

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "B": DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA.No.445/Del./2015
Assessment Year 2010-2011

The DCIT, Circle-II, Moradabad.	vs.,	M/s. Chadha Builders & Properties, Chadha Palace, Prince Road, Moradabad. PAN AADFC7247A
(Appellant)		(Respondent)

For Revenue :	Shri Subhash Verma, Sr. D.R.
For Assessee :	-None-

Date of Hearing :	10.10.2017
Date of Pronouncement :	13.10.2017

ORDER

PER BHAVNESH SAINI, J.M.

This appeal by Revenue has been directed against the order of the Ld. CIT(A), Bareilly, dated 08th October, 2010, for the A.Y. 2010-2011, on the following grounds :

1. *"In the facts and circumstances of the case the Ld. CIT(A) has erred in fact in and in law in allowing relief to the assessee the rental income under head income from house property and allow all the statutory deductions allowable under section 23 &*

24 of the I.T. Act which was rightly made by the Assessing Officer in assessing the rental income under head Profits & Gains in place of income from house property applying the decision of Allahabad High Court (Lucknow Bench) in the case of Commissioner of Income Tax vs. Goel Builders reported in (2010) 235 CTR (All) 472.

2. In the facts and circumstances of the case the Ld. CIT(A) has erred in fact in and in law in allowing relief to the assessee by deleting the addition of Rs.10,65,551/- rightly made by the AO being rental income assessed as business income and service tax is not allowable expenses while the assessee claimed service tax, interest on service tax & Education Cess of Rs.10,65,515/-.”

2. We have heard the Ld. D.R. and perused the findings of the authorities below. However, none appeared on behalf of the assessee despite notifying the date of hearing through registered post.

3. On ground No.1, the issue relates to treatment of rental income shown by assessee and treated by the A.O. as “business income”. The assessee submitted before Ld. CIT(A) that he is very old and regularly assessed to tax. It maintained proper books of account.

The income under the head “Housing Division” was shown under the head “Income from house property” and claimed statutory deductions. The A.O. however, assessed the income of the assessee as business income instead of “Income from house property” as claimed by assessee. In last many assessment years, the A.O. accepted the rental income as income from house property. The A.O. without bringing any material against the assessee has changed the head of income.

3.1. The Ld. CIT(A) accepted the contention of assessee. The Ld. CIT(A) found that A.O. had accepted/assessed rental income under the head “Income from house property” consistently from A.Ys. 2001-2002 to 2006-2007 and A.Ys. 2008-09 and 2009-10 and all these assessments were completed in scrutiny under section 143(3) of the I.T. Act. The A.O. has not brought any material against the assessee for changing the head of income. The Ld. CIT(A) therefore, directed the A.O. to assess the rental income under the head “Income from house property” and allowed all statutory deductions.

4. After considering the submissions of the Ld. D.R, we do not find any merit in ground No.1 of appeal of the Revenue. Since the

A.O. has accepted the rental income as income from house property on identical facts in preceding many assessment years in scrutiny assessments under section 143(3) of the I.T. Act, therefore, A.O. without bringing any material against the assessee, should not have change the head of income. The A.O. should maintain rule of consistency. The Ld. CIT(A) on proper appreciation of facts and material on record, correctly issued direction in this regard. We, therefore, dismiss ground No.1 of the Revenue.

5. On ground No.2, the assessee submitted before Ld. CIT(A) that A.O. has erred in making the disallowance of Rs.10,65,551 as service tax paid by assessee. The assessee submitted before Ld. CIT(A) that assessee has shown gross rent received during the year in credit side of the profit and loss account of Housing Division and payment of service tax, education cess and interest on service tax have been debited to P & L Account separately to depict the transactions under each head. In the computation of total income, the assessee has taken gross rent as gross annual value and claimed deduction of service tax under section 23 of the I.T. Act. There is a procedural mistake in computation of total income under the head

“Income from house property” as net of rent i.e., gross rent minus service tax and education cess on it was to be taken as annual value because service tax was not realised by the assessee from the tenants. The assessee entered for lease agreements long back and there was no such clause for payment of service tax by the tenants. They were liable only to deduct income tax at source on the payment of rent as per provisions of Section 194-I of the I.T. Act. Service Tax and education cess in question are paid by the assessee from its income received and it had gone to Central Government Account. Service Tax has been levied by the Act of Parliament. The assessee has shown income from ‘profit and gains’ also and it has paid the service tax and cess in the capacity of person (firm) i.e., Chadha Builders and Properties. Taxable service liable for service tax was rental income from immovable property and assessee filed return of taxable service in the O/o. Central Excise Department, Muradabad. Thus, service tax and cess is liable to be adjusted either from house property or may be allowed deduction from income under the head ‘profits and gains of business’ as it was paid by the assessee from the gross total income. It was, therefore, requested that proper direction

may be issued accordingly. The assessee relied upon the decision of ITAT, Delhi Bench in the case of Remfry and Sagar Consultants Pvt. Ltd., (ITA.No.5887/Del./2011 dated 22.07.2012) in which it was held that interest paid for the delayed payment of service tax is compensatory in nature and not in the nature of penalty. Therefore, no disallowance can be made. The Ld. CIT(A) considering the explanation of assessee, deleted the addition. His findings are reproduced as under :

*“I have considered the above submissions of the AR of the assessee Service Tax is not an allowable deduction from Income from house property. But it is true that the assessee has paid Service Tax & it was not recovered from tenants and it has also filed the return of service tax. Service tax has been paid into Central Govt Account and it is a genuine expense incurred by the assessee. Assessee’s contention is correct that **charging of income tax on Service -tax paid by the assessee will amount to double taxation.** There is force in the submissions of the AR as it has paid the Service Tax as an assessee and it is an allowable deduction*

from Profits & gains rather than income from house property. Assessee's contention is correct and AO is directed to allow the expenses of Service Tax & Cess amounting to Rs.10,25,265/-from Profits & gains of the business. He is further directed to verify the quantum of Service & Cess paid by the assessee."

6. After considering the submissions of the Ld. D.R, we are of the view that no interference is called for in the matter. The Ld. CIT(A) found that service tax is not allowable deduction from income from house property. But it is fact that assessee has paid service tax as it was not recovered from the tenant and filed service tax return with the Central Government. Therefore, it is a genuine expense. The same is an allowable deduction from profits and gains. No infirmity have been pointed out in the order of the Ld. CIT(A). We, therefore, do not find any justification to interfere with the order of the Ld. CIT(A). Ground No.2 of the department is dismissed.

7. In the result, appeal of the department is dismissed.

Order pronounced in the open Court.

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Delhi, Dated 13th October, 2017

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT "B" Bench
6.	Guard File

//By Order//

ASST. REGISTRAR : ITAT :
DELHI BENCHES : DELHI.