आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ,एफ,मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "F", MUMBAI

श्री संजय गर्ग, न्यायिक सदस्य **एवं**

श्री अश्वनी तनेजा, लेखा सदस्य**,** के समक्ष

Before Shri Sanjay Garg, Judicial Member, and
Shri Ashwani Taneja, Accountant Member

ITA NO.3984/Mum/2013
Assessment Year: 2008-09

Usha Manohar Shetty, 132 marble Arch Senapati Bapa Tmarg, Mahim Mumbai-400016	**बनाम**/ Vs.	ACIT 18(3) R.No.209, 2nd Floor, Piramal Chamber, Parel Mumbai -400012
(Revenue)		(Respondent)
P.A. No.ABBPS2235F		

Assessee by	Dr. K. Shivaram(AR)
Revenue by	Shri Santosh Mankoskar (DR)

सुनवाई की तारीख / **Date of Hearing :**	**24/11/2015**
आदेश की तारीख /**Date of Order:**	**6/01/2016**

आदेश / O R D E R

Per Ashwani Taneja (Accountant Member):

The present appeal has been filed by the Assessee against the order of Ld. Commissioner of Income Tax (Appeals)-16, Mumbai {(in short 'CIT(A)'}, dated 19.02.2013 for the

assessment year 2008-09, decided against the assessment order passed by the Assessing Officer (in short 'AO') u/s 143(3) of the Act, on the following grounds:

"1.The Ld. CIT(A) erred in upholding the action of the AO in treating the rental income earned of Rs.21,37,850/- received from let out of six shops to CKP Co-op Bank Ltd vide leave license agreement dated 15/2/2008 as 'income from other source instead of 'Income from House Property' declared by assessee.

2.The Id. CIT(A) erred in not appreciating the fact that the dominant purpose was to let out the property to earn rental income merely because along with the premises some furniture and fixtures are also provided that would not change the nature of receipt more so when the treatment is accepted by the dept consistently in past years.

3. The Id. CIT(A) failed to appreciate that by virtue of tenancy right held by the assessee he was a deemed owner of the property u/s. 27(iiib) of the of the Act."

2. During the course of hearing, arguments were made by Dr. K. Shivaram, Authorised Representative (AR) on behalf of the Assessee and by Shri Santosh Mankoskar, Departmental Representative (DR) on behalf of the Revenue.

3. The only issue to be decided in this appeal is that rental income received by the assessee from letting out of the property was treated to be assessed as 'income from other

sources' instead of 'income from house property'; on the ground that assessee was not owner of the property.

3.1. During the course of hearing, it was submitted by the Ld. Counsel that the AO has wrongly treated the impugned income as 'income from other sources'. It was submitted that assessee is deemed owner of the property u/s 27(iiib) of the Act. Our attention was drawn on a chart, submitted before us by Ld. Counsel, showing history of the assessments of the assessee wherein impugned income has been shown as 'income from house property' in last many years. The assessee also submitted copy of rent receipt dated 01.04.1985 to show that rent was paid by the assessee to the main tenant in her name. In view of these facts, it was submitted by the Ld. Counsel that the assessee has been enjoying this property as an owner and therefore rental receipt from sub-letting should be treated as 'income from house property' in its hands.

3.2. On the other hand, Ld. DR supported the orders of lower authorities and submitted that standard deduction available under the head 'income from house property' cannot be claimed by the two persons on same receipt and therefore, he requested for upholding the orders of lower authorities by confirming their action in treating impugned income as 'income from other sources'.

3.3. We have gone through the orders of lowers authorities as well as submissions made by both the sides. It is noted by us

that during the course of assessment proceedings, the AO found that income received by the assessee from sub-letting the house property was actually owned by her husband and therefore, he considered the income as 'income from other sources' on the ground that the assessee was not owner of the house property. The Ld. CIT(A) confirmed the action of the Ld. AO. Our attention has been drawn by the ld. Counsel on section 27(iiib), wherein the expression 'owner' of the house property has been defined. For the sake of ready reference same is reproduced hereunder:

> *"(iiib) a person who acquires any rights (excluding any rights by way of a lease from month to month or for a period not exceeding one year) in or with respect to any building or part thereof, by virtue of any such transaction as is referred to in clause (f) of section 269UA, shall be deemed to be the owner of that building or part thereof:"*

3.4. It is noted from the above that the assessee shall be deemed to be owner of the property in case said property was acquired by him on account of any transactions as is referred in clause of (f) of section 269UA, which reads as under:

> *"(f) "transfer"*
>
> *(i) In relation to any immovable property referred to in sub-clause (i) of clause(d), means transfer of such property by way of sale or exchange or lease for a term of not less than twelve years, and includes allowing the possession of such property to be taken or retained in part performance of a contract of the*

nature referred to in section 53A of the Transfer of Property Act, 1882(4 of 1882)

Explanation- for the purpose of this sub-clause, a lease which provides for the extension of the term thereof by a further term or terms shall be deemed to be a lease for a term of not less than twelve years, if the aggregate of the term for which such lease is to be granted and the further term or term for which it can be so extended is not less than twelve years;

3.5. It is submitted before us that the assessee has been tenant of this property for more than 12 years. These facts were not disputed by the Ld. DR before us. It is further noted by us that history chart submitted before us shows that income from this property has been treated, all along during past years, as 'income from house property'. The assessee had claimed the same as 'income from house property' being deemed owner u/s 27(iiib) of the Act. We find that in view of the facts narrated by the assessee read with the provisions of law as discussed above and seen in the light of past history of the assessee wherein claim of the assessee has been accepted through out by the Revenue, we find force in the arguments of the Ld. Counsel that in this year the Revenue was not permitted to take a contrary stand. It is worth netting that department had passed an order u/s 143(3) dated 23.09.2009, for A.Y. 2007-08 wherein similar income has been treated as 'income from house property'. The AO in the aforesaid order

made computation of income wherein, the aforesaid income has been assessed conspicuously under the head 'income from house property'. It is further noted by us that Hon'ble Delhi High Court in the case of **Smart Pvt. Ltd. vs CIT 166 Taxmann 53** held that assessee being in full control of the property as tenant, income earned from sub-letting the same is assessable as 'income from house property', even though the assessee was not owner thereof. We further find support from the judgment of Hon'ble Supreme Court in the case of **CIT vs. Excel Industries 358 ITR 295**, wherein it has been held that if a stand has been accepted by the Revenue consistently, then it should not be reversed unless there is some change in facts or law. The relevant portion of the order of Hon'ble Supreme Court is reproduced below:

> **"***28. Secondly, as noted by the Tribunal, a consistent view has been taken in favour of the assessee on the questions raised, starting with the assessment year 1992-93, that the benefits under the advance licences or under the duty entitlement pass book do not represent the real income of the assessee. Consequently, there is no reason for us to take a different view unless there are very convincing reasons, none of which have been pointed out by the learned counsel for the Revenue.*
>
> *29. In Radhasoami Satsang Saomi Bagh v. CIT [1992] 193 ITR 321/60 Taxman 248 (SC) this Court did not think it appropriate to allow the reconsideration of an issue for a*

subsequent assessment year if the same "fundamental aspect" permeates in different assessment years. In arriving at this conclusion, this Court referred to an interesting passage from Hoystead v. Commissioner of Taxation, 1926 AC 155 (PC) wherein it was said:

"Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted, litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted and there is abundant authority reiterating that principle. Thirdly, the same principle, namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken."

30. Reference was also made to Parashuram Pottery Works Ltd. v. ITO [1977] 106 ITR 1 (SC) and then it was held: "We are aware of the fact that strictly speaking res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a

fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year. On these reasonings in the absence of any material change justifying the Revenue to take a different view of the matter - and if there was no change it was in support of the assessee - we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income Tax in the earlier proceedings, a different and contradictory stand should have been taken."

31. It appears from the record that in several assessment years, the Revenue accepted the order of the Tribunal in favour of the assessee and did not pursue the matter any further but in respect of some assessment years the matter was taken up in appeal before the Bombay High Court but without any success. That being so, ***the Revenue cannot be allowed to flip-flop on the issue*** *and it ought let the matter rest rather than spend the tax payers' money in pursuing litigation for the sake of it."*

3.6. We find that in this case the AO has attempted to do flip-flop on an issue which has been decided consistently in favour of the assessee during past years. Thus, viewed from any angle, the claim of the assessee is allowable, accordingly we

direct the AO to treat the said income as 'income under the head house property'.

4. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 6th January, 2016.

Sd/-	Sd/-
(Sanjay Garg)	(Ashwani Taneja)
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य** / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated :6 /1/2016

*Patel, P.S.*नि.स.

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**