

IN THE INCOME TAX APPELLATE TRIBUNAL DELHI
(DELHI BENCH 'F' : NEW DELHI)
BEFORE SH. SHAMIM YAHYA, ACCOUNTANT MEMBER
AND
SH. ANUBHAV SHARMA , JUDICIAL MEMBER
ITA No. 6879/Del/2018, A.Y. 2015-16

ACIT, Circle-20(2) New Delhi PAN : AAMCS2353K	Vs.	Rcube Projects Pvt. Ltd. Plot No. 3, Second Floor, Local Shopping Centre Block-B, Pocket-1, Vasant Kunj, New Delhi-110070
(APPELLANT)		(RESPONDENT)

Assessee by	Ms. Rolly Chaubay, CA
Revenue by	Sh. B.K.Singh, Sr. DR

Date of hearing:	03.04.2023
Date of Pronouncement:	12.04.2023

ORDER

PER SH. ANUBHAV SHARMA, JM.

The appeal has been filed by the Revenue against order dated 21.08.2018 passed in appeal no. 10238/229/CIT(A)-7/Del./2017-18 for assessment year 2015-16, by the Commissioner of Income Tax (Appeals)-7, New Delhi (hereinafter referred to as the First Appellate Authority or in short 'Ld. F.A.A.') in regard to the appeal before it arising out of assessment order dated 28.12.2017 u/s 143(3) of I.T. Act, 1961 (hereinafter referred to as 'the Act') passed by ACIT, Central Circle-20(2), New Delhi (hereinafter referred as Ld. Assessing officer or in short Ld. AO).

2. The facts of the case are that assessee company is engaged in the business of Real Estate development. The assessee filed return declaring loss which was taken up for scrutiny assessment. The assessee has filed his return of income declaring revenue of Rs. 4.41 cr. and other income of 25,917/- . The revenue from operation consists of the rental income in respect to premises lease out to Fedral Bank Ltd., AGS Transact Technologies Ltd. Prizm Payment services (P) Ltd. , Pustakkosh Textbook Rental, Barista Coffee Company Ltd. DHL Express (I) Pvt. Ltd., Devyani International ltd., Jubilant Foodworks Ltd., Bharti Retail Ltd. Jubilant Foodworks Ltd. (New Ashok Nagar), State Bank of India (New Ashok Nagar).

2.1 As per the MOU of the assessee with DMRC, assessee was entitled to have access to operate, manage and maintain the Licensed Space at the Specified Area during the License Period at the cost and risk of the License. So, Ld. AO was of the view that, for the total fixed assets of Rs.128.63 lacs include vehicles and rest of the assets is plant and machinery. The plant and machinery include air Conditioner, digital key telephone, Microwave and computer etc. Thus it is clear no investment with regard to addition in building etc. has been made by the assessee. Ld. AO also observed that the entire building and structure was received by the assessee from the DMRC. The assessee had license to lease out these assets. The license was for the period of 15 years from the date of handing over as per MOU. The assessee has shown its entire income including rental income as business income. Therefore, the assessee was asked to explain as to why the rental income shown in the P&L account may not be taken as income from house property in view of the provisions of section 269UA(f)(i) of the I.T. Act, 1961. The assessee filed its reply claiming that it is regular business of the assessee and it is consistently showing these rental receipt as income from business in earlier year also. The Ld. AO observed that the perusal of record show that the assessee had filed original return of income for A.Y. 2011-12 to 2014-15 declaring rental income as income from house

property. Subsequently the return were revised for A.Y. 2012-13, 2013-14 and 2014-15 and income of these years earlier shown under the head income from house property was declared as business income in the revised returns.

2.2 Ld. AO after taking into consideration the provisions of Section 269 U(f)(i) r.w.s. 53A of the transfer of property Act observed that :

“5.3 The assessee argued that it has made huge investment for construction. As per the balance sheet there has not been addition in fixed assets except vehicle and other small office equipment. Out of total block of fixed assets of Rs. 128.63 Lacs, vehicles constitute 1.24 lacs. Therefore the assessee submission that it has spent huge amount on construction is incorrect. Rest of the issues mentioned by the assessee regard maintenance is not relevant because the assessee can always claim back these expenses from the sub licensees.

5.4 The submission of the assessee has been duly considered and examined. The assessee submission is not acceptable for the following reasons. The provisions of section 269U(f)(i) read with section 53A of the transfer of property act clearly lay down the Principle that if the property is transfer under a lease for the period extending 12 years than it is covered under the definition of transfer. Further as per the provisions of section 27(iiib) a person who acquires any rights (excluding any rights by way of a lease from month to month or for a period not exceeding one year) in or with respect to any building or part thereof, by virtue of any such transaction as is referred to in clause of section 269UA. shall be deemed to be the owner of that building or part thereof; Since the case of the assessee covered under the provisions of section 27(iiib) and the assessee is deemed owner of the premises therefore the provisions of section 22 i.e. income from house property are clearly applicable in the case of the assessee. The rental income received by the assessee will be covered under the provisions of section 22 i.e. income from house property.

5.4.1 Further the TDS has also been made under section 194I i.e rent.

5.4.2 The assessee has asserted that the proposition laid down in CBDT Circular No.9/2014 is applicable to its case

and hence the revenue from its operations should be treated as business income following the principles laid down for infrastructure projects. The aforementioned circular does not assist the assessee as the circular is specifically with reference to roads and highways (and inter alia, laying of roads/bridges/highways/approach roads /culverts/ public amenities, etc.). The assessee's development of commercial space at a Metro station does not classify as an infrastructure project as envisaged by the circular. In view of the aforesaid discussion the income from lease rent received by the assessee is assessed as income from house property.

6. The Assessee has filed his return of income declaring revenue of Rs. 4,41,22,937/- and other income of 25,917/-. The revenue from operation consists of the rental income of Rs. 4,41,22,937/-. Thus the entire revenue from operation is lease rent. Since the entire revenue is from lease rent except a small portion i.e. Rs. 25,917/- from interest, therefore the expenses claimed the P&L Account under other heads are restricted to Rs.20,00,000/- for running the mandatory and statutory business operation of company, which would be allowable as business loss of the year to be set-off against income from house property. Onus to file correct and accurate particulars of income always lies on the assessee. In the current case, the assessee filed inaccurate particulars of income. Hence, I am satisfied to initiate penalty u/s 271(l)(c) are initiated separately for filing inaccurate particular of income.”

3. The Ld. CIT(A) however, followed the order in favour of the assessee for A.Y. 2014-15 and it will be relevant to reproduce the same :-

“3.2 It is noted that appeal was instituted on similar facts for the A. Y. 2014-15 which was decided by the CIT(Appeals)-38 vide order dated 31.10.2017 in Appeal No. 198/2017- 18/Old Appeal No. 10704/16-17 as under:

“3.2.1 The company was incorporated on Janurary 08,2008. The company is involved in carrying on business as builders, developers, contractors, estate agents, decorators, real estate promoters etc. and that of sale, purchase, constructing, building, erection, leasing, hiring of infrastructural/commercial/residential, complexes, buildings and lands. Activities of the appellant during the year under

consideration are in accordance with the objects stated in the memorandum of association. The appellant was awarded rights for development, construction, running and management of commercial spaces in the metro station complexes by the DMRC. During the year, the appellant company was developing and running two BOT projects as under:-

- a) *New Ashok Nagar, Mayur Vihar, Delhi*
- b) *Botanical Carden, Noida.*

The appellant company has to maintain a full team of Engineers, Administrators, Consultants and legal professionals to conduct his business activities and liaison with DMRC. This shows that it is not merely a leasing activity but a business venture.

Further, at the end of the concession period, the whole facility, along with the furniture and fixtures and all other assets permanently attached to the facility revert to DMRC at NIL cost. These activities show that the right to sub-lease the facility granted to the appellant by DMRC under the concession agreement is merely a means by which DMRC has permitted the appellant to recover and realise its consideration for the construction and development of the project facility and its infrastructural services machinery for DMRC. These contracts are being executed on BOT (Build Operate and Transfer) model under the PPP scheme for DMRC. This right to develop and operate the facility is acquired for a fixed term called the concession period. The appellant constructs and develops the space and infrastructural facilities, sub leases the space developed and maintains the space and infrastructural facilities which include common area maintenance, security, renovation, upkeep, fire safety, insurance, public conveniences etc. of the project facility. All these rights are however exercisable by the appellant strictly within the restricted framework of the concession agreement which provides for permissions and sanctions on a number activities. At the end of the concession period, the project facility, in running condition is to be handed back to DMRC at NIL cost. No money is given by DMRC for the development of the project facility.

Apart from the work of development of the project

facility and the provision and maintenance of the infrastructural services thereat, the appellant has to on a regular basis, liaise with DMRC and provide responses to queries pertaining to functioning, use, updation of licences, permissions, sanctions, reconciliations of utility charges recovered and payable to DMRC, inspection by DMRC officials etc. The appellant even has to maintain a legal team to respond to the objections and sanctions raised by DMRC which put the continuance of the concession agreements to question.

All the above show that the income of the appellant is not earned by the simple act of subleasing space acquired on a lease of more than 12 years, where income is earned merely by the act of leasing out the premises. The appellant has to perform many activities to complete all its obligations under the concession agreement before the sub-license fees earned by it can be claimed by it as its income. Moreover, the right to sub-license the premises is not retained merely by regularly paying the lease rent to DMRC. The right can be continued to be enjoyed only if the obligations under the concession agreement are met and restrictions in the agreement are complied with. Thus the appellant actually enjoys a restricted, rather than a complete right over the sub-leased premises, which is the case when sub-lease income is liable to be taxed as Income from House Property. From the facts listed above, it can be seen that the appellant is carrying out a business and earning business income as there are regular and systematic activities required to be carried out to earn this income. Apart from the work of development of the project facility and the provision and maintenance of the infrastructural services thereat, the appellant has to on a regular basis, liaise with DMRC and provide responses to queries pertaining to functioning, use, updation of licences, permissions, sanctions, reconciliations of utility charges recovered and payable to DMRC, inspection by DMRC officials etc. The appellant even has to maintain a legal team to respond to the objections and sanctions raised by DMRC which put the continuance of the concession agreements to question. From the facts listed above, it can be seen that the appellant is carrying out a business and earning

business income as there are regular and systematic activities required to be carried out to earn this income.

3.2.2 In the assessment order assessing officer while considering the submissions of assessee during the assessment proceedings has opined that the submissions of assessee regarding investment in both the projects on Build-On-Transfer (BOT) with DMRC for the two metro station properties, namely:-

- a) New Ashok Nagar, Mayur Vihar, Delhi*
- b) Botanical Carden, Noida.*

are covered by the provisions of section 269U(f)(i) read with section 53(A) of the Transfer of Property Act. Assessing officer has further held that as per the provisions of section 27(iii b) a person who acquires any rights (excluding any rights by way of a lease from month to month or for a period not exceeding one year) in or with respect to bay building or part thereof, by virtue of any such transaction as is referred to in clause (f) of section 269UA, shall be deemed be the owner of that building or part thereof. Assessing Officer has held that since the case of the assessee is covered under the provisions of section 27(iii b) and the assessee is deemed owner of the premises, therefore the provisions of section 22 i.e. income from house property are clearly applicable in the case of the assessee. The rental income received by the assessee will be covered under the provisions of section 22 i.e. income from house property.

3.2.3 I have carefully considered the submissions of appellant and the assessment order. The appellant has time and again reiterated that its income in accordance with the BOT contracts with DMRC are not in the nature of house property income; rather its business income which is covered by CBDT circular no.9/2014 dated 23.04.2014 in which the issue of treatment of expenditure incurred for development of roads and highways in Buitd-On-Transfer (BOT) agreements is dealt with. Relevant extracts of the above extracts is inter-alia as under:-

"It has come to the notice of the Board that disputes have arisen as to whether the expenditure incurred on development and construction of infrastructural

facilities like roads/highways on Build-Operate-Transfer (BOT) basis with right to collect toll is entitled for depreciation under section 32(l)(ii) of the Act or the same can be amortized by treating it as an allowable business expenditure under the relevant provisions of the Income -tax Act, 1961 ('Act).

2. In such projects, the developer (hereinafter referred to as 'assessee'), in terms of concessionaire agreement with Government or its agencies is required to construct, develop and maintain the infrastructural facility of roads/highways which, inter-alia, includes laying of roads, bridges, highways, approach roads, culverts, public amenities etc. at its own cost and its utilization thereof for a specified period. In lieu of consideration of the expenditure incurred on construction, operation and maintenance of the infrastructure facility covered by the period of the agreement, the assessee is accorded a right to collect toll form users of such facility. The expenditure incurred by such assessee on development and construction of such infrastructural facility are capitalized in the accounts. It is seen that in returns-of-income, assessees are generally claiming depreciation on such capitalized expenditure treating it as an 'intangible asset' in terms of section 32(l)(ii) of the Act while in assessments, such claims are being disallowed by the Assessing officer on the grounds that such infrastructural facility is not owned, wholly or partly, by the taxpayer which is an essential condition for claiming depreciation and further right to collect toll does not fall in any of the categories of 'intangible assets' specified in sub-cause(ii) of sub-section (1) of section 32 of the Act.

3. In BOT arrangements for development of roads/highways, as a matter of general practice, possession of land is handed over to the assessee by the Government/notified authority for the purposes of construction of the project without any actual transfer of ownership and such assessee has only a right to develop and maintain such asset. It also enjoys the benefits arising from use of asset through collection of Toll for a specified period without having actual ownership over such asset. Therefore, the rights in the

land remain vested with the Government or its agencies. Thus, as assessee does not hold any rights in the project except recovery of toll fee to recoup the expenditure incurred, it cannot therefore be treated as an owner of the property, either wholly or partly, for purposes of allowability of depreciation under section 32(1)(ii) of the Act. Thus, present provisions of the Act do not allow claim of depreciation on Toll ways due to non-fulfilment of ownership criteria in such cases.

5. In view of above, Central Board of Direct Taxes, in exercise of the powers conferred under section 119 of the Act hereby clarifies that the cost of construction on development of 'infrastructure facility of roads/highways under BOT projects may be amortized and claimed as allowable business expenditure under the Act.

6. The amortization allowable may be computed at the rate which ensures that the whole of the cost incurred in creation of infrastructure facility of road/highway is amortized evenly over the period of concessionaire agreement after excluding the time take for creation of such facility.

7. In the case where an assessee has claimed any deduction out of initial cost of development of infrastructure facility of roads/highways under BOT projects in earlier year, the total deduction so claimed for the Assessment Years prior to the Assessment Year under consideration may be deducted from the initial cost of infrastructure facility of roads/highways and the cost 'so reduced' shall be amortized equally over the remaining period of toll concessionaire agreement.

8. It is hereby clarified that this Circular is applicable only to those infrastructural projects for development of road/highways on BOT basis where ownership is not vested with the assessee under the concessionaire agreement."

3.2.4 In view of the fact that CBDT circular no. 9 of 2014 specifically mentions development of public amenities developed alongwith infrastructure projects developed on a BOT Model, which in the case of the appellant is construction of metro station and sub-lease receipts payable to appellant (concessionaire) by the

concessioning authority (DMRC), I hold that appellant is fully covered by CBDT circular no. 9 of 2014. Hence, addition of Rs.18769755/- by assessing officer under the head income from house property u/s 22 read with section 27(iib) is deleted. The Ld. Assessing officer has taxed the entire lease rent receipts of Rs.2,68,13,9357- as income from house property is against income from business as claimed by appellant. In view of the finding that the business activity of appellant is covered by circular no. 9 of 2014, assessing officer is directed to treat the lease rent as business income as claimed by appellant. Assessing officer is also directed to allow the claim of expenses u/s 37 of the Income Tax Act of Rs.1,85,36,430/-."

4. The Revenue is in appeal raising following grounds :-

(1) "Whether on the facts and under the circumstances of the case, the Learned CIT(A) has erred in law and facts in applying Circular No. 9/2014 by not considering the fact that the said circular deals with aspect of allowance of BOT (Build, Operate and Transfer) expenses u/s 32 or otherwise, which presupposes taxability of highway BOT projects under head profits and gain from Business & Profession.

(2) On the facts and under the circumstances of the case, the Learned CIT(A) has erred in law and facts in not appreciating the fact the assessee himself offered to tax invoice under head Income from House Property for 3 years and later on revised ITR and offered to tax income under head profits and gains from Business & Profession.

(3) On the facts and under the circumstances of the case, the Learned CIT(A) erred in law and facts in saying that restricted rights in subleased assets there will be restrictions on enjoyment of property by first owner always and interpreting as above will make section 27(iib) redundant and it will not be possible to apply the said section under any situation.

(4) The appellant craves to be allowed to add any fresh ground(s) of appeal and/or delete or amend any of the ground(s) of appeal."

5. Heard and perused the record.

6. It was submitted on behalf of the revenue by the Ld. DR that Ld. CIT(A) has fallen in error in not considering the fact that in the previous years, the assessee had filed return considering the income as house property income. It was submitted that Ld. AO had rightly examined the issue as the property was given to the assessee on lease and rental income was being derived. Ld. DR also submitted that Ld. CIT(A) has relied the findings for A.Y. 2014-15 but that order of Ld. CIT(A)-38 was challenged before the Tribunal however, due to tax effect that involved dismissed.

6.1 On the other hand Ld. AR submitted that leasing is one of the objects in the memorandum of association. It was submitted that in the A.Y. 2012-13 and 2013-14 the Ld. AO had accepted the income from the BOT projects as business income.

7. Giving thoughtful consideration to the facts, submissions and the controversy, it comes up that primarily the fact of assessee being a licensee of bare shell structure inclusive of columns etc. is not disputed. The assessee has sub-licensed the commercial places to parties showing them as tenants. Ld. AO while invoking provisions of Section 269U (f)(i) of the Act read with section 53A of the Transfer of Property Act has concluded that the assessee is deemed owner for the purpose of Section 27(iii)(b) of the Act and therefore Section 22 of the Act making income from house property taxable is applicable.

8. The bench is of considered opinion that Ld. AO has fallen in error in applying the aforesaid provisions of law while not following the previous year assessment. The first and foremost thing that comes up is that Section 53A of the Transfer of Property Act is applicable in regard to transfer of immovable property by way of registered document. The provision is made in regard to those transactions of immovable property

where under an agreement to sell or any other contract wherein a part performance of the contract has occurred, though the title deed has not been registered, in that case, the transferor is departed from agitating his title to the property against the purchaser. The essential condition being the transferee should have taken possession of the property and should be ready and willing to perform his part of the contract.

9. However, in case of transactions of the nature Build Operate Transfer (BOT), as in the case in hand an entity, which is usually government entity, enters into a build-operate-transfer (BOT) contract, by grant of a concession to a private company to finance, build, and operate a project. The concession given by DMRC to the assessee operating in the form of a license only. The company operates the project for a period of time with the goal of recouping its investment, then transfers control of the project back to the public entity. Thus, handing over of infrastructure facility/project by developer to Government/local authority/statutory body takes place after recoupment of developer's costs. Like in case in hand the bare shell structure inclusive of columns etc has been developed to be available to the tenant for commercial use. The building etc involved always belongs to the DMRC.

10. There is no semblance of any characteristics of transactions for which Section 53A of the Act is applicable and there is no question of assessee being a deemed owner, so as to account for rent as income from property and not business income. The fact that leasing is one of the objects in the memorandum of association being not disputed and that in the A.Y. 2012-13 and 2013-14, the Ld. AO had accepted the income from the BOT projects as business income only bolsters the findings in favor of the assessee. Thus, the Bench is of considered opinion the Ld. AO has fallen in error in considering the proceeds of license to be rental income. The Ld. CIT(A) has rightly interfered and there is no error the impugned

order. Thus, grounds raised have no substance. Consequently, the appeal of Revenue is dismissed.

Order pronounced in the open court on 12th April, 2023.

Sd/-

(SHAMIM YAHYA)

ACCOUNTANT MEMBER

Date:- 12.04.2023

Binita, SR.P.S

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(ANUBHAV SHARMA)

JUDICIAL MEMBER

**ASSISTANT REGISTRAR
ITAT, NEW DELHI**