

IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH : KOLKATA

[Before Hon’ble Sri N.V.Vasudevan, JM & Shri M.Balaganesh, AM]

I.T.A No. 984/Kol/2016

Assessment Year : 2011-12

I.T.O., Ward-8(1)
Kolkata

-vs.-

M/s Batram Properties Pvt. Ltd.
Kolkata

[PAN : AACCB 0291 R]

(Appellant)

(Respondent)

For the Appellant : Shri Arindam Bhattacharjee, Addl.CIT
For the Respondent : Shri Soumitra Choudhury, Advocate

Date of Hearing : 08.01.2018.

Date of Pronouncement : 12.01.2018.

ORDER

Per N.V.Vasudevan, JM

This is an appeal by the Revenue against the order dated 16.03.2016 of C.I.T.(A)-16, Kolkata relating to A.Y.2011-12.

2. Grounds of appeal raised by the revenue read as follows :-

“1. Whether in law and on the facts and circumstances of the case, the CIT(A) erred in deleting the addition of the A.O. relying on the judgment in the case of M/s. Chennai Properties and Investments Ltd. vide Civil Appeal No.4494 of 2004 of Hon'ble Apex Court overlooking that the facts were distinct.

2. That the appellant reserves the right to amend, alter or add to any ground(s) of appeal before or at the time of hearing of the appeal. “

3. The Assessee is a company. Its source of income is income deriving from sub-letting of properties as well as from letting out properties owned by the assessee. In so far as the dispute in this appeal is concerned it pertains to the income received by the assessee from letting out two properties viz. a property at Stephen House at Kolkata-1 and another property at Light House and New Empire Building. As far as the property at Humayan

Court is concerned the assessee is a tenant under M/s Humayun Properties Ltd. The assessee sub-let the property India Bulls Securities Ltd, Reliance Web Store and Vodafone. As far as the Light House and New Empire Building is concerned the assessee is a tenant of M/s. Humayan Properties Ltd.. The assessee has sub-let its property to Devyani International. The income received by the assessee from sub-letting was declared under the head 'Income from business. The details of the income received from sub-tenants is as follows :-

BATRAM PROPERTIES PVT. LTD Statement of Income from business for the year ended 31st March,2012 Asst. Year: 2011-12 PAN # AACCB0291R		
INDIA BULLS VENTURES LTD		2070000.00
DEVYANI INTERNATIONAL LTD		5238182.00
RELIANCE WEBSTORE LTD		454940.00
VODAFONE MOBILE SERVICES LTD		1098994.00
TOTAL		8862116.00

4. It is the plea of the assessee that the assessee collected licence fee from the aforesaid tenants not only for use of the premises but has also provided other services like installation of a transformer, providing lighting in common area, deployment of security personnel and other facilities. It is the plea of the assessee that it was carrying out regular activity and the letting out of the property has to be regarded as income under the head income from business. This was rejected by the AO.

5. The CIT(A) however noticed that on identical facts in respect of identical premises taken on lease by another group company of the assessee namely M/s. Konark

Furniture Pvt. Ltd. The Tribunal in ITA No.1042/Kol/2012 for A.Y.2007-08 held that income was to be assessed under the head income from business. Following the aforesaid view the CIT(A) directed the AO to assess the income in question under the head income from business. The CIT(A) also found that in A.Y.2009-10 and in earlier years licence fee in respect of the aforesaid properties was treated as income from business. Keeping these facts in mind and also placing reliance on the decision of the Hon'ble Supreme Court in the case of Chennai Properties Civil Appeal No.4494 of 2004

6. Aggrieved by the order of CIT(A) the revenue has preferred the present appeal before the Tribunal.

7. We have heard the submissions of the Id. DR, who relied on the order of the AO. The Id. DR further pointed out that the CIT(A) while placing reliance on the decision of the Hon'ble Supreme Court in the case of Chennai Properties Civil Appeal No.4494 of 2004 has not discussed as to how the ratio laid down in the aforesaid decision is applicable to the facts of the assessee's case. The Id. Counsel for the assessee filed before us a copy of the order of assessment in assessee's own case for A.Y.2009-10 in which the AO has himself accepted similar income received as income from business as declared by the assessee.. A copy of the order of assessment was filed before us. Copy of the decision of ITAT in the case of M/s. Konark Furniture Pvt. Ltd. (supra) is also placed before us.

8. We have carefully considered the rival submissions. Under section 22 of the Act the charge to tax of income from house property is based on the ownership of such property. The admitted position in the present case is that the assessee is only a tenant and not the owner of the property. It is also not the case of the revenue that the tenancy is for a period of more than 12 years which could be construed as ownership rights u/s 27(iiib) of the Act. Therefore the income in question cannot be assessed as income from

house property. This Tribunal on an identical facts in respect of the very same property a portion of which on lease to a sister concern M/s Konark Furniture Pvt. Ltd dealt with the income from letting has to be assessed in ITA No.1042/Kol/2012by order dated 12.12.2014. The Tribunal held as follows :-

"5. We have heard the rival contentions and gone through the facts and circumstances of the case, We find that the assessee is a registered limited company deriving its income from licence fees from different sub-tenants, The assessee is a tenant of Dalhousie Properties Ltd. under Tenancy Agreement dated 01-04-2001 in respect of ground floor space at Stephen House-63 & 58 of Hemanta Basu Sarani, Kolkata-700 001. The assessee was given right to, "assigned, sub-let. under-let or part with any possession of the room or any part ,of room or permit any person to occupy even in case of temporary absence of assessee". By virtue of this agreement assessee collected licence fees and other charges from sub-tenants and the Revenue all along has accepted the income declared by the assessee under the head "profits and gains of business or profession". Ld. counsel before us argued on the concept of consistency on the given facts of the case. In this case also the terms of the lease of business assets, the intention of the lessor is that the asset leased out must remain and be treated as commercial asset and there is an exploitation of the commercial asset during the lease period and lease received is assessable as business income, In view of the above facts of the case that the assessee is consistently declaring the receipt of income from sub tenants under the head, "profits and gains of business or profession", we are of the view that principle of consistency will apply in this case as the issue stand covered by the decision of coordinate bench in the case of Mzs, Banwarilal Goel & Sons Vs. ITO in ITA No. 374/K/2009 for AY 2005-06 dated 13.02,2014, wherein it is held as under:-

"6. We have heard the rival contentions, perused the material on record and gone through facts and circumstances of the case, We find that the Hon'ble Calcutta High Court in the case of Shambhu Investment held that "the mere fact of attachment of income to any immovable properly cannot be the sole factor for assessment of such income as income from house property. It is necessary to find out the primary object of assessee while exploiting the property. If it is found that the main intention is for letting out the property or any portion thereof the same must be considered as rental income or income from house property. In case, it is found that the main intention is to exploit the immovable property by way of complex commercial activities, in that event it must be held as business income ", The view was expressed by Hon'ble Calcutta High Court and approved by Hon'ble Supreme Court in case of Shambhu Investment (P) Ltd.(Supra) In

this view of the matter, it is clear that what is to be really seen is whether the property is exploited by way of complex commercial activity or not. In this backdrop, it is quite' appropriate to refer to the observations made by the Hon'ble Supreme Court in the landmark judgment of Radhasoamy Satsang (supra), referring to the case law of Hoystead V Commissioner of Taxation [1926] AC 155 (PC), wherein it is observed as under :-

Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle – namely, that of a setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant has not been traversed. In that case also a defendant is bound by the judgment although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken",

Hon'ble Supreme Court also referred to their own judgment in the case of Parashuram Pottery Works Co , Ltd. V ITO [1977] 106 ITR 1 (SC), wherein at page 10 it was stated that "01 the same time, we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must in due course repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity ", Hon'ble Supreme Court was of the view that the assessments are certainly quasi-judicial and observations so made in the case of Parashuram Pottery Works Co. Ltd. (supra) would apply to the assessment proceedings. In the case of Parashuram Pottery Works Co. Ltd. it was observed that "res judicata does not apply in income tax proceedings and each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have all owed that position to' be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year".

This principle has been upheld and re-stated by Hon'ble Supreme Court recently in the case of PFH Mall & Retail Mangt. P. Ltd. dated

04.09.2012, wherein reiterated the Rule of Consistency and applied the same on the very issue, that is whether the income in question is to be treated as income from business or as income from house property. In view of these discussions and bearing in mind the fact that it, was a case of rental or commercial utilization of properties, which has been accepted, we are of the considered view that there is no reason to uphold this deviation. In view of the above discussions, we uphold the grievance of the assessee and direct the Assessing Officer to treat the income in question as income from business as has been in preceding and subsequent assessment year. This issue of assessee's appeal is allowed.

6. In view of above facts and circumstances, we confirm the order of CIT(A) and this issue of revenue's appeal is dismissed . “

9. In the above ruling namely applying to the facts of the present case of the assessee as in A.Y.2008-09 the revenue has accepted the head of income in the case of the assessee. Respectfully following the decision of the tribunal we uphold the order of CIT(A) and dismiss the appeal of the revenue.

10. In the result the appeal of the revenue is dismissed.

Order pronounced in the Court on 12.01.2018.

Sd/-
[M.Balaganesh]
Accountant Member

Sd/-
[N.V.Vasudevan]
Judicial Member

Dated : 12.01.2018.

[RG Sr.PS]

Copy of the order forwarded to:

1. M/s Batram Properties Pvt., Ltd., 20A Lindsay Street, 3A, Humayan Place, Light House Cinema, Kolkata-700087.
2. I.T.O., Ward-8(1), Kolkata.
3. CIT(A)-16, Kolkata
4. C.I.T.-3, Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head Of Office/ D.D.O., ITAT Kolkata Benches

