

IN THE INCOME-TAX APPELLATE TRIBUNAL "E" BENCH MUMBAI  
BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND  
SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 6749/Mum/2013 (Assessment Year 2010-11)

Scaffold Properties Pvt. Ltd. 373, Konark House, Veer Savarkar Road, Ground Floor, Near Siddhi Vinayak Temple, Prabhadevi, Dadar (West), Mumbai-400028. <b>PAN: AAGCS1847J</b>	Vs.	DCIT-5(3) Aayakar Bhavan, M.K. Road, Mumbai-400020.
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Appellant

Respondent

Appellant by : Shri Nitesh Joshi (AR)

Respondent by : Shri Chaudhary Arun Kumar Singh (DR)

Date of Hearing : 11.02.2019

Date of Pronouncement : 05.04.2019

**ORDER UNDER SECTION 254(1) OF INCOME TAX ACT**

**PER PAWAN SINGH, JUDICIAL MEMBER;**

1. This appeal by assessee is directed against the order of Id. Commissioner of Income-tax (Appeals)-9, hereinafter referred as Id CIT (A), Mumbai dated 05.09.2013 for Assessment Year 2010-11. The assessee has raised the following grounds of appeal:

1. a) The appellant submits that the order passed by the learned Assistant Commissioner of Income-tax, (hereinafter referred to as "the Assessing Officer") erred in treating outgoing charges amounting to Rs. 37,34,450/- as income under the head "Income from House property" as against offered under head "Profits and gains from business & profession" as per the return of income filed under section 139(1) of the Act by the Appellant.

2. Without prejudice to what has been stated above, the appellant submits that if its contention that outgoing charges be taxed under head "Profit and gains of

business & profession" is not accepted, the net outgoing charges received (i.e. outgoing charges received less expenses incurred in respect of the same) by the appellant ought to be considered while calculating annual rateable value under section 23 of the Income tax Act.

3 The Assessing Officer erred in levying interest under section 234B of the Act amounting to Rs. 5,15,808/-.

4 The Assessing Officer erred in levying interest under section 234C of the Act amounting to Rs. 41,955/- respectively.

5 The appellant submits that the Assessing Officer be directed:-

a) to treat outgoing charges amounting to Rs. 37,34,450/- received by the appellant as income under the head "Profits & gains of Business or Profession"

b) Without prejudice to what is stated above, if its contention as stated in 'a' above is not accepted, net of outgoing charges received by the appellant should be deducted while calculating annual rateable value under section 23 of the Act;

c) to delete levy of interest under section 234B of the Act amounting to Rs. 5,15,808/-.

d) to delete levy of interest under section 234C of the Act amounting to Rs. 41,955/-.

6. Each of the above grounds of appeal are independent and without prejudice to each other.

2. Brief facts of the case are that the assessee is a company, filed his return of income for Assessment Year 2010-11 on 28.09.2010 declaring total income of Rs. 5,33,63,938/-. The assessment was completed under section 143(3) on 30.11.2012. The Assessing Officer while passing the assessment order treated the amount of Rs. 37,34,450/- received on account of outgoing charges as "Income from House Property" in place of "Income from Business and Profession" as claimed by assessee. On appeal before the Id. CIT(A), the action of Assessing Officer was

confirmed. Therefore, further aggrieved by the order of Id. CIT(A), the assessee has filed the present appeal before us.

3. We have heard the submissions of the Id. Authorized Representative (AR) of the assessee and Id. Departmental Representative (DR) for the revenue and perused the material available on record. The Id. AR of the assessee submits that the assessee received a sum of Rs. 37,34,450/- as outgoing charges. The assessee has shown the addition under the head "Income from Business and Profession" while filing return of income. The Assessing Officer treated the said charges under the head "Income from House Property" instead of "Profit & Gain from Business & Profession" holding that outgoing charges are nothing but payments for providing services called maintenance charges, electricity charges, security charges and water charges etc. which are part of rental income, therefore, the same is required to be charged under the head "Income from House Property". The Id. AR of the assessee submits that the said outgoing charges are in respect of maintenance of common area, garden, building premises, 24 hour security, parking, attendant, infrastructure maintenance, water and common area, power, annual maintenance in generating power back up. The Id. AR of the assessee further submits that leave and license agreement between assessee and its tenants/lessee/licensee are liable to pay maintenance of agency/association of actual/proportionate share of common cost of

maintenance of said building on pro-rata basis on per sq. ft area, therefore, the outgoing charges are distinct and separate from rent received and same cannot be a part of rental income. The ld. AR of the assessee submits that in past, the said outgoing charges has been accepted as “Income from Business and Profession” in Assessment Year 2005-06, 2006-07, 2007-08, 2009-10, 2011-12, 2012-13, 2013-14 and 2014-15. The ld. AR of the assessee placed the copy of assessment order along with Profit & Loss Account for each of the assessment year, which consists of prior or subsequent to the Assessment Year under consideration.

4. The ld. AR of the assessee further submits that coordinate bench of Mumbai and Jaipur Tribunal in Kavita Marketing Pvt. Ltd. vs. ITO [2016] (159 ITD 547)/70 taxmann.com 391 (Mumbai Trib) and Vikram Golecha vs. CIT 123 ITD 438, on similar facts held that when the assessee had let out the property, on which he was receiving rent and facility services charges for providing specific services like housekeeping security etc., the same is liable to be assessed as business income.
5. The ld. AR of the assessee submits that by way of alternative ground No.2 the assessee has raised contentions that if the outgoing charges are not allowed as business income, the net outgoing charges be considered while calculating annual taxable value under section 23 of the Act in

support of his submissions the ld AR for the assessee further relied upon the decision of (1) Sharmila Tagore vs. JCIT [2005] 93 TTJ 483, ITAT, Mumbai] (2) Realty Finance & Leasing (P.) Ltd. vs. ITO (3) Shri Trilochan Singh Sahney vs. ACIT [ITA No. 5304/Mum/2008] (4) ACIT vs. Sunil Kumar Agarwal [ 8 ITR (Trib) 304, ITAT, Lucknow] (5) Dilnavaz Manek Daver vs. ITO [ITA No. 6072/Mum/2009] (6) Mr. Priya Muralidharan vs. ACIT [ITA No. 7345/Mum/2012] (7) M/s Jethmal Barthia vs. ACIT [ITA No. 2361/Kol/2013].

6. For ground no.3 the ld. AR submits that this ground of appeal is consequential and need no specific adjudication.
7. For ground no. 4 the ld. AR submits that the interest under section 234C is to be charge on return income, however, the assessing officer computed interest on assessed income. Therefore, the assessing officer be directed accordingly.
8. On the other hand the ld. DR For the revenue supported the orders of the lower authorities. The ld. DR further submits that principles of res-judicata are not applicable on the income tax proceedings each and every year facts is to be considered independently. It is not ascertainable if the assessee has filed the necessary documents or not before the assessing officer therefore, the case may be restored to the file of assessing officer for fresh adjudication of the main issue. For ground No. 4 the ld. DR

submits that the assessing officer may be directed to verify the facts and re-compute the interest under section 234C.

9. We have considered the submissions of the Id. AR for the assessee and Id DR for revenue and perused the record. The facts leading to raising the grounds no.1 of the appeal are not much in dispute. The assessee has received the outgoing charged apart from the rent. These facts are also indicated in the lease agreements placed on record by the assessee. The assessee offered the said charges under the head "business income", however, the assessing officer treated the said outgoing charges as a part of 'income from house property'. We have seen that the coordinate bench of Mumbai Tribunal in Kavita Marketing (P) Ltd Vs ITO (supra) on similar facts passed the following order:

“6. We have carefully considered the rival submissions. Quite clearly, there can be no dispute to the proposition that income derived from mere letting out of property is liable to be assessed only under the head "income from house property". Thus, there is no dispute between assessee and the Revenue with regard to the rental receipts of Rs. 13,80,000/-, which have been received for letting out the property. So however, the position canvassed by the assessee is that apart from letting out of property, it is also rendering certain services to the tenant by providing specific services on account of house-keeping, security, etc. Assessee has also pointed out that the 'facility service charges' earned by it also require outgoings also inasmuch as it had hired services providers for the same. Quite clearly, the providing of such services do not show that the income by way of 'facility service charges' can be said to be derived from mere ownership of the property. For this reason, the stand of the assessee is that income from such services is liable to be treated as 'business income'. In this connection, it would be relevant to refer to the judgment of the Hon'ble Gujarat High Court in the case of *Sarabhai (P.) Ltd. (supra)*, which lays down that if the owner of a property carries on upon the property some activities which results in profits and gains arising, not from the ownership but from use

thereof, such profit and gains would be chargeable to tax as 'business income' and not income under the head income from House Property'. In fact, in the case before Hon'ble Gujarat High Court, assessee was owner of the property, which was let out to the tenants. Apart from letting out, assessee was also rendering certain services by providing various amenities for which amount was being separately earned. The Hon'ble High Court held that amount received from the tenants as 'rent' for letting of the property was assessable under section 22 of the Act as "income from house property" and the other receipts in respect of the services rendered to the tenants was liable to be assessed under section 28 of the Act as 'business profits'. In our view, the ratio laid down by the Hon'ble Gujarat High Court in the case of *Sarabhai (P.) Ltd. (supra)* covers the instant situation. Undisputedly, the 'facility service charges' are being received by the assessee in return of providing specific services like house-keeping, security, etc. To the similar effect is also the judgment of the Hon'ble Madras High Court in the case of *A.K. Complex (supra)*, which was relied upon by the assessee before us. The argument of the Revenue that services rendered by the assessee are not of special nature, and they are of routine nature expected to be provided by the Landlord, is of no consequence to decide the controversy in question. This is for the reason that factually it has not been disputed by the Revenue that services by way of house-keeping, security, etc. have been rendered by the assessee. Moreover, it has to be deciphered on the basis of terms and conditions in each case as to the nature of the services that may be provided by the owner of property to its tenants to decide as to whether they are distinct from an activity which is merely because of ownership of the property. In the present case, it is quite evident that the said services are distinct from letting out of the property and, therefore, assessee is justified in asserting that the same be taxed as 'business income'. Thus, on this aspect, we set-aside the order of the CIT (A) and direct the Assessing Officer to recompute the income in view of the aforesaid directions. In the result, on this ground assessee succeeds.”

10. Considering the decision of the coordinate bench on the similar issue that where the assessee had given on rent a property, on which it was receiving rent and facility service charges, since facility service charges were being received by assessee in return of providing specific services like housekeeping, security, etc., same was liable to be assessed as business income. Similar view was taken by Jaipur Tribunal in Vikram

Golecha (supra). Even in AY 2005-06, 2006-07, 2007-08, 2009-10, 2011-12 the revenue has allowed the said outgoing charges as business income of the assessee, therefore, the assessing officer should have allowed the outgoing charges as business income on the concept of consistency. Thus, in view of above discussions, we respectfully following the decisions of coordinate bench direct the assessing officer to treat the outgoing charges as business income. In the result the ground No. 1 of the appeal is allowed. Ground No.2 is raised in alternative to the ground No.1, which we have already allowed, therefore, the adjudication of ground No.2 has become academic.

11. Ground No. 3 is consequential and thus needs no adjudication.
12. Ground No. 4 relates to charging interest under section 234C. The contention of the Id. AR for the assessee is that the assessing officer charged the interest under section 234C on assessed income, however, it is to be chargeable on return income. Considering the submissions of the Id. representatives of the parties the assessing officer is directed to verify the facts and pass order in accordance with law. In the result this ground if allowed statistically.
13. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 05/04/2019.

**Sd/-**  
**SHAMIM YAHYA**  
**ACCOUNTANT MEMBER**  
Mumbai, Date: 05.04.2019

**Sd/-**  
**PAWAN SINGH**  
**JUDICIAL MEMBER**

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**Copy of the Order forwarded to :**

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "E" Bench, ITAT, Mumbai
6. Guard File

**BY ORDER,**

**Dy./Asst. Registrar  
ITAT, Mumbai**