

**IN THE INCOME TAX APPELLATE TRIBUNAL "G"
BENCH, MUMBAI**

**BEFORE S. RIFAUR RAHMAN, AM &
SHRI RAVISH SOOD, JM**

आयकरअपीलसं./ I.T.A. No. 6678, 6679 & 6680 /Mum/2017
(निर्धारणवर्ष / Assessment Year: 2012-13, 2013-14 & 2014-15)

YJ Reality and Aviation Pvt Ltd., D.B House, Yashodham, Gen. A.K Vaidya Marg, Goregaon (E), Mumbai - 400063	बनाम/ Vs.	The DCIT, Central Circle - 1(4) 9 th Floor, Old CGO BLDG, Annexe, M.K Road, Mumbai – 400 020
स्थायीलेखासं./जीआइआरसं./PAN No. AAACS5655A		
(अपीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Mrs Arati Vissanji, AR
प्रत्यर्थीकीओरसे/Respondentby	:	Shri V. Vinod Kumar, DR

सुनवाईकीतारीख/ Date of Hearing	:	27.11.2019
घोषणाकीतारीख / Date of Pronouncement	:	10.02.2020

आदेश / ORDER

PER S. RIFAUR RAHMAN (ACCOUNTANT MEMBER):

The present three (3) Appeals have been filed by the
assessee against the order of Commissioner of Income Tax

(Appeals)-47, Mumbai, in short 'Ld. CIT(A)' dated 18.09.2017 for AYs 2012-13, 2013-14 & 2014-15 respectively.

2. Since the issues raised in all the appeals are identical, therefore, for the sake of convenience, these appeals are clubbed, heard and disposed of by this consolidated order. Firstly, we are taking ITA No. 6678/Mum/2017 for AY 2012-13 filed by the assessee.

3. The brief facts of the case are that assessee is engaged in the business of development and construction of immovable properties, dealing in land and acting as agent. The assessee has e-filed return of income on 22.09.2012 declaring total income of Rs. 1,12,15,700/-, the same was processed u/s 143(1) of the Act. The case was selected for scrutiny, the A.O issued a notice u/s 143(2) of the Act on 29.08.2013. Thereafter, the assessee filed revised return of income on 27.03.2014 declaring the income of Rs. 41,98,500/-. During the assessment proceedings u/s 143(3) of the Act, the A.O noticed that in the revised return of income the assessee had offered the maintenance charges as income from

other sources and also observed that till A.Y 2011-12, the assessee company was offering the maintenance charges as income from house property and has been accepted by the department also. The AO issued an order-sheet entry dated 20.02.2015, assessee was asked to explain the reasons for change in stand in disclosing maintenance receipts. In reply to the said notice the assessee submitted a detailed submission on 23.03.2015, assessee submitted that in terms of the leave and license agreement, it is entitled to receive rent which is for the year amounting to Rs. 12.68 Cr and same has been offered for tax under the head income from house property. Further, he submitted that in terms of same agreement, assessee is responsible for maintaining the mall. Assessee submitted that the maintenance charges of Rs. 1,74,70,284/- towards maintenance of common area, maintenance & repairs of lifts, security expenses, watch & ward facilities, power & fuel housekeeping expenses cannot be taxed under the head income from house property. After considering the submissions of the assessee the A.O concluded that the maintenance income, which is part &

parcel of rent income and is assessed under the head income from house property and added back to the head income from house property. The AO computed the 14A disallowance of Rs. 10,388/-, but not disallowed considering that the business income was NIL.

4. Aggrieved by the order of the A.O, the assessee filed appeal before the Ld. CIT(A). The Ld. CIT(A) confirmed the order of the A.O. Aggrieved by the order of the Ld. CIT(A), the assessee is in appeal before us by raising the following grounds of appeal:-

"1. On the facts and circumstances of the case and in law, the Ld. CIT(A) ought to have directed to the Ld. A.O as under:-

(a) Recovery made towards common area maintenance charges of Rs. 1,74,70,284/- should be assessed to tax under the head income from other sources and not under the head income from house property.

(b) Consequently, the Ld. A.O should grant deduction of expenses and depreciation allowance to the extent of Rs. 1,30,96,889/- and

(c) Accordingly, the income under the head Income from other sources should be assessed at Rs. 43,73,395/-

2. On the facts and circumstances of the case and in law, the Ld. CIT(A) ought to have directed to the Ld. AO to allow the expenses incurred for the purpose of appellants business as well as to maintain the corporate status and accordingly, ought to have directed to determine business loss at Rs. 2,51,990/- and the same should be set off against the appellants other sources of income in accordance with the provisions of Sec. 71 of the Act.

3. On the facts and circumstances of the case and in law, the Ld. CIT(A) ought to have directed to the Ld. AO to delete the disallowance of Rs. 1,03,881/- made u/s 14A of the Act r.w.r 8D(2)(iii) of the Rules.

4. It is humbly prayed that the reliefs as prayed for hereinabove and or such other reliefs as may be justified by the facts and circumstances of the case and as may meet the ends of justice should be granted.

5. The appellant craves leave to amend or alter any ground or add a new ground, which may be necessary.

5. Before us Ld. AR on behalf of the assessee brought to our notice the facts of this case by referring to assessment order / first appellate order and submitted that assessee has filed the original return of income by declaring the rental income which consists of rent and maintenance charges as income from house property. Subsequently, assessee revised its return of income and claimed the actual rental income as income from house property and the maintenance charges which was claimed from the lessee in a separate invoices declared as income from other sources. He brought to our notice copies of invoices which is part of the paper book in page no. 35 to 37 of the paper book, in which assessee has charged the rental income separately and he brought to our notice at page no. 38 of the paper book in which copy of the invoices which is details of maintenance charges charged to the tenants for the usage of common area and other maintenance expenses. He further submitted that all these years, assessee was declaring total income under the head income from house

property. However, the law of claiming and declaring the income under the head income from house property and income from other sources were developing and considering the various case laws which held that the maintenance charges are different from rental income. Therefore, assessee now lawfully intend to claim the maintenance charges separately and claim the relevant expenditure under the head income from other sources. He relied upon the case law and in the case of *Abhishek Govil vrs. CIT* (Delhi High Court), in which Hon'ble High Court allowed the assessee to claim maintenance charges separately when the terms of the agreement entered by them, which expressly referring to the payment in question as maintenance and service charges, which cannot be treated as rental income. On similar lines, he also relied upon the various case law, which are as under:-

- i) *Tarapore And Co. V/s. CIT* (Madras High Court) (2002) 125 Taxman 446.
- ii) *CIT V/s. Shankaranarayana Hotels (P) Ltd.* (Karnataka High Court) (1992) 201ITR 138.

iii) CIT V/s. Russell Properties (P) Ltd. (Calcutta High Court) (1981) 137 ITR 473.

vi) CIT V/s. Model Mfg. Co. (P) Ltd. (Calcutta High Court) (1986) 175 ITR 374.

v) M/s. Kirloskar Systems Ltd. V/s. AOT (Bangalore ITAT "C" Bench) (2013) (ITA No. 720,721 & 685 of 2011)

6. Further, Ld. AR submitted that maintenance charges collected from the tenants are to be considered separately as income from other sources and the other running expenditure should be allowed as expenditure against the income earned by the assessee and if there is any expenditure which cannot be adjusted against the income earned by the assessee and the balance expenditure should be allowed to carry forward and set off from the following assessment year's income and if there is any expenditure which is unabsorbed in the earlier assessment year should be allowed to set off in the current assessment year. For that proposition, he relied upon the case of Star Gold Pvt. Ltd. (supra).

7. With regard to disallowance u/s 14A, he submitted that assessee has not earned any exempt income during this year, therefore AO cannot invoke the provision of section 14A and on this proposition, he submitted various case laws.

8. On the other hand, Ld DR submitted that the maintenance charges are part of lease agreement and this source of income cannot be separated from the rental income as earned by the assessee. Therefore, he supported the order of AO that this part of rental income should be charged under the head income from house property. He further submitted that assessee itself declared the same as income from house property in the earlier assessment years and similarly in the original 'ROI'. Therefore, he supported the orders passed by the tax authorities.

9. Considered the rival submissions and material placed on record. We notice from the record that assessee has constructed a shopping mall cum multiplex theatre which has been given on leave and license basis until AY 2011-12 and assessee was offering the rental income received in terms of the leave and

license agreements alongwith the maintenance charges received under the head income from house property. Even in this assessment, originally declared the income under the head 'IFHP' and assessee revised its return of income by offering the maintenance charges under the head 'Income from Other Sources'. AO and Ld. CIT(A) rejected the contention of the assessee by referring to the earlier year declaration of income under the head income from rental income on the concept of consistency. Further they held that the rental income received by the assessee as composite income which cannot be separated and the maintenance charges income cannot be treated stand alone basis and is always part and parcel of the rental income.

10. After considering the submission of Ld. AR and in our considered view that the intention of assessee to give the shopping mall multiplex under leave and license to earn rental income is first place and offer the other facilities as a facility to the lessee /users. The purpose of providing separate maintenance to the lessee are not to earn any profit and may be to maintain the property in a good condition and give the licensee added

convenience for the usage of the property. What is relevant in determining whether the maintenance charges collected are part and parcel of the rental income and is the actual expenditure deductible against such receipts and whether it is relevant to the maintenance charges claimed by the assessee. If the proportion of the expenditure are in conformity with the maintenance charges collected from the licensee, then it cannot be considered as part of the rental income. We are in agreement with the AO that certain licensors are collecting the maintenance charges in order to take advantage. However, in the given case, neither assessee nor AO submitted any financial information for consideration. However, we notice that the claim of expenditure made by the assessee are considerable when compare to the maintenance charges collected from the licensee. Therefore, maintenance charges claimed by the assessee can only be treated as separate source of income and it can be charged as a separate head under income from other sources as claimed by the assessee and if there is any expenditure in connection with the above income, can only be allowed to be claimed by the assessee against the maintenance

receipts. It is not relevant, how the assessee has declared previously over the years and what is relevant the lawful claim of the assessee and whether the claim of the assessee is legally tenable. The Hon'ble Courts have held that the maintenance charges collections are different from the rental income considering the purpose and expressions contained in the agreements. Accordingly, grounds raised by the assessee are **allowed** in this regard. Therefore, we direct the AO to compute the income of the assessee under the head income from house property and income from other sources and complete the assessment after duly accepting the revised return of income and complete the assessment as per law.

11. With regard to ground no. 3 in respect of 14A disallowance, we notice from the records that assessee has no dividend income, therefore when there is no exempt income, AO cannot invoke the disallowance u/s 14A of the Act. In this respect, we draw strength from the decision of Hon'ble Delhi High Court in the case of **Cheminvest Ltd. Vrs. CIT (supra)**

and similarly in the case of **PCIT vs. Ballarpur Industries Ltd. (ITA No. 51 of 2016)**, wherein it was held as under:-

On hearing the learned Counsel for the Department and on a perusal of the impugned orders, it appears that both the Authorities have recorded a clear finding of fact that there was no exempt income earned by the assessee. While holding so, the Authorities relied on the judgment of the Delhi High Court in Income Tax Appeal No. 749/2014 {CHEMINVEST LIMITED vs. COMMISSIONER OF INCOME TAX (2015) 378 ITR 0033 (Delhi)}, which holds that the expression “does not form part of the total income” in Section 14A of the Income Tax Act, 1961 envisages that there should be an actual receipt of the income, which is not includible in the total income, during the relevant previous year for the purpose of disallowing any expenditure incurred in relation to the said income.

The Income Tax Appellate Tribunal held that the provisions of Section 14A of the Income Tax Act, 1961 would not apply to the facts of this case as no exempt income was received or receivable during the relevant previous year. It is not the case of the

Assessing Officer that any actual income was received by the assessee and the same was includible in the total income. In the facts of the case, the Authorities held that since the investments made by the assessee in the sister concerns were not the actual income received by the assessee, they could not have been included in the total income.

The findings of facts recorded by both the Authorities do not give rise to any substantial question of law.

Since no substantial question of law arises in this income tax appeal, the income tax appeal is dismissed with no order as to costs.

12. Therefore, respectfully following the aforesaid decisions which is applicable *mutatis mutandis* in the present case, we are inclined to accept the submission of Ld. AR. Accordingly, we **allow** the grounds raised by the assessee.

13 In view of the above, since the grounds of other appeals are similar to this assessment year, therefore the grounds of other appeals filed by the assessee are also **allowed**.

14. In the net result, all the appeals filed by the assessee are **allowed.**

Order pronounced in the open court on 10th Feb 2020.

<i>Sd/-</i> (Ravish Sood) न्यायिकसदस्य / Judicial Member मुंबई Mumbai;दिनांकDated : Sr.PS. Dhananjay	<i>Sd/-</i> (S. Rifaur Rahman) लेखासदस्य / Accountant Member 10.02.2020
--	--

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File
आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai