

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "E", MUMBAI**

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

**ITA No.1545/M/2021
Assessment Year: 2008-09**

**ITA No.1544/M/2021
Assessment Year: 2009-10**

**ITA No.1543/M/2021
Assessment Year: 2013-14**

Dy. Commissioner of Income Tax, Central Circle-1(2), 906, 9 th Floor, Pratishtha Bhawan, Old CGO Bldg. (Annexe), M.K. Road, Mumbai - 400020	Vs.	M/s. Sunny Vista Realtors Pvt. Ltd., 511, Dalamal Towers, 211, Nariman Point, Mumbai – 400 021 PAN: AAKCS1269E
(Appellant)		(Respondent)

Present for:

Assessee by : None
Revenue by : Shri Amol B. Kirtane, D.R.

Date of Hearing : 09. 03 . 2022
Date of Pronouncement : 25. 03 . 2022

O R D E R

Per Bench:

For the sake of brevity aforesaid appeals bearing common question of law and facts are being disposed of by way of composite order.

2. Appellant Dy. Commissioner of Income Tax, Mumbai (hereinafter referred to as the Revenue) challenged the impugned order even dated 16.06.2021 passed by Commissioner of Income Tax (Appeals)-47, Mumbai [(hereinafter referred to as the CIT(A))] by partly allowing the appeals for statistical purposes for A.Y. 2008-09, 2009-10 & 2013-14 by way of composite order, on the grounds inter alia that:

ITA No.1545/M/2021 for A.Y. 2008-09

“Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A), erred in directing the assessing officer to treat the interest income of Rs.8,36,30,107/-, being interest eared on fixed deposits as ‘Business Income’ instead of ‘Income from Other Sources’.”

ITA No.1544/M/2021 for A.Y. 2009-10

“1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A), was correct in allowing the business loss of Rs.62,55,068/- claimed on account of depreciation and amortization of amalgamation expenses, which was capitalized to work-in-progress because the assessee had only one contract and therefore, entire expenses including depreciation were liable to be capitalized as work in progress.

2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A), erred in directing the assessing officer to treat the interest income of Rs.7,44,58,749/-, being interest earned on fixed deposits as ‘Business Income’ instead of ‘Income from Other Sources’.”

ITA No.1543/M/2021 for A.Y. 2013-14

“1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A), was correct in allowing the business loss of Rs.1,38,38,226/- claimed on account of depreciation, which was capitalized to work-in-progress because the assessee had only one contract and therefore, entire

expenses including depreciation were liable to be capitalized as work in progress.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A), erred in directing the assessing officer to treat the interest income of Rs.47,61,041/-, being interest earned on fixed deposits as 'Business Income' instead of 'Income from Other Sources'."

3. Briefly stated facts necessary for adjudication of the controversy at hand are :the assessee company is into the business of construction and development of Special Economic Zone (SEZ) and during the year under consideration assessee company was engaged in constructing SEZ at Panvel, Maharashtra. During the scrutiny proceedings the Assessing Officer (for short the 'AO') noticed that the assessee has earned income from fixed deposits to the tune of Rs.8,36,30,107/-, Rs.7,44,58,749/- & Rs.47,61,041/- in A.Y. 2008-09, 2009-10 & 2013-14 respectively.

4. Declining the contentions raised by the assessee company AO proceeded to treat the interest income of Rs.8,36,30,107/-, Rs.7,44,58,749/- & Rs.47,61,041/- in A.Y. 2008-09, 2009-10 & 2013-14 respectively as "income from other sources" instead of "business income" claimed by the assessee. In A.Y. 2009-10 & 2013-14 AO noticed that the assessee has claimed business loss of Rs.62,55,068/- and Rs.13,83,226/- respectively on account of depreciation which was capitalized to work in progress. Declining the contentions raised by the assessee company AO proceeded to

disallow the business loss claimed by the assessee on account of depreciation and treated as work in progress on the ground that the project is under construction and no corresponding income has been offered to tax. Accordingly, the AO framed the assessment at the total income of Rs.9,35,44,530/-, Rs.7,44,58,749/- and Rs.47,61,040/- under section 153C read with section 143(3) of the Income Tax Act,1961 (for short 'the Act') for A.Y. 2008-09 and A.Y. 2013-14 respectively.

5. Assessee carried the matter before the Ld. CIT(A) by way of filing appeals who has partly allowed the appeals. Feeling aggrieved with the impugned orders passed by the Ld. CIT(A), the Revenue has come up before the Tribunal by way of filing the present appeals.

6. Despite issuance of the notice to the assessee none appeared on behalf of it, so the Bench decided to decide these appeals on the basis of material available on record with the assistance of the Ld. D.R. for the Revenue.

7. We have heard the Ld. Departmental Representative for the Revenue, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and case law relied upon.

Ground No.1 of ITA No.1545/M/2021 for A.Y. 2008-09:
Ground No.2 of ITA No.1544/17 for A.Y. 2009-10:
Ground No.2 of ITA No.1543 for A.Y 2013-14:

8. The Ld. CIT(A) allowed to treat the interest income earned by the assessee during the years under consideration as “business income” instead of “income from other sources” by returning the identical findings in all the aforesaid appeals except difference in figures of interest earned by returning the following findings:

“11.0 I have considered the facts of the case, submissions of the Appellant, the observations of the AO contained in the assessment order and the other materials on record on this issue. The Ground no. 2 deals with treatment of interest income earned on fixed deposits of Rs.8,36,30,107/- under the head other sources as against under the head business shown by the assessee. The assessee has argued that since no new facts have been brought on record, nor has been found during the course of search, no different view could have been taken by the AO in proceedings u/s 153C towards this income being business income.

11.1 I have considered the facts of the case. The issue involved is treatment of interest income from fixed deposits. While the assessee has treated it as income from business, the AO treated the same under the head 'Other Sources'. It is seen that an identical issue has been decided by my Ld. Predecessor in the case of M/s. Hiranandani Palace Gardens Pvt. Ltd., vide order dated 21.03.2016 wherein he directed to delete the addition by observing as under:-

"I find that the impugned receipts of Rs.6,94,26,906/- cannot be treated as receipts that flow to the appellant de hors the business as they are directly and explicitly linked to the business of the appellant. They cannot be treated as 'Income from other Sources'. Respectfully following the above decision of Hon'ble ITAT in appellant's own case, and the

ratio of the decision of Hon'ble Apex Court cited above, this ground of appeal is allowed."

11.2 *It is seen that identical issue has been decided by the Hon'ble ITAT, Mumbai in the case of M/s. Hiranandani Palace Gardens Pvt. Ltd., ITA No. 4579/Mum/2013 dated 03.12.2015, directed to allow the claim of the assessee in this regard by observing as under:-*

"9. We have heard the rival contentions of the Ld. Representatives of the parties. The Ld. AR of the assessee has brought our attention to page 13 of the ITA No.4579/M/2013 M/s. Hiranandani Palace Gardens P. Ltd. 10 paper book which is the copy of 'schedule to financial statement' to show that the assessee during the year had received advances from the customers to the tune of Rs.658,839,563/- and further explained that that given the initial years of its operation, the available surplus fund of Rs.1,70,72,127/- only was temporarily deposited in FDRs pending its utilization so as to make best use of it and to reduce the cost of the project. It was therefore offered as 'Business Income'. The Ld. AR in this respect has relied upon the various case laws including the decision of Hon'ble Karnataka High Court in the case of "Swish Chandra & Co. vs. CIT" 234 ITR 70 (KAR) (and decision of Hon'ble Bombay High Court in the case of "CIT Vs. Lok Holdings" 308 ITR 356 (Bom.) and has contended that the said decisions are fully applicable on the facts of this case. The Ld. DR on the other hand has relied upon the findings of the lower authorities.

10. We find that in the facts and circumstances of the case in hand, the decision of Hon'ble Bombay High Court in the case of "CIT vs. Lok Holdings" (supra) is squarely applicable. In that case the assessee was engaged in development of properties. Advance from customers intending to purchase flats was deposited with the banks in the course of business. The interest income was held to be assessable as business income and not as income from other sources. Following the decision of Hon'ble Bombay High Court in the case of "Lok Holdings" (Supra) the interest income earned from temporary deposits pending their

utilization out of customer advances on the booking of flats related to the project of the assessee is assessable as business income. The A.O. is accordingly directed to assess the same as business income. This ground of appeal is also allowed."

11.3 Further decision have also been examined by the undersigned in case of M/s. Hiranandani Palace Gardens Pvt. Ltd. for A.Y. 2008-09 wherein following Hon'ble ITAT findings in case of this assessee the claim of the assessee for interest income being business income was allowed by observing as under:-

"11.1 I have considered the facts of the case. It appears that in the original assessment u/s 143(3) the then AO had made disallowance of business interest income earned on fixed deposits of Rs. 1,65,18,814/-. It further appears that the same has been reproduced by the AO in the order u/s 153C dated 28.03.2016 in nature of interest income earned on fixed deposits which is the subject matter of this appeal. It further appears that the order of the Ld. CIT(A) dated 21.03.2016 deleting the said addition and the order of the Hon'ble ITAT dated 12.07.2019, confirming the order of the CIT(A) were not there before the AO at the time of passing the order u/s 153C dated 28.03.2016. Since no incriminating material as such has been found on this issue, during the course of search, I am inclined to follow the order dated 12.07.2019 of the Hon'ble ITAT, Mumbai and that of my Ld. Predecessor dated 21.03.2016 by which the above additions were deleted, as the same reached finality. The AO is accordingly directed to delete the addition of Rs.1,65,18,814/-.

11.2 Consequently the ground no. 2 taken by the assessee is allowed."

11.4 The facts of the present case are identical to the facts of the case of M/s. Hiranandani Palace Gardens Pvt. Ltd. in which Hon'ble ITAT has directed to treat this income under the head "business". Therefore respectfully following the findings of the Hon'ble ITAT, in the case of M/s. Hiranandani Palace Gardens Pvt. Ltd., LTA No. 4579/Mum/2013 dated 03.12.2015, the interest income of

the assessee from fixed deposits is to be treated as income under the head "Business". In view of this the addition made by the AO in this regard is directed to be deleted.

11.5 It may be stated that while completing the original assessment u/s 143(3) dated 29.12.2010 the AO did not make any addition against the assessee, in respect of fixed deposits interest income, as income under the head "Other Sources". Apparently during the course of search and seizure action no incriminating evidence has been found against the assessee which conveys overall fixed deposits interest income should be treated under the head "other sources". Therefore in view of settled legal position, the AO could not have disturbed the already concluded position, in the proceedings u/s 153G. Therefore on this account also addition is not warranted against the assessee in respect of interest income as income under the head "other sources".

11.6 Consequently the ground no. 2 taken by the assessee is allowed."

9. We have perused the findings returned by the Ld. CIT(A) who has decided the issue in favour of the assessee by following the order passed by the Tribunal in assessee's group company cases passed in ITA No.4579/M/2013 dated 03.12.2015, which are based upon the decision rendered by Hon'ble Karnataka High Court in case of Swish Chandra & Co. vs. CIT 234 ITR 70 (KAR) and decision rendered by Hon'ble Bombay High Court in case of CIT Vs. Lok Holdings 308 ITR 356 (Bom.)

10. When it is settled principle of law that in cases where assessee is engaged in development of properties, advances taken by it from customer to purchase the flats was deposited with the

banks in the course of business, the interest income earned there from is to be treated as “business income” and not as “income from other sources”. So in these circumstances, we find no illegality or perversity in the findings returned by the Ld. CIT(A) hence Ground No.1 of ITA No.1545/M/2021 for A.Y. 2008-09, Ground No.2 of ITA No.1544/17 for A.Y. 2009-10 and Ground No.2 of ITA No.1543 for A.Y 2013-14 are determined against the Revenue.

Ground No.1 of ITA No.1544/M/2021 for A.Y. 2009-10
Ground No.1 of ITA No.1543/M/2021 for A.Y. 2013-14

11. Assessee’s claim of business loss on account of depreciation and amortization of amalgamation expenses which was capitalized to work in progress has been disallowed by the AO, however, the Ld. CIT(A) has allowed the business loss claimed by the assessee on account of depreciation and amortization of amalgamation expenses, which was capitalized to work in progress as the assessee was having only one contract by returning the following findings:

“8.0 I have considered the facts of the case, submissions of the Appellant, the observations of the AO contained in the assessment order and the other materials on record on this issue. Ground no. 1 deals with disallowance of business loss of Rs.62,55,068/-, claimed on account of depreciation and amortization of Amalgamation expenses. From the facts of the case it appears that while filing the original return, the assessee had offered the loss of Rs.12,86,40,688/-. However in response to the notice u/s 153C, the assessee had shown loss of Rs.62,55,068/-. The AO vide order u/s 143(3) dated 29.12.2011 disallowed the business expenditure and assessed the total income at Rs.8,41,55,240/-. The assessee has failed to explain

satisfactorily as to how the assessed income of Rs.8,41,55,240/-, in the assessment order u/s 143(3) completed on 29.12.2011, turned into loss of Rs.62,55,068/- subsequent to search action in the case of the assessee. No evidence or explanation in this regard has been furnished by the assessee. However the assessee brought my attention to the Hon'ble ITAT order dated 11.01.2017 as per which the business losses incurred by the assessee while filing the return of income, were held to be proper and therefore directed to be allowed by the Hon'ble ITAT vide order dated 11.01.2017 by observing as under;-

"21. Similar view has been followed by the Mumbai Bench in the case of Hiranandani Palace Garden Pvt Ltd vs ACIT (supra). It has also brought to our notice that same method of accounting has been consistently followed by the assessee in all the subsequent years. Once a particular method of accounting has been followed consistently and apparently the same is not contrary to law or facts of the case, then the AO is not permitted to disturb the same only because as per him the some other method of accounting should have been followed by the assessee.

22. Thus, taking into account all the facts and circumstances of the case, we find that action of the AO in treating the impugned expenses as part of WIP was not justified and was contrary to law and facts. The claim made by the assessee is in line with the method of accounting consistently followed by the assessee and is in accordance with law and facts of this case. Therefore, addition made by the AO is directed to be deleted.

23. The AO is directed to allow the expenses as have been claimed by the assessee. The consequential effect shall also be given by the AO while passing order giving appeal effect for the amount of closing WIP of the year under consideration as well as opening WIP of the immediately subsequent assessment year. Thus, with these directions, the grounds 1 to 3 raised by the assessee are allowed."

8.1 In the search and seizure action no incriminating material as such has been found against the assessee on

this issue. It is a settled legal position that already concluded position will not be disturbed in the proceedings u/s 153C unless and until there is some incriminating material has been found. Accordingly this ground of appeal is allowed.

8.2 Consequently the ground no. 1 taken by the assessee is allowed.”

12. We have perused the findings returned by the Ld. CIT(A), the relevant portion of which is extracted as above. Again the Ld. CIT(A) has decided this issue in favour of the assessee by following the order passed by the co-ordinate Bench of the Tribunal in assessee's own case dated 11.01.2017 by deciding this issue in an assessment framed under section 143(3) of the Act.

13. When this issue has already been decided in favour of the assessee by the Tribunal in an appeal filed against the assessment order passed under section 143(3) of the Act, the same was liable to be decided in favour of the assessee when again disallowed during the assessment framed under section 153C read with section 143(3) of the Act. Moreover, when the assessee has been consistently following the particular accounting method, business loss claimed by the assessee on account of depreciation and amortization of amalgamation expenses is liable to be allowed. A particular accounting method consistently being followed by the assessee cannot be disturbed by the AO in treating the impugned expenses as

part of work in progress and as such when the claim of the assessee is in accordance with the method of accounting consistently being followed the claim of the assessee is allowable. Moreover, this issue has already been decided by the Tribunal in favour of the assessee during the appellate proceedings initiated on the basis of assessment framed under section 143(3) of the Act. So we find no illegality or perversity in the impugned findings returned by the Ld. CIT(A). Ground No.1 of ITA No.1544/M/2021 for A.Y. 2009-10 and Ground No.1 of ITA No.1543/M/2021 for A.Y. 2013-14 are determined against the Revenue.

14. In view of what has been discussed above, aforesaid appeals filed by the Revenue are dismissed.

Order pronounced in the open court on 25.03.2022.

**Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER**

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Mumbai, Dated: 25.03.2022.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.