

**IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC” BENCH, MUMBAI**

**BEFORE SHRI NARENDER KUMAR CHOUDHRY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA Nos.2826 to 2828/Mum/2023
(A.Ys. 2013-14 to 2015-16)**

Jolly Maker 1 Prem Co-op Society Limited, 95-97, Cuffe Parade, Cuffe Parade, Colaba Mumbai – 400005	Vs.	Asst. Commissioner of Income Tax-18(2), KautilyaBhavan, C-41 to C-43, G Block, BandraKurla Complex, Bandra (E) Mumbai – 400051
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No:AAAJJ0005E		
Appellant	..	Respondent

Appellant by :	M.V. Chokshi
Respondent by :	Ujjawal Kumar Chavan

Date of Hearing	12.12.2023
Date of Pronouncement	12.02.2024

आदेश / O R D E R

Per Bench:

All these 3 appeals filed by the assessee are directed against the different order of CIT(A), Mumbai passed u/s 250 of the Act for assessment year 2013-14 to 2015-16. Since, common issue on identical facts are involved in these 3 appeals filed by the assessee, therefore, for the sake of convenience all these appeals are adjudicated together by taking ITA No. 2826/Mum/2023 for A.Y. 2013-14 as a lead case and its finding will be applied mutatis mutandis to the other appeals wherever it is applicable.

ITA No. 2826/Mum/2023

GOA:1 Issue: Erroneous upholding of protective assessment

[Tax Effect: Rs.1,59,86,389/-]

1.1 On the facts and circumstances of the case, the learned Commissioner has grossly erred, both on facts and in law, in summarily dismissing the Appellant's appeal and confirming assessment of income from house property and interest income on protective basis in the hands of the Appellant deviating from the consistent practice of assessing these incomes in the hands of the Appellant and contradicting the settled position accepted by the Department

1.2 The learned Commissioner failed to appreciate the facts and circumstances of the case, in particular: -

a) the taxation of income from house property and interest income in the hands of the Appellant has attained finality as right person since Asst. Year 2002-03 and subsequent years in view of section 27 (iii) and section 60 in the view of the decisions of the Hon'ble Bombay High Court in the Appellant's own case as under:-

Particulars	Writ Petition No. (s)	Asst Year	Date of order of Hon'ble Bombay High Court
Jolly Maker 1 Premises Co-op Society Ltd. vs. DCIT 12(2)	851/2014	2007-08	11.02.2022
Jolly Maker 1 Premises Co-op Society Ltd. Vs. DCIT 12(2)	1159/2014; 1238/2014; 1240/2014; 1419/2014; (L) 762/2014	2008-09 2009-10 2010-11 2011-12 2012-13	09.07.2014; 25.07.2014 (Modification order)

b) Deduction under section 80P of the Act has been allowed to the Appellant in aforesaid assessment years and Asst Year 2018-19,

c) Deduction of service charges/incidental expenses have been allowed by Hon'ble ITAT in the Appellant's own cases in ITA no 3503/Mum/2009 (Asst Year 2005-06), ITA no 5140/Mum/2014 (2009-10) and ITA no 1450/MUM/2017 (Asst Year 2011-12)

1.3 The action of the learned Commissioner/learned AO of not assessing House Property income and Interest income substantively in hands of the Appellant is arbitrary, baseless, illegal and improper by erroneously relying on unrelated judgment in the case of Jolly Maker 1 Trust (396 ITR 274) and disregarding subsequent order of Hon'ble Supreme Court in SLP no CC No 3752/2017 dated 20-02-2017 against the said Hon'ble Bombay High Court's order in writ petition

1.4 On the facts in the circumstances of the case and in law, pursuant to the need follow judicial discipline, the learned AO is precluded and estopped from digressing from the assessment principles consistently followed in the Appellant's own case and that too at the instance of the Department.

1.5 The Appellant prays that the income from House Property and Interest income may be accepted as income of the Appellant

substantively as per settled legal position and deduction claimed of Service charges and u/s BOP of the Act may be allowed.

1.6 *On the facts and circumstances of the case and in law, among other things, in the absence of any prior substantive order for the year under reference in any other related case, the order passed by the learned Assessing Officer and the order of the learned Commissioner under section 250 of the Act is untenable and unsustainable and as such the order passed is bad in law and liable to be cancelled/quashed.*

GOA 2: Issue Disallowance of Service charges and incidental expenses [Tax effect. Rs.23,41,126/-]

2.1 *On the facts and in the circumstances of the case and in law, the learned Commissioner erred in confirming disallowance of Society Service charges of Nariman Bhavan premises and incidental expenses of Rs.75,76,459/-*

2.2 *The Appellant prays that the expenses of Rs.75,76,459/- claimed may be allowed following decisions of the Hon'ble ITAT in the Appellant's own case in ITA no 3503/Mum/2009 (Asst Year 2005-06), ITA no 5140/Mum/2014 (2009-10) and ITA no 1450/MUM/2017 (Asst Year 2011-12) dated 10-03-2010, 27-04-2016 and 18-07-2018 respectively*

GOA 3 Issue Disallowance of deduction u/s 80P [Tax effect Rs.1,36,45,262/-]

3.1 *The learned AO has grossly erred in not allowing deduction of Rs.4,41,59,425/- u/s 80P of the Income Tax Act, 1961*

3.2 *The Appellant prays that the deduction may be allowed as claimed.*

GOA 4: Issue: Reliefs

Each of the grounds of appeal is mutually exclusive and without prejudice to one another.

GOA 5: Issue Reliefs

The Appellant craves leave to add, alter, amend, modify, omit or substitute any or all grounds at any time before or at the time of hearing of the appeal. Any consequential relief, to which the Appellant may be entitled under the law in pursuance of the aforesaid grounds of appeal, or otherwise, may be thus granted."

2. Fact in brief is that return of income declaring total income of Rs.11,94,60,413/- was filed on 29.10.2013. The case was subject to scrutiny assessment and notice u/s 143(2) of the Act was issued on 04.09.2014. The assessee is a cooperative society and the main source of income is from house property included u/s 60 of the Act in the hands of the assessee.

3. During the course of assessment the assessing officer noticed that assessee has declared total income of Rs.11,94,60,410/- which comprised income from house property at Rs.12,32,54,282/-, income from business or profession at Rs.nil and income from other sources at Rs.403,65,556/-. The assessee has also shown interest from cooperative banks at Rs.4,43,00,181/- and also claimed deduction u/s 80P to the amount of Rs.4,41,59,425/-.

4. After perusal of the detail filed by the assessee the assessing officer noticed that there was a property named Nariman Bhavan, premises which was owned by trust namely Jolly Maker-1 Trust. The assessee cooperative society was the sole trustee of this trust. The Nariman Bhavan Property was let out and income from house property was generated from this property. The assessee has also shown interest income earned on the deposit received against letting out Nariman Bhavan Property. The assessing officer observed that the assessee cooperative society was the representative assessee of Jolly Maker-1 Trust which owned Nariman Bhavan premises at Nariman Point, Mumbai. During the year the assessee has shown interest of Rs.12,32,54,282/- from the Nariman Point premises and also earned interest on deposits received pertaining to the said premises of Rs.4,43,00,181/- against which the assessee had claimed deduction u/s 80P of Rs.4,41,59,425/-.

5. After taking into consideration the aforesaid facts the assessing officer asked the assessee that the source of interest income earned by the assessee was out of rental income and security deposit received from Nariman Bhavan Property, therefore, the interest income belonged to the trust and not to the assessee society. Therefore, by issuing of show cause notice assessee was asked to explain why not

claim of deduction u/s 80P(2) against interest income of bank deposit of Rs.4,41,59,425/- be disallowed.

6. In response the assessee submitted that since assessment year 1978-1979 the interest income has been accepted and assessed in the hands of the assessee and also referred the assessment order for assessment year 2002-03 and assessment year 2010-11 completed u/s 143(3) of the Act. The assessee also submitted that society was the owner of Nariman Bhavan Property and shares certificate of Nariman Bhavan Property was in the name of the assessee society and rental income and security deposit was received by the assessee society. The assessee also submitted that deduction u/s 80P(2)(c) of the Act was permissible from usual activities of a cooperative society without any requirement of business income and in the case of the assessee such deduction was allowed since 1997-78 in the order passed u/s 143(3) of the Act. The assessee has also submitted copies of assessment orders for assessment year 1994-95, 1995-96, 2000-01 to 2005-06 assessment year 2008-09 and AY. 2009-10.

7. However, the AO has not agreed with the submission of the assessee and stated that assessee had not given specific details of source of funds invested with banks from interest income. The assessing officer stated that the assessee as a trustee was the representative assessee of Jolly Maker trust which owned Nariman Bhavan premises at Nariman Point, Mumbai and income from the same was shown in the hands of the assessee in the capacity of representative assessee. Therefore, the funds and rental income were belonged to the trust and not to the assessee society. Accordingly, income from house property and income from other sources comprising interest income and services charges were

assessed in the hands of the assessee co-operative society on protective basis and claim of deduction u/s 80P (2)(d) was not allowed.

8. In view of the above facts and circumstances the AO stated that receipt of income belonging to the trust was required to be assessed in representative capacity as income belonging to the trust and same cannot be clubbed in the hands of the assessee society in the return of income filed in its personal capacity. Therefore, income from house property and income from other sources comprising interest income and service charges were assessed in the hands of the assessee cooperative society on protective basis.

9. The assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has dismissed the appeal of the assessee holding that the assessee society has invested the funds of the trust and the interest on these investment cannot be claimed as deduction as the funds were not its own fund and the income was substantially assessed in the hands of the trust. The ld. CIT(A) also held that since the assessee was representing a trust and the trust was not eligible for deduction u/s 80P of the Act.

10. During the course of appellate proceedings before us the ld. Counsel has submitted that for assessment year 2002-03 the assessee filed return of income on 29.07.2002 declaring income of Rs.nil and the income from house property was disclosed in the return of income of Jolly Maker Trust. However prior to this since assessment year 1979-80 the income from house property was disclosed and assessed in the hands of the assessee. The case for assessment year 2002-03 was subject to scrutiny assessment and the Additional Commissioner of Income Tax 12(2), Mumbai held that showing of lease rent income in the return filed of the trust as representative assessee was not tenable and at the instance of the revenue the assessee had

revised its return for assessment year 2002-03 and assessment was completed accepting income from house property and interest income clubbed in the hands of the assessee u/s 60 of the Act and this position was constantly followed till assessment year 2010-11.

11. The assessee further submitted that notice for reopening the assessment was issued u/s 148 of the Act for assessment year 2007-08 to 2012-13. The Hon'ble Bombay High Court vide order dated 11.02.2022 for assessment year 2007-08 had quashed the reassessment proceedings. The ld. Counsel further submitted that following the order of Hon'ble Bombay High Court dated 09.07.2014/25.07.2014 the department has withdrawn the notices issued for assessment year 2008-09 to 2012-13.

12. The ld. Counsel further submitted that assessee society has been allowed deduction u/s 80P(2)(d) of the Act in respect of interest income from cooperative bank for assessment year 2007-08 to 2010-11, 2012-13 and 2018-19.

13. On the other hand, the ld. D.R submitted that trust is a legal entity different from the assessed cooperative society, therefore, the income earned from the trust cannot be shown in the hands of the assessee cooperative society and he relied upon the order of lower authorities.

14. Heard both the sides and perused the material on record. The assessee was a trustee of Jolly Maker -1 Trust which owned Nariman Bhavan premises at Nariman Point, Mumbai. During the year under consideration the Nariman Bhavan Property was let out and the income from the house property was shown in the hands of the assessee. During the course of assessment the assessing officer also observed that the assessee has not invested its own funds in the cooperative bank to earn interest, therefore, the assessing officer has

assessed the rental income in the hands of the assessee protectively since the property belonged to the trust and not to the assessee. The assessing officer has also observed that the assessee has not invested own funds for claim of deduction u/s 80P and the funds were belonged to the trust, therefore, the rental income and interest income were assessed in the hands of the assessee on protective basis and on substantial basis in the hands of the trust. The claim of deduction u/s 80P was also not allowed on the ground that funds were belonged to the trust and not to the assessee in contravening the provision of Sec.161 of the Act.

15. The assessee has referred the decision of Hon'ble High Court of Bombay in the case of the assessee vide Writ Petition No. 851 of 2014. The relevant extract of the finding of Hon'ble High Court is reproduced as under:

- “1. *Petitioner is a co-operative society and has been assessed to tax since A.Y.-1977-1978. Petitioner declared the income under the heads of income from house property and income from other sources. Petitioner is a sole trustee and representative assessee of Jolly Maker 1 Trust, which owns NarimanBhavan premises and the income is clubbed by virtue of Section 60 of the Income Tax Act 1961 (the Act) in the return of trust (which is an oral trust) and tax paid. Hence, the returns filed by petitioner are also as trustees in capacity of representative assessee and is assessed, is accepted and finalised by the Income Tax Department.*
2. *For A.Y.-2002-2003, originally two separate returns were filed, one for society and second for trust in representative capacity. During the assessment proceedings, at the department's instance revised returns were filed to club the income as representative assessee with that of society and assessment was completed under Section 143(3) of the Act. For A.Y-2003- 2004, 2004-2005, 2005-2006 and 2006-2007 income from house property and interest income assessed and taxed in the hands of petitioner including income of trust in representative capacity as per A.Y-2002-2003 was completed under Section 143(3) of the Act. For A. Y.-2008-2009, 2009-2010, 2010-2011 and 2011-2012 the assessment was completed under Section 143(3) of the Act. For A.Y.-2012-2013 the assessment was processed under Section 143(1) of the Act. For these five years notice was issued under Section 148 and the notices were withdrawn vide orders of this court dated 9th July 2014 and 25th July 2014 in Writ Petition (L) No.762 of 2014 with Writ Petition Nos. 1159 of 2014, 1238 of 2014, 1240 of 2014 and 1419 of*

2014. Mr. Andhyarujina states that scrutiny assessment for petitioner for A.Y.-2018-2019 was also completed under Section 143(3) of the Act accepting income of trust in representative capacity in the hands of petitioner.

3. *The present petition relates to A.Y.-2007-2008, where the assessment was processed under Section 143(1) of the Act. Petitioner received the notice dated 21 November 2013 under Section 148 of the Act stating that respondents had reasons to believe that petitioner's income for A.Y.-2007- 2008 has escaped assessment within the meaning of Section 147 of the Act. Petitioner was provided reasons recorded for initiating reassessment proceedings by a communication dated 14th November 2013. The reasons recorded, as submitted by Mr. Andhyarujina are identical to the reasons recorded for A.Y-2008-2009, 2009-2010, 2010-2011, 2011-2012 and 2013- 2013. Those notices for these five years beginning 2008-2009 have been withdrawn as recorded earlier in this order. Therefore, notice issued for A.Y-2007-2008, which is impugned in this petition also could not survive. Since Mr. Suresh Kumar states he has no instructions to withdraw the notice, we have no option but to quash and set aside the notice in view of the background recorded earlier in this order.*
4. *Accordingly, notice dated 21 November 2013 issued under Section 148 of the Act and consequently the order dated 27 January 2014 rejecting petitioner's objections are quashed and set aside.*
5. *Petition disposed accordingly with no order as to costs."*

16. We have perused the aforesaid finding of the decision of Bombay High Court as referred by the Id. Counsel wherein it is held that for assessment year 2002-03 originally two separate returns were filed one for the society and second for the trust in representative capacity. However, during the course of assessment proceedings on the instance of the department assessee has revised the return of income for clubbing the income as representative assessee with that of the assessee society and assessment was completed u/s 143(3) of the Act. Accordingly, even for assessment year 2003-04 to 2006-07 income from house property and interest income were assessed and taxed in the hands of the assessee cooperative society including income of the trust in representative capacity as per assessment year 2002-03. Thereafter, for assessment year 2008-09 to 2011-12 the department

has issued notice u/s 148 of the Act, however, the same were withdrawn vide order of the Hon'ble Bombay High Court dated 09.02.2014 and 25.07.2014 in Writ Petition (L) No. 762 of 2014 with Writ Petition No. 1159 of 2014, 1238 of 2014, 1240 of 2014 and 1419 of 2014. After perusal of the decision of Hon'ble Bombay High Court in the case of assessee as referred above it is evident that assessee has clubbed income as representative assessee with that of the society on the instance of the department, thereafter the other notices issued for reopening the assessment were withdrawn by the department. Even the notice u/s 148 issued for reopening of assessment for assessment year 2007-08 was also quashed and set aside by the Hon'ble Bombay High Court vide order dated 11.02.2022 as referred above.

17. We consider that these facts and judicial findings were not considered by the ld. CIT(A) before adjudicating the appeal of the assessee in spite of the facts that assessee had made written submission before the Ld.CIT(A) as placed at page no.1 to 16 of the paper book, however no discussion was made in the order of the First Appellate Authority about the facts and judicial findings brought in the submission filed by the assessee. Therefore, we restore this issue to the file of the ld. CIT(A) for deciding afresh after considering the submission of the assessee and thereafter record reason in support of his findings on those points in dispute. It is needless to say that assessee is at liberty to file the relevant documents and written submission before the Ld.CIT(A). Therefore this grounds of appeal is allowed for statistical purpose.

Ground No. 2: Disallowance of service charge and incidental expenses:

18. The assessing officer noticed that assessee has claimed Rs.25,76,459/- as deduction u/s 57 of the Act out of service charges

received and shown under the head income from other sources. The assessing officer has disallowed the claim of deduction on the ground that assessee has already been allowed deduction u/s 24 of the Act for these expenses while computing income from house property.

19. The assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has dismissed the appeal of the assessee holding that AO has made addition on account of service charges protectively in the hands of the assessee as the service charges were received with regard to the property owned by the trust and need to be assessed in the hands of the trust substantively.

20. During the course of appellate proceedings before us the ld. Counsel submitted that in the case of the assessee itself the ITAT for assessment year 2005-06 to 2006-07 and 2009-10 vide ITA No. 3503/Mum/2009, ITA No. 3050/Mum/2010 and ITA No. 5140/Mum/2014 dated 10.03.2010, 07.07.2011 and 27.04.2016 respectively allowed the claim of service charges in favour of the assessee.

21. On the other hand, the ld. D.R supported the order of lower authorities.

22. Heard both the sides and perused the material on record. We have perused the decision of coordinate bench of the ITAT as referred above by the ld. Counsel wherein on identical issue and facts the claim of services charges were allowed in favour of the assessee, however, the ld. CIT(A) has not taken into consideration the submission of the assessee filed. Therefore, we also restore this issue to the file of the ld. CIT(A) for deciding afresh after considering the submissions of the assessee and findings of the ITAT and thereafter record reasons in support of his findings. Therefore the appeal of the assessee is allowed for statistical purpose.

ITA No.2827/Mum/2023

23. On similar issue and identical facts we have adjudicated the appeal No. 2826/Mum/2023 for assessment year 2013-14 as above by restoring the issue to the file of the Ld.CIT(A) for deciding a fresh. After applying the finding of the aforesaid decision as mutatis mutandis this ground of appeal of the assessee is also allowed for statistical purpose.

ITA No.2828/Mum/2023

24. On similar issue and identical facts we have adjudicated the appeal No. 2826/Mum/2023 for assessment year 2013-14 as above by restoring the issue to the file of the Ld.CIT(A) for deciding a fresh. After applying the finding of the aforesaid decision as mutatis mutandis this ground of appeal of the assessee is also allowed for statistical purpose.

25. In the result, all the appeals of the assessee are allowed for statistical purpose.

Order pronounced in the open court on 12.02.2024

Sd/-

(Narender Kumar Choudhry)
Judicial Member

Sd/-

(Amarjit Singh)
Accountant Member

Place: Mumbai

Date: 12.02.2024

Rohit: PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT,

Mumbai

5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench,
Mumbai.