

IN THE INCOME TAX APPELLATE TRIBUNAL
“C” Bench, Mumbai
Before Shri B.R. Baskaran (AM) & Shri Pawan Singh (JM)

I.T.A. No. 7103/Mum/2006
(Assessment Year 2002-03)

I.T.A. No. 7104/Mum/2006
(Assessment Year 2003-04)

Chandragupta Traders Private Limited 84-A, Mittal Court Nariman Point Mumbai-400 021. (Appellant)	Vs.	ITO 3(1) Aayakar Bhavan M.K. Road Mumbai-400020. (Respondent)
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PAN No. AAACC2263J

Assessee by	Shri J.D. Mistry & Shri Mehul Shah
Department by	Shri Sanjiv Dutt
Date of Hearing	8.11.2017
Date of Pronouncement	6.1.2017

O R D E R

Per B.R. Baskaran (AM) :-

Both the appeals filed by the assessee relate to AY 2002-03 and 2003-04. They are directed against the orders passed by Ld CIT(A)-III, Mumbai. Both the appeals were heard together and hence they are being disposed of by this common order, for the sake of convenience.

2. The assessee is an investment company doing trading in shares. We shall take up the appeal filed for AY 2002-03. The Ld A.R did not press ground number 3 and hence the same is dismissed as not pressed. The Ground numbers 1, 4, 5 & 6 are general in nature. The surviving ground relates to the taxability of rental income derived on sub-letting of property, i.e., the head under which the same is assessable. Identical issue is agitated in AY 2003-04

also. The facts relating to the same are discussed in brief. The assessee received rental income on sub-letting of a property in both the years. The assessee declared the rental income as its business income. The AO assessed the same under the head Income from other sources and the Ld CIT(A) also confirmed the same.

3. We heard the parties on this issue and perused the record. We notice that a company named M/s S.Kumar Tyre Manufacturing Company Ltd has developed a property belonging to M/s Shree Ram Mills Ltd. Thereafter, the above said two parties have entered into an agreement with the assessee herein on 20-12-1996, as per which the assessee has taken on rent the 4th floor of the premises admeasuring 11461 Sq. Ft and open terrace admeasuring 13148 Sq.ft. The agreement also provided an option to the assessee to purchase and/or acquire on perpetual lease the above said premises. Clause 10 of the agreement also authorises the assessee to give the properties on lease or sublease or on leave and license the whole or part(s) of the premises to one or more third parties. Accordingly the assessee gave the premises on lease to M/s Reliance Industries Ltd. The assessee declared the rental income under the head Business. The assessee's case was accepted from AY 1998-99 to 2001-02. However in AY 2002-03 and 2003-04, i.e., the years under consideration, the AO assessed the rental income under the head Income from Other sources on the following reasoning:-

"The definition of the word "business" in section 2(13) is an inclusive definition. There must be some trade, commerce or manufacture or any adventure in the nature of trade, commerce or manufacture. **There is no manufacture in the present case and subletting a property cannot be considered to be a trade in its popular or commercial sense.** The assessee's activity is not like that of a mere property owner because the assessee did not own the property. Hence, it cannot be property income. In order to constitute business, there must be something in the nature of trade, commerce or adventure or something akin to it. In the

present case, it cannot be held that merely subletting the property could be taken to be a business. **If the assessee had taken a number of premises on the same basis and had let them out to the tenants, possibly the question would have to be considered in the larger context.** No unique or specified services have been provided by the assessee. The entire activity of subletting the premises is a make-believe arrangement in order to colour the activity as "business" and thereby claiming the unwarranted expenditure against the said receipt. This type of arrangement is clearly undesirable. In light of above, it can be safely stated that the earning of the compensation cannot be called business. Hence, the income should rightly be brought to tax only with the scope of the head "Other income". **It is pertinent to mention here that the assessee company had not sublet/sub-lease a number of premises to various tenants. Thus, the income derived from subletting a single premises to a group concern cannot be said to be derived from the income from business activity.** As such, the income derived from subletting/sub licensing has to be brought to tax under the head "Income from other sources"."

The AO also took support of various decisions to strengthen his view that the sub-letting income cannot constitute business income. The Ld CIT(A) also confirmed the view taken by the AO by observing that sub-letting of single premises cannot constitute business. With regard to the contentions of the assessee that the rental income has been assessed as Business income in the earlier years, the Ld CIT(A) held that the principle of res-judicata shall not apply to income tax proceedings. In this regard, he placed reliance on the decision rendered by Hon'ble Bombay High Court in the case of Baijnath Brijmohan & Sons (P) Ltd Vs. CIT (1986)(161 ITR 234).

4. Before us, the Ld A.R submitted that the assessee has acquired the premises only with the intention to let it out. He submitted that the clause 107 of Other Objects clause permit the assessee to lease land, buildings etc. He submitted that the Hon'ble Supreme Court in the case of Chennai Properties and Investments Ltd (2015)(373 ITR 673) has held that the renting of building can constitute business activity. He submitted that both the tax authorities have not

accepted the claim of the assessee only for the reason that the assessee has let out a single premises. He submitted that letting out of single premises can also constitute as business of the assessee, if the intention of the assessee was to commercially exploit the property. On this ground he submitted that the decision rendered by Hon'ble Bombay High Court in the case of Baijnath Brijmohan & Sons (P) Ltd (supra) is distinguishable.

5. On the contrary, the Id D.R strongly supported the orders passed by Ld CIT(A) in both the years under consideration on this issue.

6. Having heard rival contentions, we find merit in the contentions of the assessee. The Ld A.R, in our view, has rightly contended that the letting out of single premises can also constitute business activity, as there is no such proposition against that. In the case of Chennai Properties and Investments Ltd (supra), the Hon'ble Supreme Court has held that the letting or subletting of property can be part of trading operation. The facts available in the present case would show that the assessee has acquired the premises on lease with the right to sub-lease the property and also with the right to purchase /acquire on lease. Further the other objects of the Memorandum of Association authorises the assessee to lease out properties. Hence there is merit in the contention of the assessee that the intention of the assessee in entering into the property transaction as part of commercial activity.

7. We have noticed earlier that the tax authorities have rejected the claim of the assessee mainly on the reasoning that the assessee has sub-let a single property. We have noticed that the said view is not in accordance with the settled propositions. We also notice that the decision rendered by Hon'ble Bombay High Court in the case of Baijnath Brijmohan & Sons (P) Ltd (supra) is distinguishable. The assessee therein took a godown on hire. It put up

partitions in the godown and sub-let part of it on leave and license basis. The assessee contended that it has carried out warehousing business. The Tribunal opined that there was no material to support the assessee's stand. Thus, we notice that the facts of the above said case were different and hence the said decision cannot be applied to the present case.

8. In view of the foregoing discussion, we set aside the order passed by Ld CIT(A) on this issue in both the years under consideration and direct the AO to assess the rental income as business income of the assessee.

9. We shall now take up the appeal filed by the assessee for AY 2003-04. The Ld A.R did not press ground No.3 and hence the same is dismissed as Not Pressed. The Ground No.1,5,6 & 7 are general in nature. Ground No.4 has been disposed of by us along with identical ground urged in AY 2002-03.

10. The remaining ground relates to disallowance of premium paid on redemption of Premium Notes. The AO noticed that the funds received on issuing of "Unsecured Optionally Convertible Premium Notes" have been invested in purchase of shares/debentures of Reliance Utilities and Power Ltd, an infrastructure company. As per the provisions of sec. 10(23G) of the Act, the income arising from the above said investment is exempt from tax. Hence the AO took the view that the provisions of sec. 14A of the Act would apply and accordingly disallowed the redemption premium paid by the assessee.

11. The Ld A.R submitted that an identical issue was considered by the co-ordinate bench in assessee's own case in ITA No.1748/Mum/2009 relating to AY 2004-05 and the co-ordinate bench, vide its order dated 13.6.2012, has deleted the identical disallowance made in that year on the view that the premium paid on the Notes cannot be considered to be an expenditure incurred exclusively in

relation to earning of exempt income so as to invoke the provisions of sec. 14A of the Act. Since the co-ordinate bench has taken a particular view on an identical issue in the assessee's own case, we are inclined to follow the same. Accordingly we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete this addition.

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

Order has been pronounced in the Court on 6.1.2017.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 6/1/2017

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
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BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai