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

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER
AND
SHRI AVDHESH KUMAR MISHRA, ACCOUNTANT MEMBER

ITA No.7697/Del/2018, A.Y. 2008-09

PVS Multiplex (India) Ltd. I BLOCK, Shastri Nagar, Meerut Uttar Pradesh PAN : AACCP8168R	Vs.	ACIT, Circle-2, Meerut
(Appellant)		**(Respondent)**

Appellant by	Shri Rohit Agarwal, CA
Respondent by	Sh. Vivek Vardhan, Sr. DR

Date of Hearing	27/06/2024
Date of Pronouncement	22/07/2024

ORDER

PER AVDHESH KUMAR MISHRA, AM

The appeal for the Assessment Year (In Short, the 'AY') 2008-09 filed by the assessee is directed against the order dated 03.10.2018 passed by the Commissioner of Income Tax (Appeals), Meerut [In Short, the 'CIT(A)'].

2. Following grounds have been raised by the appellant/assessee:-

"1. That the Id. CIT(A) has erred in law as well as on the facts of the case by confirming the disallowance of claimed 50% deduction u/s 80IB-(7A) with reference to the interest income of Rs.24,970/- on bank FDR and with reference to the income on

sale of shop in the shopping complex developed and maintained by the appellant, ignoring the fact that the income of interest from FDR and profit on sale of shopping area, were part & parcel of business income derived from construction and maintenance of a multiplex in terms of section 80IB-(7A) of the Income Tax Act, 1961.

2. That without prejudice to above, the Id. CIT(A) has erred in law by ignoring the fact that 80IB-(7A) deduction with reference to the interest income and income from sale of shops was allowed to the appellant in the immediately preceding year i.e. A.Y.2007-08 by the Id. A.O. and the rule of consistency did apply.

3. That the appellant craves leave to add, modify and/or delete any ground of appeal on or before the date of hearing in order to enable your honour to dispose of the appeal as per law."

2.1 In nutshell, the core issue for adjudication in this case is that whether the income on sale of the shop credited in the Profit & Loss Account is business income derived from multiplex theatre eligible for deduction under section 80IB(7A) of the Income Tax Act, 1961 (In short, the 'Act').

3. The relevant facts of the case for deciding this appeal, in brief, are that the appellant/assessee runs multiplex theatre. It filed its original Income Tax Return (In short, the 'ITR') declaring income of Rs.1,06,57,220/- on 30.09.2008. The case was selected for scrutiny and that assessment was completed under section 143(3) of the Act

on 29.12.2010 accepting the income declared in the ITR. Later on, the said assessment was revised, vide order dated 03.02.2012 passed under section 154/143(3) of the Act, at enhanced income of Rs.1,12,18,126/-.

3.1 The Ld. Commissioner of Income Tax, Meerut reviewed the scrutiny assessment order. She, vide order dated 25.03.2013 passed under section 263 of the Act, directed the Assessing Officer (In short, the 'AO') to exclude interest income and income on sale of the shop credited in the Profit & Loss Account of the appellant/assessee for working out the business income derived from multiplex theatre eligible for deduction claimed under section 80IB (7A) of the Act and to disallow the deduction claimed under section 80IB(7A) of the Act on interest income and income on sale of the shop. Consequent to the order passed under section 263 of the Act, the assessment disallowing the deduction of Rs.4,62,485/- under section 80IB(7A) of the Act on interest income and income on sale of the shop was completed under section 263/154/143(3) of the Act on 18.03.2014.

3.2 On appeal directed against the order dated 18.04.2014 passed under section 263/154/143(3) of the Act, the Ld. CIT(A) dismissed the appeal stating that he was not competent to decide the case which had already been decided by the CIT being co-terminus to the CIT(A).

This appeal order was challenged, by the appellant/assessee, before the Tribunal, who vide its order dated 25.04.2018 in ITA No. 3214/Del/2016, restored the mater back to the Ld. CIT(A) directing him to decide the case on merit. Later, the CIT(A), vide impugned order decided the appeal on merit. Before the CIT(A), there were two issues; namely, (i) the disallowance of interest expenses under section 36(1)(vi) and (ii) the disallowance of deduction of Rs.4,62,485/- claimed under section 80IB(7A) of the Act. The CIT(A) deleted the disallowance of interest expenses under section 36(1)(vi) of the Act and confirmed the disallowance of deduction of Rs.4,62,485/- under section 80IB(7A) of the Act relatable to the interest income and income on sale of the shop on the reasoning that neither capital gains on sale of the shop nor the interest income on FDR were business income derived from multiplex theatre as such incomes were required to be assessed under the head 'Capital gains' and 'Income from other sources'.

3.3 The order dated 25.03.2013 passed under section 263 of the Act was also challenged, by the appellant/assessee, before the ITAT, who vide order dated 14.08.2015 in ITA No. 2370/Del/2013 dismissed the appeal filed by the appellant/assessee.

3.4 The appellant/assessee has not challenged the disallowance of deduction under section 80IB(7A) of the Act relatable to interest income. Thus, the part disallowance under section 80IB(7A) has attained the finality. Only the disallowance of deduction, under section 80IB(7A) of the Act, relatable to income earned on sale of the shop has been challenged before the Tribunal.

4. The Ld. Authorised Representative (In short, the 'AR') submitted that the shop which sold out was part of the Multiplex Complex and a business apparatus to earn income; hence, the sale of the same was nothing but the business income and thus, the claim of deduction under section 80IB(7A) of the Act was valid. Further, it was contended that the appellant/assessee's claim of fulfilling all the terms & conditions to claim deduction under section 80IB(7A) of the Act was not disputed by the Revenue. It was argued that there was no restriction/bar/prohibition on such claim of deduction on income earned from sale of part of the multiplex complex. In support of the claim of deduction on income earned from sale of part of the multiplex complex, the Ld. AR drew our attention to the decision of the Hon'ble Supreme Court in the case of Sterling Foods 237 ITR 579 to emphasise that the expression 'attributable to' was a wider in import

than the expression 'derived from'. The observations of the Hon'ble Supreme Court in para 6 of the said decision are as under: -

> *"For that purpose, it relied upon the decision of this Court in Cambay Electric Supply Industrial Co. Ltd. Vs. CIT [1978] 113 ITR 84. It was there held that the expression 'attributable to' was wider in import than the expression 'derived from'. The expression of wider import, namely, 'attributable to', was used when the legislature intended to cover receipts from sources other than the actual conduct of the business. The Division Bench of the High Court observed that to obtain the benefit of section 80HH the assessee had to establish that the profits and gains were derived from its industrial undertaking and it was just not sufficient that a commercial connection was established between the profits earned and the industrial undertaking. The industrial undertaking itself had to be the source of the profit. The business of the industrial undertaking had directly to yield that profit. The industrial undertaking had the direct source of that profit and not a means to earn any other profit."*

It was submitted that the source of profit, in the present case was sale of the shop being part of the multiplex complex. Hence, the income derived from such sale was business income from multiplex complex and not incidental to the business.

4.1 The Ld. AR also emphasised that similar disallowance of deduction under section 80IB(7A) of the Act was not done in past though the appellant/assessee had sold shops in the past also. Hence, in view of the rule of consistency, the deduction under section 80IB(7A) of the Act in the relevant year should also be allowed as it

was done in AY 2007-08 in the scrutiny assessment. In support of this contention, the Ld. AR placed reliance on the decision of the Hon'ble Supreme Court in the case of Radhasoami Satsang, 193 ITR 321. The Ld. AR, placing reliance on the decision of the Hon'ble Supreme Court in the case of Saraf Exports, 453 ITR 625, emphasized that the present case is akin to this case wherein the Hon'ble Supreme Court explained the phrase 'derived from industrial undertaking'.

5. The Ld. Sr. Departmental Representative (In short, the 'Sr. DR'), placing reliance on the reasoning and case laws relied upon by the CIT and CIT(A), submitted that the appellant/assessee was not eligible for the deduction under section 80IB(7A) of the Act. It was also contended that the basic ingredient of the section 80IB(7A) of the Act; 'business of building, owning and operating a multiplex theatre' was not fulfilled in this case on the date on which the income earned/received from transfer/sale of the shop as the appellant/assessee was neither owning nor operating the shop being an integral part of multiplex theatre after transfer/sale of the shop.

6. We have heard both the parties at length and considered the material available on the record. The core issue involved here in this case is whether the income on sale of the shop is business income

derived from multiplex theatre eligible for deduction under section 80IB(7A) of the Act.

7. At the outset, it is pertinent to reproduce the section 80IB(7A) of the Act applicable in the relevant year, which reads as under: -

> *"(7A) The amount of deduction in the case of any multiplex theatre shall be—*
>
> *(a)* ***fifty per cent of the profits and gains derived, from the business of building, owning and operating a multiplex theatre****, for a period of five consecutive years beginning from the initial assessment year in any place:*
>
> *Provided that nothing contained in this clause shall apply to a multiplex theatre located at a place within the municipal jurisdiction (whether known as a municipality, municipal corporation, notified area committee or a cantonment board or by any other name) of Chennai, Delhi, Mumbai or Kolkata;*
>
> *(b) the deduction under clause (a) shall be allowable only if—*
>
> *(i) such multiplex theatre is constructed at any time during the period beginning on the 1st day of April, 2002 and ending on the 31st day of March, 2005;*
>
> *(ii) the business of the multiplex theatre is not formed by the splitting up, or the reconstruction, of a business already in existence or by the transfer to a new business of any building or of any machinery or of plant previously used for any purpose;*
>
> *(iii) the assessee furnishes along with the return of income, the report of an audit in such form and containing such particulars, as may be prescribed and duly signed and verified by an accountant, as defined in the Explanation below sub-section (2) of section 288, certifying that the deduction has been correctly claimed."*
>
> [Emphasis supplied by us]

8. The legal definition of 'owning' of the property means having the title to a property in the owner name. This title grants him the right to possess, use, and transfer the property as deem fit. The legal owner of the property has control over its management, development and potential sale. The word 'Operating" is an adjective, which means (i) engaged in active business and (ii) arising out of or relating to the current daily operations of a concern as distinct from its financial transactions and permanent improvements.

9. Here, in this case, the appellant/assessee loses both ownership and operating power over the shop as integral part of the multiplex theatre at the time of earning income from sale/transfer of the shop. Hence, we find force in the argument and contention of the Sr. DR that the shop which sold was though built by the appellant/assessee; however, the shop was neither owned nor operated as an integral part of multiplex theatre by the appellant/assessee at the time of accrual/receivable of income on sale/transfer of the shop. Further, we do not find any merit in the contention of the Ld. AR that the similar disallowance of deduction under section 80IB(7A) of the Act has not been made in AY 2007-08 in scrutiny assessment because the appellant/assessee has shown income on sale/transfer of the shop under the head "Capital Gains" in AY 2007-08. Hence, there is no

precedent of consistency of assessing the income accrued/received on sale/transfer of the shop under the head "Business income". Therefore, the case law relied upon in this regard by the Ld. AR is of no relevance. The decision of the Hon'ble Supreme Court in the case of Saraf Exports (supra) relied upon by the Ld. AR is held distinguishable on the facts and thus, is held not applicable in the present case. Basically, this decision supports the Revenue. The rental income derived from the shop was assessed as business income and not under the head 'income from house property'. Since the property; shop, a depreciable asset was sold out; then the gains/income derived from such sale/transfer has to be assessed as Short-Term Capital Gains in accordance with the section 50 of the Act. On specific query, the Ld. AR admitted that the income derived from sale/transfer of multiplex theatre (in lock, stock and barrel) would be assessed under the head "Capital Gains" and not under the head "Business income". On this analogy, we also find force in the argument/contention of the Sr. DR.

10. In the view of the above, we decline to interfere with the impugned order, dated 03.10.2018, passed by the CIT(A).

11. In view of the above, each ground does not require separate & specific finding; therefore, all grounds being related to the core issue are treated disposed of accordingly.

12. Consequently, the appeal of the assessee stands dismissed.

Order pronounced in open Court on 22nd July, 2024.

Sd/-	**Sd/-**
(VIKAS AWASTHY)	**(AVDHESH KUMAR MISHRA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated:22/07/2024
Binita, Sr. PS
Copy forwarded to:
1. Appellant
2. Respondent
3. ACIT
4. CIT(Appeals)
5. CIT(ITAT), New Delhi

ASSISTANT REGISTRAR
ITAT, NEW DELHI