

**IN THE INCOME TAX APPELLATE TRIBUNAL
“D” Bench, Mumbai**

**Before Shri Shamim Yahya, Accountant Member
and Shri Ravish Sood, Judicial Member**

**ITA No.7531/Mum/2016
(Assessment Year: 2013-14)**

Rushabh Gems Pvt. Ltd.
602/603, Prasad Chambers,
Opera House,
Mumbai – 400 007

Income Tax Officer-5(3)(1)
Mumbai
Vs.

PAN – AABCR3175M

(Appellant)

(Respondent)

Appellant by: Shri R.K. Sinha, A.R

Respondent by: Shri D.G. Pansari, Sr.D.R

Date of Hearing: 19.06.2019

Date of Pronouncement: 28.06.2019

ORDER

PER RAVISH SOOD, JM

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-10, Mumbai, dated 28.09.2016, which in turn arises from the order passed by the A.O under Sec. 143(3) of the Income Tax Act, 1961 (for short ‘Act’), dated 17.02.2016. The assessee assailing the order of the CIT(A) has raised before us the following grounds of appeal:

- “1. Wrong treatment of the usage charges for machinery as Income from house property, when the assessee had shown it as business income:
 - (i) On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in upholding the treatment of the usage charges for machinery as house property income of the Income-tax Act 1961, whereas the appellant had shown it as business income, without appreciating the facts of the case.
 - (ii) On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in not following the decision of Hon’ble ITAT in the case of the appellant itself for the Assessment Year 2011 - 12 dated 21. 07. 2016.

- (iii) On the fact in the circumstances of the case and in law, the Ld. CIT (A) erred in not following the decision of Hon'ble Supreme Court in the case of M/s Chennai properties and investment Ltd vs. CIT 373 ITR 673 (SC).
- (iv) On the facts and in the circumstances of the case and in law, the learned CIT (A) has erred in upholding the order of the Assessing Officer treating the usage charges for machinery as house property income without appreciating the fact that it is not a case of rent simpliciter. What was given on hire was factory premises to the processors of diamond. It was given to them only for diamond business. (specifically mentioned at Terms & Conditions (1) of leave and license agreement, reproduced in the order.)
- In view of the above, the appellant prays that the order of the Ld. CIT(A) may be set aside and the learned Assessing Officer be directed to treat the usage charges for machinery as business income.
2. The order passed by the learned Commissioner of income tax (Appeals) is bad in law and on facts.

The appellant craves leave to add, amend, alter or delete the said ground of appeal.”

2. Briefly stated, the assessee company had e-filed its return of income for A.Y. 2013-14 on 21.09.2014, declaring a total loss of Rs.11,01,280/-. The return of income filed by the assessee was processed as such under Sec. 143(1) of the Act. Subsequently, the case was selected for scrutiny assessment under Sec. 143(2).

3. During the course of the assessment proceedings, it was observed by the A.O that the assessee owned a building which was let out to 9 different parties. It was noticed by the A.O that the rental receipts were bifurcated and offered for tax by the assessee under two heads viz. (i). usage charges of the building as its income under the head “house property”: Rs. 15,96,000/-; and (ii). usage charges of the machinery as its income under the head “business income” : Rs.54,60,000/-. It was the claim of the assessee that as the building that was let out was a factory building, therefore, the usage charges of the factory machinery was rightly shown by it as its ‘business income’. However, the aforesaid claim of the assessee did not find favour with the A.O. It was noticed by the A.O that the claim of the assessee that property which was let out was a factory building was not substantiated by any documentary evidence. Apart there from, it was observed by the A.O that there was no specialised plant and

machinery except for a weighing machine. In fact, it was noticed by the A.O that the electric installations and fittings, air conditioning unit, freezer and RO plant was being claimed by the assessee as Plant & Machinery. Accordingly, the A.O not finding favour with the aforesaid claim of the assessee brought the entire rental receipts of Rs.70,56,000/- to tax under the head 'Income from house property'.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The CIT(A) after deliberating on the facts of the case was however not persuaded to subscribe to the segregation of the receipts, as claimed by the assessee. It was observed by the CIT(A) that as the assessee was only in receipt of the amount for letting out the property, therefore, the A.O had rightly concluded that the rental receipts were liable to be assessed under the head 'Income from house property'. It was also observed by the CIT(A), that as the order of the ITAT in the assessee's own case for A.Y. 2011-12 was distinguishable on facts, therefore, the same would not assist its case for the year under consideration. Accordingly, on the basis of his aforesaid observations the CIT(A) upheld the view taken by the A.O.

5. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The ld. Authorized Representative (for short 'A.R') for the assessee submitted, that the issue involved in the present appeal was squarely covered by the order of the **ITAT, Mumbai Bench 'SMC', Mumbai** in the assessee's own case for A.Y. 2011-12 in **M/s Rushabh Gems Pvt. Ltd. Vs. ITO-5(3)(1), Mumbai (ITA No. 7131/Mum/2014, dated 21.07.2016)**. It was submitted by the ld. A.R, that the CIT(A) had most arbitrarily concluded that the facts of the case for the year under consideration were distinguishable as against those involved in the assessee's own case for the aforesaid preceding year.

6. Per contra, the Id. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities.

7. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. On a perusal of the order of the Tribunal passed in the assessee's own case for A.Y. 2011-12, it stands revealed, that in the said year also the assessee had bifurcated the rental receipts into two parts viz. (i) receipts towards usage of machinery: Rs.54,60,000/-, which was treated as 'business income'; and (ii) receipts towards building: Rs.15,96,000/- which were treated as 'Income from house property'. As is discernible from the order of the Tribunal, the A.O while framing the assessment for A.Y. 2011-12 had declined to accept the claim of the assessee that the property which was let out was a factory building. Further, it was observed by the A.O that there were no plant and machinery except for weighing machine, electrical installations and fittings, air conditioning unit, freezer, RO plant and telephone etc. In fact, the A.O while framing the assessment for the aforesaid preceding year viz. A.Y 2011-12, had observed that the entire rental receipts were liable to be assessed under the head 'Income from house property'. On appeal, the Tribunal while disposing off the appeal of the assessee for A.Y 2011-12, had observed, that in A.Y 2006-07 the A.O had assessed the entire rental receipts under the head "business income" in the hands of the assessee. It was observed by the Tribunal, that when the assessee in conformity with the view taken by the revenue in A.Y 2006-07 had shown the rental receipts in its return of income for tax in A.Y 2009-10 under the head "business income", the same was not accepted by the A.O while framing the assessment for the said year. As observed by the Tribunal, in A.Y 2009-10, at the instance of the A.O the rental receipts were segregated into two parts viz. (i). usage charges of the building were shown under

the head "Income from house property"; and (ii). usage charges of the machinery was shown under the head "business income". Accordingly, the Tribunal while disposing off the appeal of the assessee for A.Y 2011-12 observed, that now when the A.O himself had while framing the assessment in A.Y 2009-10 accepted the allocation of the receipts under the head "Income from house property" and under the head "business income", therefore, in the absence of any change in the facts during the year before them viz. AY. 2011-12, the usage charges from the machinery could not be brought to tax under the head "Income from house property". The Tribunal while concluding as hereinabove had drawn support from the judgment of the **Hon'ble Supreme Court** in the case of **Radhasoami Satsang Vs. CIT (1992) 193 ITR 321 (SC)**.

8. We have perused the aforesaid order of the Tribunal passed in the assessee's own case for A.Y. 2011-12, and are of a strong conviction that the issue involved in the present appeal is squarely covered by the view therein taken. On a perusal of the facts, it can safely be gathered that the revenue while framing the assessment in the assessee's own case for A.Y. 2009-10 had segregated the receipts into two parts viz. (i) usage charges for the building was shown under the head "Income from house property"; and (ii) usage charges of the machinery was shown under the head "business income" We are persuaded to subscribe to the view taken by the Tribunal that in the absence of any change in facts, the usage charges from the machinery could not have been brought to tax under the head "Income from house property" in the hands of the assessee. As regards the observation of the CIT(A) that the facts of the year under consideration were distinguishable as against those for A.Y. 2011-12, we are afraid that we are unable to subscribe to the said view. As is discernible from the order of the CIT(A), the latter had tried to distinguish the facts for

the year under consideration viz. A.Y. 2013-14 as against those for A.Y. 2011-12, on the ground that the leave and license agreement for was not available in A.Y. 2011-12. We have given a thoughtful consideration and are unable to persuade ourselves to accept the aforesaid reasoning given by the CIT(A). Apart there from, nothing has been submitted by the ld. D.R before us which could persuade us to conclude otherwise. We are of a strong conviction that as the facts of the case remains the same as were there in the case of the assessee for the aforesaid preceding year viz. A.Y 2011-12, therefore, we find no justifiable reason for taking a view different from that adopted by the Tribunal while disposing off the appeal of the assessee for A.Y. 2011-12. Accordingly, respectfully following the view taken by the Tribunal in the case of the assessee for A.Y 2011-12, we are of the considered view that the assessee had rightly offered the usage charges of machinery for tax as its income under the head “business income”. The order passed by the CIT(A) is set aside in terms of our aforesaid observations.

9. The appeal of the assessee is allowed in terms of our aforesaid observations.

Order pronounced in the open court on 28.06.2019

Sd/-
(Shamim Yahya)
ACCOUNTANT MEMBER

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 28.06.2019

Ps. Rohit

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
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

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