

**IN THE INCOME TAX APPELLATE TRIBUNAL
“D” BENCH, MUMBAI**

**BEFORE SHRI AMIT SHUKLA, JM &
SHRI S. RIFAUR RAHMAN, AM**

आयकरअपीलसं./ I.T.A. No. 3697 & 3698/Mum/2016
(निर्धारणवर्ष / Assessment Year: 1989-90 & 1990-91)

DCIT(A)-3(2)(1), R. No. 608, 6 th floor, Aayakar Bhavan, M. K. Road, Mumbai-400 005	बनाम/ Vs.	M/s M. Visvesvarya Industrial Research & Development Centre 31 st Floor, Centre 1, Cuffe Parade, Colaba, Mumbai – 400 005
स्थायीलेखासं ./जीआइआरसं ./PAN No. AABCM0996K		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)
अपीलार्थीकीओरसे/ Appellant by	:	Shri Nimesh Yadav, Ld. DR
प्रत्यर्थीकीओरसे/ Respondent by	:	Shri Firoze B. Andhyarujina & Shri Maneck F. Andhyarujina , Ld. ARs
सुनवाईकीतारीख/ Date of Hearing	:	21.06.2022
घोषणाकीतारीख / Date of Pronouncement	:	19.07.2022

आदेश / O R D E R

Per Amit Shukla, Judicial Member:

The aforesaid appeals have been filed by the revenue against the separate impugned order of even date 22.02.2016, passed by Ld. CIT(A)-8, Mumbai for the AY 1989-90 and 1990-91.

2. The aforesaid appeals arising out of order giving effect of the judgment of Hon'ble Bombay High Court dated 30.06.2014 and the issue involved in both the appeals are exactly similar arising out of same set of findings, therefore the same is being heard together and disposed of by way of this consolidated order.

3. The grounds of appeal raised in AY 1989-90 are as under:-

1. *"Whether on the facts and circumstances and in law the Ld. CIT(A) is right in directing the assessing officer to allow the cost of construction of Rs. 46,70,99,217/- to the assessee?"*

2. *"Whether on the facts and circumstances and in law the Ld. CIT(A) is right in holding that the issue of cost of construction was not before the Hon'ble High Court without appreciating the fact that the Hon'ble High Court in their order has directed the assessing officer to treat the lease rental as business income of the assessee which implies though the lease rental received 13y the assessee is business income but there is no change in the ownership of the properties?"*

3. *"On the facts and circumstances and in law the Ld. CIT(A) is erred in allowing the cost of construction without considering the facts that assessee had claimed depreciation on the property and the Hon'ble High Court in their order has nowhere held that the long term lease income received by the assessee from lessees*

was sale of property and therefore there was no logic to allow the cost of construction against the lease income"

4. *"On the facts and circumstances and in law the Ld. CIT(A) is erred in not considering the decision of the Hon'ble Supreme Court in the case of ICDS Ltd vs. CIT Mysore (255 CTR 449) relied upon by the assessing officer in the order giving effect to the order of the Hon'ble High Court."*

5. *"Whether on the facts and circumstances and in law the Ld. CIT(A) was right in law in directing the assessing officer not levy interest u/s. 220(2) of I.T. Act to the assessee on the ground that the history of the case clearly specifies that various stands were taken by AO, CIT(A) & Tribunal and assessee has denied its liability of taxes levied."*

6. *"The appellant prays that the order of CIT(A) on the above ground be set aside and that of the Assessing Officer be restored."*

4. The grounds of appeal raised in AY 1990-91 are as under:-

1. *"Whether on the facts and circumstances and in law the Ld. CIT(A) is right in directing the assessing officer to delete the addition of Rs. 1,65,82,113/- without considering the fact that as per the direction of the Hon'ble High Court the lease rental income has to be treated as business income and the assessing officer while giving effect to the order of the Hon'ble High Court*

has reduced the income from house property consisting of above amount shown by assessee as income from house property?"

2. *"On the facts and circumstances and in law the Ld. CIT(A) erred in directing the assessing officer to delete the addition of Rs. 1,65,82,113/-without considering the fact that same would amounts to double relief to the assessee"*

3. *"Whether on the facts and circumstances and in law the Ld. CIT(A) is right in directing the assessing officer to allow the cost of construction of Rs. 26,93,03,174/- to the assessee?"*

4. *"Whether on the facts and circumstances and in law the Ld. CIT(A) is right in holding that the issue of cost of construction was not before the Hon'ble High Court without appreciating the fact that the Hon'ble High Court in their order has directed the assessing officer to treat the lease rental as business income of the assessee which implies though the lease rental received by the assessee is business income but there is no change in the ownership of the properties?"*

5. *"On the facts and circumstances and in law the Ld. CIT(A) is erred in allowing the cost of construction without considering the facts that assessee had claimed depreciation on the property and the Hon'ble High Court in their order has nowhere held that the long term lease income received by the assessee from lessees was sale of property and therefore there was no logic to allow the cost of construction against the lease income. "*

6. *"On the facts and circumstances and in law the Ld. CIT(A) erred in not considering the decision of the Hon'ble Supreme Court in the case of ICDS Ltd vs. CIT Mysore (255 CTR 449) relied upon by the assessing officer in the order giving effect to the order of the Hon'ble High Court?"*

7. *"On the facts and circumstances of the case the Ld. CIT(A) in law erred in directing the assessing officer to delete the addition of premium/salami of Rs. 33,83,10,062/- without considering the fact that in the order giving effect to the order of the Hon'ble High Court the capital gain computed by considering the above premium/salami has been reduced from the total income and thus the CIT(A) has allowed double relief to the assessee."*

8. *"Whether on the facts and circumstances and in law the Ld. CIT(A) was right in law in directing the assessing officer not levy interest u/s. 220(2) of IT. Act to the assessee on the ground that the history of the case clearly specifies that various stands were taken by AO, CIT(A) & Tribunal and assessee has denied its liability of taxes levied."*

5. As a lead case, we are taking AY 1989-90 and our findings given in this appeal will apply mutatis mutandis in other AY 1990-91 also as the findings of Ld. CIT(A) are same in both the appeals.

6. The brief background of the case are that assessee was registered u/s 25 of the Companies Act 1956, as a non-profit company, promoted by All India Manufacturer's Organization and leading Industrialists and was incorporated in 1970. The said centre became a member of World Trade Centers Association, New York in 1971. The Centre has obtained registration for exemption under section 12A (a) under Income Tax Act 1961 in the year 1984. It is further noted that the Government of Maharashtra allotted a plot of land for construction of commercial Complex including shopping Centre and office building etc. in the year 1970. The Government of Maharashtra allotted land to the centre and it decided to collect the lease rent for sixty years in advance from its prospective lessees and constructed its first structure i.e. "The Arcade". The amount collected towards construction was treated as liability and was being shown under the head of Advance Rent and cost of the construction was shown under the head of Fixed Asset in the Balance Sheet. Lease Agreements were entered into for a period of 60 years and hence $1/60^{\text{th}}$ part of the collected advance rent was treated as income in the Income and Expenditure Account

for that particular year. In respect of the Arcade building the Department has accepted 1/60th lease rent till date. For the first time in the A.Y. 1989-90, the Assessing Officer (DCIT) treated the lease transactions in respect of Centre-1 units as sale to the lessee members. The surplus of lease rent over the total cost of construction was treated as income under the head "business". Contribution towards sinking fund and income from sinking fund investment was added to the taxable income.

7. In so far as the assessee's claim for exemption u/s 11, the First Appellate Authority held that it is not entitled for exemption and even from the stage of Tribunal, it is held that it is not the charitable institution.

8. The AO vide order dated 27.03.1992 passed u/s 143(3) has assessed the income at Rs. 10,71,18,176/- as against returned loss of Rs. 9,14,41,770/-. In the order, the AO treated the receipts of Rs. 50,92,47,221/- (45,99,84,721/- + 492,62,500) pertaining to an used area of 65,264/-sq.ft) as sale consideration, shown by the assessee as lease rental @ 1/60th part of such receipts on completion of construction and handing over of the position of

commerce Centre-1, and after deducting the cost of construction of property of Rs. 39,77,89,584/- the balance amount of Rs. 11,14,57,637/- was treated as business income of the assessee. Since the cost of construction of property was adjusted against total receipts, claim of depreciation was disallowed.

9. In first appeal, the Ld. CIT (A) vide order dated 10/8/1993 held that the total receipts shown by the assessee comprised of primary basic rent and car parking rent collected from lessees in advance before position was given and was chargeable to income from business being in nature of salami/premium. Alternatively it was held by the Ld. CIT (A) that the receipts were taxable as short term capital gain as assessee had converted its stock into assets during the current year and consideration received on lease premises was capital receipts.

10. In second appeal filed by the assessee as well as Department, the ITAT Mumbai "B" Bench, Mumbai vide its order dated 29/03/1996 held that the said transaction fees was one of sale of leasehold right of use of space and that there was no sale as contended by the Department. The ITAT also held that the from

lease rentals were business income and no cost of construction was allowable there from as there was no sale of space, however since the Department has already given cost of construction as deduction by way of sale under the assessment order and as capital gain in appeal order, the same was not withdrawn.

11. Aggrieved by the order of the Tribunal, assessee filed miscellaneous petitions before the Tribunal and on rejection of such petition filed writ petition before the Hon'ble Bombay High Court which came to be decided on 15/03/2001. In the judgement, the Hon'ble High Court held that there is no legal concept of sale of leasehold rights of the use of space and remanded the issue back to the Tribunal to reconsider and submit its findings. On receipt of said remand report from Tribunal the Hon'ble High Court vide its order dated 25/10/2012 decided the issue in favour of the Department holding that:

1. The transaction of lease rent receipts therefrom where income from business and taxable in the year of completion of the contract between assessee and the lessee.

2. The sinking fund received by the assessee was also held to be income from business.

12. Before the Hon'ble Bombay High Court, 8 questions of the law for AY 1989-90 and 1990-91 were referred, which are as under:-

(1) Whether, on the facts and in the circumstances of the case, the tribunal was right in its conclusion that the assessee was not entitled to exemption under section 11 of the Income Tax Act, 1961?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was right in its conclusion concerning clauses 2, 4, 5, 6, 7, 20 and 24 of the Memorandum of Association of the assessee are not objects of general public utility and thereby do not fall within the meaning of section 11 of the Income-Tax Act, 1961?

(3) Whether, on the facts and in the circumstances of the case, the Tribunal was right in its conclusion that the construction activity of World Trade Center, Centre 1 and IDS! Centre were activities of business?

(4) Whether, on the facts and in the circumstances of the case, the Tribunal was right in its conclusion that the establishing of the World Trade Center cannot be object of public utility so as to be covered by the provisions of section 11 of the Income-Tax Act, 1961 ?

(5) Whether, on the facts and in the circumstances of the case, the Tribunal was right in coming to its conclusion that the activity of the assessee would also be hit by the provisions of sections 11 (4A) of the Income-Tax Act, 1961?

(6) Whether, on the facts and in its circumstances of the case, the Tribunal was right in its conclusion that the transaction was one of sale of lease-hold rights of use of space and not of leasing?

(7) Whether, on the facts and in the circumstances of the case, the Tribunal was right in its conclusion that the primary basic rent and the parking rent were assessable as income from profits and gains of business or profession?

(8) Whether, on the facts and in the circumstances of the case, the Tribunal was right in its conclusion that the amount appropriated towards a sinking fund was part of the rent received by the assessee and was in the nature of revenue receipt?

Additional Question for A.Y. 1990 - 91. .

(1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in directing to adopt the Standard rent fixed by the Municipal Authorities as the annual value instead of the actual rent realized by the assessee?

The High Court answered the reference 78 of 1998, in para 111 of its order, page 354 & 355 of the compilation as follows

(i) Question 1 is answered in the negative, in favour of the Revenue and against the assessee so far as Section 11 is concerned. In view thereof, it is not necessary to answer the question qua Section 12 for the assessee has not made any claim under Section 12.

(ii) The reference is returned unanswered in respect of questions 2 to 5 as they were not pressed by the assessee at whose instance they were referred for the opinion of this Court.

(iii) Question 6 is answered in the negative, in favour of the Revenue and against the assessee.

(iv) Question 7 is answered in the affirmative, in favour of the Revenue and against the assessee.

(v) Question 8 is answered in the affirmative, in favour of the Revenue and against the assessee.

(vi) Additional question for the assessment year 1990-91 is answered in the negative, against the Revenue and in favour of the assessee.

13. Thus, in view of the finding and decision of Hon'ble Bombay High Court, the lease rent received by the assessee being primary rent, car parking rent, the basic secondary rent and the sinking fund was treated as income from business and since the receipts

were treated as revenue receipts, the expenditure in the nature of revenue which was depreciation only was allowed against the said receipts and not the cost of construction. AO while giving effect to the order of Hon'ble Bombay High Court has withdrawn the cost of construction which were earlier reduced by the AO and computed the income in the following manner:-

<i>Total Income of the Assessee as per order u/s.</i>	<i>Rs. 262,51,781/-</i>
<i>154 dated 20.11.1996</i>	
<i>Add.: Cost of Construction allowed in Assessment order</i>	<i>Rs. 39,77,89,584/-</i>
<i>Cost of Construction allowed u/s. 154 dated 29.3.1996</i>	<u><i>Rs. 6,93,09,633</i></u>
	<i>Rs. 49,33,50,998/-</i>
<i>Less. Income added in Assessment order</i>	<u><i>Rs. 50,92,47,221/-</i></u>
	<i>Rs. 1,58,96,223/-</i>
 <i>Add. ; Business Income being premium/ Salami from</i>	
<i>Centre-I as held by the Hon'ble Bombay High Court,</i>	
<i>vide Para No. 81 on page 81,</i>	<u><i>Rs. 50,92,47,221/-</i></u>
	<i>Rs.49,33,50,998/-</i>
<i>Less: Depreciation as per Note.</i>	<u><i>Rs. 8,02,39,229/-</i></u>
<i>Total Income</i>	<i>Rs.41,31,11,769/-</i>

14. Before the Ld. CIT(A), it was pleaded by the assessee that the cost of construction was neither the issue before the Tribunal nor before the Hon'ble High Court. In fact, the cost of construction was never disallowed by the AO either in the assessment order or in the order of Ld. CIT(A). It was also submitted that the ductibility of cost

construction was reopened u/s 147 which matter has reach to the Tribunal and the Tribunal held that deductibility of cost of construction of property was never an issue before the Tribunal and admittedly no ground of appeal on this issue was preferred nor any argument on this issue was raised from either side. The Tribunal therefore held that reopening is invalid and the question of cost of construction of property would have disallowed by the AO and Ld. CIT(A), therefore matter has attained finality.

15. Against the said order of the Tribunal, revenue had again preferred the appeal before Hon'ble High Court which was already stand dismissed vide order dated 12th June 2007. Thus it was pleaded that the Assessing Officer could not travel beyond jurisdiction and judgment of Hon'ble High Court. The Assessing Officer could not have interfered into the computation done by the Assessing Officer and accepted by Ld. CIT(A) and which was not an issue before the Tribunal or Hon'ble High Court of Bombay. The issue of cost of construction was never in dispute and was not a question before Tribunal or in a reference application 78 of 1998 before Hon'ble High Court Bombay, and had reached the finality as

Department had accepted the position throughout. The Department had accepted the position and there was no appeal or cross objection made by Department on the issue of cost of construction which has reached finality.

16. Ld. CIT(A) has captured all these facts in his order and held that since the question of cost of construction was never an issue before the Tribunal or the Hon'ble High Court and the reopening u/s 147 and the same vary issue has been dismissed. Therefore question of additional cost of construction cannot be taken into account in computing the total income in order giving effect to order of Hon'ble High Court. For the sake of ready reference, his findings is reproduced below:-

5.4.1 All these grounds basically deal with the issue of addition of cost of construction. The A.R. has submitted that there is no dispute with regard to the cost of construction which was not an issue before the lower authorities or even before the Hon'ble High Court. It was pointed out that the issue of cost of construction was not a question of law or an issue which was raised in Reference Application No. 78 of 1998. It was also pointed out that various questions of law referred to the Hon'ble Bombay High Court did not take into consideration the issue of cost of construction. It was

further pointed out that the department had not filed any cross appeal/ cross objection before the Hon'ble High Court. Thus the question of cost of construction was not an issue and hence in the order giving effect to bring cost of construction was outside the purview and jurisdiction of the A.O. That the A.O. had travelled beyond the scope of the order of the Hon'ble High Court.

5.4.2 It was argued before me that the very same issue of "cost of construction" was sought to be reopened by notice u/s 148. In this connection, attention was invited to the order of the Tribunal for Assessment years 1989-90 to 1992-93.

5.4.3 In the order of the Tribunal dated 12th August, 2002, the Mumbai Tribunal D Bench in the first place recorded the reasons for re-opening which pertained to cost of construction. It was argued in Para 2 page 3 of the Tribunal's order that "...that the cost of construction was not at all an issue before the Tribunal and there were no grounds of appeal relating thereto. No arguments from either side of the revenue or the assessee were made on this issue before the Tribunal... there is no question of any finding /direction of the tribunal. He argued that the cost of construction was never disallowed by the Assessing Officer / CIT (A), hence cannot be an issue in any of the years before the Tribunal."

5.4.4 The Tribunal in Para 6 of its order held,

"6. We have carefully considered the rival submissions. The deductibility of cost of construction of the property was never an

issue before the Tribunal and admittedly no ground of appeal on this issue was preferred and there were no arguments on this issue by either side. In fact the cost of construction of the property was not disallowed by the A.O. or the CIT (A) and therefore was not an issue before the Tribunal on which it can give its finding / direction, in any of the years. The issue before the Tribunal was whether the transaction is sale or lease and the Tribunal came out with a third proposition of sale of leasehold right of use of space. This third proposition of the Tribunal i.e. sale of leasehold right of use of space is contained in Para 7.32 of Tribunal order dated 29/3/96 was not accepted by the Hon'ble High Court as a legal concept. In our considered opinion the observation of the Tribunal regarding the deductibility of the cost of construction of the property being not an issue or a ground before it, cannot be said to be a finding or a direction by the Tribunal. In this view of the matter, since the observation of the Tribunal as contained in Para 7.32 of its order dated 29/3/96 are not a direction or a finding, the only logical conclusion is that the provision of Section 150 (1) cannot be applied. Any observation of the Appellate Court on the subject matter which is not an issue or ground before it, cannot be termed as a direction or a finding by the Appellate Court and cannot arm the revenue to invoke the provision of Section 150 (1) of the Act to reopening the completed assessment.

7. In view of our decision in this regard that observation of the Tribunal in Para 7. 32 in its order dated 29/3/96 are neither direction nor finding and accordingly the provision of Section 150 (1) could not be invoked and therefore the reopening of the assessment in this case is invalid. Since we have decided the case on the legal ground of legality of the re-assessment proceedings, and have found the reassessment proceedings as bad in law, we do not consider it necessary to decide other grounds of the appeal preferred by the assesses."

5.4.5 Thus the issue of cost of construction in reopening assessment was dismissed by the Tribunal. It was pointed out that the department had filed an appeal against the said order and had taken out notice of motion no. 1517 of 2004 in Income Tax Appeal (L)-510 of 2004 along with other notice of motion for four (4) years. By order dated 12th June, 2007, the Bombay High Court had dismissed the department's appeal on the ground that there was gross delay. The court in Para 2 observed as follows:

"There is thus gross delay in filing the appeals and the delay has not been explained properly. We have been repeatedly pointing out to the department in a number of matters that the delay ought to be explained properly. However the Department has not explained the delay in a proper manner."

5.4.6 The A.R. pointed out that the issue of cost of construction had thus reached finality. In the written submissions filed before me, the following points were pointed out:

In the order giving effect the main dispute is that the cost of construction which was originally allowed.

1. Cost of construction allowed in Assessment order Rs.39,77,89,584/-

2. Cost of construction allowed under Section 154

dated 29.3.1996

Rs. 6,93,09,633/-

Total: Rs.46,70,99,217/-

5.4.7 In this connection it may be noted that:

i. In Income Tax reference 78 of 1998, 8 questions of law was referred to the Hon'ble High Court Bombay, pursuant thereto a remand report was called for the main issue before the Hon'ble High Court is on the nature of the amount received as advance rent/lease rent and whether the same is to be spread over for 60 years which is the period of lease.

ii. The Hon'ble High Court Bombay by its order dated 25.10.2012 in Para 109 of page 107 summed up the position as under –

iii. "Thus, after the remand report, we are left with the situation where the tribunal has held not only that the transactions constituted the assessee's business, but that the consideration received by the assessee in respect thereof are

chargeable to tax under the head "Profits and gains of Business or profession ".

iv. There is no dispute with regard to the cost of construction which was not an issue before the lower authority or before the Hon'ble High Court. The issue of cost of construction was neither a question of law nor an issue nor argued nor even agitated by the Department in cross appeal/cross objections.

v. The question of Cost of Construction was not before the Hon'ble High Court Bombay, nor did the High Court deliberate on the issue on the cost of construction.

vi. This position is amply made clear when the department by reopening sought to disturb the settled issue of Cost of construction allowed by the Assessing Officer.

vii. The tribunal by its order dated 12.08.2002 made it very clear that the deductibility of cost of Construction of the property was never a issues before the tribunal and the tribunal observed that cost of construction of the property was not disallowed by Assessing officer or Commissioner of Income Tax (Appeal) and was not an issue at all before the tribunal.

viii. For sake of ready - reference Para 6 of tribunal order is quoted below:

ix "the deductibility of cost of construction of the property was never an issue before the Tribunal and admittedly no ground of

appeal on this issue was preferred and there were no arguments on this issue by either side. In fact the cost of construction of property was not disallowed by Assessing Officer or Commissioner of Income Tax (Appeal) and therefore, was not issue before the tribunal on which it can give its finding or direction in any of the years."

It may be pointed out that department filed appeal being Income Tax appeal (L) No. 510-513 of 2004 before the Hon'ble High Court Bombay.

xi. By its order dated 12.06.2007 the Division Bench of the Hon'ble High Court Bombay in the Notice of Motion taken out by the Department dismissed the notice of motion and consequently the Appeal of the Department was dismissed.

xii. It may be noted that the cost of construction therefore was never an issue before the Income tax authorities, tribunal and the Hon'ble High Court Bombay deciding the Reference 78 of 1998. In fact, the cost of construction was not disallowed by Assessing Officer or by the Commissioner of Income Tax (Appeal) and therefore was not an issue before the tribunal as the issue of cost of construction had reached finality. Hence in the reference application the question of cost of construction was not an issue at all nor had the department filled any cross objection of agitated the issue cost of construction at any stage.

xiii. This is the settled and correct position because in the order giving effect to the order of Hon'ble High Court dated 25.10.2012 the starting point has been correctly taken at Rs. 2,62,51,781/-. Hence the question of issue of cost of construction can not arise at all.

xiv. The correct computation for appeal giving effect to the order of the high court is that there would be a revised total loss of Rs.5,39,87,448/-.

5.4.8 It was also pointed out to me that in the order giving effect to the Court's order dated 25th October, 2012, the A.O. had taken total income of the assessee as per order u/s 154 dated 20th November, 1996 at Rs. 2,62,51,7817-.

5.4.9 It was pointed out that the computation was done as per Department's A.Y. 1989-90 and after rectification and after taking into account Tribunal's order dated 12th August, 2002. Thus it was argued that the issue of cost of construction is settled and the issue does not arise of adding back cost of construction.

5.4.10 I have gone through the order of the Hon'ble Bombay High Court dated 25th October, 2012 as well as the order of the High Court in notice of motion no. 910 of 2003 of ITR No. 78 of 1998 dated 21st March, 2003. It is correct that the question of cost of Construction was not before the Hon'ble Bombay High Court or even before the Tribunal. I have also gone through the order of the Tribunal dated 12th August, 2002 and the order of the High Court

dated 12th June, 2007 and it is a matter of fact that the reopening for the cost of construction was dismissed by the Tribunal as well as by the High Court.

5.4.11 In the light of the above, since the question of cost of construction was not an issue before the High Court or the Tribunal and as the reopening has been dismissed, I am of the view that the question of addition of cost of construction cannot be taken into account in computing total income in order giving effect to order of High Court. These grounds of appeal are, therefore, allowed.

17. Thus, Ld. CIT(A) has discussed the entire checkered history and the entire background and the relevant judgment rendered by the Tribunal as well as Hon'ble High Court.

18. After hearing both the parties and on perusal of the impugned order as well as material referred before us, the only issue for our limited consideration is, whether the AO was correct in law and on facts that while giving effect to the order of Hon'ble High Court to disallow the cost of construction of Rs. 46,17,99,217/- while computing the income of the assessee as business income. Ld. CIT-DR submitted that once the income is assessable business income and there is no question of cost of construction from the detail discussion of entire background of the case.

19. Here in this case, allowability or disallowability of cost of construction was never a subject matter of dispute either in the original order of assessment or before the Ld. CIT(A) or before the Tribunal at any point of time, the cost of construction was ever disallowed by the AO or by the Ld. CIT(A), even in the various question of law raised before the Hon'ble Bombay High Court. This was never an issue raised by the revenue or assessee before the Hon'ble High Court. Now, in the order giving effect, AO has tried to tinker with the cost of construction and disallowing the same while computing the income of the assessee. One very important fact is that, the same very issue of cost of construction was subject matter of reopening u/s 147 and this Tribunal vide order dated 12th August 2002 in ITA No. 5622 and 5623 for the AY 1989-90 and 1990-91 and also in AY 1992-93 held that the deductibility of cost of construction of the property was never an issue before the Tribunal and admittedly no ground of appeal on this issue was preferred or any argument was taken from either side. The only issue before the Tribunal was whether the transaction is sale or lease and the Tribunal had come out with 3rd proposition of sale of leasehold right

of use of space which was not accepted by the Hon'ble High Court as a legal concept. Thus, the Tribunal had already rejected this contention vide para 6 of the said order which has been reproduced in the aforesaid appellate order. Against the Tribunal order, the department has preferred the appeal which the Hon'ble Bombay High Court had dismissed on the ground that there was gross delay, thus this matter had attained finality.

20. Now the revenue is trying to rake up the same issue again when neither there is any direction by the Hon'ble High Court nor any discussion nor there was any issue of such allowability of reducing the cost of construction from the computation of income. In the order giving effect, the AO has certainly transgressed himself in taking up the issue and disallowing the same which already originally stood allowed and then specifically decided in reassessment proceedings u/s 148. Accordingly, we do not find any infirmity in the said order of Ld. CIT(A) which is in consonance with the order of Hon'ble Bombay High Court as well as Tribunal and particularly this appeal which is circumscribed to the order giving

effect by the Hon'ble High Court wherein there was no such issue.

Accordingly, the grounds raised by the revenue are dismissed.

21. Similarly, the other appeal for AY 2009-10 are also dismissed on the same reasoning.

22. In the net result, both the appeals filed by the revenue are **dismissed.**

Orders pronounced in the open court on 19th July, 2022.

Sd/-
(S. Rifaur Rahman)
Accountant Member

Sd/-
(Amit Shukla)
Judicial Member

मुंबई Mumbai;दिनांक Dated : 19/07/2022
Sr.PS. Dhananjay

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./ Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai