

IN THE INCOME-TAX APPELLATE TRIBUNAL "G" BENCH MUMBAI
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER
ITA No. 6053/Mum/2017 (Assessment Year 2012-13)

ACIT-31(1) Room No. 111, C-13, 1 st Floor, B.K.C. Bandra (E), Mumbai-400051	Vs.	M/s Gundecha Builders, 801, Hubtown Solaries, N.S. Phadke Marg, Off Telui Galli, Near Andheri Flyover, Andheri (E), Mumbai-400062. PAN: AAAFG0848E
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Appellant

Respondent

Appellant by : Shri Satish Rajore (Sr. DR)

Respondent by : Shri Vimal Punmiya (C.A.)

Date of Hearing : 13.06.2019

Date of Pronouncement : 21.06.2019

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by revenue is directed against the order of Id. Commissioner of Income Tax (Appeals)-42 [the Id. CIT(A)], Mumbai dated 29.06.2017 for Assessment Year 2012-13. The revenue has raised the following grounds of appeal:

1. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing rental income under the head 'income from House Property' by following decisions of Hon'ble ITAT of assessee's own case for A.Ys 2008-09 & 2009-10, Without considering the fact that the department has not accepted the decision of the Hon'ble ITAT for the aforesaid A.Ys and appeal u/s 260A has been filed before Hon'ble High court.

2. " Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance on account of excess salary paid of Rs. 12,21,267/- by stating that the same employees had been with assessee in

the part also, without appreciating the merits of the case that the assessee failed to prove these persons were employee of assessee and the assessee neither furnished any appointment letter nor had it furnished address of said employed persons.

2. Brief facts of the case are that the assessee is a registered partnership firm engaged in the business of development and construction of residential as well as commercial projects, filed its return of income on 20.09.2012 declaring total income of Rs. 7.54 crore. The return of income was selected for scrutiny and assessment was completed under section 143(3) of the Act. The Assessing Officer while passing the assessment order besides the other additions /disallowance treated the income from house property as “Income from Business and Profession” and made *ad hoc* disallowance of 50% of salary paid to three employees. On appeal before the Id. CIT(A), the action of Assessing Officer was reversed. Thus, aggrieved by the order of Id. CIT(A), the revenue has filed the present appeal before this Tribunal.
3. We have heard the submission of Id. Departmental Representative (DR) for the revenue and Id. Authorized Representative (AR) of the assessee and perused the material available on record.
4. At the outset of hearing, the Id. AR of the assessee submits that Ground No.1 of the appeal raised by revenue is covered in favour of assessee and against the revenue. The Id. AR of the assessee further submits that for Assessment Years 2008-09, 2009-10, 2010-11 & 2011-12 similar income was treated as “Income from Business and Profession”, however, on appeal before the

Tribunal, the issue was decided in favour of assessee. The ld. AR of the assessee also filed copy of decision of Tribunal in assessee's own case for Assessment Year 2008-09 in ITA No. 4475/Mum/2011, for Assessment Year 2009-10 in ITA No. 762/Mum/2013, for Assessment Year 2010-11 in ITA No. 3906/Mum/2014 and for Assessment Year 2011-12 in ITA No. 6103/Mum/2014. The ld. AR of the assessee further submits that similar relief was granted to the assessee in appeal for Assessment Years 2006-07 & 2007-08 and on further appeal by revenue before Hon'ble jurisdictional High Court, the appeal of assessee was not admitted on this ground, vide ITA No. 21 of 2017 dated 11.03.2019.

5. On the other hand, the ld. DR for the revenue after going through the order of Tribunal for Assessment Years 2008-09, 2009-10, 2010-11 & 2011-12 and order of jurisdictional High Court in appeal for Assessment Year 2006-07 & 2007-08 submits that he relied upon the order of Assessing Officer.
6. We have considered the rival submission of the parties and have gone through the orders of lower authorities. We have noted that in the return of income, the assessee has shown lease rental income of Rs. 1.87 crore and Car parking charges of Rs. 3.18 lakhs and offered under the head "Income from House Property". The Assessing Officer treated the said receipt as "Income from Business & Profession". On appeal before the ld. CIT(A), the ld. CIT(A) by following the decision of Tribunal in Assessment Years 2009-10,

2010-11 and directed the Assessing Officer to treat the rental income under the head "Income from House Property".

7. We have note that the co-ordinate bench of Tribunal in appeal for Assessment Year 2008-0-9 in ITA No. 4475/Mum/2011 dated 09.02.2014 by following the order of Tribunal in earlier years in assessee/s own case for Assessment Years 2005-06, 2006-07 & 2007-08 allowed the similar ground of appeal in favour of assessee. Further in appeal for Assessment Year 2009-10 similar relief was granted to the assessee and in appeal for Assessment Year 2009-10 again in Assessment Year 2010-11 & 2011-12. Therefore, considering the consistent view if the coordinate bench of Tribunal, we do not find any merit in the ground of appeal raised by revenue.
8. In the result, Ground No.1 of the appeal is dismissed.
9. Ground No.2 relates to adhoc disallowance of salary of Rs. 12,21,267/-. The Id. DR for the revenue supported the order of Assessing Officer. The Id. DR further submits that the assessee has debited a sum of Rs. 24,42,535/- on account of salary paid to employees namely Mahendra K. Jain, Gopal Sharma and Lalit V. Jain. The Assessing Officer has not carried out any project from last several years. Therefore, the Assessing Officer after issuing show-cause notice to substantiate the expenses of salary paid to the employee when the assessee has not under taken any work. The assessing officer after considering the reply of assessee rightly concluded that assessee failed to prove that these persons were in the employment of assessee. The assessee

failed to prove their employment with the assessee. The Assessing Officer made a reasonable disallowance.

10. On the other hand, the Id. AR of the assessee submits that Assessing Officer made addition on mere assumption and presumption based all three employees namely Mahendra K. Jain, Gopal Sharma and Lalit V Jain were employee in preceding years. The Assessing Officer has not disallowed any such expenditure on account of salary paid to those employees. The observation of Assessing Officer that there was no income from the sales of housing project and hence, these expenses neither were nor required. As a matter of fact, the observation of Assessing Officer is wrong. The assessee has sold the flats earned income of Rs. 2.04 crore. There is no dispute that assessee paid salary for regular course of business. It is not the jurisdiction, the Assessing Officer to decide the fact whether the assessee-firm should incur the expenses or not for carrying its business. It is the discretion of businessmen as to whether any expenditure should be incurred on the cost of employee or not. In support of his submission, the Id. AR of the assessee relied upon the decision of Hon'ble Supreme Court in case of Hero Cycles Pvt. Ltd. [2015] 379 ITR 347 (SC)], wherein it was held that once it is established that there is nexus between the expenditure and purpose of business, revenue cannot justifiable claim to put itself in the Arm Chain of businessmen and to assume the role of Board of Director to decide how much reasonable expenditure be made. The Id. AR of the assessee further submits

that there must be adverse material on record to dispute the expenses. The addition cannot be made on the basis of presumption and assumption. The Assessing Officer disallowed 50% of salary. However, the balance salary was not disputed. The disallowance of 50% of salary was not based on any scientific method or by specifying a defect. In support of his submission, the ld. AR of the assessee further relied upon the decision of CIT vs. Roman & Co. [1986] 67 ITR 11 (SC), CIT vs. Calcutta Discount Co. Ltd. [1973] 91 ITR 8(SC), Omar Salay Mohamed Sait vs. CIT [1995] 37 IR 151 (SC), Dhirajlal Girdharilal vs. CIT [226 ITR 734 (SC)], Dr. Anita Sahai vs. DIT [266 ITR 597 (All)] and MODI Creations Pvt. Ltd. vs. Ito [2011] 13 taxmann.com 114 (Delhi)]. The ld. AR also furnished the copy of Form-16 of Mahendra K. Jain, Gopal Sharma and Lalit V Jain along with slip of contribution of Employment Provident Fund (EPF).

11. We have considered the rival submission of the parties and gone through the orders of authorities below. We have also deliberated on various case laws relied by lower authorities and ld. representative of the parties. The Assessing Officer made addition on taking view that assessee has not furnished appointment letter or address of the employee. The Assessing Officer concluded that the income of assessee-firm mainly from Income from House Property and Interest and has sold 1-2 property during the year. Keeping in view the activities of the assessee, the Assessing Officer treated the salary of three employees as huge salary and disallowed 50% (i.e. 50% of Rs.

24,42,535/-). The Id. CIT(A) deleted the addition holding that the Assessing Officer made addition on adhoc basis. The Id. CIT(A) observed that the same employees were working with the assessee in past years and their salary have not been disputed by Assessing Officer. The assessee's own certain litigated properties in its work-in-progress which also infers that assessee would need a managerial level of employees and that Assessing Officer cannot step into shoes of the assessee and deleted the disallowance.

12. We have noted that the Id AR for the assessee claimed that all three persons whose salary payment was disputed by Assessing Officer were in the employment of assessee during the Assessment Years 2010-11, 2011-12 & 2012-13. This fact is not disputed by Id. DR for the revenue. The assessee provided the name, designation and PAN of all three employees before the assessing officer. The assessing officer has not brought any adverse material on record, except holding that the assessee failed to prove the employment. The Id AR for the assessee also furnished the Form-16 of Mahendra K. Jain, Gopal Sharma and Lalit V. Jain along with copy of EPF contribution. Moreover, the Assessing Officer has admitted the employment of all three employees by allowing 50% of the salary. The disallowance of salary is not based on any scientific method. Once the employment is admitted by allowing 50% salary, the Assessing Officer has no right to dispute the quantum of salary in absence of any material or evidence on record. The Hon'ble Supreme Court in Hero Cycles Pvt. Ltd. (supra) held that once it is

established that there is nexus between the expenditure and purpose of business, the revenue cannot put itself in the Arm Chair of businessmen or in a position of Board of Director to assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case.

13. In our view, the action of Assessing Officer in absence of any material was not justified to disallow the 50% of the wages, therefore, we affirm the action of Id. CIT(A).

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

Order pronounced in the open court on 21/06/2019.

Sd/-
M. BALAGANESH,
ACCOUNTANT MEMBER

Mumbai, Date: 21.06.2019

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Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "G" Bench, ITAT, Mumbai
6. Guard File

Sd/-
PAWAN SINGH
JUDICIAL MEMBER

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai