

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

**BEFORE SHRI ABY T. VARKEY, JM AND SHRI OM PRAKASH KANT, AM**

आयकर अपील सं/ I.T.A. No.2506/Mum/2021

(निर्धारण वर्ष / Assessment Year: 2016-17)

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| ACIT, Central Circle-4(2)<br>Room No.1918, 19 <sup>th</sup> Floor,<br>Air India Building, Nariman<br>Point, Mumbai-400021. | <b>बनाम /</b><br>Vs. | Gigaplex Extate Pvt. Ltd.<br>Plot No. C-30, G Block,<br>Opp. SIDBI, Bandra<br>Kurla Complex, Bandra<br>(E), Mumbai-400051. |
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आयकर अपील सं/ I.T.A. No.1181/Mum/2022

(निर्धारण वर्ष / Assessment Year: 2017-18)

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| DCIT, Central Circle-4(2)<br>Room No. 1918, 19 <sup>th</sup> Floor,<br>Air India Building, Nariman<br>Point, Mumbai-400021. | <b>बनाम /</b><br>Vs. | Gigaplex Extate Pvt. Ltd.<br>Plot No. C-30, G Block,<br>Opp. SIDBI, Bandra<br>Kurla Complex, Bandra<br>(E), Mumbai-400051. |
| <b>स्थायी लेखा सं. /जीआइआर सं. /PAN/GIR No. : AAACB1508R</b>  |                      |  |
| (अपीलार्थी /Appellant)  | ..                   | (प्रत्यर्थी / Respondent)  |

|              |                             |
|--------------|-----------------------------|
| Assessee by: | Shri Madhur Agrawal & Manan |
| Revenue by:  | Shri Kishore Dhule (DR)     |

सुनवाई की तारीख / Date of Hearing: 27/12/2022

घोषणा की तारीख /Date of Pronouncement: 31/01/2023

**आदेश / ORDER**

**PER ABY T. VARKEY, JM:**

These are appeals preferred by the revenue against the order of the Ld. CIT(A)-52, Mumbai dated 27.10.2021 for AY. 2016-17; and dated 11.11.2021 for AY. 2017-18.

2. Both sides agree that in both the appeals, the grounds of appeal raised are five (5) and both of them are similar grounds. Therefore, we take up the appeal of the revenue for AY. 2016-17, the decision of which will be followed for AY. 2017-18.



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**3.** The grounds of appeal of the revenue for AY. 2016-17 are as under: -

“1. “The Ld. CIT(A) erred in considering lease rentals income earned by the appellant as income y under the Profit or Gains from Business and Profession (PGBP) as against Income from House Property has claimed in its Return of Income filed u/s 139(1) of the Act.”

2. “The Ld. CIT(A) erred in not considering the decision held by the Hon’ble apex Court in CIT v. Sun Engineering Works (P) Ltd. and by the Hon’ble Bombay High Court in K. Sudhakar S. Shanbhag v. ITO with regard to the fact that assessee can’t seek relief not claimed earlier during post search assessment and reassessment as per section 153A of the Act”.

3. “The Ld. CIT(A) erred in deleting the disallowance of interest expenses which was attributable to monies borrowed for making payment of Rs.100.80 Crores to M/s Om Metals Ltd. and M/s Wellwisher Construction & Finance Pvt. Ltd even when the payment of Rs.100.80 Crores did not qualify the provision of section 37(1) of the IT Act.”

4, “The Ld. CIT(A) erred in holding the payment of Rs.100.80 Cr. to M/s OM Metal Pvt. Ltd. and M/s Well Wisher Construction and Finance Pvt. Ltd. as genuine business expenditure without paying heed to the decision of Hon’ble Apex Court in the case of MC Dowell and Co. Ltd. Vs CTO 154 ITR 148 even though the excess amount refunded and received is nothing but colorable transactions which results to manipulation”.

5. “The Ld. CIT(A) erred in partly allowing the appeal of the assessee on the additional ground of depreciation on assets without considering the fact that in reassessment proceedings, an



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assessee can neither claim nor be allowed a deduction that was not claimed in the original return, as such the assessment proceedings initiated on the basis of an action under section 132 of the Act also cannot be utilized by the assessee to seek relief not claimed earlier.”

4. Ground no. 1, 2 and 5 are inter-connected and therefore are taken up together. By raising the aforesaid grounds, the revenue has challenged the action of the Ld. CIT(A) considering the lease rental income earned by the assessee as “*income from business*” as against the action of the AO who included the same under the head “*income from house property*”. And the revenue is also challenging the action of the Ld. CIT(A) allowing depreciation on the assets to the assessee, consequent to his aforesaid action.

5. Brief facts of the case are that the assessee is a company engaged in the business of real estate development; and in the year under consideration it was involved in development and maintenance of Industrial Parks situated in the Special Economic Zones (in short “SEZs”); and the assessee had filed return of income u/s 139(1) of the Income Tax Act, 1961 (hereinafter “the Act”) dated 30.11.2016 declaring loss of Rs.26,30,15,329/-. It also reflected book profit at loss of Rs. (-) 15,24,08,629/-. Later, the case of the assessee was selected for scrutiny proceedings. While assessment was pending before the AO (for both AY. 2016-17 and AY. 2017-18) search action u/s 132 of the Act was carried out on 30.11.2017 [*resulting in abatement of the*



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*assessment proceedings as per the 2<sup>nd</sup> proviso to Section 153A of the Act*]. Since search action was initiated against the assessee, the AO issued u/s 153A of the Act wherein the assessee declared total loss of Rs.(-)25,32,42,137/- which AO noted was significantly higher than the original returned loss of income. The AO taking note of the fact that the assessee has claimed lesser loss in the return filed u/s 153A of the Act vis-à-vis the loss shown in the original return filed before search action, asked the assessee to explain why it has done so ? Pursuant to which, the assessee submitted that the lesser loss was on account of change in offering of lease rentals. It was clarified that in the return furnished u/s 139(1) of the Act, the lease rentals were offered under the head “*Income from House Property*” whereas in the return of income furnished u/s 153A of the Act, these lease rentals were offered under the head “*Profits and Gains from Business or Profession*”. The assessee submitted that the said change of course was adopted pursuant to the CBDT Circular 16/2017 which clarified that the lease rentals derived by entities in SEZ/Industrial Park should be taxed under the head “*Profits and Gains from Business or Profession*”. The AO did not agree with the assessee since the lease rentals for AY. 2014-15 & AY. 2015-16 in the case of assessee has been considered under the head “*income from house property*” and therefore, following the principles of consistency, he did not accept the claim of the assessee. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to allow the same by holding as under: -

“7.2 From the chart provided by the assessee, it is noted that the investment assets or the value of assets generating lease rental



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have come into existence in FY. 2013-14, the value of total assets being Rs 114 crore, predominantly in form of buildings but some plant and machinery and furniture which have been leased out to various manufacturing entities / software companies in SEZ area. It is also noted that since the income in respect of these assets was being offered as income from house property, these asset are appearing in the books of the appellant at their cost price and not depreciated price no depreciation is allowed on these items. It is the submission of the assessee that in the first year of the income being taxed under the head 'PGBP', this cost price should be adopted as the opening value of assets on which depreciation is required to be availed by the assessee.

7.3 It is the claim of the assessee that the assessee has filed a return u/s 153A of the Act for AY 2014-15 and AY 15-16 wherein the income, which had been shown under the head 'Income from House property' in the original return, has been offered under the head 'PGBP' and accordingly, depreciation at specified rates has been claimed in these years. Accordingly, the depreciation for the AY 2016-17 has been claimed on the written down value of the assets. The assessee claims that if the revised claim of the assessee in AY 2014-15 and AY 2015-16 is allowed, then this additional ground becomes infructuous. However, if the revised claim of the assessee in the two preceding years are not allowed, the opening value of the assets for the purpose of claiming depreciation should be adopted at the original cost of assets and not the written down value of such assets as computed in the revised return filed by the assessee.

7.4 The claim of the assessee has been it is noted that the appeals for AY 2014-15 and AY 2015-16 have been already



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decided by dismissing the ground taken in these returns filed u/s 153A of the Act. Also as held above, the claim of the assessee with respect to the revised return has been allowed. In this appeal, as such it is required to be held that this is the first year in which the depreciation claim can be taken by the assessee. Hence, if this happens to be the first year in which the lease rentals are being taxed as income from business and profession, the original cost of assets will have to be taken as the value on which depreciation will have to be allowed.

7.5 The assessee's contention that the deduction given statutorily from income from house property does not include a deemed deduction of depreciation is found acceptable for two reasons. It is noted that the statutory deduction under income from house property is with reference to the rent received and not the cost of asset which has been leased. The cost of asset in the balance sheet does not change with each year of rental receipt. Even when the asset is sold after certain years, the cost of asset for computing capital gains is the original cost of the asset and not the depreciated value of the asset. Hence, in such a circumstances, it is required to be held that the cost of asset does not depreciate when the income from such asset is being offered under the head 'House Property'. It is only when the asset becomes a business asset and the income is being shown as income from business and profession, the depreciation is allowed to the assessee and the value of asset gets altered every year based on the depreciation claimed. When the asset is sold, the assessee is allowed relief only to the extent of remaining depreciated value.

7.6 Under the circumstances, it is to be held that if this is the first year in which the income from lease rentals is being offered



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to tax under the head 'PGBP', then the original cost of the asset will have to be adopted for computing the profit arising out of this business income. The AO is directed accordingly. However, the claim of the assessee will not be found tenable if the assessee has contested the decision of CIT(A) in further appeal before higher judicial authorities in which case, the written down value, as arrived by the assessee in its return of income, shall be adopted by the AO for computation purpose."

6. Aggrieved by the aforesaid action of the Ld. CIT(A), the revenue is before us.

7. We have heard both the parties and perused the records. At the outset, the Ld. AR of the assessee brought to our notice that this issue is no longer res-integra. According to the Ld. AR, during the search operation on 30.11.2017, the assessee's sister concern namely viz M/s. Mind space Business Park Pvt. Ltd. was also searched and pursuant to which the assessment proceedings u/s 153A of the Act, was also initiated against that assessee (M/s. Mindspace Business Park Pvt. Ltd. for AY. 2015-16 & AY. 2016-17) and like in the present assessee's case on the date of search these assessment years were abated assessments; and that assessee (M/s. Mindspace) was also letting out premises situated at SEZs and offering the rental income under the head "house property" and pursuant to the notice u/s 153A of the Act while filing the return of income had claimed the rental income under the head "Income from Business and Profession". The AO did not accept the claim made by the assessee by changing the head of income and assessed it under the income from "house property" as similarly



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done in the present assessee's case. This action of AO was challenged before the Ld. CIT(A) in (M/s. Mindspace case) wherein the Ld. CIT(A) taking note of the CBDT Circular No. 16/2017 dated 25.04.2017 which clarified that the income arising from letting out of premises/developed space along with amenities in an Industrial Park/SEZ need to be charged to tax under head "*Profit and Gains from Business*", was pleased to allow the claim of that assessee. Aggrieved, the revenue preferred an appeal before this Tribunal and the Tribunal upheld the action of Ld. CIT(A) by passing the order in M/s. Mindspace Business Park Pvt. Ltd (ITA. No.433 & 434/Mum/2022 for AY. 2015-16 and AY. 2016-17) dated 29.08.2022. We note that similar grounds were raised by the revenue as raised before us in these appeals and the Tribunal while upholding the action of Ld. CIT(A) held as under: -

“12. Aggrieved by the above order of Ld.CIT(A), Revenue preferred appeal before us raising following common grounds in its appeals. Grounds raised for the A.Y. 201516 are reproduced below: -

- “1. The Ld. CIT(A) erred in considering lease rentals income earned by the appellant as income under the Profit or Gains from Business and Profession (Profit and Gain from Business and Profession) as against Income from House Property as claimed in its Return of Income filed u/s 139(1) of the Act.
2. The Ld. CIT(A) erred in not considering the decision held by Hon'ble Apex Court in CIT v. Sun Engineering Works (P) Ltd. and by the Hon'ble Bombay High Court in



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K. Sudhakar S. Shanbhag v, ITO with regard to the fact that assessee can't seek relief not claimed earlier during post search assessment as per section 153A of the Act.

3. The Ld. CIT(A) erred in partly allowing the appeal of the assessee on the ground of depreciation on assets without considering the fact that in post search assessment proceedings, an assessee can neither claim nor be allowed a deduction that was not claimed in the original return."

13. At the time of hearing Ld DR brought to our notice the findings of assessing officer and submitted that the assessee cannot the change the head of income for the lease rentals earned under the head income from Business and Profession while filing the return of income u/s 153A instead of income under the head House Properties as declared in the original return of income filed u/s 139 of the Act. He submitted that the Ld CIT(A) while adjudicating failed to consider the decision of Hon'ble Supreme Court in the case of Sun Engineering Works (P) Ltd (supra) and Hon'ble Bombay High Court decision in the case of K Sudhakar S Shanbhag (supra). Similarly, he submitted that the assessee cannot claim or allowed to claim the depreciation of assets that was not claimed originally in the return of income in the subsequent proceedings u/s.153A of the Act. Therefore, he vehemently supported the findings of assessing officer.

14. Ld. Counsel for the assessee reiterated the submissions made before the Ld.CIT(A). Ld. AR submitted that the years under consideration i.e A.Y. 2015-16 and A.Y. 2016-17 represent abated years. He submitted the below chart with the relevant dates:

| Particulars                          | AY. 2015-16 | AY. 2016-17 |
|--------------------------------------|-------------|-------------|
| Original return under section 139(1) | 28.11.2015  | 30.11.2016  |



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| Revised return under section 139(5)    | 22.03.2016 | 28.03.2018 |
| Notice under section 143(2) of the Act | 15.04.2016 | 29.07.2017 |
| Date of search                         | 30.11.2017 |            |
| Notice under section 153A              | 01.08.2018 | 01.08.2018 |

15. Ld AR submitted that from the above table, it can be concluded that during the years under consideration, proceedings under section 143(3) of the Act were initiated but the same were never completed on account of search action under section 132 of the Act. Accordingly, the years under consideration represents abated years. Ld. AR of the assessee submitted that the said fact was also acknowledged by the Assessing Officer in the assessment orders for A.Y.2015-16 and A.Y.2016-17.

16. With respect to the legal position, Ld. AR placed reliance on the judgement of Hon'ble Bombay High Court in the case of Commissioner of Income Tax v. B.G. Shirke Construction Technology P. Ltd [(2017) 395 ITR 371 (Bom)], wherein, it was held that in case of an abated assessment year, once the return is filed under section 153A of the Act, the return filed under section 139 of the Act is replaced by it and the entire assessment proceedings will be conducted by the revenue considering the return filed under section 153A of the Act only. Accordingly, all the provisions which are applicable to the return filed under regular course will be applicable to the return filed under section 153A of the Act.

17. Further, Ld AR brought to our notice the decision of Hon'ble Bombay High Court in case of Pr.CIT v. JSW Steel Limited [(2020) 422 ITR 71 (Bom)], wherein, Hon'ble Bombay High Court revisited the issue as to whether in case of an abated year, the assessee is allowed to raise fresh claim, which was not raised in the original return of income. While adjudicating the matter,



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Hon'ble Bombay High Court held that in accordance with second proviso to section 153A of the Act, once the assessment got abated, it is open for both assessee and revenue to make claims for allowance or disallowances as the case maybe. It has been held that once the assessment gets abated, the original return loses its originality and the subsequent return filed under section 153A of the Act takes place of the original return. Accordingly, all the legitimate claims would be open to the assessee to raise in the return filed under section 153A (1) of the Act.

18. Further, in respect of the judgment of Hon'ble Apex Court in the case of CIT v. Sun Engineering Works Pvt Ltd relied by the department as mentioned in Ground No. 2 of grounds of appeal, Ld AR submitted that the said decision was relied by the department before the Hon'ble Bombay High Court in the case of CIT v. B.G. Shirke Construction Technology P. Ltd [(2017) 395 ITR 371 (Bom)]. While adjudicating the matter, the Hon'ble Bombay High Court has held that the department has misplaced its reliance, as the judgement of Hon'ble Apex Court in Sun Engineering was restricted to the order passed under section 147/148 of the Act only.

19. Ld. AR further submitted that although, the department has not challenged the merits of the case but for the sake of completeness it is submitted that the merits are covered by the CBDT Circular No.16/2017 dated 25.04.2017. In the instant circular, it has been clarified that the income arising from letting out of premises/ developed space along with amenities in an Industrial Park/SEZ will be charged to tax under head "Profit and Gains from Business"



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20. Further, with respect to Ground No. 3, wherein the department has contested the Ld. CIT(A)'s jurisdiction in respect to the claim of depreciation, Ld AR submitted that once the years under consideration are held as "abated years", it becomes open for an assessee to make a fresh claim which needs to be considered on merits. Thus, the Ld.CIT(A) was well within his jurisdiction while allowing the assessee the claim of depreciation. However, he submitted that the said ground is consequential to the adjudication of the other grounds raised by the revenue.

21. Considered the rival submissions and material placed on record. We observe that the assessee is earning income from the let of out of the premises situated in the SEZs and offered to tax in the original return of income filed by the assessee under the head income from House property. However, subsequent to the Search, while filing the return u/s 153A, it changed the head of income to declare the income from let out of premises under the head Income from Business and Profession. This action of the assessee was rejected by the Assessing Officer that the assessee cannot claim new benefit in the revised proceedings u/s 153A of the Act. However, Ld CIT(A) decided the issue in favour of the assessee considering the fact on record that the assessment years under consideration are abated, therefore, the assessee can claim fresh or modified claim. After considering the submissions of both counsels, we observe that this issue is well settled and the Hon'ble Bombay High Court held in the case of B.G. Shirke Construction Technology P Ltd (supra) that in the case of abated assessments the return filed u/s 153A replaces the return filed u/s 139 of the Act, for the sake of clarity, it is reproduced below:  
"10. The reliance on the decision of the Apex Court in Sun



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Engineering Works (P.) Ltd. (supra) by the Revenue is misplaced. The above case dealt with re-opening of an assessment under Section 147 of the Act. It was in that context that the Apex Court observed that the Order passed under Section 147/148 and the Assessing Officer is primarily restricted to such income which has escaped assessment and does not permit reconsideration of issue which are concluded in the earlier assessment years in favour of the Revenue.

11. In the present facts for the subject assessment years it is an undisputed position that the pending assessment before the Assessing Officer consequent to return filed under Section 139(1) of the Act for the subject Assessment years had abated. This was on account of the search and as provided in second proviso to Section 153A(1) of the Act. The consequence of notice under Section 153A(1) of the Act is that assessee is required to furnish fresh return of income for each of the six assessment years in regard to which a notice has been issued. It is this return which is filed consequent to the notice which would be subject of assessment by the Revenue for the first time in the case of abated assessment proceedings. Consequent to notice under Section 153A of the Act the earlier return filed for the purpose of assessment which is pending, would be treated as non est in law. Further, Section 153A(1) of the Act itself provides on filing of the return consequent to notice, the provision of the Act will apply to the return of income so filed. Consequently, the return filed under Section 153A(1) of the Act is a return furnished under Section 139 of the Act. Consequently, the assessee-assessee is being assessed in respect of abated assessment for the first time under the Act. Therefore the provisions of the Act which would be otherwise applicable



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in case of return filed in the regular course under Section 139(1) of the Act would also continue to apply in case of return filed under Section 153A of the Act and the case laws on the provision of the Act would equally apply."

22. We observe that similar view was expressed by Hon'ble Bombay High Court while adjudicating similar issues in the case of JSW Steel Ltd (supra) and held as under: -

"13. In the present case, search was conducted on the assessee on 30-11-2010. At that point of time assessment in the case of assessee for the assessment year 2008-09 was pending scrutiny since notice under section 143(2) of the Act was issued and assessment was not completed. Therefore, in view of the second proviso to section 153A of the said Act, once assessment got abated, it meant that it was open for both the parties, i.e. the assessee as well as revenue to make claims for allowance or to make disallowance, as the case may be, etc. That apart, assessee could lodge a new claim for deduction etc. which remained to be claimed in his earlier/regular return of income. This is so because assessment was never made in the case of the assessee in such a situation. It is fortified that once the assessment gets abated, the original return which had been filed loses its originality and the subsequent return filed under section 153A of the said Act (which is in consequence to the search action under section 132) takes the place of the original return. In such a case, the return of income filed under section 153A(1) of the said Act, would be construed to be one filed under section 139(1) of the Act and the provisions of the said Act shall apply to the same accordingly. If that be the position, all legitimate claims would be open to the assessee to raise in the return of income filed under section 153A(1). 16. From the above we conclude that in



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view of the second proviso to section 153A(1) of the said Act, once assessment gets abated, it is open for the assessee to lodge a new claim in a proceeding under section 153A(1) which was not claimed in his regular return of income, because assessment was never made/finalised in the case of the assessee in such a situation."

23. With regard to submissions made by the Ld DR that the Ld CIT(A) has ignored the decision of Sun Engineering Works (P) Ltd decision, we observe that the Hon'ble Bombay High Court already considered the above decision in the case of B.G Shirke Construction (supra) in the Para No.10 of the decision (refer para no 22 above). It held that the stand of the revenue is misplaced as the issue is relating to the assessment u/s.147/148 of the Act, the same cannot be applied for the issue under consideration. Therefore, the submissions made by the Ld.DR are substantially answered.

24. Considering the above discussion, we are inclined to dismiss the grounds raised by the revenue in the appeal filed for the AY 2015-16. The issues raised in the appeal for the AY 2016-17 are mutandis mutatis, we are inclined to dismiss the grounds raised in that appeal as well.

25. In the result, appeals filed by the Revenue are dismissed."

**8.** Moreover it has been brought to our notice that the revenue had challenged similar issue before the Hon'ble Bombay High Court in the case of CIT-II, Pune Vs. Magarpatta Township Development and Construction Co. Ltd., (ITA. No. 318 of 2015) wherein the Hon'ble High Court by order dated 19.11.2017 framed the relevant question of law as under: -



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“(b) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that income derived from letting out of the premises of the I. T. Park was to be assessed as ‘Business Income’ when the true character of the income derived is income from property?”

**9.** And the Hon’ble High Court noted as under: -

“4. Reg. Question No.2

(a) Mr. Tejveer Sing, learned Counsel appearing for the revenue states that he is not pressing this question in view of the CBDT Circular No. 16 of 2017 dated 25<sup>th</sup> April, 2017. The above circular has clarified that income arising from the letting out of the premises in an Industrial Park/SEZ, are to be charged under the head “Profits and gains of business” and not under the head “Income from House Property”. It further directs the department to withdraw/not press any appeal, filed, seeking to tax income from letting out of the premises in an Industrial Park under the head “income from house property”.

(b) In view of the above, as the question is not being pressed, no occasion to consider the same arises.”

**10.** Since the Ld. CIT-DR could not point out any change in facts or law, respectfully following the order of this Tribunal in assessee’s own case DCIT Vs. Mindspace Business Park Pvt. Ltd. (supra) and the Hon’ble Bombay High Court in the case of CIT-II Pune Vs. Magarpatta Township Development and Construction Co. Ltd. (supra), we uphold the action of the Ld. CIT(A) and dismiss the ground nos. 1 & 2 of the revenue; coming to ground no. 5, (depreciation on assets) . First of all, we note that assessee has not contested the



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direction/decision of Ld. CIT(A) on this issue by filing a cross-appeal/Co, so we have to examine the action of Ld. CT(A) in the light of the ground no. 5 raised by the revenue. Having gone through the ground against the action of Ld. CIT(A), we are of the opinion that since we upheld the action of Ld. CIT(A) allowing the assessee to change the *head* of income in an abated assessment year pursuant to a notice of AO u/s 153A of the Act, (ie. change of rental income from “*income from house property*” to ‘*income from business profession*’), the AO is directed to re-compute the depreciation claimed by the assessee treating AY. 2016-17 as the first year in which the claim has been made and for that adopt the original cost of asset for computing the profit arising out of this business. And the AO is directed to compute the depreciation claimed by the assessee in accordance to the law. And since there is no change in law or facts, the reasoning given (*supra*) for AY. 2016-17 will apply *mutatis mutandis* for AY. 2017-18.

**11.** Coming to the ground nos. 3 & 4 of the revenue, they are against the action of the Ld. CIT(A) deleting the disallowance of interest expenses which was attributable to borrowed fund for making payment of Rs.100.80 crores to M/s. Om Metals Ltd. and M/s. Well wisher Construction & Finance Pvt. Ltd. At the outset, the Ld. AR of the assessee brought to our notice that this issue also is no longer *res-integra*. And pointed out that assessee has received the funds in AY. 2006-07 and has been paying interest regularly to these entities from whom assessee has borrowed the loan. The Ld. CIT(A) has decided the issue in favour of the assessee by taking note of the decision of this Tribunal in assessee’s own case M/s Gigalplex Estate Pvt. Ltd. Vs.



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DCIT (ITA. No.1132, 1133 & 1137/Mum/2016 dated 10.11.2017 for AY. 2007-08, 2008-09 & 2006-07) wherein the Tribunal has held in favour of the assessee and allowed the claim of interest as revenue expenditure. The Ld. CIT(A) has taken note of the decision of the Tribunal (supra) wherein the Tribunal held that the transaction relating to the purchase of interest [*relinquished by both JV partners*] in the land by the assessee from its JV partners were genuine. And therefore, the interest incurred on the money borrowed for purchase of such interest in immovable property was a commercial/business exigency and has to be allowed to the assessee. And has taken note of the observation of the Tribunal as under: -

“6.1 Since was have decided the ground no.2 in favour of the assessee holding the transaction to be true on the ground that the same transaction which was treated as genuine in the hands of both the JB partners namely WW and OM, the same cannot be held to be non-genuine and sham in the hands of the assessee. In view of the said finding any interest which the assessee has incurred on the money borrowed has to be allowed to the assessee and accordingly we direct the AO to delete the disallowance.”

**12.** It is noted that the Ld. CIT(A) has allowed the interest expenditure by following the decision of Tribunal orders in Assessee's own case on this issue from AY. 2006-07 to AY. 2008-09; and he further noted the Tribunal orders Assessee's own case from AY. 2009-10 to AY. 2011-12; and moreover, the Ld. AR brought to our notice that this Tribunal has allowed this issue up to AY. 2015-16. Therefore, we confirm the action of the Ld. CIT(A) and dismiss the appeal of the



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revenue. Since there is no change of facts or law, the decision rendered in earlier years in assessee's own case will be applicable for both AY. 2016-17 and for AY. 2017-18. And therefore the revenue appeals of both AY. 2016-17 & AY. 2017-18 stands dismissed.

**13.** In the result, both the appeals of the revenue are dismissed.

Order pronounced in the open court on this 31/01/2023.

Sd/-

(OM PRAKASH KANT)  
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)  
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 31/01/2023.  
Vijay Pal Singh, (Sr. PS)

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai