IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH: 'G' NEW DELHI]

BEFORE Dr. B.R.R. KUMAR, ACCOUNTANT MEMBER

AND

SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER

I.T.A. No. 97/DEL/2019 (A.Y. 2014-15)

Ultimate Fashion Maker Ltd., B-286, Okhla Industrial Area, Phase–I, New Delhi – 110 020. **PAN No. AAACU2099N** **(APPELLANT)**	Vs.	ACIT, Circle : 27 (1), New Delhi. **(RESPONDENT)**

Assessee by : **Ms. Gunjan Jain, C. A.;**

Department by : **Shri Rajesh Kumar Dhanesta, Sr. D. R.;**

Date of Hearing	**21.02.2023**
Date of Pronouncement	**06.04.2023**

ORDER

PER YOGESH KUMAR U.S., JM

This appeal is filed by the assessee against the order, dated 31.10.2018 of the ld. Commissioner of Income Tax (Appeals)-9 [(hereinafter referred to CIT (Appeals)] New Delhi, for assessment year 2014-15.

2. The assessee has raised the following grounds of appeal :-

"1. Under the facts and circumstances of the case, the ld. First Appellate Authority has grossly erred in affirming the action of Id. Assessing Officer disallowing expenditure on account of accumulated service tax on rent amounting to Rs.26,53,750/- paid by the assessee which is grossly injudicious, unwarranted, against the facts of the case and untenable at law.

Tax Effect relating to above mentioned ground of appeal is Rs. 8,61,009/-

2. Under the facts and circumstances of the case, the ld. First Appellate Authority has grossly erred in affirming the action of ld. Assessing Officer disallowing rent paid amounting to Rs.6,64,000 which is grossly injudicious, unwarranted, against the facts of the case and untenable at law.

Tax Effect relating to above mentioned ground of appeal is Rs.2,15,435/-

3. The appellant prays for leave to add, amend, alter or withdraw any grounds of appeal.

Total Tax Effect relating to all the above mentioned grounds of appeal is Rs.10,76,444/-."

3. The assessee filed return of income declaring total income of Rs.1,06,38,650.-. The case was selected for scrutiny and the notice under section 143(2) of the Income Tax Act, 1961 (the Act) was issued. The assessment order came to be passed under section 143(3) of the Act by making the following additions:-

" Disallowance u/s 14A	Rs.3.97,561/-
Disallowance of factory rent	Rs.33.17,750/-
Disallowance of prior period expense	Rs.57,432/-
Disallowance of employees contribution towards ESI	Rs.1,80,211/-
Disallowance u/s 40(a)(ia)	Rs.4.75,450/-
Disallowance of employees contribution towards ESI	Rs.3,83,181/-"

4. As against the assessment order the assessee preferred an appeal before the CIT (Appeals). The ld. CIT (Appeals) vide order dated 31.10.2018 partly allowed the appeal and disallowed expenditure claimed on account of accumulated service tax on rent amounting to Rs.26,53,750/- paid by the assessee and further confirmed the disallowance of rent paid amounting to Rs.6,64,000/- on the ground that the assessee has not prove the existence of tenancy and also usage of the premises for business purpose. Aggrieved by the order of the ld. CIT (Appeals), the assessee preferred the present appeal on the grounds mentioned above.

5. The Ground No. 1 of the assessee is regarding disallowance of expenditure on account of accumulated service tax of rent amounting to Rs.26,53,750/-.

6. The ld. Counsel for the assessee submitted that the assessee is a lessee of the premises in Okhla Industrial Area, wherein the assessee is carrying the business of manufacturing of readymade garments, the assessee had been

tenant of the said premises right from 05.03.2011 and paying the rent and the same was being allowed as deduction. Further submitted that, the said 'expense for the purpose of business of assessee' is covered by section 30 of the Act. The service tax on renting of property was levied by the legislature with effect from 01.06.2007, thus, the transaction of renting of property for non-residential purpose has been brought into ambit of service tax. Further, the issue of the levying of service tax as to whether the same amounts to 'service' or not has been decided by the Hon'ble Delhi High Court in the case of Home Solution Retail India Ltd. Vs. Union of India (2009) 223 CTR 191 (Del.) wherein it is held that levy of Service tax is unconstitutional and gave relief to the petitioners therein. Subsequently, the legislature made some retrospective amendment to provision with respect of levying of service tax of renting of property and made the same applicable retrospectively, which has been upheld by the Court. As a result the various properties rented for non residential purpose became liable to pay service tax. Therefore, the AR submitted that the disallowance made by the Revenue authorities required to be quashed.

7. On the other hand, the Ld. DR relied on the order of the CIT (Appeals).

8. It is not in dispute that the assessee had entered into lease deed on 5.03.2011 and being paying the rent to the owner and expenses has been claimed for the 'purpose of business' under section 30 of the Act. The ld. Assessing Officer has disallowed the amount of service tax paid on the rent on the ground that the 'reply of the assessee found to be not satisfactory'. In appeal before the CIT (Appeals) the said addition has been sustained in the following manner:-

> *"5.4 During the course of appellate proceedings, the AR of the appellant was confronted to this fact that no enabling clause w.r.t liability of service tax to be borne by the tenant (appellant) is found to be available in the lease deeds and therefore, he was to explain and submit due evidence for this claim in the form of amended/ supplementary element if any. However, the AR did not provide any supportings/ evidence or any clarification but claimed that clause no. 8 of rent agreement provides for Appellant liability to make payment of these service tax dues.*
>
> *5.5 I have perused the impugned order and gone through the submission including lease deeds filed by the appellant. It is noted that the clause 8 of agreement which provides that only there dues to be levied by the Government, would be responsibility of the license which arises out of any voluntary or involuntary breach of the said condition/ objection, is tend to be inapplicable in this case in as much as the service tax liabilities is not on account of any voluntary/ involuntary breach of obligations. In fact, the said clause of 8 of these deeds is vague and round worded so far appellant responsibility w.r.t arrear cess, tax or duties are concerned.*

5.6 In the factual matrix of the ground, I am of the view that a liability of service tax on rent pertaining to period 2007-08 to 2011-12 was not of the appellant but of the property owner namely Mr. Gajender Singh and Nirmohan Singh. Since, the appellant was not burdened with this liability as per extent term and conditions available in the lease deeds as discussed above, it was not eligible to claim the expenses on that account. In view of the finding of the fact, the claim of expenses on account of arrear service tax on rent amounting to Rs.1931875/- and Rs.721875/- are held to be inadmissible expenditure u/s 37(1) of the Act and therefore, addition so made by the appellant is disextent is upheld. "

9. The service tax is an indirect tax wherein the supplier of the 'services' collects the tax from the recipient of the services and deposits the same with Revenue authorities. Even the levy on the renting of immovable property wherein the service tax has to be borne by the lessee but the same has to be collected by the landlord who is under obligation to perform the function of facilities or wherein he collect the tax and deposits the same with the Revenue authorities. Thus, the liability of service tax on the rent is always passed on the recipient of the service. The reasoning given by the Revenue authorities in the present case are grossly erroneous. The allow-ability of rent paid for the purpose of business of assessee is covered under section 30 of the act. As regards service tax of rent, the same takes the character of the rent itself, as a result, the same should be allowed under section 30 of the Act.

10. Further, the ld. Counsel for the assessee submitted that the payment made to Mr. Gajinder Singh amounting to Rs.19,31,875/- and Mr. Nirmohan Singh Pahwa amounting to Rs.7,21,875/- was in respect of service tax paid on rent, which has been subsequently deposited by Mr. Gajinder Singh and Mr. Nirmohan Singh Pahwa to the account of the Govt. and produced challans of service tax referred above. The assessee has also submitted that the total amount paid by Mr. Gajinder Singh amounting to Rs.29,34,959/- out of which amounts to Rs.19,31,875/- pertaining to the amount paid by the assessee company and the balance is other liabilities of Mr. Gajinder Singh. By taking into consideration of the above submissions and the 'documents' produced by the assessee before us, we deem it fit to remand the issue to the file of the Assessing Officer and examine the submission and the documents produced thereon and pass appropriate order in accordance with law after providing adequate opportunity of being heard to the assessee. Ground No. 1 of the assessee is allowed, for statistical purposes.

11. Ground No. 2 is regarding the disallowance of payment of rent of Rs.6,64,000/- to Ms. Manju Gosai. In so far as rent paid to Ms. Manju Gosai amounting to Rs.6,64,000/-, the ld. Assessing Officer and the ld. CIT (Appeals) has rejected the same on the ground that in the premises B-285, Okhla Industrial Area, Phase-I, New Delhi, there was no lease agreement and the assessee has not submitted any document to prove that the said premises has been used for business purpose.

12. The ld. Counsel for the assessee submitted that the assessee has been operating the business in the building, B-285, Okhla Industrial Area for many years. The assessee entered into lease agreement with Ms. Manju Gosai on 01.02.2009, thereafter the same has been renewed orally. The assessee has produced the initial lease deed dated 01.02.2009 and is placed at page Nos. 50 to 53 of the paper book. It is the specific allegation of the Revenue authorities that there is no written agreement of lease is in existence in the year under consideration and the assessee has not proved that the premises has been used for business purpose. Though the lease agreement need not be in writing and the tenancy can be oral, but to prove the tenancy the assessee could have produced the owner before the Assessing Officer in support of his claim and the burden cast upon the assessee to substantiate the claim that the premises has been used for 'Business Purposes'.

13. Considering the above facts and circumstances, we deem it fit to remand the matter to the file of the Assessing Officer with a direction to the assessee to prove the oral tenancy and also to prove that the premises has been used for the 'business purpose' and the Assessing Officer is directed to decide the matter afresh after providing adequate opportunity of hearing to the assessee. Accordingly, Ground No. 2 of the assessee is allowed for statistical purposes.

14. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on : **06/04/2023.**

Sd/-	**Sd/-**
(Dr. B.R.R. KUMAR)	**(YOGESH KUMAR U.S.)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated : 06/04/2023

MEHTA/R.N, Sr PS

Copy forwarded to :-

1. Appellant
2. Respondent
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI