**आयकर अपीलीय अधिकरण "बी" न्यायपीठ मुंबई में।**
**IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI**

श्री जोगिन्दर सिंह, न्यायिक सदस्य **एवं** श्री संजय अरोड़ा, लेखा सदस्य के समक्ष ।
**BEFORE SHRI JOGINDER SINGH, JM AND SHRI SANJAY ARORA, AM**

आयकर अपील सं./I.T.A. No. 6420/Mum/2011

(**निर्धारण वर्ष /** Assessment Year: 2008-09)

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| Nimish A. Munim<br>c/o. Texchem Industries,<br>E/14, Priya Pushpakunj,<br>15-J, Nehru Road, Santacruz-400 055 | **बनाम/**<br>Vs. | Asst. CIT-10(1),<br>M. K. Road, Aayakar Bhavan,<br>Mumba-400 020 |
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAEPM 3783 G | | |
| (अपीलार्थी /**Appellant**) | : | (प्रत्यर्थी / **Respondent**) |

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| अपीलार्थी की ओर से / **Appellant by** | : | Shri K. M. Modi |
| प्रत्यर्थी की ओर से/**Respondent by** | : | Shri Sanjeev Jain |

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| सुनवाई की तारीख / **Date of Hearing** | : | 29.2.2016 |
| घोषणा की तारीख / **Date of Pronouncement** | : | 29.04.2016 |

आदेश / O R D E R

Per Sanjay Arora, A. M.:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-21, Mumbai ('CIT(A)' for short) dated 21.06.2011, partly allowing the Assessee's appeal contesting its assessment u/s.143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2008-09 vide order dated 24.8.2010.

2. The appeal raises two issues, per its two grounds, which we shall take up in seriatim. Vide Ground 1, the assessee agitates the disallowance of expenses (Rs.1.07 lacs), primarily on car, against business income, being interest and remuneration from

two firms, namely M/s. Globus Enterprises & M/s. Silken Car Detaining, in which he is a partner. The Assessing Officer (A.O.) disallowed the same for the reason that the assessee could not establish any direct nexus of the impugned expenditure with the said business. The user of the car for personal purposes could not, in any case, be ruled out. In appeal, the ld. CIT (A) was of the view that the income by way of interest and remuneration to a partner from a partnership firm is rightly assessable as income from other sources u/s. 56. That apart, the expenditure claimed, being on account of professional fees, car repair, car depreciation and interest on car loan (at Rs.1,07,355/-), had no nexus with the receipt by way of interest and remuneration from the partnership firms.

3. We have heard the parties, and perused the material on record.

Without doubt, even as the ld. Authorized Representative (AR), the assessee's counsel, was at pains to emphasize before us, income by way of interest (on capital) and remuneration (against services rendered) to a partner (from a partnership firm) is assessable as business income u/s. 28(v). That being the case, the expenditure, detailed as under, where incurred for business purposes, is liable to be allowed u/s. 37(1) of the Act:

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| Professional fees | Rs.5,051 |
| Car repairing charges | Rs.25,789 |
| Depreciation on motor car | Rs.70,202 |
| Interest on car loan | Rs.6,313 |
| Total | Rs.1,07,355 |

The nature of the professional expenses is not clear, though the ld. counsel would submit that the same represents his fees for preparing and filing the assessee's return of income (presumably for the relevant year). Tax is a charge on income, and has nothing to do with the earning of income or returning the same under the Act. The law in the matter is clear, and all that it requires is the sum claimed being expended wholly & exclusively for business purposes. There is nothing on record to suggest that the car/s under reference was used wholly & exclusively by the assessee for the

conduct of the business of the two partnership firms. We may though discuss the matter in some detail.

Interest on capital, though assessable as business income, has no relation whatsoever with car expenses. As regards remuneration, we do not even know if the assessee is receiving the same from one or both the firms. Even assuming from both, what is there to show that the car/s is being deployed for the purposes of the firms. *Where, we wonder, as also expressed during hearing, is the expenditure on car maintenance, i.e., on its' running, incurred from, being not claimed by the assessee*? That in fact would exhibit if the car is being actually used, as well as, where so, to the extent it is, for the purposes of the two firms. It is only in such a case (i.e., of a car user), that the other expenditure on car, i.e., as being claimed, may – to whatever extent, stand to qualify as eligible for deduction.

The firm and the partners are separate & distinct entities/persons under the Act, even as the receipt of interest and remuneration by a partner from a firm is only in nature of share in the profits of the firm and, thus, assessable as business income. This position gets further clarified after the amendments to the Act (viz. ss. 28, 40, 184, 185) by Finance Act, 1992, materially altering, firstly, the definition of income (of a partnership firm and its' partners) and, secondly, the manner of its computation and bringing it to tax. On facts, assuming the car/s being used for the business purposes of the firms, why should a partner bear the expenditure of the firm, which, besides being not deductible in his hands, would only be to his own detriment. *Or, is it that the user of the car by the assessee-partner is only for commuting between his residence and business premises, while using another car (vehicle) for the business purposes of the firms*; the assessee stating of his residence being in Santa Cruz (West), Mumbai, while his office is in Santa Cruz (East) (refer para 1(f) of the written submissions dated 01.6.2011 before the ld. CIT(A)/PB pgs. 1-9). In which case, the expenditure on car maintenance would, as other incidental expenditure on car, stand to be incurred by the assessee himself. The question of actual incurring of the maintenance (running)

expenditure, and source thereof, though continues. We are conscious that the expenditure on commuting, where claimed by the firm(s) as a part of their business expenditure u/s.37(1), could imply that the firm has extended the said facility to the partner, which though could only be where the car/s is owned by the partnership firms, as distinct from the partner/s. It could also be a case of the same (common) car being used for both, i.e., for commuting to and from work, and for the firm's business, putting the car, thus, to optimum use, besides representing a practical, common-sense approach. It is only in the case of the former, i.e., for commuting, that expenditure would stand to be allowed as a business expense in the hands of the assessee-partner, as distinct from the partnership firms. There is, however, no claim to this effect, with the assessee, on the other hand, stating that the firms (of which he is a partner), as being not interested in investing in a car. In fact, in case of the same (common) car being used, the expenditure would necessarily have to be appropriated between the two firms, for which the car is thus used, and the assessee (refer s. 38(2)). In other words, the expenditure would required to be split three ways, i.e., the two firms for which the car is being also used, and the assessee. That, as well as the proportionate incidental expenditure – on car repairs, depreciation, and interest (on car loan), is, as afore-stated, the only expenditure that the assessee can rightly claim against the business income from the firms, with that relatable to the business purpose of the firms being deductible in their hands. Further, the assessee has nowhere specified the expenditure on the personal user of the car/s, an aspect which cannot be overlooked.

We, accordingly, restore the matter back to the file of the A.O. to verify the assessee's claims and determine the expenditure on car/s deductible in his hands in accordance with law, issuing definite findings of fact. The onus, we may clarify, to establish his claims, with materials and explanations, would only be on the assessee. We decide accordingly.

4. The second Ground is in respect of income assessable under the head 'Income from House Property'. The brief facts are that the assessee, who owns a flat and two garages at Priya Pushpakunj Co-operative Housing Society, 15 J. Nehru Road, Santa Cruz (East), Mumbai, besides another (flat) at Seth Dham, Khar, Mumbai, let his one flat on rent to a company (Swash Non-ionics Pvt. Ltd.) in which he is a director, and the two garages to the two partnerships firms, returning the rental income as house property income u/s. 22 r/w s. 23(1)(a), as under (refer para 5.1 of the assessment order):

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| Rent from Swash Nonionics Pvt. Ltd. (5000 x 2) | Rs.60,000 |
| Rent from Silken (2500 x 12) | Rs.30,000 |
| Rent from Globus Enterprises (4000 x 12) | Rs.48,000 |

The net income, i.e., after allowing standard deduction (on account of repairs), Rs.88,315/-, was adjusted against interest paid on loan for the self occupied property, returning *a net loss of Rs.61,685/-*. In the A.O's view, the assessee had, on account of close nexus between him and the tenant-firms, or otherwise to save on tax, had shown very nominal rental income. On the basis of market inquiries through his Inspector, he estimated Rs.10,000/- per month and Rs.7,000/- per month as the minimum rent for the flat and the garages respectively, which he assessed as their annual value u/s. 22. The claim of maintenance charges (Rs.10,096/-) to the housing society/s was also disallowed. In appeal, the assessee, relying on the decision in *CIT vs. Shiv Mohan Lal* [1993] 202 ITR 60 (All.), claimed that as the house properties under question were being used for the purposes of his business by the assessee-owner, their annual value was not liable to tax u/s. 22. The ld. CIT (A) found the said case law distinguishable in-as-much as in that case the assessee-owner had used the house properties for the purposes of his own business, while in the present case the assessee owner & the company/partnership firms are separate legal entities. The annual value estimated by the A.O. was reasonable. The assessment being confirmed thus, aggrieved, the assessee is in second appeal.

5. We have heard the parties, and perused the material on record.

Our first observation in the matter is that the assessee's self occupied property (SOP) – which is not specified, would be that located in Santacruz (W), Mumbai, stated by him to be the location (address) of his residence (refer para 3 above). The law exempts only one SOP from tax, while the assessee has thus claimed two, i.e., at Santacruz (W), Mumbai and at Seth Dham, Khar, Mumbai, properties as SOPs. We state this as a preliminary observation, which though does not appear to have a bearing on the dispute under reference. The claim of the Santacruz (W), Mumbai residence could though be verified by the A.O. while determining the assessee's claim in respect of expenses covered vide Ground 1.

On merits, we find the assesee's claim *qua* the use of the house properties for his business as misconceived. A company & its' directors are separate legal persons. Similarly, as afore-stated, a firm & a partner are separate persons under the Act. In fact, the assessee has himself admittedly let his house properties to these entities for a rent, which could only be where the two, i.e. the owner and the tenant, are separate and distinct.

The issue at large is one of valuation, the A.O., based on market inquiry (through his Inspector), enhancing the rental income assessable under section 22 r/w s. 23 of the Act. In this regard, we observe that the assessee states that the Inspector's report was not confronted thereto, violating the principles of natural justice. The same, where so, is, without doubt, improper, and would therefore normally warrant restoration of the proceedings to the stage at which the irregularity had occurred. Be that as it may, why, we wonder, did not the assessee seek the copy of the said report, if not at the assessment stage, at least at the appellate stage, and present his case on merits? The report, as made clear, is based on market inquiries, which states of the prevailing monthly rent to be at a minimum of Rs. 10,000/- & Rs. 7,000/- for the relevant properties, i.e., the flat and two garages respectively, situate in the locality in which they are. The area of each of the three house properties and, thus, of the rent

rate assessed, claimed to be on market inquiries, is only known to the assessee. Why, then, could he not state the rent rate charged in terms of square feet, i.e., as being at 'X' (say) not 'Y' (say) for the property situate in that area/locality at the relevant time? Rent rates, though based on demand and supply, are also influenced by and dependent on the cost of construction/acquisition of the house property, calculated to yield a reasonable rate. *What is the going rate of the relevant properties in the relevant area at the relevant point of time*? This, we understand to be the basic question, i.e., the point of difference between the assessee and the Revenue, and which, therefore, needs to be addressed. The assessee's case is completely silent, even up to the stage of the Tribunal, on all these relevant aspects and parameters. Surely, the plea of natural justice cannot be allowed to be used as a ruse. When all the information is available (with the assessee), all that it entails is a comparison between the rate adopted (by the assessee) and that applied (by the A.O.).

The adoption of an enhanced rate does not breach the theory of real income in-as-much as what the law envisages is the estimation of the annual value, defined as the fair rent that a house property is expected to fetch from year to year (sec. 23). It is only where the actual rent exceeds the fair rental value that the same is taken as annual value u/s. 22. That the tenants are related entities, and the assessee entered into the rental arrangements (perhaps for the first time), as stated, with a view to set off the interest on loan utilized for self occupied house property (residence), is of little relevance and, if anything, rather impugns the assessee's case. We, accordingly, do not consider it as a fit case for remand. As regards maintenance charges (Rs.10,096/-) paid to the housing society, the payment thereof is certainly an expenditure that would be factored into while determining the rent, so that where paid/payable by the owner, who is legally liable therefor, the rent is increased to that extent, neutralizing its impact. Considering the totality of facts, including the nominality of the amount, we consider the assessee's claim as sustainable in law as the market rent presumably factors in such charges. The same is directed to be allowed.

The decision in the case of *Shiv Mohan Lal* (supra), which we have carefully perused, is, in all respects, in favour of the Revenue and against the assessee. In the facts of that case, the house property, which was being used by the partnership (M/s. Ganeshi Lal & Sons) for its business, was owned by the assessee's HUF. The mere fact that the assessee, among others, was a partner, would be of no consequence. Again, the fact that no rent was being charged, and which position had continued for the past several years, would be to no avail, as what the law envisages is bringing the annual letting value of a house property, subject to the provisions of the Act, to tax. The actual receipt of the rent in respect of a house property is not necessary to incur the liability to tax on the income from house property, and there was nothing in section 22 of the Act to indicate so. Accordingly, the decision by the tribunal that the property be deemed to be used by the assessee for its' business, so that its' annual (letting) value was not taxable in the hands of the assessee-HUF, was reversed by the Hon'ble Court, holding that it was not right in holding that the user of the house property by the partnership was the user by the assessee for its' business. Further, no question or issue as regards valuation (of the annual letting value) was present in the said case. The said decision would thus be of no assistance to the assessee; rather, fully supports the case of the Revenue.

We, accordingly, confirm the action of the Revenue, further directing it to allow the assessee, in computing the income from house property, his claim *qua* maintenance charges (Rs.10,096/-) after verifying if the same is wholly in respect of the rented house property/s. We decide accordingly, and the assessee gets part relief.

6. In the result, the assessee's appeal is partly allowed.

*Order pronounced in the open court on April 29, 2016*

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| Sd/- | Sd/- |
| (Joginder Singh) | (Sanjay Arora) |
| न्यायिक सदस्य / Judicial Member | लेखा सदस्य / Accountant Member |

मुंबई Mumbai; दिनांक Dated : 29.04.2016

व.नि.स./Roshani, Sr. PS

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

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

**आदेशानुसार/** BY ORDER,

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