| आयकर अपीलीय अधिकरण न्यायपीठ, मुंबई |

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

SHRI NARENDRA KUMAR BILLAIYA, HON'BLE ACCOUNTANT MEMBER
&
BEFORE SUNIL KUMAR SINGH, HON'BLE JUDICIAL MEMBER

I.T.A. No. 3944/Mum/2024
Assessment Years: 2013-14
&
I.T.A. No. 3945/Mum/2024
Assessment Years: 2014-15

Striton Properties Private Limited (Erstwhile Mars Hotel and Resorts Private Limited), Mumbai Opp. Leela Hotel Off International Airport Approach Road Marol Andheri East, JB Nagar Mumbai - 400059 **[PAN: AAACM3827C]**	Vs	**Dy. Commissioner of Income Tax, Circle-10(2)(2), Mumbai**
अपीलार्थी/ (Appellant)		**प्रत्यर्थी/** (Respondent)

Assessee by :	Shri Ravikant S. Pathak, C.A.
Revenue by :	Shri Bhangepatil Pushkaraj Ramesh, Sr. A/R

सुनवाई की तारीख/**Date of Hearing : 08/01/2025**
घोषणा की तारीख /**Date of Pronouncement: 13/01/2025**

आदेश/O R D E R

PER NARENDRA KUMAR BILLAIYA, AM:

I.T.A. No. 3944/Mum/2024 & I.T.A. No. 3945/Mum/2024 are two separate appeals preferred by the assessee against two separate orders dated 29/04/2024 by NFAC, Delhi [hereinafter 'the ld. CIT(A)'] pertaining to AYs 2013-14 & 2014-15.

2. Both these appeals are barred by limitation by 40 days. We have considered the request for condonation of delay in filing of the appeals, which is supported by an affidavit of the Chartered Accountant, who was the cause for the delay in filing of the appeals. We are convinced that the assessee was prevented by reasonable and sufficient cause. Therefore, the delay is condoned.

3. Since common grievance in involved in both the appeals, they were heard together and are disposed off by this common order for the sake of convenience and brevity. Though the quantum may differ.

4. Representatives of both the sides argued on the facts of ITA No. 3944/Mum/2024. The grievance of the assessee reads as under:-

> *"1. Treating the income of Rs.53,00,000/- from car parking facilities as income from other sources as against the income from business declared by the appellant.*
>
> *2. Depreciation claimed u/s 32 of the Income Tax Act, 1961 ("Act") on building used for car parking on the ground that the construction of building is not complete.*
>
> *3. Depreciation claimed u/s 32 of the Act on plant and machinery used for maintaining the garden and club house.*
>
> *4. Disallowance of Expenses amounting to Rs. 50,44,870/-."*

5. Briefly stated the facts of the case are that the assessee is engaged in the business of hospitality and club related activity. Vide agreement dated 24/06/2004, with Mars Enterprises, a partnership firm, the assessee agreed to lease land admeasuring 4713.782 sq. mtrs., for a period of 29 years for building and running of hotel and the lessee, Mars Enterprises agreed to pay 5% of the gross turnover of the hotel annually by way of royalty to the lessor i.e., the assessee.

5.1. Vide another agreement dated 24/06/2004 with Mars Enterprises, the assessee agreed to lease land admeasuring 3106.26 sq. mtrs., for a period of 35 years for the construction of club house. The lessee agreed to pay the lessor, fixed percentage of the annual gross turnover of the Club as royalty to the assessee.

5.2. The assessee has been showing the receipt from parking facilities as business income since 2008 and the same has been accepted as such by the AO. However, during the year under consideration, the AO

breached the principle of consistency and treated the income as income from other sources.

6. At the very outset, it would be pertinent to consider the decision of the Hon'ble Jurisdictional High Court of Bombay in the case of *National Leasing Limited & Ors in Income tax Appeal No. 685 of 2007 & Ors., judgment dated 21/10/2024*. The relevant findings read as under:-

> *"26. We also find substance in the contention as urged by Mr. Cama that the Assessing Officer, for almost 11 Assessment Years has consistently held that such income of the assessee is required to be treated as "income from business" and not the "income from house property". This has been the consistent approach of the department, therefore, the principles of consistency, as the law recognizes are required to be accepted. In this context, Mr. Cama has rightly referred to the decision in M/s. Radhasoami Satsang, Saomi Bagh, Agra (supra) wherein the Supreme Court has accepted the rule of consistency as a settled principle of law. In a recent decision of this Court in Banzai Estates P. Ltd. (supra), a Division Bench of this Court of which one of us (G. S. Kulkarni, J.) was a member, while referring to the decision in M/s. Radhasoami Satsang, Saomi Bagh, Agra (supra) as also the decision in Bharat Sanchar Nigam Ltd. & Anr. Vs. Union of India & Ors.8 made the following observations:-*
>
> > *"13. In the prior Assessment Years, the Assessing Officer had accepted the assessee's treatment of such income as an income from house property, which is one of the factors which has weighed with the Tribunal to allow the Appeals filed by the assessee, on the principle of consistency. We are of the opinion that such principles are appropriately applied by the Tribunal. The Supreme Court has held it to be a settled principle of law that although strictly speaking res judicata does not apply to income tax proceedings, and as such, what is 8 [2006]282 ITR 273 (SC) 21 October 2024 16ITXA-685-07GRP.DOC decided in one year may not apply in the following year. Thus, when a fundamental aspect permeating through different assessment years has been treated in one way or the other and that has been allowed to continue such position ought not be changed without any new fact requiring such a direction. (See: M/s. Radhasoami Satsang, Saomi Bagh, Agra v. Commissioner of Income Tax [1992] 1 SCC 659). The decision of the Supreme Court in M/s. Radhasoami Satsang (Supra) has been referred in a decision of a recent origin in Godrej & Boyce Manufacturing Company Ltd. vs. Dy. Commissioner of Income Tax, Mumbai, & Anr.[2017] 7 SCC 421*
> >
> > *14. We may also usefully refer to a decision of this Court in the case of Principal Commissioner of Income-tax v. Quest Investment Advisors (P.) Ltd. [2018] 96 Taxmann.com 157 (Bom), in which this Court referring to the decision of the Supreme Court in Bharat Sanchar Nigam Ltd. 4 Anr. vs. Union of India & Ors. [2006] 282 ITR 273(SC), which followed the decision*

in Radhasoami Satsang Sabha (supra) accepted the rule of consistency. The following observations of the Supreme Court are required to be noted:-

> *"15. The question in Radhasoami Satsang v. Commissioner of Income-tax [1992] 1 SCC 659; [1992] 193 ITR 321 (SC) (also cited by the State of U. P. was whether the Tribunal was bound by an earlier decision in respect of an earlier assessment year that the income derived by the Radhasoami Satsang, a religious institution, was entitled to exemption under sections 11 and 12 of the Income-tax Act, 1961. The court said:*
>
> *"We are aware of the fact that, strictly speaking, res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year, unless there was any material change justifying the Revenue to take a different view of the matter."*
>
> *27. Thus, even on the ground of consistency, the case of the Revenue in supporting the orders passed by the Tribunal cannot be accepted.*
>
> *28. In the light of the above discussion, the appeals need to succeed. The impugned orders passed by the Tribunal are set aside to the extent we hold that 21 October 2024 16ITXA-685-07GRP.DOC the rent income derived by the assessee from lease of its properties was assessable as income from profits and gains of business. The questions of law as framed by this Court are answered in favour of the assessee and against the revenue."*

7. As no new facts have been brought on record by the AO and the law has not changed, therefore, following the ratio laid down by the Hon'ble Supreme Court in the case of *Radhasoami Satsang v. Commissioner of Income-tax (1992] 193 ITR 321 (SC)* and the Hon'ble Jurisdictional High Court *(supra)*, we direct the AO to treat the parking receipts as business income.

8. As mentioned hereinabove, vide agreement dated 24/06/2024, the assessee has leased land admeasuring 3106.26 sq. mtrs., for a period of 35 years commencing from the date of completion of construction of the club house having a built-up area of about 2600 sq. mtrs., on

payment of a fixed percentage of the annual gross turnover of the club as royalty to the assessee.

8.1. Though, for some reason, the new building which was purported to be a hotel building to be constructed by Mars Enterprises, could not be completed. But ground, lower and upper basements have been constructed adjoining to the existing hotel. The commencement certificate issued by the BMC clearly mentioned in its subject that parking layout plan submitted by the assessee is in respect of the proposed hotel building. Therefore, the AO formed a belief that the said three floors of parking were part of the proposed hotel building and since the proposed hotel building was not completed, the claim of depreciation was denied.

9. We are of the considered view that the assessee is entitled for depreciation even on part of the building mentioned hereinabove which was used as a parking facility to the adjoining hotel and in our understanding of the facts, the parking facility is part and parcel of the business of hotel and such facilities are incidental to the carrying on of the main business of the assessee. Therefore, the assessee is very much entitled for the depreciation on the same and the AO is directed to allow the depreciation.

10. The next grievance relates to the denial of the claim of depreciation on plant and machinery used for maintaining the garden and club house.

10.1. The assessee has installed plant and machineries for the maintenance of the swimming pool and the club house and claimed depreciation on the same. The claim was denied because neither the

assessee has shown any income on letting out of plant and machinery nor it is the owner of the swimming pool/garden/club house.

11. Section 57(ii) of the Act read as under:-

> *"**Deductions.***
>
> ***57.** The income chargeable under the head "Income from other sources" shall be computed after making the following deductions, namely :—*
> **********
> **********
> *(ii) in the case of income of the nature referred to in clauses (ii) and (iii) of sub-section (2) of section 56, deductions, so far as may be, in accordance with the provisions of sub-clause (ii) of clause (a) and clause (c) of section 30, section 31 and [79][sub-sections (1) [80][***] and (2)] of section 32 and subject to the provisions of [81][section 38] ;"*

11.1. This has to be read along with Section 56(2)(ii) & (iii) of the Act, which read as under:-

> *"**Income from other sources.***
> ***56.** (1) Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income-tax under the head "Income from other sources", if it is not chargeable to income-tax under any of the heads specified in section 14, items A to E.*
>
> *(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head "Income from other sources", namely :—*
> **********
> **********
> *(ii) income from machinery, plant or furniture belonging to the assessee and let on hire, if the income is not chargeable to income-tax under the head "Profits and gains of business or profession";*
>
> *(iii) where an assessee lets on hire machinery, plant or furniture belonging to him and also buildings, and the letting of the buildings is inseparable from the letting of the said machinery, plant or furniture, the income from such letting, if it is not chargeable to income-tax under the head "Profits and gains of business or profession";"*

11.2. A conjoint reading of both the provisions show that the income should be chargeable under the head income from other sources for the claim of depreciation. Since no income has been shown by the assessee,

the assessee has not fulfilled the mandatory condition of Section 56(2)(ii) & (iii) and Section 57(ii) of the Act. Therefore, the action of the AO cannot be faulted with. This Ground is accordingly dismissed.

12. The next grievance relates to the disallowance of the claim of expenditure which are legal and professional fees, repairs and maintenance of building, repairs and maintenance of plant and machinery, landscaping and corresponding expenses.

12.1. The AO has denied the expenses because according to the AO, all the expenses have to be borne by the lessee i.e., Mars Enterprises and not the assessee.

13. We do not concur with this view of the AO since the assessee has been showing the income from royalty as business income and also parking receipts are directed to be taxed under the head profits and gains from business or profession. The expenses incurred by the assessee have to be allowed. Merely because Mars Enterprise has to incur the expenses, cannot be a reason to deny the claim u/s 37(1) of the Act to the expenses incurred by the assessee. We accordingly direct the AO to allow the claim of expenses.

14. In the result, appeal both the appeals of the assessee are partly allowed.

Order pronounced in the Court on 13 January, 2025 at Mumbai.

Sd/-	*Sd/-*
(SUNIL KUMAR SINGH)	**(NARENDRA KUMAR BILLAIYA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dated /01/2025
SC SA

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

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

आदेशानुसार/ **BY ORDER,**
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Mumbai