



IN THE INCOME TAX APPELLATE TRIBUNAL

"D" BENCH, MUMBAI

BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND

SHRI S. RIFAUH RAHMAN, ACCOUNTANT MEMBER

ITA no.3153/Mum./2019
(Assessment Year : 2012-13)

ITA no.3154/Mum./2019
(Assessment Year : 2013-14)

Dy. Commissioner of Income Tax
Circle-12(3)(2), Mumbai

..... Appellant

v/s

Magnus Properties Ltd.
Uniphos House, 11th Road
Near Madhu Park, Khar (W)
Mumbai 400 052 PAN-AADCM7520M

..... Respondent

Revenue by : Shri Kailash Kanojia
Assessee by : Shri Nitesh Joshi

Date of Hearing – 25.03.2021

Date of Order – 10.06.2021

ORDER

PER S. RIFAUH RAHMAN, A.M.

These Appeals are by the revenue against the order passed by the Commissioner of Income Tax (appeals)-21 Mumbai. The revenue has raised the following grounds of appeal:-

"1. Whether, on the facts and in the circumstances of the case and in Law, the Ld. CIT(A) erred in treating the rental income of Rs.8,47,60,032/- as income from House Property without appreciating the fact that leasing and renting of property is business of the assessee and accordingly it should be taxed as

business income?"

2. Whether, on the facts and in the circumstances of the case and in Law, the Id. CIT(A) is justified in treating the rental income earned from leased assets which are part of stock in trade of the assessee instead of Business income held by the AO?"

3. Whether, on the facts and in the circumstances of the case and in Law, the Ld. CIT(A) is justified in deleting the addition without appreciating the decision of Hon'ble Apex Court in the case M/s. Chennai Properties and Investment Ltd held in Civil Appeal No.4494 of 2004 wherein it was held such income. is to be considered as Business Income?"

4. The appellant prays that the order of the Ld. CIT(A) on the grounds be set aside and 'that of the Assessing Officer be restored.

5. The appellant craves leave to add, amend or alter all or any of the grounds of appeal."

2. We notice that the only issue raised in the above said appeals are that the rental income derived by the assessee is to be treated as income under the head business income considering the fact that the assessee has shown the leased property as an inventory in the Balance Sheet from which the rental income was earned and such rental income was declared by the assessee under the head income from house property and claimed the standard deduction under section 24(a) of the Income Tax Act 1961 (for short "*the Act*"). After considering the submissions of the both the parties, we notice that the issue under consideration is recurring in nature from the assessment year 2007-08 to 2011-12. We also noticed that this issue under

consideration is already adjudicated by the Co-ordinate bench in favour of the assessee in the earlier assessment years. For the sake of clarity we are reproducing the decision of the Co-ordinate bench in ITA No.5944/Mum./2012, ITA No. 836/Mum./2015 and ITA No. 7011/Mum./2014:-

"9. As regards the merits of the issue, it is relevant to observe, the AO has treated the income generated from leave and license fee as income from business primarily for the reason that the unsold flats have been shown as stock-in-trade in the books of the assessee. In our view, accounting entry or accounting treatment given by the assessee in its books of account is not conclusive. What is required to be examined is the intention of the assessee whether to exploit the property as owner or engage itself in an organized and systematic activity of constructing, developing and building house property and giving them on lease along with other services for earning rental income. As can be seen from the objects of the assessee as contained in the Memorandum and Articles of Association, the primary object of the assessee is not to construct, develop and lease them out for earning rental income but to engage itself as real estate developer. Therefore, as it appears from the facts on record, the business of the assessee is not letting out properties for earning rental income. In case of Chennai Properties and Investment Ltd. (supra) the Hon'ble Supreme Court held the income derived from letting out of property as business income only because the building was constructed by the assessee for earning rental income as per the object of the company. The same view was again expressed by the Hon'ble Supreme Court in the case of Rayala Corporation Ltd. (supra). However, in the case of Raj Dadarkar & Associates (supra) the Hon'ble Supreme Court, taking note of its own decision in the case of Chennai Properties & Investment Ltd. (supra) and Rayala Corporation Ltd (supra) observed that by applying the dominant test the nature and character of income has to be determined. The Hon'ble Supreme Court held, the ultimate determinative factor is whether the assessee has carried on the activity as business venture. In the case of Sane & Doshi Enterprises (supra) the Hon'ble Bombay High Court while considering the issue identical to the present appeal observed that the character of rental income is not altered just because of the treatment given by the assessee in the books of account as stock-

in-trade. Thus, ultimately the Hon'ble Jurisdictional High Court held, irrespective of the fact whether the property has been shown as stock-in-trade in the books of account, the income derived from letting out of such property would not alter the character and nature of income as house property income. The aforesaid ratio laid down by the Hon'ble Jurisdictional High Court squarely applies to the facts of the present case. Even otherwise also, as rightly observed by the learned CIT(A) in the appellate order passed for ay 2010-11, in case the Department treats the income generated from leave and licence fees as business income, the AO is duty bound to allow depreciation to the assessee on the asset generating such income. In such eventuality, the income which would ultimately be determined would be lesser than the income offered by the assessee, hence, prejudicial to the interest of Revenue. It is also relevant to observe, in assessee's own case for A.Y. 2009-10 the AO while completing the assessment under Section 143(3) of the Act has accepted the income generated from leave and licence fees of the building as income from house property. The assessment order so passed has neither been revised nor reopened. That being the case, the Department cannot be allowed to take different stand in different assessment years with regard to head of income generated from leave and licence fees. In view of the aforesaid, we do not find any reason to interfere with the decision of the learned CIT(A). Accordingly, grounds raised are dismissed."

3. Since the issue is settled in favour of the assessee in the above said order and we do not see any reason to interfere with the order passed by Ld CIT(A). Accordingly, the grounds raised by the revenue are dismissed in both the appeals filed by the revenue.

4. In the net result, the appeals filed by the revenue are dismissed.

Order pronounced in the open court on 10.06.2021

Sd/-
MAHAVIR SINGH
VICE PRESIDENT

Sd/-
S. RIFAUH RAHMAN
ACCOUNTANT MEMBER

MUMBAI, DATED: 10.06.2021

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai