IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A" : HYDERABAD

BEFORE SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER
AND
SMT. ASHA VIJAYARAGHAVAN, JUDICIAL MEMBER

ITA.No.1038, 1039 & 1040/Hyd/2014
Assessment Year 2006-2007, 2007-2008 & 2009-2010

M/s. K. Raheja IT Park (Hyderabad) P. Ltd., Hyderabad. PAN AACCK1914G (Appellant)	vs.	Commissioner of Income Tax-II, Hyderabad. (Respondent)

For Assessee : Mr. Arvind Sonde
For Revenue : Mr. P. Somasekhar Reddy

Date of Hearing : 16.09.2014
Date of Pronouncement : 07.11.2014

ORDER

PER B. RAMAKOTAIAH, A.M.

These three appeals are by assessee against the Order of Ld. CIT-II, Hyderabad passed under section 263 of Income Tax Act, 1961 dated 28.03.2014 for the assessment years 2006-07, 2007-08 and 2009-2010. Since, common issue is involved, all the cases are heard together and disposed of by this common order. Assessee has raised more or less common grounds in all the assessment years and for the sake of record, the grounds in A.Y. 2006-07 are extracted hereunder.

"Ground 1 : Erroneous and Prejudicial Order

1.1. The learned CIT erred in holding that the assessment order dated December 30, 2011, passed by the A.O. under section 143(3) of the Act is erroneous and prejudicial to the interest of the revenue although the

twin conditions required to be fulfilled for exercising the jurisdiction are not satisfied.

1.2. The learned CIT erred in observing that since the appellant is not entitled to a deduction under section 32(iia) of the Act, the assessment order is prejudicial to the interest of the revenue although the appellant did not make any such claim in its return of income nor this formed the basis of the show cause notice invoking jurisdiction under section 263 of the Act.

Ground No.2 : Business Income vs. Income from House Property.

2.1. The learned CIT erred in holding that rental income earned on letting out the immovable property is to be assessed as 'Business Income' and not as 'Income from House Property' as returned by the appellant and accepted in the assessment proceedings.

Ground 3: Depreciation on assets.

3.1. Without prejudice to Ground 2, in case the income of the appellant is classified as 'Business Income' instead of 'Income from House Property', the appellant ought to have been allowed depreciation in respect of its assets, including the buildings and fittings and machinery therein.

The appellant prays, for the following relief :

(a) The Hon'ble Tribunal be pleased to hold that the assessment order dated December 30, 2011 is not erroneous and prejudicial to the interest of the revenue and hence the CIT was not justified in exercising the jurisdiction under section 263 of the Act.

(b) The Hon'ble Tribunal be pleased to hold that rental receipts are assessable as 'Income from House Property' and not as 'Business Income'.

The appellant craves leave to add, alter, omit or substitute any or all of the above grounds of appeal, at any time before or at the time of the appeal, to enable the learned Income Tax Appellate Tribunal to decide the appeal according to law."

2. In the course of appeal proceedings, assessee has raised an additional ground in assessment years 2006-07 and 2007-08 as under :

> *"The order dated March 28, 2009 passed by the Ld. CIT u/s.263 of the Act is beyond the period of limitation as the issue on which revision has been made by him is on an items which was not the subject matter of re-assessment proceedings and therefore, the period of limitation begins from completion of the original assessment i.e., October 31, 2008 and not from the completion of the re-assessment i.e., December 30, 2011."*

2.1. Since additional ground is legal and does not require any fresh verification of facts, after considering the objections from the D.R. the same is admitted.

3. We have heard the Ld. Counsel Mr. Arvind Sonde and learned CIT-DR Mr. P. Somasekhar Reddy and perused the paper books and various case law placed on record.

4. Assessee-company is engaged in the business of maintenance of software technology park. It derives income from operation and management of technology park (i) rent for lease of space and (ii) income from management of facilities. These incomes have been offered to tax under the Head "Income from house property" and "profits and gains of business or profession" respectively. Assessment for A.Y. 2006-07 under section 143(3) was originally completed on 31.10.2008 accepting the loss returned with certain adjustments. On the reason that assessee has received subsidy of Rs.3.07 crores, A.O. initiated proceedings under section 147 and completed the re-assessment proceedings vide order dated 30.12.2011. In the assessment year 2007-08,

assessee company filed its return of income on 31.10.2007 declaring total loss of Rs.7,04,29,000 and book profit of Rs.14,92,30,662. Subsequently, assessee filed a revised return on 02.03.2009 declaring total loss of Rs.4,61,96,210. The return was accepted u/s 143(1). Later, A.O. reopened on the reason of receipt of Subsidy and completed the assessment under section 143(3) read with section 147 vide order dated 30.12.2011. For AY 2009-10 the assessment was completed u/s 143(3). In all these years assessee's computation of income was accepted, assessing the rental income under the head " Income from House Property" and services income under the head "Profit and Gains of Business or profession".

5. Ld. CIT issued notice dated 17.02.2014 for the impugned years asking the assessee to file its objections why the rental income also not be treated as income under the head "profits and gains of business or profession" in line with the judgment of ITAT, Bangalore in the case of M/s. Global Tech Park P. Ltd., vs. CIT 119 TTJ 421.

6. Assessee filed its objections, which are partly extracted by Ld. CIT in the order, contesting that the orders passed by A.O. are neither erroneous nor prejudicial to the interests of Revenue. As far as the erroneous part of the order is concerned, assessee submitted that the incomes were correctly offered under the head "Income from House Property" and relied on the judgment of Hon'ble Supreme Court in the case of United Commercial Bank Ltd., vs. CIT 32 ITR 688 for the proposition that the incomes are to be assessed under the specific head which is not only proper but also obligatory. Assessee also relied on the judgment of Hon'ble Supreme

Court in the case of East India Housing Land Development Trust Ltd., vs. CIT 42 ITR 49 to contend that the income received on leasing out the properties was correctly offered under the head "House Property". It also relied on the judgment of the Hon'ble Supreme Court in the case of Karnani Properties Ltd., vs. CIT 82 ITR 547 for the same proposition. Assessee also distinguished the judgment of the ITAT in the case of Global Tech Park P. Ltd., ACIT 119 TTJ 421 submitting that the composite rent received therein was allowed to be assessed as business income whereas the assessee was distinctly receiving the rental income and service income separately which were offered accordingly under separate heads. Moreover, it also contended that A.O. have been consistently accepting the said classification of the incomes from the inception of the company and therefore, assessee has not erred in offering the same income under the head "Income from House Property". Since the same were accepted in the scrutiny orders under section 143(3) the orders cannot be considered as erroneous in nature.

7. Contending that the order is also not prejudicial to the interests of Revenue assessee submitted that income which had been offered under the head "Income under House Property", if treated as business income, the deduction of 30% on net ratable value as well as claim of 1/5th of preconstruction interest in respect of House Property has to be withdrawn. However, assessee could be entitled to depreciation on all its assets including buildings, fittings etc., and the claim of interest in its entirety in the year of liability. Consequently, it was submitted that the depreciation claimed now on the assets to be more than the claims already made under the

head "House Property" and gave working not only for the impugned years but also for the subsequent period up to A.Y. 2012-2013 to submit that assessee's loss claimed would be converted to unabsorbed depreciation and till A.Y. 2012-2013 there would be no tax liability. It gave detailed submissions on the working in each year so as to submit that the order is also not prejudicial to the interests of Revenue.

7.1 Gist of the objections of assessee are summarized by Ld. CIT as under :

a) *The order of the AO is neither erroneous nor prejudicial to the interests of Revenue. Even if it is presumed that the order is erroneous, the same is not prejudicial to the interests of Revenue.*

b) *For consistency purpose, the case needs to be considered from A.Y 2004-05 and the assessee submitted computation for all the years starting from A.Y 2007-08 stating that it is the oldest year that can be reopened. According to the assessee, there is no change in tax computation even if the income is assessed as business income.*

c) *The heads of income prescribed in the Income Tax Act are mutually exclusive and the case of the assessee falls under the category of "House Property".*

d) *The assessee is showing rental receipts and receipts from services separately.*

e) *Even if the assessee is in the line of business of letting, the income would fall under the head of "House Property" as the Income Tax Act clearly mandates such heads.*

f) *The assessee relied on various case laws including that of Apex Court and also stated that the decision of Bangalore Bench of ITAT in*

the case of Global Tech Park Pvt Ltd (28 SOT 45) is distinguishable because in the said case entire activity was conducted in organized manner with a motive to earn profit out of investment made by the assessee as a commercial venture. In the case of the assessee, income is received from two streams, viz., lease rental and facility management where as M/s. Global Tech was apparently deriving composite income.

g) In various other cases, the Department itself argued that the income is from House Property.

h) The order of the AO is not prejudicial to the interests of Revenue as the tax benefit on leased industrial units on account of additional depreciation would offset the gains to be on account of disallowance of 30% deduction repairs and maintenance as well as amortization of pre-construction period interest.

8. However, Ld. CIT did not agree with the same and rejected the objections vide para 5 of the order as under :

"5. The following observations are made on the submissions of the assessee:

a) At the outset it may be stated that the computations filed by the assessee regarding income of various years are not acceptable. It is a plain fact that the depreciation rate for buildings, which are the main business assets of the assessee is 10%, where as the assessee claiming 30% deduction on repairs and maintenance under the house property,

b) The rule of consistency is not applicable to cases of patently wrong claims. In the case of Apollo Hospitals Enterprise Ltd (300 ITR 167), the Madras High Court held that "if wrong claims availed, particularly quoting wrong application of law are not allowed to be reviewed, a chaotic situation would arise, putting a big dent to the exchequer having negative repercussions on the developmental activities of the country", Therefore, the rule of consistency is not

applicable, Besides, the proceedings of each year are different and there is no 'res judicata' to tax proceedings.

c) The issue in for examination in this case is "Whether the income from leasing out of units of the "industrial park" is income from house property or income from business?"

d) Admittedly the main object of the assessee is to carry on the business of developers of land, building, and real estates". Therefore profit motive is inherent in the activity of the assessee.

e) One very important feature is that the assessee is a joint venture of K. Raheja Group Private Ltd and APIIC Ltd. In pursuance of the JV agreement, APIIC allotted land to the assessee at concessional rate for developing, marketing and selling. Also adequate number of jobs need to be created by the assessee, which clearly shows that the entire activity is aimed at industrial development and employment generation in the State of AP and not simple letting of properties. In the Directors' report also the project is described as business activity of infrastructure development. Efforts in marketing and job creation are also explained in detail.

f) If the assessee was simply letting out the property, the income would probably fall under income "house property". If he is engaged in organized activity of exploiting commercial assets for business purpose, the income would be from business. No doubt, the heads of income are mutually exclusive. Yet, a receipt can manifest in different forms depending on the context making it fit into an appropriate head of income, suiting such context.

g) In the case of Tuticorin Alkali Chemicals & Fertilizers Ltd (227 ITR 172), the Apex Court held that "where question is taxability of a certain receipt of money and deductibility of certain amount from that receipt, the same is to be decided according to principles of law and not in accordance with accountancy practice". Therefore principles of law

shall govern the case and not the practice followed by an assessee.

h) Verification of the return of income filed by the assessee reveals that on its own admission the activity is shown as "Builders Property Developers". In the tax audit report also it is clearly indicated that the assessee is in the business of "real estate development/leasing and Hoteliers". All the items of receipt and expenditure including the lease rentals are subject to Audit unlike the case of simple letting out of property. Merely because the entities occupying the premises deduct TDS u/s. 194I, the character of the income cannot be changed. As per the settled principles of law, the character in the hands of the payer and payee need not be same.

i) It is also pertinent to note that on its own admission, the assessee approached the authorities at Department of Industrial Policy and Development to obtain approval for the "Industrial Park" as part of his business activity with a view to obtain better returns from the commercial assets.

j) The following important features are present in the activity of the assessee as seen from the accounts, viz. the assessee availed huge project term loans banks to construct the buildings, he is spending huge amounts as project support fees and also as selling & marketing expenses. This clearly shows the assessee engaged in systematic activity of building an industrial park and market the space also by spending huge amounts. Therefore, this is a clear case of commercial exploitation on assets for the purpose of business.

k) None of the case laws cited by the assessee support the preposition that irrespective of the context, the income has to be assessed as house property income.

l) The assessee is also trying to make an artificial distinction between his case and that of of Global Tech Park Pvt Ltd. Merely because, the assessee is recording entries for lease rent and facility management separately, the activities would not be

distinct and separate. In reality, without facility management, none would take the premises on lease because the units need strong infrastructural support without which the concept of "industrial park" would itself be meaningless.

m) It is also incorrect on the part of the assessee to state that the order is not prejudicial to the interests of revenue because the claim of additional depreciation would offset the gains. The assessee would not fit into the ambit of section 32(iia) as he is not producing any article or thing nor he is engaged in generation or distribution of power. Besides, the prime assets of the assessee are the buildings, which do not fall under the definition of plant.

n) The A.O. did not examine any of these facts and allowed the claim without any verification. Therefore, judicious view was not taken by him to state that he took one of the possible views.

o) In the case of Boston Analytics Ltd (20 12-TIOL-605-ITAT-MUM), the Mumbai bench of ITAT held that "The view taken by the AO should not be a mere view in vacuum but a judicial view".

p) As per decision of the Chennai Bench of ITAT in the case of Bharat Overseas Bank Ltd (152 TT J 546) (Chennai) (Trib.), When the order of the Assessing Officer was silent on the claim made by assessee, and allowed such claim, without any discussion, it was held that such an order was erroneous and prejudicial to the interest of revenue.

q)Therefore, this argument is devoid of merit and the order is clearly erroneous and prejudicial to the interests of revenue.

6. In light of the above, it is held that the order of the AO passed u/s. 143(3) is erroneous and prejudicial to the interests of Revenue. It is also held that the income from lease rentals is "business income" and not income from "house property". The AO is directed to compute the income of the assessee in light of the above direction."

9. Ld. CIT passed similar orders in impugned assessment years. Assessee is contesting the same. As briefly stated in assessment years 2006-07 and 2007-08 assessee has further raised additional grounds that the orders passed by CIT are time barred.

10. Ld. Counsel referring to the order of Ld. CIT took objection for the first observation of the CIT that assessee would be eligible for 10% depreciation claimed whereas, it was claiming 30% deduction on repairs and maintenance. It was submitted that Ld. CIT did not consider the basis for the above deductions. It was submitted that assessee would be entitled for depreciation at 10% of the asset cost whereas, under the head "House Property" 30% deduction is on incomes received as rent. Since the basis for calculations are different, the quantum of allowance which assessee would be entitled if the income is treated as income from business, is much more than the deduction already claimed on the income. It was submitted that Ld. CIT wrongly considered the percentages alone to reject assessee's contentions without examining the facts. It was further submitted and explained with the help of the details filed before the Ld. CIT that there may be reduction in loss claimed but the depreciation which is to be allowed to the assessee would take care of not only the losses so claimed but further claim would be there till A.Y. 2012-2013 of more than Rs. 1 crore, if computation was disturbed.

11. Coming to the merits of the case, it was the submission that assessee has correctly offered the income under the head "House Property" to the extent of rents received. Ld. Counsel took us through the principles laid down

by the Hon'ble Supreme Court on the issue from the very first case relied upon by assessee i.e., United Commercial Bank Ltd., vs. CIT 32 ITR 688 for the proposition that incomes are to be assessed under correct head and then explained the propositions laid down in the decision of Hon'ble Supreme Court in the case of East India Housing and Land Development Trust Ltd., vs. CIT 42 ITR 49 and then the facts in the case of M/s. S.G. Mercantile Corporation P. Ltd., 83 ITR 700 to submit that the decision of the Hon'ble Supreme Court there also supports assessee's contention. It was submitted that liability to tax under the head "House Property" is on the owner of the building or land appurtenant thereto which is facts in assessee's case. In the case of M/s. S.G. Mercantile Corporation P. Ltd., (supra) assessee is developing the properties on lease basis and is not owner of the property. This finding is given in page 705 of the above said judgment of the Hon'ble Supreme Court. Therefore, in that case, the incomes were held not to be assessed under the head "House Property". Ld. Counsel also distinguished the facts in the case of Global Tech Park P. Ltd., (supra) which relied on the Hon'ble Karnataka High Court Judgment in the case of Balaji Enterprises vs. CIT 225 ITR 471. It was submitted that in the case of Balaji Enterprises (supra) the facts are that the firm took property on lease to build structures thereon and leased out them to tenants. At the end of the dissolution of the firm, the property was to be handed-over to lessees. In those facts of the case, the Hon'ble Karnataka High Court held that income cannot be assessed under the head "House Property" and was treated as income from business. As the facts are distinguishable, Ld. Counsel submitted that assessee's incomes are correctly assessed under the Head "Income from

House Property" to the extent of rentals received. It was submitted that since A.O. has correctly assessed the incomes, the order is neither erroneous nor prejudicial to the interests of Revenue, twin conditions which are required to be satisfied for invoking the jurisdiction under section 263.

12. Coming to the additional ground raised that the order was time barred, Ld. Counsel submitted that the orders which are revised by Ld. CIT are the orders passed consequent to the proceedings under section 147. He referred to the orders of A.O. under section 143(3) read with section 147 dated 30.12.2011 wherein the only issue considered by A.O. was with reference to subsidy received from Government of A.P. which was brought to tax. It was the submission that the issue of assessing under correct head was concluded by earlier orders in A.Y. 2006-07 by the order of A.O. dated 31.10.2008 and intimation under section 143(1) dated 30.09.2008 for A.Y. 2007-08. He relied on the judgment of Hon'ble P & H High Court in the case of CIT vs. Darshan Singh 277 ITR 53 and also the decision of Rajasthan High Court Jaipur Bench in the case of CIT vs. Hemraj Udyog 259 ITR 420 for the proposition that the orders are sought to be revised on this issue were the original orders not the orders under section 147. Therefore, the Ld. CIT does not have jurisdiction to reopen the assessment after expiry of limitation period.

12.1 Ld CIT(DR) relied on orders of CIT to submit that AO did not examine the correct head under which the incomes are to be assessed and therefore orders of CIT u/s 263 are justifiable.

13. We have considered the issue and examined the rival contentions vis-à-vis the available details placed on record in the paper book by assessee in all the years. First of all, there is no dispute with reference to the fact that assessee is receiving incomes from rentals as well as service income from its industrial park. Assessee was offering the income from rentals under the head "Income from House Property" and service income under the head "Business". It was accordingly assessed by A.O. subject to small modifications. For A.Y. 2006-07 the order under section 143(3) was passed on 31.10.2008. Therefore, the time limit for reopening the assessment actually on this issue starts from this date and ends on or before 31.03.2011. The assessment can be revised i.e., two years from the end of A.Y. in which the order was passed. As far as A.Y. 2007-08 is concerned, there was no order under section 143(3) but there is an intimation under section 143(1) dated 30.09.2008. Therefore, the issue whether the income was to be considered as income from business or house property got concluded by the intimation and non-selection of scrutiny at that point of time. In these two years what the Ld. CIT, as specified in the order under section 263, revised the orders passed on 30.12.2011 in these years consequent to the proceedings under section 147 with reference to receipt of subsidy of Rs.3,07,20,000 in A.Y. 2006-07, Rs.20,51,60,000 in A.Y. 2007-08. As seen from the orders, the issue which was decided in those years in later order was with reference to the subsidy received in A.Y. 2006-07 and subsidy and short term capital gain in A.Y. 2007-08. The issue of assessing the correct income under the head "Business or Profession" or "House Property" was not an issue at all in those orders. Therefore, in our view, exercising the jurisdiction by Ld. CIT to revise the

orders under section 263 on an issue which was already concluded by earlier order cannot be justified.

14. We rely on the judgment of Hon'ble Punjab & Haryana High Court in the case of CWT vs. Darshan Singh 277 ITR 53. In that case, the facts are as follows :

> **"***The assessee is an individual and filed his WT return for the asst. yr. 1977-78 on 2nd Feb., 1978, declaring net wealth of Rs. 4,11,100. The assessment was completed under s. 16(3) of the Act on 8th March, 1978. The assessee, thereafter, filed a revised return on 31st May, 1979, declaring net wealth of Rs. 4,49,130. The stand of the assessee was that while preparing the original return, the share of immovable properties inherited from his father was left out inadvertently. Reassessment was completed on 12th Feb., 1980, on the net wealth of Rs. 4,48,365. The WTO included a sum of Rs. 2,500 being the amount of CDS.*
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> *Vide his order dt. 4th Dec., 1981, the CWT, exercising jurisdiction under s. 25 of the Act, set aside the assessment order dt. 12th Feb., 1980, on the ground that the question of valuation of interest of the assessee in Preet Palace Theatre had not been gone into.*
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> *The assessee preferred an appeal before the Tribunal and submitted that the order revising the assessment was not justified, as the question of valuation of the assessee's interest in Preet Palace Theatre stood settled in the original order of assessment dt. 8th March, 1978, wherein the WTO had accepted the valuation of interest of the assessee in the said property and the said order had become final. It was further explained that in the assessment order dt. 12th Feb., 1980, the WTO had merely assessed the additional wealth offered by the assessee in the revised return. The said order did not deal with the issue about the valuation of the Preet Palace Theatre. This submission was accepted and the order of the CWT passed under s. 25(2) of the Act was set aside.*
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> *Held, that While exercising power of revision of the order dt. 12th Feb., 1980, the CWT has failed to notice that the*

said order did not deal with the question of valuation of interest of the assessee in theatre which had become final as per order dt. 8th March, 1978. The CWT could not have exercised powers against the said order as the limitation under s. 25(3) which is two years, had also expired with regard to the said order. The Tribunal, was right in vacating the order of the Commissioner of Wealth Tax".

14.1. As considered in the above decision, the orders sought to be revised i.e., order dated 30.12.2011 did not deal with the question of assessing under the correct head but only the issue of subsidy has been dealt with. The issue of accepting under the correct head was already concluded at the time of original assessment finalized vide order dated 31.10.2008 for A.Y. 2006-07. Likewise, even though the order under section 143(3) was not passed, intimation under section 143(1) was already issued in A.Y. 2007-08 and in the reopening assessment the issue was not taken-up by A.O. at all. At least, for the A.Y. 2006-07, the orders sought to be revised has barred by limitation. As per the provisions of the Act, even an intimation under section 143(1) also becomes an assessment after expiry of the period for issuance of notice under section 143(2). Therefore, in A.Y. 2007-08 also, technically speaking the order of CIT u/s 263 gets time barred.

15. We also rely on the decision of CIT vs. Hemraj Udyog 259 ITR 420. In the said case, it has been held that :

"2. The original assessment was completed on 16th Dec., 1988. While framing the assessment, the assessee was granted deduction under s.32AB at the rate of 20 per cent of the book profits. As assessee was aggrieved on certain additions/disallowances made in the original order, he preferred an appeal before the CIT(A). Out of these grounds taken before the CIT(A), two grounds were rejected and on the third ground regarding depreciation, the CIT(A) remanded the matter back to the AO for fresh

consideration. Following the directions of the CIT(A) and after examining the issue relating to depreciation, the AO made a fresh assessment order on 27th Dec., 1989. Subsequently, the CIT assuming the jurisdiction under s. 263 of the Act, issued a show-cause notice to the assessee dt. 31st Dec., 1991. After hearing the assessee, the CIT(A) was of the view that the deduction of Rs. 2,66,255 granted to the assessee under s. 32AB was not proper and hence, it rendered the assessment to be erroneous and prejudicial to the interests of Revenue. After giving due opportunity of hearing to the assessee, the CIT made an order under s. 263 of the Act directing the AO to reframe the assessment after re-examining the claim of the assessee for deduction under s. 32AB of the Act.

3. In appeal before the Tribunal, the Tribunal held that period of limitation starts with effect from the date of original assessment order dt. 16th Dec., 1988, since the issue related to deduction under s. 32AB stood settled in the earlier order itself. The subsequent assessment order was for a limited issue of depreciation only. The Tribunal also observed that if the contention of the Revenue is accepted, then every error in the original assessment discovered after the fresh assessments are made, would go on enlarging the limitation period. Thus, the Tribunal has quashed the order of CIT under s. 263 on the ground of limitation.

Held that the CIT has the power to revise the order of the AO on the issues which are not taken in appeal before the CIT(A), but if the limitation has expired, CIT cannot revise the original order of ITO beyond the period of limitation. The period of limitation in this case is two years from the date of order sought to be revised i.e., 16th Dec., 1988, but the order of CIT under s. 263 is dt. 26th Feb., 1992, i.e., beyond two years. The order of revision was barred by limitation.".

15.1. Following the principles laid down above, we uphold the additional grounds raised by assessee in these two years that Ld. CIT order under section 263 revising a subsequent order under section 147 on an issue which did not arise in that order was barred by limitation.

16. Apart from the above, even on merits, we are of the opinion that the order of A.O. is neither erroneous nor prejudicial to the interests of Revenue so as to revise the same under section 263. Assessee has been consistently offering the incomes under the head "Income on House Property" as far as the receipts of rents are concerned and under the head "Business" as far as the service fee and management fee on maintenance are concerned. Not only in the impugned years, even in earlier years also, the incomes were accepted as such. Since the Ld. CIT cannot revise those orders, these orders are not subject matter of proceedings u/s 263 and therefore, the issues are concluded therein accepting assessee's contention. On the rule of consistency also, it cannot be modified in a later year. However, it is not on rule of consistency alone. As seen from the orders passed by the authorities at the time of assessment, they have accepted the bifurcation of rental income and services income and rental income was accepted under the head "House Property". As rightly pointed out by assessee in the submissions before the Ld. CIT that assessing incomes under head Business was not prejudicial to the interests of revenue considering that a higher claim of depreciation was allowable on the properties when compared to 30% allowance for repairs on the incomes assessed, we agree that the orders are not prejudicial to the interest of Revenue.

17. Ld. CIT erred in relying only on the ITAT order in the case of Global Tech Park P. Ltd., ACIT (supra) wherein the Coordinate Bench relied on the judgment of Hon'ble Karnataka High Court in the case of Balaji Enterprises vs. CIT 225 ITR 471. As seen from the judgment of Hon'ble Karnataka High

Court the facts in the said case were that assessee firm even though constituted to carry on business of dealing in real estate and setting up, development and exploitation of commercial complex in market, they have not owned the property but were developing the properties obtained on lease hold or on free hold basis and further leasing the properties after development to the lessees. In those facts of the case, the incomes are correctly held as assessable under the head "Business". Further, in the said case of Global Tech Park P. Ltd., (supra), the incomes received were composite incomes for both leasing as well as maintenance and A.O. has not bifurcated them at all. In that case construction and maintenance of industrial park was indeed held as 'business activity'. However, in order to arrive whether a particular income is to be assessed under "House Property or Business" there are many aspects which require examination. First of all, one has to enquire whether assessee is owner of the property or not. Thereafter, assessee's nature of activities are to be analysed vis-à-vis the activities/agreements entered by assessee with reference to various lessees and to verify whether rental income is separately received or as a composite rent but bifurcated by assessee. The terms of agreement, the period of lease, the conditions of lease etc., also required to be examined. Therefore, in order to take a decision whether a particular income is to be assessed under the head "House Property" or under the head "Business" many more facts are required to be examined. In this case, neither the A.O. nor the Ld. CIT examined any of these aspects, but decided simply on the principles of law. Therefore, we are unable to give any finding about the correctness of the action of either A.O. or Ld. CIT in coming to a particular conclusion whether the income is

assessable under 'House Property' or 'Business' in the absence of facts in these years.

18. However, as far as the law is concerned, the Hon'ble Supreme Court as early as 42 ITR 49 in the case of East India Housing and Land Development Trust Ltd., vs. CIT on the following facts held as under :

> *"The appellant company, which was incorporated with the objects of buying and developing landed properties and promoting and developing markets, purchased 10 bighas of land in the town of Calcutta and set up a market therein. The question was whether the income realized from the tenants of the shops and stalls was liable to be taxed as "business Income" under section 10 of the Income Tax Act or as income from property under section 9.*
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> *Held that the income derived by the company from shops and stalls is income received from property and falls under the specific head described in s. 9. The character of that income is not altered because it is received by a company formed within object of developing and setting up markets. Nor because of the fact that the company was required to obtain a licence from the Calcutta Municipality to maintain sanitary and other services and for that purpose had to maintain a staff and to incur expenditure did the income become "profits or gains" from business within the meaning of section 10. Nor was the character of the income altered merely because some stalls were occupied by the same occupants and the remaining stalls were occupied by a shifting class of occupants. The primary source of income from the stalls was the occupation of the stalls, and it was a matter of little moment that the occupation which was the source of the income was temporary.*
>
> *Income-tax is undoubtedly levied on the total taxable income of the taxpayer and the tax levied is a single tax on the aggregate taxable receipts from all the sources; it is not a collection of taxes separately levied on distinct heads of income. But the distinct heads specified in s. 6 indicating the sources are mutually exclusive and income derived from different sources falling under specific heads 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 s. 6, the fact that it may indirectly be covered by another head will not make the income taxable under the latter head".

18.2. Thereafter, the Hon'ble Supreme Court has another occasion to re-visit the issue in the case of Karnani Properties Ltd., vs. CIT, West Bengal 82 ITR 547 wherein the Hon'ble Supreme Court considered the facts and held as under**.**

" The assessee-company owned house properties, popularly known as Karnani Mansion in Park Street, Calcutta. The said Karnani Mansion consists of numerous residential flats and over a dozen shop premises. All those were let out to different tenants on a monthly rental basis. The tenants in respect of each of the flats and shops let out had to make a monthly payment which included charges for electric current, for use of lifts, for the supply of hot and cold water, for the arrangement for scavanging, for providing watch and ward facilities as well as other amenities. The Tribunal further found that the assessee-company purchases from the Calcutta Electric Supply Corporation high voltage A.C. current in bulk, converts the same into low voltage A.C. current in the company's own power house within the premises and supplies the power to its tenants. It also maintains a separate water pump-house and a boiler for the supply of hot and cold water to the tenants. The company further provided for the benefit of tenants, electric lifts working day and night. The further finding of the Tribunal was that for all these purposes the assessee-company maintains a large number of permanent staff. The company claimed that the entire receipts from the tenants should be treated as income from business as it had been formed for carrying on the business of letting out flats and shops. ***The Income Tax Officer rejected its claim but split the receipts into two parts, one part being treated as rent and the other as "income from other sources" taxable under section 12 of the Income Tax Act, 1922****. The Appellate Tribunal held that the second part was assessable as income from business under section 10. Neither the department nor the assessee contended that the part was assessable under section 9. On a reference the High Court held that the latter part of*

the receipts was also assessable as income from property under section 9. On appeal to the Supreme Court :

Held, reversing the decision of the High Court, (i) that the department having all along proceeded on the basis that the income of the assessee was from two different sources, it should not have been allowed by the High Court to change its case ;

(ii) that, on the facts, the services rendered by the assessee to its tenants were the result of its activities carried on continuously in an organized manner, with a set purpose and with a view to earn profits; those activities were business activities and the income arising therefrom was assessable under section 10.

When the question to the High Court speaks of "on the facts and in the circumstances of the case:, it means on the facts and circumstances found by the Tribunal and not facts and circumstances that may be found by the High Court on a reappraisal of the evidence. In the absence of a question whether the findings were vitiated for any reason being before the High Court, the High Court has no jurisdiction to go behind or question the statement of fact made by the Tribunal."

18.3. Thus the issue decided by the Hon'ble Supreme Court in the above case was that services income was assessable as income from business, but there is no dispute with reference to 'Rent' being assessed under the head " Income from House property". The Hon'ble Supreme Court in the case of S.G. Mercantile Corporation Pvt. Ltd., vs. CIT 83 ITR 700 (SC) on the following facts held as under :

"The assessee company was incorporated in January, 1955. One of the objects specified in its memorandum of association was to take on lease or otherwise acquire and to hold, improve, lease or otherwise dispose of land, houses and other real and personal property and to deal with the same commercially. Within less than two weeks of its incorporation the company took on lease a market place for an initial term of 50 years, undertaking to spend

Rs. 5 lakhs for the purpose of remodeling and repairing the structure on the site. It was also given the right to sublet the different portions. The appellant's activity during the period covered by the assessment years 1956-57 to 1958-59 consisted of developing the property and letting out portions thereof as shops, stalls and ground spaces to shopkeepers, stallholders and daily casual market vendors. The question was whether the appellant's income from subletting the stalls was assessable as business income under section 10 of the Income Tax Act, 1922, or as income from othe sources under section 12 :

Held : (i) that since the appellant-company was not the owner of the property or any part thereof, no question of making the assessment under section 9 arose ;

(ii) that the definition of "business" in section 2(4) was of wide amplitude and it could embrace within itself dealing in real property as also the activity of taking a property on lease, setting up a market thereon and letting out shops and stalls in the market;

(iii) that, on the facts, the taking of the property on lease and subletting portions thereof was part of the business and trading activity of the appellant and the income of the appellant fell under section 10 of the Act ; and

(iv) that where, as in this case, the income could appropriately fall under section 10 as being business income, no resort could be made to section 12.

The liability to tax under section 9 of the Income Tax Act, 1922, is of the owner of the buildings or land appurtenant thereto. In case the assessee is the owner of the buildings or lands appurtenant thereto, he would be liable to pay tax under section 9 even if the object of the assessee in purchasing the landed property was to promote and develop a market thereon. It would also make no difference if the assessee was a company which had been incorporated with the object of buying and developing landed properties and promoting and setting up market thereon.

The residuary head of income can be resorted to only if none of the specific heads is applicable to the income in

question; it comes into operation only after the preceding heads are excluded."

18.4. Thereafter, the Hon'ble Supreme Court in the case of Sambhu Investments Pvt. Ltd., vs. CIT 263 ITR 143 also held that the prime object of the assessee shall to let out portion of the said property to various occupants by giving them additional right for using furnitures and fixtures and other common facilities and hence, income derived from the said property was an income taxable under the head 'Income from property'. The principles laid down in various decisions of Hon'ble Supreme Court were followed in various other decisions. Hon'ble Madras High Court in the case of CIT vs. Chennai Properties and Investments Ltd., 274 ITR 117, Hon'ble Bombay High Court in the case of Mangala Homes P. Ltd., vs. ITO 325 ITR 281 reiterated the same principles. Even the jurisdictional High Court in the case of PVG Raju Vs CIT 66 ITR 122 following the judgment of Apex Court in the case of East India Housing and Land Development Trust Ltd., (supra), held that a mere fact that the building or shops built with the specific object of forming, developing or setting-up a market did not change the character of income derived as owner of the property and by leasing the same. It was held that the income derived was to be held as income from house property and not income derived from business or profession.

19. In view of the prevailing judicial principles/ precedents on the issue, A.O. might have accepted the bifurcation of assessee receipts and offering the incomes under respective heads in the scrutiny orders passed. Therefore, it is to be considered that he has formed an opinion of accepting assessee's rental income under the head "Income from House

Property" and allowing the claims as per that Head rather than allowing depreciation on assets, if it is converted to income from business. Since the A.O. formed an opinion not only in the impugned assessment years but also in earlier years, we are of the opinion that the Ld. CIT opinion that the same is to be assessed as business income will fall under the category of difference of opinion. If A.O. has taken one of the opinion available out of the two, the Ld. CIT cannot invoke jurisdiction under section 263. Provisions of section 263 does not permit substituting one opinion by another opinion. Therefore, the order of Ld. CIT cannot be sustained on the principles of 'erroneous' nature of A.O. order, as it is not erroneous.

20. Coming to the issue of 'prejudicial to the interests of Revenue', as rightly pointed out by Ld. Counsel as per the workings placed in the paper books, the re-computation under the head "Business" would result in granting more depreciation and as rightly demonstrated by assessee in respective years, the computation will result in carrying forward more unabsorbed depreciation to the assessee not only in the impugned years but also in later years upto A.Y. 2012-2013. It is also further noticed that the incomes in the A.Ys. 2007-2008 and 2009-2010 were ultimately assessed under section 115JB on book profits as the normal computation resulted in losses or NIL income. Therefore, looking at any way, the orders are not prejudicial to the interests of Revenue in any of the impugned assessment years. When this was pointed out by assessee in the course of proceedings under section 263 by giving a detailed workings, Ld. CIT not only ignored them but even rejected them on the reason that assessee was entitled for 10% depreciation, whereas, 30% was claimed under the head

house property towards repairs, on wrong presumption that the basis for those two claims *per se* are same. As rightly pointed out by Ld. Counsel, depreciation was claimed on assets which are valued more than Rs.300 crores whereas 30% on rentals is only a small percentage when compared to depreciation. This aspect itself, if analysed properly by Ld. CIT, would have established that orders being revised are not prejudicial to the interests of Revenue.

21. We also notice that Ld. CIT got carried away by 'additional depreciation' and rejected the same holding that assessee has not produced any article or thing nor is engaged in generation or distribution in power so as to fit into the ambit of section 32(iia). The word used 'additional' is not about additional depreciation but alternate claim of depreciation which was not claimed under the head 'House property income'. Ld. CIT should have been careful in noticing that no depreciation should be allowed while calculating the incomes under 'house property' on the assets used whereas, while calculating the income from 'business' assessee would be eligible for depreciation under section 32. What assessee has intended to indicate to the Ld. CIT was about additional claim of depreciation when the claim of repairs was withdrawn. In that context, the word 'additional' was used. Since the word is used along with the word 'depreciation', we are of the opinion that Ld. CIT wrongly considered it as a claim of "additional depreciation" ignoring that assessee's claim of depreciation is under section 32(i) and not under section 32(iia), even as can be seen from the workings furnished. Be that as it may, we have already held that the claim of depreciation under the head "Business" is much more than the claims made under

"Income from House Property" which results in not only working out higher losses / depreciation in the impugned years but also in later years as demonstrated before Ld. CIT by way of detailed working by assessee. In view of this, we certainly hold that the orders of A.O. are not prejudicial to the interests of Revenue.

22. As briefly stated above, we are unable to give any finding whether the incomes are to be assessed under the head "Business" or under the head "House Property" in the impugned assessment years in the absence of complete details. Suffice to say that for analyzing the issue in respect of jurisdiction under section 263 by Ld. CIT, we are convinced that the orders of A.O. are not either erroneous or prejudicial to the interests of Revenue. In A.Ys. 2006-07 and 2007-08, since the issues were concluded in earlier orders and not in the orders sought to be revised, they are also time barred. In view of this, in all the impugned assessment years assessee's contentions are accepted and the orders of Ld. CIT under section 263 are set aside. We restore the orders of Assessing Officer in respective years. Accordingly, in all the three appeals, grounds raised by assessee are allowed.

23. In the result, appeals of the assessee are allowed.

Order pronounced in the open Court on 07.11.2014.

Sd/-	**Sd/-**
(ASHA VIJAYARAGHAVAN)	**(B.RAMAKOTAIAH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Hyderabad, Dated 07th November, 2015.

VBP/-

Copy to

1.	M/s. K. Raheja IT Park (Hyderabad) Private Limited, Mindspace, Cyberabad, Survey No.64 (Part), APIIC Software Layout, 1st Floor, Titus Towers, Building-10, Madhapur, Hyderabad.
2.	Commissioner of Income Tax-II, Hyderabad
3.	Addl. Commissioner of Income Tax, Range-II, Hyderabad
4.	D.R. ITAT "A" Bench, Hyderabad