

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

**BEFORE SHRI M.BALAGANESH, AM
&
SHRI RAM LAL NEGI, JM**

**ITA No.3262/Mum/2019
(Assessment Year : 2014-15)**

M/s. Trans Freight Containers Ltd., 72-73, Nariman Bhavan Nariman Point Mumbai – 400 021	Vs.	Deputy Commissioner of Income Tax, Circle 3(3)(2), Room No.609, Aayakar Bhavan M.K.Road Mumbai – 400 020
PAN/GIR No. AAAC1447P		
(Appellant)	..	(Respondent)

Assessee by	Shri Nitesh Joshi
Revenue by	Shri Amit Pratap Singh
Date of Hearing	18/11/2019
Date of Pronouncement	07/02/2020

आदेश / ORDER

PER M. BALAGANESH (A.M):

This appeal in ITA No.3262/Mum/2019 for A.Y.2014-15 arises out of the order by the Id. Commissioner of Income Tax (Appeals)-8, Mumbai in appeal No.CIT-8/IT-619/2016-17 dated 25/03/2019 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 14/12/2016 by the Id. Dy. Commissioner of Income Tax-3(3)(3), Mumbai (hereinafter referred to as Id. AO).

2. The first issue to be decided in this appeal is as to whether the Id. CIT(A) was justified in confirming the action of the Id. AO in considering

mesne profit of Rs.2 Crores as revenue receipt and accordingly assessing the same under the head 'income from house property' in the facts and circumstances of the case.

3. The brief facts of this issue and the chronology of various events which triggered receipt of mesne profit by the assessee are narrated as under:-

- The assessee is engaged in the business of development of pre-fabricated accommodation systems/modular designs for providing housing solutions. The assessee has also designed and developed products for various applications, its flagship products being mufti storey building for transit camps for slum rehabilitation projects.
- The assessee had e-filed its original return of income for A. Y. 2014-15 on 24.11.2014 declaring total income as Nil and claiming refund of Rs. 13,27,060/-.
- The assessee had given 1st and 2nd Floor Mittal Tower, Nariman Point Mumbai 400021 ('premises') admeasuring 20800 sq. ft. of area on lease to MMTC limited, as per the terms of agreement dated 22-10-1980 for a period of 9 years and 9 months.
- The said lease expired on 30.06.1990 and thereafter MMTC continued to occupy the said premises as per the provisions of the then prevailing Bombay Rent Act and last rent was paid to the assessee was at Rs. 1,94,480/- per month.
- After the expiry of the aforesaid period of lease, the assessee has requested to MMTC to vacate and handover the vacant possession of the property. However, MMTC did not vacate the premises on

the ground that they were protected under provision of the then existing Bombay Rent Act, 1947.

- Subsequently, w.e.f. 31.03.2000, the Bombay Rent Act, 1947 was repealed and Maharashtra Rent Control Act, 1999 came into existence. Under the Maharashtra Rent Control Act 1999, the premises let to MMTC were exempt from the applicability of the provision of the said Act and therefore, the MMTC was not protected under any Rent Control Legislation thereafter.
- As MMTC was no longer protected under Rent Control Legislation, the assessee terminated the said tenancy w.e.f 30.06.2000: through its advocate's letter dated 06.05.2000.
- Subsequently, assessee filed an eviction suit before Small Causes Court. The said court vide its order dated 02.05.2001 directed MMTC to vacate the said premises and ordered an enquiry for Mesne Profit under Order 20 of Rule 12 of C.P.C, from the date of termination of lease i.e. from 01.07.2000 till the date of handing over the possession i.e. 31.03.2002. MMTC filed an appeal against the order of trial court before assessee court. Subsequently, the appellate court upheld the order of the trial court by dismissing the appeal filed by MMTC.
- Thereafter, the Small Causes Court vide its order dated 20.11.2008 awarded the assessee Mesne Profits, in nature of damages for deprivation of use and occupation of the property. MMTC filed an appeal against the above money decree, before the appellate court.

The appellate court in its interim order dated 07.11.2009 stayed the above order with a condition that the MMTC will deposit Rs. 3,23,25,993/- in the court.

- Subsequently, in the final order, the appellate court upheld the order of the trial court by dismissing the appeal filed by MMTC. MMTC filed a writ petition against the order of the appellate court before the Hon'ble Bombay High Court, Hon'ble High Court vide its order dated 10.08.2011 upheld the order of lower courts.
- MMTC filed an SLP before Hon'ble Supreme Court against the "order of Hon'ble Bombay High Court. The Supreme Court upheld the order of Bombay High Court vide order dated 16.03.2012 and directed MMTC to pay an amount of Rs. 3,00,00,000/- to the assessee out of balance amount of Rs. 5,00,00,000/-.

3.1. Thereafter, the Hon'ble Supreme Court vide order dated 04/12/2012 directed MMTC to pay final amount of Rs.2 Crores to the assessee as compensation which was received by the assessee during the year under consideration. The assessee claimed the same as capital receipt while filing the return of income for the A.Y.2014-15, in view of the fact that the said sum was received as damages from MMTC for wrongful possession of the premises of the assessee. The assessee submitted that expression "mesne" profits has been defined in Section 2(12) of the code of Civil Procedure 1908 as under:-

(12) " mesne profits " of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received there from, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession"

3.2. In view of the aforesaid definition, the assessee pleaded that any receipt pursuant to wrongful possession of property would get characterized as mesne profits. In the present case, the amount received under the decree of the Court is related to the wrongful or unlawful possession of the property. The assessee placed reliance on the following decisions in support of its contentions before the Id. AO:-

- a. Special Bench of Mumbai Tribunal in the case of Narang Overseas Pvt. Ltd. vs CIT reported in 111 ITD 1 which was subsequently upheld by the Hon'ble Bombay High Court in appeal No.1791/2008.
- b. Decision of Mumbai Tribunal in the case of ACIT vs. Goodwill Theaters Pvt. Ltd. in ITA No.8185/Mum/2011 dated 19/06/2013.
- c. Decision of Hon'ble Kerala High Court in the case of CIT vs. Annamma Alexander reported in 191 ITR 551
- d. Decision of Hon'ble Calcutta High Court in the case of CIT vs. Lila Ghosh reported in 205 ITR 9 (Cal).

3.3. The Id. AO observed that the case laws relied upon by the assessee are not applicable in view of the fact that in the assessee's case, the quantum was awarded on the basis of Rs.161/- per sq.ft for 20,800 sq.ft

for a period of 21 months which is at par with the comparable market rent. Hence, the said receipt takes the character of rent. The Id. AO also observed that the decision rendered by this Tribunal in the case of Goodwill Theatres Ltd. referred to supra has been approved by the Hon'ble Jurisdictional High Court in favour of the assessee and the department has not accepted the said decision and Special Leave Petition was proposed by the revenue in that case before the Hon'ble Supreme Court. The Id. AO observed that the Small Causes Court specifically mentioned that the compensation per month at Rs.161/- per sq.ft for 20,800 sq.ft was rightly demanded by the assessee as being the prevalent market rent. Since MMTC has not paid the assessee at this rate, the compensation was arrived at and decided. He held that the assessee had got the eviction notice issued has no bearing on the nature of receipt. The Id. AO in turn placed reliance on the decision of the Hon'ble Madras High Court in the case that CIT vs. P. Mariappa Gounder reported in 147 ITR 676. By placing reliance on the aforesaid decision, the Id. AO observed that the amounts received by the assessee in the form of compensation is to be treated as arrears of rent u/s.25B and u/s.25AA which was inserted in the statute of Finance Act 2000 and 2001 respectively w.e.f. 01/04/2000 and 01/04/2001 respectively. Accordingly, he brought to tax the compensation received in the sum of Rs.2 Crores as arrears of rent chargeable under the head 'income from house property'

and granted 30% standard deduction thereon u/s.24 and assessed the remaining Rs.1,40,00,000/- as taxable income from house property.

3.4. The assessee submitted before the Id. CIT(A) as under:-

a) The learned AO in para 5.6 has observed that the letter dated 6th May 2000 of the Advocate of the assessee to MMTC for termination of tenancy was unsigned and does not bear proper acknowledgement by any of the parties.

In this regard we invite Your Honour's attention to page no 1 to 3 of the paper book where the said letter is placed and on perusal of the same it will be noticed that it is 'sd/-' copy which means it is signed by the person who has issued the fetter. Further, on perusal of the order dated 02.05.2001 passed by the Small Causes Court, Your Honour will appreciate that the said letter is referred into the order (refer page 5) and the contents of the said letter is mentioned in the said letter. Therefore, just because the copy of letter is 'sd/-' and not bear the acknowledgment of other party ; the same will not have any impact on the taxability of Mesne Profit specially when the said letter has been referred by various judicial authority as mentioned in the facts above.

b) The learned AO in para 5.7 has observed that MMTC continued to pay the assesses the rent at the contractual rate for the period ending 31.03.2002 while handing over the premises to the assessee and the same was a/so accepted by the assessee.

In this regard we invite Your Honour's attention to para 4 of the order dated 02.05.2001 passed by the Small Causes Court (refer page 6). In the said order it is observed by the Court that:

"the defendants were paying a monthly rent of Rs. 1,94,480/~ per month till 30.06.2000 and the rent for July and August 2000 was forwarded to the plaintiff vide defendant's fetter dated 7.9.2000. But the same was returned by the plaintiffs on the pretext that the matter is subjudice.

Thus, till the matter was subjudice, the appellant did not accept the payment from MMTC.

Subsequently, when Small Causes Court decreed the suit filed by the appellant and ordered to vacate the suite premises and Inquiry for Mesne profit, the appellant while receiving the vacant possession of the suit

property has received the contractual rent for the period 1.07.2000 to 31.03.2002 as part payment of mesne profit subject to determination of mesne profit under order XX Rule 12 of Civil Procedure Code. We also invite Your Honour Attention to pars 35 of order dated 20.11.2000 (refer' page no. 54 or the compilation) of Small Causes Court wherein it was held that:

"the payment of compensation at the rate of contractual rent cannot be considered as full payment of the mesne profits for wrongful occupation. As while passing the decree, Court directed inquiry under Order XX Rule 12 of Civil Procedure Code to determine the mesne profits, the defendants are liable to pay the same. The plaintiffs are therefore, entitled to recover the mesne profits for the period as claimed in this notice i.e. for the period from 01.07.2000 to 31.03.2002, at the rate of Rs. 161/- per sq.ft per month."

Thus, the entire payment at Rs.161 per sq.ft was mesne profits for wrongful occupation of the appellant's premises by MMTC.

c) In para 5.6, 5.8, 5.17, 5.18, 5.22 and 5.23 the learned AO has observed that even after expiry of the lease period the assesses had recognized MMTC as its tenant. The sudden terminology of treating the rent received at market rates as a capital receipt is wrongly interpreted by the assessee The Bombay High Court has upheld the order of the Small Causes Court wherein the compensation @ 161 per sq.ft. per month for 20800 sq.ft. was decided on prevalent market rent. If such cases are admitted as capital receipts, there may prevail cases of window dressing where small duration rent agreements may crop up to give compensations to properly owners and such owners claiming it as capital receipts thus depriving the Revenue the share of taxes thereon. The enhanced rate of Rs. 161 was determined as per the market forces and thus the amount so received during the year is required to be treated as Arrears of Rent u/s 25B and is chargeable to tax u/s 25AA even in those conditions when the assessee is not the owner of the property at the time of realization (para 5.6, 5.8, 5.17, 5.18, 5.22 and 5.23)

With reference to learned AO's observation that even after expiry of the lease period the assessee has recognized MMTC as its tenant we would like to invite Your Honour's attention to the para 3 of order dated 02.05.2001 of Small Causes Court wherein it is observed that:

'after the expiry of the period of lease defendants continued in possession of the suit premises as monthly tenant and the last rent was paid to the plaintiff at the rate of Rs. 1,94,480/- per month. After the expiry of the period of lease the plaintiff requested the defendant to vacant and hand over the vacant possession of the suit premises as the same was required reasonably and bonafide for their own use and occupation. The defendants however, failed to vacate and handover possession of the suits premises contending that they were protected under the provisions of then existing Bombay Rent Act 1947

being Bombay Act 57 of 1947. Ultimately, plaintiffs by their advocate's letter dated 6th May 2000 addressed to the defendants terminated the tenancy in respect of suit premises and called upon to vacate and handover the possession thereof to the plaintiff.¹" (emphasis supplied).

Thus, from the above Your Honour will appreciate that during the subsistence of the Bombay Rent Control Act the MMTC was protected under Bombay Rent Control Act and could not be vacated from the premises. Thus, the observation of the learned AO that it was only due to repeal of the Bombay Rent Control Act the assessee has taken support of the same to claim the compensation non-taxable as factually incorrect and misleading

.. The learned AO has also observed that the mesne profit was decided based on the prevalent market rent and the amount so received is required to be treated as Arrears of Rent u/s 258. In this regard we would like to invite Your Honour's attention to para 23 of order dated 20.11.2008 (refer page 50 of the compilation) of Small Causes Court wherein it is mentioned that "thus, the defendants being in wrongful possession have benefited to the extent of prevailing market rate which they would have to pay renting out similar premises, if they had vacated instead of continuing and wrongful possession of the suit premises. It is to be paid on termination of tenancy. The mesne profit in such cases has to be determined on the basis of comparable market rate" (emphasis supplied). Thus, the basis of determination of mesne profit will not change the nature of such compensation from mesne profit to rent as sought by the learned AO. The mesne profit has to be determined on the basis of what benefit the owner of the premises has lost or deprived when the premises is in unlawful or wrongful possession by someone else.

Further on perusal of section 25B (relevant to assessment year under consideration Your Honour will appreciate that the said section will become applicable only when property was let (refer clause (a) of section 25B) and the assessee is in receipt of any amount by way of arrear. Thus, as per the section any arrear of rent received for the period during which the property was actually let will be taxable in the year of receipt. However, in the case of the appellant the property was not let out for the period 1.07.2000 to 31.03.2002 as the appellant has terminated the tenancy w.e.f. 01.07.2000 by giving notice through its advocate vide letter dated 6th May 2000 and therefore MMTC was unlawfully occupying the said property for the period 1.7.2000 to 31.03.2002 for which Mesne Profit was determined. Therefore, the action of the ld. AO in bringing such mesne profit to tax under the head 'Income from House Property' by virtue of section 25AA / section 25B of the Act is misconceived.

We would like to submit that Mesne Profit is not defined under the Income Tax Act, however, The mesne profits is defined in s. 2(12) of the CPC, 1908 and various judicial precedent as under.

"Mesne profits" means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession.

From the above, it is clear that amount received for wrongful possession/ exploitation of property is termed as "Mesne Profit". Accordingly, once an income is characterized as 'mesne profits' by the judicial court, then income tax judicial precedents based on 'mesne profits' shall be applicable to all other cases of 'mesne profits'. Such an approach has utmost relevance because an owner of property may be deprived of its right as a true owner in many ways which shall not always be comparable to other cases.

In the present case, amount received by the assessee is not for occupation / renting of property but wrongful possession of property by the other party. hence it clearly falls within the meaning of mesne profit and not taxable as held by special bench of Mumbai Tribunal in the case of Narang Overseas (111 ITD 1) and then by Goodwill Theatres Private Limited.

d) The learned AO in para 5.10 and 5.11 has observed that decision of IT AT Special Bench in Narang Overseas Pvt. Ltd. (111 ITD 1) was not accepted and department had appealed to High Court. Bombay High Court has dismissed this appeal on technical ground and hence cannot be attributed to hearing of the issue of Mesne Profit and further the facts of Narang Overseas are different on following count:

The compensator (i.e. the tenant) was not the statutory tenant

- It was not letting out of premises but a business arrangement on profit sharing basis

- The tenant continued to occupy the premises even after termination of the arrangement had to pay the compensation to landlord which was claimed as Mesne Profit with an element of being a capital receipt.

- The award given was a lump sum award of Rs. 10 lacs per month with interest, while in the case of the assessee market rent was allowed which is clearly arrears of rent due to the assessee.

With reference to the AO's observation that in case of Narang Overseas the compensator was not a statutory tenant will not make any difference on nature of receipt so far so the property was occupied unlawfully. In case of the appellant on perusal of para 3 of order dated 02.05.2001 of Small Causes Court it will be appreciated that the tenant was occupying the property of the appellant unlawfully. Further, the learned AQ's observation that in case of Narang Overseas it was not letting out of premises but a business arrangement on profit sharing basis will not change the

characteristic or nature of receipt. Once the Mesne Profit, awarded for unlawful possession of premises, is held to be 'capital receipt' by Special Bench of ITAT it will not make any difference whether the rental income was taxable under house property or business profit.

The other observation of the learned AO that in Narang overseas tenant continued to occupy the premises after termination and lump sum award was given at Rs. 10 lacs. In the case of the appellant also the facts are similar (viz. MMTC continued to occupy the premises and mesne profits was determined at 161/~ per sq ft-) and the same will be evident from the previous paras.

Thus, there is no change in facts in the case of the appellant as compare with the facts of the Narang Overseas and the assessee has rightly relied upon the said decision.

e) In para 5.12., 5.16 and 5.19 the learned AO has observed that the facts the Mumbai Tribunal in Goodwill Theatres Pvt. Ltd. which was upheld by Bombay High Court, Kerala High Court in CIT v Annamma Alexander and Calcutta High Court in CIT v Lila Ghosh are different from the facts of the assessee.

Facts in Goodwill Theatres Private Ltd.

1. During A.Y. 20C8 09, Goodwill Thostro Pvf. Ltd. ("GTPL") rocoivod mesne profit of Rs. 1,47,28,280/- for unauthorised occupation of the premises from Central Bank of India ("CBI").

2. The tenancy of CBI had ended on 01.06,2000, however, CBI gave possession to GTPL of Novelty Chambers on 30.09.2003.

3. Hence, GTPL filed a suit for mesne profit for the period between 01.06.2000 to 30.09.2003 before small causes court. Accordingly, the small causes court at Mumbai passed an order wherein the Mesne Profit was fixed at Rs. 8,33,474/- p.m. for the said period plus interest thereon. The total compensation was thus fixed at Rs.3,33,38,960/- plus interest thereon at the rate of 6%.

4. Thereafter, CBI filed an application to the Small Cause Court for staying execution and operation of the said order which was disposed by directing the appellant to pay Rs, 1.47.28,280/- which was paid by CBI during A.Y 2008-09 and GTPL claimed the same as capital receipt exempt from tax in its computation of income.

5 The AO in the given case decided the issue against GTPI following the decision of Hon'ble Madras High Court in the case of P. Maraiappa Gounder.

6. Based on the above facts Mumbai ITAT relying upon the decision of Special Bench in Narang Overseas Private Limited (111 ITD 1) has held that "the AO failed to appreciate the fact that the decision of Madras High Court and Apex Court confirming the decision of Madras High Court in the case of P. MaraiappaGounder was considered by the Special Bench in the case of Narang Overseas Private Limited and found that the facts in the instant case are different from that in the case of P. MaraiappaGounder." The ITAT in the above case has upheld the order of CIT(A) which held that Mesne Profit is capital receipt and not taxable.

On perusal of the facts in the case of Goodwill Theatre and facts in the case the' appellant as discussed in the beginning. Your Honour will appreciate that there is no change in the facts Further the learned AO's observation "that- Goodwill Theatre was running theatre and whereas the assessee was out the property to MMTC and offering the income under the head "House property" will not change the characteristic or nature of receipt. Once the Mesne Profit, awarded for unlawful possession of premises, is held to be 'capita! receipt' by the tribunal it will not make any difference whether the rental income was taxable under house property or business profit.

Similarly, there is no difference in the facts of the Kerla High Court in CIT v Annamma Alexander and Calcutta High Court in CIT v Lila Ghosh as both the decisions has been considered by the Special Bench of ITAT in the case of Narang Overseas

f) With reference to learned AO's observation in para 5.20 and 5.21 that Delhi High Court in CIT v Uberoi Sons (Machines) Ltd. relying upon the decision of the Madras High Court, in CIT v P. MariappaGounder (147 ITR 676) has decided the issue in favour of the Revenue we submit as under:-

The issue before the Hon'ble High Court of Delhi was not whether Mesne Profit is capital receipt or revenue receipt. The issue before the High Court was whether Mesne Profit is taxable on mercantile basis or on real income basis when the decree is actually passed. The department wanted to tax mesne profit on accrual basis. To which the High Court has held that such profits accrue to the assessee only on date of decree actually passed.

With reference to reliance on decision of Hon'ble Madras High Court in P. Mariappa Gounder, we would like to submit that Special Bench of Mumbai Tribunal while deciding the issue In the case of Narang Overseas (Supra)has considered the said decision and thereafter come to conclusion that mesne profit is capital receipt not chargeable to tax.

In view of the above stated facts and legal position we pray before Your Honour to kindly delete the addition made by the learned AO.

3.5. The Id. CIT(A) placed reliance on the decision of Hon'ble Madras High Court in the case of P Mariappa Gounder vs. CIT reported in 147 ITR 676 and held that mesne profits would have to be taxable as revenue receipt. The Id. CIT(A) observed that the assessee in that case had appealed before the Hon'ble Apex Court and the only issue that was contended before the Hon'ble Apex Court was of the year of taxability of mesne profits. Accordingly, the Hon'ble Supreme Court had decided on the year of taxability of mesne profits in the case of P. Mariappa Gounder reported in 232 ITR 2 vide order dated 21/01/1998. With regard to the decision relied on the Mumbai Tribunal by the assessee in the case of CIT vs. Goodwill Theaters Pvt. Ltd. in ITA No. 8185/Mum/2011 dated 19/06/2013, the Id. CIT(A) observed that the said decision was affirmed by the Hon'ble Bombay High Court. The relevant operative portion of the Hon'ble Bombay High Court observation are as under:-

11. We make it clear that we have not examined the merits of the question raised for our consideration. We are not entertaining the present appeal on the limited ground that the Revenue must adopt an uniform stand in respect of all assesseees. This is more so as the issue of law is settled by the decision of the Special Bench of the Tribunal in Narang Overseas Pvt. Ltd., (supra). The fact that even after the dismissal of its Appeal (L) No.1791 of 2008 for non-removal of office objections on 25th June, 2009, no steps have been taken by the Revenue to have the appeal restored, is evidence enough of the Revenue having accepted the decision of the Special Bench of the Tribunal in Narang Overseas Pvt. Ltd., (supra). Thus, the question as framed in the present facts does not give rise to any substantial question of law.

3.6. The Id. CIT(A) further observed that on further appeal by the revenue, the Hon'ble Supreme Court in the case of CIT vs. Goodwill

Theaters Pvt. Ltd., reported in 93 Taxmann.com 36 dated 29/11/2017 had set aside the above order of the Hon'ble Bombay High Court with a direction to decide the matter on merits. Accordingly, the Id. CIT(A) held that the reliance placed on the decision of Goodwill Theaters would not advance the case of the assessee and thereby he upheld the action of the Id. AO in treating the mesne profits as taxable receipt.

4. Aggrieved, the assessee is in appeal before us.

5. We have heard the rival submissions and perused the materials available on record. The primary facts narrated hereinabove remain undisputed and hence, the same are not reiterated herein for the sake of brevity. It is not in dispute that the assessee had received the sum of Rs.2 Crores as compensation for wrongful possession of the erstwhile tenant in the property belonging to the assessee, though the same had been characterized by the revenue as arrears of rent taxable u/s.25B r.w.s. 25AA of the Act. This is a short dispute before us which is to be addressed.

5.1. We find that Small Causes Court, Mumbai in Misc. Notice No.74 of 2003 in T.E.R. Suit No.76/102 of 2000 dated 20/11/2008 in the case of Trans Freight Containers Ltd., (Petitioner - assessee herein) vs. MMTC (Defendant) had ultimately held as under:-

1. The Misc. Application No. 74 of 2003 in I.E. & R. Suit No. 7.6 /102 of 2000 is allowed with costs.

2. The plaintiffs are entitled to recover the mesne profits from the defendants by way of compensation at the rate of Rs,161/- per sq ft per month on the area of 20800 sq ft for the period from .01.07.2000 to 31.03.2002 after, adjusting amount of contractual rent, if any paid by way of compensation.

3. The plaintiffs are entitled to recover the interest from the defendants at the rate of 6% per annum on the amount of mesne profit calculated on monthly basis.

4. The plaintiffs to pay the court fees on the above said decreetal amount

5. The decree be drawn up accordingly.

(Emphasis supplied by us)

5.2. This order has been ultimately approved up to Hon'ble Supreme Court and the compensation amount was determined finally by the Hon'ble Supreme Court pursuant to which, the sum of Rs.2 Crores was received as compensation towards mesne profits by the assessee during the year. Hence, the nature of receipt being mesne profit has been proved beyond doubt and had attained finality. We find that the issue in dispute had been already addressed by the Co-ordinate Bench of this Tribunal in the case of Goodwill Theaters Pvt. Ltd. in ITA No.8185/Mum/2011 dated 19/06/2013 wherein it has been held as under:-

4. Assessee preferred appeal before the CIT(A). Detailed written submissions were filed before him. It was submitted that mesne profit received for unauthorized occupation of the premises is a capital receipt not chargeable to tax in the light of the decision of Special Bench of the Tribunal in the case of Narang Overseas Pvt. Ltd. Vs. ACIT, reported in 100 ITD (Mum)(SB). Further reliance was placed on the decision in the case of CIT Vs. Mrs. Annamma Alexander, 191 ITR 551 (Ker.). Regarding

the decision of the Hon'ble Madras High Court relied upon by the learned AO, it was submitted that the facts in that case are different. The finding of the learned AO were explained before the CIT(A) through written submission and it was submitted that findings of the learned CIT(A) are not correct. It was further submitted that the decision of the Hon'ble Madras High Court, which is merged in the decision of the Hon'ble Supreme Court, has been considered by the Special Bench and found that the facts are different. Learned CIT(A) after considering the order of the AO, detailed written ITA No.8185/2011 submission filed on behalf of the assessee, which are part of the order of learned CIT(A) also, found that the AO was not justified in treating the receipts as revenue in nature. Learned CIT(A) found that the decision of the Hon'ble Madras High Court has been considered by the Special Bench is squarely applicable on the facts of the present case as the facts of the present case are also similar to the facts before Special Bench. Accordingly, he held that the mesne profit received by the assessee is capital in nature and not chargeable to tax. Against the finding of the learned CIT(A), the department is in appeal here before the Tribunal

5. Learned DR placed reliance on the order of AO. Part of the order of the AO was read also. On the other hand, learned counsel of the assessee placed strong reliance on the order of learned CIT(A). The findings of the learned CIT(A) have been recorded in para 1.3 at pages 17 & 18 of his order, are as under :-

"I have considered the facts. It is seen that the AO has relied in the case of P. Mariappa Gounder 147 ITD 676 (Mad) which has been affirmed by the Supreme Court in 232 ITR 2 (SC) wherein the issue was the year of taxability of the msene profit. Wherein as per the order of Supreme Court, the trial Court has determine the amount of mesne portit payable to the appellant and the trial court has determined the liability and passed an order on December 22, 1962. Therefore, it was held that the amount was ascertained on 22.12.1962. Hence, it was liable to be charge on the basis of mercantile system of accounting in the AY. 1963-64. It is further seen that the Appellant has contested that the issue whether the mesne profit was capital or revenue was not the question agitated in the case of P. Mariappa Gounder. The AR relied in the case of Narang Overseas P.Ltd. 111 ITD 1 Mum, (SB) wherein the Hon'ble 5 Member Special Bench has considered the decision in the case of P. Mariappa Gounder (supra) and observed that the above decision was only concern with one issue relating to year of applicability of mesne profit i.e. whether it was taxable in the AY. 63-64 or A.Y. 64-65. The issue ITA No.8185/2011 whether mesne profit constitute revenue receipt or capital receipt was not before the Supreme Court as was apparent from the question posed before it for adjudication. After considering these facts, the Hon'ble Special Bench has held that mesne profit received from the depreviation of use of occupation of property would be capital receipt not chargeable to tax. This decision of Special

Bench is also taken before the jurisdictional High Court. However, the appeal against this decision was dismissed vide order dated 25.6.2009 in ITA No. 1797 of 2008 by the Hon'ble Bombay High Court. In the light of these facts, the mesne profit received by the appellant on account of decree and depreciation of use of occupation of property and therefore, the sum so received was capital in nature not chargeable to tax. Since the decision of Special Bench is binding on the appellate authorities working under its jurisdiction. Therefore respectfully following the same, the mesne profit is received by the appellant is treated as capital receipt and not chargeable to tax."

6. After going through the order of AO and the above findings of the learned CIT(A), we noted that the AO decided the issue against the assessee following the decision of the Hon'ble Madras High Court in the case of P. Mariappa Gounder (supra). This decision of the Hon'ble Madras High Court and the decision of the Hon'ble Supreme Court confirming the order of Hon'ble Madras High Court has been considered by the Special Bench and found that the facts are different. It is further seen that the decision of the Special Bench has been confirmed by the Hon'ble Bombay High Court vide order dated 25-6- 2009. All these facts have been considered by the learned CIT(A), which remained uncontroverted. Therefore, without going into details further, we see no reason to interfere in the findings of the learned CIT(A) as the order of the learned CIT(A) is in consonance with the order of the Special Bench, which has been confirmed by the Hon'ble ITA No.8185/2011 Bombay High Court. Accordingly, we confirm the order of the learned CIT(A) on the issue involved.

5.3. We find that the other decisions relied upon by the Id. DR and the Id. AR need not be gone into in view of the fact that the aforesaid decision of this Tribunal in the case of Goodwill Theaters has already been decided in favour of the assessee and the matter is pending at present before the Hon'ble Jurisdictional High Court pursuant to the restoration of the appeal by the Hon'ble Supreme Court to the Hon'ble Bombay High Court. Hence, as on date, there is a decision of this Tribunal on the impugned issue which is in favour of the assessee and any reliance placed on any other decision would be premature at this stage in the aforesaid

circumstances. Hence, we proceed to follow the decision of the Co-ordinate Bench of this Tribunal in the case of Goodwill Theaters referred to supra by holding receipt of compensation (i.e. mesne profit) of Rs.2 Crores as capital receipt. Accordingly, the ground No.1 received by the assessee is allowed.

6. The ground No.2 raised by the assessee is challenging the action of the Id. CIT(A) in confirming the disallowance of professional fees of Rs.48,376/- u/s.40(a)(ia) of the Act.

6.1. We have heard rival submissions and perused the materials available on record. We find that assessee had made payment to M/s. Sharex Dynamic India Pvt. Ltd., as professional fees amounting to Rs.48,376/-. The said party had acted as Registrar and transfer agent of the assessee company. The professional fees was paid to them for rendering the services as Registrar and Transfer Agent which is not in dispute before us. The Id. AO disallowed the said expenditure u/s.40(a)(ia) of the Act on the ground that payment was made by the assessee without deduction of tax at source. The assessee pleaded before the Id. CIT(A) that the recipient of the professional fees i.e. M/s. Sharex Dynamic India Pvt. Ltd had duly offered the subject mentioned receipt in their returns of income and had paid taxes thereon and hence, the assessee could not be treated as assessee in default in terms of Section 201(1) of the Act in view of the second proviso thereon. The Id. CIT(A)

however, upheld the action of the Id. AO. We find that the Id. AR fairly stated that let this issue be factually valued by the Id. AO as to whether the recipient had already disclosed the subject mentioned receipt in its returns and had paid due taxes thereon. We find lot of force in the said argument as it is a statutory claim made by the assessee in terms of second proviso to Section 40(a)(ia) of the Act which says that once the recipient has already paid the taxes on a particular payment made by the assessee to the said recipient, then the disallowance u/s.40(a)(ia) of the Act cannot be invoked in the hands of the payer i.e. assessee herein. The Id AO is directed accordingly. Hence the ground No.2 raised by the assessee is allowed for statistical purposes.

7. The ground No.3 raised by the assessee is challenging the action of the Id. CIT(A) in confirming the addition of Rs.16,245/- made by the Id. AO with respect to interest on fixed deposit with banks on account of difference of amount reflected in form 26AS and amount disclosed by the assessee in the return.

7.1. We have heard rival submissions and perused the materials available on record. We find that this addition was made by the Id. AO on account of difference in interest amount reflected in form 26AS vis-à-vis the amount reflected in the returns. We find that assessee had offered the interest income of Rs.61,41,915/- towards interest on fixed deposits

with banks based on the certificate issued by The National Co-operative Bank Ltd., which is enclosed in page 143 of the paper book. Merely because the extra amount of Rs.16,245/- is reflected in form 26AS, the assessee cannot be asked to explain the difference. The assessee herein had placed reliance on the external evidence i.e., the certificate given by the bank for offering interest income on deposits to tax. If the said bank had disclosed some other figure while filing its TDS returns by mentioning the PAN of the assessee, then assessee cannot be called upon to reconcile the difference. There is no dispute that it is the very same bank which had also given the certificate to the assessee certifying that only a sum of Rs.61,41,915/- has been paid as interest to the assessee during the year under consideration. Hence, the addition made by the AO and sustained by the Id. CIT(A) does not survive. Accordingly, the ground No.3 raised by the assessee is allowed.

8. The ground No.4 raised by the assessee is with regard to treatment of interest income on fixed deposits of Rs.1,64,10,938/-.

8.1. We have heard rival submissions and perused the materials available on record. We find that the issue in dispute before us is whether the interest income on fixed deposits of Rs.1,64,10,938/- should be taxed under the head 'income from other sources' or under the head 'profits and gains of business or profession'. The assessee had offered the said interest income as business income in consonance with the consistent

stand taken by it from the earlier years. In this regard, the Id. AR placed on record the scrutiny assessment orders for A.Yrs 2008-09, 2009-10, 2011-12 and 2012-13 passed u/s.143(3) of the Act dated 21/12/2010, 20/12/2011, 25/03/2014 and 31/03/2015 respectively. In all these years, the Income Tax department has accepted the stand of the assessee that the interest income on fixed deposits had got business nexus and had to be assessed only as business income. Hence, the Id. AR pleaded that there is no reason for the revenue to take a divergent stand during the year under consideration alone when there is absolutely no change in the facts and circumstances of the case. In this regard, the Id. AR placed reliance on the decision of Hon'ble Supreme Court in the case of CIT vs. Dalmia Promoters and Developers Pvt. Ltd. in Civil Appeal No.74/2007 dated 22/09/2015 wherein it was held as under:-

“By an assessment order dated 29th February, 1996, with regard to Assessment Year 1993-94 (with which we are concerned in the present case), the Assessing Officer held that interest earned from Fixed Deposits before business actually commenced would be taken under the head ‘interest from other sources’ and not under the head ‘business income.’ This was reversed by the Commissioner of Income Tax (Appeals) by its order dated 4th September, 1996 taking into account inter alia the fact that for the previous three assessment years the assessee for similar interest from such fixed deposits had been held to come within the head ‘business income’ and therefore, following the principle of consistency, it was held that this would have to be for the Assessment Year 1993-94 as well. An appeal filed by the Revenue before the Income Tax Appellate Tribunal was dismissed on 1st October, 2004. Not satisfied went to the High Court of Delhi under Section 260A of the Income Tax Act and vide judgment dated 17th January, 2006 the appeal filed by the Revenue was dismissed on the said same ground viz, that the previous three years such income would have to be treated as business income. There being no change in the circumstances for the Assessment Year 1993-94 the same result would, therefore, have to follow.

Shri Jaideep Gupta, learned senior counsel appearing on behalf of the Revenue has argued before us that in Tuticorin Alkali Chemicals & Fertilizers Ltd. vs. Commissioner of Income-Tax (227 ITR 172), this Court has held that in such a situation such income would have to be treated as interest from other source and not as business income. This is resisted by the learned counsel appearing on behalf of the assessee. We are not going into this issue in as much as this appeal can be disposed of on the ground that consistency does demand that there being no change in circumstances, the income for the year 1993-94 would also have to be treated business income as for the previous three years. Accordingly, the appeal is dismissed."

8.2. Respectfully following the said decision and the principle of consistency, we hold that the interest income on fixed deposits in the peculiar facts of the instant case should be assessed only under the head 'business income'. Accordingly, ground No.4 raised by the assessee is allowed.

9. The ground No.5 raised by the assessee is general in nature and does not require any specific adjudication.

10. In the result, appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on this 07/02/2020

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 07/02/2020
KARUNA, sr.ps

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai