

"income from other sources" in view of the decision in M K Dar vs CIT (1982) 138 ITR 801 (All.) and CIT vs DL Kanhere (1973) 92 ITR 535 (Bom.) where it was held that the lease income enjoyed from the letting out of the cinema building and the furniture, etc. would be assessed as income from other sources and when the said cases are in principal similar to the case at hand."

4. *"The CIT(A) has erred in holding that there is no question of disallowance of depreciation on the basis of provision of section 38 of the Act when neither has the assessee claimed any depreciation nor any depreciation is allowable in view of the provisions of section 38".*

2.1 Facts in brief relevant to the grounds of appeal as culled out from the orders of the lower authorities are that the assessee filed return of income on 31.03.2008 declaring total income of Rs.43,41,800/- which included rental income from six properties declared under the head 'income from house property'. In the scrutiny assessment completed under section 143(3) of Income Tax Act, 1961 (in short 'the Act') on 31.12.2009, the Id. Assessing Officer accepted the rental income from properties declared in return of income under the head 'income from house property' except following two properties:

1. Hotel Building along with asset therein, and
2. Business premises of jewellery show-room along with furniture.

2.2 In respect of Hotel building, the Id. Assessing Officer observed that the assessee was running a hotel in earlier years, which was let out and therefore rental income from hotel building was liable for assessment under the head 'income from other sources' in view of the judgment of Hon'ble Supreme Court in the case of Sultan Brother Pvt. Ltd. Vs. CIT (1964) 51 ITR 353 (SC). Whereas, the assessee contended before the Id. Assessing Officer that primary purpose of letting out the hotel building was to earn income from the property and therefore in view of the later judgment of the Hon'ble Supreme Court in the case of Sambhu Investment Pvt. Ltd Vs. CIT, 263 ITR 143, the income was to be assessed under the head 'Income from house property'. The Id. Assessing Officer did not accept the contention of the assessee and noted that as per clause (iii) of section 56(2) of the Act the letting out of the property was inseparable from letting out of the furniture and other assets of the hotel and the facts of the case being squarely covered by the judgement of the Hon'ble Supreme Court in the case of Sultan Brother Pvt. Ltd.

(supra), the income derived from letting out of the hotel property was held as assessed under the head 'income from other sources' as under:-

<i>"Total receipts on letting out of hotel property</i>	<i>Rs.43,48,000/-</i>
<i>Less:</i>	
<i>Deduction u/s 57:</i>	
<i>Interest</i>	<i><u>Rs.3,25,362/-</u></i>
<i>Income from other sources</i>	<i>Rs.40,54,638/-"</i>

2.3 In respect of shop let out with furniture and fixtures including strong room for diamond and jewellery showroom, following the decision in respect of Hotel property, the Id. Assessing Officer held that the rental income from shop is also assessable under the head 'income from other source's as under:-

<i>"Total receipts on letting out of shop</i>	<i>Rs.1,50,000/-</i>
<i>Less: Deduction u/s 57</i>	<i>Nil</i>
<i>Income from other sources</i>	<i>1,50,000/-"</i>

2.4 The Id. Assessing Officer further did not allow the depreciation in respect of the two properties stating that neither the assessee had claimed any depreciation nor depreciation was allowable in view of the provision of section 38 of the Act.

2.5 Aggrieved, the assessee filed appeal before the learned Commissioner of Income-tax (Appeals), wherein he contended that the facts of the case of the Sultan Brother Pvt. Ltd. (supra) were different from the facts of the case of assessee and later decision in the case of Sambhu Investment Pvt. Ltd. (supra) was applicable to the facts of the assessee. The submission of the assessee before the learned Commissioner of Income-tax (Appeals) is summarized as under:-

- The main asset let out was the building and not the furniture or the other assets.
- The assessee was unable to run the hotel and therefore he gave the building and furniture and other amenities on lease.
- The main asset in the case is land and building and furniture and other amenities were having a nominal value of land and building.
- The Assessing Officer considered the decision of the Supreme Court in the case of Sultan Brothers Pvt. Ltd. (supra) decided in 1964 based on the old Income Tax Act, 1922, whereas the Hon'ble Supreme Court in the later decision in the year 2003 in the case of Sambhu Investment

Ltd. (supra) upheld the decision of the Calcutta High Court reported in 249 ITR 47 (Cal) and the Hon'ble Calcutta High Court has considered the decision of different Courts including the decision of the Hon'ble Supreme Court in the case of Sultan Brother (supra).

- In the case of Sultan Brothers (supra) the rent of property was almost equal to rent from furniture, whereas in the present case approximate value of land and building is Rs.2.78 crores as compared to furniture and fixture of Rs.13,11,472/-, therefore the ratio of rental receipts on account of movable and immovable property was 4.44% and 95.56%,
- The lessee also made a substantial investment in the furniture and fixtures etc.
- In earlier year, the Assessing Officer himself has assessed the rental income from the Hotel property under the head income from house property.

2.6 Similarly in respect of shop / showroom property the submission filed before the learned Commissioner of Income-tax (Appeals) by the assessee are summarised as under:-

- The assessee installed safe, CCTV and air conditioner etc as basic amenities for running of a shop.
- The market value of the shop was around 60 lakhs whereas the cost of all amenities was Rs.5.43 lakhs.
- The shop could not be let out without the basic amenities and in the case of Deputy Commissioner of Income Tax Vs. GR Rao (Hyderabad) (2010) 134 TTJ 87 the Tribunal has held that income let out from the building with some basic amenities was assessable under the head income from house property.

2.7 In view of the submission of the assessee, the learned Commissioner of Income-tax (Appeals) held that the rental income from the above referred two properties was assessable under the head 'Income from house property'. In respect of depreciation on above two properties, the learned Commissioner of Income-tax (Appeals) held as under:-

"It may, thus, be observed that Section 38 of Income-tax Act, 1961, does not disallow depreciation on assets which are assessable under the head 'income from other sources'. It only restricts the deduction proportionately with regard to the use of the assets in business or otherwise. In the instant case, all the assets are exclusively used by the lessee in the activity of letting out. Thus, there is no question of disallowance of depreciation on the basis of provisions of/section 38 of the Income-tax Act, 1961.

It has, thus, been submitted that even if the income were to be treated under the head 'income from other sources', the total depreciation which works out to Rs.9,55,479/- as per details placed on record will have to be allowed as deduction u/s 57 (ii) of the Income-tax Act."

3 Aggrieved with the above findings of the Id. Commissioner of Income-tax (Appeals), the Revenue is before us.

4. The learned Senior Departmental Representative relied on the order of the Assessing Officer and submitted that Assessing Officer has rightly invoked the case of Sultan Brothers (supra), as the furniture, other assets etc were inseparable from the building and therefore, rental income from hotel building and other assets was assessable under the head 'Income from other sources' only. Similarly in respect of shop/ showroom, the learned Senior Departmental Representative submitted that rental income has been correctly assessed by the Assessing Officer under the head 'Income from other sources'. Whereas on the other hand, the learned Authorized Representative of the assessee relied on the order of the learned Commissioner of Income-tax (Appeals) and submitted that in respect of hotel building, the cost of investment in furniture and fixtures was not more than 5% of the total cost of investment in land and building and that being a basic amenities for letting out the building, the judgement of the Hon'ble Supreme Court in the case Sultan Brother (supra) was not applicable to the facts of the assessee. He reiterated the submission made before the learned Commissioner of Income-tax (Appeals). In respect of shop/show-room, he submitted that providing safe, air conditioner or CCTV camera was a basic necessity for letting out the property to jewelers who were prospective tenants in the area.

5. The first three grounds of the Revenue are in respect of whether the rental income from above two properties is assessable under the head 'Income from other sources' or under the head 'Income from House Property', therefore all the three grounds are decided together.

6. We have heard the rival submission and perused the material available on record including the order of the learned Commissioner of Income-tax (Appeals). We find that the learned Commissioner of Income-tax (Appeals) has taken into consideration the facts of the case and the decision of the Hon'ble Supreme Court in the case of Sultan Brothers (supra) as well as the decision in the case of Sambhu Investment (supra) and thereafter arrived at a conclusion that rental income from above referred two properties was to be assessed under the head 'income from house property' rather than under the head 'income from other sources'. In the cases of M K Dar Vs. CIT(supra) and CIT Vs. D L Kanhere & anr (supra) relied upon by the Revenue in its grounds of appeal, the assessment years involved are 1958-59 & 1959-60 and 1959-60 to 1965-66 respectively. The judgements in both these cases have been given relying on the judgement of the Hon'ble Supreme Court in the case of Sultan Brothers P Ltd. We find that the judgement in the case of Shambhu Investment (supra) is a later on and in that case Hon'ble High Court of Calcutta after considering the ratio laid down in the case of Sultan Brothers P Ltd (supra) and other judgements subsequent to the judgement of Sultan Brothers P Ltd (supra), has held as under :

“Taking a sum total of the aforesaid decisions it clearly appears that merely because income is attached to any immovable property cannot be the sole factor for assessment of such income as income from property. What has to be seen is what is the primary object of the assessee while exploiting the property. If it is found applying such test that the main intention is for letting out the property or any portion thereof, the same must be considered as rental income or income from property. In case it is found that the main intention is to exploit the immovable property by way of complex commercial activities, in that event it must be held as business income.

In the light of the above, let us now apply such test in the present case. From the copy of the agreement produced before us it appears that the assessee has let out the furnished office at monthly rent payable month by month by the respective occupants. Services rendered to the various occupants according to the said agreement are not separately charged and the monthly rent payable is inclusive of all charges to the assessee.

To decide this issue we cannot overlook the fact that the cost of the property was Rs. 5,42,443. A portion of the said property is used by the assessee himself for his own business purpose. The rest of the said property has been let out to the various occupiers as stated hereinbefore. It further appears that the

assessee had already been recovered a sum of Rs. 4,25,000 as and by way of security free advance from three occupants. Hence, the entire cost of the property let out to those occupiers has already been recovered as and by way of interest free advance by the assessee. Hence, it cannot be said that the assessee is exploiting the property for its commercial business activities and such business activities are primary motto and letting out the property is a secondary one.”

7. The above judgement of the Hon'ble High Court has been affirmed by the Hon'ble Supreme court in their judgment reported in 263 ITR 143.

8. From the submission made on behalf of the assessee before the Id. Commissioner of Income-tax(Appeals)and before us , we find that the main asset in case of hotel property was land and building and cost of investment of which at relevant time has been estimated at Rs. 2.78 crore, whereas cost of the furniture and fixture has been estimated at merely Rs. 13.11 lakhs. Further, we find that the assessee was unable to run the hotel, so he leased out the property to earn income from the property. We have also noted that the structure of building was as such that it could not have been let out for the purpose other than running a hotel and therefore letting out of the furniture and fixture and other amenities was a necessity, without which the assessee could not have fetched the prospective tenant. The main object was letting out of the building and not machinery or furniture or fixture, as it is the building along with furniture and fixture etc has been let out and not the machinery or furniture or fixture along with building. The basic object was to explore the potential of the building and therefore the learned Commissioner of Income-tax (Appeals) has rightly held that income from the hotel building is assessable under the head 'income from house property'. The findings of the Hon'ble High court in the case of Shambhu Investment (supra), which have been affirmed by the Hon'ble Supreme Court are squarely applicable to the facts of the assessee. Similarly in the case of shop/ show room building was equipped with safe, air conditioner, CCTV camera etc, which were essential for prospective tenant in that area of jewellery and the main asset again was building and not the amenities provided. We are of the opinion that there is no infirmity in the decision of the learned Commissioner of Income-tax (Appeals) in holding the income from shop as income under the head income from house property.

9. In view of the above we hold that no interference is required in the decision of the learned Commissioner of Income-tax (Appeals) and therefore ground Nos.1, 2 and 3 of the Revenue are dismissed.

10. In Ground No.4 the Revenue has raised that learned Commissioner of Income-tax (Appeals) has erred in holding that there was no question of disallowance of depreciation u/s 38 of the Act in respect of the two properties. We find that the learned Commissioner of Income-tax (Appeals) has considered the provision of section 38 wherein the disallowance for part house of the property for own business purpose is prescribed. Apparently, the provisions of the section 38 of the Act are not applicable in the facts of present case as the properties were not subjected to partly use for official or business purpose by the assessee. The ground of the Revenue that the assessee has not claimed the depreciation is also based on incorrect appreciation of facts, because the assessee has offered rental income under the head income from house property, in which depreciation is not allowable deduction, so there was no requirement for the assessee to claim the depreciation. Since, we have already held the rental income from both the properties as assessable under the head 'income from house property', the issue whether depreciation is allowable to the assessee in respect of those two properties under the head 'income from other sources' is mere academics. In view of facts, the ground No. 3 of the Revenue is also dismissed.

11. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 30.11.2015.

Sd/-

**(I.C.SUDHIR)
JUDICIAL MEMBER**

Dated: 30 /11/2015

A K Keot

Sd/-

**(O.P.KANT)
ACCOUNTANT MEMBER**

Copy forwarded to

1. Applicant
- 2.
3. Respondent
4. CIT
5. CIT (A)
6. DR:ITAT

**ASSISTANT REGISTRAR
ITAT, New Delhi**