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ASSISTANT COMMISSIONER OF INCOME TAX vs. UNITED HOTELS LIMITED

IN THE ITAT DELHI BENCH 'G'

ANIL CHATURVEDI, AM & KULDIP SINGH, JM.

ITA No. 2115/Del/2017

Jul 28, 2021

(2021) 62 CCH 0363 DelTrib

Legislation Referred to

Section 14A, 36(1)(ii), 143(3)

Case pertains to

Asst. Year 2013-14

Cases Referred to

Radhasoami Satsang vs CIT (1992) 193 ITR 321 (SC)
Shazada Nand & Sons vs. CIT (1997) 108 ITR 358
Maxopp Investment Ltd vs. CIT (2011) 203 Taxman 364
Joint Investments Pvt. Ltd. vs CIT (2015) 372 ITR 694

Counsel appeared:

Prakash Dubey, Sr. D.R for the Assessee.: Jagdish Ajmani, C.A for the Revenue

ANIL CHATURVEDI, AM.

1. This appeal filed by the Revenue is directed against the order dated 22.11.2016 of the Commissioner of Income Tax (Appeals)- 13, New Delhi relating to Assessment Year 2013-14.

2. The relevant facts as culled from the material on records are as under :

3. Assessee is a company stated to be running a Five Star Hotel in the name of 'The Ambassador' located at Sujan Singh Park at Delhi. Assessee electronically filed its return of income for A.Y. 2013-14 on 26.09.2013 declaring total income of Rs.7,81,77,470/-. The case was selected for scrutiny and thereafter, the assessment was framed u/s 143(3) of the Act vide order dated 08/02/2016 and the total income was determined at Rs.9,43,93,560/-.

4. Aggrieved by the order of AO, assessee carried the matter before the CIT(A) who vide order dated 25.11.2016 allowed the appeal of the assessee. Aggrieved by the order of CIT(A), Revenue is now in appeal before us and has raised the following grounds of appeal:

> *1. " That on the facts and circumstance of the case, the Ld. CIT(A) has erred in ignoring the fact that the working arrangements agreements clearly provides that a fixed percentage - profits to be paid to M/s Sir Sobha singh & Sons Pvt. Ltd. as compensate, which clearly makes it an application of income."*
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> *2. "That on the facts and circumstances of the case, the Ld.. CIT(A) has erred in not appreciation of the fact that the sharing of profit between two entities is clearly covered in the ambit of application of income and expense on the account cannot be allowed as deductible in P& L account."*
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> *3. "That on the facts and circumstances of the case, the ld CIT(A) has erred in not appreciation of the fact that the assessee has paid commission to the share holder Directors without any services rendered by them to the company any only to bypass the provision of Section 36(1)(ii) so as to not declared the dividend."*
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> *4. "That on the facts and circumstances of the case, the Ld CIT(A) has erred in not appreciation of the fact that the AO made the disallowance in accordance with sec. 14A r.w.r 8D of the IT Act only."*
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> *5. "The appellant craves, leave or reserving the right to amend modify, alter add or forego any groups) of appeal at any time before or during the hearing of this appeal."*

5. Ground No.1 & 2 are interconnected and therefore, both are considered together.

6. During the course of assessment proceedings, AO noticed that assessee has claimed compensation of Rs.1,26,00,000/- paid to Sir Sobha Singh & Sons Pvt. Ltd. (SSPL). The assessee was asked to submit the details of payments and also justify its allowability. In response to the query, assessee inter alia submitted that in order to run the hotel business at Delhi, assessee in the year 1951 had taken the hotel premises on lease from Sir Sobha Singh & Sons Pvt. Ltd. (SSPL) at an annual rent of Rs. 1 lac. The hotel building is situated in the heart of Delhi City on a land of 7.58 acres. The owner of the land was continuously asking for upward revision of rent and for that it had also filed various suits against the assessee including suit for eviction of building. In the year 1996 a working arrangement agreement was reached between the owner of the property and the assessee for the revision of rent. As per the agreement, the minimum rent payable for the period under consideration was Rs.10.50 lac per month and thus the assessee had paid aggregate amount of Rs.1,26,00,000/-. It was thus submitted that the expenses was an allowable expenditure. The submissions of the assessee was not found acceptable to AO. AO on perusing the working arrangement agreement noted that as per the agreement assessee had agreed to pay to SSPL an amount of 5% of "gross operating profit" of the hotel every year w.e.f 01.04.1996 subject to minimum guaranteed amount. The AO therefore asked the assessee to show-cause as to why the claim of compensation paid to SSPL not be disallowed as it was a case of application of income and not a case of diversion of income by over riding title. The submissions of the assessee was not found acceptable to AO. AO was of the view that the amount of compensation paid by the assessee falls within the definition of application of income and therefore it is not a deductable expense. He accordingly disallowed the payment of Rs.1,26,00,000/-. Aggrieved by the order of AO, assessee carried the matter before the CIT(A) who decided the issue in favour of the assessee. Aggrieved by the order of CIT(A), Revenue is now before us.

7. Before us, Learned DR took us through the findings of AO and further submitted that Learned CIT(A) has erred in holding that the ratio of the decision in the case of Shitaldas Tirath Das (33 ITR

367) which has been relied upon by AO is not applicable to the facts of the case. He further submitted that the principle of res judicata is not applicable to income tax proceedings and each assessment year is an independent year. He submitted that merely because the enhanced compensation that has been paid by assessee since 1999 onwards has not been disallowed in any of the earlier assessment years, that cannot be the ground for allowing the expenses. He thus supported the order of AO.

8. Learned AR on the other hand reiterated the submissions made before the lower authorities. He further pointing to the working arrangement agreement that has been reproduced by AO in the order, submitted that the agreement continued to be a rent agreement. He thereafter submitted that though there is a clause in the agreement which provides that in case the profit increases manifold, then the assessee shall pay 5% of the gross operating profit, but he submitted that this clause had not been triggered in the year under consideration as the gross operating profit was not higher than the minimum rent. He submitted that during the year the gross operating profit was Rs.697.24 lacs & 5% of it works out to Rs.34.86 lacs whereas the rent paid was Rs.126 lacs. He therefore submitted that since the rent was not paid according to the gross profits, the very basis of addition was incorrect and that rent has not been paid in proportion of profit. He further submitted that assessee has been paying the enhanced rent since 1996 (when the agreement was entered into) and the assessee has been allowed the claim of deduction of the rent paid. He submitted that on same set of facts, a different view is not permissible. He further submitted that the case law relied upon by AO is not applicable to the present facts. He thus supported the order of CIT(A).

9. We have heard the rival submissions and perused the materials available on record. The issue in the present ground is with respect to allowability of enhanced compensation. AO had disallowed the expenses but CIT(A) has held that AO was not justified in disallowing the expenses. It is an undisputed fact that the assessee had entered into an agreement in 1996 with the owners of the property and pursuant to which the assessee has been paying the enhanced rent. Before us, Learned AR has pointed out that though the clause of the agreement speaks about the payment of rent in proportion of the gross profit but the said clause has not been triggered by the parties. The aforesaid contention of the Learned AR has not been controverted by Revenue. We further find that assessee has paid enhanced rent pursuant to the agreement entered into in 1996, but in any of the earlier years in the assessments that have been framed, no disallowance of rent has been made by Revenue. We agree with the contention of Learned DR that the principle of res judicata is not applicable to income tax proceedings and each assessment year is an independent but at the same time the Hon'ble Supreme court in the case of Radhasoami Satsang vs CIT (1992) 193 ITR 321 (SC) has held that even though principles of res judicata do not apply to income tax proceedings, but where a fundamental aspact permeating through different assessment years has been found as the fact one way or the other and the parties have allowed the position to be sustained by not challenging the order, then it would not be appropriate to allow the position to be changed in the subsequent year. We further find that based on the view of disallowance of enhanced rent paid in the year under consideration, no reassessment proceedings for earlier years has been initiated by the Revenue. Considering the totality of the aforesaid facts and relying on the aforesaid decision rendered in the case of Radhasoami Satsang (supra), we find no reason to interfere with the order of CIT(A). Thus the ground of Revenue is dismissed.

10. Ground No.3 is with respect to the commission paid to shareholder Directors.

11. During the course of assessment proceedings, AO noticed that assessee has made payment of Rs.33,03,384/- to the three working Directors namely; Shri Narinder Kumar, Shri Virender Kumar and Shri Rajinder Kumar. AO noted that the aforesaid three persons were also the shareholders of the assessee company. AO was of the view that the provision of 36(1) (ii) of the Act were applicable in the present case. AO was of the view that had the amount not been paid as commission to the three Directors, the assessee would have to pay dividend to those persons. He noted that no dividend was

declared by the assessee in the past number of years and the assessee has thus saved on dividend tax. He therefore, held that the payment of Commission to the three Director employees to be not allowable expenditure and accordingly made addition of Rs.33,03,384/-.

12. Aggrieved by the order of AO, assessee carried the matter before the CIT(A). CIT(A) noted the fact that the terms of appointments of the Directors have been approved by shareholders/directors meetings held in 2008, the total remuneration paid to the directors was within the limits fixed as per Section 309 and 198 of the Companies Act, 1956, similarly disallowance of commission made in the A.Y. 2003-04 was deleted by the CIT(A) and deletion was upheld by the Tribunal. CIT(A) also noted that assessee has been paying dividend for more than 20 years and for the year under consideration, it has declared dividend @ 50% amounting to Rs.4,20,00,000/-. Considering the aforesaid facts he held that AO had wrongly held that assessee has avoided paying dividend tax by making payment of commission to the Directors. He accordingly deleted the addition made by AO. Aggrieved by the order of CIT(A), Revenue is now before us.

13. Before us, Learned DR pointing to the observations made by AO supported the order of AO. He further submitted that CIT(A) has erred in deleting the addition made by AO.

14. Learned AR on the other hand reiterated the submissions made before the lower authorities and further submitted that out of the three working whole time directors, Mr. Rajinder Kumar and Mr. Virender Kumar are the whole time directors of the company since 1968 and Mr. Narinder Kumar is the whole time directors of the company since 1998. He submitted that Mr. Rajinder Kumar has done Hotel Management from Cornell University USA and before joining, he worked in various hotels internationally. He submitted that he contributes his expert knowledge and skill in the functioning of the hotel. With respect to Mr. Narinder Kumar, Learned AR submitted that he is a qualified Chartered Accountant from England & Wales and he shares his professional knowledge and looks after the accounting, finance, budgeting, etc, of the hotel working. With respect to Mr. Virender Kumar, it was submitted that he is a graduate and has almost fifty years experience of the hotel industry. Learned AR thereafter submitted that Commission paid to working Directors were within the limits specified u/s 198 & 309 of Companies Act, 1956, the payment of commission has been duly approved by the shareholders. He further submitted that identical payment of commission was disallowed by the AO in the Year 2003-04 but CIT(A) had deleted the addition and the action of CIT(A) was upheld by the Co-ordinate Bench of Tribunal. He further submitted that the AO has wrongly assumed that company has not been paid dividends but on the contrary assessee during the year under consideration has paid dividend of Rs.4,20,00,000/- which works out to 50%. He also submitted that assessee has also paid dividends in the past. He thereafter submitted that the case laws relied upon by the AO are distinguishable on facts and therefore not applicable to the present facts. He submitted that on the contrary the Hon'ble Apex Court in the case of Shazada Nand & Sons vs. CIT (1997) 108 ITR 358 has held that the sharing of profit by employees should be encouraged by adopting a progressive and liberal approach. He thus supported the order of CIT(A).

15. We have heard the rival submissions and perused the materials available on record. The issue in the present ground is with respect to deleting the disallowance made by AO of the commission paid to the whole time Directors of the company. It is an undisputed fact that three whole time working Directors had been paid commission and the commission payment is as per the limits prescribed under the Companies Act, the commission payment has been approved by the shareholders in the general meeting of shareholders. It is the case of AO that no dividend has been paid by the assessee and had the assessee not paid the commission, it would have been required to distribute the amount as dividend necessitating the payment dividend tax. The aforesaid observation of the AO of assessee not paying of dividend is contrary to the fact as the assessee has been paying dividend in the past and during the year under consideration, assessee has paid dividend @ 50% to its share holders. Before us, Revenue has

not pointed out any fallacy in the findings of CIT(A) nor has controverted to the factual submissions made by Learned AR. Considering the totality of the aforesaid facts, we find no reason to interfere in the order of the CIT(A). Thus the ground of Revenue is dismissed.

16. Ground No.4 is with respect to disallowance u/s 14A r.w.r 8D of the Act.

17. AO noted that during the year assessee had earned dividend of Rs.50,900/-. He was therefore of the view that Sub Section (3) of Section 14A of the Act were applicable in the present case. He was of the view that even if the assessee has claimed to have not incurred any expenditure for earning dividend, the expenditure for earning such exempt income was required to be disallowed. He thereafter by following the methodology prescribed under Rule 8D of the Act worked out the disallowance u/s 14A of the Act of Rs.3,12,707/-.

18. Aggrieved by the order of AO, assessee carried the matter before the CIT(A) who after relying on the decision rendered by Delhi High Court in the case of Maxopp Investment Ltd vs. CIT (2011) 203 Taxman 364 and in the case of Joint Investments Pvt. Ltd. vs CIT (2015) 372 ITR 694, deleted the addition. Aggrieved by the order of CIT(A) Revenue is now in appeal before us.

19. Before us, Learned DR supported the order of AO. Learned AR on the other hand reiterated the submission made by the AO and CIT(A) and further submitted that assessee had earned dividend income of Rs.50,900/- but has suo moto disallowed Rs.3,12,523/- u/s 14A of the Act. The act of disallowance again by AO of Rs.3,12,707/- has resulted into double disallowance. He further relying on the decision in the case of Joint Investments Pvt. Ltd vs CIT (2015) 372 ITR 694 (Del) submitted that disallowance u/s 14A cannot be more than the dividend received. He therefore submitted that CIT(A) has rightly deleted the addition. He thus supported the order of CIT(A).

20. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to the disallowance u/s 14A r.w.r 8D of the Act. It is an undisputed fact that assessee has earned dividend of Rs.50,900/- and had suo moto worked out the disallowance u/s 14A r.w.r 8D of the Act at Rs.3,12,523/-. AO has further disallowed Rs.3,12,707/- u/s 14A of the Act resulting into double disallowances. We find that Hon'ble Delhi High Court in the case of Joint Investments Pvt. Ltd. (supra) has held that the disallowance u/s 14A r.w.r 8D cannot exceed the dividend income. Considering the aforesaid facts and in the absence of any fallacy being pointed out in the order of CIT(A), we find no reason to interfere in the order of CIT(A) and thus the ground of Revenue is dismissed.

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

Order pronounced in the open court on 28.07.2021

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