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Court : Income Tax Appellate Tribunal ITAT Guwahati

Decided On : Jul-31-2001

Reported in : (2002)80ITD355(Gau.)

Judge : N Ganesan, N Saini

Appellant : Assistant Commissioner of

Respondent : Eastern Industrial Enterprises

Judgement :

1. Being aggrieved by the order of the CIT(A) dated 24-1-1994 in respect of the assessment year 1990-91 the Revenue has filed the present appeal before the Tribunal.

2. The brief facts of the case is that the assessee company registered under the Indian Companies Act with an object of purchasing, leasing or otherwise dealing with land, building, tenaments etc. In pursuance of the object of the company the assessee purchased an area of 5989 sq.

ft. on the 5th floor of the premises at 113, Park Street, Calcutta.

According to the assessee, the abovesaid premises was let out to various tenants on monthly rental basis. The assessee filed its return for the assessment year 1990-91 disclosing a total loss of Rs. 4,21,680 which includes Rs. 3,55,380 as carried forward loss of earlier year.

According to the assessee the income from the abovesaid property is to be classified under the head "Business income" under Section 28 of the Income-tax Act, 1961. However, the Assessing Officer disagreed with the assessee and after elaborate discussion the Assessing Officer came to the conclusion that the monthly rental income received by the assessee from the tenants is only to be treated as an income from house property and accordingly computed the total income of the assessee under Section 22 of the Act.

Against this order of the Assessing Officer the assessee took up the matter in appeal before the CIT(A). The learned CIT(A) by relying upon a judgment of the Hon'ble Supreme Court in the case of *Karnani Properties Ltd. v. CIT* [1971] 82 ITR 547 held that the income earned by the assessee by letting out the premises was in nature of business activity and, therefore, the entire income shall be taxed as business income. The first appellate authority has directed the Assessing Officer to treat the service charges said to be received by the assessee as business income and to allow proper deduction therefrom.

4. Against this order of the CIT(A) the Revenue has preferred this second appeal. Mr. S. Bhattacharjee, the learned Departmental Representative, submitted that even though the object of the assessee company is to acquire land and building by purchase, lease, exchange or otherwise, the present activity of the assessee in letting out the premises on monthly rental basis for a longer period with a clause to renew the lease thereafter cannot be treated as a business activity of the assessee. According to the learned Departmental Representative the present activity of the assessee in letting out the property to various tenants amounts to enjoyment of property by letting out the same to tenants as an owner and not otherwise. The Departmental Representative vehemently argued that the first appellate authority has committed an error in relying upon the judgment of the Hon'ble Supreme Court in the case of *Karnani Properties Ltd. (supra)*. According to the learned Departmental Representative this case of the Hon'ble Supreme Court is not applicable to the facts of the present case. The learned Departmental Representative brought to our notice the judgment of the Hon'ble Supreme Court in the case of *East India Housing & Land Development Trust Ltd. v. CIT* [1961] 42 ITR 49 and argued that the first appellate authority ought to have relied upon this

judgment which is more applicable to the facts of the present case. In nut shell, the Departmental Representative submitted that the income of the assessee company from letting out the building to various tenants on monthly rental basis shall be treated as an income received from house property since the activities of letting out property on monthly rental basis for a period of 5 years with a renewal clause cannot be construed as an activity of business.

5. On the contrary, the learned senior counsel, Mr. R.P. Agarwalla, submitted that the assessee company was promoted with an object to acquire land and building and exploited the same commercially either by selling or by leasing out the same. In pursuance of the objects of the company, the company purchased the present property at Calcutta and in order to do its business activity in accordance with the object of the company the assessee let out the premises to various tenants. The learned senior counsel invited our attention to the copy of the lease deed filed in the paper book at page 5 of the paper book. According to the senior counsel, the tenants have to pay a monthly rent @ Rs. 3 per sq. ft. and apart from that a service charge @ Rs. 4 per sq. ft. The learned senior counsel further submitted that this activity of the assessee in acquiring a building at Calcutta and letting out the same in order to earn income in pursuance of the object of the company as per its memorandum shall be construed as a business activity and the income derived therefrom shall be treated as an income from business under Section 28 of the Act. According to the learned Senior counsel, the case of the Hon'ble Supreme Court in Karnani Properties Ltd. (supra) is applicable to the facts of the present case and the CIT(A) has correctly decided the case and hence no interference is called for by this Tribunal. The learned counsel further submitted that in respect of previous assessment year the Assessing Officer treated the income of the assessee from the very same house property as income from business and hence the Assessing Officer cannot be permitted to change his views at this stage. The learned senior counsel further submitted that the income of the assessee is only from the rental income received from the property at Calcutta and hence the entire income shall be treated as income from business since the company is letting out the property in furtherance of its object in the memorandum of association registered under the Companies Act, 1956.

6. We have considered the arguments of the learned Departmental Representative and the learned senior counsel for the assessee. The Income-tax Act, 1961, prescribed certain classification for the purpose of taxation in our country. Section 14 of the Income-tax Act, 1961, classified the income as follows for the purpose of computation of total income under the Income-tax Act:- Business includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture.

So, it is obvious that the definition given in the Income-tax Act, 1961, is inclusive one and not exhaustive. The Hon'ble Supreme Court in *Barendra Prasad Ray v. ITO* [1981] 129 ITR 295 : 6 Taxman 19 at page 306 says that the word "business" is one of wide import and it means an activity carried on continuously and systematically by a person by the application of his labour or skill with a view to earning an income.

Now, we have to consider whether the letting out of property on a monthly rental basis for a longer term of 5 years with a clause for further renewal would amount to a business activity of the assessee company or not. The Hon'ble Supreme Court in the case of *Sultan Bros.*

(P.) Ltd v. CIT [1964] 51 ITR 353 held that the income under the lease cannot be assessed as income of business. In that case the assessee company was the owner of certain building at Bombay which was fitted up with furniture and fixtures for being run as a hotel. The assessee company let out the building fully equipped and furnished for a term of six years for running the hotel and for certain other ancillary purposes. The assessee in that case claimed that the entire income of leased amount should be assessed under the head "Income from business" or in the alternative the income from a residuary sources. After discussing the various case laws the Hon'ble Supreme Court held that each case has to be looked at from a businessman's point of view to find out whether the letting was the doing of a business or the exploitation of its property by an owner. The Hon'ble Supreme Court further said that it is not possible to say that a particular activity is business because it is concerned with an asset with which trade is commonly carried on. According to the Hon'ble Supreme Court the object of the company in that case

was to acquire land and building and to turn the same into account by construction and reconstruction, decoration, furnishing and maintenance of them and by leasing and selling the same. The activity contemplated in the aforesaid clause of the company, assuming it to be a business activity, would not by itself turn the lease into a business deal. Finally, the Hon'ble Supreme Court held as follows :- Thus Clause (a) is a covenant for quiet enjoyment. Clause (b) provides for a renewal of the lease of the demised premises being granted to the lessee for a further term of six years at his request. Clause (c) deals with payment of municipal bills and similar charges and ground rent. Clause (d) provides that the lessee shall during the continuance of the lease and on its renewal provide various things which included furniture, pillows, mattresses, gas-stoves, bottle coolers, refrigerators, lift, electric fittings and the like and also paint the outside of the building with oil once in five years and keep the building insured. These are ordinary covenants in a lease of a furnished building. These do not at all show that the lessor was rendering any service in the hotel business carried on by the lessee or in fact doing any business at all. On the facts of this case we are unable to agree that the letting of the building amounted to the doing of a business. The income under the lease cannot, therefore, be assessed under Section 10 of the Act as the income of a business.

8. As found by the Hon'ble Supreme Court in the above case, the agreement of the present assessee reads almost the same clauses as in the case of the Hon'ble Supreme Court. According to the agreement the assessee has to let out the property for a period of 5 years on monthly rent of Rs. 1,200. The lease may be renewed even after 5 years according to the clause I of the agreement at page 6 of the paper book.

Clause 5 of the agreement reads as if the lessee shall pay the service and maintenance which is caused to be rendered by the lessor on the basis as may be negotiated and settled with Anandilal Poddar & Sons (P.) Ltd. who are the promoters of the building. As it is clearly observed by the Hon'ble Supreme Court, the generalised clause contained in the agreement shows that the present assessee is not at all doing any service in the premises. The fact of the case is almost equal to the facts before the Hon'ble Supreme Court. In Supreme Court's

case the hotel premises was let out to a person for running a hotel business. In the present case on our hand the premises was let out to various tenants for carrying out their respective business and as already said the agreement shows that the assessee has to receive the monthly rent as an owner and it does not require to do any services. Following the judgment of the Hon'ble Supreme Court we can safely come to the conclusion that letting out of the property to third parties for doing their business cannot be construed as a business in hands of the assessee.

9. In the case of CIT v. National Storage (P.) Ltd. [1967] 66 ITR 596 the Hon'ble Supreme Court held as follows :- There is no force in the sixth submission of the learned counsel for the appellant because the Indian Income-tax Act does not contemplate assessment of property under Section 9 in respect of the rental income and assessment under Section 10 in respect of the extra income derived from the carrying on of an adventure or concern in the nature of trade if the assessee is in occupation of the premises for the purposes of the business.

From the above observation of the Hon'ble Supreme Court it is very clear that if the assessee is in occupation of the premises for the purpose of business or carrying on any adventure in the nature of trade, the income derived therefrom can be classified as business income. In the case in our hand the assessee admittedly is not in occupation of the premises and the premises were under the occupation of various tenants for carrying on their trading activities in respect of their field. Moreover, the assessee has no control over the property and at all material times the occupation and possession of the premises continued to be with the tenants. Even though the assessee is in constructive possession under the Transfer of Property Act, for the purpose of Income-tax Act the assessee is not in occupation of any part of the premises for the purpose of carrying on its trading activity in furtherance of its object as per the Memorandum of Association. In the case of CIT v. Halai Nemon Association [2000] 243 ITR 439 : 111 Taxman 326 the Hon'ble Madras High Court held that the activity of earning an income from making the building available to others for a charge for limited periods is not to be equated with the letting out of a building on lease from month to month or year to year. According to the Hon'ble High Court where the building was let out on month to month or year to year basis it could be said that the building was being exploited

by the owner to earn rental income. In this case the assessee is a charitable institution and it has put up a building for the purposes of marriage and other functions. It also supplies chairs and mikes etc., in the building and collected service charges from the parties to whom these facilities are made available. The let out of this building for marriage purposes or other function for a limited period would amount to an activity of business. The Hon'ble Madras High Court observed that the overall control of the building at all times being retained by the assessee.

10. In the case of our hand the building was admittedly let out to various tenants on month to month basis for a period of 5 years and which can also be extended for further periods. This shows that the assessee has no control over the building except to maintain the same as an owner/land lord. The over all control of the building and its occupation and physical possession always continues to be with the tenants and the assessee is entitled to receive only the monthly rent and other charges with an obligation to maintain the building as a land lord or owner. In view of the judgment of the Hon'ble Madras High Court it is very clear that whenever the building remains under the control of an owner, the activity of the assessee can be described as business carried on by the assessee with the intention of earning income from the building. As already discussed in the case at our hand the entire control and possession of the building is with the tenants and the lessee is entitled to receive the monthly rent only as an owner or landlord, the activity of such letting out of the property cannot be considered as business activity.

11. In the case of Sri Balaji Enterprises v. CIT [1997] 225 ITR 471 the Hon'ble Karnataka High Court held as follows :- From the aforesaid decision of the Supreme Court it is clear that if a person receives rental income by leasing out the property as its owner, then the income may come under Section 22 of the Income-tax Act, 1961. But if the leasing of the property was done as part of the business concern, the income received therefrom, cannot be said to be received as a land owner but as a trader. In other words, if the property is taken on lease, thereafter developed and leased out to various tenants as part of the business activity of the assessee and not in its activity as the owner, then the income has to be treated as business income. In other words, the dictum of the court is clear to the effect that such an income is received as business income, and not as the owner of the

property. In this case, the assessee has taken the property on lease, developed the same and has leased out the same as part of its business.

From the above case it is very clear whenever the property was let out as an owner for the purpose of earning rental income, the said income has to be treated as income from house property under Section 22 of the Act. In the case on our hand it is an admitted fact that the assessee is the owner of the premises and the same was let out to various tenants in terms of the agreement contained in the copy of the agreement filed before us. This generalised clause contained in the agreement discloses that the assessee's intention is to earn rental income from the building and the present transaction cannot be termed as business activity. *S.G. Mercantile Corpn. (P.) Ltd. v. CIT* [1972] 83 ITR 700 the Hon'ble Supreme Court held that letting out shops and stalls to shopkeepers and stallholders cannot be treated as an activity in the nature of trade or utilising the real estate in the best possible way or dealing with it commercially. The Hon'ble Supreme Court further held that in case the assessee is the owner of the building or lands appurtenant thereto he would be liable to pay tax as income from house property even if the object of the assessee in purchasing the landed property was to promote and develop market thereon.

13. In view of the above observation even though the object of the assessee is to acquire the building and promote the same for the purpose of its business still the activity of the assessee in letting out the same to various tenants cannot be treated as business activity, the income derived therefrom shall be considered as an income from house property.

14. The case of *Karnani Properties Ltd. (supra)* which was relied on by the CIT(A) for arriving at the conclusion that the assessee's income shall be treated as income from business. We have carefully gone through the judgment of the Hon'ble Supreme Court in this case. The fact before the Hon'ble Supreme Court was that the assessee was the owner of the Karnani Mansion in Park Street, Calcutta. The abovesaid mansion consists of numerous residential flats and over a dozen shop premises. All these were let out to different tenants on a monthly rental basis. The assessee in that case appears to have purchased high voltage

A.C. current in bulk from Calcutta Electric Supply Corporation and converted the same into low voltage A.C. current in the company's own power house within the premises and supplies the powers to its tenants. It also maintains separate water pump-house and a boiler for supply of hot and cold water to the tenants. On these findings of facts the Hon'ble Supreme Court held that the rental income received by the assessee shall be treated as income from house property and the service charges shall be treated as income from business. The Hon'ble Supreme Court has also made it very clear that the Supreme Court was not considering any abstract proposition of law in that case and they are letting down the law applicable to the facts found.

15. In view of the above facts, we are of the considered opinion that the facts of the Hon'ble Supreme Court in the case of Karnani Properties Ltd. (supra) is not applicable to the facts of the present case. Even if the similarity of certain facts as found in the case of Karnani Properties Ltd. (supra) has to be applied in the case on our hand, it will go against the assessee since the rental income received by the assessee was treated as income from house property by the Hon'ble Supreme Court. So, we are of the considered opinion that the CIT(A) has committed an error in relying upon the judgment of the Hon'ble Supreme Court in the case of Karnani Properties Ltd. (supra) in arriving at his conclusion that the income of the assessee is one of income from business activity. In respect of service charges the lease deed does not disclose any particulars of service which is accepted to be performed by the assessee. The lease deed reads as if the promoter and builder of the premises is one M/s. Anandilal Poddar & Sons Pvt.

Ltd. The order of the CIT(A) discloses as if the assessee is rendering, as many as, 8 services. We have gone through the records carefully and there is no material available on record to show that these services were really rendered by the assessee. The lease deed which is supposed to be a basic document for providing services and establishing a relationship between the landlord and the tenants did not speak about any services and no document has been filed by the assessee either before us or before the lower authorities to show that they are performing any services as it was mentioned in the order of the first appellate authority. Furthermore, admittedly, the premises is at 5th floor. The other floors of the

building should be owned by some other persons. The lift facilities, staircase, car parking and other services mentioned in the CIT(A)'s order cannot be undertaken independently without the cooperation of the owners of other premises or other floors. In these circumstances, we see no reason in the argument of the learned counsel that the assessee rendered any service to the tenants in furtherance of its business activities. We are of the considered opinion that the assessee has mentioned in the lease deed as 4% service charges without disclosing the details of services with an intention to split up the rental income for the purpose of avoiding the income-tax or other taxable liabilities.

16. In the case of *Karanpura Development Co. Ltd. v. CIT* [1962] 44 ITR 362 the Hon'ble Supreme Court held that where a company acquires property which it sells or leases out with a view to acquiring other properties to be dealt with in the same manner, the company is not treating them as property to be enjoyed in the shape of rent on which they yield but as kind of circulating capital leading to 'profits of business' which profits may be either enjoyed or go back into the business, to acquire more properties for further profitable exploitation. In the case on our hand, admittedly the properties were let out for a period of 5 years with a clause for renewal. The reading the agreement between the assessee and the tenant clearly shows that the assessee has no intention either to sell it or to lease out with a view to acquiring other properties to be dealt with in the same manner.

On the contrary, the facts are very clear from the agreement that the assessee company intended to give the property for the purpose of earning rental income as an owner and hence we are of the considered opinion that the rental income received by the assessee and other maintenance service charges shall be treated as income from house property.

17. In the case of *East India Housing & Land Development Trust Ltd.* (supra) the Hon'ble Supreme Court observed that the income derived by the company from shops and stalls is income received from property and falls under the specific head "income from house property".

18. As we have already discussed, the activities of the assessee in letting out the premises to various tenants on monthly rental basis amounts to receiving rental

income as an owner and not with the intention to perform any business activity. There is a fine distinction to classify the income derived from property either as a house property income or business income. Even though the object of the assessee company is to acquire land and building and lease out the same the present transaction as appears from the lease deed is only a normal transaction between the landlord and the tenants with a view to receive rental income which otherwise cannot be considered as a business activities. There is no intention on the part of the assessee company either to sell the property or to turn into account the leased amount for the purpose of expanding its business in the like properties. On the basis of the facts available before us, we are of the considered opinion that the act of letting out the premises by the assessee to various tenants cannot be termed as business activities and hence the income derived therefrom has to be classified under the head "income from properties" under Section 22 of the Act.

19. In respect of service charges as we have already discussed, the agreement is almost silent in respect of the nature of service which is accepted to be rendered by the assessee. There is absolutely no document or evidence available either before the lower authorities or before us to show that any service as indicated by the first appellate authority is rendered by the assessee. In view of the absence of evidence we find that no service was rendered by the assessee to its tenants except the maintenance of the premises as a landlord. In view of the above discussion, we find that the first appellate authority has committed an error in arriving at the conclusion that the income earned by the assessee by letting out the premises was in the nature of business activity and hence we have no hesitation to set aside the order of the CIT(A) and restore that of the Assessing Officer.

20. The other contention of the learned senior counsel is that in the previous year the income of the assessee was treated as income from house property by the Assessing Officer. It is well settled principles of law that the principle of res judicata is alien to the proceedings under income-tax. Merely because the Assessing Officer has committed an error in making a classification for the purpose of taxation, that will not prevent the Assessing Officer to rectify the mistake in the subsequent years. In other words, each assessment proceeding is

separate and distinct one and each case has to be decided in accordance with the facts available before the concerned authorities. Hence we do not find any infirmity in the order of the Assessing Officer in treating the income of the assessee as income from "house property".

21. In the result, we set aside the order of the. CIT(A) and restore the order of the Assessing Officer and the appeal stands allowed.

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