

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: 'F', NEW DELHI**

**(Through Video Conferencing)**

**BEFORE  
SHRI G.S. PANNU, VICE PRESIDENT  
AND  
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No.9016/Del/2019  
(ASSESSMENT YEAR-2016-17)**

Sh. Rohit Kapur 3,The Green Rajokri New Delhi-110038  PAN -ASLPK 1411C	Vs.	Add. CIT, Special Range-8, New Delhi
<b>(Appellant)</b>		<b>(Respondent)</b>

Appellant By	<b>Sh. S. Krishanan, Adv.</b>
Respondent by	<b>Sh. M. Barnwal, Sr. DR</b>
Date of Hearing	<b>27.05.2020</b>
Date of Pronouncement	<b>01.07.2020</b>

**ORDER**

**PER SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER:**

This appeal is preferred by the assessee against order dated 27.09.2019 passed by the Ld. Commissioner of Income Tax (Appeals)-8, New Delhi {CIT(A)} for Assessment Year: 2016-17.

2.0 The brief facts of the case are that the assessee is the whole time Managing Director of M/s Selan Exploration Technology Ltd. During the year under consideration, apart from salary from the

whole-time Directorship of this company, the assessee has also earned interest and income from other sources within India and he has also disclosed income from sources outside India in the nature of interest income, rental income (loss) and income from transactions in financial securities. The assessee was also the owner of one unit in Trump Hotel, USA, on which he incurred loss of Rs. 52,97,197/- and claimed the said loss under the head “income from other sources” and sought to set off the loss against the salary income of the same year. The assessee also claimed loss from two Limited Liability Companies (LLC) in the USA of Rs.26,94,282/- as deduction u/s 57 of the Act, as ‘business loss’. However, the Assessing Officer (AO) considered the loss of Rs.52,97,197/- from the unit held in Trump Hotel, claimed under the head income from other sources as business loss and also treated the loss of Rs.26,94,282/- from the LLCs claimed under the head other sources u/s 57 of the Act as business loss. The assessment was completed at an income of Rs.10,25,0000/-.

2.1 Aggrieved, the assessee approach the Ld. First Appellate Authority who dismissed the assessee’s appeal and now the assessee

is now before this Tribunal and has challenged the order of the Ld. CIT (A) by raising the following grounds of appeal:

*“On the facts and in the circumstances of the case and in law the Ld. CIT (Appeals) erred in confirming the following actions of the Assessing Officer:*

- (i) In assessing loss from hotel unit at Hotel Trump International, New York, USA under the head ‘business loss’ as against loss under the head ‘Income from other sources’ declared in the return;*
- (ii) In determining share of loss from LLCs (situated in USA) under the head ‘business’ as against loss under ‘income from sources’ declared in the return;*
- (iii) In denying the set off of loss suffered from Hotel Unit in USA and also loss from partnership in LLCs against salary income.*

*All the above actions being arbitrary, erroneous and unjust the same must be quashed with directions for appropriate relief.”*

3.0 The Ld. Authorized Representative submitted that the assessee had made investment in one unit of a property in the USA which along-with other such units had been developed as a hotel entity by some other entrepreneurs which is called ‘Hotel Trump International’. The arrangement for investment was that the assessee would be allotted a unit in that complex which along with several other similar units (total number 160) belonging to a huge number of

others would be developed, operated, maintained and run professionally as a hotel. Periodically, the net income of the hotel was divided and defrayed to the unit owners by that enterprise there in the USA which was operating the hotel. The Ld. AR submitted that the assessee had neither any control of any sort over the property constituting the units nor did the assessee have any say or role in the management of the hotel. It was emphasized by the Ld. AR that in fact none of the unit holders subscribing to the hotel property had any such say or role in the conduct of the hotel operations.

3.1 It was argued by the Ld. AR that the purpose of putting money in one unit in the complex comprising 160 units by the assessee was solely and wholly for investment purposes. It was submitted that the assessee could never had done any business there for several reasons. The first of it was that he was a whole-time Director of the company in India that forbade him from engaging in any other activity elsewhere. Secondly, the hotel business was located in USA out of India and the assessee could not be there at all due to the exigencies of his employment in India. Thirdly, it was submitted, the Assessee was the owner of only a fraction of the hotel property i.e.

1/160 and the rest of the property was owned by several other persons over whom the Assessee would, understandably, have no say. It was submitted that the assessee had no relationship with the disparate owners of other units or even with that entrepreneur in USA who was running the hotel operations.

3.2 It was submitted by the Ld. AR that the findings of the Assessing Officer, as recorded in Para 3.3, are all erroneous and are wholly untenable because business, as understood under the Act, comprises of a systematic and organized activity done repetitively with the purpose of earning income and the entrepreneur assumes a proactive role in the conduct of business activity. It was argued that passive disposition is contrary to the enterprise in business. The Ld. AR submitted that an important factor to determine whether a transaction is business or investment is the initial intention of the assessee while deploying funds in that particular pursuit and in this particular case, the Assessee knowing fully-well that he was the owner of only one out of 160 units and that he could not in any circumstance manage the hotel operations both due to the size of his holding in the business of hotel and his service commitments in India

entailing his stay in India and his desisting from engaging in other activity, he had paid the money as for investment. It was submitted that there is nothing brought on record by the Assessing Officer to dispel that view and that the activity of the Assessee does not fall in the portal of business. It was argued that the pre-dominant fact in the subject case is that this Assessee has invested for one unit in a complex of 160 units and he has done so wholly and solely as an investment out of his own surplus funds, the Assessing Officer's action in treating the income as business is thus *per se* wrong. It was pleaded that the income as returned under 'other sources' is correctly and properly done for it arises out of investments and so it was pleaded that the same may kindly be directed to be accepted and adopted for assessment purposes by the Assessing Officer.

4.0 With reference to the second dispute in this appeal pertaining to a loss of Rs. 19.26 lakhs from two LLCs, the Ld AR submitted that these are losses which have been incurred in terms of the returns, firstly, from South Board Investors LLC and, secondly, from 10 Greene Owners LLC. Both these outlays were essentially on account of investments made in USA by the Assessee for the purpose

of supplementing his income from other sources. It was submitted that the Assessing Officer has treated the negative return from these two outlays as business loss so as to deny the benefit of set off as claimed. It was submitted that not only due to the locational differences, but also due to the occupational limitations, the Assessee could not have done any business. It was submitted that the outlays in the two cited ventures were only for the purpose of earning investment income over and above the regular salary income earned in India. It was argued that the intention was, and always has been, to make such outlays in USA which would fetch returns without any further act or deed on the part of the Assessee. The Ld. AR submitted that the Assessing Officer has failed to appreciate that in the case of outlays of this nature, it is important to determine as to whether the investment act lies in the realm of business or not and in so doing, the intention of the assessee is of cardinal importance. The Ld. AR submitted that the Assessing Officer has at no point of time established that intention of the assessee was to earn out of business. It was submitted that the action of the Assessing Officer is thus totally fallacious and devoid of merit particularly in the light of the fact that

in the preceding years investments of this nature have consistently not been treated as business in the assessments.

4.1 The Ld. Authorized Representative further submitted that the lower authorities have erred in not abiding by the principle of consistency also as the assessment records of the assessee would reveal that the income earned from investment activity has always been considered as investment income but in the year under consideration the Assessing Officer has revised his opinion to treat such income as income from business activity which is against the principle of consistency. It was also submitted that onus was on the Revenue to prove that the income was from business activities and not from other sources.

5.0 In response, the Ld. Sr. DR appearing on behalf of the Department submitted that there is no *res judicata* in Income Tax Law and, therefore, the clock can be re-set to give a correct treatment to the income earned by the assessee. It was also submitted that the earlier assessments made u/s 143(3) of the Act were limited scrutiny assessments and the issues in the present appeal were not looked into at that point of time. The Ld. Sr. DR placed extensive reliance on



the findings of both the lower authorities and vehemently argued that the order of the Ld. CIT (A) be upheld.

6.0 We have heard the rival submissions and have also perused the material on record and the two questions arising for consideration by us are: (i) whether the lower authorities were correct in assessing loss from a Hotel Unit at Hotel Trump International, New York (USA) under the head 'business loss' as against loss under the head 'income from other sources' as claimed by the assessee; and (ii) whether the lower authorities were correct in determining the share of loss from limited liability companies (constituted in USA) under the head business loss as against the loss under income from other sources as claimed by the assessee.

6.1 The facts leading to the first controversy are that the assessee had purchased and is the owner of one unit in the Trump Hotel International in New York (USA). This property was acquired when the assessee was a non-resident Indian and was employed in the USA. The assessee has entered into hotel maintenance and operation agreement in respect of the Hotel Unit owned by him and under this agreement Hotel Unit is operated as a part of the Hotel by

an appointed Managing Company. The assessee's unit, along with other units is provided to the Hotel Guests for boarding and lodging facility, bookings for which can be done through various travels agents, website etc. Under the said agreement, the Hotel collects tariff from the guests staying in the rooms and the operating expenses are proportionately realized. The Hotel claims reimbursement of Real Estate Taxes etc. from the assessee along with other unit holders. Subsequently, the surplus or deficit from the transactions is transferred to the account of the assessee and the assessee is provided periodical details of Revenue and expenses in respect of this unit. It is seen that the assessee has been offering such income to tax under the head 'income from other sources' and, undisputedly, this income was accepted as income from other sources in earlier assessment years i.e., 2014-15 & 2015-16. It is also a case on the point that the Trump Hotel International makes payment to the assessee towards rent of the Unit and the assessee is debited for the use of furniture, fixture, toiletries, financial administration and accounting charges, use of staff to collect rooms rentals, staff for monitoring and collecting charges such as cable television, telephone

and rooms services charges etc. Thus, evidently, the Revenue is being generated for each Hotel Unit without the active participation of the unit owners.

6.2 The Hon'ble Apex Court in the case of Sultan Brothers (Pvt.) Ltd. vs. CIT reported in [1964] 51 ITR 353 (SC) was considering an issue to decide the appropriate head for taxing the income i.e., whether the income was covered under income from business or profession or income from other sources. In this case, the assessee had constructed a building fully furnished and had let out the same to another person for use as a Hotel. The assessee never carried on the business of the Hotel in the premises let out and there was nothing to show that it intended to carry on the Hotel business itself. The building and the furniture and plants etc. were all let out for running the Hotel and were inseparable from each other. The Hon'ble Apex Court held that the income was to be assessed as income from other sources. In the present case, it is evident from the conduct of the assessee that the assessee was not intending to run a unit in Trump Hotel International himself but rather he had purchased the unit while he was employed with an Oil Exploration Company in USA

and he has given this unit for being run under the 'Hotel Operations and Maintenance Agreement' to be run by the managing company. Thus, at no point of time has the assessee ever been engaged in running the Hotel Unit on his own. It is also evident that the control of the affairs of the assessee's unit like to whom the unit is to be let out, what kind amenities are to be provided within the unit, what tariff has to be charged from the unit etc. are beyond the control and decision making powers of the assessee. Thus, for all practical purposes, the unit under consideration cannot be considered to be a business undertaking of the assessee. Admittedly and undisputedly, the Department has also accepted this position in the preceding two assessment years. Although the principle of *res judicata* does not strictly apply to Income tax proceedings, all the same, the Hon'ble Apex Court in the case of Radha Soami Satsang Vs. CIT, 193 ITR 32 (SC) has held that the revenue cannot disturb and alter issues which have already been settled in previous years if there is no change in the facts and circumstances. Accordingly, we are unable to accept the view taken by the Ld. CIT (A) and we set aside his finding on the issue

and direct the Assessing Officer to treat the loss from the unit in Trump Hotel International under 'income from other sources'.

7.0 As far as such second issue of determining the head of income for share of loss from LLCs situated in the USA is concerned, it is seen that the assessee had made investment in two limited liability companies in the USA namely South Broad Investors (LLC) and 10-Green Onus (LLC) and the assessee had shown loss of Rs.26,94,282/- from these two LLCs under the head income from other sources. The Assessing Officer was of the opinion that the assessee was doing business as partner in the LLCs and, therefore, the resultant income or loss was to be booked under the head 'business income' and not income from other sources. On this issue also it is undisputed fact that the losses in Assessment Years 2014-15 & 2015-16 had been accepted by the Assessing Officer under income from other sources. Further, on the facts of the case, it is our considered opinion that the assessee, by virtue of being the whole time employee Director in an oil exploration company, could not have made the capital outlay in the two limited liabilities company for the purpose of business and, apparently, this was only for the purpose of

an investment. However, the Assessing Officer seems to have overlooked this factor. The Assessing Officer as somehow failed to appreciate that in the case of outlays of this nature, it is important to determine as to whether the investment was in the realm of business or not. The Assessing Officer has at no point of time established that the intention of the assessee was to earn out of business. The Assessing Officer also has chosen to ignore the fact that in the preceding assessment years, the investment of this nature have consistently have not been treated as business. Therefore, even on the ground of consistency, the impugned loss should have been treated as loss under other sources. Also it is well-settled that the onus is on the Revenue to prove that the particular time of income or loss is from business. However, in the present case such a finding by the Assessing Officer is entirely absent. Accordingly, there is no foundation for the Assessing Officer to have treated the impugned loss as business loss and we have no option but to disagree with the findings of the Ld. CIT (A). Accordingly, we set aside his order on this issue and direct the Assessing Officer to treat the impugned loss as loss under income from other sources.

8.0 In the final result, the appeal of the assessee stands allowed.

Order pronounced on 01/07/2020.

Sd/-  
**(G.S.PANNU)**  
**VICE PRESIDENT**

Sd/-  
**(SUDHANSHU SRIVASTAVA)**  
**JUDICIAL MEMBER**

Dated:01/07/2020

*PK/Ps*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT NEW DELHI