

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'B' BENCH, KOLKATA**

**Before Shri Waseem Ahmed, Accountant Member and
Shri K. Narasimha Chary, Judicial Member**

**I.T.A. No. 1580 /KOL/ 2012
Assessment Year: 2003-2004**

Income Tax Officer,.....Appellant
Ward-41(1), Kolkata,
18, Rabindra Sarani,
Kolkata-700 001

-Vs.-

Sri Shyamal Banerjee,.....Respondent
128A, Bidhan Sarani,
Kolkata-700 004
[PAN:AENPB 8022 L]

Appearances by:

Shri Tanuj Kumar Neogi, Additional CIT, Sr. D.R., for the Department
Shri Subash Agarwal, Advocate, for the assessee

Date of concluding the hearing : August 25, 2016

Date of pronouncing the order : September 14, 2016

O R D E R

Per Shri K. Narasimha Chary, J.M.:

This is an appeal by the Revenue challenging the order dated 18.06.2012 passed by the learned Commissioner of Income Tax (Appeals)-XXX, Kolkata (hereinafter referred to as "learned CIT") for the assessment year 2003-04.

2. Brief facts of the case are that the assessee is doing business in textile and also deriving income from other sources which shall include income from lodging business carried in the name of Bani Bhavan at Puri, income from partnership firm Young Bengal Society, Jagat Jyoti Cloth Dying and Printing House, Maa Durga Candle works and Bengal paper converters. On 18.02.2003 there was a survey conducted in the business premises of the assessee, wherein certain incriminating documents and evidences were unearthed and were impounded with identification marks, inter alia, TCS-2, TCS-4, TCS-9, TCS-22, TCS-44, and TCS-48, relevant for the purpose of this appeal. The assessee filed his return on 28.11.2003 declaring a total income of Rs.12,28,450/-. By way of an

order dated 28.03.2006 learned AO assessed the income of the assessee at 1,53,77,200/-. Aggrieved by the said order, the assessee carried the matter in appeal to learned CIT. Ld. CIT by order dated 5.1.2007 gave certain relief to the assessee pursuant to which learned AO passed an order under section 251 of the Act granting relief to a tune of Rs.2,99,629/-. Matter reached ITAT in appeal and the ITAT by order dated 14.12.2007 remanded the matter to learned AO for fresh disposal after de novo consideration. Subsequently, pursuant to the orders of the ITAT, learned AO vide order dated 30.12.2008 made certain additions on account of rental income and the advances received from the parties in respect of Bani Bhavan at Puri, and unexplained and undisclosed investments and income. He framed the assessment at 1,10,35,881/-. Subsequently, on 2.2.2009 he modified the same under section 154/143(3)/251/254 of the Act and assessed the income at 1,07,20,210/-.

3. Aggrieved by the said order of learned AO, the assessee carried the matter in appeal to learned CIT and the CIT by way of impugned order treated the income from Bani Bhawan as income from business and deleted the additions made on that score. Further, learned CIT calculated the undisclosed or unexplained investment or income of the assessee at Rs.39,44,106/- as against Rs.91,65,486/- calculated by learned AO, thereby granted a relief to the assessee to a tune of Rs.52,21,380/-.

4. Challenging these two findings of learned CIT in the impugned order, the Revenue preferred this appeal with three days delay before us on the following grounds:-

(1) The ld. CIT(A) has erred in law as well as on facts in treating income from 'Bani Bhawan', Puri as "Income from Business" instead of "Income from House Property". The issue was discussed in detail in assessment order. It is gathered from record that on the same issue in AY 1993-94 order u/s 143(3)/254/251 dated 29.12.2006 of the I.T. Act, was passed and the assessee has not preferred further appeal and accepted the said order.

(2) The ld. CIT(A) has erred in law as well as on facts in allowing relief of Rs.52,21,380/- without appreciating the facts that the addition was made on the basis of different documents found during the course of survey u/s 133A of the I.T. Act.

5. This appeal is preferred with three days delay. It is explained by the Revenue that the order of the learned CIT impugned in this appeal was communicated to them on

27.08.2012 and the last day of limitation for filing appeal was 26.10.2012. However, since 27th & 28th October, 2012 happened to be Saturday and Sunday and on 29th the ITO was on leave on the occasion of Durga Puja and Laxmi Puja , the delay occurred. When we heard the Id. Counsel for the assessee, he fairly conceded for condoning the delay and to argue the matter on merits. Recording the same, and accordingly we condone the delay and proceed to hear the appeal on merits.

6. It is the argument of the Id. D.R. that the learned CIT erred in holding the income from Bani Bhawan as the income from business instead of income from house property, since the assessee is residing in a part of the building and let out the remaining to others on rental basis. He further assailed the impugned order on the ground that the learned CIT committed error in holding that the total turnover was accumulated through a periodic cycling of the sales amount to purchases for four times during the financial year, instead of adding the entire unexplained investment as undisclosed income. For these reasons, learned DR prayed to restore the order of the learned AO.

7. It is the argument of the Ld. AR that the learned CIT has taken the total unexplained investment as the result of rotating the same amount for four times instead of taking it as rotation for nine times in view of the tax audit report where the ratio of stock to turnover was found to be 10.10%. He further submitted that the learned CIT increased in the Gross Profit Ratio from 10.36% to 11.55% and made certain addition on this basis.

8. At the outset, it we wish to state that in respect of the learned CIT taking the undisclosed investment as the investment in four cycles instead of investment in nine cycles as pleaded by assessee, and learned CIT enhancing the Gross Profit Ratio from 10.36% to 11.55%, there is no appeal preferred by the assessee. It is only the revenue that has come in this appeal challenging the treatment of income from Bani Bhawan and also granting relief to the assessee to a tune of Rs.52,21,380/-.

9. Basing on the above contentions and circumstances the points that arise for our consideration are,-

- (i) Has the learned CIT erred in treating the income from Bani Bhawan at Puri as income from business instead of the income from house property as framed by the learned AO?

- (ii) Has the learned CIT erred in granting relief to a tune of Rs.52,21,380/- to the assessee?

Issue No. 1

10. As could be seen from the record Bani Bhawan is a Lodge situated on the beach at Puri. The assessee has been conducting his business in letting out this property on commercial basis to many Government, semi-Government and institutions to be used as Holiday Home. Since establishment about three decades back, the income from the lodging house has been treated as business income by the assessee and has been accepted so by the department. However, from about the assessment year 1993-94, the department has started treating such income as income from house property. Dispute has reached the level of ITAT in respect of the assessment years 1993-94 and 1995-96, wherein the ITAT decided the issue in favour of assessee holding that the income from Bani Bhawan be treated as income from business and not income from House property.

11. In respect of the assessment year relevant to this appeal also, this issue has been canvassed before the learned CIT. Certain documents were produced before the learned CIT and also before this Tribunal. Now we shall proceed to analyze and appreciate such documentary evidence. The assessee produced the copy of licensee fee receipt and also the licenses for the years 2003-2004 and 2006 as samples to show the terms and conditions. These documents are enumerated from page no. 53 to 56 of the paper book. In all these documents, while granting licence in favour of the assessee to received lodgers/pilgrims, the licensing authority, i.e. the Magistrate, Lodging House Fund, Puri had stipulated the following conditions :-

(1) The License shall be produced to the Magistrate, the Medical Officer or Health or any other persons authorised to enter and inspect under section 10 of the Act.

(2) The License is granted subject to the conditions prescribed in Rule 7 which is as follows :-

(i) The owner, or in his absence the person in charge of any licensed house, shall keep one sweeper for every hundred pilgrims.

(ii) Provide open Kerosine tins tarred within and without at the rate of one for every ten pilgrims for the collections of rubbish refuse.

(iii) Cause the living rooms, varandaha and court yards to be swept and cleaned daily and the collections of rubbish and refuse to be removed.

(iv) Cause all wells attached to the licensed house to be thoroughly cleaned once a year & except in the case of covered wells fitted with a pump shall have all well disinfected at such times and in such manner as the Magistrate shall prescribe.

(v) Cause all latrines, urinal, drain cesspools and receptacles for rubbish to be cleaned daily.

(vi) Display on a conspicuous part of the main entrance of the house, a ticket showing red letters not less than six inches in height:

(a) The registered number of the license,

(b) The number of pilgrims which the house is licensed to accommodate.

(c) The period during which the license is in force.

(vii) Display in a conspicuous place on the lintel of each room or on the posts of each varandah licensed for the accommodation of pilgrims a ticket showing the number of pilgrims for which it is licensed & shall not accommodate more than the number authorised by the Magistrate.

(viii) Report immediately to the nearest police station all cases of serious illness and all dates accruing in the licensed house. Information shall be sent immediately by the Officer-In-charge of the Police Station to the Medical Officer of Health.

(ix) Afford assistance to the Medical Officer of Health or his assistant in removing the sick persons, if necessary, to hospital and in getting the house disinfected.

12. The assessee also produced as many as nine agreements entered into with different organizations which are incorporated in page nos. 57 to 96 of the paper book.

All these agreements invariably show that the organizations taking the premises under these agreements were under an obligation to use the premises for the purpose of Holiday Home only. In some agreements, the purpose was mentioned as lodging. Scheduled annexed to all these agreements clearly show that the demised premises consists of some bed rooms, toilet, kitchen, etc.

13. The license granted by the Magistrate, Lodging House Fund clearly shows that for carrying on the business of letting out the property to be used as Holiday Home or lodge, such license was granted. The agreements referred to above also clearly show that with such stipulation only the property was let out to different organisations. Further is not a case of mere letting out the property on a rent, but the assessee also provided watch and ward, furniture and fixtures and other services. All these facts unmistakably show the intention of the assessee that he was making use of the property for business or commercial purpose. It is worth to note that in Sultan Bros. Pvt. Ltd. -vs- - CIT (1964) 51 ITR 353 at page no. 354, the Hon'ble Apex Court observed that whether a particular letting is business has to be decided in the circumstances of each case, and each case has to be looked at from a businessmen's point of view to find out whether the letting was the doing of a business or the exploitation of his property by an owner.

14. Further, in the grounds itself, the revenue pleaded that order dated 29.12.2006 under section 143(3)/254/251, in respect of assessment year 1993-94 was the same, and the assessee accepted the same without preferring any appeal. As a matter of fact, the revenue has never produced any such material in support of its contention. On the other hand, vide page No. 104 and 106 of the paper book the assessee produced the copy of an order in ITA No. 49/Cal/2000 in respect of assessment year 1995-96. In this order, a Coordinate Bench of this Tribunal clearly observed that the copy of the order in respect of AY 1993-94 was produced before the Tribunal and the Tribunal observed therein that the income from the Bani Bhawan was treated as business income. Further, vide no. 107 to 114 of the paper book, the assessee produced the order dated 26.2.2010 passed by the learned CIT in respect of AY 2001-02. In this order, vide Para (i) under ground no. 3, the learned CIT observed that the Puri Municipality has given licence to run the commercial project only as a lodging/holiday home restricting the number of

lodgers at 165, and the matter relating to the income of Bani Bhawan as a business income had already been decided in the past by the ITAT in the AYs. 1993-94 and 1995-96. The learned CIT also referred therein to the order in ITA No. 49/Cal/2000 for AY 1995-96 wherein the issue was held in favour of assessee. Following the same in respect of the AY 2001-02, learned CIT concluded that the income from Bani Bhawan Puri should be treated as business income. In the impugned order Learned CIT referred to all these facts and circumstances of the case. He also relied upon the decision reported in National Storage Pvt. Ltd. Vs CIT (1967) 66 ITR 596 (SC), for the principle that even rental income from property having limitation in its use is assessable as business income and not income from house property. It is pertinent to note that in this case also the use of property is burdened with conditions as could be found from the license granted by the Magistrate of the Lodging House Fund, Puri, which are extracted above.

15. Hon'ble Allahabad High Court in Commissioner of income Tax -vs.- Pateshwari Electrical and Associated Industries (P) Limited 282 ITR 61 (All) referred to the decision in Sultan Bros. (P) Ltd. -vs.- CIT [1964] 51 ITR 353, CEPT -vs.- Shree lakshmi Silk Mills Ltd. [1951] 20 ITR 451 (SC), CIT -vs.- Shanmugham [1984] 147 ITR 692 (Mad.), S.G. Mercantile Corpn. (P) Ltd. -vs.- CIT [1972] 83 ITR 700 (SC), and distinguished the decisions reported in Shambhu Investment (P) Ltd. [2001] 249 ITR 47 (Cal.) and CIT -vs.- Purshottam Dass [2001] 247 ITR 516 (Delhi) to reach a conclusion that when the property was used for commercial purpose by letting out the same with a furniture and fittings after obtaining Sarai licence from the District Magistrate as well as from the Dist. Health Officer and renewable from year to year, the learned CIT was right in treating the receipts as business income. This decision is application to the facts of this case on all fours.

16. Revenue could not produce the document, which they are relying upon and at the same time they are unable to demonstrate how and where the learned CIT was wrong. Viewing from any angle we do not find any error in the finding of the learned CIT that the income from Bani Bhawan Puri constitutes business income and not income from house property. We, therefore, uphold the finding of learned CIT and answer the issue in favour of the assessee.

Issue No. 2:

17. Now coming to the relief to a tune of Rs.52,21,380/- granted by the learned CIT to the assessee, we find that the learned AO, basing on the incriminating documents with identification mark TCS-22, TCS-44 and TCS-48 assessed undisclosed investment at Rs,71,69,487/-. To this amount, learned AO also added gross profit at 10.36%. Learned AO also considered payments to Anuj Textiles and added the amount along with Gross Profit Ratio at 10.36%. Finally the learned AO added Rs.2,60,000/- in respect of the amount under TCS-2, to reach the final figure of Rs.91,65,486/- on account of undisclosed or unexplained investment or income.

18. We have carefully perused the order of the learned CIT. After an elaborate discussion and comprehensive consideration of the documents under TCS-2, TCS-4, TCS-9, TCS-22, TCS-44 and TCS-48, the learned CIT reached at Rs.1,00,79,633/- as the total amount of turnover. Learned CIT did not agree with the learned AO in respect of Gross Profit Ratio, and as against the Gross Profit Ratio of 10.36% framed by AO, learned CIT enhanced it to 11.55% and added the difference amount to the income of the assessee. As already stated above, the assessee does not challenge the enhancement of the turnover from Rs.95,61,486/- as framed by the learned AO to Rs.1,00,79,633/- or enhancing the Gross Profit Ratio from 10.36% to 11.55%. The entire dispute in this appeal revolves around the finding of the learned CIT that the same amount was rotated for four times to make the total turn over of Rs. 1,00,79,633/- as such of only one fourth of this total turn over alone is the investment which has to be added to the income of the assessee instead of adding the total turnover to the income of the assessee. For this purpose, we have to look into the order of the learned CIT and a line of reasoning given by him to reach such a conclusion that the turnover was accumulated by rotating the sale amount to purchases for four times a year, and that Rs.25,19,908/- is the actual amount of undisclosed investment.

19. It could be seen from the record that initially the assessee has claimed that the sales amount was ploughed in at least four times for purchases during the period; therefore, the undisclosed investment should be estimated at 1/4th of the turnover. However, subsequently he changed the version at claimed that the investment being

rotated nine times on the basis of the disclosed accounts and the ratio of stock to turnover in the tax audit report. Learned CIT appreciated the record and account books of the assessee to find out the truth and rejected the second version of the assessee. On verification of the payments made by the assessee the learned CIT found that the payments are of small amounts and periodic in nature and the entire amount has not been paid in one time. The payments were from to time during the financial year. On considering the purchases and the goods sold learned CIT further found that the amounts realized on sale of goods were again ploughed in by way of purchases, and this cycle of sales and purchases continued, having considered the nature of business of the assessee, learned CIT came to an opinion that monies in such manner could be rotated four times in a year. On this premises, learned CIT estimated undisclosed investment at Rs.25,19,908/- being 1/4th of the total turnover of Rs.1,00,79,633/-. Neither the Revenue nor the assessee could explain to us as to how the learned CIT was wrong in this process. Merely because the documents recovered from the premises of assessee in the survey conducted on 18.9.02.2003 indicate that there was undisclosed turnover of Rs.91,65,486/- as per learned AO or Rs.1,00,79,633/- as per learned CIT, the entire turnover amount cannot be treated as the undisclosed income or investment, without having regard to the facts and figures surrounding the business of the assessee. While assessing the income of the assessee, should have had to the common course of natural elements, and public and private business in relation to facts and figures obtained in a particular case. It seems learned AO did not consider this aspect and the learned CIT having gone through the details relating to the purchases sales and payments in respect of the business of the assessee reached a conclusion that the total turnover was accumulated through a periodic cycling of the sales amount to purchases and it generally takes three months for each cycle to complete. This finding of the learned CIT is in conformity with the initial plea of the assessee that the funds were being rotated at least four times during the year.

20. Now coming to the aspect of enhancing the Gross Profit Ratio from 10.36% to 11.55%, learned CIT has considered the Gross Profit Ratio rate by working the formula, i.e. $\text{Gross Profit Ratio} = \frac{\text{GP on sales}}{\text{Sales}} \times 100$. By working out like this he arrived at 11.55% of Gross Profit Ratio on the total turnover of Rs.1,00,79,633/-. By calculating the G.P. in that method and adding such amount to the undisclosed amount

of Rs.25,19,908/-, learned CIT reached the amount to be added back at Rs.39,44,106/-. By doing so, the learned CIT granted relief to a tune of Rs.52,21,380/-. We are at loss to understand where exactly the ld. CIT erred in this process. The reasoning adopted by the learned CIT is scientific and the findings reached by him are impeccable. We uphold the same. We, therefore, find this issue against the revenue and dismiss Ground No. 2.

21. In view of our findings on issue no. 1 & 2, we dismiss grounds no. 1 & 2. Consequently appeal is also dismissed, confirming the findings of ld. CIT on these aspects.

22. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open Court on September 14, 2016.

Sd/-
(Waseem Ahmed)
Accountant Member

Sd/-
(K. Narasimha Chary)
Judicial Member

Kolkata, the 14th day of September, 2016

*Copies to : (1) Income Tax Officer,
Ward-41(1), Kolkata,
18, Rabindra Sarani, Kolkata-700 001*

*(2) Sri Shyamal Banerjee,
128A, Bidhan Sarani,
Kolkata-700 004*

*(3) Commissioner of Income Tax(Appeals)-XXX, Kolkata
(4) CIT- ,Kolkata;*

(5) The Departmental Representative

(6) Guard File

By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.