IN THE INCOME TAX APPELLATE TRIBUNAL

"B" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

ITA no. 5944/Mum/2012
(Assessment Year : 2009–10)

Dy. Commissioner of Income Tax
Circle–9(2), Mumbai ……. Appellant

v/s

M/s. Magnus Properties Pvt. Ltd.
Uniphos House, Madhu Park
11th Road, Khar (West)
Mumbai 400 052 PAN – AADCM7520M ……. Respondent

ITA No. 836/Mum./2015
(Assessment Year : 2011–12)

Dy. Commissioner of Income Tax
Circle–12(3)(2), Mumbai ……. Appellant

v/s

M/s. Magnus Properties Pvt. Ltd.
Uniphos House, Madhu Park
11th Road, Khar (West)
Mumbai 400 052 PAN – AADCM7520M ……. Respondent

ITA No. 7011/Mum./2014
(Assessment Year : 2007–08)

Dy. Commissioner of Income Tax
Circle–9(2), Mumbai ……. Appellant

v/s

M/s. Magnus Properties Pvt. Ltd.
Uniphos House, Madhu Park
11th Road, Khar (West)
Mumbai 400 052 PAN – AADCM7520M ……. Respondent

ITA no. 7012/Mum./2014
(Assessment Year : 2010–11)

Dy. Commissioner of Income Tax
Circle–9(2), Mumbai ……. Appellant

v/s

M/s. Magnus Properties Pvt. Ltd.
Uniphos House, Madhu Park
11th Road, Khar (West)
Mumbai 400 052 PAN – AADCM7520M ……. Respondent

Revenue by : Shri Chaudhary Arun Kumar Singh
Assessee by : Shri R. Murlidhar

Date of Hearing – 01.10.2018	Date of Order – 30.10.2018

O R D E R

PER SAKTIJIT DEY, J.M.

Aforesaid appeals by the Revenue are against separate orders passed by the learned Commissioner (Appeals)–20, Mumbai, pertaining to assessment years 2007–08, 2009–10, 2010–11 and 2011–12.

2. The core issue arising for consideration in the aforesaid appeals, except, the appeal relating to assessment year 2009–10 in ITA no. 5944/Mum./2012, is relating to the issue as to whether the income derived by the assessee from leave and license fee is to be treated as income from house property as claimed by the assessee or as income from business as held by the Assessing Officer (AO). Therefore, at the

outset, we propose to address the aforesaid issue. Since, facts relating to the aforesaid issue are more or less common in all the appeals, for the sake of brevity, we will discuss the facts as involved in ITA no.7011/ Mum./2014, for the assessment year 2007–08.

3. Brief facts are, the assessee a company is a builder and developer and is in real estate business. For the impugned assessment year, the assessee filed its return of income on 29th October 2007, declaring total income of ₹ 2,09,11,640. The return of income filed by the assessee was selected for scrutiny and after verifying the books of account and other documents, the Assessing Officer completed the assessment under section 143(3) of the Income Tax Act, 1961 (for short "the Act") vide order dated 24th December 2009, determining the total income at ₹ 2,17,41,730. Subsequently, the Assessing Officer being of the opinion that leave and license fee received by the assessee should be assessed as income from business, instead of income from property, re–opened the assessment under section 147 of the Act by issuing a notice under section 148 of the Act on 30th March 2012. During the re–assessment proceedings, when the Assessing Officer called upon the assessee to explain why the leave and license fee should not be assessed as business income, the assessee objected to it by submitting elaborate submissions supported by judicial precedents to justify its claim that such income should be assessed as

income from house property. The Assessing Officer however, did not find merit in the submission of the assessee. He observed that the property in question from which the assessee has generated leave and license fee has been shown in the Balance Sheet as inventory. He observed, since the assessee has treated the building as stock–in–trade, the income derived therefrom has to be treated as income from business. In this context, he relied upon the decision of Hon'ble Gujarat High Court I CIT v/s Neha Builders Pvt. Ltd., [2007] 164 taxmann.com 342 (Guj.). Accordingly, he assessed the rental income received by the assessee as income from business. Being aggrieved of the assessment order so passed, the assessee preferred appeal before the first appellate authority, inter–alia, on the ground that re–opening of assessment under section 147 of the Act is invalid.

4. The learned Commissioner (Appeals) after considering the submissions of the assessee in the context of facts and material on record, found that in course of the original proceedings under section 143(3) of the Act, the Assessing Officer has examined the issue whether the rental income is to be assessed as house property income or income from business and thereafter completed the assessment accepting assessee’s claim of house property income. Therefore, he held that in the re–assessment proceedings the Assessing Officer cannot sit in the judgment over the decision taken in the original

assessment order. Thus, he held that the re–opening of assessment on a mere change of opinion to change the head of income from house property to business is legally unsustainable. As regards the merits of the issue the learned Commissioner (Appeals) found that in assessee's own case for assessment year 2009–10, the ACIT who is higher in rank has completed the assessment under section 143(3) of the Act assessing the rental income as income from house property. Therefore, he observed, the Department cannot take different stand in the different assessment years with regard to the head of income. Further, the learned Commissioner (Appeals) observed, the income earned by the assessee from renting out the building has to be assessed as income from house property considering the ratio laid down in the judicial precedence cited by the assessee. Therefore, ultimately, the learned Commissioner (Appeals) concluded that the rental income received by the assessee has to be treated as income from house property. Accordingly, he deleted the addition made by the Assessing Officer.

5. The learned Departmental Representative (D.R.) relying upon the observations of the Assessing Officer submitted, while completing the original assessment the Assessing Officer has not examined the issue relating to the proper head under which the rental income is to be assessed. Therefore, he submitted, there being no change of opinion,

re–opening of assessment under section 147 of the Act is valid. In support of his contention, the learned Departmental Representative relied upon the decision of the Hon'ble Gujarat High Court in CIT v/s Neha Builders Pvt. Ltd., [2008] 296 ITR 661 (Guj.).

6. So far as the merits of the issue is concerned, the learned Departmental Representative submitted, since the assessee is holding the property as stock–in–trade and is in the business of leasing out property, the rental income derived by the assessee is to be treated as business income.

7. The learned Authorised Representative (A.R.) strongly supporting the decision of the learned Commissioner (Appeals) submitted, the assessee is not in the business of leasing property but is a real estate developer and builder. Therefore, rental income derived by the assessee cannot be treated as business income. He submitted, for qualifying as business income, the assessee must be seen to have engaged in a systematic and organized activity of providing services. He submitted, in the present case, the assessee has simply let–out the building and earned rental income. Therefore, it cannot be treated as business income. The learned Authorised Representative submitted, merely because the property is shown as inventory it will not change the nature and character of income as the treatment given in the

books of account is not conclusive**.** He submitted, to determine the nature of rental income earned by the assessee what is required to be seen is the intention of the assessee, whether is to let out the property as an owner or exploit the property in a systematic and organised manner by providing various services. He submitted, the character of income received from rent will not change merely because the assessee is a company or the property has been shown as stock–in–trade. For such proposition he relied upon the decision of the Hon'ble Jurisdictional High Court in CIT v/s Sane & Doshi Enterprises, [2015] 58 taxmann.com 111 (Bom.). Distinguishing the decision of the Hon'ble Supreme Court in Chennai Properties and Investment Ltd. v/s CIT, [2015] 231 Taxman 336 (SC) and Rayala Corporation v/s ACIT, [2016] 243 Taxman 360 (SC), the learned Authorised Representative submitted that the issue has been further explained by the Hon'ble Supreme Court in Raj Dadarkar & Associates v/s ACIT, [2017 394 ITR 592 (SC), wherein, the Hon'ble Court held that merely because of a particular object in the object clause, it would not be a determinative factor to arrive at the conclusion that the income is to be treated as business income. He submitted, in Chennai Properties and Investment Ltd. (supra), the only activity of the assessee was to earn rental income from the property and it had no other business activity. He submitted, whereas the facts are different in assessee’s case. The

learned Authorised Representative submitted, in assessment year 2009–10 the Assessing Officer while completing the assessment under section 143(3) of the Act has accepted the rental income received by the assessee as income from house property. Therefore, a different stand cannot be taken by the Department in other assessment years. Finally, the learned Authorised Representative submitted, while completing the original assessment under section 143(3) of the Act the Assessing Officer after examining the issue has accepted assessee's claim of house property income. He submitted, in the absence of any other tangible material, the Assessing Officer could not have re–opened the assessment on the basis of very same material available at the time of original assessment. He submitted, even though the re–opening of assessment is within the period of four years, however, the Assessing Officer cannot exercise his power under section 147 of the Act on a mere change of opinion just to change the head of income from income from house property to income from business. Thus, he submitted, the re–opening of assessment under section 147 of the Act is also invalid. In this context, he relied upon the decision of the Hon'ble Supreme Court in CIT v/s Kelvinator of India Ltd., [2010] 320 ITR 561 (SC).

8. We have considered rival submissions and perused materials on record. We have also applied our mind to the decisions relied upon. As

far as the factual aspect of the issue is concerned there is no dispute between the parties. The only dispute is with regard to proper head of income under which the rental income received by the assessee from leave and licence of the building is to be assessed. It is a fact on record that in the return of income filed for the impugned assessment year assessee has offered the aforesaid rental income as income from house property. While completing the original assessment the AO has also accepted assessee's claim and assessed the rental income under the head "income from house property". Subsequently, the AO being of the opinion that rental income has to be assessed as income from business has reopened the assessment. Therefore the first and primary issue which needs to be addressed is, whether the reopening of assessment under Section 147 of the Act is valid. Undisputedly, for the impugned assessment year the assessment was originally completed under Section 143(3) of the Act. As it appears from the original assessment order, copy of which is at page 24 of the Paper Book, the AO while completing the original assessment was conscious of the fact that the assessee has offered the leave and licence fees from letting out the building as income from house property. This fact is evident from the observations of the AO in paragraph 4.1 of the assessment order. Therefore, one has to conclude that the AO having examined the claim of the assessee has accepted the income

generated from leave and licence fees as income from house property. That being the case, the reopening of assessment under Section 147 of the Act merely for substituting the head of income from "house property" to "business and profession" is nothing else but a mere change of opinion on the part of the AO without having any tangible material in his possession to form a belief that income has escaped assessment. This, in our considered opinion, is not permissible having regard to legal principles enunciated in the judicial precedents cited before us. Therefore, we agree with the learned CIT(A) that reopening of assessment for A.Y. 2007-08 is invalid.

9. As regards the merits of the issue, it is relevant to observe, the AO has treated the income generated from leave and license fee as income from business primarily for the reason that the unsold flats have been shown as stock-in-trade in the books of the assessee. In our view, accounting entry or accounting treatment given by the assessee in its books of account is not conclusive. What is required to be examined is the intention of the assessee whether to exploit the property as owner or engage itself in an organized and systematic activity of constructing, developing and building house property and giving them on lease along with other services for earning rental income. As can be seen from the objects of the assessee as contained in the Memorandum and Articles of Association, the primary object of

the assessee is not to construct, develop and lease them out for earning rental income but to engage itself as real estate developer. Therefore, as it appears from the facts on record, the business of the assessee is not letting out properties for earning rental income. In case of Chennai Properties and Investment Ltd. (supra) the Hon'ble Supreme Court held the income derived from letting out of property as business income only because the building was constructed by the assessee for earning rental income as per the object of the company. The same view was again expresses by the Hon'ble Supreme Court in the case of Rayala Corporation Ltd. (supra). However, in the case of Raj Dadarkar & Associates (supra) the Hon'ble Supreme Court, taking note of its own decision in the case of Chennai Properties & Investment Ltd. (supra) and Rayala Corporation Ltd (supra) observed that by applying the dominant test the nature and character of income has to be determined. The Hon'ble Supreme Court held, the ultimate determinative factor is whether the assessee has carried on the activity as business venture. In the case of Sane & Doshi Enterprises (supra) the Hon’ble Bombay High Court while considering the issue identical to the present appeal observed that the character of rental income is not altered just because of the treatment given by the assessee in the books of account as stock-in-trade. Thus, ultimately the Hon’ble Jurisdictional High Court held, irrespective of the fact

whether the property has been shown as stock-in-trade in the books of account, the income derived from letting out of such property would not alter the character and nature of income as house property income. The aforesaid ratio laid down by the Hon'ble Jurisdictional High Court squarely applies to the facts of the present case. Even otherwise also, as rightly observed by the learned CIT(A) in the appellate order passed for ay 2010-11, in case the Department treats the income generated from leave and licence fees as business income, the AO is duty bound to allow depreciation to the assessee on the asset generating such income. In such eventuality, the income which would ultimately be determined would be lesser than the income offered by the assessee, hence, prejudicial to the interest of Revenue. It is also relevant to observe, in assessee's own case for A.Y. 2009-10 the AO while completing the assessment under Section 143(3) of the Act has accepted the income generated from leave and licence fees of the building as income from house property. The assessment order so passed has neither been revised nor reopened. That being the case, the Department cannot be allowed to take different stand in different assessment years with regard to head of income generated from leave and licence fees. In view of the aforesaid, we do not find any reason to interfere with the decision of the learned CIT(A). Accordingly, grounds raised are dismissed.

10. The only issue arising in Departmental appeal in ITA No. 5944/Mum/2012 for A.Y. 2009-10 relates to allowance of assessee's claim of deduction under Section 24(b) of the Act on account of interest on borrowed capital.

11. The brief facts of the case are, for the impugned assessment year the assessee filed its return of income on 27.09.2009 declaring total income of Rs.3,46,39,786/-. In the course of assessment proceedings, the AO noticed that while computing the income from house property the assessee has claimed deduction of Rs.1,08,60,299/- under Section 24(b) of the Act towards interest and pre-payment charges. After calling for necessary details from the assessee and examining those AO found that as per the sanction letter from HDFC Bank the loan was obtained subsequent to leasing out of the property. Therefore, he called upon the assessee to explain why interest payment should not be disallowed. In response to the query raised by the AO it was submitted by the assessee that initially the assessee had borrowed Rs.15 crores in the year ending 31.03.2005 for construction of the building. It was submitted, during the financial year 2005-06 the assessee has repaid an amount of Rs.6 crores and the outstanding loan as on 31.03.2006 was Rs.16 crores. It was submitted, the aforesaid loan amount was converted to EMI based loan as per the sanction letter dated

20.04.2006 and the assessee has not taken any fresh loan. Therefore it was submitted, the interest paid is allowable under Section 24 of the Act. The AO, however, was not convinced with the explanation of the assessee. Referring to the sanction letter dated 20.04.2006 the AO observed, it does not mention that the loan was granted either for purchase or construction of the property. He further observed, as per the terms of the sanction letter, the loan is secured against future rental income which implies that the loan obtained by the assessee is for working capital and not for purchase or construction of the property given on rent. Thus, ultimately the AO disallowed interest payment of Rs.1,08,60,299/- claimed as deduction under Section 24(b) of the Act. In addition, the AO also disallowed pre-payment charges of Rs.3,37,080/- on the reasoning that it is not in the nature of interest. Being aggrieved of such disallowance, the assessee preferred appeal before the learned CIT(A). After considering the submissions of the assessee in the context of facts and material on record the learned CIT(A) observed that the assessee is not into any manufacturing or trading activity which required working capital. He also observed that the AO has not brought any material on record to demonstrate that the loan sanctioned by the bank was for working capital and not for construction purposes. He further found from the material on record that the assessee has not taken any fresh loan as alleged by the AO but

the earlier outstanding loan was only converted to new loan. Thus, he held that the interest payment made by the assessee is allowable under Section 24(b) of the Act. As regards pre-payment charges of Rs.3,37,080/-, the learned CIT(A) having elaborately dealt with the issue ultimately concluded that the pre-payment charges, since, represent service charge in respect of money borrowed/debt incurred, it falls within the meaning of interest as defined under Section 2(28A) of the Act. Accordingly, he deleted the disallowance made by the AO.

12. The learned D.R. relied upon the observations of the AO.

13. The learned A.R. strongly supporting the decision of the learned CIT(A) submitted that on wrong assumption of facts the AO has disallowed the deduction claimed by the assessee. The learned A.R. drawing our attention to the sanction letter dated 25.03.2004 issued by the HDFC bank submitted that the loan of Rs.15 crores was sanctioned for construction of house. He submitted, the assessee took further loan of Rs.7 crores as on 31.03.2006 and the outstanding loan payable by the assessee stood at Rs.15 crores. He submitted, on 01.07.2006 the assessee entered into a loan agreement with the HDFC bank under which the outstanding loan payable by the assessee was converted to a new loan. To substantiate such fact the learned A.R. drew our attention to different clauses of the loan agreement, a copy

of which is placed at page 79 of the Paper Book. The learned A.R. submitted, in realty the assessee did not receive any fresh loan but the old outstanding loan availed by the assessee for construction purpose was termed as new loan. Thus, he submitted, the learned CIT(A) was justified in allowing the claim of the assessee. Without prejudice to the aforesaid submission, the learned A.R. submitted that interest payable on a fresh loan raised to repay the original loan taken for construction/buying property is also allowable as deduction as per CBDT Circular No. 28 dated 20.08.1969.

14. We have considered rival contentions and perused the material on record. From the facts on record it is understood that initially vide letter dated 25.03.2004 the HDFC bank has sanctioned a loan of Rs.15 crores for construction of a building. Subsequently, the assessee had availed further loan of Rs.7 crores from HDFC bank towards construction purposes. It is also a fact on record that the assessee had repaid the loan of Rs.6 crores during the financial year 2005-06. Thus, as on 31.03.2006 loan amounting to Rs.16 crores remained outstanding. On 01.07.2016 the assessee entered into a loan agreement with HDFC bank for availing loan of Rs.15,00,00,000/-. From a perusal of the said loan agreement placed at page 79 of the Paper Book it is very much clear that the said loan amount of Rs.15,00,00,000/- was to be disbursed to the assessee in one lump

sum and has to be acknowledged by the borrower (assessee) as per the receipt. On perusal of the receipt appended to the loan agreement itself, it is very much clear that the receipt of fresh loan of Rs.15,00,00,000/- was by way of adjustment of the earlier loan account. Thus, it is a clearly established fact that vide sanction letter dated 20.04.2006 the HDFC bank did not disburse any fresh loan to the assessee but the outstanding amount out of the loan granted earlier to the assessee for construction of the building was converted into a fresh loan. That being the case, there cannot be any doubt that the loan availed by the assessee was for the purpose of construction of building, hence, interest paid on such loan is allowable under Section 24(b) of the Act. It is further relevant to observe, the AO has observed that the fresh loan sanctioned to the assessee vide letter dated 20.04.2006 was for working capital. Such fact is not forthcoming either from the sanction letter or from the agreement between the assessee and the bank. Therefore, the conclusion reached by the AO is purely on conjecture and surmises. As regards the pre-payment charges paid to the bank, there is no doubt that such pre-payment charges are connected/ attached to the loan availed by the assessee for construction purposes. Therefore, has to be considered as part of the cost of loan. Hence it is allowable as deduction under Section 24(b) of the Act. In view of the aforesaid we do not find any reason to

interfere with the decision of the learned CIT(A) on the issue. Accordingly the ground raised is dismissed.

15. To sum up, all the appeals of the Revenue are dismissed.

Order pronounced in the open Court on 31.10.2018

Sd/-	**Sd/-**
MANOJ KUMAR AGGARWAL	**SAKTIJIT DEY**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 31.10.2018

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

(Sr. Private Secretary)
ITAT, Mumbai