आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद /

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD – BENCH 'A'

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

आयकर अपील सं./ **ITA No.135/Ahd/2018**
*निर्धारण वर्ष***Asstt. Year: 2013-14**

Gulmohar Park Mall P.Ltd. Gulmohar Park Satellite Road Ahmedabad 380052. PAN : AACCN 2111 Q	Vs.	DCIT, Cir.2(1)(1) Ahmedabad.

अपीलार्थी/ (Appellant)		*प्रत्यर्थी/* (Respondent)

Assessee by :	Shri Tushar P. Hemani, AR
Revenue by :	Smt.Apporna Agarwal,CIT-DR

*सुनवाई की तारीख/*Date of Hearing : 23/10/2019
*घोषणा की तारीख /*Date of Pronouncement: 21 /11/2019

*आदेश/***O R D E R**

PER RAJPAL YADAV, JUDICIAL MEMBER:

Assessee is in appeal before the Tribunal against order of the ld.CIT(A)-2, Ahmedabad dated 4.12.2017 passed for the Asstt.Year 2013-14.

2. Assessee has raised six grounds in the appeal, out of which ground no.3 to 6 are not pressed for adjudication. They are accordingly dismissed for want of prosecution.

3. Remaining grounds for adjudication i.e ground no.1 and 2 of the appeal reads as under:

"1. On the facts and in the circumstances of the case, the learned CIT(A) erred in confirming that income of Rs. 9,04,49,999/- is taxable under the head Income from House Property as against under the head Income from Business and Profession offered in the return of income of the appellant.

2. On the facts and in the circumstances of the case the learned CIT(A) erred in rejecting the relevant ground No.3 raised by the appellant before him to the effect that Ld. A.O. erred in restricting the deduction towards interest on borrowed fund to Res. 6,33,14,999/-. The assessee has incurred interest expenditure of Rs. 6,77,22,853/- being interest on borrowed fund which were utilized for constructing the house property and acquiring the Plants & Machinery and equipment wherefrom income was derived. The A.O. ought to have allowed the deduction towards the interest expense of Rs. 6,77,22,853/- in computation of total income.:

4. Brief facts of the case are that the assessee-company is engaged in the business of constructing, developing fully equipped retail malls, shopping complexes etc. The assessee is also operating and running a fully equipped retail mall known as "Gulmohar Park". It has filed return of income on 30.9.2013 declaring total income at Rs.NIL. The case of the assessee was selected for scrutiny assessment and notice under section 143(2)was issued and served upon the assessee. During the assessment proceedings, the ld.AO noticed that the assessee has earned income from various let out properties, which was treated by the assessee as business income. The ld.AO sought explanation from the assessee as to why income earned by the assessee from let out properties be not treated as "Income from house property". The ld.AO based on the decision of earlier years i.e. 2010-11 and 2011-12, held that in order to maintain

consistency with the earlier years, the income from let out properties is to be treated as income from house property. Appeal before the ld.CIT(A) did not yield any success. Hence, the assessee is now before the Tribunal.

5. Before us, the ld.counsel for the assessee filed written synopsis which is running over 25 pages. The same is placed on record. It is *inter alia* pleaded that the assessee gives space in the mall to the licensees purely on leave and license basis for conducting and operating retail store. Besides income from let out properties, it also derives income from providing other services on the basis of the agreement made with the parties. The assessee has shown business revenue of Rs.1166.68 lakhs in its audited annual accounts, which showed that the assessee is also getting income from other sources as per the agreement. The assessee has to perform contractual obligations such as providing various facilities, amenities and services to the licensee/visitors. It is further pleaded that these activities require continuous management, monitoring and attention and for the same the assessee has employed number of personnel on permanent basis, and therefore, management and administration of the shopping mall is the sole responsibility of the assessee. The assessee is carrying out systematic business activities as a one-unit, which are inseparable. The rental income is part and parcel of the business activities of the assessee-company. It is reiterated that the intention of the assessee is to commercially exploit the property by way of complex commercial activities and it is not a case of let out the property *simplicitor*. The rental income and

the service charges thus are received by the assessee as business income during the course of business carried out by them of operating and running *mall a*s a commercial activity. In its submissions, the assessee has relied on various judgments to support the case of the assessee that since the intention of the assessee was to exploit the property commercially, the income received for letting out of the property was to be assessed under the head "business income". The ld.counsel for the assessee also drawn to our attention that in earlier years also similar claim was made by the assessee. The issue went upto the Tribunal, and the Tribunal in ITA Nos.3559 & 3560/Ahd/2015 allowed the claim of the assessee and directed the AO to treat the income received by the assessee by letting out of the property as income from business. In this year also, facts are identical, and therefore, claim of the assessee for A.Y year 2013-14 be allowed. He placed on record copy of the order of the Tribunal dated 27.8.2019. On the other hand, the ld.DR supported orders of the Revenue authorities.

6. We have considered rival submissions and gone through the record carefully. We have also gone through order of the Tribunal in the assessee's own case for the assessment year 2010-11 and 2011-12. We find that issues raised in this year are similar to assessment year 2010-11 and 2011-12. Before us, this is not a vexed issue, because the assessee is continuously claiming the same claim right from the Asstt.Year 2009-10, and the Tribunal has also upheld the treatment of income earned by the assessee under the income from business or profession. The discussion

made by the Tribunal while allowing the claim of the assessee reads as under:

> *"7. We have noted that in assessee's own case for the assessment year 2009- 10, the Assessing Officer himself has accepted the treatment of income in question as 'profits and gains from business or profession'. No doubt the principles of res judicata do not apply to the income-tax proceedings, but where a fundamental aspect permeating through different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year. This is so held by the Hon'ble Supreme Court in the case of Radhasoami Satsang v. CIT [1992] 193 ITR 321 (SC). In this perspective, when we approach the facts of the present case, we find that whether the income in question is to be treated as income from house property or income from business or profession is a question which must depend on the appreciation of complex web of facts pertaining to the services offered by mall to, and for, those occupying the business premises on such mall. Once the Assessing Officer himself comes to the conclusion that given the complexity of these services and all these facts being taken as integrated wholly the income in question is to be taxed as business income, it would not at all appropriate for the Assessing Officer to deviate from such a stand, without any material change in the facts and circumstances in a subsequent year. In any event, the maintenance charge for common area maintenance is only one of the segments of services provided to the unit holders in the mall. The common area maintenance is one aspect where costs are shared but that does not mean that all other services and amenities essential to smooth functioning and conducive to business, can be ignored for the purpose of ascertaining the nature of business model. It, therefore, cannot be said, on the facts and circumstances that all the services which have been provided to the unit holders have been separately taxed as business income. The fact remains that even though common area maintenance services are charged for certain services, there are larger number of services such as round-the-clock security, electrification, cleanliness, parking services and most of other services which are integrated and essential for successful operation of mall, consideration for which is included in the*

charges received from unit holders. The fact that these unit holders treat these charges as rent simpliciter and tax deducted at source under section 194-I cannot determine the question of taxability in the hands of the recipient. In the business model embedded by the operation of the shopping mall, as we have pointed out earlier, a complex web of integrated services are to be provided and the consideration received from those occupying the business premises is not simply as such rent for the premises. As we hold so, we find support from Hon'ble Supreme Court's judgment in the case of CIT vs. E City Real Estate (P.) Ltd., [2018] 100 taxmann.com 94 (SC), wherein Their Lordships has, inter alia, observed as follows:-

> *"14. In the present case, the facts are otherwise. The substantive income of the Assessee is from leasing out the shop/stalls.*
>
> *15. The Tribunal in its Judgment, while appreciating the facts, has observed that the various malls are built by Assessee and are operated from the year 2001. The operational income received from the said activity, in the form of rent, and other service charges was consistently offered to tax as its business income in the earlier years and the same was accepted by the Department as a business income. After demerger, both the Assessee Companies took over the assets and liabilities of the demerged Company and continued the same business of operating and running the malls. The Tribunal has considered the nature of the business activities of the Assessee Company, as well as, terms and conditions of the relevant agreements, under which the commercial space in the mall was given on hire by the Assessee Companies to the concerned parties. It also considered the various services provided by the Assessing Companies during the course of operation and running of the Family Entertainment Centre-cum-malls. On appreciation of facts, the Commissioner (Appeals) and the Tribunal have concurrently arrived at a conclusion that the intention of the Assessing Companies was to commercially exploit the property by way of complex commercial activities and it was not a case of letting out the property simplicitor. The rental income and the service charges thus were received by the Assessee Company as business income during the course of business carried out by them of operating and running a Mall as a commercial activity. The facts of the present case are much similar to the case of*

Chennai Properties and Investments Ltd. (referred to supra). 16. We find that the appreciation of evidence by the Commissioner (Appeals) and Tribunal is not perverse and the finding arrived at by them is plausible one."

8. Specifically dealing with a materially similar question, the Hon'ble Kerala High Court in the case of CIT vs. Oberon Edifices & Estates (P) Ltd, reported in [2019] 103 taxmann.com 413 (Kerala), have, inter alia, observed as follows:-

"27. In the instant case, it is not a letting out of property simpliciter, without anything more. A host of services are being provided by the assessee at the shopping mall. The assessee is engaged in a complex set of activities at the shopping mall. Management of the shopping mall is done by the assessee. The basic purpose is commercial exploitation of the property. The assessee has earned the income not merely by letting out the shop rooms but also by providing amenities and facilities at the shopping mall. Such amenities and facilities are not the basic facilities required for occupation of a shop room by a tenant. They are the special facilities for running the shopping mall and are meant to attract the customers and provide them the comfort and convenience of shopping. In cases where the income received is not from the bare letting out the property but on account of the facilities and services rendered, the operations involved in such letting out is in the nature of business and the income derived therefrom has to be treated as business income and not income from property. The income derived by the assessee cannot be regarded as simply from the exercise of property right. Where the assessee company has developed the shopping mall and let out the same by providing a variety of services, facilities and amenities in the mall, it can be found that the primary intention of the assessee was commercial exploitation of the property and where it has derived substantial part of its income by such activity, which constitutes its main business, the income so derived would be business income of the assessee. We, therefore, agree with the view of the Tribunal that the income derived by the assessee by letting out the shops in the mall has to be assessed as income from business and not as income from house property.

28. On the basis of the discussion above, we find that the amount received by the assessee company on letting out the shop rooms in the mall constructed by it has to be

> *treated as business income and it has to be assessed to tax under the head "profits and gains of business" and not under the head "income from house property". The substantial question of law is answered in favour of the assessee and against the revenue."*
>
> *9. In view of the above discussions, as also bearing in mind entirety of the case, we are of the considered view that the authorities below were indeed in error in treating the consideration received by the assessee for commercial space given in the mall to various persons as income from house property. We vacate the action of the authorities below and direct that the said income be treated as profits and gains from business or profession. As this core issue has been decided by us in favour of the assessee, all other issues are rendered academic and infructuous. The appeal of the assessee is thus allowed."*

The ld.DR has not pointed out any fundamental changes in the facts of this year with that of earlier years, so as to prompt to us to take a different view. Rather, both the Revenue authorities gone to record a finding that there is no change in the facts and to maintain consistency with the earlier years, income of the assessee is to be treated as income from house property. Since identical issue was dealt with by the Tribunal in earlier years, as cited (supra) in the assessee's own cases, following the principle of consistency, we direct the AO to treat the impugned income earned by the assessee under "profit and gains from business or profession".

7. In ground no.2, the assessee is aggrieved by the action of the Revenue in restricting the deduction towards interest on borrowed funds and not allowing the same to be set off against the income from business. In the foregoing paragraph, we have held that income earned by the assessee is to be treated under the head "profits and gains from business or profession", as a

consequence thereof, this expenditure is also to be considered from that angle. Accordingly, this ground is allowed.

8. In the result, appeal of the assessee is partly allowed.

Order pronounced in the Court on 21st November, 2019.

Sd/-	Sd/-
(AMARJIT SINGH)	(RAJPAL YADAV)
ACCOUNTANT MEMBER	JUDICIAL MEMBER