IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

BEFORE SHRI M. BALAGANESH, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.1233/Mum/2017
(**निर्धारण वर्ष** / Assessment Year: 2013-14)

Shree Nirmal Commercial Ltd. 241/242, Nirmal Bldg, Backbay Reclamation, Nariman Point, Mumba-400021.	**बनाम**/ Vs.	Income tax officer Ward 3(3)(3) Aaykar Bhavan, Mumbai-400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACS7533F		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri K. Gopal Ms. Neha Paranjpe
Revenue by:	Shri Rajendra Joshi (DR)

सुनवाई की तारीख / Date of Hearing: 02/12/2020
घोषणा की तारीख /Date of Pronouncement: 09/02/2021

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The assessee has filed the present appeal against the order dated 28.11.2016 passed by the Commissioner of Income Tax (Appeals) -8, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2013-14.

2. The assessee has raised the following grounds: -

> "1.1 On the facts and circumstances of the case and in law the assessing officer has erred in considering the following expenses as Capital expenditure instead of revenue expenditure out of the total expenses of Repairs & Maintenance of Rs. 70,04,835 debited to Profit & Loss Account and CIT(A) in confirming the same.

Name of Party	Rupees
M/s. Bagwe Engineering Ltd.	12,17,472
M/s. Kamal Marble	23,62,501
M/s. Vinod Engineering	17,77,716
Total	53,57,689

2.2 The CIT(A) and the assessing officer is of the view that the above expenditures have not been incurred in relation to annual maintenance cost for normal wear and tear and the said expenditures are expected to give long lasting benefit to the appellant and hence, erred in considering the same as capital expenditure.

2.3 It is submitted that the nature of activities carried on by the appellant is just like co-operative society i.e maintaining the affairs of the building "Nirmal". Thus the way a cooperative society collects repair fund and incurs out of it the expenditure for the repairs of the building, in a similar way the appellant also has incurred expenses on repairs. It had not collected any separate repair fund as the appellant has surplus funds available out of compensation charges etc. recovered from the unit holders. The CIT(A) has erred in not appreciating the said fact and considering the expenditure as capital expenditure.

2.4 It is further submitted that the object of every repair is to improve the condition or the efficiency which has been lost on account of the use and so there is necessarily an improvement or betterment. Merely because the benefit of repairs extends beyond the year of expenditure it would not make the expenditure a capital expenditure. The fact that new material has to be used while

replacing a worn out or damaged part of portion of a building does not result in creation of a new asset. Based on this the appellant submits that the expenditure incurred be considered as revenue expenditure.

3.1 The assessing officer has erred in disallowing Rs.55,775/- due to non-submission of bills, being the amount paid to M/s Bagwe engineering Ltd. The CIT(A) has erred in not adjudicating the said ground.

3.2 It is submitted that the payment was made by an account payee cheque through the bank account of appellant. TDS at appropriate rate was also deducted from the payment. Merely because the invoices could not be submitted, the disallowance of expense is unjustified and the addition made be deleted.

4. The appellant craves leave to add, alter, amend or delete any or all the above grounds of appeal, if so advised.*"*

3. The brief facts of the case are that the assessee filed its return of income on 30.9.2013 declaring total income of Rs.55,58,990/-. The case was selected for scrutiny. Notices u/a 143(2) & 142(1) of the I. T. Act, 1961 were issued and served upon the assessee. The assessee was the owner of premises Nirmal Building and acts like a mutual association for managing the property for the benefit of the unit holders cum share holders of the company who contribute by the way of compensation charges and out of the same various expenses of the building were made. The assessee has shown the interest income in sum of Rs.1,58,25,633/- which was treated as income from other sources. The assessee has shown the repair & maintenance charges of Rs.50,03,041/- which was treated as capital expenditure and disallowed. The total income of the assessee was assessed

to the tune of Rs.1,04,58,500/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who partly allowed the claim of the assessee but the assessee was not satisfied, therefore, the assessee has filed the present appeal before us.

ISSUE Nos. 1 to 4

4. We have heard the arguments advanced by the Ld. Representative of the parties and perused the record. At the outset, the Ld. Representative of the assessee has argued that the assessee was not the owner of the property, therefore, the expenses are not liable to be capitalized in any manner. It is also argued that the assessee is the lease-holder and only claiming the repair and maintenance charges, hence, the expenses are not liable to be capitalized in the interest of justice. In support of these contentions, the Ld. Representative of the assessee has placed reliance upon the decision in the case of **CIT Vs. Shree Nirmal Commercial Ltd. (1995) 213 ITR 361.** It is also argued that in the A.Y. 2008-09 and 2010-11, the claim of the assessee in connection with the expenses has been admitted as revenue expenses which is inconsistent to this year, hence, the claim of the assessee is liable to be allowed. However, on the other hand, the Ld. Representative of the Department has refuted the said contention. It is to be seen whether the expenses incurred/claim is capital in nature or revenue in nature. The issue is duly covered by the assessee's own case titled as **CIT Vs. Shree Nirmal Commercial Ltd. (1995) 213 ITR 361.** The relevant finding has been given as under.:-

> "13. Shri Dastur, therefore, is right in inviting us to hold that the payment of interest being accepted as genuine, the same would be required to be allowed as deductible at least under section

37 if not under section 28 of the Income-tax Act. Shri Jetley in the last tried to contend that there was no occasion for payment of interest at all as the amounts are "non-refundable deposits" and there was no necessity to agree to pay any interest at all. Shri Dastur tried to meet the said argument by contending that such an argument is untenable as it is for the assessee to decide as to what expenditure should be incurred for the betterment of the business of the assessee, and nobody can challenge the assessee's decision unless it is claimed to be a fraudulent claim which obviously is not the case of the Department in view of the material already on record. To substantiate this contention, Shri Dastur has relied upon a number of decisions. He has first pointed out that this court in the assessee's own case reported in Shree Nirmal Commercial Ltd. v. CIT [1992] 193 ITR 694, at page 700, has observed that the arrangement arrived at by the assessee in the present case was devised for raising finance as the assessee-company was faced with the stupendous task of raising funds of about Rs. 80 lakhs which was the estimated cost of construction of a commercial building and that the arrangement between the assessee-company and its shareholder was a genuine and bon fide arrangement for payment of a sum of money designated as interest in return for the company obtaining finance for construction of the building. Shri Dastur also pointed out that the Income-tax Department and the Tribunal did not allow the assessee's claim for deduction of the sum of Rs. 4.77 lakhs and Rs. 4.79 lakhs for the two years on the ground that the deposits were trading receipts and accordingly the interest would not be payable on what constituted the assessee's trading receipt or income. Shri Dastur

contended that the fact that the said receipts were considered as trading receipts did not alter the situation at all. They were part of the arrangement for obtaining funds for carrying its activities under which the assessee-company received the deposits and also collected monthly sums from the occupants. The sums were paid under the contractual liability. The payment was in no way excessive as it was only at the rate of 6 per cent. of the amount deposited, and, as pointed out earlier, the genuineness and bona fides of the arrangement are not under dispute at all and the Tribunal has found that there is no device or scheme in the said arrangement and though the amounts were deposits they partook of the character of trading receipts and have been taken into account in determining the business profit or loss of the assessee-company and what has been held is that the nature of the amount paid by way of deposit was a trading receipt and the High Court had set out how the amount was to be dealt with in the books of the assessee-company, i.e., it was to remain to the credit of the unitholder. This court in the assessee's case has observed that the Tribunal was right in holding that the said deposits were in essence the consideration paid by the shareholders for allotment of the floor space and that the Tribunal was right in its view that this was in the nature of sale proceeds. Shri Dastur, however, contended that this does not mean that the said deposits completely lose their character as deposits. Relying upon the decisions reported in Punjab Distilling Industries Ltd. v. CIT and CIT v. Punjab Distilling Industries Ltd. , wherein the Supreme Court while determining the character of empty bottles return security deposit account held that the receipts reflected under that account partook of the

character of trading receipts. But that, however, did not mean that as between the parties the said amount would cease to be a deposit. The Supreme Court also observed in the said case that the amount described as security deposits were also returned as and when the bottles were returned and, therefore, though they were treated as trading receipts in the hands of the manufacturers, they did not cease to be deposits as between the parties to the agreement. Shri Dastur contended that in the present case also the interest at the rate of 6 per cent. has in fact been paid as per the terms of the agreement between the assessee and the shareholders on the said non-refundable deposits and, therefore, even if the said deposits were considered as taxable income on account of trade or business the interest paid thereon treating them as deposits, on which interest as per the terms of the contract was payable, cannot be disallowed as claimed by the Department. Reliance was also placed on the decision reported in CIT v. Tata Sons Ltd. [1939] 7 ITR 195 (Bom), wherein n annual amount payable to a lender of money which was needed by the assessee was held to be deductible even if it was payable after the entire loan had been repaid. Shri Dastur relied upon the observation made in Tata Sons Ltd. v. CIT [1950] 18 ITR 460, 467 (Bom), wherein it has been observed that "one has to consider the deductibility of the amount claimed by the assessee-company by taking into account commercial expediency and the principles of ordinary commercial trading and whether the expenditure was a part of the process of profit making". He also relied upon the observations made in Eastern Investments Ltd. v. CIT , wherein it is observed that in order to claim a deduction it is enough if it

is shown that the money was expended not of necessity but voluntarily and on the ground of commercial expediency and in order to facilitate the carrying on of the business. Reliance was also placed on the observations made in Tata Sons Ltd. v. CIT [1950] 18 ITR 460, 468 (Bom), wherein it was observed "Even a voluntary payment, if for commercial expediency, would still be an expenditure for the purpose of business." Shri Dastur has also relied upon the observations made in the case of Eastern Investments Ltd. , cited above to point out that it was observed in the said decision "one is not concerned with the legality-or propriety of a transaction or whether the result could have been achieved in another way. What one is concerned with is whether the transaction was done in the ordinary course of business, however mistaken the directors and shareholders may have been", and also the further observations "It is irrelevant that a transaction was forced on the company by its principal shareholders." Shri Dastur also relied upon the observations made in F. E. Dinshaw Ltd. v. CIT [1959] 36 ITR 114, 121 (Bom), wherein it has been held that in the absence of fraud, the questions whether the transaction has the effect of diminishing an assessee's taxable income and whether it was necessary for the assessee to enter into the transaction are irrelevant. Shri Dastur also relied upon the decision in CIT v. Nainital. Bank Ltd. Ltd. , wherein it is held that "the sole question for determination is whether in incurring the expenditure the assessee-company acted in the interests of and for the purpose of its business. Even if it is held-which is not at all admitted-that the assessee-company was under no legal liability to make the payment, still if it made the payment for the purpose of its

business the same would have been deductible". In Sasoon J. David and Co. Pvt. Ltd. v. CIT , it has been held that "Payment for the purposes of business is deductible whatever be the motive behind the payment, and it is for the assessee to decide whether the expenditure should be incurred in the course of its business. Such expenditure may be incurred voluntarily and without any necessity, and if it is incurred for promoting the business and to earn profit, the same can be claimed as deduction". The above said decisions no doubt clearly support the contention of Shri Dastur and view of the same the proposition advanced by Shri Dastur in this respect has got to be accepted. We, therefore, hold that the payment of interest on non-refundable deposits will have to be allowed as deductible expenditure under section 37 if not under section 28 of the Income-tax Act, 1961. In the view which we have taken on the basis of the above discussion, it must be held that the Income-tax Officer was not entitled to enhance the compensation to the extent of the compensation received by the share-holders in their own right.

14. The next question arises for consideration as to whether the claim of the assessee that losses of the past years should be carried forward and adjusted against the income of the assessee for the assessment years 1971-72 and 1972-73 has been rightly rejected by the Tribunal. The said claim of the assessee was rejected merely because the matter was finally not decided. In the view which we have taken, the losses would be required to be carried forward and adjusted against the income of the assessee for the assessment years 1971-72 and 1972-73."

5. The said judgment speaks that the income of the assessee should be treated as business income. No doubt in the said circumstances, the expenses are liable to be allowed as revenue expenses. Further, we find that in the previous and subsequent year, the claim of the assessee has been accepted by the revenue as revenue expenses. The claim of the assessee is liable to be accepted on the basis of consistency also. Moreover, there is no plausible reason given by the AO as well as CIT(A) in which it can be assumed that the nature of the expenses has been changed. Anyhow, in view of the above said facts and circumstances, it is quite clear that the assessee is not the owner of the building he is only lease-holder, hence, expenses are not liable to be capitalized. Moreover, the claim of the assessee has been accepted in the previous and subsequent year also, therefore, in the said circumstances, the finding of the CIT(A) is not justifiable, hence is liable to be set aside. We ordered accordingly and the claim of the assessee is hereby allowed.

6. In the result, the appeal filed by the assessee is hereby allowed.

Order pronounced in the open court on 09/02/2021

Sd/-	Sd/-
(M. BALAGANESH)	**(AMARJIT SINGH)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य/JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated : 09/02/2021
Vijay Pal Singh (Sr. P.S.)

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

(Assistant Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**