

IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH : KOLKATA

[Before Hon’ble Shri S.S. Godara, JM & Shri M.Balaganesh, AM]

I.T.A No. 1413/Kol/2017

Assessment Year : 2012-13

DCIT, Circle-7(1), Kolkata

-vs-

M/s Dhanuka Ventures Pvt. Ltd.

[PAN: AABCM 7883 K]

(Appellant)

(Respondent)

For the Appellant : Shri A. Bhattacharjee, Addl. CIT

For the Respondent : Shri Ravi Tulsian, FCA

Date of Hearing : 13.06.2018

Date of Pronouncement : 04.07.2018

ORDER

Per M.Balaganesh, AM

1. This appeal by the Revenue arises out of the order of the Learned Commissioner of Income Tax(Appeals)-16, Kolkata [in short the Id CIT(A)] in Appeal No. 849/CIT(A)-16/Kol/2015-16/C-7(1) dated 23.02.2017 against the order passed by the DCIT, Circle-7(1), Kolkata [in short the Id AO] under section 143(3) of the Income Tax Act, 1961 (in short “the Act”) dated 30.03.2015 for the Assessment Year 2012-13.

2. At the outset, there is a delay in filing of appeal by 45 days by the revenue. We have gone through the reasons stated for the delay and we are inclined to condone the delay of the revenue and admit the appeal for adjudication.

3. The only issue to be decided in this appeal is as to whether the Id CITA was justified in directing the Id AO to treat the receipt from M/s Pantaloon Retail (India) Ltd as Business income , in the facts and circumstances of the case.

4. The brief facts of this issue are that the assessee is a non-banking financial company (NBFC) registered with Reserve Bank of India (RBI) carrying on financing business apart from engaging in the agency / venture business at the premises owned by it. The return of income for the Asst Year 2012-13 was filed on 26.9.2012 declaring total income of Rs 1,58,81,810/-. The assessee showed agency commission income of Rs 3,57,08,634/- vide agreement dated 14.9.2011 , the quantum of which is dependent on the sale percentage at the premises owned by the company at 49/1, Leela Roy Sarani, Kolkata - 700019 in respect of property owned by the company and let out to M/s Pantaloon Retail (India) Ltd. It was submitted that M/s Pantalooan Retail (India) Ltd used the premises at 49/1, Leela Roy Sarani, Kolkata - 700019 as a retail outlet of running a showroom situated at ground and mezzanine floor in the said commercial complex. The Id AO observed that assessee had received only rent on letting out of this property to M/s Pantaloon Retail (India) Ltd and hence the same cannot be treated as business income of the assessee and instead it had to be taxed as income from house property. The Id AO also disallowed the depreciation on the said property amounting to Rs 1,70,159/- as the rental income is taxed under the head income from house property. The Id AO observed that the assessee had debited a sum of Rs 1,17,99,120/- in its profit and loss account under the head 'other expenses'. Out of this, he allowed Rs 25,00,298/- as business expenditure to be set off against other business income and disallowed Rs 92,98,822/- as the rental income earned by the assessee is to be taxed only as income from house property and not as business income. The Id AO however granted flat deduction of 30% of the rental income while computing the income from house property.

5. The assessee submitted that it had been earning agency commission from M/s Pantaloon Retail (India) Ltd (PRIL) for rendering services in connection with stock and display, for retail sale, the products and goods of PRIL at its property located at 49/1, Leela Roy Sarani, (Gariahat Road), Kolkata – 700019 , which also represents retail outlet of PRIL. The assessee pursuant to an agreement with PRIL had agreed for commercial utilization of the immovable property owned by it for operating as a showroom. The assessee pursuant to the agreement had also agreed to provide various services and incur expenses for the purpose of maintaining, managing and assisting PRIL to put up and use the said property as a showroom. As against this business proposal of providing of the aforesaid services, the assessee earns 10% of the gross sales from the showroom as commission, which is offered to tax by the assessee as income from business. During the year under consideration, the assessee earned agency commission of Rs 3,57,08,634/- and offered to tax as business income in consonance with the treatment given by it in the earlier years, which has been accepted by the department in all the earlier years preceding the Asst Year 2010-11. It was submitted that the careful reading of various clauses in the agreement stipulates that the activities were carried out by the assessee with a motive to earn profit and not for the sake of mere letting out of its property. The agreement with PRIL had been made operative for a considerable period of time (i.e 5 years) signifying that the services were being rendered continuously during the said period. For providing the various services as per the agreement, the assessee had to arrange for / obtain permission s/ clearances/ facilitations from various Government bodies. It had to maintain staff and managers and take various administrative measures to ensure smooth running of the retail outlet / showroom premises. All these are continuous organized activities undertaken for a set purpose of carrying on business as managers and maintainers of the retail outlet/ showroom premises . Hence it was pleaded that the assessee had taken up the venture of setting up a showroom at the premises owned by it and for that matter all the aforementioned activities undoubtedly constitute ingredients of an organized business

venture. The assessee placed reliance on the decision of Hon'ble Supreme Court in the case of Karnani Properties Ltd vs CIT reported in 82 ITR 547 (SC).

5.1. In addition to the above, it was pleaded that rental income pre-supposes existence of an owner – tenant relationship between the receiver and the payer of the rent. One of the principal characteristics of such relationship is that the tenant must enjoy tenancy rights, which he acquires the moment he becomes a tenant. Section 55(2)(a) of the act even speaks of the cost of acquisition of such tenancy rights for the purpose of computation of capital gains on transfer thereof. However, in the agreement that the assessee company entered into with PRIL, it has been specifically provided that the user of the services provided by the owner shall not have any tenancy rights.

5.2. The assessee further submitted that the Kolkata Municipal Corporation (KMC) had revised the valuation of the area in which the showroom has been set up by the assessee together with PRIL, by alleging that the said premises had been let out to PRIL and hence had sought to levy higher property tax. In this connection, the assessee filed a writ against KMC before the Hon'ble Calcutta High Court. The Hon'ble Calcutta High Court after examining the agency agreement, vide its order dated 15.10.2004 observed as under:-

“I have gone through the agreement, therein nowhere I find that the writ petitioner has parted with the possession of the premises in question or has given control and domain over the property to the Pantaloons Fashion India Ltd.. It appears that it is merely business deal. As a remuneration of such business deal the payment of commissions has been fixed according to yearly turnover. The Pantaloon has been made party to the WRIT petition they have not claimed any right of tenancy. Therefore, it is absurd to guess that subject agreement is otherwise than what is apparent particularly when the alleged tenant does not claim so. It is hard to believe that the tenant would pay any rent or occupation charges without having occupancy right.”

6. The Id CITA appreciated the aforesaid contentions of the assessee and also by placing reliance on the following decisions held that the agency commission income derived by

the assessee from PRIL is to be taxed only as business income and not income from house property :-

- a) *Hon'ble Supreme Court in the case of Chennai Properties & Investments Ltd vs CIT reported in (2015) 373 ITR 673 (SC).*
- b) *Co-ordinate bench decision of this tribunal in the case of PFH Mall and Retail Management ltd vs ITO reported in (2008) 298 ITR (A.T.) 371 (ITAT Kolkata) . The revenue's appeal before the Hon'ble Calcutta High Court and Hon'ble Supreme Court against this tribunal order has been dismissed.*
- c) *Hon'ble Calcutta High Court in the case of Everest Hotels Ltd vs CIT reported in (1978) 114 ITR 779 (Cal).*
- d) *Hon'ble Gujarat High Court in the case of ACIT vs Saptarishi Services Ltd reported in (2004) 265 ITR 379 (Guj).*
- e) *Hon'ble Bombay High Court in the case of CIT vs National Storage P Ltd reported in (1963) 48 ITR 577 (Bom).*

7. Aggrieved, the revenue is in appeal before us.

8. We have heard the rival submissions and perused the materials available on record. From the facts narrated above, we find that PRIL (user) is only granted permissive use of the services and facilities provided in the premises by the assessee. Further, the user would not be vested with or enjoy any right, title or interest of any kind of the retail outlet / showroom premises. As per the terms of the agreement, the users had no right of occupancy. They have only limited access to use the space for the purpose of their business and that too, in respect of certain activities, during the specific hours of the day only. Thus the users do not enjoy any tenancy right as per the agreement. We also find that the assessee is responsible for payment of maintenance charges, municipal and other taxes, rates and as well as other such related outgoings. The various case laws

relied upon in the order of the Id CITA's order squarely supports the case of the assessee. We find that the assessee had provided various arrangements on a daily basis to the user, to ensure smooth and efficient running of the retail outlet/ showroom which reflect a clear manifestation of an organized activity carried out by the assessee for a set purpose of earning profits out of commercial exploitation of the property owned by it. In consideration of rendering the services as per the agreement, the assessee is compensated in the form of commission calculated at 10% of gross sales in the said retail outlet /showroom. Moreover, the Hon'ble Calcutta High Court in the context of writ proceedings on the levy of higher property tax for the subject mentioned property, had held supra that PRIL does not possess any tenancy rights and the agreement entered into by the assessee with PRIL is only a mere business arrangement. In this background, there is no need to take a different view on the nature of the agreement entered into by the assessee with PRIL. Hence it could be safely concluded that the said receipt of agency commission would squarely fall under the ken of business income and to be assessed accordingly. Moreover, we also find that the said treatment of assessing the agency commission as business income and allowing depreciation thereon, has been allowed by the department up to Asst Year 2009-10 and out of which, the assessments for the Asst Years 2006-07 , 2008-09 and 2009-10 were completed u/s 143(3) of the Act. Hence there is no reason to take a divergent view during the year under appeal on the same set of facts. Reliance in this regard is placed on the decision of Hon'ble Supreme Court in the case of Radhasaomi Satsang vs CIT reported in 193 ITR 321 (SC) enunciating the principles of consistency to be followed by the revenue, when there is no change in facts and circumstances of the case.

8.1. Since the agency commission has been directed to be assessed as business income as above, the allowability of depreciation on the subject mentioned property becomes automatic . Similarly there is no need to disallow any expenses as not relatable to business as admittedly, the Id AO had not stated that the said expenditures which were

disallowed are not meant for business purposes of the assessee. The same were disallowed only on the ground that the agency commission is assessed as house property income against which no expenses could be allowed except allowing flat deduction of 30% on net annual value. Hence we direct the Id AO to delete the disallowance of depreciation and expenses made in the assessment as the agency commission has been directed to be assessed as income from business.

9. In the result, the appeal of the revenue is dismissed.

Order pronounced in the Court on 04.07.2018

Sd/-

[S.S. Godara]
Judicial Member

Sd/-

[M.Balaganesh]
Accountant Member

Dated : 04.07.2018

SB, Sr. PS

Copy of the order forwarded to:

1. DCIT, Circle-7(1), Kolkata, Aayakar Bhawan, 5th Floor, P-7, Chowringhee Square, Kolkata-700069.
2. M/s Dhanuka Ventures Pvt. Ltd., 40, Shakespeare Sarani, Kolkata-700017.
- 3..C.I.T.- 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches