

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "E", MUMBAI

BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER
AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA No. 7452/Mum/2016
Assessment Year : 2012-13

Shibani S.Bhojwani, Samir Complex, First Floor, St.Andrews Road, Bandra (West), MUMBAI [PAN : AABPB6649R]	Vs.	Deputy Commissioner of Income Tax, Central Circle-3(4), MUMBAI
(Appellant)		(Respondent)

Appellant by : Shri Yogesh A.Thar, AR
Respondent by : Shri Pankaj Kumar, DR

Date of Hearing : 04-09-2019	Date of Pronouncement : 16-09-2019
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ORDER

PER RAJESH KUMAR, A.M:

This appeal filed by the assessee is directed against the order of the Commissioner of Income Tax(Appeals)-39, Mumbai, dated 28-09-2016.

2. The Grounds raised by assessee are as under:

“Ground No.1: On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the action of the Ld.DCIT, Central Circle-3(4), Mumbai (“the AO”) in assessing the license fees received from the composite letting of property under the head ‘Income from House Property’ instead of ‘Profits and Gains of Business or Profession’ and consequently also erred in disallowing depreciation.

Ground No.2: Without prejudice to Ground 1 above and in the alternative if the income is held as rightly chargeable under the head

“income from house property”, then, the AO be directed to determine the total income as so computed even if such assessed income is lower than the returned income.”

3. The issue raised by assessee in Ground No.1 is against the order of CIT(A), upholding the action of the Ld.AO, Central Circle-3(4), Mumbai in assessing the license fee received from the composite letting of property including furniture and fixture under the head ‘income from house property’ instead of ‘profit and gains of business or profession’ and also consequently upholding the disallowance of depreciation claimed thereon.

3.1. The facts in brief are that assessee has shown the income from letting out of flats as ‘business income’ under the head ‘Leave and License Income’. Such flats were given on rent under ‘Leave and License Agreement’. Under the said agreement, rent is charged for the flats and furniture and fixtures. The said rent is composite rent and there is no bifurcation of rent charged between the flats and furniture and fixtures and therefore, the assessee was showing it as ‘income from business’ and claimed expenditure connecting therewith. The AO treated the income from such renting out of flats and furniture and fixtures as income under the head ‘house property’, by rejecting the contentions of assessee of consistency and no change in the facts and circumstances over the years. Ld.CIT(A) also affirmed the order of AO by following the order of the predecessor CIT(A) in AY.2011-12.

3.2. At the outset, the Ld. AR submitted before the Bench that the issue is squarely covered in favour of the assessee by the decision of Co-ordinate Bench in assessee's own case in ITA Nos.7573, 7574 & 7575/Mum/2014 (AYs.2009-10, 2010-11 & 2011-12), order dt.26-07-2017. Ld.AR prayed before the Bench that the issue may be decided in favour of the assessee by following the decision of the Co-ordinate Bench in earlier years.

3.3. Ld.DR, on the other hand, fairly agreed that the issue has been decided in favour of assessee in earlier years. However, he relied on the order of the authorities below.

3.4. After hearing both the parties, perusing the material on record, including the decision of the Co-ordinate Bench of the Tribunal, we observe that identical issue has been decided by the Co-ordinate Bench of the Tribunal in favour of assessee. The operative portion of the said order is reproduced hereunder:

“10. We have deliberated on the facts of the case and after giving a thoughtful consideration to the contentions of the authorized representatives for both the parties in the backdrop of the settled position of law, are unable to persuade ourselves to subscribe to the view arrived at by the lower authorities. We are of the considered view that now when it remains as a matter of fact that the income from the composite letting of the furnished flats by the assessee, had after thorough vetting and scrutinizing consistently accepted and assessed as ‘business income’ by the department in the earlier years while framing regular assessments, therefore, in the absence of any new facts emerging during the year under consideration, which could irrebuttably dislodge the aforesaid view and therein justify a view to the contrary, such an inconsistent approach on the part of the A.O would not be permissible. We find that the reliance placed by the department on the judgment of the Hon’ble High Court of Bombay in the case of H.A. Shah and Co. Vs. CIT(1956) 30 ITR 618 (Bom) is

distinguishable on facts. We find that in the aforesaid case the Hon'ble High Court had upheld the view arrived at by the A.O, for the reason that during the year under consideration certain documents justifying taking of such contrary view were made available on record. We are of the considered view that unlike the facts involved in the case before the Hon'ble High Court, now when in the case of the present assessee no such material had therein emerged which could go to justify taking of an inconsistent view by the A.O, therefore, the income received by the assessee from composite letting of furnished flats on the basis of same facts as were there before him in the preceding years, cannot be permitted to be assessed during the year under the head 'Income from house property'. That before culminating, we may herein observe that except for raising of oral averments, no material had been brought to our notice by the Id. D.R which could persuade us to subscribe to the claim of the department that certain new facts had emerged during the year under consideration, which clearly militated against the validity and legality of assessing of the composite rental receipts under the head 'business income' in the preceding years, and would thus justify a departure from the consistent approach that had been adopted by the department at stretch for years. We thus in the backdrop of our aforesaid observations, thus set aside the order of the CIT(A) and therein hold that the composite rental receipts were liable to be assessed, as claimed by the assessee in her return of income, as her 'business income'. The Ground of appeal No. 1 is allowed".

3.5. The said decision has been followed for deciding the issue in subsequent years i.e., AYs.2010-11 and 2011-12. Since the facts before us are identical to ones as involved in the cases decided by the Co-ordinate Bench of the Tribunal, we, therefore, respectfully following the said decisions set aside the order of Ld.CIT(A) and direct the AO to assess the income as 'income from business or profession' as claimed by the assessee and allow the expenses claimed including depreciation. Hence, Ground No.1, raised by assessee is allowed.

4. Ground No.2 raised by assessee is without prejudice and alternative to the Ground No.1 above in which the assessee has prayed that if the income is held as rightly chargeable under the head 'income from house property', then, the AO is directed to determine the total income as so computed even if such assessed income is lower than the returned income. Since we have decided Ground No.1 in favour of assessee, on merits, the Ground No.2 raised by assessee becomes infructuous and need not be adjudicated.

5. In the result, the appeal of assessee is partly allowed.

Order pronounced in the open court on 16th September, 2019

Sd/-
(MAHAVIR SINGH)
न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-
(RAJESH KUMAR)
लेखा सदस्य/ACCOUNTANT MEMBER

मुंबई/Mumbai; दिनांक/Dated : 16-09-2019

TNMM

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asst. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai