

**आयकर अपीलीय अधिकरण “गुवाहाटी” न्यायपीठ गुवाहाटी में।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL “GUWAHATI” BENCH,**  
**GUWAHATI**

श्री एस.एस. गोदारा , न्यायिक सदस्य एवं डॉ ए.एल. सैनी लेखा सदस्य के समक्ष।

**BEFORE SRI S.S. GODARA, JM AND DR. A.L. SAINI, AM**

**आयकर अपील सं./ ITA No. 169/GAU/2018**

(निर्धारण वर्ष / Assessment Year 2012-13)

**आयकर अपील सं./ ITA No. 170/GAU/2018**

(निर्धारण वर्ष / Assessment Year 2013-14)

Dy. Commissioner of Income-tax, Circle-4, Aayakar Bhwawan, 5 <sup>th</sup> Floor, Christanbasti, G.S. Road, Guwahati-781005	Vs.	M/s ATC Realtors Pvt. Ltd. C/o. ATC Assam Ltd, Kedar Road, Machkhowa, Guwahati-781001
<b>(अपीलार्थी / Appellant)</b>	..	<b>(प्रत्यर्थी / Respondent)</b>
<b>स्थायी लेखा सं./PAN No. AAGCA5209A</b>		

अपीलार्थी की ओर से / Assessee by	:	Shri Sandeep Sengupta, JCIT
प्रत्यर्थी की ओर से / Respondent by	:	Shri Somnath Ghosh, Advocate

सुनवाई की तारीख / Date of hearing:	02.07.2019
घोषणा की तारीख / Date of pronouncement :	10.07.2019

**आदेश / O R D E R**

**PER Bench,**

The caption two appeals filed by the Revenue, pertaining to assessment years 2012-13 and 2013-14 are directed against the separate orders passed by the Commissioner of Income Tax(Appeals)-2 [in short CIT(A)-2], Guwahati, which

in turn arise out of separate assessment orders passed by the assessing officer (AO) under section 143 (3) of the Income Tax, Act 1961 (hereinafter referred to 'the Act').

2. Since, these two appeals filed by the Revenue relate to the same assessee, identical and common issues are involved, therefore these have been clubbed and heard together and a consolidated order is being passed for the same of convenience and brevity. The Revenue's appeal in ITA No. 169/Gau/2018, for AY 2012-13, is taken as the lead case.

3. However, in these two appeals, the Revenue has raised multiple grounds of appeal but at the time of hearing, the main grievance of the Revenue have been confined to the following issues:

*"i) Ground No. 1 raised by the Revenue relates action of Id CIT(A) in treating the amount of Rs.1,15,81,078/- as income from "profits and gains from business and profession" instead of "income from house property".*

*ii) Ground No. 2 raised by Revenue relates to deletion of addition of Rs.1,50,00,000/- by Id CIT(A) holding that the creditor has proved creditworthiness and identity to substantiate her investment.*

*iii) Ground No. 3 raised by the Revenue in ITA No. 170/Gau/2018 relates to the deletion of addition of Rs. 54,120/- on account of parking fees."*

4. Now, we take ground No. 1 raised by the Revenue which relates to action of Id CIT(A) in treating the amount of Rs.1,15,81,078/- as income from "profits and gains from business and profession" instead of "income from house property"

5. Brief facts qua the issue are that the assessee has filed its return of income for A.Y. 2012-13 on 24.09.2012, declaring total income to the tune of Rs. Nil. The Return of income was processed under section 143 (1) the Act. Later on, the assessee's case was selected for scrutiny under section 143 (2) of the Act. During the course of assessment proceedings, the AO noticed that the assessee has shown

income from house property (which is assessable under section 22 of the Act), under the head “Income from business or profession”. Therefore, the AO issued show cause notice to the assessee to demonstrate that why not house property income should be assessed under the head of “income from house property” instead of “income from business or profession”. In reply to the show cause notice the assessee company has furnished written submission dated 26/03/2015 which is reproduced as below: -

*"The assessee company is engaged in the Real Estate Business during the financial year. We would like to draw your kind attention to the Memorandum of Association of the Company incorporating the objects of the Company. One of the main objects of company is to "To purchase; sell, develop, take in exchange, or on lease, hire or otherwise acquire whether for investment or sale, or working the same any real or personal estate including lands, mines, business, building, factories, mill, houses, cottages, shops, depots, warehouse, machinery, plant, stock-in-trade, mineral rights, concessions, privileges, easement or interest in or with respect to any property or interest in or with respect to any property whatsoever for the purpose of the Company in consideration for a gross sum or rent or partly in one way and partly in the other or for any other consideration and to carry or business as proprietors of lands, plots, buildings etc and to let on lease or otherwise e properties therein.*

*The second object mentioned in MOA is "To acquire by purchase, lease, exchange, hire or otherwise, lands, plots, building and hereditaments of any tenure or description situated in India or abroad and any estate or interest and rights therein in particular by building, constructing, reconstructing, adapting, upholding, altering, improving, deegrating, furnishing and maintaining all kinds and types of immovable properties and providing the same on lease, rent, hire or letting out for any or all business purposes."*

*Therefore, treating the income from letting of property on hire as 'business income' emanates not only from the Memorandum of Association of the Company but also from the nature of the activity actually carried out.*

*"We would like to draw your kind attention to relevant case law of Income-tax Officer, Wared-2, Gandhidham v. Tejmalbhai & Co. [2006 ITD 399(Rajkot)] wherein the Hon'ble ITAT has held that merely because the property is immovable it cannot be considered as income from house property and that if the main hiring is main business than it would be business income."*

6. However, the Id assessing officer rejected the contention of the assessee and held as follows:



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*“The fact of the case law referred by the assessee i.e. Income-tax Officer, Wared-2, Gandhidham v. Tejmalbhai & Co.[20061TD 399(Rajkot)] is as below*

- 1. the entire godowns had not been given for exclusive possession but space had been let out as per the requirements of the parties*
- 2. various services such as lighting, telephone, watch and ward and staff for managing loading and unloading are provided by the assessee and possess the key*
- 3. the assessee is engaged in the warehousing business.*

*Here, in case of the assessee company the shops are given on lease to different parties. As per the lease agreement it is evident that the licensee has given exclusive possession of the premise, the keys are maintained by the licensee, they are entitled to complete the interior of the said premise internally at their own costs, electricity bills and water charges are to be paid by the licensee. The Company is not involved in any of the business activity of the licensee.*

*Let us a study particular case, one of the licensee is Reebok India Company and has taken on lease a shop for the Company Showroom for running an exclusive retail outlet. The assessee Company is in real estate business and there is no business nexus between the two. The fact is that, the assessee company has let-out one of his premises to Reebok India Company for carried out their own business independently by paying rent on monthly basis.*

*Under section 22, the charging section for “Income from house property”, the only exception provided is the income derived from property used/occupied by the assessee for his own business. Therefore, income derived from letting out of house property will always be taxable under the head "Income from house property'. Even if the business of the assessee is to own and give houses on rent or to trade in houses, the annual-value of the houses owned by him during the previous year would be taxable as “Income from house property" It will be so taxable even if property is held by the assessee as stock-in-trade of his business. In the case of New Delhi Hotels Ltd V ACIT (2014) 360 ITR 187 the Delhi High Court followed its own decision in the case of CIT vs Discovery Estates Pvt. Ltd/CIT vs Discovery Holding Pvt Ltd, wherein it was held in the case of rental income derived from unsold flats which were shown as stock-in trade in the books of the assessee should be assessed under the head "Income from house property" and not under the head "Profits and gains from business and profession".*

*There is no denying the fact that the assessee company is the owner of the property. Also, as evident from the lease agreement made by the company with all the occupants, the company is receiving rent or in other word the assessee is deriving income from this property.*

*It is a settled position of law that when a specific head of charge is provided for income from the ownership of house property, rents or other income from the ownership of house property, cannot be brought to tax under any other head. Assessment under this head is not only proper but obligatory.*

*In fact, the Hon'ble Supreme Court has held in the case of East India Housing and Development Trust vs. CIT 42 ITR 49 that if a company incorporated with the objects of buying and developing landed properties and promoting and developing markets, purchases some land, sets up a market therein and realizes rent from tenants of shops and stalls in the market, the income so derived must be computed for assessment purposes under the head "Income from House property". It was observed by the Apex Court that:*

*“the distinct heads specified in section 6 of the Income-tax Act indicating the sources are mutually exclusive and income derived from different sources falling under specific head has to be computed for the purpose of taxation in the manner provided by the appropriate section if the income from a source-falls-within a specific head set out in section 6, the fact that it may indirectly be covered by another head will not make the income taxable under the later head.”*

*Similar principle has been laid down by different High-courts in cases such as:*

*Brijnath Brijmohan & Sons Pvt. Ltd. 161 ItR 234 (Bombay)*

*CIT vs. New India Maritime Agencies (P) Ltd. 256 ITR 513 (Madras)*

*Rampur Industries Ltd. vs. CIT 82 ITR 23 (Allahabad)*

*Attukal Shopping Complex P. Ltd. vs. CIT 259 ITR 567 (Kerala)*

*CIT vs. Mithila Properties Publication & Contractor Enterprises (P) Ltd 228 ITR 713*

*The following observation made by the Hon'ble Madras High Court in the case CIT vs. Indian Overseas Bank 246 ITR 206 makes the law very clear::-*

*Under the provisions of the Income-tax Act each head of income is separate and distinct and if certain income of the assessee falls under a particular head, it is not possible for the assessee to take the income from one head of income to another head. Admittedly, the income from the letting out of the property is assessable only under the head "Income from house property" and it is not open to the assessee as to claim that it should be assessed under the head "Income from business or profession".*

*Income cannot be assessed under a wrong head merely because the assessee has returned it returned under a wrong head. The income received by the assessee has to be taxed under a particular head having regard to the source from which that income is derived. For determining the head of income, the character or nature of the income has to be determined.*

*As already discussed in the foregoing paragraphs, the assessee is deriving income from the ownership of house property. Hence, this income is to be taxed under the appropriate head viz., "Income from house property."*

*In the result, the amount of Rs. 1,15,81,078/-received by the assessee as rent is brought under the head "Income from house property".*

7. Aggrieved, by the order of the AO, the assessee carried the matter in appeal before the learned CIT(A) who has deleted the addition made by the AO. Aggrieved, by the order of the learned CIT(A) the Revenue is in appeal before us.

8. The learned DR for the Revenue has primarily reiterated the stand taken by the AO which we have already noted in our earlier Para and the same is not being repeated for the sake of brevity.

9. On the other hand, the learned Counsel for the assessee submitted that the assessee company is engaged in the business of establishing & running of Shopping Complex cum Multiplex during the relevant financial year. The Memorandum of Association of the Company speaks one of the main objects of the company stating as follows:

*"To purchase; sell, develop, take in exchange, or on lease, hire or otherwise acquire, whether for investment or sale, or working the same, any real or personal estate including lands, mines, business, building, factories, mill, houses, cottages, shops, depots, warehouses, machinery, plant, stock-in-trade, mineral rights, concessions, privileges; licenses, easement or interest in or with respect to any property or interest in or with respect to any property whatsoever for the purpose of the Company in consideration for a gross sum or rent or partly in one way and partly in the other or for any other consideration and to carry on business as proprietors of lands, plots, buildings, etc. and to let on lease or otherwise properties therein."*

The second object mentioned in MOA is as follows:

*"To acquire by purchase, lease, exchange, hire or otherwise, lands, plots, buildings and hereditaments of any tenure or description situated in India or abroad and any estate or interest and rights therein, in particular by building, constructing, reconstructing, adapting, upholding, altering, improving, decorating, furnishing and maintaining all kinds and types of immovable properties and providing the same on lease, rent, hire or letting out for any or all business purposes."*



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Therefore, Id counsel submitted that letting of property on hire as emanates not only from the Memorandum of Association of the Company but also from the nature of the activity actually carried out. The only source of income earned by the company is from the rents and maintenance charges received on letting of property on hire. Thus, the income earned should be treated as business income and not as house property income.

10. We have heard both the parties and perused the material available on record, we note that the assessee is a private limited company incorporated on 21/09/2006 with the main objects of carrying on the business of letting out its commercial properties. The assessee filed its return of income u/s. 139(1) of the Income Tax Act, 1961 on 24/09/2012 disclosing total income at Rs. NIL for the assessment year under dispute. During the course of assessment proceedings, the Ld. Assessing Officer asked the assessee to explain with reasons as to why the income disclosed under the head 'Business' should not be treated as 'House Property'. It was replied by the assessee that the activities of the assessee is to develop commercial establishment and let them out on hire with a host of other facilities which is in tune with its main objects and as such, the income earned there from is correctly returned under the head "Business". However, the Ld. Assessing Officer was not agreed and he noticed that assessee is the absolute owner of the property and it had simply let such property out for earning of rental income, the income shall be assessed under the head "House Property" and not "Business" and accordingly, he assessed the income from "rent and service charges" under the head "House Property".

11. We note that it is an admitted fact that the assessee is a private limited company which was incorporated with the main objects of letting out its construction in an organized manner. In pursuance to its activities, the assessee had constructed a mall in Guwahati and has let out the said property in accordance with its object clause as set out in the Memorandum of Association.



The assessee maintains and provides necessary service for proper upkeep of such properties in order to earn income by letting and/or leasing thereof. The assessee has disclosed the income earned from letting of its property in the sum of Rs. 1,15,81,078/- under the head "Business". In course of assessment proceedings, the Ld. Assessing Officer misconstrued the provision of section 22 of the Income Tax Act, 1961 and conceived that the assessee have earned the rental income as an owner and is accordingly liable to be assessed under the head "House Property". The Ld. Assessing Officer was apprised by the assessee that the income earned from letting out its property do not partake of the character of "Income from House Property" and had been correctly disclosed under the head "Business" since the assessee carried on this business in consonance with its main objects. In the present instance, the assessee has developed shopping mall on a property owned by it and let out same by providing host of services/facilities/amenities in the said mall and as such, the basic intention of the assessee was commercial exploitation of its property by developing them as shopping malls, therefore, Id Counsel claimed income derived there from as 'business income'.

12. There is no dispute that as per memorandum of Association of the assessee, it has main object to purchase, construct and/or acquire property and to give on lease and/or on license basis along with complex commercial activities and in consonance therewith, the assessee has declared its income from such mall as its business income. The mere fact that the income is attached to immovable property, cannot be the sole criterion for assessing such income as income from House Property. It is necessary to dig further to find out what is the primary object of the assessee while exploiting the property. As in the instant case, the main intention is found to be the exploitation of the immovable property by way of commercial activities, then the resultant income must be held as business income. In the present instance, the assessee company was formed with the main





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object of constructing properties on its land and letting it out on lease and/ or license. The activity of the assessee is in consonance with its main objects. Further, various services and amenities are rendered by the assessee to the lessees in the premises like maintenance of sewerage lines, drains, water tank, drinking and usage water supply lines, pumps and latrines with septic tanks and regular upkeep of such building. The activities involved in providing the above facilities/amenities meet all the requirements to qualify as business operations. The assessee has taken up the venture of utilizing its assets commercially and since these activities constitute ingredients of an organized business venture and as such, the trappings of business activities are present in abundance for classifying the income of the nature derived by the assessee as being of commercial in character to fall under the ambit of business. It had to maintain staff and hire services of personnel to render such services. All these are continuous organized activities undertaken for the purpose of carrying on business and in pursuance of such activities it incurred various expenses. In other words, for earning income, the assessee had to incur expenses for providing various services and amenities to the lessees of the said premises. Consequently, the income derived from such activities can only be assessed under the head "Business". The general principle invariably applicable is that whenever an asset is capable of being commercially exploited for purpose of earning income, the resultant profit is assessable as income from "Business". Where assessee-company had developed shopping malls/business centers on properties owned by it and had let out same to various users by providing host of services/facilities/amenities in said malls/business centers, it could be said that basic intention of assessee was commercial exploitation of its properties by developing them as shopping malls/business centers and, therefore, income derived there from was rightly assessed as business income. [PFH MALL & RETAIL MANAGEMENT LTD. -VS- I.T.O. (2007) 16 SOT 83 (KOL)].



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At the cost of repetition, we state that where the assessee company developed shopping malls and business centers on properties owned by it and let out same by providing host of facilities in said business centre, income derived there from was business income, as held by the Coordinate Bench of ITAT Mumbai in the case of A.C.I.T. - VS- STELLER DEVELOPER (P.) LTD. (2015) 68 SOT 34 (MUM)]. Again, where the assessee's main objects were acquiring, constructing, operating and maintaining of multiplexes, business centres, etc., income derived from such activities is to be treated as business income and not income from house property as held by the Coordinate Bench of ITAT Mumbai in the case of SHREEJI EXHIBITORS -VS- A.C.I.T. (2015) 42 ITR (TRIB.) 596 (MUM)]. Therefore, it is settled law that the income earned by the assessee from letting out various shops/stalls in shopping malls constructed by them is to be treated as business income and not as income from house property. That being so, we decline to interfere with the order of Id. C.I T.(A) in deleting the aforesaid additions. His order on this addition is, therefore upheld and the grounds of appeal of the Revenue are dismissed.

13. Ground No. 2 raised by the Revenue relates to deletion of addition of Rs. 1,50,00,000/- by holding that the creditor was having creditworthiness to substantiate her investment in share capital/premium worth of Rs. 1,50,00,000/-.

14. The Brief facts qua the issue are that in order to verify the genuineness, creditworthiness and identity of investment of Rs. 1,50,00,000/-, the AO asked the assessee to furnish relevant documents. The said amount was borrowed from Smt. Davina Mary Lyngwa. The AO noticed that neither Smt. Davina Mary Lyngwa nor the assessee produced any documentary evidence to prove that the cash belongs to Smt. Davina Mary Lyngwa and the said amount was deposited by her in the bank account. The learned AO noticed that any prudent person in the ordinary course of business would make investment to earn profit/return but in this case Smt. Davina Mary Lyngwa has claimed that she had made an



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investment of Rs. 2,40,00,000/- with ATC Realtors Pvt. Ltd. in spite of knowing the fact that the company is debt ridden. She has purchased the shares of the company not at par but with a hefty premium of Rs. 190 whereas the book value of the said shares is only Rs. 27.71/-. Smit Savina Mary Lyngwa is a tribal and her income accrued in scheduled area are exempted from Income Tax under section 10(26) of the I.T. Act, 1961. The assessee nor Smti Davina Mary Lyngwa has produced any document before AO which can prove that the money belong to her. Therefore, AO noticed that the assessee company had used Smti Davina Mary Lyngwa for issuing bogus share capital and share premium. Thus, the AO made addition under section 68 of the Income Tax Act, 1961, to the tune of Rs. 1,50,00,000/-.

15. Aggrieved, by the order of the AO, the assessee carried the matter in appeal before the learned CIT(A) who has deleted the addition made by the AO.

16. The learned DR for the Revenue submitted that the subscriber of the shares, Smt. Davina Mary Lyngwa was served a notice under section 131 of the I.T. Act, and her statements was taken on oath and she accepted that she made investment in assessee company. The ld DR pointed out that neither Smt. Davina Mary Lyngwa nor the assessee produced any documentary evidence to prove that the cash belongs to Smt. Davina Mary Lyngwa and the said amount was deposited by her in the bank account. It was the assessee`s black money which was introduced by the assessee in the books of accounts in the name of Smt. Davina Mary Lyngwa, therefore addition made by AO should be sustained.

17. On the other hand, ld Counsel for the assessee submitted before us that the ld. AO has erred in treating the capital/premium receipt of Rs.1,50,00,000/- comprising of share capital/premium as undisclosed income and added the same to the total income of the Assessee. Although, the subscriber herself accepted that she had made investments with ATC Realtors Pvt. Ltd but merely because the



subscriber is a tribal and her income is exempt under section 10(26) of the I.T. Act, does not mean that the company had used her for issuing bogus share capital and share premium as cited by the Ld. AO in his order.

18. We have heard both the parties and the material on record, we note that Ld CIT(A) noticed that the amount impugned in the present ground of appeal should be Rs.2,40,00,000/- and not Rs.1,50,00,000/-. The addition has been made by the Ld. AO on account of Share Capital received by the Assessee from one Ms. Davina M. Lyngwa, which amount as per the impugned order is undisputedly Rs.2,40,00,000/-.

However, we note that in the assessment year 2011-12 the Department has accepted the claim of the assessee partly, that is, out of Rs. 2,40,00,000/- share capital/premium, Rs.90,00,000/- share capital/premium, has been accepted by the Department as genuine. The Relevant para of the assessment year 2011-12 is reproduced below for ready reference:

*“22 The case of the assessee for the A.Y. 2012-13 was selected for scrutiny under CASS. During the course of assessment proceedings it was found from the examination of the balance sheet of the assessee, that the assessee issued and allotted 6,00,000 Nos. of shares at a premium of Rs. 2,28,00,000/- Out of the shares issued, 1,85,000 Nos. of shares were issued to Smt. Davina Mary Lyngwa for an amount of Rs. 2,40,00,000/- as share application money and the entire amount was received in cash. Moreover, from the Ledger account of share application money of Smt, Davina M. Lyngwa in the books of M/s ATC Realtors Pvt. Ltd., it is seen that out of the total share application money of Rs 2,40,00,000/-, an amount of Rs. 90,00,000/- was received as share premium during the F.Y. 2010-11 relevant to the A.Y. 2011-12 and Rs, 1,50,00,000/- was received during the F.Y. 2011-12 relevant to A.Y. 2012-13.*

*2.3 In view of the above, there was reason to believe that amount of Rs.90,00,000/- had escaped assessment within the meaning of Sec. 147 of the Act. It was a fit case for issue of notice U/s 148 of the Act.*

*3.1 In this case a return of income was filed for AY 2011-12 but no scrutiny assessment U/s 143(3) of the Act was made. Accordingly, in this case, the only requirement to initiate proceeding U/s 147 is reason to believe which has been recorded above in paragraph 2 consideration of the facts and circumstances as discussed hereinabove and*



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*taking into account various details submitted by the assessee, the total income of the assessee is computed under e-Assessment proceedings as per the return income filed.*

*3.2 It is pertinent to mention here that in this case the assessee has filed return of income for the year under consideration on 14-10-2011 but no assessment as stipulated U/s 2(40) of the Act was made and the return of income was only processed U/s 143(1) of the Act on 20-04-2012. In view of the above, provisions of clause (b) of explanation 2 of section 147 are applicable to facts of this case and the assessment year under consideration is deemed to be a case where income chargeable to tax has escaped assessment,*

*3.3 In this case more than four years have lapsed from the end of the assessment year under consideration. Hence necessary sanction to issue notice U/s 148 has been obtained separately from Principal Commissioner of Income Tax-2, Guwahati, as per the provisions of section 151 of the Act.*

*3.4 In response to issued Notices Summons and questionnaire, assessee made their replies vide letters dated 29/10/2018 and 30/10/2018. Subsequently, Notice for furnishing of information U/S 133(6) of the Act of 1961 was issued to the Smt. Davina Mary Lyngwa asking her to furnish information with regards to the sources of the funds. The reply has accordingly been furnished. The same is perused and not adverse interference is dawn."*

Thus, the AO accepted the claim of the assessee in A.Y. 2011-12, in respect of share capital/premium of Rs.90,00,000/-, therefore balance claim of Rs.1,50,00,000/- in the assessment year under consideration is also genuine, as there is no change in the facts and in the nature of amount. We note that it is a well settled legal position that factual matters which permeate through more than one assessment year, if the Revenue has accepted a particular view or proposition in the past, it is not open for the Revenue to take an entirely contrary or different stand in a later year on the same issue, involving identical facts unless and until a cogent case is made out by the Assessing Officer on the basis of change in facts. For that we rely on the order of the Hon'ble Supreme Court in *RadhasoamiSatsang vs. CIT 193 ITR 321 (SC)*, wherein it was held as follows:

*"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. On these reasoning, in the absence of any material change justifying the Revenue to take a different view of the matter - and, if there was no change, it was in support of the assessee – we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income-tax in the earlier proceedings, a different and contradictory stand should have been taken."*

We are of the view that the above cited precedents on principle of consistency are squarely applicable to the assessee under consideration. Therefore, we note that there is no infirmity in the order passed by the Id CIT(A).

19. We note that the identity of the Share Capital Subscriber, Mrs. Davina Mary Lyngwa is not in dispute, since she had identified herself before held AO in compliance to summons under Section 131 of the Act, issued to her. The fact that the notice under Section 133(6) of the Act calling for information from her as well as summon issued under Section 131 were well served upon her at her residential address at D/o Late Sh. F.G. Franklin, Mission Compound Road, Mawkhar, Shillong-02. Even the Ld. AO had not disputed the identify of Mrs. Davina Mary Lyngwa. Further, Mrs. Davina Mary Lyngwa had duly confirmed the investment made by her during the above assessment year in the shares of the Assessee Company and these facts have been duly acknowledged in para 6.2 of the order impugned by the Ld AO himself.

Regarding the Creditworthiness/Capacity/Financial Strength of the Share capital Subscriber, Mrs. Davina Mary Lyngwa was well confirmed by her during the course of her Statement under Section 131 of the Act, wherein she had stated as under: -

Q No. 7. Please furnish details of investments made by you in the F.Y 2011-12?  
 Please explain the source.

Ans: I have the following investments:

I) Two Guest Houses as mentioned



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2) Properties in Shillong three number, Barupani Two numbers and Tura Two numbers

3) Investment in ATC Realtors Private Limited an amount of Rs.2.40 crores.

4) Cash in hand and Bank

This, it would be noted from the above details of her investments, including the investments made during the above assessment year, that the said share capital subscriber, Smt. Davina Mary Lyngwa, is a person of considerable means. The fact that she had got 7 properties at various places in Meghalaya apart from Guest Houses etc. has not been disproved by the Ld AO. Apart from this, Mrs. Davina Mary Lyngwa had also confirmed her sources of income, during the course of deposition.

We also note that the following facts remained uncontroverted:

(1). That the identity of Smt. Davina Mary Lyngwa was proved beyond doubt and that the notices, summons etc. were duly served upon her at her address provided by the Assessee.

(2). That Smt. Davina Mary Lyngwa is a woman of considerable financial strength and capacity. She has investments in many immovable properties.

(3). That Smt. Davina Mary Lyngwa is also has a substantial annual income, most of which is being earned by her in cash.

(4). That as per para 6.2 of the order impugned, the Ld. AO had himself observed that Smt. Davina Mary Lyngwa is a tribal and her income accrued in scheduled area are exempted from Income Tax Under Section 10(26) of the I.T. Act, 1961.





(5). That the Assessee Company, as well as its promoters i.e. Goyal Family are known to Smt. Davina Mary Lyngwa since around 40 years and that the late husband of Smt. Davina Mary Lyngwa had economic and social relations with the promoters of the Assessee company, which relations have been continued by her even after the death of her husband.

(6). That Smt. Davina Mary Lyngwa had duly confirmed the investment made by her in the shares of the Assessee company and had also not only explained the mode of investment, but had also substantiated the reasons as well as justification for making investments in the shares of the Assessee.

