

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

**SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 853/MUM/2023
(Assessment Year: 2014-15)**

**Assistant Commissioner of Income Tax –
Circle-3(1)(1), Mumbai,**

Room No. 607, 6th Floor, Aayakar Bhavan,
M.K. Road, Mumbai - 400020

..... **Assessee**

**M/s Gentex Merchants Private
Limited,**

81, Maker Chambers-III, 223,
Nariman Point, Mumbai - 400021
[PAN:AABCG1491M]

Vs

.....

Respondent

Appearance

For the Assessee/Department : Shri Dr. Kishor Dhule
For the Respondent/Assessee : Shri Anuj Kisnadwala

Date : 22.06.2023
Conclusion of hearing : 05.07.2023
Pronouncement of order

ORDER

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Revenue has challenged the order, dated 19/01/2023, passed by the Ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2014-15, whereby the Ld. CIT(A) had partly allowed the appeal of the Assessee against the Assessment Order, dated 26/12/2016, passed under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').
2. The Revenue has raised following grounds of appeal:

- "1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in restricting the annual value of the property let out at Rs. 1,44,00,000/- as against Rs. 16,57,46,060/- determined by the AO.*
 - 2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition made by the AO in treating the income of Rs. 24,00,000/- received towards service charges under the head 'income from house property.*
 - 3. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance made by the AO on account of various administrative expenses incurred for earning the income from rendition of service."*
3. The relevant facts in brief are that Assessee filed return of income for the Assessment Year 2014-15 on 30/09/2014 declaring total income of INR 23,32,220/-. The case of the Assessee was selected for scrutiny. During the assessment proceedings, the Assessing Officer noted that the Assessee had borrowed funds from its holding company (i.e. Maurindo Investments Ltd.) and a ground company (i.e. Dalijita Financial & Technical Services Private Limited), both, controlled by Mr. L. N. Mittal. The aggregate debt at end of the relevant previous year stood at INR 1,65,74,60,603/- consisting of (a) Long Term Foreign Currency Loan of INR 120,19,96,000/- taken from Maurindo Investments Ltd., Mauritius, (b) loan of INR 6,36,53,403/- taken from Dalijita Financial & Technical Services Private Limited and (c) Zero Percent Optionally Convertible Debentures INR 39,18,11,200/- issued to Maurindo Investments Ltd., Mauritius. The Assessing Officer also noted that the Assessee had rented a property to Mr. L.N. Mittal and offered to tax rental income there-from and service charges income related thereto to tax as income from house property and business income, respectively. The Assessing Officer viewed all the transactions as being connected having been structured to avoid tax. The Assessing Officer concluded

that the house property was rented at a meager rent to offset the benefit of interest free funds received from the holding/group. Therefore, the Assessing Officer increased annual value of the house property declared by the Assessee at INR 1.44 Crores by INR 16,56,46,060/-, being 10% of total outstanding debts of INR 165,74,60,603/-. Further, the Assessing Officer was of the view that the service charge was nothing but rental income of the Assessee from the property. Therefore, the Assessing Officer brought to tax service charge of INR 24,00,000/- in the hands of the Assessee as rental income after allowing standard deduction at the rate of 30% and denying deduction for all the expenses claimed by the Assessee. Thus, the total income of the Assessee was assessed by the Assessing Officer as under:

Income from house property	INR 16,57,46,060/-
Add: Service Charge	<u>INR 24,00,000/-</u>
	INR 16,81,46,060/-
Less: Municipal Tax	<u>INR 20,39,467/-</u>
	INR 16,61,06,593/-
Less Standard Deduction @ 30%	<u>INR 4,98,31,978/-</u>
Total Income From House Property	<u>INR 11,62,74,620/-</u>

4. Being aggrieved, the Assessee preferred appeal before CIT(A). The CIT(A) granted relief to the Assessee by following decision of the Tribunal in the case of the Assessee for the Assessment Year 2010-11. CIT(A) restricted the annual value of the rented property to INR 1.44 Crores and accepted the claim of the Assessee that the service charges of INR 24,00,000/- were to be taxed as business income. Thus, CIT(A) deleted both the additions vide order dated 19/01/2023.

5. Being aggrieved, the Revenue has preferred the present appeal before the Tribunal against the aforesaid relief granted by the CIT(A).
6. We have heard the rival submissions and perused the material on record.
7. On perusal of the order passed by the Tribunal in the case of the Assessee for the Assessment Year 2010-11 [ITA No. 1161/Kol/2014, dated 30/08/2017], we find that following grounds were raised in appeal before the Tribunal:
 - "1. *That on the facts and circumstances of the case and in law the Ld. CIT(A) erred in deleting the addition made by the AO in treating the income of Rs. 12,00,000/- received towards service charges under the head 'income from house property'.*
 2. *That on the facts and circumstances of the case and in law the Ld.CIT(A) erred in deleting the disallowance made by the AO on account of various administrative expenses incurred for earning the income from rendition of service.*
 3. *That on the facts and circumstances of the case and in law the Ld. CIT(A) erred in deleting the action of AO in determining the annual value of the property let out at Rs. 13,06,61,131/-."*

Rejecting identical contentions raised by the Revenue, the Tribunal dismissed all above grounds and decided the issue in favour of the Assessee holding as under:

"28. The Hon'ble Calcutta High Court in the case of Satya & Co. Ltd (supra), Bhaskar Mitter (supra), Poddar Bros. Pvt Ltd. (supra), Prabhabati Bansali (supra) has consistently held that the annual value of a House Property under Section 23 is to be assessed at higher of the actual rent or the annual value determined by the municipal/local authority. The Full Bench of the Delhi High Court in the case of M.K. Subba (supra) in principle accepted the ratio laid down by the Calcutta High Court and held that in arriving at the annual value of the property the annual value determined by

the municipal authorities is the relevant factor provided however assessment by the local authority was contemporaneous and reflected true annual value.

29. In the present case the facts as it transpired before CIT(A) shows that the Municipal Valuation determined by the NDMC for the relevant previous year was a sum of Rs.1,16,83,790. The determination of annual valuation by NDMC happened by an order dated 27.9.2012 much after the AY 2010-11. Based on the revision in the Municipal Valuation, the Assessee and Mr.L.N.Mittal revised the terms of the lease and the tenant revised annual rent to Rs.1,17,00,000/-. The higher of the municipal valuation or the actual rent received has to be adopted as the annual value for the purpose of Sec.23(1)(b) of the Act. Therefore the annual value of the property in question has to be adopted at Rs.1,17,00,000/-. The conclusions of the CIT(A) in this regard are correct and does not call for any interference.
30. The facts as it transpired further show that the revision in the annual rent by agreement between the parties was made after the end of the relevant previous year relevant to AY 2010-11 and was applicable retrospectively from AY 2006-07. The arrears of rent consequent to revision in the annual rent between the parties amounting to Rs.3,54,31,400/- was offered as income of the assessee in AY 2013-14 in conformity. Sec.25B of the Act, provides as follows:

xx xx

Thus ultimately the entire annual value as determined by NDMC amounting to Rs.1,17,00,000/- has suffered tax in AYs 2010-11 & 2013-14. The conclusion of the CIT(A) that no further adjustment to the disclosed annual value was necessary in the assessment for AY 2010-11, in our view is fully justified and calls for no interference. The CIT(A)'s conclusion directing the AO to assess the income from house property at 22, Aurangzeb Road, New Delhi taking its annual value at Rs.60 lacs and re-compute the assessee's income under the head "House Property" is therefore upheld.

31. On the question whether in a case where interest free advance are given by the tenant could notional interest on such advance be taken for the purpose of arriving at the Annual Value of the property, the CIT(A) held that notional interest cannot be taken into account for the purpose of determining annual value of

property. The CIT(A) relied on the decision of the Hon'ble Calcutta High Court in the case of Hemraj Mahabir Prasad (supra) wherein it was held that notional interest on interest free loan given by the tenant would neither be a determining factor nor a component to be considered in assessing the true & fair annual value of house property in terms of Section 23 of the Income-tax Act, 1961. The Hon'ble Calcutta High Court in the case of CIT v. Satya & Co. Ltd. [1994] 75 Taxman 193 (Cal.) has held that notional interest cannot be added to the interest free security deposit to arrive at the annual value of the property while determining income under the head "income from House Property". Similar view was also expressed by the Bombay High Court in the case of J.K. Investors (Bom.) (supra) and by the Delhi High Court in the case of Asian Hotels Limited (supra) The CIT(A) found that the Full Bench of the Delhi High Court in its decision in the case of M.K. Subba (supra) held that in arriving at the fair rent there is no provision in law for inclusion of any notional interest on interest free deposit received from tenant. The Full Bench of the High Court specifically rejected the Revenue's contention that a reasonable interest can be included in arriving at the true & correct annual value of a house property. The Full Bench of the Delhi High Court thereafter made the following observation:

"Since the provisions of fixation-of annual rent under Delhi Municipal Corporation Act are pari materia of Section 23, the view of the Calcutta High Court in Satya & Co Ltd (supra) was to be accepted that in such circumstances, the annual value fixed by the municipal authorities can be rational yardstick. However, it would be subject to the condition that the annual value fixed bears a close proximity with the assessment year in question in respect of which the assessment is to be made under the Income-tax laws, "

32. We are of the view that the in the light of the judgments of the Calcutta, Bombay & Delhi High Court, in arriving at the annual value of a house property for the purposes of Section 23 of the Income-tax Act, 1961, notional interest on the interest free loan or deposit cannot be considered to be a relevant factor. Such notional interest cannot be included in the fair rent of the property. In the circumstances, the CIT(A) was fully justified in holding that AO was not justified in enhancing the annual value of the property by making addition to the actual rent received

equivalent to 10% of the interest free loan received by the assessee from its holding company. The addition made by the AO was therefore rightly held by the CIT(A) to be unsustainable in view of the decision of the Full Bench of the Delhi High Court in the case of M.K. Subba (supra). We hold accordingly.

33. On the question whether the parties have arranged their affairs in such a manner that the taxes payable are avoided and therefore all arrangements have to be ignored and on the question whether income from providing services charges have to be assessed under the head "Income from Business" or should form part of the "income from house property", we are of the view that the issue as to whether income by way of service charges 'is assessable under the head "Business" was no longer res integra. It is not in dispute that in the first year of the lease the AO had disputed assessee's classification of such income under the head "Business". On appeal however the first appellate authority held that service charges collected separately from the tenant were assessable under the head "Business" and the decision of the appellate authority was accepted by the Revenue. In the circumstances, the issue was rightly held by the CIT(A) to have attained finality in the case of the Assessee. The CIT(A) was therefore right in concluding that income by way of service charges was chargeable under the ' "Profits & Gains from Business".
34. The loan which the assessee received had no connection with the tenancy of Shri L.N. Mittal. The amount in question was received by the assessee from the holding company and not from the tenant. Interest free loan was received during the period when construction of the property was in progress. The loans were received from the holding company in order to meet the cost of construction and cost of acquisition of the property. Therefore the receipt of interest free loan from the holding company was an event which had occurred prior to grant of tenancy and as such these two events apparently did not have any connection. The CIT(A) therefore was right in holding that the very basis on which the AO concluded that the interest free loan was in the nature of interest free deposit from the tenant was factually unfounded. The arrangement between the parties was therefore real and not sham. In such circumstances it is not possible to ignore the agreements and conclude that the agreements have to be disregarded as it results in lesser tax burden on an Assessee. If

one were to proceed on the assumption that L.N.Mittal was the person in control of the affairs of the holding and subsidiary company and the corporate personality of the holding and subsidiary company has to be ignored, then, as rightly submitted by the learned counsel for the Assessee, L.N.Mittal would have to be construed as owner of the property and was entitled to a nil annual value, as the property would have to be regarded as self occupied. We need not go that far. It would be sufficient to hold that the claim of the revenue for ignoring the agreements between the parties is not sustainable.

*35. For the reasons given above, we uphold the order of the CIT(A) and dismiss the appeal of the revenue as one without merit.”
(Emphasis Supplied)*

8. On perusal of the above decision of the Tribunal, it is clear that in identical facts and circumstances the Tribunal rejected the contention of the Revenue that the annual value of the house property must be increased by 10% of interest free loans received by the Appellant by the following the judgment of the Full Bench of Hon'ble Delhi High Court in the case of CIT Vs. Moni Kumar Subbah: 333 ITR 38 Del (FB) and the judgment of the Hon'ble Bombay High Court in the case of CIT Vs. J.K. Investors (Bom.) Ltd. : [2001] 248 ITR 723. The Tribunal has concluded that as per provisions of Section 23(1)(b) of the Act higher of the municipal valuation or the actual rent received has to be adopted as the annual value. We note that the CIT(A) has adopted the actual rental value of INR 1.44 Crore as annual rental value as the same was much higher than the municipal value, and has deleted the addition of notional interest of INR 16,56,46,060/- computed at the rate of 10% of total outstanding debts of INR 165,74,60,603/- by following the aforesaid decision of the Tribunal. Therefore, we do not find any infirmity in the order passed by the CIT(A) in this regard. Accordingly, **Ground No. 1** raised by the Revenue is dismissed.

9. As regards, the head taxability of service charges received in relation to the rented house property, we note that the Tribunal took note of the fact that in the Assessment Year 2006-07, which was the first year of lease of the rented house property, the Assessing Officer had disputed the classification of service charges as business income. However, in appeal before the CIT(A), the Assessee succeeded as the CIT(A) held that service charges collected by the Assessee separately from the tenant were assessable under business income. The Tribunal concluded that in the aforesaid circumstances, the issue was rightly held by the CIT(A) to have attained finality in the case of the Assessee and therefore, the CIT(A) was right in concluding that income by way of service charges was chargeable under the head 'Profits & Gains from Business'. We note that in identical facts and circumstances, the CIT(A) has held that the service charges of INR 24,00,000/- has been correctly offered to tax by the Assessee as business income. We find that the decision of CIT(A) is in line with the aforesaid decision of the Tribunal for the Assessment Year 2010-11 and therefore, does not call for any interference. Thus, **Ground No. 2** raised by the Revenue is dismissed.
10. As regards, the claim for deduction for expenses incurred for earning service charges is concerned, we have already held that the service charges is to be assessed under the head 'Income from Profits & Gains of Business' and therefore, the Assessee is entitled to claim deduction for expenses incurred for earning the service charges. We note that the Assessing Officer disallowed all the expenses claimed since the Assessing Officer concluded that the service charges were to be assessed under the head 'Income from House Property'. The CIT(A) overturned the decision of Assessing Officer and accepted the

claim of the Assessee that the service charges was assessable as business income and in the process allowed deduction for expense claimed without verification by allowing ground number 5 & 6 raised by the Assessee in appeal before the CIT(A). Accordingly, to this limited extent we remand this issue back to the file of Assessing Officer for computing the business income/loss arising for provision of services by the Assessee by allowing deduction for expenses claimed after verification taking into account the decision of the CIT(A) for the Assessment Year 2006-07 and 2010-11. Thus, **Ground No. 3** raised by the Revenue is allowed for statistical purposes.

11. In result, the present appeal preferred by the Revenue is partly allowed.

Order pronounced on 05.07.2023.

Sd/-
(B.R. Baskaran)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 05.07.2023
Alindra, PS

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

1. अपीलार्थी / The Assessee
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.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