IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'D' : NEW DELHI)

BEFORE SHRI U.B.S. BEDI, JUDICIAL MEMBER
and
SHRI B.C. MEENA, ACCOUNTANT MEMBER

ITA No.5346/Del./2011
(ASSESSMENT YEAR : 2006-07)

M/s. JMD Realtors Pvt. Ltd., 6, U.G.F., Devika Tower, Nehru Place, New Delhi – 110 019. **(PAN : AAACJ2071K)**	vs.	DCIT, Central Circle 18, New Delhi.
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri R.S. Singhvi, CA
REVENUE BY : Ms. Namita Pandey, DR

ORDER

PER B.C. MEENA, ACCOUNTANT MEMBER :

This appeal filed by the assessee emanates from the order of CIT (Appeals)-III, New Delhi dated 03.10.2011 for the assessment year 2006-07.

2. The assessee is a company incorporated on 07.11.1996 and engaged in the business of real estate development. The assessee has declared a sum of Rs.82,07,161/- under the head income from house property and the details of which are as under :-

(i)	Rental income against investment	Rs.15,51,613/-
(ii)	Signage rent	Rs. 7,98,000/-
(iii)	Parking rent	Rs.24,50,237/-
(iv)	Lease rent	Rs.18,48,350/-
(v)	Terrace rent	Rs. 1,00,000/-
(vi)	License fees	Rs.12,29,000/-
(vii)	License fee	Rs. 2,29,961/-
		Rs.82,07,161/-

Assessee also claimed deduction u/s 24(1) of Rs.24,62,148/-. The Assessing Officer took a view that out of the total income of Rs.82,07,161/- declared under the head "income from house property", the amount of Rs.48,07,198/- received consisting of signage rent of Rs.7,98,000/-, parking rent of Rs.24,50,237/-, terrace rent of Rs.1,00,000/- and license fees of Rs.12,29,000/- is to be taxed under the head "profits or gains of business". The CIT (A) held that the income should be taxed under the head "income from other sources". Against which assessee is in appeal before us in respect of licence fee and parking rent.

3. The grounds of appeal read as under :-

> "1. That on the facts and circumstances of the case, the CIT(A) was not justified in not accepting claim of the assessee that licence fee and parking rent is to be considered under the head income from house property as same is part of renting in accordance with provisions of sec. 22 of the Income Tax Act, 1961.
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> 2(i) That finding of the CIT(A) that income from licence fee and parking of rent is assessable under the head other sources even though there was no such ground or finding of the Assessing Officer and as such these observations were without any legal basis or in the context of any such claim or controversy.
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> (ii) That only issue before CIT(A) was whether income from licence fee and parking of rent is to be considered under the head property or under the head business as held by the Assessing Officer and as such the finding and conclusion of the CIT(A) is not in respect of any dispute or ground that such income is required to be considered under the head other sources.
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> (iii) That finding and conclusion of the CIT(A) is without jurisdiction and out of context and same is not sustainable under the law.

3. That Assessing Officer may be directed to consider income from licence fee and parking of rent as assessable under the head income from house property and to allow consequential rebate u/s. 24(1) of the Income Tax Act, 1961.

4. That the orders of the lower authorities are not justified on facts and same are bad in law."

Thus, the dispute in the appeal involved is only regarding the taxability under the head Income in respect of income from license fee and parking rent. Assessee claims it as income under the head income from house property and CIT (A) held it as income from other sources.

4. While pleading on behalf of the assessee, the learned AR submitted that assessee is engaged in the business of real estate development and the income has been earned by letting out its properties to various persons. Ld. AR also pleaded that the Assessing Officer took a view that only the income which falls under section 22 and 23 of Income-tax Act is purely limited to residential and commercial properties. He pleaded that various circulars issued by the department are in support of the view taken by the assessee. The tax has been deducted by payer of amount by treating the amount as rent under section 194I of the Income-tax Act. He also pleaded that the circulars of the CBDT made it clear that any income attracted from letting out of the land or building is assessable under section 22 and 23 of the Income-tax Act and not under the head profits and gains of business or profession under section 28 of the Income-tax Act. The CIT (A) changed the head, i.e., income from other sources which is also not justified. Therefore, the conclusion arrived by the Assessing Officer as well as the CIT (A) are arbitrary and not in consonance with the contents of the income-tax provisions. A Circular

No.699 dated 30.01.1995 the rent has been defined. The rent means any payment, by whatever name called under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of any land or any building (including factory building) together with furniture, fittings and the land appurtenant thereto, whether or not such building is owned by the payee. Another Circular No.715 dated 08.08.1995 regarding the deduction of tax also confirms that the tax is to be deducted from rent paid by whatever name called for hire of property the incidence of deduction of tax at source does not depend upon the nomenclature but on the content of the agreement. The scope of deduction u/s 194I has been clarified by Board Circular No.715 dated 08.08.1995. As per the Circular, if a person has taken a particular space on rent and thereafter sub-lets the same fully or in part for putting up a hoarding, he should be liable to TDS u/s 194I and not u/s 194C. From these circulars and clarifications, it is well established that the assessee has rightly offered the income received from letting out the space, etc. etc. under the head income from property and not under the head business or profession and income from other sources as held by the CIT (A). The learned AR also submitted that department is accepting the income under the head income from house property in other years, therefore, for the rule of consistency, the order of the authorities below deserves to be set aside.

5. On the other hand, the learned DR relied on the orders of the authorities below.

6. We have heard both the sides. Generally the rule of consistency would prevail when a view accepted in earlier years is to be followed in the subsequent

years. However, this rule is not applicable to the facts of present case, i.e., firstly, the rule of res judicata is not applicable to the income-tax proceedings. Res judicata as applicable to civil court decisions and has no application to income-tax proceedings, so what is covered in an earlier assessment can still be raised in later one. This rule is subject to expectation of consistency especially where, there are no fresh facts; and secondly, the perpetuation of bonafide mistake made earlier is also not permitted by law. In cases, where the earlier findings are inconclusive and in subsequent year, Assessing Officer takes a view or depart from earlier view the doctrine of res judicata is not applicable. Assessing Officer is not bound to take the same view as in previous years of assessment if any bonafide mistake occurred earlier. The rule of consistency is not a complete sacrosanct in nature, as the principles of res-judicata is not applicable to the income-tax proceedings. Each assessment year is a separate assessment year and any bonafide mistake committed should not be allowed to be perpetuated. Thirdly, the reliance of the assessee that the TDS had been deducted as per the provisions of section 194I which are applicable to the TDS on rent is also not of a ground on which correct head of the income can be determined. The provisions of tax deducted at source are procedural in nature and these are meant for collection of taxes on the basis of principle “as you earn as you pay”. The income to be assessed under the head “Income from house property” under section 22 of the Income-tax Act is the income relate to building or land or land appurtenant thereto of which the assessee is the owner. Such income is chargeable under the head income from house property. Section 23 lays down the ways of calculation of annual value of such property which is let out

by the owner. Section 24 provides about deduction from income from house property. The income earning from installation of towers / antennas on its premises or income received from installation of signage or income from parking rent or income from giving space for operating small kiosks cannot be said to be income from house property or from land appurtenant with such property.

7. When we look to the TDS provision on rent we find nothing which could decide the head of income. Section 194I in Chapter XVII read as under :-

> **"194-I.** Any person, not being an individual or a Hindu undivided family, who is responsible for paying to [a resident] any income by way of rent, shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, [deduct income-tax thereon at the rate of—
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> [(*a*) two per cent for the use of any machinery or plant or equipment; and
>
> (*b*) ten per cent for the use of any land or building (including factory building) or land appurtenant to a building (including factory building) or furniture or fittings:]]
>
> **Provided** that no deduction shall be made under this section where the amount of such income or, as the case may be, the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the financial year by the aforesaid person to the account of, or to, the payee, does not exceed **[***one hundred and eighty thousand rupees***]** :
>
> [**Provided further** that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause (*a*) or clause (*b*) of section 44AB during the financial year immediately preceding the financial year in which such income by way of rent is credited or paid, shall be liable to deduct income-tax under this section.]
>
> *Explanation.*—For the purposes of this section,—
>
> [(*i*) "rent" means any payment, by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of (either separately or together) any,—

(*a*) land; or
(*b*) building (including factory building); or
(*c*) land appurtenant to a building (including factory building); or
(*d*) machinery; or
(*e*) plant; or
(*f*) equipment; or
(*g*) furniture; or
(*h*) fittings,

whether or not any or all of the above are owned by the payee;]

(*ii*) where any income is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.]"

Nowhere the provisions of section 194I of Act provides that these provisions are applicable only to the rental income chargeable under the head "income from house property" as per the provisions of section 22 of the Act. Certain types of rent are also taxable under the head "Income from other sources" which is clear from the provisions of section 56 of the Act. The provisions of section 56 read as under :-

"56. (1) Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income-tax under the head "Income from other sources", if it is not chargeable to income-tax under any of the heads specified in section 14, items A to E.

(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head "Income from other sources"

……

(*ii*) income from machinery, plant or furniture belonging to the assessee and let on hire, if the income is not chargeable to

income-tax under the head "Profits and gains of business or profession";

(*iii*) where an assessee lets on hire machinery, plant or furniture belonging to him and also buildings, and the letting of the buildings is inseparable from the letting of the said machinery, plant or furniture, the income from such letting, if it is not chargeable to income-tax under the head "Profits and gains of business or profession".

The provisions of Section 56 of the Income-tax Act for taxing income from other sources are inclusive. Certain incomes specify in section 56(2) are without prejudice to the generality of the provisions of sub-section (1) of section 56. Sub-section (1) to section 56 provides that income of every kind which is not to be excluded form the total income under this Act shall be chargeable to income-tax under the head "Income from other sources", if it is not chargeable to income-tax under any of the head specified in section 14, Item No.(a) to (e) in section 14 which are as under :-

"……
A.—Salaries.
B.— [***]
C.—Income from house property.
D.—Profits and gains of business or profession.
E.—Capital gains."

By considering these provisions of Act, in our considered view, assessee's reliance on the deduction of tax as per the provisions of section 194I shall not be of any help to the assessee with regard to the head of the income under which the income from license fee and parking rent is to be assessed.

6.1 In the case of Mukherjee Estate P. Ltd. reported in 244 ITR 1, the Hon'ble Calcutta High Court has held that income on account of display of hoardings on the

top of the building for advertisement purposes to display the advertisement is not an income from house property as hoardings do not form part of the building which is income from the house property and other parts of the building. Hon'ble High Court has clearly held that letting out the hoardings, which are neither part of the building nor the land appurtenant thereto, therefore, such income cannot be income from house property. To treat the income from house property, first it should be letting out of a property. This is a primary requirement of treating any income from income from property. Similarly, the income derived from installation of towers/ antennas on roof of building and giving parking space on rent is not income from house property which falls or to be assessed under section 22 of Income-tax Act. Any income from these sources has to be assessed under the head "income from other sources". In view of these, we are in agreement with the order of CIT (A), which is accordingly upheld.

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

Order pronounced in open court on this 29th day of February, 2012.

Sd/-	**sd/-**
(U.B.S. BEDI)	**(B.C. MEENA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated the 29th day of February, 2012
TS
Copy forwarded to:
1.Appellant
2.Respondent
3.CIT
4.CIT(A)-III, New Delhi.
5.CIT(ITAT), New Delhi

AR, ITAT
NEW DELHI.