IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "G", MUMBAI

Before Shri Saktijit Dey, JM & Shri Rajesh Kumar, AM

ITA No.5427/Mum/2016
Assessment Year : 2011-12

ACIT Circle 7(1)-1, Mumbai	Vs.	M/s Grew Industries Pvt Ltd., 303-A, Poonam Chambers, Dr. A B Road, Worli, Mumbai 400 005. PAN AAACG0529M
(Appellant)		(Respondent)

Appellant By : Shri V Vidhyadhar
Respondent BY : Shri Vijay Mehta

Date of Hearing :10.04.2018		Date of Pronouncement : 09.05.2018

O R D E R

Per Saktijit Dey, Judicial Member

This is an appeal by the department against the order, dated 17.06.2016, of learned Commissioner of Income Tax (Appeals)-13, in short CIT(A), Mumbai, for the assessment year 2011-12.

2. In ground nos. 1 & 2, the department has challenged the decision of the CIT(A) in accepting assessee's claim to treat the income received from undivided share in I.T.Park as 'Income from business'. Briefly, facts are the assessee - a company, is engaged in the business of development of commercial properties including I.T. Parks, offices etc., and given them on lease. For the assessment year under dispute the assessee filed its return of income on 27.09.2011, declaring total income of ₹ 31,45,230/-, under the normal provisions of the Act and book profit of

₹ 1,09,52,958/- u/s. 115JB of the Act. During the assessment proceedings, the Assessing Officer noticed that the assessee has declared income received by lease rent as 'Business income' and called upon the assessee to explain as to why it should not be assessed under the head 'Income from house property'. In response, the assessee furnishing the details of the commercial properties given on lease submitted that the I.T.Park was developed by M/s. Salarpuria Properties Pvt Ltd (SPPL) on the land belonging to the assessee, wherein, the assessee had 23% undivided share of the total developed area. It was submitted, the assessee had developed I.T.Park with the intention of using the premises as I.T.Park by giving the licenses not only for premises but also for supporting infrastructure facilities. It was submitted, in addition to the premises given on rent the assessee has provided power, DG backup, air conditioning, fully completed toilets, car parking and water treatment plant. Further, it has appointed M/s. Salarpuria Property Management Pvt Ltd. to provide maintenance services. It was submitted, the assessee developed the property to be used as I.T.Park in Bangalore keeping the need of I.T Sector in Bangalore and office premises of several I.T Companies are located in the I.T.Park. It was submitted, the development and maintenance of I.T.Park is a very complex commercial activity, which requires continuous and considerable efforts so as to provide services round the clock. It was submitted, as per section 80 IA of the Act, development and maintenance of I.T.Park is regarded as a business activity. It was submitted by the assessee that in A.Y. 2006-07 to A.Y.2010-11, the income received from I.T.Park was offered as 'Business income' and the department has also accepted it. Therefore, it was submitted, the income offered by the assessee

should not be assessed as 'Income from House Property', The Assessing Officer after considering the submissions of the assessee however, did not find merit in them and referring to certain clauses of the agreement and relying upon some case laws, ultimately concluded that the income derived by the assessee from letting out of various commercial and residential property is to be taxed under the head 'Income from house property' and accordingly, proceeded to compute income of the assessee. Being aggrieved with the aforesaid decision of the Assessing Officer, the assessee preferred appeal before the CIT(A).

3. The learned CIT(A) after considering the submissions of the assessee in the context of the facts and materials on record as well as judicial precedents cited before him, held that the income derived by the assessee from lease rentals have to be assessed as 'Business Income' of the assessee. Accordingly, he allowed the claim of the assessee.

4. The learned DR relying on the observations of the Assessing Officer submitted that the lease rentals were received by the assessee merely as a owner of the property. Therefore, the income derived from lease rental has to be assessed as 'Income from House Property'. He submitted, the Assessing Officer has recorded a finding of fact that the I.T.Park was not constructed by the assessee therefore, the assessee cannot claim that it has developed the I.T.Park so as to enable it to claim the income derived as 'Business Income'.

5. The learned AR strongly relied upon the observations of the CIT(A) and submitted that undisputedly, the assessee was owner of the land and it has entered

into an agreement with Salarpuria Properties Pvt Ltd for development of I.T.Park. He submitted that assessee may not have constructed I.T.Park but fact remains that the assessee along with SPPL has developed the I.T.Park, wherein, the assessee had 23% undivided share over the total developed area. The learned AR submitted that the assessee has also demonstrated with documentary evidence that it is operating and maintaining the I.T.Park. Further, the I.T.Park has been recognised by the CBDT. In this context, he drew our attention to CBDT Circular issued recognizing the building as a I.T.Park. The learned AR submitted the assessee is in the business of developing and leasing out commercial properties, I.T.Parks etc. Therefore, the income derived from such activities has to be treated as 'Business income'. The learned AR submitted, in the preceding assessment years, the income received by the assessee from lease rentals have been offered under the head 'Business Income' and the department has also accepted it. Therefore, applying the rule of consistency, the income derived by the assessee from lease rentals has to be assessed as 'Business Income'. In support of such contention the learned AR relied upon the decision of the Tribunal in the case of DCIT vs. M/s. E-City Project Construction Pvt. Ltd. in ITA No 8390/Mum/2010 and Ors dated 30.07.2014 and the decision of Hon'ble Bombay High Court in the case of CIT vs. M/s. E City Project Construction Pvt. Ltd. in Income Tax Appeal No. 149 of 2015 & Ors dated 18.07.2017.

6. We have considered rival submissions and perused the material on record. As could be seen from the facts on record, the assessee has entered into a joint development agreement with Salarpuria Properties Pvt Ltd on 11.08.2003 and

15.04.2004 for development of I.T.Park. As per the terms of the agreement, the assessee is entitled to 23% of the saleable area along with proportionate number of car parking and common areas and terrace space in lieu of 77% undivided share in the developed property. Thus, as could be seen from the terms of the agreement, the assessee though may not have constructed the I.T.Park, however, the assessee had jointly developed the I.T.Park with Salarpuria Properties Pvt Ltd. Further, it is evident from material on record, the assessee was carrying on maintenance activities of the I.T.Park. From the impugned order of the learned CIT(A), it is observed that after analysing the factual details the learned CIT(A) has recorded a finding of fact, though, the assessee may not have constructed the I.T.Park he is a developer of the I.T.Park. From the Memorandum of Association of the assessee company he has found that the main object of the assessee company *"is to carry on all or any of the business as estate builders of residential, office or any other type of accommodation and for that purpose to buy, hold and sell or otherwise deal in lands, sites and other immovable and movable properties".* In fact, the Assessing Officer himself has accepted the fact that the assessee owns number of properties and has leased them out. Thus, from the aforesaid facts, it becomes clear that the object of the assessee is to derive income from developing properties and leasing them out. Further, it is noticed that in the preceding assessment years the assessee has offered lease rental income received from the properties including I.T. Park as 'Business Income' and the Assessing Officer in the assessment completed u/s. 143(3) of the Act has accepted the claim of the assessee. This fact is found to be correct on perusal of assessment orders passed for A.Ys. 2006-07, 2007-08, 2008-

09 and 2009-10. In fact, in the assessment order for A.Y. 2009-10 the Assessing Officer has even accepted the fact that the assessee is in the business of leasing of technology parks and estates. Thus, from the aforesaid fact it is clear that in the preceding assessment years the Assessing Officer has accepted the income derived from the leasing out of properties as 'Business Income' of the assessee. Though principle of res judicata is not strictly applicable to income tax proceedings, each assessment year being an independent unit, however, rule of consistency cannot also be ignored. Once both the parties have accepted certain position relating to a particular issue over a period of time, the same cannot be disturbed in a subsequent year unless there are material differences in fact. In the present case, the department has failed to bring to our notice any material difference in facts so as to deviate from the view taken by the department in the preceding assessment years. Moreover, development of infrastructure facilities including I.T.Parks is recognized as a business activity and even deduction u/s. 80 IA(4) of the Act is allowed. In fact, CBDT vide notification No.134/2006 dated 07.07.2006 has recognised the I.T.Park jointly developed by the assessee with SPPL as a infrastructure project. Further, the CBDT Circular No.16/2017 dated 25.04.2017 has clarified that income from letting out of premises/developed space along with other amenities in an industrial park/SEZ is to be charged under the head 'Profits and Gains of Business'. It has further been clarified in the said Circular that appeals filed by the department on the aforesaid issue may be withdrawn or not pressed upon. In the case of DCIT vs. E-City Project Construction Pvt. Ltd. (supra), the co-ordinate Bench, applying the rule of consistency has held that the rent received from malls has to be considered

as 'Business Income'. The aforesaid decision of the co-ordinate Bench was upheld by the Hon'ble Jurisdictional High Court in the decision cited before us by the learned AR. Thus, on overall consideration of facts and material on record, we are of the view that the order passed by the CIT(A) in allowing assessee's claim suffers from no infirmity, hence, deserves to be upheld. Ground nos. 1 & 2 raised by the department are therefore dismissed.

7. In ground nos. 3 & 4 the department has challenged the deletion of addition made of ₹ 5,56,666/- u/s. 40A(2)(b) of the Act. Briefly, the facts are, during the course of assessment proceedings, the Assessing Officer noticed that the assessee has claimed deduction on account of payment of salaries of ₹ 1,11,000/- and Directors remuneration of ₹ 2,20,00,000/-. The Assessing Officer found that no such remuneration was paid in the earlier assessment years. He, therefore, called upon the assessee to justify the reasonableness of payment made to them. Though the assessee justified the payment made to the Directors, however, the Assessing Officer was of the view that there was no justification of payment to the Directors and also observed that the assessee failed to establish the reasonableness of commission paid to the Directors. Accordingly, he disallowed the payment made u/s. 40A(2)(b) of the Act. Further, he also held that the commission paid is not allowable u/s. 36(1)(ii)of the Act, since, the assessee has not carried out any business activity. As regards payment of ₹ 5,40,000/- to M/s. Shirolkar & Associates, the Assessing Officer disallowed the same stating that the assessee failed to furnish any supporting evidence to demonstrate that the concerned party

has rendered any services. The assessee challenged the disallowance before the CIT(A).

8. The CIT(A) after considering the submissions of the assessee allowed assessee's claim on the reasoning that the leasing out of I.T Park and other properties were a business activity of the assessee and the Directors had undertaken all the activities themselves and the remuneration paid to them was commensurate with their inputs. He further observed that the disallowance at the hands of the company would amount to double taxation as Directors have offered the amount received by them as income in the return of income filed by them. As regards the payment made to M/s. Shirolkar & Associates, learned CIT(A) allowed the said expenditure as it was towards services rendered by them

9. The learned DR relied on the observations of the Assessing Officer.

10. The learned AR relying upon the findings of the CIT(A) submitted that the assessee through documentary evidence has established that payment to M/s Shirolkar & Associates was for services actually rendered by them. Therefore, the CIT(A) was justified in deleting the addition. As regards remuneration paid to Directors, the learned AR submitted, once the income of the assessee is assessed as 'Business Income', the expenditure in relation to such activity has to be allowed. He submitted that apart from the leasing activities the assessee has other business activities as well. Therefore, the Assessing Officer was wrong in holding that assessee has no business activities. He submitted that the CIT(A) has also allowed other expenditure but the department has not challenged them. He submitted that

the payment made to the Directors are in the nature of salary and only for applying 36(1)(ii) of the Act the Assessing Officer has termed it as commission. As regards applicability of section 40A(2)(b) of the Act, the learned AR submitted, the Assessing Officer before applying the said provisions, was to establish that the payment made by the assessee is unreasonable. For that, the Assessing Officer must ascertain the fair market value of the services rendered before concluding that the payment made by the assessee is not reasonable. He submitted, the Assessing Officer has also disallowed the entire amount without mentioning what is the reasonable amount. Without prejudice to the aforesaid submission, the learned AR submitted that the amount received by the Directors towards remuneration has been offered to tax by them and since both the Directors and the Company are taxed at the same rate, there is no loss to the Revenue.

11. We have considered rival submissions and perused the material on record. As regards the payment to M/s. Shirolkar & Associates is concerned, the Assessing Officer has disallowed it primarily on the consideration that the assessee has failed to furnish evidence to indicate that they have actually rendered services. However, it is evident from the observations of the CIT(A) that the said party has provided various services such as preparation of financial data for banks, follow-up with banks and financial institutions for getting final sanction, liaison with banks for monitoring various facilities, consultancy services for assessee's legal, financial and banking matters etc. It is also found that the assessee has duly deducted tax at source u/s. 194J of the Act on the payment made to the said party. Thus, from the material on record, it is established that the payment made by the assessee to the

concerned party was against services actually rendered. That being the case, the disallowance made by the Assessing Officer cannot be sustained. As regards the payment made to the Directors, the Assessing Officer has disallowed them primarily for two reasons – firstly, the assessee has not carried out any business activities and secondly, the payment made is unreasonable. The first reasoning of the Assessing Officer has lost its force considering the fact that the income derived by the assessee has been held to be business income. Even otherwise also, as rightly urged before us by the learned AR, besides leasing out of properties, the assessee has other business activities also. That being the case, the disallowance of expenditure on the ground of no business activity is totally wrong. As regards the applicability of section 40A(2)(b) of the Act is concerned, the Assessing Officer has not established on record what is the fair market value of the services rendered by the Directors before concluding that the payment made by the assessee is unreasonable. As recorded by the learned CIT(A), the assessee has factually established before him that the Directors were handling all activities as there were no management level employees in the assessee company. Thus, the claim of the assessee that the remuneration was paid to the Directors for the services rendered by them cannot be overlooked or ignored with some general observations. If the Assessing Officer was of the view that the remuneration paid by the assessee to the Directors are unreasonable, he should have brought facts and materials on record to establish the actual fair market value of the services rendered. Without bringing any material on record, the Assessing Officer cannot disallow assessee's claim merely on presumptions and surmises. Even otherwise also, undisputedly, the

Directors have offered the remuneration received by them to tax. It is also not disputed before us that the Directors are paying tax at the maximum rate. Therefore, in effect, whether the income is assessed at the hands of the Directors or the hands of the Company will have very little impact on the Revenue. Thus, on overall consideration of facts and material on record, we do not find any infirmity in the order of the learned CIT(A). Accordingly, we uphold the order of the CIT(A) on this issue and dismiss the grounds raised by the Department.

12. In the result, the Department's appeal is dismissed.

Order pronounced in the open court on this day of 9th May 2018.

Sd/-	**Sd/-**
(Rajesh Kumar)	**(Saktijit Dey)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated : 9th May, 2018.

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Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT(A), Mumbai.
4. The CIT
5. The DR, 'G' Bench, ITAT, Mumbai

BY ORDER,

//True Copy//

(Assistant Registrar)
Income Tax Appellate Tribunal, Mumbai