

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E" MUMBAI**

**BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI S. RIFAUR RAHMAN (ACCOUNTANT MEMBER)**

**ITA No. 5811/MUM/2018
Assessment Year: 2013-14**

Trimurti Films Pvt. Ltd.,
B-11, Commerce Centre, Tardeo
Road, Mumbai-400034.

Vs. ACIT, Circle 16(1),
467, Aayakar Bhavan, 4th floor,
M.K. Road, Mumbai-400020.

**PAN No. AAAC T 4118 M
Appellant**

Respondent

Assessee by : Mr. Mihir C. Naniwadekar, AR
Revenue by : Mr. Vijay Kumar Menon, DR

Date of Hearing : 01/06/2021
Date of pronouncement : 13/08/2021

ORDER

PER S. RIFAUR RAHMAN, A.M.

The present appeal is filed by the assessee against the order of the Commissioner of Income Tax (Appeals)-4, Mumbai [in short 'CIT(A)'] for the assessment year 2013-14 dated 19.07.2018 and arises out of assessment completed u/s 143(3) of the Income Tax Act, 1961 (in short the Act).

2. Brief facts of the case are, the assessee filed the return of income for assessment year 2013-14 on 29.09.2013 declaring total income of Rs.16,62,62,960/-. The return was processed u/s 143(1) of the Act. Subsequently, the case was selected for scrutiny and accordingly notices u/s 143(2) and 142(1) were issued and served on the assessee. In response, the Ld.

AR of the assessee attended and submitted the relevant information as called for.

The assessee is in the business of production and distribution of Hindi Films and assessee has shown income from house property and income from business and profession. During the year, the assessee declared receipts from hiring of studio to the extent of Rs.51,19,024/- under the head 'other income' in the books of account and brought the same to tax under the head 'income from house property'. The Assessing Officer observed that the assessee has claimed deduction u/s 24(a) of the Act @ 30% and also claimed deduction of property tax. He also observed that besides it also claims several business expenses pertaining to the said studio by enjoying dual benefit. The Assessing Officer by following the assessment orders passed for assessment year 2010-11, 2011-12 and 2012-13 treated the income from studio under the head 'business income' as against income from house property.

3. Aggrieved with the above order, the assessee preferred an appeal before Ld. CIT(A)-4, Mumbai and filed detailed submission before him, the same was reproduced by Ld. CIT(A) at page 3 to 9 of his order. After considering the detailed submissions of the assessee and after considering First Appellate orders for assessment year 2010-11 and 2012-13, he dismissed the appeal of the assessee by observing as below :

"6.3 I have carefully considered the facts of the case, oral contentions and written of the assessee, discussion of the AO in the assessment order and material available on record. The assessee has made elaborate submission (which are similar to the submissions made in the appellate proceedings of earlier years) as has been reproduced hereinabove but finally has relied upon in its own case decided by Ld.

CIT(A)-7, Mumbai for A.Y.rs. 2010-11 and 2012-13. In the said A.Y.rs, the Ld. CIT(A)-7, Mumbai has decided the issue in favour of the appellant. Copies of the appellate order were also enclosed with the submission. It is seen from the order of Ld. CIT(A)-7, Mumbai for A.Y.rs 2010-11 as well as for A.Y. 2012-13, the finding has been given at Para 2.3 of the order which is reproduced as under:

I have considered appellant's submission. This shows that appellants land at Dahisar was rented to tenants on monthly basis no other facility was provided, hence, AO is directed to treat income received from Dahisar land as house property income instead of Business Income as details filed show no facilities were provided. Hence, ground of appeal is allowed." **[Bold for emphasis]**

It is seen from the above that a clear finding of fact has been given by Ld. CIT(A)-7 Mumbai that what is rented out by the assessee is land at Dahisar and no other facilities were provided by the assessee. In this regard, it is important to look into the provisions of Sec 22 of the Act which for ready reference is reproduced below :

"The annual value of property consisting of any buildings or lands appurtenant thereto of which the assessee is the owner, other than such portion of such property as he may occupy for the purpose of any business or profession carried on by him the profits of which are chargeable to income tax, shall be chargeable to income tax under the head "Income from House property"." **[Bold for emphasis]**

It is clear from the plain reading of sec 22 of the Act that for an income to be chargeable to tax under the head Income from House Property, the 'property' should be 'consisting of any buildings or lands appurtenant thereto'. The scope of the provisions of Sec 22 of the Act therefore, does not include property consisting of land alone. It is the finding of fact by the Ld. CIT(A)-7, Mumbai in the case of the appellant for A.Y. 2010-11 as well as for A.Y. 2012-13 that what has been let out on monthly basis is the 'Dahisar land' of the assessee and no other facility was provided. These

finding of facts have been given by the Ld. CIT(A)-7, Mumbai in the case of the assessee is based on the details filed by the assessee itself. However, it looks that the Ld. CIT(A)-7, Mumbai, on misreading the provisions of Sec 22 of the Act. has allowed the ground of appeal in the favour of the assessee. In view of the facts and circumstances of the case and discussion hereinabove, when what has been let out is the 'Dahisar land' alone by the assessee, then the consequent income cannot be considered to have been covered under the provisions of Sec 22 of the Act and in this view of the matter, the principles of consistency in reference to the said decision of Ld. CIT(A)-7, Mumbai cannot be followed. Accordingly, the conclusion reached by the AO in the assessment order is upheld and the ground of appeal so raised by the appellant is dismissed.”

4. Aggrieved with the above order, the assessee preferred an appeal before the Tribunal and filed the following grounds of appeal :

1. On the facts and in the circumstances of the case, the Learned Commissioner of Income Tax (Appeals)-4, Mumbai has grossly erred in not following the principles of consistency by differing with the conclusions of the Learned Commissioner of Income Tax (Appeals)-7, Mumbai on a similar decided ground where the appellant's appeal was fully allowed in Asstt. years 2010-11 and 2012-13 and thereby treating the income of rent for land and premises at Rs.45,07,326/- from house property as income from business and denying deduction u/s 24(b) of Rs.13,52,198/- to the appellant. The appellant prays that when there is no change in the facts and in the circumstances of the case, the principles of consistency please be followed and relief granted to the appellant.
2. On the facts and in the circumstances of the case, the Learned Commissioner of Income Tax (Appeals)-4 erred in concluding that what is rented out by the appellant is land at Dahisar and not buildings or lands appurtenant thereto and the Learned Commissioner of Income Tax (Appeals)-4 did not even seek any evidence from the appellant on the issue but concluded on his own that what

is let out is the Dahisar land alone and hence the consequent income cannot be considered to have been covered under the provisions of Section 22 of the Act when in fact, the appellant's property consists of premises /buildings along with lands appurtenant thereto. The appellant prays that since at the ground level the appellant's property does consist of premises /buildings along with lands appurtenant thereto the benefit of deduction u/s 24(b) of the Act, which is a beneficial provision, may please be allowed to the appellant.

5. At the time of hearing the Ld. AR of the assessee submitted that the assessee is in the business of distribution of Films and it has vacant land which is leased out to other film productions. He brought to our notice, observation of Assessing Officer at para 4.3 of the order and he also brought to our notice first appellate orders passed in earlier assessment years by the respective Ld. CIT(A) in assessment year 2010-11 and 2012-13. He submitted that the same appellate orders were submitted before the Ld. CIT(A). However, the Ld. CIT(A) rejected the contentions of the assessee and dismissed the plea of the assessee by taking a view by relying on section 22 of the Act.

The assessee also filed a written submission in respect of additional evidence and also filed additional evidence in the form of paper book before the Tribunal and the Bench remanded the matter to the Assessing Officer. After considering the additional evidences submitted by the assessee. The AO filed remand report before us. For the sake of clarity, we are reproducing the AO's report and assessee's response below:

“AO's Remand Report

“2. As per the indenture agreement submitted it can be seen that everywhere it is mentioned that the land is appurtenant to the structures standing their land.

However, as per the documents presented and the MOU submitted the rent has been received from Bungalow and not land.

3. Therefore, as rightly pointed out by the assessing officer the real issue is whether such income is from house property or business.

4. In this regard the facts are summarized as per below: -

- i. It is seen from the records that in its books the assessee has accounted for the Dahisar land and the Dahisar building separately. It is also seen as per depreciation chart that the assessee has claimed depreciation of building at Dahisar.
- ii. It is also seen that as per the service tax return for the assessment year 2013-14 the category of service as mentioned in the case of assessee is renting of immovable property service.
- iii. It can be seen as per the MOU Filed by the assessee before ITAT with M/s village boys Telefilm that the premise of the assessee was used by the latter for short durations as per the shootings schedule, in the instant case was for a period of four months and not for long-term. This necessarily relates to the business activities of the assessee.
- iv. It is seen that the regular business of the assessee is production related activity and that at times when the assets of business are not used by the assessee itself then the same are being used by other production houses like village boy telefilm in lieu of compensation.
- v. It is further seen that there is a contradiction in the MOU as filed by the assessee and the submission made by the assessee before the assessing officer vide letter dated 22nd of February 2016 (copy enclosed). While in the MOU it can be clearly seen that the word "bungalow" has been clearly used, it can be seen that before the assessing officer the assessee had claimed that the bungalow is not let out and only the open land is let out.

Therefore, the assessee is presenting contradictory statement to favour its own case.”

Assessee's submission

"Income from Property :

Rent Income

(Land at Parbat Nagar, S.V. Road, Dahisar,

Mumbai - 400 068).

Rs.51 19024

<u>Less:</u>	Service Tax paid on rent	<u>Rs.585113</u>	
			Rs.4533911
<u>Less:</u>	Property Taxes paid		<u>Rs. 26585</u>
			Rs.4507326
<u>Less:</u>	Deduction u/s 24 @ 30%	<u>Rs.1352198</u>	<u>Rs.3155128</u>
			=====

The reasoning for treating the same as Income from house property by our client are manifold :-

1. Our client is a private limited company registered on 6th January, 1969 at Bombay with the main object "to carry on the business of manufacturers, producers, exhibitors, exploiters, financiers, importers, exporters and distributors of cinematographic films and pictures..... Over the years production and distribution of Hindi feature films has been the main activity. The activity of renting out has never been the object of the company, it is therefore, be incorrect to give the activity of renting the colour of business income when the main object clause forming part of the Memorandum of Association of the Company does not even permit renting activity.

2. Our client ("the Company") lets out the Dahisar land to outside T.V. / Commercial producers, income is derived from the Dahisar land which is appurtenant to the Cl shed with asbestos roof ("bungalow"). The bungalow is used by the company for its own business purposes as a storage premise. The bungalow is not let out. Only the open land appurtenant to the bungalow is let out The bungalow is used by the Company for its own business purposes for storage of old dresses and costumes, old

camera lights, old cameras, nagra lights etc. The Cl shed with asbestos roof (loosely described as "bungalow") occupies only 13% of the entire plot area.

3. What is provided to the T.V. serial producers is only the vacant open land by the Company in its capacity as a landlord. It is to be noted that the TV. Serial producers bring in their own production equipments, vehicles, vanity vans, power generators, lighting equipments, cast and crew, personal effects, props, catering, refreshments, audio visual tools etc. and they take it out / remove the same from the premises on expiry of the tenure of their respective M.O.U./renting agreement. Temporary sets are erected and re-erected by the T.V, serial producers and dismantled by them at the end of their venture. The Company has nothing to do with the setting up of sets by the TV serial producers. No services, facilities or amenities are provided by the Company. The security charges incurred by the Company are for the purposes of protection of the property of the Company in its capacity as a landlord. Property tax / municipal tax is paid by the Company in its capacity as a landlord. The accounts of the Company also clearly reflect that there is no volume, frequency, continuity or regularity of transactions in respect of the Dahisar land which could give the colour of business income to it. There is absolutely no intention of the Company to do any business in respect of the Dahisar land. The accounts of the Company would also reflect that there is no capital expenditure incurred in respect of the property at Dahisar.

4. Details of the Rent for premises is separately filed. The details will reflect the name of the lessee, date of entry and the fixed rent amounts according to the period of hire. As a prudent owner / landlord of the property the Company has let out the property to earn rent but not exploited it for any commercial gains.

5. The Company has satisfied all the conditions laid down in Section 22 of the Act for the rental income to be classified as income under the head, "income from house property". Specific provisions prevail over general provisions. The Company satisfied all conditions of being classified as an "Owner" for the purposes of Section 22 of the Act.

6. The Dahisar land is reflected as a capital asset in the fixed assets schedule and no depreciation is claimed on it.
7. Service Tax department has granted registration to the Company under the category of "Renting of immovable property service".
8. TDS has been deducted by the lessees u/s 194I of the Act."

The Ld. AR relied on the submissions made by the assessee before Assessing Officer in respect of additional evidence and further relied on the following case law in *Raj Dadarkar & Associates v. ACIT* (2017) 394 ITR 592 (SC) and *PCIT v. City Centre Mall Nashik Pvt. Ltd.* (2020) 424 ITR 85 (Bom).

6. On the other hand, the Ld. DR relied on the order of authorities below and he also relied on the remand report submitted by the Assessing Officer.
7. Considered the rival submissions and material on record. We notice that assessee is in the business of production and distribution of films. Due to slack in the film production and assessee is not at present producing any films and it is owning production facilities which includes and consists of Bungalow and vacant land adjacent to Bungalow at Dahisar. It is submitted that the Bungalow is used by the assessee for its own business as storage premises. The vacant land appurtenant to bungalow is let out. The bungalow is CI shed with asbestos roof occupies only 13% of the entire area. The vacant open land is let out to the serial producers in its capacity as a landlord and the required instrument for production of serial/movies are brought by tenants. The duration of the lease invariably for a period of 2 to 4 months. No other amenities or facilities are provided by the assessee. Further, it is submitted that the assessee is not permitted as per its MoU to let out any property, therefore, it cannot be

considered as a business income since there is no volume, frequency, continuity or regularities of transactions in respect of vacant land. The assessee maintains the details of rent, which contains the name of the lease, date of entry and rent amount collected.

Considering the above factual background, it is clear that the assessee owns the bungalow and vacant land and in fact these were used as business assets, when it was producing films. Since, it stopped making films, the assessee separately deals with the bungalow and vacant land, the bungalow is continuing to be used for its own purpose as storage place and the vacant land is let out for the film/serial production.

We notice that Ld. CIT(A) opined that the assessee has let out vacant land exclusively and it does not fall under the definition "Land appurtenant thereto". Therefore, the income cannot be assessed under the head 'income from house property'. Literally, the word "appurtenant" means belong to or pertains to and not adjacent to as held in the case of *Harnam Singh v. Bibi Kimbar Singh* (AIR 1980 All 50). Further, we notice that Hon'ble Madras High Court held that if the land is capable of being sold separately then it would not be a part of the house property. (*S. Radhakrishna v. CIT* [1984] 145 ITR 170 (Mad)).

Further, we observe that the Hon'ble Andhra Pradesh High Court dealt with a case where there was a small house on a large property, it held that where the land is treated as an indivisible unit along with the building or if the occupiers have always treated and enjoyed the two as a single unit, then, it is a land appurtenant to the building.

8. On the other hand, if the land had been put to any use other than for the enjoyment of the building or if the owner carries out activities such as agriculture or horticulture on that land and derives separate income from that land, the land would be different unit from the building.

In the given case, the assessee was using the bungalow and land together for the film production as part of business assets. Since the film production is stopped, it has separated the bungalow and vacant land. It uses the bungalow for storage for its own purpose and leases the vacant land not on the regular basis but based on the requirement of the other production houses. It leases only the vacant land which it was earlier utilized for its own business. Just because, it let out only the vacant land the type of assets will not change. it will remain as business assets. Since, it is part of total asset of the assessee. The assessee claims depreciation only on bungalow and not on vacant land. When the assessee let out not on regular but based on the requirement of the industry, it can only be treated as income from letting out business assets. Moreover, the assessee demonstrated that the land can be separated and used to earn independent income.

Further, we notice that the vacant land cannot reasonably expected let from year to year basis. Therefore, the annual value cannot be reasonably estimated or expected. The vacant land is continuing to be used or usable for film production. The same land when assessee in case, decided to continue with the film production, will be used for the assessee's business as business asset. Therefore, temporary let out of the vacant land and only be part of business income. Therefore, in the given case the land is separable from the bungalow to let out independently, thus the land can be treated as separate asset and this

letting out of the land independently cannot be part of the income from these property.

With the above observations, in our considered view, the letting out of the land independently which is part of the business asset of the assessee can be treated as income from business only. Accordingly, grounds raised by the assessee are dismissed.

8. In the result, the appeal filed by the assessee is dismissed.

Order pronounced in the open Court on 13/08/2021.

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Mumbai;
Dated: 13.08.2021
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Assistant Registrar)
ITAT, Mumbai