallowance.

2.1 Without prejudice, that the Commissioner of Income-tax (Appeals) erred on facts and in law in not adjudicating the claim of allowance of Rs.2,27,379 on the ground that the claim was not made by filing a revised return, without appreciating that the embargo/ prohibition as per the case of Goetze India Limited: 154 Taxman 1 (SC) does not apply to the powers of the appellate authority to entertain any fresh/ new claim.

The appellant craves leave to add, alter, supplement, amend, vary, withdraw or otherwise modify the grounds mentioned hereinabove at or before the time of hearing."

4. From the above grounds, it is gathered that only grievance of the assessee in this appeal relates to the assessment of the rental income under the head ñincome from house propertyò instead of ñincome from other sourcesò assessed by the AO.

5. Facts of the case in brief are that the assessee e-filed its return of income on 30.09.2010 declaring an income of Rs.13,01,986/- which was processed u/s 143(1) of the Income Tax Act, 1961 (hereinafter referred to as the Act). Later on, the case was selected for scrutiny. During the course of assessment proceedings, the AO noticed that the assessee had let out First Floor of Vikram Tower to Bank of Baroda and had shown the income under the head ñincome from house propertyò. Besides this the assessee had let out space at the roof for fixing Anentenna, the rental income had been shown under the head ñhouse propertyò and a deduction u/s 24(a) of the Act to the tune of Rs.11,04,250/- had been claimed. The AO asked the assessee to explain as to why the income from letting out the space at the roof may not be assessed under the head ñincome from other sourcesò, following the decision of the ITAT for the assessment year 2008-09 in ITA No. 901/Del/2012, order dated 30.04.2012. The assessee submitted that the said issue had been contested in the appeal

before the Honôble Delhi High Court, therefore, the income may be assessed as ñincome from house propertyò till it reaches finality. However, the AO held that the order of the ITAT one way or other was binding on the lower authorities, since, it had not been stayed by Higher Judicial Authority. He, therefore, assessed the income of Rs.36,80,802/- under the head ñincome from other sources.ò

6. Being aggrieved the assessee carried the matter to the ld. CIT(A) who confirmed the view taken by the AO.

7. Now the assessee is in appeal. The ld. Counsel for the assessee at the very outset stated that this issue now had been settled by the Honôble Jurisdictional High Court in ITA No.43/2014 vide order dated 25.03.2015 (copy of the said order was furnished which is placed on record).

8. In his rival submissions, the ld. DR strongly supported the orders of the authorities below but could not controvert the aforesaid contention of the ld. Counsel for the assessee.

9. We have considered the submissions of both the parties and perused the material available on the record. It is noticed that the issue under consideration now has been settled by the Honôble Jurisdictional High Court in assesseeôs own case vide

aforesaid referred to order dated 25.03.2015 wherein the relevant findings have been given in paras 19 to 23 which read as under:

> *"19. The crucial test is as to whether the letting out has a definite nexus with the business of the assessee. In our opinion, the approach of both the AO and the ITAT in the case at hand has been totally misdirected. Wrong classification of the licensed space in the books of account as stock-in-trade cannot change the character of the transaction concerning its eventual exploitation. The use of the expression "leave and licence" in the agreement entered with M/s Arvind Mills Ltd. (Telecommunication) may be debatable. The fact remains that the use of the terrace floor has been handed over to the licensee not only for setting up the tower/mast on which antenna is to be mounted but also for construction of a room where the watch/ ward staff can be stationed and space used for storage purposes.*
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> *20. Unlike the case of Mukherjee Estate (P.) Ltd. (supra) where no space on the terrace floor was let out (the income generated being restricted to the display of advertisement on the hoardings provided), in the case of the assessee here, the licensee is virtually given exclusivity in utilizing the terrace floor for achieving the objectives set out in the agreement. There is no parallel with the case of National Storage Pvt. Ltd. (supra), where the giving of vault spaces in the building developed was the dominant purpose of the business activity undertaken by the assessee.*
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> *21. In the case at hand, the building the top terrace of which is the subject of focal attention here has been developed for its various portions to be sold or let out with no possibility of the terrace floor being subjected to such utilization. The assessee continues to be the*

owner of the terrace floor. It has conceivably no other purpose to be served by such property as is held on the terrace floor, except the exploitation of the licensed space for gaining the income that cannot be treated as either income from business or income from other sources. The income was thus rightly returned as income from house property.

22. We do not approve of the logic employed by ITAT in rejecting the claim of it being income from house property. The terrace floor cannot exist in the air. It is part of the building which has been constructed on the land beneath the super-structure. It is, therefore, not correct to hold that the terrace does not have any appurtenant land. We, therefore, reject the conclusion of ITAT that the agreement of renting and hiring terrace is in essence for hiring space and not hiring building or land appurtenant thereto.

23. For the above reasons, we answer the question of law in the affirmative in favour of the assessee. In the result, we set aside the impugned order passed by ITAT and restore the view taken by the CIT (Appeals).ô

10. Since, this issue has now been settled by the Honôble Jurisdictional High Court in assesseeôs favour. We, therefore, set aside the impugned order passed by the ld. CIT(A) and decide the issue in favour of the assessee.

11. The next issue vide Ground Nos. 2 & 2.1 relates to the sustenance of disallowance of Rs.2,27,379/- made by the AO on account of construction expenses of Vikram Tower.

12. The facts related to this issue in brief are that the assessee debited Rs.2,27,379/- on account of construction at Vikram Tower Flat. The AO asked the assessee to submit the details and explained as to why these expenses may not be treated as capital in nature and that the First Floor at Vikram Tower was let out to Bank of Baroda and income from which was declared under the head ñincome from house propertyò, so no depreciation was allowable. Since, no reply was filed by the assessee, therefore, the AO treated those expenses as capital in nature and disallowed the claim of the assessee.

13. Being aggrieved the assessee carried the matter to the ld. CIT(A) who sustained the disallowance made by the AO.

14. Now the assessee is in appeal.

15. We have considered the submissions of both the parties and perused the material available on the record. In the present case, while deciding the first issue relating to the income received by the assessee from the rent of the same building for which the impugned expenses were incurred on account of repair, we have held in the former part of this order by following the judgment of the Honôble Jurisdictional High Court that the income to be held under the head house property and deduction u/s 24(a) of the Act for repairs to be

allowed. Since, the repairs & maintenance has already been allowed as per the provision contained in Section 24(a) of the Act. Therefore, no separate deduction can be allowed for repairs & maintenance. Accordingly, we do not see any merit in this ground of the assesseeôs appeal.

16. The issue involved in Ground Nos. 1, 1.1 & 2 in ITA No. 1729/Del/2014 for the assessment years 2004-05 and Ground Nos. 1 & 1.1 in ITA No. 2160/Del/2014 for the assessment year 2009-10 is similar to the Ground Nos. 1 & 1.1 in ITA No. 5937/Del/2013 for the assessment year 2010-11 which we have already adjudicated in the former part of this order. Therefore, our findings given therein shall apply *mutatis mutandis.*

17. Ground No. 3 in the appeals for the assessment years 2004-05 and 2009-10, relates to the levy of interest u/s 234B of the Act. As regards to this ground, it was the common contention of both the parties that it is consequential in nature, we order accordingly.

18. Now the only issue remains to be adjudicated in Ground Nos. 2 to 2.2 in ITA No. 2160/Del/2014 for the assessment year 2009-10 relates to the disallowance of expenditure u/s 14A of the Act r.w. Rule 8D of the Income Tax Rules, 1962.

19. The facts related to this issue in brief are that the assessee has earned exempt dividend income of Rs.3,07,924/-. During the course of assessment proceedings, the AO asked the assessee to file the working of the disallowance u/s 14A of the Act. The assessee submitted that due to oversight disallowance u/s 14A of the Act could not be made. The AO disallowed a sum of Rs.82,750/- by observing in paras 4.7 & 4.8 of the assessment order dated 30.11.2011 as under:

"4.7 In absence of separate accounts being maintained by the assessee, the expenditure in relation to the income, which does not form part of total income has been worked out on the basis of Rule 8D. The working of the disallowable expenditure is as under:

Sl. No.	*Procedure to be followed to work out the expenditure in relation to exempt income*	*Amount disallowable*
1	*The amount of expenditure directly relating to the income, which does not form part of total income*	*NIL*
2	*Where the assessee has incurred expenditure by way of interest, which is not directly attributable to any particular income or receipt, then the amount computed – (A x B)/ C A= Intt. Other than interest included in clause (i)* *B= average value of investment in Balance sheet on the 1st day and last day of previous year, income from which does not or shall not form part of the total income* *C= average of total assets in Balance sheet on the 1SI day and last day of previous year*	*Nil*

3	*An amount equal to ½% of average value of investment in Balance sheet on the 1st day and last day of previous year, income from which does not or shall not form part of the total income = 0.5 % of (1.61 crore + 1.70 crore)/2*	*Rs. 82,750/-*
	Expenditure incurred in relation to exempt income =	*Rs. 82,750/-*

4.8 In view of the above discussion, the disallowance of Rs.82,750 is to be made u/s 14A of I. Tax Act being the amount of expenditure incurred in relation to earning of exempt income, which does not form part of total income."

(Addition : Rs.82,750/-)

20. Being aggrieved the assessee carried the matter to the ld. CIT(A) and submitted that the assessee furnished a calculation of disallowance thereby offering disallowance of Rs.47,767/- by adopting the same method which was accepted by the ITAT for the assessment year 2008-09. The ld. CIT(A) did not find merit in the submissions of the assessee by observing that the *res-judicata* does not apply to the income tax proceedings and that for the assessment year 2008-09, the method was accepted by the ITAT because disallowance was made mechanically and reasons were not recorded, however, for the year under consideration, the AO followed the procedure laid down by Rule 8D of the Income Tax Rules, 1962 to disallow 1/2% of average value of investment under

Clause (iii) of sub-rule (2) of Rule 8D. Therefore, the disallowance of Rs.82,750/- made by the AO was sustained.

21. Now the assessee is in appeal. The ld. Counsel for the assessee submitted that the AO while computing the value of average investment for the purpose of computing disallowance u/s 14A of the Act had considered all the investments and not just those investments from which the income earned does not form part of the total income. It was also submitted that after considering the investment which yielded exempt income, the disallowance u/s 14A of the Act computed as per Rules 8D(2)(iii) of the Income Tax Rules, 1962 stands reduced to Rs.13,584/- and the calculations for the same were furnished to the ld. CIT(A). The reliance was placed on the judgment of the Hon'ble Delhi High Court in the case of ACB India Ltd. Vs ACIT 374 ITR 108.

22. In his rival submissions, the ld. DR strongly supported the orders of the authorities below and further submitted that no calculation was furnished before the AO for the disallowance to be made u/s 14A of the Act but the same has been furnished first time before the ld. CIT(A).

23. We have considered the submissions of both the parties and carefully gone through the material available on the

record. In the present case, it appears that the calculations made by the assessee for making the disallowance u/s 14A of the Act r.w. Rule 8D of the Income Tax Rules, 1962 were furnished first time before the ld. CIT(A) and not before the AO. We, therefore, deem it appropriate to set aside this issue back to the file of the AO to be adjudicated afresh in accordance with law after providing due and reasonable opportunity of being heard to the assessee.

24. In the result, the appeals of the assessee are partly allowed.

(Order Pronounced in the Court on 13/12/2017)

Sd/-	Sd/-
(K. N. Chary)	**(N. K. Saini)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 13/12/2017
Subodh
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR