

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI

BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER
AND SHRI JOGINDER SINGH, JUDICIAL MEMBER

ITA No. 4886/MUM/2014
(Assessment Year : 2009-10)

M/s. Kavita Marketing Pvt. Ltd.,
C/o. Shri Prakash Jhunjunwala,
Chartered Accountant,
5, Jolly Bhawan No.2, Gr. Flr.,
7, New Marine Lines, Churchgate,
Mumbai 400 020.
PAN:AAACK 2103P

... Appellant

Vs.

The Income Tax Officer, Wd.5(2)(2)
4th Floor, Aaykar Bhavan,
MK Road, Mumbai 400 020

.... Respondent

Appellant by : Shri Prakash Jhunjunwala
Respondent by : Shri Aarsi Prasad

Date of hearing : 08/02/2016
Date of pronouncement : 15/06/2016

ORDER

PER G.S. PANNU, AM:

The captioned appeal filed by the assessee pertaining to assessment year 2009-10 is directed against an order passed by CIT(A)-9, Mumbai dated 02/05/2014, which in turn arises out of an order passed by the Assessing Officer under section 143(3) of the Income Tax Act, 1961 (in short 'the Act') dated 05/12/2011.

2. In this appeal, assessee company has raised the following Grounds of appeal:-

“ The appellant company prefers an appeal against an order dated 02/05/2014 passed Ld. Commissioner of Income Tax (Appeal) 9, Mumbai on following amongst other grounds each of which are without prejudiced to any other:-

1.0 On facts and circumstances of the case and in law, Ld. CIT(A) erred in confirming the Ld. AO's action on erroneously treating the facility charges received of Rs 9,60,000/- as "Income from House Property" as against appellant's claim as "Income from Business or Profession";

1.1 The CIT(A) erred in ignoring the vital fact that the Leave and license agreement bifurcates the receipts towards rent of Rs 11,40,000/- and receipts for various facilities of Rs 9,60,000/-

1.2 The Ld CIT(A) erred seriously in ignoring the remand report wherein Ld AO accepted that the appellant had incurred the house keeping and Security expenses of Rs 10,11,900/-

2.0 The Ld. CIT(A) erred in not adjudicating the ground relating to disallowance of expenses of Rs 18,96,428/- made in assessment merely for the reason that the business was not achieved in impugned year;”

3. As the above cited Grounds of appeal reveal, the grievance of the assessee is on two counts, which we shall take up in seriatim. The substantive dispute in Grounds of appeal Nos.1.0 to 1.2 is with regard to the assessability of Rs.9, 60,000/- received by the assessee as ‘facility service charges’. In the course of assessment proceedings, the Assessing Officer noticed that assessee had given on rent a property, on which it was receiving rent of Rs.13,80,000/- and facility service charges of Rs.9,60,000/-. In so far as, the assessability of rent received of Rs.13,80,000/- is concerned, the Assessing Officer did not dispute that the same was assessable under the head “income from house property”. The receipts by way of ‘facility service charges’ of

Rs.9,60,000/- was returned by the assessee as assessable under the head "business income", which was objected to by the Assessing Officer. According to Assessing Officer, the amount of Rs.9,60,000/- was also received from the person from whom rental income was received and, therefore, the same was liable to be assessed under the head "income from house property". The Assessing Officer was not satisfied with the explanation of the assessee that the said sum was received on account of certain specific services rendered. As per the Assessing Officer the services rendered by the assessee are not of any special nature but they are of routine nature expected to be provided by a Landlord. Accordingly, it was held that the amount of Rs.9,60,000/- was also taxable under the head income from "house property" by treating it as a part and parcel of the rental income. The said decision of the Assessing Officer has also been affirmed by the CIT(A). As per the CIT(A), the 'facility service charges' of Rs.9,60,000/- were received by the assessee primarily because of the letting out of the property and, therefore, the Assessing Officer was right in treating the same as an amount assessable under the head "income from house property".

4. Before us, Ld. Representative for the assessee pointed out that the facility service charges of Rs.9,60,000/- were being received under separate terms and conditions for provision of services such as house-keeping, caretaker and security, etc., therefore, it was not relatable to the letting out of the premises for which rental income was being received separately. Ld. Representative for the assessee also pointed out that assessee was incurring expenses specifically for rendering such

services and for that matter he referred to the fact that assessee had incurred house-keeping expenses of Rs.5,34,900/- and security charges of Rs.4,77,000/-. The Ld. Representative for the assessee explained that in fact, during the year under consideration assessee had incurred a small loss as the service provider had recovered higher amount from the assessee than the 'facility service charges' earned by the assessee. In support of the submissions that such charges are not taxable under the head "house property income" but under the head "business income" he has relied upon various decisions namely; (i) A.R. Complex vs. ITO, 292 ITR 615(Mad);(ii) CIT vs. Sarabhai (P) Ltd.,263 ITR 197 (Guj); and, (iii) ACIT vs. Vijay S. Mallya, 52 SOT 0197 (URO).

5. On the other hand, Ld. Departmental Representative has supported the stand of the lower authorities by reiterating the arguments contained in the respective orders, which we have already adverted to in the paras above and are not being repeated for the sake of brevity.

6. We have carefully considered the rival submissions. Quite clearly, there can be no dispute to the proposition that income derived from mere letting out of property is liable to be assessed only under the head "income from house property". Thus, there is no dispute between assessee and the Revenue with regard to the rental receipts of Rs.13,80,000/-, which have been received for letting out the property. So however, the position canvassed by the assessee is that apart from letting out of property, it is also rendering certain services to the tenant by providing specific services on account of house-keeping, security,

etc. Assessee has also pointed out that the 'facility service charges' earned by it also require outgoings also inasmuch as it had hired services providers for the same. Quite clearly, the providing of such services do not show that the income by way of 'facility service charges' can be said to be derived from mere ownership of the property. For this reason, the stand of the assessee is that income from such services is liable to be treated as 'business income'. In this connection, it would be relevant to refer to the judgment of the Hon'ble Gujarat High Court in the case of Sarabhai (P) Ltd., which lays down that if the owner of a property carries on upon the property some activities which results in profits and gains arising, not from the ownership but from use thereof, such profit and gains would be chargeable to tax as 'business income' and not income under the head income from House Property'. In fact, in the case before Hon'ble Gujarat High Court, assessee was owner of the property, which was let out to the tenants. Apart from letting out, assessee was also rendering certain services by providing various amenities for which amount was being separately earned. The Hon'ble High Court held that amount received from the tenants as 'rent' for letting of the property was assessable under section 22 of the Act as "income from house property" and the other receipts in respect of the services rendered to the tenants was liable to be assessed under section 28 of the Act as 'business profits'. In our view, the ratio laid down by the Hon'ble Gujarat High Court in the case of Sarabhai (P) Ltd.(supra) covers the instant situation. Undisputedly, the 'facility service charges' are being received by the assessee in return of providing specific services like house-keeping, security, etc. To the similar effect is also the judgment of the Hon'ble Madras High Court in

the case of A.K.Complex (supra), which was relied upon by the assessee before us. The argument of the Revenue that services rendered by the assessee are not of special nature, and they are of routine nature expected to be provided by the Landlord, is of no consequence to decide the controversy in question. This is for the reason that factually it has not been disputed by the Revenue that services by way of house-keeping, security, etc. have been rendered by the assessee. Moreover, it has to be deciphered on the basis of terms and conditions in each case as to the nature of the services that may be provided by the owner of property to its tenants to decide as to whether they are distinct from an activity which is merely because of ownership of the property. In the present case, it is quite evident that the said services are distinct from letting out of the property and, therefore, assessee is justified in asserting that the same be taxed as 'business income'. Thus, on this aspect, we set-aside the order of the CIT(A) and direct the Assessing Officer to recompute the income in view of the aforesaid directions. In the result, on this ground assessee succeeds.

7. The second Ground raised by the assessee is with regard to the disallowance of expenses of Rs.18,96,428/-. It has been explained that the expenditure was disallowed by the Assessing Officer on the ground that there was no business achieved during the year. Ld. Representative for the assessee pointed out that the said ground has inadvertently not been decided by the CIT(A).

8. As per the assessee, the expenses debited in the P&L Account are routine expenses which are liable to be allowed for maintaining the

business entity. In this context, reliance has been placed on the decision of the Mumbai Tribunal in the case of Preimus Investment & Finance Ltd. vs. DCIT, 171 TTJ 794(Mum-ITAT) to say that expenditure incurred for maintaining status namely, miscellaneous expenses, salary, legal expenses, travel expenses etc. would be an allowable expenditure.

9. On the other hand, Ld. Departmental Representative has pointed out that the Assessing Officer disallowed the expenditure by noticing that the expenses debited in the P&L Account were relatable to earning of rental income from house property and further in the absence of any business activity, the impugned expenditure would not be allowed.

10. We have carefully considered the rival submissions. At pages 58 - 64 of the Paper Book, copies of Balance sheet and P&L Account for the year under consideration have been placed. Schedule -8 of the P&L Account pertaining to administrative expenses reveal that various expenses on account of repairs and maintenance, filing fee, post and telegraph, bank charges, accounting charges, audit fee, etc. have been debited apart from expenses incurred on house-keeping and security charges, with which we have dealt with in the earlier part of this order. In our view, the Assessing Officer has mechanically disallowed the entire expenditure without appreciating that certain bare minimum expenses are liable to be incurred by the assessee company in order to maintain its status of a corporate body, as noted by our Co-ordinate Bench in the case of Preimus Investment & Finance Ltd. (supra) based on the judgment of Hon'ble Allahabad High Court in the case .of

Rampur Timber & Turnery Co.Ltd. Therefore, we deem it fit and proper to restore the matter back to the file of Assessing Officer in order to examine the allowability of expenditure afresh in the aforesaid light and thereafter recompute the income of the assessee. Thus, on this issue the assessee succeeds for statistical purposes.

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

Order pronounced in the open court on 15/06/2016

Sd/-
(JOGINDER SINGH)
JUDICIAL MEMBER
Mumbai, Dated 15/06/2016

Sd/-
(G.S. PANNU)
ACCOUNTANT MEMBER

Vm, Sr. PS

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./Asstt. Registrar)
ITAT, Mumbai