

IN THE INCOME TAX APPELLATE TRIBUNAL

AHMEDABAD “A” BENCH

**(BEFORE SHRI PRAMOD KUMAR, ACCOUNTANT
MEMBER & SHRI MAHAVIR PRASAD, JUDICIAL MEMBER)**

**ITA. No: 3034/AHD/2014
& ITA 1865, 1866 & 3487/AHD/2016
(Assessment Years: 2010-11 to 2013-14)**

M/s. Oceanic Buildcon Pvt. Ltd. GF-1, Cine Mall, Nr. Natubhai Circle, Race Course Road, Baroda- 390007	V/S	The Asst. Commissioner of Income Tax, Circle-4, Baroda
(Appellant)		(Respondent)

PAN: AAACO8023E

**Appellant by : Shri Mukund Bakshi, AR
Respondent by : Shri S. K. Dev, Sr. D.R.**

(आदेश)/ORDER

Date of hearing : 18 -07-2018

Date of Pronouncement : 15-10-2018

PER MAHAVIR PRASAD, JUDICIAL MEMBER

1. These four appeals have been filed by the Assessee against the order of the ld. CIT(A). Since grounds are common for the assessment years and amounts are

different, therefore, for the sake of convenience, we would like to dispose of all the four appeals together.

2. In ITA No. 3034/Ahd/2014 for A.Y. 2010-11 Assessee's appeal. The assessee has taken following grounds of appeal:

- 1 *The learned Commissioner of Income Tax (Appeals)-III Baroda erred in fact and in law in holding that the income of the assessee is taxable under the head "Income from house property" instead of business income.*

- 2 *The learned CIT(A) erred in fact and in law in confirming the action of AO in disallowing the business loss of Rs. 2,46,06,893/- and treating the same as pre-operative expenses.*

- 3 *The learned CIT(A) erred in fact and in law in confirming the action of AO in considering rental income of Rs. 1,35,000/- as income from other sources and thereby taxing the said income.*

- 4 *The learned CIT(A) erred in fact and in law in confirming the action of AO in not allowing set off of business loss against other income.*

5. *The learned CIT(A) erred in fact and in law in confirming the action of AO in initiating penalty proceedings u/s. 271(l)(a).*

3. The facts of the case are that the assessee company was engaged in the business of providing immovable property on hire/rent basis. During the year, the assessee was doing construction of building to give on rent. The assessee purchased a land in the financial year 2005-06 and commenced the construction of building a Mall in the Financial Year 2007-08. The Mall is completed in the Financial Year 2009-10. The Company started marketing its property to prospective customers.

4. The assessee entered into a MoU on 19.02.2007 with Cinemax outlining the broad terms of lease of the property. While the construction was underway, the Company also derived income from renting of hoardings. In the accounts

prepared for the Financial Year 2008-09, it was considered by the Company that business is already commenced and accordingly the P&L Account is prepared.

5. In the assessment made for A.Y. 2009-10 the A.O. denied the claim of loss and the Ld. CIT(A) in first appeal held that the Company's activity is of renting of premises and therefore, the income earned by it is to be taxed as income from house property. The action of the A.O. was thus upheld. Being aggrieved, the assessee had preferred a further appeal to the Tribunal. The Tribunal in its order dated 29.02.2016 in ITA No. 1060/Ahd/2013 expunged the findings of the Ld.-CIT(A) with respect to the taxation of income from rent as income from house property. The finding of the Tribunal is as under:

"4. Having heard the rival contentions and having perused the material on record, we find ourselves in agreement with the learned counsel that the CIT(A) has indeed made certain observations which pre-empt the case of the assessee for the subsequent assessment years as well. We, therefore, make it clear that the observations made by the CIT(A), so far as period outside the assessment year 2009-10 is concerned, are devoid of any basis and stand vacated. A fresh call on merits will have to be taken for the assessment years, uninfluenced by the stand taken by the CIT(A) in the assessment year 2009-10, and the observations in this order, to that extent, stand expunged. Learned counsel, in this background, does not press the ground of appeal on merits and he is content with the unwarranted observations of the CIT(A) being held to be devoid of legal force,"

6. In the A.Y. 2010-11, the assessee has claimed a business loss of Rs. 2,46,03,893/- which is denied by the A.O. holding that the project of the assessee is still under construction during the year and. therefore, the loss could not be allowed. In first appeal, the Ld. CIT(A), following his order for A.Y. 2009-10, held that since the activity of the assessee is that of earning income

from house property and that the Company shall not carry out any business, the claim of loss allowed was upheld.

7. In the A.Y. 2011-12, the appellant claimed a business loss of Rs. 1,18,49,623/- which is assessed at a loss of Rs. 1,11,50,526/-. The A.O. accepted the conduct of the business of lease of premises as claimed by the assessee. In first appeal, the ld. CIT(A), after issuing notice for enhancement and affording the opportunity, held that the income of the assessee is from house property and the claim of business loss was denied.
8. In the A.Ys. 2012-13 and 2013-14 ,the A.O, has assessed the income as income from house property which is upheld by the ld, CIT(A).
9. In the proceedings before the Tribunal that assessee submitted that the main object of the Company since incorporation is to carry on the business of leasing of premises. In pursuing this objective, the assessee purchased the land and started constructing the Mall premises. The premises in the Mall are rented out to various parties and the terms of agreement of lease varies from party to party. Referring to the copies of agreements placed in. the Paper Book, it was pointed out that the terms of agreement with each of the occupiers are different. The broad terms of agreements with some of the parties" were being as under:

a) Reliance Trends

- i) The area leased is 18,094 sq.ft. [Page No. 102] from 18.03.2010 for a period of 60 months [Page No. 79 & 80]

- ii) The License fees is not to be paid for the first 34 days from the date of commencement of business or first 154 days from the date of possession, whichever is earlier [Page No. 79]
- iii) Lock-in period 12 months. [Page No. 80]
- iv) The License fee is the higher of- [Page No. 80]
 - Minimum guarantee fees @ Rs. 45 per sq. ft. carpet area and
 - 10% of net sales
- v) The Company would provide common facilities such as - [[Page No. 94 - 95]
 - (a) Central Air conditioning on continuous basis during the business hours as agreed in common areas of the Mall
 - (b) Maintain common passages, lobbies and entrance of the said Mall, inter alia, with proper illumination.
 - (c) Maintain Elevation, Glass facade of the Mall, maintain structure, Terrace Area, Staircases, Elevators, Lifts, Service Lifts, all the equipment forming part of the infrastructure and essential for the functioning of the said Mall, including services, firefighting system, lighting and illumination, landscaping etc.
 - (d) Ensure proper maintenance of building, building structure, water leakages, sewage and drainage lines functioning and servicing. Availability of uninterrupted services such as electricity, water connection and other required services for the Mall.
 - (e) General security services for the said Mall, parking lot and other surrounding portion of the plot forming part of the said development. However, Licensee is free and entitled to appoint security for the unit of required by the Licensee.

(f) Manage & monitoring of housekeeping of the common areas and facilities including the parking area of the said Mall.

vi) The common area maintenance is to be collected @ Rs. 7 per sq. ft. carpet area or actuals, whichever is lower. [Page No. 83-84]

vii) The Licensor could sell the licensed premises to any other person [Page No. 88]

viii) The Licensor to insure the property. [Page No. 88]

ix) The Licensee to make payments for electricity, water etc. [Page No. 92]

x) The agreement does not create any right of tenancy. [Page No, 100]

b) The Forge:

i) The charges recoverable for letting out the premises are referred as Lease Rental to be recovered @ Rs. 45 per sq. ft. for initial 3 years and thereafter increase of 20%. The total lease period of 9 years. [Page No. 110]

ii) The common area maintenance is to be recovered @ Rs. 6 per sq. ft. or the actuals, whichever is higher. [Page No. III]

iii) Lock-in period of 3 years. [Page No. III]

iv) The lessor to provide D.G. set for power back up. [Page No. 113]

v) The timings of the Mall shall be 11.00 a.m. to 10.00 p.m. However, the Lessee could use the premises between 5.30 a.m. to 10.00 p.m. [Page No. 116]

c) Cinemax India Ltd.

i) The lessor to ensure occupancy of 50% of Mall premises at all times. If Mall premises exceeding 50% remain vacant for more than 6 months

affecting the revenue of lessee, the lease rent to be negotiated. [Page No.143.]

- ii) Lock-in period of 9 years. [Page No. 146]
- iii) Services to be provided by the Lessor: [Page No. 159-160]
 - (a) Repairs and maintenance of the Mall.
 - (b) Insurance
 - (c) Overall security systems including security personnel
 - (d) Cleaning and maintenance of common area
 - (e) Maintenance and upkeep of Air Conditioning, Fire Fighting Equipment, Utilities, D.G. Set / Power supply
 - (f) Maintenance and upkeep of landscaping and other infrastructure.

d) Cosmo Flavours

- i) The charges recoverable for letting out the premises is referred as Lease Rent. The lease rent to be recovered @ 45 per sq. ft. for the first six months and thereafter @ 51 per sq. ft. [Page No. 169]
- ii) The lease is for a period of 9 years with 15% increase after every 3 years. [Page No. 169]
- iii) The common area maintenance is to be recovered @ Rs. 6 per sq. ft. or the actuals, whichever is higher. [Page No. 186]
- iv) The services to be provided at the cost of the Lessee is the maintenance and upkeep of the common areas [Page No. 186]
- v) Lock-in period of 6 years. [Page No. 173]
- vi) The common facilities and common areas to be utilized by the Lessee which shall be maintained by the Lessor. [Page No. 186]

e) Sujal Advertising

Hoarding rights for installation of two hoardings on the building is given in consideration of annual rent of Rs.3,60,000/-.

f) Cafe Noir

- i) The lease is for a period of 9 years and the lease rent payable is on lumpsum basis @ Rs. 80,000/- in the first year, Rs. 90,000 in the second year and so on upto 5 years. [Page No. 196]
- ii) Lock-in period of 3 years. [Page No. 199]

10. Referring to the above, it was emphasized that the terms of agreement with each of the parties is different. In the case of Reliance Trends, it was pointed out that the licence fees was to be quantified as percentage of the net sales or an agreed rent.

11. It was also pointed out that along with the premises, a large number of services were also required to be provided. It was stated that the activity of lease with each of the lessees is complex and involves the risk. The activities are carried out on a systematic and on regular basis in the nature of business. Therefore, such income was required to be taxed as the business income.

12. It was also pointed out that the assessee company has no other activity and this is the only activity and business. For substantiation of this contention, the extracts of the Profit & Loss account for the A.Y. 2011-12 to 2013-14 were furnished being reproduced:

Particulars	2012-13	2011-12	2010-11
A. Income	362.65	372.30	205.82
B. Expenditure			

a)Cost of services rendered	111.97	114.21	68.57
b)Finance cost	152.55	161.17	124.38
c)Depreciation	71.41	78.66	85.02
d)Others	9.38	17.45	9.58
Total (a to d)	345.31	3761.49	287.55
C.Profit	17.34	0.81	(81.73)
	[Ref. Page No. 256]	[Ref. Page No. 256]	[Ref. Page No. 35]

13. The assessee submitted that it has to incur substantial expenses towards maintenance, security, cleaning, repairs & maintenance, electricity charges, etc. It has to maintain regular staff and employees either on contract or on regular basis for rendering all the services as agreed with the lessees.

14. The assessee also relied on various decisions in support of the claim that the income of the assessee, in the facts of the case, shall be income from business. The decisions relied are –

- **Chennai Properties & Investments Ltd. Vs. CIT - 56 taxmanii.com 456 (SC)**
- **Rayala Corporation Pvt. Ltd. Vs. ACIT 72 taxmann.com 149 (SC)**
- **Pr. CIT Vs. Atlantis Multiplex Pvt. Ltd. in ITA Nos. 71/2017 and 61/2017 (All.)**
- **ITO Vs. Nishta Mall Management Co. Pvt. Ltd. in ITA No. 5882/Mum/2010 dated 30.10.2015 (Mum. Trib.)**
- **PFH & Retail Management Ltd. Vs. ITO - 110 ITD 337 (Kolkata Trib.)**
- **ACIT Vs. Steller Developer Pvt.Ltd. 54 taxmann.com 252 (Mumbai Trib.)**

15. In Chennai Properties & Investments Ltd. Vs. CIT - 56 taxmanni.com 456 (SC).

The Hon'ble Apex Court held :

“Section 28(i), read with section 22, of the Income-tax Act, 1961 - Business income -Chargeable as (Letting out of properties) - Whether where in terms of memorandum of association, main object of assessee-company was to acquire properties and earn income by letting out same, said income was to be brought to tax as business income and not as income from house property - Held, yes [Paras 5 and 11] [In favour of assessee]”

16. With respect to the appeal for the A.Y. 2010-11 it was stated that the business of the assessee is required to be considered as commenced from the F.Y. 2005-06 itself when the land required for construction of the Mall was purchased. As per the method of accounting prescribed as per AS-16 issued by The Institute of Chartered Accountants of India, the interest cost incurred up to the date of completion of the building is capitalized being attributable to the construction. The interest expense incurred after the date of completion and all other expenses like administrative and other expenses which are not attributable to the construction or creation of asset is claimed as revenue expenditure resulting into loss. According to him, such loss is to be allowed. Reliance was placed on under noted judgments:

- **Dhoomketu Builders & Development Pvt. Ltd. Vs. ACIT 17 taxmann.com 36 (Trib.Delhi)-Confirmed in 34 taxmann.com 18 (Delhi)**
- **Tetron Commercial Ltd. Vs. CIT 261 ITR 422 (Cal)**
- **Hotel Alankar Vs. CIT 133 ITR 866 (Guj.)**
- **Hagwood Commercial Developers Pvt. Ltd. Vs. ACIT 82 taxniann.com 475 Mum. Trib.)**

17. In Hagwood Commercial Developers Pvt. Ltd. Vs. ACIT 82 taxniann.com 475

Mum. Tribunal held :

“Section 37(1) of the Income-tax Act, 1961 - Business expenditure - Allowability of (Capital v. Revenue expenditure) - Assessment year 2012-13 - Assessee was engaged in construction of a mall - There was no business income and project was still under progress, assessee had debited administrative and overhead expenses to its profit and loss account of year in which they were incurred - Assessee submitted that said expenditure was not added to capital work-in-progress as same was not incurred for purpose of project - It was found that assessee was following AS2 and AS7 issued by ICAI which was mandatory standards whereby direct costs were added to capital work-in-progress being construction of mall and residential complex and all indirect expenses being general overhead were charged to profit and loss account - Whether since assessee had set up business by acquiring land and obtaining approval for construction of mall and residential complex, although mall had not commenced business till end of relevant year, assessee had rightly debited general overhead expenses being indirect expenses incurred, in profit and loss account - Held, yes [Para 8] [In favour of assessee]”

18. The ld. D.R. did not controvert the factual submissions nor has brought to the notice any contrary judgments.

19. We have gone through the relevant record and impugned order. The construction of the building is commenced in the Financial Year 2007-08 and is completed in the Financial Year 2009-10. The source of funds for the construction of Mall being own funds, unsecured loans from promoters as also

- borrowing to the extent of Rs. 8.65 crores from Financial Institutions. The company had started marketing the availability of premises in the Mall and entered into a MoU dated 19.02.2007 with Cinemax proposing the broad terms on which the property would be licensed/leased. In the accounts prepared for the Financial Year 2008-09, the business of the construction of Mall had already commenced and the appellant derived some income from renting of hoarding signs etc. and mainly company is engaged in renting of premises and in the Assessment Year 2010-11, ld. A.O. denied the claim of loss of Rs.2,46,03,893/- as claimed in the return of income holding that assessee's project was still under construction and that the loss could not be allowed.
20. In appeal before ld. CIT(A), appellant contended that it had set up its business during the year and Mall under construction was capitalized and contended that loss was required to be allowed. But ld. CIT(A) held that income of the appellant to be taxed under the head income from house property.
21. As we can see, that in similar circumstances, Hon'ble Supreme Court in the matter of Chennai Properties & Investments Ltd. (supra) decided matter in favour of the assessee holding that income from renting a property of Mall to be treated as business income and in those circumstances, appellant case is fully covered by the aforesaid judgment. ITAT Bench of Mumbai in the matter of Hagwood Commercial Developers Pvt. Ltd. (supra) has also given finding in favour of assessee. To the effect that even if Mall had not commenced business till end of relevant year, assessee had rightly debited general overhead expenses being indirect expenses incurred, in profit and loss account. Thus, we are considered opinion, that in assessee's case, the income from renting a properties in Mall to be taxed as business income and not income from house property as well as business loss also to be allowed.

22. So far initiating of penalty proceeding u/s. 271(1)(a) is concerned, same are premature. Thus, we do not want to comment on that.

23. In the result, appeal filed by the Appellant is allowed.

ITA No. 1865/Ahd/2016 for A.Y. 2011-12.

24. The assessee has taken following grounds:

1. *The Id. CIT(A)-2, Vadodara has erred in law and in facts in confirming 5% of expenses incurred under the heads Repairs Maintenance and other direct expenses is in complete disregard of available material and facts. The disallowance of expenses of 5% i.e. Rs. 1,07,176/- is prayed to be deleted.*
2. *The Id. CIT(A)-2, Vadodara has erred in enhancing the income of the appellant in complete disregard of the facts and material placed on record.*
3. *The Id. CIT(A)-2, Vadodara has erred in law and in facts by wrongly treated the entire income declared by the appellant as income from house property without considering the fact that the same is income earned from business. The impugned addition being in complete disregards of the applicable facts and law is prayed to be deleted.*

25. Since we have given relief to the appellant in the preceding year and has held that income from renting of Mall to be treated as business income. Thus, disallowance of expenses of 5% i.e. Rs. 1,07,16,176/-.

26. In the result, this appeal is also allowed.

ITA No. 1864/Ahd/2016 for AY. 2012-13.

27. The assessee has taken following grounds:

1. *The Id. CIT(A)-2, Vadodara has erred in confirming the addition made by the Id. A.O. and wrongly treated the entire income declared by the appellant as income from house property without considering the fact that the same is income earned from business. The impugned addition being in complete disregard of the applicable facts and law is prayed to be deleted.*
2. *The Id. CIT(A)-2, Vadodara has erred in confirming the addition made by the Id. A.O. and not allowed the depreciation claimed by the appellant on the mall without considering the fact that the appellant in the business of running a mall and giving its space on rent. The impugned addition being in complete disregard of the applicable facts and law is prayed to be deleted.*

28. Since we have given relief to the appellant in earlier two years, we reiterate in this appeal that renting of property of Mall income to be a business income. .

ITA No. 3487/Ahd/2016 for A.Y. 2013-14

29. The assessee has taken following grounds:

1. *The Id. CIT(A)-2, Vadodara has erred in confirming the addition made by the Id. A.O. and wrongly treated the entire income declared by the appellant as income from house property without considering the fact that the same is income earned from business. The impugned addition being in complete disregard of the applicable facts and law is prayed to be deleted.*
2. *The Id. CIT(A)-2, Vadodara has erred in confirming the addition made by the Id. A.O. and not allowed the depreciation claimed by the appellant on the mall without considering the fact that the appellant in the business of running a mall and giving its space on rent. The impugned addition being in complete disregard of the applicable facts and law is prayed to be deleted.*

15 ITA No 3034/Ahd/2014
& ITA Nos. 1865, 1866 & 3487/Ahd/2016
A.Ys. 2010-11 to 2013-14

30. In this appeal, nothing new facts have emerged and in earlier preceding three years, we have given relief to the appellant. Hence, following the earlier once, we allow this appeal as well.

31. In the result, all the four appeals filed by the Assessee are allowed.

Order pronounced in Open Court on	15 - 10- 2018
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Sd/-

(PRAMOD KUMAR)
ACCOUNTANT MEMBER **True Copy**
Ahmedabad: Dated 15 /10/2018

Sd/-

(MAHAVIR PRASAD)
JUDICIAL MEMBER

Rajesh

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.
3. The CIT (Appeals) –
4. The CIT concerned.
5. The DR., ITAT, Ahmedabad.
6. Guard File.

By ORDER

Deputy/Asstt.Registrar
ITAT,Ahmedabad