

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC", MUMBAI
Before Shri Shamim Yahya (AM) & Shri Pawan Singh (JM)

ITA No. 5951/Mum/2018(Assessment year: 2014-15)

Shri Sunil Hingorani 104, Nibhana Annex, Pali Hill, Bandra (W), Mumbai-400 050 PAN : AAAPH1482P	Vs	ITO-16(1)(4), Room No. 438, Aayakar Bhawan, New Marine Lines, Mumbai -400020
APPELLANT		RESPONDEDNT

Appellant by	Shri Ajay Sekhri AR
Respondent by	Shri Akhtar H Ansari SR DR
Date of hearing	27-11-2019
Date of pronouncement	20-12-2019

ORDER

PER PAWAN SINGH, JM :

1. This appeal filed by the assessee is directed against the order of the learned CIT(A)-4, Mumbai dated 27-09-2018, which arises from assessment order passed under section (u/s) 143(3) dated 20.10.2016.
2. The brief facts of the case are that the assessee, an individual is a film director by profession. The assessee is also engaged in trading business of optical and lenses in the name & style of his proprietary concern, M/s Savvy Designs. In the computation of income the assessee has shown exempt income of Rs. 91,967/- and income from house property of Rs. 18,20,002/-, besides income from other sources. The assessing officer (AO) while passing the assessment order made disallowance under section 14A of Rs. 7,25,600/- and treated the income from house

property as business income. On appeal before the Id CIT(A), the disallowances under section 14A was restricted to Rs.202,329/- , subject to verification by AO and the treatment of income from house property as business income was upheld. Thus, further aggrieved by the order of Id CIT(A) the assessee has filed present appeal before this Tribunal. The assessee has raised following grounds of appeal.

“1. On the facts and circumstances of the case and in law, the Learned Commissioner of Income Tax (Appeals-4) Mumbai [hereinafter referred to as Ld CIT(A) erred in confirming the disallowance of a sum of Rs 202,329/- /- u/s 14A r.w.r Rule 8D of the Income Tax Rule.

2. On the facts and circumstances of the case and in law, Ld CIT(A) -4 erred in confirming the treatment of Income from M/s. Palkit Impex Private Limited as income from business & profession and not as income from House property.

3. That the order of Ld AO is bad in law and on facts.”

3. We have heard the submissions of the learned authorised representative (Id AR) for the assessee and the learned departmental representative (Id DR) for the revenue and perused the record carefully. Ground No. 1 relates the disallowances under section 14A. The Id. AR for the assessee submits that during the financial year relevant for assessment year under consideration the assessee has earned exempt income of Rs. 91,967/-. The AO invoked the provisions of Rule 8D and disallowed Rs. 725,600/-. The Id AR for the assessee further submits that has very limited submissions that the disallowance of section 14A should

not exceed the exempt income earned during the period under consideration. In buttress his submissions the Id. AR relied on the decision of Delhi High Court in Cheminvest Limited [2015] 378 ITR 33 (Delhi).

4. On the other hand the Id. DR for the revenue supported the order of the lower authorities.
5. We have considered the submissions of both the parties and gone through the orders of the lower authorities. There is no dispute that during the relevant period the assessee earned the exempt income of Rs. 91,967/-. The AO invoked the provisions of Rule 8D and disallowed Rs. 725,600/-. However, on appeal before Id CIT(A), the disallowances were restricted to Rs. 2,02,329/-. The Hon'ble Delhi High Court in PCIT Vs Caraf Builder and Construction (P) Ltd (2019) 101 taxmann.com 107 Delhi while relying on its earlier decisions Cheminvest Limited (supra) and in Pr. CIT v. McDonalds India (P.) Ltd. ITA 725/2018 decided on 22nd October, 2018 and in CIT Vs Holcim (P.) Ltd. [2015] 57 taxmann.com 28 (Delhi) and held that disallowances under section 14A cannot exceed the exempt income of that year. This decision follows the ratio and judgment of the Supreme Court in the case of Maxopp Investments Ltd. v. CIT [2018] 402 ITR 640/254 Taxman 325/91 taxmann.com 154. Considering the aforesaid decisions of the

Superior Courts, we direct the AO to restrict the disallowances under section 14A to the extent of Exempt income. In the result the ground No.1 of the appeal is allowed.

6. Ground No.2 relates to treating the income from Palkit Impex Pvt Ltd as 'income from business and profession' in place of income from 'house property'. The ld. AR for the assessee submits that the assessee has 1/3 share in the property. The assessee has let-out the property to tenant along with other co-owner to the tenant for running restaurant. The income earned from letting in 'income from the house property'. In support of his submissions the ld. AR for the assessee relied on the decision of Hon'ble Apex Court in Shambhu Investment Vs CIT9 [2003] 129 Taxman 70 (SC).
7. On the other hand the ld. DR for the revenue supported the order of the authorities below. The ld. DR further submits that the lower authorities have examined the rent/ business agreement and came to the right conclusion that the income offered by the assessee from Palkit Impex Pvt Ltd in nothing but income from business. The case law relied by the ld. AR for the assessee is not applicable on the facts of the present case.
8. We have considered the submission of both the parties and perused the orders of lower authorities carefully. During the assessment, the Assessing Officer noted that assessee has offered income of Rs.

18,20,002/- after claiming deduction under section 24(a) of the Act. The assessee was asked to file the details like copy of rental agreement, payment proof of Municipal Taxes, etc. The assessee filed its reply dated 11.07.2016 and furnished the copy of rent agreement dated 16.06.2012 with copy of ledger account. The Assessing Officer examined the rent agreement and in para-6 of the assessment order extracted the relevant portion of the agreement, which is as under:-

“6.a.The conductor will be liable to pay the full minimum monthly guarantee fee for the periods of this agreement that is for 5 years in advance on the signing of this agreement. For the initial period of three years commencing from 1st August, 2012, will pay to the Owners by way of royalty the sum of Rs.6,50,000/- (Rupees Six Lax Fifty Thousand only) as Minimum Monthly Guarantee Fee or Royalty **per month** or 18% of the net monthly sales, whichever is higher. As a facility the owner agrees to receive from the conductor the above said payment is form of 60 post dated cheques, as per annexed-A. If the conductor wants to terminate this agreement after 36 months then the balance cheques will be returned back to the owner after deducting any amounts receivable under this agreement.....”

9. The reply of assessee was not accepted by Assessing Officer and the assessee was asked to show-cause why the income received from Palkit Impex P. Ltd. should not be treated as business income. The assessee again filed its reply vide reply dated 07.10.2016. The Assessing Officer

has extracted the relevant portion of reply in para-6.1 of his order, which is extracted below:

".....S,22 provides for taxation of income from house property. Now Assessee has let out the whole of the property along with the relevant, licenses The primary revenue is from letting of property and not from use of licenses for miming the restaurant. In fact licenses belong to another company namely Tristar Hospitality Pvt. Ltd. and not assessee which have been allowed to be used by the Assessee. Assessee along with 2 co-owners has entered into a conducting agreement with M/s. Palkit Impex (P) Ltd. Assessee along with 2 parties own premises No.1,2,3,4,12, 13and 14 o 2nd i floor of building known as "Kenilworth Shopping Centre" Linking Road, Bandra (W), Mumbai 50 on which a. company namely "Tristar Hospitality Pvt. Ltd. (Tristar)was operating a restaurant "Barbeque Factory Restaurant", Due to various reasons said Restaurant was closed and premises were vacant. Thereafter M/s. Palkit Impex (P) Ltd. have shown interest to operate a restaurant on said premises. However, to safeguard interest and liquor license being already obtained from the owners of the premises. M/s. Palkit has entered into conducting agreement instead of pure leave & license agreement. Copy of rent agreement has already been submitted vide our letter dated 11-07-2016.

It is hereby submitted that the very nature of the agreement and definition of consideration does not change the characteristics of income. Different terminology is used to show that Palkit does not claim to be statutory tenancy. ',

The Restaurant business is being earned on by M/s. Palkit Impex (P) Ltd. Thus it cannot be said that Assessee is carrying out any business and that amount, received from M/s. Palkit Impex (P)

Ltd. be taxed as income House Property. Considering the facts of the case tenant is deducting tax u/s. 1941 @ 10% of the rent"

10. The above explanation of assessee was not accepted by the assessing officer. The Assessing Officer took his view that under the rent agreement, the assessee was getting royalty of Rs. 6,50,000/- for initial period of three years from 01.08.2012 or 18% of the net monthly sales, whichever is higher. Accordingly, the Assessing Officer worked out the total royalty received from 01.04.2013 to 31.03.2014 @ Rs. 6,50,000/- for twelve month, which comes to Rs. 78,00,000/-. The share of assessee being 1/3rd i.e. Rs. 26,00,000/- and accordingly treated the same as Business Income. The assessee offered rental income at Rs. 18,20,002/-, thus, the Income from House Property was reduced to Rs. 18,00,000/-. On appeal before the Id. CIT(A), the assessee filed detailed written submission which is recorded in para-8.2 of the order of Id. CIT(A). The Id. CIT(A) after considering the submission of assessee concluded that the assessee has leased out running restaurant business owned by assessee for a consideration, which cannot fall under the provision of section 22 of the Income-tax Act and upheld the action of Assessing Officer.
11. Before us, the Id. AR for the assessee made limited submission that he is the owner of 1/3rd of the property and the income from letting out is

Income from House Property and in support of his submission relied upon the decision of Hon'ble Supreme Court in Shambhu Investment (P.) Ltd. vs. CIT (supra). We have noted that no written agreement for letting out the units, wherein the tenant of assessee is running restaurant, or rent agreement or agreement for conducting existing business of the restaurant with the tenant is filed before us by assessee for the reasons best known to the assessee. There is no dispute that assessee with his has not only merely let out property for running the restaurant but certain facility is also provided to the tenant, who is running restaurant business.

12. The Assessing Officer during the assessment while considering the explanation of the assessee and the rent agreement has brought out on record that assessee along with two co-owner entered into a 'conducting agreement' with Palkit Impex P. Ltd. for operating a restaurant in the premises i.e Unit No. 1,2,3,4, 12, 13 & 14 on 2nd Floor of Building known as Kenilworth Shopping Centre, Linking Road, Bandra (West). The Assessing Officer from the reply of assessee also noted that owner of the premises already obtained a liquor licence. M/s Palkit entered into agreement for conducting agreement instead of pure leave and licence. We have noted that the Assessing Officer after examining the material placed before him noted that the assessee with

his co-owners not only entitled for minimum 18% of sale or Rs. 6,50,000/- as a Royalty, whichever is higher for initial period of three years. The Id. AR of the assessee failed to counter these finding of Assessing Officer. The aforesaid finding of Assessing Officer is clearly establishes that the activities of the assessee are in the nature of adventure of business and the income arising from such arrangement which includes the letting of property is nothing but a business income. The Id. AR of the assessee relied upon the decision of Hon'ble Supreme Court in Shambhu Investment (P.) Ltd. vs. CIT (supra), in our humble view, the ratio of decision is not helpful to the assessee. In the said case, assessee let out furnished premises to various persons and agreed to provide service like watch & ward staff, electricity and other common amenities, which were offered for taxation as Business Income. However, in the present case, the assessee along with his co-owner authorized the other party to conduct and run the existing business of Restaurant "Barbeque Factory Restaurant", wherein the other party has agreed to pay the minimum royalty or royalty for three year of Rs. 6,50,000/- or 18% of the net monthly sales, whichever is higher. Thus, the facts of the present case are different. No other contrary facts or any other evidence is brought to our notice to take

other view. In the result, the ground no.2 of appeal raised by assessee is dismissed

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

Order pronounced in the open court on 20-12-2019.

Sd/- (Shamim Yahya)	Sd/- (Pawan Singh)
ACCOUNTANT MEMBER	JUDICIALMEMBER

Mumbai, Dt : 20th December, 2019

Pk/-

Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

/True copy/

By order

Asstt. Registrar, ITAT, Mumbai