

आयकर अपीलीय अधिकरण, हैदराबाद पीठ में
IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B", HYDERABAD

BEFORE
SHRI RAMA KANTA PANDA, ACCOUNTANT MEMBER
&
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER

आ.अपी.सं / ITA Nos.	निर्धारण वर्ष / A.Y.	अपीलार्थी / Appellant	प्रत्यर्थी / Respondent
2284/Hyd/2018	2011-12	M/s. Highend Properties Pvt. Ltd., Hyderabad [PAN: AABCH7130G]	Deputy Commissioner of Income Tax, Circle-2(2), Hyderabad
2285/Hyd/2018	2012-13		Income Tax Officer, Ward-2(3), Hyderabad
2286/Hyd/2018	2013-14		Assistant Commissioner of Income Tax, Circle-2(2), Hyderabad
2287/Hyd/2018	2014-15		Deputy Commissioner of Income Tax, Circle-2(2), Hyderabad

निर्धारिती द्वारा/Assessee by: Shri A.V. Raghuram, AR
राजस्व द्वारा/Revenue by: Shri Kumar Aditya, DR

सुनवाई की तारीख/Date of hearing: 21/02/2023
घोषणा की तारीख/Pronouncement on: 29/03/2023

आदेश / ORDER

PER K. NARASIMHA CHARY, JM:

Aggrieved by the orders passed by the learned Commissioner of Income Tax (Appeals)-Guntur & Hyderabad ("Ld. CIT(A)"), in the case of M/s. Highend Properties Pvt. Ltd., ("the assessee") for the assessment years 2011-12, 2012-13, 2013-14 & 2014-15, assessee preferred these

appeals. For the sake of convenience, we dispose-of these appeals by this common order.

2. Assessee is a private limited company incorporated on 8/6/2006 and has been in the business of real estate. A detailed account of the business of the assessee is necessary in this matter. According to their Memorandum of Association, the main object of the assessee is to carry on the business of real estate, builders, developers, promoters, architects, supervisors, contractors, consultants, dealers, and agents for real estate including development of townships and the sale of plots. It is further stated therein that the business of the assessee is to purchase, sell, develop, take in exchange, or on lease, hire or otherwise acquire, whether for investment for sale, or working in same, any real or personal estate including lands, buildings, houses, easement or interest in or with respect to any property or whatsoever for the purpose of the company in consideration gross sum or rent or partly in one way and partly in the other way or for any other consideration and to carry on the business of real estate's dealers, estate owners, undertaken construction activities and development of housing plots, suits and projects, design, build, operate, own and manage software technology parks, malls, entertainment parks, theme parks, integrated townships including construction of apartments, houses, housing colonies and commercial complexes and industrial estates, export processing zones, special economic zones and the business zones.

3. According to the assessee, in pursuance of the above objects, it raised funds of Rs. 34.21 crores by availing loan of Rs. 26.72 crores from NSL Estates Pvt. Ltd., and by way of rental security deposit and a sum of Rs. 7.49 crores. It purchased a commercial property by name "Embassy Building" admeasuring 97,232 square feet in Bangalore for a consideration of Rs. 34.21 crores. Subsequently, by availing a loan to the tune of Rs. 30 crores from India Bulls Financial Services Ltd., the assessee repaid the existing loan of SBI and SBM. A balance of Rs. 8.4 crores was utilised for

acquiring another commercial property at Hyderabad, which the assessee could not acquire subsequently.

4. The assessee let out the property at Bangalore. For the assessment years 2011-12 to 2014-15 the assessee initially offered the said income of lease rentals under the head "Income From House Property" (IFHP), but realizing that there is a mistake, started taking the plea before the learned CIT(A) to the effect that the income from the lease rentals is taxable under the head "Profits and Gains from Business or Profession" (PGBP). Learned CIT(A), however, rejected such a plea of the assessee holding that there is no such object in the Memorandum of Association of the assessee. The contention of the assessee that the lease rentals derived by the assessee from the property at Bangalore has to be taxed as PGBP is the common issue in all these four appeals.

5. Learned Assessing Officer did not accept the contention of the assessee that with the incorporation itself, the assessee shall be deemed to have commenced the business and returned a finding that the assessee had not commenced the business. On this premise learned Assessing Officer did not allow to carry forward the business loss, a part of interest and also the processing fee.

6. In appeal, learned CIT(A) held that deriving rental income is not a part of the business of the assessee, and the assessee did not commence its business as per its objects under Memorandum of Association. In respect of the assessee making investment of Rs. 8.40 crores out of Rs. 30 crores loan contracted by them from India Bulls Financial Services Ltd., learned CIT(A) directed the learned Assessing Officer to restrict the disallowance on the premise that the processing fee in the form of interest has to be allowed to the extent the loans were utilised for repayment of the debt incurred in relation to the acquisition of property from which rental income was accrued to the assessee. Insofar as the interest added by the learned Assessing Officer is concerned, learned CIT(A) was of the

opinion that under section 24(b) of the Income Tax Act, 1961 (for short "the Act"), interest incurred in relation to the loan meant for acquisition of property can be deducted and since Rs. 8.40 crores was not meant for clearing the loans borrowed for acquiring the property yielding house property income and, therefore, the rest of the interest cannot be allowed.

7. Hence the assessee is in appeal before us. Learned AR argued that the ground relating to the disallowance of carry forward of losses, proportionate process fee and interest are dependent upon the basic questions as to whether the assessee commenced its business or not, and whether the income of the assessee from lease rentals is taxable under the head PGBP or IFHP. He submitted that though the assessee initially offered the rental income to tax under the head IFHP, subsequently realising the mistake and pursuant to the decision of the Hon'ble Apex Court in the case of Chennai Properties and Investments Ltd vs. CIT 373 ITR 673 (SC), he desires to offer the same under PGBP which is legal and proper. According to him, the activity of purchase of property whether for investment or for sale or "working in same" includes the activity of leasing out to derive income and, therefore, the decision of the Hon'ble Apex Court in the case of Chennai Properties and Investments Ltd., (supra) is applicable to the facts of the case.

8. He further submitted that under section 149 of the Companies Act, commencement of business will be applicable to public limited company which go for public issues and for other company, it is deemed that business is commenced soon after incorporation. He further submitted that the issue of commencement of business would arise only in the case of a manufacturing company which requires the setting up of plant and machinery before commencing operations whereas in this case for the commencement of business of the assessee, it is suffice that they are incorporated and they started purchasing and selling the property for the avowed objects. Learned AR further submitted that, whether or not the income from lease rentals is to be charged to tax under the head PGBP,

the fact remains that the advance made for purchase of property in Hyderabad is part of business of the assessee and, therefore, interest is allowable in respect of the advance made.

9. Per contra, it is the argument of the learned DR that the rental income of the building in Bangalore was claimed as 'Income from House Property' after claiming the standard deduction of 30% and the interest under section 24(b) of the Act, and since the objects in Memorandum of Association of the assessee do not include the leasing activity, the assessee was right in offering the rental income to tax under the head IFHP. He submits that in the absence of any object to cover the activity of leasing, the decision of the Hon'ble Apex Court in the case of Chennai Properties and Investments Ltd (supra) has no application to the facts of the case.

10. In respect of the disallowed portion of interest and loan processing fee against the other house property in Hyderabad, he submitted that such a property was not acquired during any of the assessment year is covered by these appeals, but only an advance amount was given, and, therefore, such portion of the processing fee and interest is not allowable because nothing materialised during all the four years involved in these appeals. According to him the assessee parked the loan amount at some place according to their convenience, only with an intention to claim deduction on the ground of commencement of business. According to the learned DR, a business is said to have been acquired only when it is made fit for business usage, until such time the interest has to be capitalised. He submitted that the decision of the Hon'ble Apex Court in the case of Chennai Properties and Investments Ltd., (supra) has no application to the facts of the case because the Memorandum of Association of the assessee does not spell out the activity of leasing and earning rental income as one of the objects of the assessee.

11. We have gone through the record in the light of the submissions made on either side. Though we have detailed the objects of the business

of the assessee as per the Memorandum of Association, we deem it necessary, for the sake of completeness, to extract the same hereunder.

“1. To carry on the business of Real Estate builders, developers, Promoters, Architects, Supervisors, Contractors/Consultants, dealers, and Agents for Real estate including development of townships and sale of plots.

2. To purchase, sell, develop, take in exchange, or on lease, hire or otherwise acquire, whether for investment for sale, or working in same, any real or personal estate including lands, buildings, houses, easement or interest in or with respect to any property or whatsoever for the purpose of the company in consideration gross sum or rent or partly in one way and partly in the other way or for any other consideration and to carry on the business of real estate’s dealers, estate owners, undertaken construction activities and development of housing plots, suits and projects, design, build, operate, own and manage software technology parks, malls, entertainment parks, theme parks, integrated townships including construction of apartments, houses, housing colonies and commercial complexes and industrial estates, export processing zones, special economic zones and the business zones.”

12. On a careful perusal of the above objects of the assessee as narrated in the Memorandum of associations, we find that there is no reference to the activity of letting out the property by the assessee is one of the objects. What all that is stated is that the assessee can acquire the property on lease, hire or otherwise. According to the learned AR, this leasing activity by the assessee is covered by the expression “working in same”. We find it difficult to agree with such a contention. Words have to be understood in the context of the other words in their company. When once acquiring by lease is a specific, in the same way we expect that letting out should also have been specifically mentioned. The assessee is aware of the activity of lease or hire, because that is specifically mentioned to have been included in the process of acquisition. In such situation, it is difficult to read something that is not to be found in the objects of the assessee and which cannot be inferred from the language employed

therein. It is not for the courts to give a meaning to an expression, which in fact was not intended by the parties.

13. We, therefore, hold that leasing out the property is not one of the objects of the business of assessee as could be culled out from the Memorandum of Association. Consequence is that the decision of the Hon'ble Apex Court in the case of Chennai Properties and Investments Ltd (supra) has no application to the facts of the case. We accordingly hold that the learned CIT(A) is right in rejecting the contention of the assessee and maintaining the chargeability of rental income under the head IFHP. Grounds relating to this issue are dismissed.

14. Coming to the issue relating to the commencement of business, there is no dispute that the assessee is a private limited company and was incorporated on 8/6/2006. Unlike a limited company, a private limited company is not required to obtain the certificate for commencement of business. A private limited company can start the business immediately after incorporation. Immediately after incorporation, the assessee had carried out several operations like raising loans and acquiring business assets and in that process the asset at Bangalore was acquired and an advance amount for acquiring the asset at Hyderabad was made. According to us, these transactions are part of the business of the assessee and there is no requirement of obtaining any commencement certificate in this case. Apart from this, the assessee incurred expenditure relating to printing and stationery, audit fee, filing fee, miscellaneous expenses etc., which according to the learned Assessing Officer are not specifically related to the business. Learned Assessing Officer further held that the Income from House Property cannot be equated to business income. We, however, are of the considered opinion that in commencement of business the assessee purchased the property and the rent is a by-product. We, therefore, accept the contention of the assessee that they have commenced their business.

15. In respect of the processing fee, the assessee incurred an expenditure to the tune of Rs. 1.08 crores towards processing fee for obtaining the fresh loan from India Bulls Financial Services Ltd., and the learned Assessing Officer disallowed this amount, but as observed by the learned CIT(A) he worked out the proportionate processing charges also. Before the learned CIT(A) the assessee argued that the processing fee as interest as per section 2(28A) of the Act and requested to allow the same because the attempt to purchase the property at Hyderabad is also a part of the business activity. Learned CIT(A) analysed the argument of the assessee in the light of the provisions of the Act and also the Board circulars and held that the processing fee is interest as per section 2(28A) of the Act. However, learned CIT(A) found that only that part of interest which is relatable to the amount of loan utilised for repayment of the debt incurred by the assessee in respect of the income earning property at Bangalore, alone is eligible for deduction. According to the learned AR, the remaining part of the processing fee is also eligible for deduction.

16. The other addition is the interest which the learned CIT(A) allowed in respect of the sum of Rs. 8.40 crores utilised for giving advance to purchase the property in Hyderabad. Such part of interest relatable to the amount utilised for repayment of the debt in respect of the Bangalore property was allowed under section 24(b) of the Act. According to the authorities there was no stock in trade or work in progress shown by the assessee, and, therefore, no business asset was acquired by the assessee during the assessment years covered by these appeals. In such situation, learned CIT(A) observed that at best the interest expenditure can be capitalised.

17. In the preceding paragraphs, we held that the assessee commenced its business. However, in order to claim any deduction towards interest or the processing fee in the nature of interest, the assessee must have acquired a business asset. There is no dispute that there is neither work in progress nor any stock in trade shown by the assessee in their books. Only

some advance was given for acquiring the property in Hyderabad. Giving advance for acquiring a property cannot be equated to the acquisition of the property. Acquisition of property for business purpose means such property must be available to the assessee to be dealt for its business purposes, namely, to carry on the business of real estate's dealers, estate owners etc. Unless and until the assessee purchased the property in Hyderabad, it cannot be said that they are in a possession to use such property for the purposes of carrying out their business.

18. We, therefore, are of the opinion that mere giving advance towards the property in Hyderabad will not entitle the assessee to deal with such property for the purposes of their business and, therefore, it cannot be said that the assessee acquired such property. Till the property is acquired by the assessee and ready for use for carrying out the business purposes, the interest or the processing fee in the nature of interest has to be capitalised and it cannot be claimed as deduction as 'revenue expenditure'. We, therefore, do not find anything illegality or irregularity in the findings of the learned CIT(A) and restricting the processing fee and the interest to the extent the borrowed amount was used for repayment of the debt is incurred to acquire the Bangalore property and to disallow the rest of it, holding that at best it can be capitalised.

19. In the result, all these appeals are accordingly allowed in part.

Order pronounced in the open court on this the 29th day of March, 2023.

Sd/-
(RAMA KANTA PANDA)
ACCOUNTANT MEMBER

Sd/-
(K. NARASIMHA CHARY)
JUDICIAL MEMBER

Hyderabad, Dated: 29/03/2023

TNMM

Copy forwarded to:

1. M/s. Highend Properties Pvt. Ltd., NSL Icon, 4th Floor, D.No. 8-2-684/2/A, Road No. 12, Banjara Hills, Hyderabad.
2. Deputy Commissioner of Income Tax, Circle-2(2), Hyderabad.
3. Asst. Commissioner of Income Tax, Circle-2(2), Hyderabad.
4. Income Tax Officer, Ward-2(3), Hyderabad.
5. Pr.CIT-2, Hyderabad.
6. DR, ITAT, Hyderabad.
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