

**IN THE INCOME TAX APPELLATE TRIBUNAL
“E” Bench, Mumbai
Before Shri Shamim Yahya, Accountant Member
and Shri Ravish Sood, Judicial Member**

**ITA No.2816/Mum/2016
(Assessment Years: 2011-12)**

DCIT-2(3)(1)
Room No. 552, 5th Floor,
Aaykar Bhavan, M.K. Road,
Mumbai – 400 020

Vs.

M/s Tanna Builders Ltd.
3rd Floor, Devidas Mansion,
Mereweater Road, Colaba,
Mumbai - 400039

PAN – AA ACT2198R

(Appellant)

(Respondent)

Appellant by: Shri Vijay Kumar Menon, D.R

Respondent by: Shri Niraj Sheth, A.R

Date of Hearing: 13.01.2021

Date of Pronouncement: 19.01.2021

ORDER

PER RAVISH SOOD, JM

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-6, Mumbai, dated 19.01.2016, which in turn arises from the order passed by the A.O under Sec.143(3) of the Income Tax Act, 1961 (for short 'Act'), dated 27.02.2014 for A.Y. 2011-12. The revenue has assailed the impugned order on the following grounds of appeal before us:

“On the facts and in the circumstances of the case and in law, the learned CIT (A) has erred in allowing relief to the assessee to the extent impugned in the grounds enumerated below:

1. The order of the CIT (A) is opposed to law and facts of the case.
2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition made on account of proceeds of Rs.4,20,00,000/- received on issue of debentures holding that no sale had taken place without appreciating that this is a sham transaction entered only to avoid tax.

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has not appreciated that the assessee company is not the actual owner of the flats/parking spaces but the shareholders/debenture holders are the actual owners of the flats/parking spaces.”

2. Briefly stated, the assessee company which is engaged in the business of a builder, masonry and general construction contractor had filed its return of income for A.Y. 2011-12 on 20.09.2011, declaring its total income at Rs.26,41,130/-. The return of income filed by the assessee was processed as such under Sec. 143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

3. During the course of the assessment proceedings, it was observed by the A.O that the assessee had constructed two buildings, viz. (i) Tanna Residency (Phase-I); and (ii) Raheja Empress (Phase-II). As observed by the A.O, that while for the building Tanna Residency (Phase-I) was completed by the assessee in the year 2001, the other building i.e Raheja Empress (Phase-II) was completed in the year 2008. On a perusal of the records, it was noticed by the A.O that the assessee had made the buyers of the units/houses as share holders of the company and allotted shares of Rs.10/- per share to them. Further, it was observed by the A.O that the assessee had issued debentures to those purchasers/shareholders equivalent to the value of the sale consideration of the units/houses sold. As noticed by the A.O, debentures with a face value of Rs.1 lac each were issued and an amount of Rs.99,990/- was collected on each debenture and shown as a liability in the balance sheet of the assessee company. On a perusal of the records, it was observed by the A.O that the aforesaid transaction was adopted by the assessee for all the 27 allottees/purchasers of the houses/units in the two buildings as on the date of commencement of the respective projects. On November, 2013, it was observed by the A.O

that there were 70 share holders with different share holding and debentures issued to them. As per the balance sheet, the buildings were shown by the assessee company as its investments. In the backdrop of the aforesaid method of accounting adopted by the assessee, it was noticed by the A.O that during the year under consideration i.e A.Y. 2011-12 the assessee had issued similar debentures of Rs.4.20 crores towards the sale of certain units/spaces.

4. After deliberating at length on the aforesaid *modus operandi* that was followed by the assessee, the A.O held a conviction that the assessee had been accounting the sale proceeds of its stock as a liability in its balance sheet instead of sales in the profit and loss account. On the basis of his aforesaid observations, the A.O was of the view that the assessee by accounting the sale receipts as a liability in its balance sheet was not only avoiding its income tax liability but also the stamp duty which it was obligated to pay on the registration of the sale deeds in favour of the purchasers of the houses/units. In the backdrop of his aforesaid view, the A.O called upon the assessee to explain as to why the amounts received on issuing the debentures during the year under consideration i.e A.Y. 2011-12 may not be treated as its sales and be subjected to tax. In reply, the assessee submitted the details of the debentures/shares that were issued during the year in question, and submitted that it was not engaged in any trading activity for earning profits insofar the construction of the building viz. Tanna Residency was concerned. It was further stated by the assessee that its aforesaid claim had been accepted by the department in the respective assessments that were framed under Sec. 143(3) in the preceding years, viz. A.Y 2001-02 and A.Y 2006-07 to A.Y. 2009-10. Elaborating on the nature of its business activities, it was submitted by the assessee that it continued

to own the building and its construction cost had been raised through the share holders by issuing unsecured redeemable debentures to them. In order to buttress its aforesaid claim, it was submitted by the assessee that issuing of debentures by the company and raising of money therefrom was neither held as sale of units nor sale of parking space by the department while framing its assessments for the aforementioned preceding years. Coming to the facts pertaining to the year under consideration i.e A.Y.2011-12, it was submitted by the assessee that it had issued 60(sixty) 1% Unsecured Redeemable Optionally Convertible Debentures (for short "Debentures") to one of its share holder, viz. M/s International Export and Estate Agency ('IEEA') in the proportion of 12 debentures for 4 equity shares held in the company. It was stated by the assessee that as it was in the practice of allotting 1 debenture for 3 equity shares, therefore, 60 debentures were issued to IEEA as it was holding 180 shares of the assessee company. It was submitted by the assessee that on the basis of its holding of 180 shares and 60 debentures the assessee company had given IEEA the right to use, possess and occupy 60 basement parking spaces in its building. As stated by the assessee, the debentures were issued to IEEA pursuant to a resolution passed in the Board of Directors meeting held on 04.10.2010 AND the resolution passed by the shareholders in the Extraordinary General Meeting held on 29.10.2010. Further, it was stated by the assessee that the aforesaid 60 debentures had thereafter been redeemed by the assessee company on 18th October, 2013 on the request of IEEA. In order to support its aforesaid claim the copy of the resolution passed in the meeting of the Board of Directors on 7th October, 2013 and the copy of the bank statement evidencing the payment of the redemption amount by the assessee company to IEEA was filed with the A.O. In the backdrop of the aforesaid facts, it was

stated by the assessee that the right to use, possess and occupy the 60 basement parking spaces was currently with the assessee company. Accordingly, on the basis of the aforesaid facts, it was therein claimed that the assessee company had at no stage sold any car parking spaces to IEEA. In order to fortify its claim that the car parking spaces had not been sold by the assessee to IEEA reliance was placed by the assessee on the judgment of the **Hon'ble Supreme Court** in the case of **Nahalchand Laloochand Pvt. Ltd. Vs. Panchali Co-operative Housing Society Ltd. [Civil Appeal No. 2544 of 2010, dated 31.08.2010]**, wherein it was held that a promoter has no right to sell stilt parking spaces as these were neither flats nor appurtenant or attachment to flats. It was further stated by the assessee that tax was offered by the shareholders in the year in which transfer of shares and debentures was carried out. On the basis of the aforesaid facts, it was stated that the assessee company was used as a vehicle for its members to acquire rights in respect of specified positions in the building being constructed by it. As such, it was submitted by the assessee that funds raised by the assessee company by issuing debentures not being in the nature of income could not have been brought to tax.

5. After deliberating at length on the contentions advanced by the assessee, the A.O was not persuaded to accept the same. It was observed by the A.O that while framing the assessment for A.Y. 2006-07 the assessee's claim for depreciation on buildings was specifically disallowed, for the reason, that the assessee was not the real owner of the buildings. As noticed by the A.O, in the assessee's assessment for A.Y. 2007-08 it was specifically observed that the assessee company was only maintaining the property and was not the owner of the same. Also, as observed by the A.O a similar view was taken while assessing

the income of the assessee company for A.Y. 2008-09, wherein it was once again held that the assessee was maintaining the building and, thus, was impliedly not the owner of the same. Accordingly, the A.O dislodged the claim of the assessee that the department had accepted its method of accounting in the preceding years. As regards the claim of the assessee that the debentures of Rs.4.20 crores issued were only with respect to use of the parking area space and the same were redeemed in October, 2013, it was observed by the A.O that though the said contention of the assessee was correct in form, the substance of the transaction was not the way it was so depicted. On a perusal of the records, it was observed by the A.O that the assessee had sold the basement space to IEEA for a consideration of Rs.4.20 crore in A.Y. 2011-12. In October, 2013, the A.O was of the view that IEEA had sold the space to some other entity and the debentures which were issued to IEEA were redeemed by the assessee company and were issued in the name of the new purchaser. It was observed by the A.O, that though in effect the net liability remained the same in the books of the assessee, but, there was a change in actual ownership of the basement space of the buildings sold by the assessee. Insofar, the claim of the assessee that as under law sale of parking space was prohibited, thus, the amount received on allotment of debentures towards basement space could not be treated as sale receipts, the same, did not find favour with the A.O. Observing, that as the assessee had created/presented its accounts in such a way so as to bend rules and avoid income tax and sales tax, the A.O was of the view that the aforesaid transaction of the assessee clearly fell within the realm of tax evasion. Observing, that the assessee had sold the units/houses in the aforesaid buildings to the share holders/debentures holders who were the actual owners of the said properties, the A.O was of the view that the claim of the assessee that it

was the owner of the building and the debentures/shares were issued for raising funds was clearly a sham transaction that was carried out with an intent to evade taxes. To sum up, the A.O was of the view that the amount received by the assessee company by issuing shares/debentures to the purchasers of the houses/units/spaces was supposed to have been accounted by it as its income in its profit and loss account. Accordingly, in the backdrop of his aforesaid observations the amount of Rs.4.20 crore received by the assessee by issuing debentures/shares during the year were treated as the sales income of the assessee company by the A.O.

6. Aggrieved, the assessee carried the matter in appeal before the CIT(A). Observing, that the accounting treatment of debenture money received by the assessee company had been accepted by the department since A.Y. 2001-02, the CIT(A) was of the view that the charging of the same as sale income of the assessee in the year in question i.e A.Y. 2011-12 would go against the principle of consistency. Accordingly, finding favour with the contentions advanced by the assessee, the CIT(A) vacated the addition by observing as under: -

“6. I have carefully considered the facts of the case and the submissions made by the Ld. AR. I have also gone through the decisions relied on by the Ld. AR. The issue that requires consideration is whether the receipt of debenture money from M/s. International Export and Estate Agency (“IEEA”) amounts to sale consideration of the parking space. The appellant has received similar debenture monies in the past which have been accepted as such by the AO. The receipt was not considered as sale proceeds of the flats or parking space. This is clear from the assessment order passed by the AO for A.Y.2001-02, wherein it was concluded that the appellant company is not engaged in trading activities for earning profit as far as construction of residential complex is concerned. This was with reference to the building known as Tanna Residency at Prabhadevi, Mumbai. It was also accepted that the appellant has been receiving management fees and maintenance charges for maintaining the constructed building. The AO also concluded that the assessee continues to own the building and that the activities of the assessee is that of allotting units on no profit / loss basis.

6.1 Further, in the appellate order of the Ld. CIT(A) for AY 2007-08, the fact that the assessee was mainly engaged in carrying on two types of

business activities, namely, constructing building for its shareholders and maintaining the constructed building has been accepted. In the said appellate order, the expenses which were disallowed in the assessment order were allowed on the ground that the expenses so disallowed were necessary not only for the business of the appellant of maintenance of the existing building but also for the corporate existence of the assessee. The appellant has stated that the Department has accepted the order of Ld. CIT(A). Therefore, the Department has accepted the fact that the appellant is the owner of the buildings and is not engaged in any trading activity for earning profits from construction of building.

6.2 The appellant had issued debentures during the subject year to one of its Shareholders, IEEA, in respect of its parking area for use by IEEA. The basement space is appellant's assets and by virtue of holding the required number of shares and debentures, Clauses 6A and 6B to the Articles of Association confer a member the right to occupy units/parking space. IEEA was allotted sixty Debentures vide resolution of Board of Directors dated 04.10.2010 and resolution of shareholders in Extraordinary General Meeting held on 29.10.2010. The debentures were issued with certain terms and conditions specified therein. The appellant had given IEEA only the right to occupy parking space and hence it cannot treat the same as a sale of parking space. The debenture money received by the appellant cannot be treated as sale consideration in the hands of the appellant. Further, there is no contingency attached to the obligation of the appellant to redeem the debentures and under no circumstances the liability of the appellant ceases or is reduced. The debentures cannot also be forfeited for breach of any condition. The debenture also carries interest from the date it becomes fully paid up. There remains a liability on the appellant to redeem the debentures, which makes it a debt. That the debentures are redeemable on a future date does not detract the liability from becoming a debt. In view of the above facts, the receipt of debenture money does not partake the character of revenue receipt, which can be subjected to tax.

6.3 That the appellant has not sold the parking space to IEEA is also clear from the another fact. IEEA had the right to occupy the parking spaces as long as it held the requisite number of shares and debentures. The appellant has brought to my notice the fact that the impugned sixty debentures were redeemed on 07.10.2013. The redemption of debentures issued to IEEA released the parking spaces allotted to IEEA. Presently, right to occupy the parking spaces is with the appellant. The appellant is the owner of the parking spaces, which justifies its stand of allotting parking spaces to persons on the basis of holding requisite number of shares and debentures. It is immaterial whether the funds are generated out of own source or from further borrowings as long as redemption of debentures was carried out. The ownership of the parking space was always with the appellant. The appellant has also relied on the decision of the Hon'ble Supreme Court in the case of Nahalchand Laloochand Pvt. Ltd. (supra) wherein it was held that promoters have no right to sell stilt parking spaces as these are neither flats nor are appurtenant or attachment to a flat. When there is no right to sell parking spaces, how the debenture money can be treated as income from sale. The receipt of same nature in earlier years were not assessed as income and the same cannot be considered as revenue receipt in the present assessment year as well.

6.4 The appellant has explained that upon transfer of shares/debentures by share holders/debenture holders, they pay tax on gains on such transfers, if any. The appellant has filed copies of income-

tax returns of two individuals in support of the claim. Hence, taxing debentures in the hands of appellant will lead to double taxation, which is not permissible.

6.5 From the facts of the case and details submitted by the appellant, it is observed that the debenture money has been utilized for development of land and buildings as well as for providing various facilities to the residents. The table below may be seen for ready reference:

Sr. No.	Description of Fixed Assets	Amount (Rs.)	Type of Unsecured Debentures	Amount (Rs.)
1.	Land	20,80,09,400	3240 No. of 1% debentures	32,36,76,000
2.	Building I	40,20,57,072	180 No. of 1% debentures	8,09,82,000
3.	Building II	20,63,47,651	3570 No. of 1% debentures	35,66,43,000
4.	Library Building	36,04,804	189 No. of 1% debentures	1,97,80,200
5.	Society Assets	13,98,161	60 No. of 1% debentures	4,19,94,000
	Total	82,20,00,220	Total	82,30,75,200

It is evident from the above table that the entire debenture money received from the share/debenture holders has been utilized for development of the land and buildings and for providing amenities to the shareholders and the debenture holders.

6.6 It is seen from the details that debentures were also issued in previous years relevant to A.Ys.2001-02 and 2008-09 and the AO has accepted the said debentures as liability of the appellant and has not treated the debenture money as sale proceeds of flats or parking space. While it is true that principle of *res judicata* is not applicable in tax proceedings, but the principle of consistency would certainly apply. The appellant, in this regard, has relied on the decisions in the cases of Radhasoami Satsang(supra), Chetan K. Mehta (supra), Oil India Ltd (supra), and Spectra Shares & Scrips (P.) Ltd. (supra). The Hon'ble Supreme court in the case of Radhasoami Satsang(supra) has held that 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** appropriate to change the position in a subsequent year. Hence, the principle of consistency is to be maintained when the facts are identical. There is no reason as to why the ratio of the above decisions shall not be applicable to the facts of the instant appeal. In the present case, the accounting treatment of debenture money by the assessee has been accepted since A.Y.2001-02 and hence, charging it in AY 2011-12 would go against the principle of consistency. In view of the above facts and the precedents, there is no merit in the conclusion of the AO that the assessee has not presented the accounts in a proper manner to avoid payment of tax and that the decision in the case of Mc Dowell & Co. (supra) is applicable. The action of the AO in treating the denture money as income from sale of parking space is not correct and the same is therefore, deleted and the ground is allowed.”

7. The revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, and also considered the

judicial pronouncements that have been pressed into service by them to drive home their respective contentions. Before proceeding any further, we may herein observe that the assessee had raised an alternative claim before the CIT(A), which reads as under:

“Without prejudice to Ground No. 1

Not allowing business expenditure incurred against the business income

1. On the facts and circumstances of the case and in law, the A.O erred in not allowing cost of construction against the amount of Rs.4.20 crore treated by him as business income.
2. The appellant, without prejudice to Ground No.1 above, prays that cost of construction to be allowed against the amount received on issue of debentures.”

By raising the aforesaid alternative ground, it was the claim of the assessee that in case if the amount raised by issuing debentures/shares of Rs.4.20 crores was to be taken as the sale consideration of the parking space, then, the corresponding cost of construction may therein be allowed as a deduction. In fact, the assessee had filed additional evidence in respect of the corresponding cost of parking space. However, we find that the CIT(A) had refrained from adjudicating the aforesaid claim of the assessee, for the reason, that he held a conviction that now when he had vacated the treating of the proceeds received on issue of shares/debentures of Rs.4.20 crores as the assessee's income from business by the A.O, therefore, adjudication of the aforesaid alternative ground raised by the assessee would not be necessary. In our considered view, the piecemeal disposal of the appeal by the first Appellate Authority cannot be accepted. As per the settled position of law, the appellate authorities are obligated to dispose off all the grounds of appeal raised by the appellant before them so that multiplicity of litigation may be avoided. In support of our aforesaid view reliance is placed on the judgment of the **Hon'ble High Court of Madras** in the case of **CIT Vs. Ramdas Pharmacy (1970) 77 ITR 276 (Mad)**, wherein

it was held that the Tribunal should adjudicate all the issues raised before it. By way of an analogy that can safely be drawn from the aforesaid judicial pronouncement, we are of a strong conviction that there can also be no escape on the part of the CIT(A) from discharging the statutory obligation cast upon him to deal with and dispose off all the grounds of appeal on the basis of which the impugned order has been contested by the assessee before him. We, thus, in all fairness and in the interest of justice, and in order to avoid multiplicity of litigation are of the considered view that the matter requires to be revisited by the CIT(A) for adjudicating the aforesaid alternative ground of appeal which was raised by the assessee in unequivocal terms before him, but had not been adjudicated by him. Accordingly, refraining from adverting to and dealing with the view taken by the CIT(A) as regards the primary issue i.e treating of the proceeds received on issue of shares/debentures of Rs.4.20 crores as the assessee's income from business, we are of the considered view that in all fairness and for the sake of completeness the matter requires to be restored to the file of the CIT(A), with a direction to dispose off the aforesaid alternative ground of appeal that was raised by the assessee before him.

8. Resultantly, the appeal of the revenue is restored to the file of the CIT(A) for the aforesaid limited purpose in terms of our aforesaid observations.

Order pronounced in the open court on 19.01.2021

Sd/-
Shamim Yahya
(ACCOUNTANT MEMBER)

Sd/-
Ravish Sood
(JUDICIAL MEMBER)

Mumbai, Date: 19.01.2021
PS: Rohit

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