

आयकर अपीलीय अधिकरण, मुंबई "ई" खंडपीठ मे
Income-tax Appellate Tribunal -"E"Bench Mumbai

सर्वश्री राजेन्द्र,लेखा सदस्य एवं अमरजीत सिंह, न्यायिक सदस्य

Before S/Sh.Rajendra,Accountant Member and Amarjit Singh,Judicial Member

आयकर अपील सं./I.T.A./7364/Mum/2010, **निर्धारण वर्ष /Assessment Year: 1999-2000**

Sukhsagar Traders Private Ltd. 301A, Solaris-I, 72 Saki Vihar Road Andheri East , Mumbai Mumbai-400 072. PAN:AAACS 6165 P	Vs.	ITO-8(3)2 Aayakar Bhavan, M.K Road Mumbai-400 020.
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

राजस्व की ओर से / **Revenue by:** Dr. A.K. Nayak- DR

अपीलार्थी की ओर से /**Assessee by:** Dr. Paras Jain

सुनवाई की तारीख / **Date of Hearing:** 21/03/2017

घोषणा की तारीख / **Date of Pronouncement:** 31.03.2017

लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-

Challenging the order dt.3.8.2010 of CIT(A), Mumbai the assessee has filed the present appeal. Assessee-company filed its return of income on 31. 01. 1999,declaring income Rs.13. 16 lakhs.Initially return was processed u/s.143(1) of the Act. Later on notice u/s.148 of the Act was issued on 27.3.2006 after recording the reasons for re-opening.The Assessing Officer (AO)completed the assessment u/s.143(3)r.w.s 147 of the Act,determining its income at Rs. 41.46 lakhs.

2.First Ground of appeal is about upholding the action of AO in reopening of the assessment u/s.147of the Act.During the appellate proceedings,before the First Appellate Authority (FAA) the assessee argued that the explanation to section 2(b) to section 147 were not applicable to House Property income,that the provisions of section 147 could not be invoked where the issue was debatable,that change of head amounted to change of opinion. After considering the submission of the assessee ,the FAA referred to Explanation 2 of section 147 and held that the assessee had offered rental income as business income, that it had claimed expenses to the tune of Rs.36.05 lakhs resulting in under assessment on account of classifying the income under the wrong head, that it had claimed several expenses that were otherwise not allowable under the head House Property income,that the action of the assessee resulted in under assessment of income, that it was covered by Explanation 2 of section 147 of the Act. He further held that cases relied upon by the assessee i.e. Rohan Dyes and Intermediaries Ltd.(270ITR350),Karnani Properties Ltd.(82ITR547) and Pericels Foods (P) Ltd. (17SOT

602)were not applicable to the facts of the case.He further observed that the AO had relied upon the judgment of the Hon'ble Apex Court in the case of Shambu Investment (P.) Ltd. (263ITR143),that the facts of the case under consideration were squarely covered by the decision of the above referred judgment,that the primary intention was to let out the property on monthly rental basis, that in case of Sindoori Traders, a sister concern, the assessee had offered the rental income as House Property income in AY 2006-07, that the reopening was perfectly in accordance with the Act.

2.2.During the course of hearing before us the Authorised Representative (AR) stated that there was no tangible material for reopening the assessment for the year under appeal.The Departmental Representative(DR) supported the order of AO and stated that the Tribunal had decided the issue against the assessee while adjudicating the appeal for AY 2000-01.(ITA/6291/Mum/2011,dt.24.07.2013).

2.3.We have heard the rival submissions and perused the material before us.We find that the identical issue has been deliberated upon and decided by the Tribunal while deciding the appeal for the AY 2000-01 (supra). We are reproducing the relevant portion of the order.:-

“8. A perusal of the reasons recorded clearly show that the assessee has shown receipts from business centre under the head business income and has claimed expenses under various heads. It can be further seen that in the earlier year, the income of the assessee has been taxed under the head “Income from House property. This by itself is a sufficient material for the reopening of the assessment. It is also seen that in subsequent assessment year i.e. 2003-04, the same treatment has been given to the receipts from business centre i.e. it has been taxed under the head “Income from House property. Thus, previous years findings and subsequent year’s findings are sufficient for reopening of the assessment. Therefore, the plea of the Ld. Counsel that no tangible material was available is contrary to the facts of the case. Therefore, the cases relied upon by the assessee are clearly distinguishable on facts. It cannot also be said that it is a case of change of opinion as the original return has been accepted u/s. 143(1) of the Act therefore, it cannot be said that the AO has formed any opinion. For this proposition, we draw support from the decision of the Hon’ble Jurisdictional High Court in the case of Dr. Amin’s Pathology (supra). Further, facts on record show that notice u/s. 148 is dt. 23.3.2007 and in A.Y. 2003-04 the Ld. CIT(A) has confirmed the order of the AO taxing income under the head “Income from house property”. The order of the Ld. CIT(A) dt. 24.1.2007 is in appeal No. CIT(A)XXIX/ITO-8(3)(2)/IT.193/2005-06. Thus, the order of the Ld. CIT(A) for subsequent assessment year in itself was a tangible material before the AO for reopening the assessment. Therefore, reliance on the decision of the Hon’ble Supreme Court in the case of Kelvinator of India Ltd. 320 ITR 561 is misplaced.

9. Considering all the facts on record, in the light of the provisions of Sec. 147 of the Act, we have no hesitation to hold that the reopening is valid as there is neither a change of opinion nor it is a case of absence of any tangible material. Therefore, we do not find any reason to interfere or tamper with the findings of the Ld. CIT(A).

10. In the result, the appeal filed by the assessee is dismissed.”

Respectfully following the above we decide the first two grounds of the appeal against the assessee.

3.Third Ground of appeal is about upholding the addition of Rs.2.46 lakhs under the head

rental income. During the assessment proceedings the AO noticed that the gross rent receipts, as per TDS certificate, were of Rs.54.58 lakhs, that as per the P&L account such receipts were of Rs.52.43 lakhs only as per the direction of AO the assessee explained the difference of Rs.2.46 lakhs was due to refund of the said amount to Kaybee Flex Infotech Enterprises Pvt. Ltd.(Kaybee). The AO observed that as per the TDS certificate the assessee was charging monthly rent of Rs.38,500/- from Kaybee, that the annual rent worked out to Rs.4.62 lakhs, that Kaybee had deducted TDS Rs.92,400/-, that the assessee had claimed credit for TDS but did not offer the entire gross receipts to tax, that the assessee had not made any plausible explanation in that regard, that there was no proof that KB had deducted TDS without actually making the payment, that as per the provisions of TDS income has to be assessed in the year in which the credit for TDS was claimed. Finally, the AO made an addition of Rs. 2.46 lakhs to the income of the assessee.

3.1. Aggrieved by the order of the AO, the assessee preferred an appeal before the FAA. After considering the available material the FAA held that the assessee had not produced any evidence that the disputed amount was not received by it during the year under consideration, that the AO was justified in making the addition. Before us, the AR stated that the assessee had returned the amount in question to the tenant on a specific query by the Bench about evidence of returning the money, he stated that he was not in a position to submit the same. The DR supported the order of the FAA.

3.2. After considering the rival submissions we are of the opinion that the order of the FAA does not suffer from any legal or factual infirmity. The assessee had made a claim but had not produced any evidence in its support. Therefore, claim made by it, was rightly rejected by both the authorities. Upholding the order of FAA, we decide Ground No.3 against the assessee.

4. Next Ground is about not allowing any expenses from the income of the sub-let property. During the assessment proceedings, the AO found that the assessee had taken a property (A-701, Sunset Bldg. 1 Raheja Vihar, Powai) on monthly lease of Rs.20,000/-, that it belonged to one of the directors of the company, that it was sub-let at monthly rent of Rs.50,000/-. He held that the rental income was to be assessed under the head income from house property.

4.1. In the appellate proceedings, the FAA held that the assessee contented that certain expenses were to be allowed against sub-let properties. As it did not make any submissions as to what type of expenses were incurred in earning income of Rs.6.00 lakhs, that in absence of any proof, the order of the AO had to be endorsed.

4.2.Before us, the AR stated that assessee had incurred certain expenses. We find that it had not produced any evidence before AO/FAA in support of its claim.Similar is the position when the case was heard by us.Therefore, we do not want to interfere with the order of the FAA confirming the same we reject Ground No.4.

5.Next Ground is about not allowing depreciation and other expenses on leased and other assets. During the assessment proceedings the AO found that the assessee had claimed an expenditure of Rs.36.00 lakhs under various heads of expenditure against business income (rent). He taxed the rental income under the head income from house property and disallowed the expenses claimed against the said income.

5.1.Before the FAA,during the appellate proceedings the assessee raised an alternative plea, that the income from commission should be treated as business income and expenses should be allowed accordingly.The FAA observed that against the income from commission of Rs.50,489/- the assessee had claimed expenditure to the tune of Rs.36.05 lakhs, that the claim made by the assessee included depreciation on building of Rs.16.87 lakhs, that the claim of the assessee was not admissible as the income was assessed under the head house property income,that the expenditure also included rent and taxes of Rs.2.40lakhs, that the said amount was paid by the assessee to its director for taking his premises on lease at monthly rent of Rs.20,000/-, that there was no merit in the claim made by the assessee in claiming expenses of Rs.36.00 lakhs against income of Rs.50,489/-,that the AO was reasonable enough to allow 10% of the commission as expenses incurred for earning commission. Finally,he upheld the order of the AO.

5.2.Before us, the assessee made same submissions that were made before the FAA.We find that the assessee had earned commission income of Rs.50,000/- (approx), that it had claimed expenditure of Rs.36.0 lakhs(approx.) against the said income, that his alternate claim was rejected by the FAA.

We find that it has not produced any evidence to prove that expenditure claimed by it was incurred for business purposes.The assessee has let out the property and had been rightly assessed under the head income from house property. Naturally, no depreciation can be allowed against such income.We further find that AO had allowed 10% of the commission income as allowable expenditure and that the FAA has not disturbed his finding.In our opinion,there is no need to interfere with his order.So, confirming the order of the FAA we decide the fifth ground of appeal against the assessee .

6.Next two Grounds of appeal are also about commission income of Rs.50,489/-.The assessee has objected to taxing income under the head income from other sources instead of business income and restricting the deduction to 10% of the income. In the immediate earlier paragraph,we have narrated the facts of the case.We find that the assessee has not produced any evidence to show that commission income was not income from other sources.Secondly he has not produced any evidence to justify the incurring of expenditure against the said commission income.The FAA has held that 10% of income should be allowable as deductible expenditure.We are of the opinion that there is no need to interfere with the order of the FAA.So, confirming his order, Ground No.6&7 are decided against the assessee.

7.Last Ground of appeal is about not allowing set off of brought forward unabsorbed depreciation of Rs.4.07lakhs.We find that FAA had given a categorical finding of fact that no business was carried out by the assessee during the year under consideration and therefore, claim made by the assessee had to be rejected.In our opinion,there is no infirmity in the order of the FAA.Confirming his order,we decide last GOA against the assessee .

As a result, appeal filed by the assessee stands dismissed.

फलतः निर्धारिती द्वारा दाखिल की गई अपील नामंजूर की जाती है.

Order pronounced in the open court on 31st March,2017.

आदेश की घोषणा खुले न्यायालय में दिनांक 31 मार्च,2017 को की गई ।

Sd/-

Sd/-

(अमरजीत सिंह / Amarjit Singh)

(राजेन्द्र / Rajendra)

न्यायिक सदस्य / JUDICIAL MEMBER

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक/Dated : 31.03.2017.

Jv.Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त

5.DR “ ” Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.