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

BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER
AND SH. C.N. PRASAD, JUDICIAL MEMBER

**I. T. A. No. 4058/Mum/2013**
Assessment Year: 2009-10

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| Md. Hussain Habib Pathan, Prop of Raksha Construction, A-9/10, the Phoenix Mills Compound, Senapati Bapat Marg, Lower Parel, Mumbai. [AACPP3071A] | vs. | ACIT 18(2) Mumbai. |
| **(Appellant)** | | **(Respondent)** |

Appellant by : Sh. Kirit Mehta (CA)
Respondent by: Ms. Kavita P. Kaushik (DR)

Date of Hearing: 03.03.2020
Date of Pronouncement: 05.03.2020

**ORDER**

Per Sanjay Arora, AM:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-29, Mumbai ('CIT(A)' for short) dated 13.12.2012, partly allowing the assessees' appeal contesting his assessment for Assessment Year (AY) 2009-10 vide order u/s. 143(3) of the Income Tax Act, 1961 ('the Act') dated 30.12.2011.

2. At the outset, it was observed that the assessee's appeal is delayed by a period of sixty six days. In view of the delay being reasonably explained, we are, after hearing the parties, inclined to condone the delay, and admit the appeal.

3. Opening the arguments for and on behalf of the assessee, it was submitted by his counsel, Sh. Mehta, that he is not pressing the assessee's Ground II as well as the additional ground, making an endorsement to that effect on Form 36. No plea was accordingly advanced toward the admission of the additional ground. The only issue therefore requiring our adjudication is that raised by the assessee per Ground I, i.e., in respect of house property income *qua* the assessee's residential house property, i.e., A/1-5, Prithvi Apartments, at Mumbai. The assessee has claimed a loss of Rs.15,32,120 *qua* the said property on account of interest (on borrowed capital) at Rs. 21,62,120, adjusting it against the rental income of Rs. 9 lakhs. The said rent was, on the basis of a field enquiry by the Assessing Officer (AO), found to be from the assessee's major son, Roman Pathan and major daughter, Neha Pathan, residing thereat along with the assessee's other family members. Nobody would, in the view of the AO, charge rent (for residence) from his own son and daughter, particularly considering that both are unmarried and living together with their family at its' self-owned abode. The arrangement was therefore regarded merely as a tax-reducing device adopted by the assessee, liable to be ignored. Treating the house property as a self-occupied property, the AO restricted the claim of interest u/s. 24(b) to Rs. 1,50,000, and which was confirmed by the ld. CIT(A) in appeal for the same reason/s.

4. Before us, the assessee's claim was that there is nothing to show that the arrangement, which is duly supported by written agreements, furnished in the assessment proceedings, is fake or a make-believe. Rental income cannot be overlooked or disregarded merely because it arises from close family members. Sh. Mehta was, however, not able to, on a query by the Bench, state the status, i.e., self-occupied or rented, of the said premises for the earlier or subsequent years, though would submit that this is the first year of the claim of loss. The rent

agreements having not been brought on record by the assessee, he was also unable to tell us of the area let, i.e., out of the total area available, inasmuch as other family members, including the assessee, are also residing in the same premises. The Revenue's case, on the other hand, was of no cognizance being accorded to an arrangement which is against human probabilities, and clearly a device to avoid tax.

5. We have heard the parties, and perused the material on record.

5.1 Surely, the arrangement is highly unusual, particularly considering that the rent is in respect of a self-owned property (i.e., for which no rent is being paid), which constituted the family's residence, with, further, the assessee's son and daughter being unmarried. That, however, to our mind, may not be conclusive of the matter. Being a private arrangement, not involving any third party, not informing the cooperative housing society may also not be of much consequence. The Revenue has rested merely by doubting the genuineness of the arrangement, without probing the facts further. What is the total area, as well as its composition/ profile? How many family members, besides the assessee (the owner) and the two tenants, are residing thereat? Has the area let been specified, allowing private space (a separate bedroom each) to son and daughter, who would in any case be also provided access to or user of the common area - specified or not so in the agreement/s, viz. kitchen, balcony, living area, bathrooms, etc. How has the rent been received, i.e., in cash or through bank and, further, been sourced, i.e., whether from the assessee (or any other family member), or from the capital/income of the tenants. Why, there was even no attempt to inquire if the arrangement was a subsisting/continuing one, or confined to a year or two, strongly suggestive of, in that case, a solely tax motivated exercise.

5.2 It could, however, we are conscious, well be that the assessee's major son and daughter are financially independent (or substantially so), with independent incomes, sharing the interest burden of their common residence with their father. And, as such, instead of transfer of funds to him *per se*, have regarded, by mutual agreements, the same as rent, as that would, apart from meeting the interest burden to that extent, also allow tax saving to the assessee-father. A genuine arrangement cannot be disregarded as the same results or operates to minimize the assessee's tax liability. Reference in this regard may be made to the decision in *Union of India v. Azadi Bachavo Andolan* [2003] 263 ITR 706 (SC) and, more recently, in *Vodafone International Holdings B.V. v. Union of India* [2012] 314 ITR 1 (SC). We are, accordingly, in principle, in agreement with the assessee's claim inasmuch as, as afore-noted, there is nothing on record to further the Revenue's case of the arrangement being not a genuine arrangement, i.e., apart from being unusual.

5.3 On quantum, however, the assessee's stand is infirm. The house property, A/1-5, Prithvi Apartments, the family residence of the Pathan family, is, in view of the rent agreements, both a self-occupied and a let out property. The interest claimed (Rs. 21.62 lakhs) is *qua* the entire property, which therefore cannot be allowed in full against the rental income, which is *qua* a part of the house property. The assessee's interest claim therefore cannot be allowed in full and shall have to be suitable proportioned, even as agreed to by Sh. Mehta, restricting the interest claim relatable to the self occupied part thereof to, as allowed, Rs. 1.50 lakhs. The assessee shall provide a reasonable basis for such allocation as well as the working of the area let. We say so as it may well, in view of the joint residence, be that no area (portion) is specified in the rent agreements. The number of family members living jointly; their living requirements – which may not be uniform; fair rental value of the property, etc., are some of the parameters which could be considered

for the purpose. The AO shall adjudicate thereon per a speaking order, giving definite reasons for being in disagreement, where so, in whole or in part, with the assessee's working, within a reasonable time. We decide accordingly.

6. In the result, the assessee's appeal is partly allowed on the aforesaid terms.

*Order pronounced in the open court on 05.03.2020*

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| Sd/- | Sd/- |
| (C.N Prasad) | (Sanjay Arora) |
| Judicial Member | Accountant Member |

Mumbai, Dated 05.03.2020
KRK, PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. Concerned CIT
5. DR, ITAT, Mumbai
6. Guard file.

**आदेशानुसार/** BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार** ( Asst. Registrar)
**आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Mumbai**