IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "B" BENCH
(Virtual Court)

Before: Shri Amarjit Singh, Accountant Member
And Ms. Madhumita Roy, Judicial Member

ITA No. 1718 /Ahd/2018 **Assessment Year 2015-16**

Gulmohar Park Mall Pvt. Ltd., Gulmohar Park, Satellite Road, Ahmedabad PAN: AACCN2111Q (Appellant)	Vs	The ACIT, Circle-2(1)(1), Ahmedabad (Respondent)

Revenue by:	**Shri Kishan Vyas, CIT-D.R.**
Assessee by:	**Shri Tushar Hemani, Sr. A.R.** **And Shri P.B. Parmar, A.R.**

Date of hearing	:	12-01-2021
Date of pronouncement	:	19-02-2021

आदेश/ORDER

PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-

This assessee's appeal for A.Y. 2015-16, arises from order of the CIT(A)-2, Ahmedabad dated 16-07-2018, in proceedings under section 143(3) of the Income Tax Act, 1961; in short "the Act".

2. The assessee has raised following grounds of appeal:-

> *"1. On the facts and in the circumstances of the Appellant's case, the learned CIT(A) erred in confirming that income of Rs. 7,93,93,398/- 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 Appellant's case, the learned CIT(A) erred in not allowing deduction in respect of various expenditure incurred during the year against common area maintenance income and space selling income tax as income from business and profession."*

3. The fact in brief is that return of income declaring total loss of Rs. (-)2,35,58,479/- was filed on 30th Sep, 2015. The case was subject to scrutiny assessment and notice u/s. 143(2) of the Act was issued on 21nd March, 2016. During the course of assessment, the Assessing Officer noticed that assessee has earned income from various let out properties and shown the same as business income by making reference to the earlier assessment year. The Assessing Officer has asked the assessee to explain why the income earned from various let out properties should not be treated as income from house property as treated in earlier assessment year. The assessee has submitted detailed submission produced at page no. 3 to 10 of the assessment order stating that assessee company was engaged in the business of construction, developing malls and shopping complex. It was also explained that assessee was operating and running fully equipped retail mall known as Gulmohar Park and assessee was having necessary staff, infrastructure and other equipment to carry on its business of operating the mall. The assessee provides space in the mall to the licensee on lease and licence bases for conducting and operating a retail store. The management and administration of the shopping mall was the sole responsibility of the assessee. After giving the detail of terms and conditions of the agreement, the assessee has stated that the main object of the business of the assessee was of constructing, operating and maintaining of the mall and not merely of letting of any particular property. The rental income and the service charges were its business income from the business of operating and running a mall

as a commercial activity. The Assessing Officer has not accepted the detailed submission and supporting material furnished by the assessee and after referring the earlier assessment year in order to make consistency stated that income earned by the assessee from various let out properties was treated as income from house property instead of business income.

4. Aggrieved assessee has filed appeal before the ld. CIT(A). The ld. CIT(A) has dismissed the appeal of the assessee.

5. During the course of appellate proceedings before us, the ld. counsel has submitted that identical issue on similar fact has been adjudicated in favour of the assessee by the Co-ordinate Bench of the ITAT for assessment year 2010-11 to 2011-12 vide ITA No. 3559 & 3560/Ahd/2015 dated 27-08-2019. The ld. Departmental Representative is fair enough not to controvert these undisputed fact that the issue in the appeal is covered by the decision of Co-ordinate Bench of the ITAT in the case of the assessee itself as refereed by the ld. counsel.

6. Heard both the sides and perused the material on record. The assessee is engaged in the business of developing and maintaining properties and malls. During the year under consideration, the Assessing Officer has treated the income from let out of various properties in the mall under the head house property as done in the earlier year in order to maintain consistency. With the assistance of ld. representatives, we have gone through the decision of Co-ordinate Bench of the ITAT for assessment year 2010-11 to 2013-14 and noticed that similar issue on identical facts has been

decided in favour of the assessee vide ITA No. 3359/Ahd/2015, ITA No. 3560/Ahd/2015 and ITA No. 135/Ahd/2018. The discussion made by the Tribunal while allowing the claim of the assessee for assessment year 2013-14 vide ITA No. 135/Ahd/2018 is reproduced as under:-

> *"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:*
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> > *"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:-*
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> > *"14. In the present case, the facts are otherwise. The substantive income of the Assessee is from leasing out the shop/stalls.*
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> > *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".

Since identical issue on similar fact has been adjudicated by the ITAT in earlier years as supra in favour of the assessee treating the said income as profit and gain from business or profession, therefore, we direct the Assessing Officer to assessee the income earned by the assessee under the head profit and gain from business or profession. Accordingly, this appeal of the assesse is allowed.

7. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 19-02-2021

Sd/-
(MADHUMITA ROY)
JUDICIAL MEMBER

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

Ahmedabad : Dated 19/02/2021

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद