

आयकर अपील अाधिकरण, अहमदाबाद ढयायपीठ
**IN THE INCOME TAX APPELLATE TRIBUNAL,
"D" BENCH, AHMEDABAD**

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER

And

MS MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./ITA No.2226/AHD/2016

अाधरण वर्ष/Asstt. Year: 2007-2008

M/s Jaylaxmi Land Developers, B-07 Jaylaxmi Towers, Ganesh Chokdi, Post. Anand-388 001. PAN: AAFFJ1432Q	Vs.	Income Tax Officer, Ward 1, Anand.
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(Applicant)	(Respondent)
Assessee by :	Shri Anil R. Shah & Kinjal Shah, A.Rs
Revenue by :	Shri Uma Shankar Prasad, Sr.DR

सुनवाई का ताराख/Date of Hearing : 14/02/2019

घोषणा का ताराख /Date of Pronouncement: 29/03/2019

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Commissioner of Income Tax (Appeals)- 2, Vadodara[CIT(A) in short] vide appeal no.CAB/(A)-2/427/14-15, dated 29/04/2016 arising in the matter of assessment order passed under s.144 r.w.s 147 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") dated 25/03/2013 relevant to Assessment Year (AY) 2007-08.

2. The assessee has raised the following grounds of appeal:

I. On Legality' of the Order:

1. *Your Appellant submits that the Reopening of Assessment u/s.148/147 is bad in Law and void and Time Barred and therefore the entire proceedings and order u/s. 147 be cancelled.*
2. *Without prejudice, it is submitted that it appears the Assessing Officer has not recorded Reasons for Reopening since the same are not sent alongwith notice u/s. 148 of the Act of 13-3-2012.*

It is further submitted that as per the Appellant no income has escaped assessment or under assessed and Sec. 147 does not apply to the facts of the case.

II. *On Merits:*
Income from Property.

1. *It is submitted by your Appellant that the CIT(A) has erred in giving hearted relief in computing Income from Property at Rs. 34,01,4007- in p, of income assessed at Rs.49,95,4467- and Income declared at Rs. 1,00,0007-actually received.*
2. *The addition made by the Assessing Officer and partly confirmed by the CIT(A) of Income from Property is not as per provisions of Law and not supported by evidence and the CIT(A) ought to have accepted Income as income Estimated by Municipal Corporation for Tax purposes and in view of Rent Central Act no increase in Rent can be presumed to have been earned.*
3. *Your Appellant further submits that CIT(A) has erred in not accepting Income claimed as Business Income and upholding it to be as Income from Property as decided by Assessing Officer . On facts and provision of Law he should have accepted the claim of your Appellant.*

Income added u/s.68

1. (a) *The CIT(A) has also erred both in Law and in fact in confirm j Applicably of Sec.68 and confirming addition of Rs.38,23,0007- mau; by the Assessing Officer in the capital account of Partner of your Appellant Mr. Vasoolal Melaram.*

(b) *Your Appellant submits that Sec. 68 does not apply for credit in account of Partner of the Firm as held by various Judicial Authorities.*
2. *Without prejudice to above, it is submitted by your Appellant that on facts of the case and as per provisions of Law all the Depositors are known persons, identity and creditworthiness is proved and*

transaction being genuine, CIT(A) ought to have deleted the entire addition of Rs.38,23,0007-.

3. *In the alternatively and again without prejudice and if any addition u/s.68 is called for the same ought to have been worked out on Peak Credit basis as per accepted principals of accounting and various judicial authorities.*

It is therefore submitted that relief claimed above be allowed and the order of the Assessing Officer be modified accordingly.

Your Appellant reserves right to add, alter, amend to withdraw any or all Ground of Appeal.

3. At the outset it was noticed that the appeal filed by the assessee was barred by limitation by 57 days. The Ld. AR for the assessee before us submitted that the delay has occurred in filing the appeal due to the death of the main partner of the firm. The Ld. AR in support of his contention filed the affidavit of the other partner of the firm along with the death certificate of the deceased person. Accordingly, the Ld. AR before us prayed to condone the delay which was occurred due to unavoidable circumstances.

4. On the other hand the Ld. DR considering the nature and reasons of the delay, did not object for the condonation of the delay.

In view of the above stated facts, we condone the delay and proceed to hear the grounds of appeal of the assessee on merit.

5. At the outset, the Ld. AR for the assessee before us submitted that he has been instructed by the assessee not to press ground No. 1 of the appeal. Therefore we dismiss the same as not pressed.

6. The 2nd issue raised by the assessee is that Ld. CIT (A) erred in partly confirming the order of the AO by sustaining the disallowance of ₹ 34,01,400/- on account of Income From House Property.

6.1 Briefly stated facts are that the assessee in the present case is a partnership firm and deriving its income by way of letting out the property on rent which was offered to tax under the head business and profession. The assessee is the owner of the building comprising of 5 floors. The assessee has given on rent its ground and 1st floor to V-Mart on a monthly rent of ₹ 3,04,999/- only. The assessee at the same time has let out its 4 floors (2nd to 5th floor) to its related party on annual rent of ₹ 1 lakh. Thus the AO found the difference in the amount of rent charged by the assessee from the unrelated and related party. Accordingly the AO determined the fair rent of the property rented out to the related party for ₹ 49,95,546/- only.

6.2 The AO also observed that the similar addition was also made to the total income of the assessee in the immediate preceding assessment year under the head income from house property instead of business income. Therefore the AO made the addition of Rs. 49,95,546.00 to the total income of the assessee by treating the fair market rent as income under the head house property.

7. Aggrieved assessee preferred an appeal to the Ld. CIT (A) who has reduced the addition made by the AO to ₹ 34,01,400/- Only. Accordingly the Ld. CIT (A) partly confirmed the order of the AO.

8. Being aggrieved by the order of the Ld. CIT (A) the assessee is in appeal before us.

9. The Ld. AR before us at the outset conceded the fact that the aforesaid issue has been decided by the Honøble ITAT in ITA No. 1171/AHD/2011 against the assessee in its own case.

9.1 However, the Ld. AR further submitted that the Ld. CIT (A) has enhanced the annual rental value as determined by the ITAT in the immediate preceding A.Y. 2006-07 by ₹ 4,01,400/- without issuing the notice as mandated under section 251(2) of the Act.

10. On the other hand the Ld. DR vehemently supported the order of the authorities below.

11. We have heard the rival contentions and perused the materials available on record. At the outset we note that the issue stands covered against the assessee in its own case (*supra*). The relevant extract stands as under:

"5. We have considered rival submissions regarding first issue of assessing the rental value of the said property under the head "Income from House Property". We find that the assessee has not brought any material on record to show that it has provided any common facility like air-condition plant, power back-up, lift, watchmen j etc. to "VCPL" or its partner to whom the upper floors were let out by [the assessee-firm. A bare reading of the lease agreement between the | assessee-firm and "VCPL" shows that the rent was charged by the I assessee-firm only for the "premises" as provided in the lease \ agreement. Providing of electrical panel and space for generator could not be said to be a separate service or asset and in fact no separate rent is charged for the same. We find that there was no provision of any services to be provided by the assessee to the "VCPL" or to the partner of the assessee-firm in the upper floor. The CIT(A) has recorded in his appellate order that the value of the building was shown at Rs.3.86 crores whereas the value of the furniture and fixtures is of Rs.87,226/- only, which are of insignificant value vis-a-vis value of the building. In these facts of the case, we are of the view that in the absence of any facilities or business infrastructure provided by the assessee-firm to its lessee, rental income from let out of "premises only" was rightly taxed by the

department under the head "Income from House Property" and no interference in the order of the CIT(A) on this issue is called for, which is confirmed and the ground of the appeal on this issue is dismiss."

XX

"7. We have considered rival submission and perused the orders of the AO and the CIT(A). We find that the assessee has charged the rent of Rs.1 lakh only for the second floor to fifth floor of the said property for the entire year from one of its partners, who runs a hotel business therein under the name "Sudarshan Palace". No valid reasons could be assigned on behalf of the assessee before us for charging such lower rent for second to fifth floor of the property as compared to rent of Rs.2.69 lakhs from "VCPL" per month for two floors. In reply to a specific query from the Bench, no definite figure of the covered area let out to Sudarshan Palace could be filed before us. The CIT(A) has given a finding that it is not the appellant's case that the property was subjected to Rent Control Act or standard rent was got determined. No conclusive evidence could be led on behalf of the assessee to show that the 2nd floor of the asset was in broken condition and not usable for any commercial purpose. We find that the ground floor to first floor of the property was let out to "VCPL" at Rs.2.69 lakhs per month, and that, there is a clear disparity in this case between the rent charged from related parties and from an unrelated parties for two portions of the property in question. The case law of relied upon by the learned counsel for the assessee were distinguishable on facts. In these facts, we hold that the rent figure shown by the assessee at Rs.1 lakh per annum for second floor to fifth floor of the property let out to Sudarshan Palace is low and has to be substituted for the amount for which the property might reasonably expect to let for the relevant year. This leaves us to the only issue of determination of reasonable amount of rent for which the property might be expected to let from year to year. Considering totality of the facts and circumstances of the case, and the fact that the allowance of deduction at 10% per higher floor from the bottom ground and first floor of the property, was on the lower side, and that upper second floor to fifth floor not having any hall type construction to suit for commercial use for any departmental stores etc., and construction of building consisted of small rooms only and the claim of the assessee that covered area on the higher floors were less as compared to the ground and first floor of the property, and also considering the undisputed fact that the partner of the assessee firm, who is running a hotel "Sudarshan Palace" business has advanced deposit of Rs.1.63 crores to the assessee firm without charging any interest, we are of the view that the ends of justice shall be met, if the rental value of second floor to fifth floor of the property used for hotel business is determined at Rs.30.00 lakhs per annum for the relevant year, as against Rs.49.95 lakhs determined by the AO, and after allowing Rs.2 lakhs for municipal tax paid by the assessee, and also 30% of the annual value of the property, the income from second floor to fifth floor of the property let out to M/s. Sudarshan Palace, should be assessed at Rs.19.00 lakhs as against Rs.32,96,882/- assessed by the AO and the grounds of the appeal of the assessee, on this issue, are partly allowed."

In view of the above, the rental income of the assessee is taxable under the head House Property at the fair market rent and not under the head Business and Profession.

12. The next issue arises for the consideration regarding the enhancement of the rent by the Ld. CIT (A) for ₹ 4,01,400/-. First of all we note that the AO made the addition of ₹ 49,95,546/- which was reduced to ₹ 34,01,400/- thus it is not a case of enhancement as alleged by the Ld. AR for the assessee.

13. Admittedly the Ld. CIT (A) enhanced the rent in parity of the order of the Tribunal in the immediate preceding year. As such in the immediate preceding the year the Tribunal to determine the fair rental value of the property has compared with rent of the V-Mart. In the year under consideration the rent of the property let out to M/s V- Mart was increased by 13.38% in comparison to the immediate preceding A.Y. i.e. 2006-07. Therefore the rent for the impugned property should also be increased in the same proportion to maintain the consistency. Thus we reject the argument of the Ld. AR for the assessee that the Ld. CIT (A) enhanced the rent without issuing the notice as mandated under section 251(2) of the Act.

In view of the above, we do not find any reason to interfere in the finding of the Ld. CIT (A). Hence the ground of appeal of the assessee is dismissed.

14. The 3rd issue raised by the assessee is that the Ld. CIT (A) erred in confirming the order of the AO by sustaining the addition of ₹ 38,23,000/- as unexplained cash credit under section 68 of the Income Tax Act.

15. The assessee during the year has received a sum of ₹ 38,23,000/- from its partner as capital contribution. However the AO found that the assessee has failed to furnish the source of money in the hands of the partner on the basis of documentary evidence. Therefore the AO made the addition to the total income of the assessee for ₹ 38,283,000/- only as unexplained cash credit under section 68 of the Act.

16. Aggrieved assessee preferred an appeal to Ld. CIT (A) who has confirmed the order of the AO.

17. Being aggrieved by the order of the Ld. CIT (A), the assessee is in appeal before us.

18. The Ld. AR before us submitted that there is no ambiguity that the money was contributed by the partner of the firm which was suitably explained to the lower authorities. Thus if any addition is to be made on account of unexplained cash credit, then it can be made in the hands of the partner of the firm.

19. On the other hand the Ld. DR vehemently supported the order of the authorities below.

20. We have heard the rival contentions and perused the materials available on record. The issue in the instant case relates to the fact whether the capital contributed by the partner to the firm is unexplained cash credit under section 68 of the Act in the given facts and circumstances.

20.1 Admittedly the partner of the firm has contributed capital to the partnership firm. The assessee accordingly has duly disclosed in its balance sheet the capital contributed by the partner of the firm.

20.2 This fact can be verified from the balance sheet of the assessee which is available on record. The relevant extract of the balance sheet as on 31st March, 2007 is extracted below;

<i>LIABILITIES</i>		<i>AMOUNT</i>
<i>PARTER'S CAPITAL A/C</i>		
<i>MAMTABEN TRIBHOVANDAS</i>		
<i>Opening Balance</i>	<i>402,088.34</i>	
<i>Add: Profit during the year</i>	<i><u>104,956.67</u></i>	
		<i>507,045.01</i>
<i>SANGITABEN RADHAKISAN</i>		
<i>Opening Balance</i>	<i>402,089.27</i>	
<i>Add: Profit during the year</i>	<i><u>104,956.67</u></i>	
		<i>507,045.94</i>
<i>VASOOLAL MELARAM</i>		
<i>Opening Balance</i>	<i>21,434,940.65</i>	
<i>Add: Profit during the year</i>	<i>104,956.67</i>	
<i>Addition during the year</i>	<i>5,300,000.00</i>	
<i>Add: Salary to Partner</i>	<i><u>160,000.00</u></i>	
<i>Less: Withdrawl</i>	<i>26,999,897.32</i>	
	<i><u>4,141,200.50</u></i>	
		<i>22,858,696.82</i>

From the above, there remains no ambiguity that the assessee has shown contribution by the partner of the firm in the year under consideration. Now the question arises about the source of fund in the hands of the partner. Regarding this the law is settled that the partnership firm is not liable to justify the source of fund in the hands of the partner. In this connection we find support and guidance from the judgement of Honøble High Court of Gujarat in the case PCIT vs Vaishnodevi Refoils & Solvex reported in [2018] **89 taxmann.com 80 (Gujrat)** wherein it was held as under:

“In the facts of the present case, when the assessee has furnished the details with regard to the source of the capital introduced in the firm and the concerned partner had confirmed such contribution, the assessee had duly discharged the onus cast upon it. Thereafter, if the Assessing Officer was not convinced about the creditworthiness of the partner who had made the capital contribution, the inquiry had to be made at the end of the partner and not against the firm. The controversy involved in the present case, therefore, stands squarely covered by the decision of this court in the case of CIT v. Pankaj Dyestuff Industries in Income Tax Reference No. 241 of 1993.”

20.3 The above view was also subsequently confirmed by the Honøble Apex Court in the SLP filed before it reported in 96 taxmann.com 469. In the said case the SLP was dismissed by the Honøble Apex Court.

In view of the above, we are of the considered opinion that there cannot be any addition made in the hands of the partnership firm on account of the capital contributed by the partner of the firm to the firm. In case any justification is required for the source of fund in the hands of the partner, then partner in his individual capacity is liable to explain. There is no liability fastened on the assessee (firm) for the explanation about the source of funds in the hands of the partner. Hence we disagree with the order of the Ld. CIT (A) and accordingly direct to the AO to delete the addition made by him. Thus the ground of appeal of the assessee is allowed.

21. In the result the appeal of the assessee is partly allowed.

Order pronounced in the Court on 29/03/2019 at Ahmedabad.

-Sd-

**(MS MADHUMITA ROY)
JUDICIAL MEMBER**

-Sd-

**(WASEEM AHMED)
ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 29/03/2019
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आदेश क० त० प्रतः / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. त्रिभागीय प्रजाध, आयकर अपीलार्थी अधीकरण / DR, ITAT,
6. गार्डफाइल / Guard file.

आदेशानुसार/BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलार्थी अधीकरण, अहमदाबाद / ITAT, Ahmedabad