

IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA No.1039/Bang/2019
Assessment year : 2012-13

The Assistant Commissioner of Income Tax, Circle 1(2)(3), Bengaluru.	Vs.	M/s. Nitesh Infrastructure & Constructions, No.25A, 2 nd Floor, Imperial Court, Cunningham Road, Bengaluru – 560 052. PAN: AADFN 2384F
APPELLANT		RESPONDENT

Appellant by	:	Shri H. Kabila, Addl.CIT(DR)(ITAT), Bengaluru.
Respondent by	:	Shri K.R. Vasudevan, Advocate

Date of hearing	:	27.08.2021
Date of Pronouncement	:	23.09.2021

ORDER

Per Chandra Poojari, Accountant Member

This appeal by the revenue is directed against the order dated 14.3.2019 of the Principal Commissioner of Income Tax (Appeals)-2, Bengaluru [PCIT(A)] for the assessment year 2012-13.

2. The assessee is a partnership firm engaged in the business of development of real estate primarily commercial buildings on joint development basis and thereafter renting the portion of the developed property received under joint development terms.
3. The business activities of the appellant includes: -

- (a) Identifying potential properties in central business district' for joint development;
- (b) Holding talks and negotiation with the potential land owners for drawing up the modalities and arrangement of working for the development;
- (c) Seeking legal clearances, engage firm of architects for design conceptualization and drawing plans, obtain approval of plans and other clearances from appropriate authorities, engage civil contractors for the construction, monitor and supervise the projects and such;
- (d) Upon completion of construction hold formal launch of the properties to attract corporate tenants for the properties developed;
- (e) Negotiate and enter into agreement with the tenants for its and the land owner share in the developed properties;
- (f) Maintain the let out properties on behalf of the tenants, like providing security services, uninterrupted power supply through stand by generators, etc.

4. Since inception, the assessee had built three commercial properties on joint development basis. As per the terms of joint development agreement, in lieu of carrying out the construction of the building, the assessee was entitled to get the lease hold rights of an agreed portion of the developed property for a specified period of time, during which pendency it was entitled to let out the same and earn rental income and upon the completion of the specified period of the lease period, the assessee was required to surrender such lease hold rights of the developed property back to the landlord.

5. Of the three properties developed, the building Nitesh Timesquare & Nitesh Broadway was developed by the appellant on JD basis with Ms. Nalini Mohan, where the assessee was entitled to lease rights of 50% portion of the built space in these buildings for a term of 65 years. In

respect of the third property, Nitesh Lexington Avenue, the assessee had built this building on the land which was leased from the Archdiocese of Bangalore for a period of 40 years for a payment of land rent, which comprised of non-refundable portion deposit and annual land rent.

6. The assessee being entitled only to the lease hold rights of the developed property for a specified period as per the joint development terms, it required the assessee to recover its investment made in the construction of the property along with the profits.

7. For the AY 2012-13, the assessee filed its return of income on 06/09/2012 declaring a taxable income of Rs. 36,08,340 after inter-head set off of the Business Loss and Income from House Property and accordingly paid the tax of Rs. 10,82,501. In the return, the assessee had disclosed the rental income earned from letting out the property under Income from House Property, although the nature of activity carried out was akin to Business and such income was partially set off against the Business Loss.

8. During the proceedings u/s 143(3) of the Act, the AO had concluded the assessment by re-computing the taxable income of the appellant at Rs. 2,88,46,1901- after disallowance / additions / alterations under the following major heads:-

Sl. No.	Particulars	Amount (Rs)
1	Disallowance of Office Rent	57,60,000
2	Disallowance of Land Rent	1,67,58,000
3	Interest Paid On Term Loan	67,77,347
4	Disallowance of Depreciation on Interiors	22,24,430
5	Parking Fees	40,96,500
6	Disallowance of Repairs and Maintenance	25,05,516
7	Disallowance of Inauguration Expenses	5,53,430
8	Profession & Consultancy Charges	15,79,395

9	Write back of certain Sundry Creditors as Income	20,86,354
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9. After concluding the assessment u/s 143(3) for the AY 2012-13, the AO had served upon the assessee the notice u/s 148 relevant to AYs 2008-09 to 2011-12 proposing to re-assess the appellant's income u/s 147 for those years.

10. Shortly after the AO had passed the order u/s 143(3) for the AY 2012-13, the Hon'ble Supreme Court had passed a judgment dated 9.4.2015 in the case of *Chennai Properties & Investments Ltd. v. CIT, Civil Appeal No.4494 of 2004*, which facts were identical to that of the assessee's case. The Court had held that it was the nature of activity of the assessee and nature of operations in relation to them which determines the nature of income and concluded that income from letting out of properties was business income, if the primary business activity of the assessee was letting properties for rent. Relying on this judgment the assessee had revised the returns of income for the AYs 2013-14 & 2014-15 by offering the income under the head Business, instead of House Property.

11. In response to the notices issued u/s 148, the assessee relying on the above SC ruling filed revised returns of income for the AYs 2008-09 to 2011-12 by disclosing the income under Business instead of House Property claiming refund of taxes paid.

12. The return of income was taken up for scrutiny asst for the AYs 2013-14 and 2014-15 where the assessment was concluded by the AO treating the income of the appellant as Business Income based on the ruling of the Hon'ble Supreme Court in the case of *Chennai Properties & Investments Ltd. (supra)*.

13. Consequently, the AO who had initiated the proceedings u/s 148 for the AYs 2008-09 to 2011-12, had concluded the proceedings u/s 147 by ignoring the revised returns of income filed by the assessee for the AY 2008-09 to 2011-12 in which it had claimed tax refund arising from charge of depreciation under Business and accepted the income disclosed in the original return of income filed for the AYs 2008-09 to 2011-12.

14. On appeal by the assessee for AY 2012-13, the CIT(Appeals) allowed it. Against this, the revenue is in appeal before us.

15. The first issue for consideration is with regard whether the income of assessee is to be assessed under the head 'house property' or 'income from business'. In this regard, the assessee has raised the following grounds:-

“2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowances made by the Assessing Officer by following the Judgment of the Supreme Court in the case of Chennai Properties and Investments Ltd Vs CIT, 373 ITR 673 though the facts of the instant case are different.

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that the entire income of the assessee required to be assessed under the head income from business, without giving any reasons for the same.

4. On the facts and circumstances of the case and in law, the CIT(A) has erred in allowing relief to the assessee without appreciating the fact that the assessee had declared income from House Property from leased buildings but claimed various expenses such as lease rent, depreciation, repairs and maintenance, inauguration expenses etc relating to the leased buildings as business expenses which is not as per the provisions of Sec 24(a) of the IT Act.

5. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified in holding that the income of the assessee from leased properties is to be assessed as business income ignoring the fact that the assessee has offered the lease rent as its House Property Income in the return of income.”

16. The Id. DR submitted that the assessee has declared income from house property in respect of the three properties viz., Nitesh Timesquare, Nitesh Broadway & Nitesh Lexington Avenue and the CIT(Appeals) was not justified in changing the head of income from house property to business income.

17. On the other hand, the Id. AR supported the order of the CIT(Appeals) and relied on the judgment of Hon'ble Supreme Court in the case of *Chennai Properties & Investments Ltd. v. CIT, 373 ITR 676 (SC)* wherein it was held that if the entire income is from letting out of property, then it should be treated as business income. He submitted that the assessee has revised the returns of income from AYs 2008-09 to 2011-12 showing the rental income as income from business. The AO has concluded the proceedings u/s. 147 accepting the original income (thereby allowing all the expenses which have been disallowed in this year) and ignoring the revised return of income, under which there is claim of tax refund arising from charge of depreciation. Similarly, the assessee had filed returns for AYs 2013-14 & 2014-15 showing the rental income as "income from business", after scrutiny the income was accepted as business income, relying on the decision in the case of *Chennai Properties & Investments Ltd (supra)*. Therefore, the AO himself has treated the rental income as "income from business" for the later years and it cannot be any different for this year.

18. Further it was submitted that the facts of *Chennai Properties & Investments Ltd (supra)* apply squarely to assessee's case inasmuch as :-

- (i) The objective is to acquire properties and let out those properties for rental income.
- (ii) The entire income which accrued was from letting out of these properties and there is no other income except the letting out of these properties.

19. It was submitted that since the facts of the assessee's case are exactly similar to that of *Chennai Properties & Investments Ltd (supra)*, the CIT(A) has rightly relied on the same. As the rental income is to be assessed as "business income" the expenses incurred for the purpose of business are rightly held to be allowable expenditure.

20. We have heard both the parties and perused the material on record. It is admitted fact that in AYs 2013-14 & 2014-15, the AO assessed the income as income from business. This is also supported by the judgment of Supreme Court in *Chennai Properties & Investments Ltd (supra)*. In our opinion, the CIT(Appeals) was justified in directing the AO to assess the rental income from the above properties as income from business placing reliance on the above judgment of Supreme Court. Accordingly, we direct the AO to recompute the income of the assessee as income from business only after giving the allowable deduction as business expenditure in this assessment year also. This ground of the revenue is dismissed.

21. Ground No.6 of the revenue is as follows:-

“6. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified in allowing the claim of interest on term loan without deliberating upon merits of the case and ignoring the fact that the claim is contrary to the provision of Sec 24(a).”

22. The facts are that out of the total Interest paid on borrowed capital for the purposes of construction of the commercial building Nitesh

Lexington Avenue of Rs.1,01,66,020, the AO disallowed a sum of Rs. 67,77,347/- on the ground that the additional loan was obtained only just prior to the completion of the building and hence not meant for the purposes of construction as per section 24(b) of the Act which states that "the deduction on interest is allowed only when the property had been acquired, constructed, repaired, renewed or re-constructed with borrowed capital". Accordingly the portion of interest on the additional loan of Rs. 8.00 crores, amounting to Rs. 67,77,981 was disallowed u/s. 24(b).

23. Before the CIT(Appeals), the assessee submitted that it had initially availed Term Loan from Bank of Baroda during Oct 2010 amounting to Rs. 4.00 crores for the construction of the building Nitesh Lexington Avenue, which loan amount was far lower than the actual cost of construction. Later, when the construction was in progress it had availed the additional loan of Rs.12.00 crores towards the same project sometime in Aug. 2011 and liquidated the initial loan of Rs. 4.00 crores, whereby the net loan for the project was Rs. 12.00 crores. The building project was completed during Sept. 2011 and let out from 1st Sept. 2011. The total cost of construction of the building project Nitesh Lexington Avenue was Rs. 12.78 crores which was constructed to the prospective tenants, Bank of Baroda, who required the building within a specified period of time. With the time constraint to complete the construction, the appellant had to augment funds from other sources over and above the sanctioned amount of Rs. 4.00 crores. Simultaneously, the assessee had made application for the additional loan from the Bank for the same project which got sanctioned sometime during Aug. 2011 and the top up loan amount of Rs. 8.00 crores was used to clear the outside borrowings. It was contended that the AO's conclusion that loan was availed at the end of the construction and might have been for different purposes is baseless and arbitrary. On a consideration of these

submissions, the CIT(Appeals) allowed this ground of the assessee. Against this, the revenue is in appeal before us.

24. We have considered the rival submissions on this issue. Since we have held that income of the assessee from the above property is to be assessed as 'income from business', the assessee is entitled to interest on term loan u/s. 36(1)(iii) instead of section 24(a) of the Act. However, if the fund has been used for the purpose of business, the assessee has to establish that the additional loan of Rs.8 crores was actually used for repayment of the liability which has been used for the purpose of acquiring new assets for the purpose of business. Further, if the additional loan has been advanced as a loan to any related party, the assessee cannot claim any interest on it as business expenditure. Therefore, this issue is remitted back to the file of AO for examination of the above facts and decide the issue afresh, after due opportunity to the assessee.

25. Ground No.7 by the revenue reads as follows:-

“7. On the facts and in circumstance of the case and in law, the Ld. CIT(A) was not correct in holding that the parking rent received by the assessee is to be assessed as business income ignoring the fact that the receipts had to be rightly taxed as Income from Other Sources.”

26. The facts of the case are that the assessee firm had provided parking space in its commercial buildings Nitesh Broadway and Nitesh Time Square and collected the parking rent of Rs.6,04,500 and Rs.34,92,000 respectively during the FY 2011-12 for providing the visitors to the building who parked their cars in the parking area. These rents were not collected from the tenants to whom the property was let out. The AO was of the view that rent under the head income from house property was always with respect to the annual value and not daily collection and hence such parking charges collected cannot be classified as rent under the head

income from house property to be eligible for the benefit of deduction u/s. 24(a) of the Act.

27. The CIT(Appeals) observed that the rental agreements executed by the assessee with its tenants required the tenants to pay apart from the rent, the charges for parking facility provided which the AO had failed to consider as the tenants were paying the rent and parking charges by way of consolidated amount. The AO misrepresented the facts by stating that the assessee had collected adhoc parking charges on daily basis which cannot be attributable to any specific tenant, whereas the agreement required the tenant to pay on monthly basis along with the rent. The CIT(A) held that AO was not justified in treating the amount collected for parking facility under income from other sources.

28. We have heard both the parties and perused the material on record. The parking rent is akin to the rental income of the assessee on the above properties and the same is to be assessed as income from business instead of income from house property or income from other sources. This ground is remitted to the AO to consider it as part of the business income of the assessee.

29. Ground No.8 by the revenue reads as follows:-

“On the facts and in circumstance of the case and in law, the Ld. CIT(A) has erred in not considering the issue of cessation of liability due to Ms. Nalini Mohan; which was not confirmed by the creditor i.e Ms. Nalini Mohan.”

30. The AO has added a sum of Rs. 20,86,354 under Creditors to income citing cessation of liability, based on the confirmation received from the creditor, Ms. Nalini Mohan u/s. 133(6) of IT Act 1961, who had responded to the notice issued by the dept. by stating no such dues exist in

her books. On appeal, the CIT(Appeals) allowed the appeal of the assessee. Against this, the revenue is in appeal before us.

31. The Id. AR submitted that the building project Nitesh Time Square was developed in the land owned by Nalini Mohan as per the joint development terms where the assessee and the landlord shared 50:50 of the developed area. However, the assessee firm was not conferred any ownership of the 50% of the area developed, but was granted lease hold rights of 50% of the developed area for a period of 65 years during when it was free to use the same in the manner it deemed fit and thereafter the expiry of 65 years the lease hold rights would cease in favour of the land owner Nalini Mohan.

32. As per the joint development terms, the entire developed portion of the building were jointly held by the land owner and the assessee firm with no clear demarcation of the areas in the building in favour of the either party. Further the assessee firm was responsible for engaging tenants for the entire building belonging to both parties and the rental proceeds were shared 50:50. The assessee used to collect the security deposit and the rents from the tenants and share only the rents belonging to the share of the land owner Nalini Mohan. During such process, one tenant M/s. DTZ International at Nitesh Time Square had vacated the premises and the rental dues from such party was adjusted against the security deposit held by the assessee firm while returning the same to the tenant. The share of rent relating to Ms. Nalini Mohan which was adjusted from the deposit had amounted to Rs. 20,86,354 which was shown as payable in the books of the assessee firm under Sundry Creditors. However the assessee firm had held back the payment in view of the fact that the said Nalini Mohan had not cleared some of the payments due towards the interior works carried out by the assessee on behalf of Nalini Mohan.

33. In view of the fact that this amount becomes due when the Issues are sorted out, the liability appearing in the books cannot be written back as cessation of liability as it would become payable one day and hence additions made by the AO were liable to be deleted in this regard for the AY 2012-13.

34. It was further submitted on the depreciation charge that consequent to the change in the method of treating rental income as business income, the assessee had been filing its return of income under Income from House Property against which income it was setting off the loss from business and paying tax on the balance, if any. At the time when the assessee was offering its income under house property, it was not claiming depreciation on such properties which were let out by the firm. Further, while business losses were set off against the property income for the same year, depreciation on such properties let out were not set off.

35. It was submitted that during the scrutiny asst. proceedings for the AY 2012-13, the AO had disallowed certain expenditures in the business from being set off against the property income on the grounds that Property Income enjoyed a Standard Deduction of 30% and some of the business expenses were relating to such properties which cannot be allowed.

36. The Id. AR submitted that the AO had reopened the assessments for the AY 2008-09 to 2011-12 on the grounds that there was a reason to believe that taxable income had escaped assessment. Upon the receipt of notices u/s. 147 for the AY 2008-09 to 2011-12, the assessee firm filed revised return of income for the AY 2008-09 to 2011-12 offering its income under business citing the ruling of the Hon'ble Supreme Court in the case of *Chennai Properties & Investments Ltd. v. CIT*, Civil Appeal No.4494 of 2004 (SC). At the time of filing the revised return of income from the AY 2008-09 till 2014-15, the assessee firm calculated depreciation which

hitherto was not claimed on the properties which were let out. While computing the same from the AY 2008-09, the opening WDV of the buildings it had considered was the closing WDV as on 31.3.2007. The assessee firm was depreciating the let out properties as per the rates prescribed in the Income Tax Act in its books. In light of the above, it is submitted that the value of the Properties let out considered for the depreciation in the changed circumstances was the WDV as on 1.4.2007.

37. The Id. DR supported the order of the AO.

38. We have considered the rival submissions. The amount of Rs.20,86,354 due to Nalini Mohan arose in the course of business activity of the assessee. The assessee has shown it as liability in the books of account as payable to Nalini Mohan. However, nowhere before the AO it was confirmed by Nalini Mohan that such amount was not due to her. Hence the AO treated it as income from business under the provisions of section 40(1)(i) of the Act. Now the contention of the Id. AR is that such amount is payable to Nalini Mohan and the assessee has not written off the same and the assessee had held back the payment in view of the fact that Nalini Mohan had not cleared some of the payments due towards the interior works carried out by the assessee on behalf of Nalini Mohan. However, the details of interior work carried out by the assessee on behalf of Nalini Mohan is not at all brought out on record by the assessee to show that the assessee actually has carried out the interior works on behalf of Nalini Mohan. There was no such plea of the assessee before the AO. These facts are required to be examined by the AO. Hence we deem it fit to restore this issue to the file of the AO for re-examination of this issue afresh after due opportunity to the assessee.

39. In the result, the appeal by the revenue is partly allowed for statistical purposes.

Pronounced in the open court on this 23rd day of September, 2021.

Sd/-
(BEENA PILLAI)
JUDICIAL MEMBER

Sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 23rd September, 2021.

/Desai S Murthy /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.