IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C", MUMBAI
BEFORE SHRI R.C. SHARMA, ACCOUNTANT MEMBER

AND
SHRI PAWAN SINGH ,JUDICIAL MEMBER

ITA No. 2863/Mum/2018 AY 2013-14
ITA No. 2864/Mum/2018 AY 2014-15

Plaza Hotels Pvt Ltd 70-C, Nehru Road Vile Parle (E), Mumbai-99 PAN : AAACP2117N	vs	DCIT, 10(3)(2), Mumbai
APPELLANT		**RESPONDEDNT**

ITA No. 3887/Mum/2018 AY 2013-14
ITA No. 3888/Mum/2018 AY 2014-15

DCIT, 10(3)(2), Mumbai	vs	Plaza Hotels Pvt Ltd 70-C, Nehru Road Vile Parle (E), Mumbai-99 PAN : AAACP2117N
APPELLANT		**RESPONDEDNT**

Assessee by	Shri Arun G Verman (AR)
Revenue by	Shri Choudhary Arunkumar Singh
Date of hearing	27-08-2019
Date of pronouncement	30-08-2019

O R D E R

Per Pawan Singh, JM :

This group of four cross appeals are directed against the order of CIT(A)-17 all dated 16-03-2018 for AY-2013-14 and 2014-15. In all appeals, the parties have raised certain common grounds of appeal.

Therefore, with the consent all appeals were heard together and are decided by this common order.

2. At the outset of hearing, the Ld.AR of the assessee submits that the assessee, for both the years has raised ground against disallowance u/s 14A. The Ld.AR further submits that the grounds of appeal raised by the assessee is covered in favour of the assessee and against the revenue by the judgement of Hon'ble Delhi High Court in the case of State Bank of Patiala (2018) 99 taxmann.com 285 (Del). The Ld.AR of the assessee further submits that during the year the assessee has earned exempt income of Rs.10,300/-. The assessee made *suo moto* disallowance of Rs.17,26,069/-. During the first appellate stage, the assessee raised additional ground of appeal and prayed that *suo moto* disallowance should be reduced to Nil. The additional ground of appeal of assessee was not accepted by Ld.CIT(A) who upheld the action of AO. The Ld.AR of the assessee further submits that assessee is entitled to make a legal claim by way of additional ground of appeal during the first appellate stage without filing revised return of income as per decision of Bombay High Court in case of Prithvi Stock Broker & Shareholders Ltd 23 Taxmann.com 23 (Bom). On merit, the Ld.AR submits that as per the decision of Delhi High Court in State Bank of Patiala (supra), the disallowance should not exceed the exempt income.

3. On the other hand, the Ld. DR for the revenue supported the orders of lower authorities.

4. We have considered the submission of both the parties and perused the orders of lower authorities. We have noted that during the first appellate stage the assessee vide application dated 19-03-2016 raised the issue that the assessee held shares in Kamat Hotels (I) Ltd and other sister concerns for the purpose of control and management of company and not for earning dividend income and prayed to reduce the disallowance made voluntarily and inadvertently. The assessee also stated that assessee has sufficient interest free funds available against the share capital paid. The contention of assessee was not accepted by holding that the assessee has made *suo moto* disallowance u/s 14A which was accepted. Therefore, no grievance arose to the assessee to contest its own disallowance. We have noted that the assessee has claimed that they have earned only exempt income of Rs.10,900/- during the year. The assessee has furnished the details of dividend income as per details mentioned on pages 56-65 of the paper book. We have further noted that the lower authority has not examined the quantum of dividend income earned by the assessee as assessee himself has offered *suo moto* disallowance of Rs. 17,26,069/-. It is settled law that no tax can be levied without authority of law. Further, there is no estoppel against the statutory provision

in making claim, to which the assessee is legally entitled. If the assessee under misconception or bonafide belief has made excess disallowance, it cannot be treated as estoppels of law against it. The Hon'ble Bombay High Court in Prithvi Stock Broker & Shareholders Ltd (supra) held that though the AO is not entitled to accept the revised computation in absence of revised return. However, this power is not restricted to the appellate authority. Considering the decision of Bombay High Court in Prithvi Stock Broker & Shareholders Ltd (supra) and the assessee has claimed to have exempt income of Rs.10,900/-, we admit the additional ground of appeal raised by the assessee and restore the case to the file of AO with the direction to examine the fact and consider the submission of the assessee for restricting the disallowance to the extent of exempt income earned during the year by the assessee and pass the order afresh in accordance with law. .

5. In the result, appeal of the assessee is allowed, for statistical purpose.

ITA No.2864/Mum/2018(AY 2014-15)

6. Assessee has raised identical ground of appeal raised in appeal for AY 2013-14, which we have allowed, for statistical purpose. Therefore, appeal for AY 2014-15 is also allowed with similar directions.

Appeal of Revnue:

7. The revenue has raised the following grounds of appeal for AY 2013-14:-

> 1. Whether on the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in upholding the action of the assessee of treating the receipts received from the hotel Business as Business Income without appreciating that the assessee has given Hotel property owned by it to Kamat Hotels(lndia) Ltd. on a Business Contract agreement whereby the assessee is to receive 1% of the total revenue and also the interest free deposit, which is nothing but a rent on the Property and the same is taxable u/s. 22 of the Income-tax Act,1961?"
> 2. " Whether on the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the action of the assessee of treating the receipts received from the hotel Business as Business Income and thereby not determining the ALV as per the provisions of section 23(l)(a) of the Income-tax Act,1961 without appreciating that if the rateable value under normal municipal laws does not represent the correct fair rent, then as per section 23(l)(a) of the Income-tax Act,1961, the Assessing Officer may determine the same on the basis of material evidence on record, which the Assessing Officer has correctly done.?"

8. At the outset of hearing, the Ld.AR of the assessee submits that the grounds of appeal raised by the revenue are covered in favour of the assessee in assessee's own case for AY 2006-07 in ITA No.6676 & 6636/Mum/2011 dated 13-09-2013, which was followed for AYs 2006-07, 2007-08 & 2008-09, 2009-10 & 2010-11 wherein similar ground of appeal was allowed in favour of the assessee. The Ld.AR further submits that the department filed appeal before Hon'ble Bombay High Court in Income-tax Appeal No.235 of 2015 and 203 of 2015, where the Hon'ble High Court dismissed the appeals vide order dated 25-07-2017 and further SLP before Hon'ble Supreme Court has been dismissed.

9. On the other hand, the Ld. DR for the revenue, after going through the grounds of appeal and the decision of Tribunal relied upon the order of Assessing Officer.

10. We have considered the submissions of both the parties and perused the material available on record. We have noted that on similar set of facts in assessee's own case for AY 2011-12 in ITA No.5313/Mum/2014 by following the decision of earlier years, i.e. for AYs 2006-07, 2007-08 & 2008-09, 2009-10 & 2010-11 passed the following order:-

> "At the outset, the Ld. A.R. of the assessee has stated that the issue raised vide ground No.l in Revenue's appeal is covered in favour of the assessee by the earlier decisions of the Tribunal for A.Y. 2006-07, 2007-08, 2008-09, 2009-10 and 2010-11. He has filed the copy of the orders of the Tribunal for the earlier assessment years. He has further submitted that if the ground No.l is decided in favour of the assessee, the issue raised vide ground No.2 will become infructuous.
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> 4. The Ld. D.R. has also admitted that the issue involved is covered in favour of the assessee by the decision of the Tribunal in earlier assessment years in the own case of the assessee right from A.Y. 2006-07.
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> 5. After going through the impugned order of the Ld. CIT(A) as well as of the order of the Tribunal in assessee's own case for earlier assessment years, we find that whether the assessee's receipt from hotel business is to be assessed as business income or income from house property has been settled in favour of the assessee by consisting finding of the Tribunal in the earlier assessment years. For the sake of completeness, the relevant part of the order of the Tribunal dated J3.09.13 passed in iTA Nus.6676/M/20Jl and ITA No.6636/M/20J *I* (A.Y. 2006-07) is reproduced as under:
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> > "14, After considering the submission and perusing the material on record, we are of the view that there is no dispute that the assessee was running the hotel itself before giving to KHIL under agreement entered in the year of 1994. The entire

activities of hotel carried out by the assessee itself before entering the agreement was given to KHIL An interest free security was also obtained from KHIL, which was refundable after completion of period entered into between the parties. The assessee was sharing a revenue at the rate of *1%* of the revenue earned by the KHIL on account of running of hotel owned by the assessee. Though the CIT(A) has recorded the facts in his order that M/s KHIL was allowed to renovate the hotel or reconstruct the same from his own funds, but it does not mean that the character of asset owned by the assessee has been changed. The fact is that the assessee owned hotel, which was run by the assessee before entering into the agreement. Whatever the requirement of the hotel was there, the same was made by KHIL with its own fund as agreed upon. The character of the asset *was* that the entire hotel which was run by the assessee itself earlier was given under the agreement to M/s KHIL to run the hotel. Therefore, in our considered view, this was an exploitation of commercial asset for business purpose and whatever the receipts are received from exploiting of commercial asset for business use are to be treated as business receipts. When the assessee was running this hotel, the receipts from the hotel were shown as business receipts and they were accepted. After giving to KHIL I.e. in the year 1994, the return was filed for assessment year 1995-96 showing the revenue receipt from KHIL as business income and the same was accepted. The assessment was completed under Section 143(3). Up to assessment year 2005-06, the assessment has been completed by the AO and the contention of the assessee that the revenue received from KHIL are business asset, were accepted. For assessment year 2005-06 & 2003-04 the assessment was completed under Section 143(3). The matter reached to the stage of the Tribunal, however, this issue was never disputed by the AO that the revenue receipt received from M/s KHIL under the agreement are business receipt as they were accepted. Therefore, it cannot be said that any character of the revenue receipt has been changed in the year under consideration. In our considered view, the principle of consistency in the case in hand is applicable. Accordingly, the AO should have accepted the receipt under the head business income shown by the assessee.

14,1 The AO has placed reliance on the decision of the Hon"ble Supreme Court in the case of Shambhu Investments (supra), which has been considered by the learned CIT(A) also. However, we noted that in the case of Shambhu Investments (supra), the Hon"ble Apex Court has observed that, if the assessee has given any asset exploring the property for commercial purpose, then the same has to be treated as business income. The following observations have been made by the Hon"ble Supreme Court in the case of Shambhu Investments (supra):-

"Taking a sum total of aforesaid discussions, it clearly appears that merely because income is attached to any immovable property cannot be the sole

> factor for assessment of such income as income from property; what has to be seen is what was the primary object of the assessee while exploiting the property. If it is found, applying such test, that main intention is for letting out the property, or any part thereof, the same must be considered as rental income or income from property. In case, it is found that the main intention is to exploit the immovable property by way of complex commercial activities, in that event, it must be held as business income."

In this case the Hon"ble Supreme Court has held that if it is found that the main intention is for letting out the property or any part thereof, the same must be considered as rental income or income from property. In this case it is observed that if the main intention is to exploit the immovable property by way of complex commercial activities, it must be held as business income. The ratio of this decision, in our considered view, is applicable in the present facts of the case as the assessee has given the property for exploiting by way of complex commercial activities in the year of 1994 and from assessment year 1995-96 to 2005-06, the department has accepted the contention of the assessee holding that the receipt on account of leasing to KHIL are business receipt.

14.2 This is also a matter of fact that there was no fixed rate as the assessee was earning/receiving only 1% of the gross revenue receipts. From this fact, it is amply proved that the commercial asset was used by the assessee, and, therefore, any commercial receipt has to be treated as business receipt. It is further seen that as per agreement entered into between the assessee and M/s KHIL, the hotel premises will be handed over to the assessee and the assessee is liable to pay all the expenditures incurred by M/s KHIL on its construction and renovation as per formula agreed upon. It is also a matter of fact that the assessee was running this hotel itself and the assessee is also running various other hotels at present.

14.3 In case of CIT Vs. Mohiddin Hotels P. Ltd., reported in 284 ITR 229, similar facts were involved. In this case also the hotel was given on lease to a third party. The AO treated the lease income as income from house property against shown by the assessee as business receipt. The Tribunal allowed the issue in favour of the assessee. On appeal before the High Court, the Hon"ble High Court in the aforesaid case confirmed the order of the Tribunal by holding as under ;-

> "Held, that from the facts found by the Tribunal as well as the agreement dated February 1, 1987, it was more than clear that the agreement between the assessee and S related to the building that was ready for the purposes of commencing the hotel business. The agreement did not relate to a bare tenement but was in respect of the hotel. That the said hotel was complete with fittings and fixtures and ready for commencing the business was apparent from the agreement. The fact that all licences, permissions and no objection certificates required for running hotel were to be obtained in the

name of the assessee was a pointer to the aspect that the assessee intended to exploit the business asset (the hotel). The income of Rs. 7,80,000 received from S in the hands of the assessee was income from business under section 28 of the Income-tax Act, 1961."

While holding so the Hon"ble High Court has referred to the cases viz,, CEPT Vs. Shri Lakshmi Silk Mills Ltd., 20 ITR 451 (SC), CIT Vs. Calcutta National Bank Ltd., 37 ITR 171 (SC), CIT Vs. Vikram Cotton Mills Ltd., 169 ITR 597 (SC), Sultan Brothers P, Ltd. Vs. CIT, reported in 51 ITR 353 (SCJ and in case of Universal Plast Ltd, Vs. CIT, 237 ITR 454 (SC). After considering various decisions as mentioned above, the Hon"ble High Court has held that the assessee has given hotel on lease for exploiting business asset and, therefore, the Tribunal was correct in holding that the income from leasing the hotel was income from business. Facts of the case in hand are similar to the facts before the Hon"ble High Court in case of Mohiddin Hotels Pvt. Ltd. (supra). Therefore, for this reason also, we are of the view that the receipt from M/s KHIL on account of leasing the hotel was business receipt. There is no dispute that the assessee is owner of the hotel given on lease to M/s KHIL. All the licenses and permissions are in the name of assessee. This is also a fact that the assessee was running its hotel itself before giving to M/s KHIL. Accordingly, in our considered view, the receipts received from KHIL are business receipt. Therefore, we allow this ground of the assessee and direct the AO to treat the business receipt against income from property treated by him."

The above finding of the Tribunal has been subsequently followed vide order dated 25.07.14 in ITA Nos.2828 & 2829/M/2012 for A.Y. 2007-08 and ITA Nos.3I91 & 3I92/M/2012 for A.Y. 2008-09 and further in assessment year 2009-JO in ITA Nos.5855/M/2013 and 5950/M/2013 vide order dated 31.08.15 and thereafter in the A.Y. 2010-11 vide ITA No.4606/M/2014 vide order dated 12.01,16.

6. As regards ground No.2, in view of our findings given above in ground No.l, ground No.2 would become infructuous and the same is accordingly dismissed."

7. Considering the decision of Tribunal on identical set of facts, we do not find any merit in the grounds of appeal raised by revenue. Moreover, we have seen that the Ld. CIT(A) while passing the order, followed the order of Tribunal for AYs 2006-07 to 2011-12 which have been affirmed by the Tribunal, as referred to above.

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

ITA No.3888/Mum/2018

9. The revenue has raised identical grounds of appeal as has been raised in appeal for AY 2013-14 which we have dismissed. Therefore, following the principle of consistency, this appeal is also dismissed.

Order pronounced in the open court on 30-08-2019.

Sd/-	Sd/-
(R.C. Sharma)	(Pawan Singh)
ACCOUNTANT MEMBER	JUDICIALMEMBER

Mumbai, Dt : 30th August, 2019
Pk/-
Copy to :
1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

By order

Asstt. Registrar, ITAT, Mumbai