

**IN THE INCOME TAX APPELLATE TRIBUNAL  
BANGALORE BENCH " B "**

**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER**

I.T. (I.T) A. No.65/Bang/2015 (Assessment Year : 2008-09)		
Shri Ravindra Sunku, No.57, AECS Layout, Near ISRO, RMV II Stage, Bangalore-560 094 PAN AOP	Vs.	Income Tax Officer, International Taxation Ward 2(1), Bangalore.
Appellant		Respondent.
I.T. (I.T) A. No.66/Bang/2015 (Assessment Year : 2008-09)		
Smt. Roopa Ravindra Sunku, No.57, AECS Layout, Near ISRO, RMV II Stage, Bangalore-560 094 PAN AOP	Vs.	Income Tax Officer, International Taxation Ward 2(1), Bangalore.
Appellant		Respondent

Appellant By : Shri K.Y. Ningoji Rao, C.A. Respondent By : Smt. Renuka Devi, JCIT (D.R)
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Date of Hearing : 19.7.2016.

Date of Pronouncement : 29.7.2016.

**ORDER**

These two appeals by the husband and wife are directed against the composite order dt.28.5.2014 of Commissioner of Income Tax (Appeals) for the

Assessment Year 2008-09. Common grounds are raised in these appeals which are as under :

- “ 1. That the orders of the A.O./CIT (Appeals) in so far as it is against the appellant is against the law, facts, circumstances, natural justice, equity, without jurisdiction, bad in law and all other known principles of law.*
- 2. That the total income and total tax liability computed is hereby disputed.*
- 3. That the assessment made in the status of AOP is bad in law and without jurisdiction requires to be cancelled.*
- 4. That the learned CIT (Appeals) erred in upholding the assessment made in the hands of AOP.*
- 5. The Id. A.O./CIT (Appeals) erred in taxing the rental income of Rs.8,53,632 letting out building as income from other sources.*
- 6. Without prejudice to the above, the A.O./CIT (Appeals) erred in not allowing depreciation as per law.*
- 7. The Id. A.O./CIT (Appeals) erred in not giving credit to the taxes paid.*
- 8. The appellant denies liabilities for interest under Section 234B. Without prejudice to the appellant's right of seeking waiver before appropriate authority, the appellant begs for consequential relief in the levy of interest under Section 234B.*
- 9. For the above and other grounds and reasons which may be submitted during the course of hearing of this appeal, the appellant requests that the appeal be allowed as prayed and justice be rendered.”*

2. Both the assesses filed their returns individually, the Assessing Officer while completing the assessment treated husband and wife (assesses) as Association of Persons (AOP) and further the income from house property

declared in the respective returns in equal amounts representing rent and service charges received from the property which was purchased and held in joint names was assessed as 'income from other sources'. Aggrieved by the action of the Assessing Officer the assesses filed appeals before the CIT (Appeals). The CIT (Appeals) has confirmed the action of the Assessing Officer so far as the assessment were made as AOP in respect of individual assesses as well as treatment of rental income and service charges as 'income from other sources'. However the CIT (Appeals) has directed the Assessing Officer to consider the grant of depreciation as per provisions of section 57(ii) of the Act.

3. Ground Nos.1 & 2 are general in nature and does not require any specific adjudication.

4. Ground No.3 & 4 are regarding the status of AOP.

4.1 The learned Authorised Representative of the assessee has submitted that the assesses are husband and wife and Non-Resident Indians (NRIs). The assesses are working in USA and having their joint account in USA as well as in India. The property in question is a commercial property and was purchased by the assesses in their joint names by contributing the purchase consideration from the joint account. Therefore the assesses are having equal share in the

property and accordingly rental income of the property as well as service charges of the property are equally shared by the assesses and offered to tax as 'income from house property'. The learned Authorised Representative has referred to the rent agreement and service agreement and submitting that the separate agreements were entered into by the assessee. When the assesses are not in the business of hiring or leasing out of the property, the assessments made by the Assessing Officer by treating the same as AOP in respect of individual is not justified. He has referred to the Section 45 of Transfer of Property Act and submitted that in the case of joint ownership of the property the shares of the joint owners will be determined as per the share of contribution in purchase of the property. The learned Authorised Representative has referred to the agreement and pleaded that the assesses have the joint account in USA as well as in India and both husband and wife are working having their independent source of income. He has further contended that the assesses have filed the relevant documents to show their separate source of income and joint account in USA as well as in India from where the purchase consideration was paid. Thus the learned Authorised Representative has pleaded that the evidence filed by the assesses may be admitted as

additional evidence to show that both the husband and wife are having independent source of income and the purchase consideration was paid by contributing from their own income. Thus he has contended that when the assesses are able to show their contribution for purchase of property then the finding of the Assessing Officer is not sustainable. There is no definite share in the property and therefore the Assessing Officer assessed the entire income in the hand of the AOP instead of individual status. The status of individual was not accepted by the Assessing Officer as the sale date under which the property was purchased has not expressly mentioned specific share of the husband and wife. Thus the learned Authorised Representative has submitted that in view of the Section 45 of the Transfer of Property Act as well as the additional evidence filed by the assessee, the share of the husband and wife in the property in question shall be in the ratio of contribution made by them in purchase of the property.

4.2. On the other hand, the learned Departmental Representative has submitted that the Assessing Officer has given a finding that it is not ascertainable from the documents of title deed, the specific shares of the

husband and wife, therefore, the status of the assesses were rightly treated as AOP. She has relied upon the orders of the authorities below.

4.3 Rival submissions as well as relevant records have been considered. There is no dispute that the property in question was purchased by the husband and wife in the joint names and no specific share of the husband and wife is mentioned in the purchase document. However, the assessee has filed the additional evidence showing the independent source of the husband and wife for purchase of the property which was pooled into joint account in USA and transferred to India from where the payment was made in the property. Thus the assesses have claimed that when the husband and wife both have contributed their share of purchase consideration then the share in the property is in the ratio of contribution in the purchase consideration. Reference has been made to Section 45 of the Transfer of Property Act as under :

*“45. Joint transfer for consideration -- Where immovable property is transferred for consideration to two or more persons and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to*

*them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interest in such property in proportion to the shares of the consideration which they respectively advanced.*

*In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.”*

As per the provisions of Section 45 of the Transfer of Property Act in case of joint ownership of property the share of the co-owner shall be determined as per the ratio of their contribution in the purchase consideration. Since the assesses have filed additional evidence in support of the independent source of income and contribution in the purchase consideration which is required to be examined and verified. Accordingly in the facts and circumstances of the case this issue is set aside to the record of the Assessing Officer to examine and verify the additional evidence filed by the assessee and then decide the issue.

5. Ground No.5 is regarding taxing the rental income as ‘income from other sources.’

5.1 The learned Authorised Representative of the assessee has submitted that the property in question was let out by two separate agreements one is rental agreement and another is service agreement which will not lead to the

conclusion that the assessee is carrying out activity of leasing out the property but in this case of assesses individual property was let out to the tenant and as per requirement of the tenant two separate agreements were entered one for rent and another for service. Thus the learned Authorised Representative has submitted that treating the rental income as 'income from other sources' is not justified as this is the only property of the assessee which has been let out with obvious reason that the assesses are staying in USA for their job purpose and therefore rental income offered by the assessee as 'income from house property' ought to have been accepted. He has further contended that service agreement is nothing but regarding the air-condition, lift and other common amenities of maintenance of generator etc. which are part and parcel of the building and therefore cannot be given a separate and different treatment than 'income from house property.'

5.2 On the other hand, the learned Departmental Representative has relied upon the orders of the authorities below and submitted that the Assessing Officer has given a finding that the let out of the building is inseparable from letting of plant and machinery, furniture and therefore entire income is to be assessed as 'income from other sources' as per section 56(2)(iii) of the Act.

5.3 Having considered the rival submissions and relevant material on record it is noted that this is an isolated case of purchase of property in the joint name by the husband and wife and letting out the same to the tenant. Therefore it is not the case of a regular and organized activity of the assessee to lease out the properties. When it is only an isolated case of owning a single property in the joint name then the rental income from letting out of the property will be in the nature of 'income from house property' and cannot be treated as 'income from other sources'. As regards the service charges under the separate service agreement, it is clear that this is only with respect to the power back up, air condition and other lighting fixtures and service lifts as well as car parking spaces. Therefore no specific machinery or furniture was made available by the assessee to the tenant against the service charges but only the necessary amenities and power back up and common lift are part of the subject matter of the service agreement. When the dominant purpose of letting out of the property in question is the house property and not the plant and machinery, then the rental income as well as the service charges has to be given the same treatment as held by the Hon'ble Calcutta High Court in the case of Shambu Investments Ltd. (supra) which has been confirmed by the Hon'ble Supreme

Court cited in 263 ITR 143. The Hon'ble Supreme Court in the case of Sultan Brothers Vs. CIT 51 ITR 353 while dealing with an identical issue has observed that the income realized by the owners by way of rental income from a building whether commercial or residential house is assessable under the head 'income from house property'. The only exceptions are cases where letting off the building is inseparable from letting of machinery, plant and furniture. In such cases it has been held that the rental income would not have been realized but for letting out of machinery, plant or furniture along with such building and therefore the rentals received for the building is to be assessed under the head 'income from other sources.' In the case on hand, the predominant purpose was letting out the commercial building/property in question and not the lift or air-conditioners fixed in the building. Therefore the charges for common lift and air condition would partake the character of the main purpose of letting out which is the building and accordingly the rental income will be assessed as 'income from house property'. Hence the orders of the authorities below for this issue was set aside and the claim of the assessee is allowed.

6. Ground No.6 is allowance of depreciation. In view of the finding on the Ground No.5, this ground becomes infructuous. The other grounds are consequential in nature .
7. In the result, the appeals are partly allowed for statistical purpose.

Order pronounced in the open court on 29th day of July, 2016.

Sd/-

**(VIJAY PAL RAO)**  
**JUDICIAL MEMBER**

\*Reddy gp

Copy to :

1. Appellant
2. Respondent
3. C.I.T.
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard File.

By Order

Asst. Registrar, ITAT, Bangalore