(7). That Smt. Davina Mary Lyngwa had duly further confirmed the reasons for keeping cash in hand and the said factum has not been rejected by the Ld. AO.

(8). That the enquiry qua deposit of cash in the bank accounts of the Assessee was made by the Ld AO after recording the statement of the said share capital subscriber and the said observations of the Ld AO as to the cash not being deposited by the share capital subscriber into the bank account of the Assessee as Shillong remained unsubstantiated.

(9). That it is a common knowledge that insofar as the companies incorporated under the Indian Companies Act are concerned, whether private limited or public limited companies, they raise their capital through shares, though the manner of raising the share capital in the private limited companies on the one hand and public limited companies on the other hand, would be different. In the case of private limited companies, normally, the shares are subscribed by family members or persons known/close to the promoters. Public limited companies, on the other hand, generally raise public issue inviting general public at large for subscription of these shares.



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(10). That it is not just comprehensible as to when the said Smt Davina Mary Lyngwa had duly confirmed the reasons, justification for making the investment as also the mode, source and availability of the cash in hand with her, which further document was required by the Ld AO since the Ld AO had observed that no document was furnished by Smt Davina Mary Lyngwa which would prove that the money belong to her. The cash in hand is different via-a-vis balance at bank and the fact that Smt Davina Mary Lyngwa has confirmed her investment and that the Assessee had acknowledged her investment and in lieu thereof had issued shares to her, is itself a common adoption of the transaction by the transacting parties and a valid proof of payment, more-so when cash has no color.

Based on these factual position, we note that ld CIT(A) has rightly deleted the addition, therefore, we confirm the order of ld CIT(A).

20. Ground No.3 raised by the Revenue in ITA No. 170/Gau/2018, relates to deletion of addition of Rs. 54120/- on account of parking fees.

21. Brief facts qua the issue are that during the assessment proceedings the AO treated 20% of parking fees on account of personal expenses and added to the total income of the assessee. On appeal, the learned CIT(A) deleted the addition by observing the following: -

*“I have gone through the submissions of the Assessee as well as the observations of the Ld. AO. The addition has been made since the business receipts of the Assessee were considered as Rental income. Since the said ground no ‘b’ supra has been held in the favour of the Assessee, therefore, I find substance in the contention of the Assessee, wherein it has been stated that 100% of the parking fees has already been offered by the Assessee as its business income. Therefore, no further addition is warranted and the impugned addition of Rs.54,120/- is, hereby, deleted. This ground of appeal is accordingly allowed.”*

Aggrieved by the order of ld CIT(A), the Revenue is in appeal before us. We have heard both the parties and perused the material available on record. We note that assessment of the assessee was carried out by the AO under section 143 (3)



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of the Act, and not under section 144 of the Act, therefore, without rejecting the books of account of the assessee, the adhoc disallowance to the tune of Rs. 54,140/-, is not permitted. Therefore, we do not find any infirmity in the order passed by the learned CIT(A), his order on this issue is hereby accepted and the grounds of Revenue are dismissed.

22. In the result, both the appeals of the Revenue are dismissed

Order pronounced in the open court on 10-07-2019.

Sd/-

(एस.एस. गोदारा / S.S. GODARA)  
(न्यायिक सदस्य/ JUDICIAL MEMBER)

Sd/-

(एवं डॉ ए.एल. सैनी/ DR. A.L. SAINI)  
(लेखा सदस्य / ACCOUNTANT MEMBER)

गुवाहाटी, दिनांक/ Guwahati, Dated: 10-07-2019

सुदीप सरकार, व. निजी सचिव / *Sudip Sarkar, Sr.PS*

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

1. अपीलार्थी / The Assessee
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, गुवाहाटी / DR, ITAT, Guwahati
6. गार्ड फाईल / Guard file.

**आदेशानुसार/ BY ORDER,**

सत्यापित प्रति //True Copy//

**व. निजी सचिव/ Sr. Private Secretary (on Tour)  
आयकर अपीलीय अधिकरण, गुवाहाटी / ITAT, Guwahati**