

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "B", MUMBAI**

BEFORE SHRI WASEEM AHMED (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 7331/MUM/2016
Assessment Year: 2012-13**

Bralco Metal Industries Pvt. Ltd., Gupta Mills Estate, Reay Road, Mumbai - 400010 PAN : AACCB7849P	Vs.	The Dy. CIT Circle 6(1)(2), 5 th Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

Assessee by : Shri R.C. Jain (AR)

Revenue by : Ms. Kavita P. Kaushik (DR)

Date of Hearing: 04/11/2019

Date of Pronouncement: 03 /02/2020

ORDER

PER RAM LAL NEGI, JM

This appeal has been filed by the assessee against the order dated 14.09.2016 passed by the Commissioner of Income Tax (Appeals)- 51 (for short 'the CIT(A), Mumbai, pertaining to the assessment year 2012-13, whereby the Ld. CIT(A) has partly allowed the appeal filed by the assessee against the assessment order passed u/s 143 (3) of the Income Tax Act, 1961 (for short the 'Act').

2. The brief facts of the case are that assessee an individual having income from business and profession and income from other sources, filed its return of income for the assessment year under consideration declaring nil income. The case was selected for scrutiny. Accordingly, the AO issued notice u/s 143 (2) and 142 (1) of the Act. In response to the said notices, the authorized representative of the assessee appeared before the AO, submitted the details and discussed the case from time to time. Since it was noticed that the assessee had earned rental income of Rs. 6,86,644/- from sub-letting of 5,556 Sq. ft. of Tulsi Ram Devi Dyal Property Trust situated at Gupta Mill Estate and

claimed the said income under the head income from business profession, the AO asked the assessee to furnish the details of the property, copy of agreement and the details of rental income in question etc. The AO further asked the assessee to explain as to why the income from property should not be taxed u/s 23, treating the assessee an owner of the house property u/s 27 of the Act. The AR submitted that section 27 of the Act is not applicable in the case of assessee because the assessee has taken the property on month-to-month rent basis. However, the AO rejecting the contention of the assessee estimated the fair market value and determined the rent @ Rs. 80 per sq.ft. per month and computed the total income from house property at Rs. 37,33,632/-. The AO also made other additions and determined the total income of the assessee at Rs. 97,94,500/-. The assessee challenged the assessment order before the Ld. CIT(A) *inter alia* on the ground that the AO has wrongly treated the income in question as income from house property. The Ld. CIT(A) confirmed the action of the AO in treating the income in question as income from house property, however, directed the AO to treat rental income as gross annual letting value of the property and reduced the expenditure deducted in respect of the said property while computing business expenditure. Still aggrieved, the assessee in appeal before the Tribunal.

3. The assessee has challenged the impugned order passed by the Ld. CIT (A) on the following effective grounds:-

1. The Ld. CIT (Appeals) erred in directing AO to treat income from subletting of let out property situated at Reay Road, Mumbai – 400010 as income under the head property which income was disclosed as income under the head of 'Business' after giving deduction with corresponding disallowance while computing business income.

1.1 The Ld. CIT (Appeals) did not appreciate that the said income has been assessed as business income for the past several years in the scrutiny assessments and that the AO has not justified material departure from the conclusions arrived at in earlier years in the absence of change of facts or law.

- 1.2 *The Ld. CIT (Appeals) did not appreciate that the issue stood clinched in favour of the appellant by decisions of Supreme Court despite the same being brought to his notice.*
2. *The Ld. CIT (Appeals) erred in confirming 50% disallowance of Rs. 135061/- out of miscellaneous and Lonavala Guest House expenses aggregating to Rs. 270121/-.*
- 2.1 *The Ld. CIT (Appeals) did not appreciate that no specific items were pointed out by AO to justify the disallowance in the face of the fact that a box file containing the vouchers was submitted to him which was retained by him for verification for considerable period between 19.02.15 and 18.03.15 read with ledger accounts of expenses of Rs. 2989035/- submitted in the course of assessment proceedings.*
- 2.2 *The Ld. CIT (Appeals) erred in directing the AO to disallow the repairs and maintenance expenses pertaining to previous year 2009-10 and 2010-11 without appreciating that the AO did not point any specific items pertaining to earlier years apart from making a general statement.*
3. *The Ld. CIT (Appeals) erred in holding that levy of interest u/s 234C is mandatory without appreciating that on the basis of Nil return of income filed such interest was not leviable.”*

4. At the outset, the Ld. counsel submitted that the assessee does not want to press Ground No. 2.1 and 2.2 of the appeal. Hence, we dismiss Ground No. 2.1 and 2.2 as not pressed.

5. Vide Ground No. 1, 1.1 and 1.2, the assessee has challenged the action of Ld. CIT (A) in confirming the findings of AO in treating income from sub-letting of house property situated at Reay Road Mumbai as income from house property as against income from business claimed by the assessee. The Ld. counsel placing reliance on the decisions of the Mumbai Tribunal in the case of Shri Vitthal Das G Vyas vs. ITO, ITA No. 7721/Mum/03 for the AY 2000-01, ITA No. 7037/Mum/05 for the AY 2001-02, ITA No. 7038/Mum/05 for the AY 2002-03, ACIT vs. Shri Vikram Vitthal Das Vyas ITA No. 4498/Mum/2012

for the AY 2007-08 and ITA No.7787/Mum/2012 for the AY 2008-09, submitted that since the findings of the Ld. CIT (A) are contrary to the decisions of the Mumbai Benches in the aforesaid cases, the impugned order is liable to be set aside. The Ld. counsel further invited our attention to the assessment orders passed by the AO in assessee's case pertaining to the assessment year 2009-10, 2010-11, and 2011-12 and pointed out that the assessee has been showing rental income from this property as business income for the last so many years and the department never questioned the claim of the assessee. The Ld. counsel further submitted that in the present case since the assessee itself is deemed to be the monthly tenant, it has claimed the rent received as business income. The Ld counsel further pointed out that since there is no change in the fact of the present case, the department has wrongly change its stand and taken a contrary view. In view of the aforesaid facts and in the light of the decisions relied upon, the Ld. counsel submitted that the findings of the Ld.CIT (A) is liable to be set aside.

6. On the other hand, the Ld. Departmental Representative (DR) supporting the findings of the Ld. CIT (A) submitted that since the Ld. CIT (A) has directed the AO to treat the rental income received by the assessee as gross annual letting value and to arrive at the income from house property after giving necessary deduction and further directed the AO to deduct the expenditure incurred in respect of the said property while calculating the business income there is no infirmity in the order of the Ld. CIT(A).

7. We have heard the rival submissions and perused the material on record including the cases relied upon by the Ld. counsel. The only grievance of the assessee is that the Ld.CIT (A) has wrongly confirmed the action of the AO in treating the rental income as income from the house property instead of income from business claimed by the assessee. The undisputed facts are that the assessee itself is a sub-lessee of the property in question and has been letting out the same to various tenants on regular basis. Now the question arises as to whether under these circumstances the assessee can be treated as the owner of the property within the meaning of section 27(iib) of the Act? As

pointed out by the Ld. counsel, the coordinate Bench has decided the similar issue in favour of the assessee holding that the deeming provisions of section 27(iiiB) r.w.s. 269UA (f) have to be construed strictly and therefore the assessee cannot be said to have acquired any rights as contemplated u/s 27(iiiB) of the Act. In the said case, the assessee had received warehousing charges of Rs. 33,02,377/- which he had offered to tax under the head business income. However, the AO treated the same as income from house property holding that by virtue of section 27 (iiiB) the warehousing charges received by the assessee is to be assessable under the head income from house property. The Ld. CIT (A) set aside the findings of the AO and directed the AO to assess the said income under the head business income. In the further appeal, the coordinate Bench confirmed the findings of the Ld. CIT (A).

8. Further, as pointed out by the Ld. counsel the assessee has been showing the said income as business for the last so many years. We notice that in assessee's case for the assessment years 2009-10, 2010-11 and 2011-12, the AO passed the assessment orders u/s 143 (3) of the Act treating the said income as business income. In the assessment year under consideration, the AO has changed its stand. The Ld. DR did not point out any change of material fact in the assessment year under consideration for taking a different view. Hence, we are of the considered view that the decision of the Ld.CIT(A) is contrary to the findings of the coordinate Benches in the case of *Shri Vitthal Das G Vyas vs. ITO*, for the AY 2000-01, 2001-02, 2002-03, *AICT vs. Shri Vitthal Das G Vyas*, for the AY 2007-08 and AY 2007-08 (supra). Moreover, the AO and the Ld. CIT (A) have not pointed out any reason in their orders for taking a different view in the assessment year under consideration. Hence, taking into consideration the entire facts of the case in the light of the submissions made by the Ld. counsel for the assessee, we hold that the findings of the Ld.CIT (A) are not in accordance with the decisions of the coordinate Bench relied upon by the Ld counsel for the assessee. We therefore, allow this ground of appeal and set aside the findings of the Ld. CIT (A).

Accordingly, we direct the AO to treat the rental income received by the assessee as business income.

9. Ground No. 3 of the appeal is of consequential nature hence does not require adjudication.

In the result, appeal filed by the assessee for assessment year 2012-2013 is partly allowed.

Order pronounced by listing the result on the notice board of the bench under rule 34(4) of the Appellate Tribunal Rules, 1963.

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 03 /02/2020

Alindra, PS

आदेश 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.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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