

Super Leasing Ltd. Vs. Assistant Commissioner of Income Tax. (Also Asstt. Cit V. Super Leasing Ltd.).

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Court : Mumbai

Decided On : Mar-25-1996

Reported in : (1996)56TTJ(Mumbai)258

Appeal No. : ITA Nos. 9625 to 9627/Bom/1989; Asst. yrs. 1986-87 to 1988-89, 25th March, 1996, (ITA Nos. 113 to 11

Appellant : Super Leasing Ltd.

Respondent : Assistant Commissioner of Income Tax. (Also Asstt. Cit V. Super Leasing Ltd.).

Judgement :

ORDER

M. V. R. PRASAD, A. M. :

These are cross-appeals by the assessee and the Revenue and are directed against the consolidated order of the CIT(A), dt. 10th Oct., 1989. As common points are involved, the appeals were heard together and are disposed of by this common order for the sake of convenience.

2. We shall first take up the appeals of the assessee. The first common ground for all the years is that the CIT(A) erred in holding that the compensation received from leasing out the premises should be assessed as income from house property

and not as business income as claimed by the assessee.

3. The CIT(A) has indicated the facts relating to this issue succinctly and paras 2 and 2.1 of his order read as follows :

'2. The assessee is a company incorporated on 9th April, 1984. The main objects of the assessee-company was to carry on the business of leasing, hiring, selling, letting, hire purchase and hire purchase financing of all types of plant and machineries, industrial and office equipments, appliances, vehicles, land and buildings, real estates, movable and immovable properties and assets acquired for manufacturing, processing, mining, transportation, electricity generation, shipping, construction, etc. One of the objects of the company was also to carry on business as an investment company. The assessee purchased by an agreement dt. 26th June, 1984, three flats in a building called 'Dashineshwar' situated at 10 Hailey Road, New Delhi, for a consideration of Rs. 15,92,500. This money was given to it by its holding company M/s Suryodaya Investment & Trading Co. Ltd. as loan free of interest. All these three flats numbering 30, 31 and 32 and measuring 2,000 sq. ft., 1,450 sq. ft. and 1,450 sq. ft. respectively, were let out to one of its sister concerns M/s Lohia Machines Ltd. for a compensation of Rs. 36,000 per year. During the previous year relevant to the asst. yr. 1987-88 the assessee-company had received a security deposit from the lessee amounting to Rs. 22,50,000 on 13th Aug., 1985. This security deposit was free of interest. Out of this deposit, the assessee had repaid the interest-free loan of Rs. 15,92,500 obtained by it earlier from its holding company. The balance amount of security deposit was also advanced to this same holding company as interest-free loan. There was no change in the facts in the asst. yr. 1988-89 also.

2.1 On these facts, the Asstt. CIT came to the conclusion that the income received from the lessee of these 3 flats should be assessed only as income from house property and not as business income, which was the claim made by the assessee before him. He was of the opinion that considering the nature of the receipt by the company as owner of the house property, the income could not be assessed as business income. He also held that the annual letting value of these 3 flats, as admitted by the assessee at Rs. 36,000, was not the correct market value. Taking

into account the interest-free deposit of Rs. 22,50,000 received by the assessee from the lessee, the AO concluded that the company had received certain benefits as owner of these 3 flats. So he was of the opinion that the annual letting value should be determined with reference to the possible interest which the company could have earned out of the interest-free security deposit. On this ground, he estimated the reasonable market rate of interest at 15%. So he had added Rs. 3,37,500 to the actual amount of Rs. 36,000 received by the company from these flats and had thereby determined the annual letting value at Rs. 3,73,500. On this basis he had proceeded to compute the income from property.'

4. On the above facts, the Assessing Officer (AO) came to the conclusion that the income received from the lease of the 3 flats in the building called 'Dahineshwar' should be assessed only as income from house property and not as business income as claimed by the assessee before him and this finding is upheld by the CIT(A).

5. It was pleaded before the CIT(A) that as the assessee-company was in the leasing business, the letting out of the three flats was in the course of its business activity and it amounts to exploitation of a commercial asset and as such the rental income received should be treated as part of the trading receipts and should be brought to tax under the head Business.

6. Before us, the learned counsel for the assessee has reiterated the contentions as made out before the CIT(A) and reliance has been placed on the various decisions like the following :

Seth Banarsi Das Gupta vs. CIT : [1977]106ITR559(All)

CIT vs. Indermani Jatia : [1970]77ITR133(All)

New Savan Sugar & Gur Refinishing Co. Ltd. vs. CIT : [1969]74ITR7(SC)

CEPT vs. Shri Lakshmi Silk Mills Ltd. : [1951]20ITR451(SC)

Sultan Brothers Pvt. Ltd. : [1964]51ITR353(SC)

CIT vs. National Storage Pvt. Ltd. : [1963]48ITR577(Bom)

CIT vs. National Storage Pvt. Ltd. : [1967]66ITR596(SC)

Apart from the above, he has cited some 28 cases, list of which is enclosed along with the written submissions and placed on file.

7. The CIT(A) has relied on the decision of the Supreme Court in the case of East India Housing & Land Development Trust Ltd. vs. CIT : [1961]42ITR49(SC) and rejected the claim of the assessee. He also observed that the various case law relied upon by the assessee before him did not support the assessee's contention because in all these cases the various assessee's had taken the properties on lease and thereafter subleased the properties to other third parties.

8. We find that there is no merit in the contention of the assessee even though the issue is somewhat debatable. It is accepted that the heads of income under the IT Act are mutually exclusive. If a receipt falls under one of the specific heads of income, then such receipt can be taxed only in accordance with the provisions relating to that head. Even when such assets are held as business assets or stock-in-trade and the income from the sale is in the nature of business income, yet the same has to be assessed under the specific head under which the income falls. This principle is laid down by the apex Court in the case of United Commercial Bank Ltd. vs. CIT : [1957]32ITR688(SC) wherein it was held that interest on securities was a specific head of charge (before s. 18 was deleted by the Finance Act, 1988) and, therefore, it could not be charged as profits of business even if the securities were held as trading assets.

9. In the light of the above principle, we are of the view that the rental income received by the assessee has to be brought to tax under the head House property even though the objects of the company include leasing. The assessee purchased three flats and as such it is the owner. They are not simply taken on lease and sublet. They are owned and the income derived is on the exercise of the ownership rights like any landlord.

10. We find that the cases cited by the learned counsel for the assessee are distinguishable. In the case of CIT vs. National Storage Pvt. Ltd. (supra), the Bombay High Court has culled out the principle applicable in such cases. One of

the principles reads as follows :

'House-owning, however profitable, cannot be a business or trade under the IT Act. Where income is derived from house property by the exercise of property rights properly so called, the income falls under the head 'Income from property' chargeable under s. 9. It is the nature of the operations and not the capacity of the owner that must determine whether the income is from property or from trade. Where the operations involved in the activity of earning income from house property are not different from those of ordinary house-owner turning to profitable account the property of which he is the owner, the income derived is income from property chargeable under s. 9 irrespective of whether the operations are carried on by a company one of whose objects or even the sole object is to indulge in the activity of earning income from house property. Thus, where house property is given on lease or licence basis for earning income therefrom, the true character of the income derived is income from property falling under s. 9. The said character is not changed and the income does not become income from trade or business if the hiring is inclusive of certain additional services such as heating, cleaning, lighting or sanitation, which are relatively insignificant and only incidental to the use and occupation of the tenements.'

11. Even though the above case was decided by the Honble Bombay High Court against the Revenue on the ground that the subject which was hired out was a complex one, the above principle still holds good. Further, the case was affirmed by the apex Court in the case of National Storage Pvt. Ltd. (supra) reported in : [1967]66ITR596(SC) . In the light of the above principle, as summarised by the Honble Bombay High Court, where a house property is let out on lease or licence basis, the income is assessable under the head Property even though the assessee is a company and the objects of the company include leasing operation. We are of the view that the present case falls squarely within the four corners of the above principle. This is also the principle laid down by the apex Court in the case of East India Housing & Land Development Trust Ltd. vs. CIT (supra) on which the CIT(A) has relied on. Hence, we are of the view that the CIT(A) has correctly relied on the decision of the apex Court and the ratio of that decision, to our mind, squarely applies to the facts of the present case.

12. In this connection, the decision of the apex Court in the case of S. G. Mercantile Corpn. P. Ltd. vs. CIT : [1972]83ITR700(SC) may also be considered. In this case, the question that arose was whether the income from lease of a particular property was assessable under the head Business or under the head Other sources. While deciding this issue, the apex Court has mentioned that if the property is owned and not simply taken on lease, the income will be assessed under the head Property i.e., s. 9 of the old Act. In this context, the relevant comments of the apex Court are as follows :

'Sec. 9 of the Act deals with income from property. According to that section, the tax shall be payable by an assessee under the head 'Income from property' in respect of the bona fide annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner, other than such portions of such property as he may occupy for the purpose of any business, profession or vocation carried on by him the profits of which are assessable to tax, subject to certain allowances which are mentioned in that section but with which we are not concerned. It is noteworthy that the liability to tax under s. 9 of the Act is of the owner of the buildings or lands appurtenant thereto. In case the assessee is the owner of the buildings or lands appurtenant thereto, he would be liable to pay tax under the above provision even if the object of the assessee in purchasing the landed property was to promote and develop market thereon. It would also make no difference if the assessee was a company which had been incorporated with the object of buying and developing landed properties and promoting and setting up markets thereon. The income derived by such a company from the tenants of the shops and stalls constructed on the land for the purposes of setting up markets would not be taxed as 'Business income' under s. 10 of the Act, to which a more detailed reference would be made hereafter, but under s. 9 of the Act. A concrete instance of this type is afforded by the case of East India Housing & Land Development Trust Ltd. vs. CIT : [1961]42ITR49(SC) ;

The Court went on to observe that in that case, there was no finding that the company was the owner of the property in question and so, it was not considered whether the income was assessable under the head Property.

13. In the instant case, there is a definite finding that the assessee owns three flats and so the income derived by letting out those three flats are assessable under the head Property. In this context, the Supreme Courts decision in the case of Karanpura Development Co. Ltd. vs. CIT : [1962]44ITR362(SC) is also relevant. In this case, the apex Court indicated the possibility that the ownership of property and leasing it out may be done either as part of business or as land owner. The relevant observations are as follows :

'Ownership of property and leasing it out may be done as a part of business, or it may be done as land-owner. Whether it is the one or the other must necessarily depend upon the object with which the act is done. It is not that no company can own property and enjoy it as property, whether by itself or by giving the use of it to another on rent. Where this happens the appropriate head to apply is 'Income from property' (s. 9) even though the company may be doing extensive business otherwise. But a company formed with the specific object of acquiring properties not with the view of leasing them as property but to selling them or turning them to account even by way of leasing them out as an integral part of the business, cannot be said to treat them as landowner but as trader.'

14. The learned counsel for the assessee has not adduced any evidence as to why in the present case, the income from letting out of the three flats should be assessed under the head Business and not under the head Property except stating that the objects of the company include dealing in the real estate and leasing and so, invariably, the income in question from the three flats has to be taxed under the head Business. In the light of the decision of the apex Court considered above, it is clear that even in a case where the assessee is a company and the objects of the company include dealings in real estates and leasing, the income from property owned by the company has to be assessed under the head Property unless there are circumstances which indicate that the property has not been put to use simply as a land-owner but as part of the trading operation. Such circumstances have not been adduced before us. In the circumstances, we have to hold that the income is assessable under the head Property.

15. The cases on which the learned counsel for the assessee has relied on, to our mind, are distinguishable. In these cases, we find that the subject-matter of the lease or licence is not a simple flat or an apartment and even if a flat or apartment is involved, it is taken on lease and not owned by the assessee concerned. The assets considered were like factories, godowns and theatres which were clearly commercial assets and they were leased out either when there was lull or a temporary suspension of the main activity or the subject-matter of the lease was a complex one where the assessee rendered many other services. In some cases, the question involved was not whether the income was assessable under the head House property or Business but whether it was assessable under the head Business or Other sources. So, we are of the view that the cases on which the assessee has relied on are distinguishable and the facts of the present case are squarely governed by the ratio of the decision of the apex Court in the case of East India Housing & Land Development Trust Ltd. (supra) and also the decision of the Bombay High Court in the case of National Storage Pvt. Ltd. (supra), which is also affirmed by the Honble Supreme Court. So, we have to hold that the income in the present case is assessable under the head Property and not Business. This ground is rejected.

16. The next common ground is that the CIT(A) erred in reducing the loss or income by not granting allowances and reliefs admissible under the provisions of ss. 28 to 44D of the IT Act. This is a consequential ground and, as we have held that the income is assessable under the head Property, only the deductions permissible under that head are to be allowed. Subject to this remark, this ground is rejected.

17. The next common ground relates to the determination of the annual letting value of the 3 flats in question. The CIT(A) has determined it at Rs. 58,212 on the basis of the annual rateable value determined by the New Delhi Municipal Committee. The assessee finds this too high as it is higher than the compensation received of Rs. 36,000 per year from M/s Lohia Machines Ltd. The AO, on the other hand, finds it too low as he has not taken into consideration the notional interest on the interest-free deposit of Rs. 22,50,000 received from lessee.

18. The grounds taken by the Revenue in this regard read as follows :

'1. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in directing the AO to accept the amount of Rs. 58,212, as the annual letting value of the three flats in New Delhi as against Rs. 3,73,500 considered by the AO.

2. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in accepting fresh evidence without giving an opportunity to the AO under r. 46A of the IT Rules.

3. On the facts and in the circumstances of the case and in law, the learned CIT(A) failed to appreciate that as per the provisions of s. 23 of the IT Act the ALV is deemed to be the sum for which the property might reasonably be expected to let from year to year and consequently erred in not upholding the determination of ALV by the AO on the basis of actual compensation increased by fair notional interest @ 15% on the amount of interest-free deposits received by the assessee from lessee.'

19. The learned counsel for the assessee has pleaded that there is no authority for determining the annual letting value of the properties in question on the basis of the notional interest. For the asst. yr. 1986-87, there was no interest-free deposits received by the assessee from the lessee and so for this year, there is no question of including such notional interest at all. Even for the other two asst. yrs. 1987-88 and 1988-89, including such notional interest in the annual letting value is contrary to the decided cases in this regard. In this context, the learned counsel for the assessee has relied upon the following decisions :

1. Dewan Daulatrai Kapoor vs. New Delhi Municipal Committee & Ors. : [1980]122ITR700(SC)

2. Mrs. Sheila Kaushish vs. CIT : [1981]131ITR435(SC)

3. Amolak Ram Khosla vs. CIT : [1981]131ITR589(SC)

4. CIT vs. Satya Co. Ltd. (1994) 75 Taxman 193 (Cal).

In the light of the above decisions, the learned counsel for the assessee argued that there was no basis at all for determining the annual value of the property by including the notional interest on the interest-free deposits received from the lessee. He has also argued that where the actual compensation received is less than the municipal rateable value, it is only the actual compensation received that can be taken into account.

20. The learned Departmental Representative, on the other hand, argued that where the amount received is more than the municipal rateable value, it is the amount actually received that should form the basis for determining the annual value. In this context, he has also argued that w.e.f. 1st April, 1976, the section has been amended by Taxation Laws (Amendment) Act, 1975, and under the provisions of s. 23(1)(d) [sic 23(1)(a)], the annual rent received or receivable forms the basis for determining the annual value. In this context, he has relied on the decision of the Tribunal, Bombay Bench D in the case of Cygnus Negri Investments Pvt. Ltd. vs. 12th ITO, dt. 2nd Sept., 1992 in ITA Nos. 3724 & 3725/Bom/1989, and Asstt. CIT vs. Mecca Properties & Development Pvt. Ltd. in ITA No. 9288/Bom/1990, dt. 10th Sept., 1993.

21. In his reply, the learned counsel for the assessee has mentioned that the abovementioned orders of the Tribunal would have been different had they considered the decision of the Calcutta High Court cited supra.

22. For the asst. yr. 1986-87, the question of including the notional interest does not arise because the interest-free deposits were not received for that year. For the other two years, we find merit in the contentions of the learned counsel for the assessee. In the present case, no interest has been received on the interest-free deposits. Out of this amount of Rs. 22,50,000 received, the assessee repaid interest-free loans of Rs. 15,92,500 obtained by it earlier from its holding company. The balance amount of security deposit was also advanced to the same holding company as interest-free loan. So actually, no interest was either received or was receivable. On these facts, we are of the view, the provisions of s. 23(1)(d) [sic 23(1)(a)] cannot be invoked. This clause refers to the annual rent received or receivable. In the present case, no interest is received or receivable. Further,

interest in question cannot, to our mind, be equated with rent. If interest is received or receivable, it can be brought to tax under different provisions of the Act and this altogether is a different question. We find that the assessee is entitled to succeed on the basis of the decision of the Calcutta High Court in the case of CIT vs. Satya Co. Ltd. (supra) and the other decisions of the apex Court. We also do not find any infirmity in the direction of the CIT(A) that the annual value has to be taken as the annual rateable value determined by the Delhi Municipal Committee. In the present case, we are of the view that the value for which the property might reasonably be expected to let from year to year within the meaning of s. 23(1)(a) is not less than the municipal rateable value and, as such, the CIT(A) was correct in giving the direction that the annual value should be taken at Rs. 58,212 which is the municipal rateable value.

23. We do not find any merit in the contention of the Revenue that the CIT(A) has entertained additional evidence. The learned Departmental Representative mentioned that the alleged additional evidence was the fact that the municipal rateable value was Rs. 58,212. We are of the view that this evidence was required by the CIT(A) for the proper disposal of the appeal and so he was entitled to take into consideration the municipal rateable value under the provisions of r. 46A(4) of the IT Rules. However, in case, the municipal rateable value is higher for any of the years then, Rs. 58,212 which is the figure adopted by the CIT(A), the Department may substitute that figure for that year. Subject to this remark, we have to dismiss the grounds taken both by the assessee and the Revenue.

24. The next common ground taken by the assessee is that the CIT(A) erred in not considering the ground of appeal relating to the charge of interest under s. 217 and enhancement of penalty under s. 273. We find that the above grounds were taken before the CIT(A) and the CIT(A) has not made any reference to these grounds in his order. He may consider them now. The appeals of the assessee are partly allowed.

25. Now we take up the appeals of the Revenue. The common ground taken in these appeals is that the CIT(A) erred in not considering the notional interest received on the interest-free deposit of Rs. 22,50,000 by the assessee from the

lessee, M/s Lohia Machines Ltd. for the purpose of determining the annual value of the flats under s. 23 of the IT Act, 1961.

26. We have already considered these grounds along with the ground taken by the assessee on this issue while considering the assessee's appeals hereinbefore. For the reasons recorded therein, we have to dismiss the appeals of the Revenue.

27. In the result, the appeals of the assessee (ITA Nos. 9625 to 9627/Bom/89) are partly allowed and those of the Revenue (ITA Nos. 113 to 115/Bom/90) are dismissed.

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