

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'B' BENCH, KOLKATA**

[Before Shri N. V. Vasudevan, Hon'ble Judicial Member & Shri Waseem Ahmed, Hon'ble Accountant Member]

I.T.A. No. 844/Kol/2016
Assessment Year: 2011-12

Deputy Commissioner of Income Tax, Circle-13(1), Kolkata.....Appellant
Ayakar Bhavan Poorva
6th Floor
R. No. 610
110, Shantipally
Kolkata - 700 107

Calcutta Mumbai Truck Terminal Ltd.....Respondent
545, G.T. Road (South)
Howrah - 711102
[PAN : AABCC 0747 Q]

Appearances by:

Shri R.S. Sahay, FCA, appeared on behalf of the assessee.

Shri S. Dasgupta, Addl. CIT, DR appearing on behalf of the Revenue.

Date of concluding the hearing : February 20th, 2018

Date of pronouncing the order : 1st March, 2018

O R D E R

Per N.V. Vasudevan :-

This is an appeal filed by the revenue against the order dt. 22/01/2016, of the Id. Commissioner of Income Tax (Appeals)-1, Kolkata (hereinafter the 'Id. CIT (A)'), passed u/s 250 of the Income Tax Act, 1961 (the 'Act'), relating to the Assessment Year 2011-12.

2. There is a delay of three days in filing of this appeal by the revenue. It has been explained by the revenue that the delay in filing of the appeal was due to administrative and procedural reasons. The reasons given for the delay in filing of the appeal is accepted and the delay is condoned.

3. The grounds of appeal raised by the revenue reads as follows:-

"1. That in the facts and circumstances of the case and in law, the Id. CIT(A) has erred in considering the Rental income against various capital assets as assessee's business income.

2. *That in the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the additions being capital expenditure under the head "Cost of construction, repairs & maintenance, depreciation and interest of loan.*

3. *That the Department craves leave to add, modify or alter any of the above ground(s) of appeal and/or adduce additional evidence at the time of hearing of the case."*

4. The brief description of the activities of the assessee is that it has set up a multifarious Truck Terminal at Vill: Dhulagori, Sankrail, Howrah in joint venture with West Bengal Transport Infrastructure Development Corporation Ltd., under Ministry of Transport, Govt. of West Bengal. The said project is being set up under the endeavor of Govt. of West Bengal to ease out the flow of heavy vehicles in the city of Kolkata. The Said project is eligible for deduction of 100% of Profits u/s 80 IA(4) of the Income Tax Act, 1961 for 10 years. Buildings constructed was shown in Fixed Assets and depreciation was claimed on such assets viz., Truck Parking Area, Administrative Building, Bank Block, Boundary Walls, Dormitory, Electrical Installation Building, Electric Substation Building, Mini Theatre, Dormitories, Fire Brigade office, Health Club, Medical centre, Police Station, Post office, Petrol Pump Pump House, Tall gate storage, Toilet, water reservoir etc. Some of the assets constructed were sold and have been shown under Stock viz., Business centre, Fish & Live birds market, Fruits & vegetable market, Storage & Warehouses (Godowns) Perishable Goods market, Repair work shop, Shopping Plaza, Show Rooms, Residential Quarters, offices, Weigh Bridges etc. These units are treated at Stock / Stock in Process.

5. The assessee has let out several godowns etc. in the said complex on rent and income from such letting out was shown as business income. The said rent has been claimed as business income in the preceding years as well in next years also in view of the fact that renting of godowns /ware houses are part of trading operation of the assessee. The assessee has sold several warehouses at the said complex however not all could be sold. Since the said business asset cannot be utilized by the company the same has been let out to be commercially exploited by others.

6. On the claim of the assessee that income from letting was to be considered as income from business, the Assessing Officer was of the view that the income from letting out of the various facilities by the assessee, cannot be regarded as "income from business" but had to be regarded as income under the head "income from house property". Accordingly, the rental income which was shown by the assessee as business income was reduced from the business income and taxed separately u/s 22 of the Act.

7. Aggrieved by the action of the Assessing Officer, the assessee preferred an appeal before the Id. CIT(A). Before the Id. CIT(A), the assessee pointed out that the 'C' Bench of the Kolkata ITAT in the assessee's own case in *ITA No. 736/Kol/2011, for the Assessment Year 2008-09*, vide its order dt. 30/10/2015, was pleased to hold that the income from letting was on account of exploiting the commercial asset and, therefore, income from letting was to be regarded as business income. It was also pointed out that in the assessee's own case for the Assessment Year 2007-08, 2009-10 in *ITA No. 1189 & 1190/Kol/2011*, the Tribunal held that the godown rents received by the assessee has be assessed under the head "income from business". The Id. CIT(A) agreed with the contentions of the assessee and following the Tribunal's order in the assessee's own case, directed the Assessing Officer to assessee the rental income from letting out godowns as business income and not under the head "income from house property".

8. Aggrieved by the order of the Id. CIT(A), revenue has preferred the present appeal before the Tribunal.

9. The Id. D/R, relied on the order of the Assessing Officer. The Id. Counsel for the assessee relied on the order of the Id. CIT(A). We have duly considered the rival submissions. It is seen from the record that similar issue has been considered by the Hon'ble ITAT in the assessee's own case for the Assessment Year 2007-08 to 2009-10. The Tribunal on the issue whether rental income from godowns has to be regarded has business income or income from house property, came to following conclusion:-

"7.5 We have heard the rival submissions and perused the materials on record. On a specific query from the Bench to the Learned AR with regard to the status of the

unsold godowns in the subsequent years, he stated that the unsold godowns were duly sold in the subsequent years and business income offered by the assessee. Before us, the counsel relied on the decision of the Jurisdictional High Court in the case of *Azimganj Estate (P) Ltd vs CIT* reported in 352ITR 82 (Cal), wherein it was held as below:-

"11. In our opinion, we would have accepted the reasoning assigned by the Tribunal if the subject matter of stock-in-trade was not unsold flats simpliciter, but were plants, machinery} godown, etc and in those circumstances it could be reasonably argued that income by exploiting those stock-in-trade would come under the "purview of income from business. Even in the decision of the Gujarat High Court relied upon by Mr. Nizamuddin and the Tribunal below, in paragraph (iii) at page 247 of the Report, it was pointed out that what was to be seen was whether the asset was being exploited commercially by the letting out or whether it was being let out for the purpose of enjoying the rent. According to the said decision, the distinction between the two is a narrow one and has to depend upon certain facts peculiar to each case. It was further pointed out that you're and simple, the commercial assets like machinery, lentils, industrial sheds or godowns having high business potentials stand on a different footing from assets like land and building. In our view, in the case before us, the subject matter of exploitation being unsold flats still owned by the assessee, Commissioner of income tax (appeals) rightly concluded that same shall be treated as income from house property by way of letting it out.

12. In the case of *CIT v. Ajmera Industries (P.) Ltd.* [1976] [103 ITR 245](#) (Cal.) relied upon by the Tribunal below, a Division Bench of this Court was considering a case where the assessee was carrying on business and in course of its trading activities, the assessee was using and exploiting non-factory building including its godowns. In such a fact, the Division Bench was of the view that non-factory building including the godowns clearly constituted commercial assets of the assessee and the finding of the Tribunal in that case was that non-factory buildings including godowns were commercial assets of the company which amounted to exploiting major portion of the same by letting out to some others as business income of the assessee."

In the aforesaid judgement, the Hon'ble Calcutta High Court agrees to the fact that of the subject matter of stock in trade includes godowns then it could reasonably be argued that income by exploiting those stock in trade would come under the purview of income from business. Similarly in CIT vs Ajmera Industries (P) Ltd. reported in (1976) 103 ITR 245 (Cal) relied upon hereinabove, the assessee was using and exploiting non-factory building including its godowns. In such a fact, the division bench was of the view that non-factory building including the godowns clearly constituted commercial assets of the assessee which amounted to exploiting major portion of the same by letting out to some others as business income of the assessee.

7.6. We hold that in order to be a business income within the meaning of section 28 of the Act, there must be evidence of exploitation of the commercial asset. Exploitation of a commercial asset does not necessarily mean exploitation by the assessee himself at all material times. The assessee may temporarily cause it to be exploited by other person against payment of consideration and for this purpose may also execute a lease for a fixed period even with clauses of option to renew. But in order that the income derived from the leaves may be taxable it must be shown that the lessor's intention was that during the period of the lease the asset leased out must remain and treated as a commercial asset and exploited as such. This intention of the

lesser referred to above has to be a certain from the cumulative effect of all the terms of the lease and other material circumstances.

We find that the subject mentioned godowns were sold subsequently update was remaining unsold for some time and it was only during the intervening period, the same read let out by the assessee and rental income derived thereon. We find that the assessee is not engaged in the business of simply letting out of land and building but is engaged in developing, running and operating the truck terminal with several amenities and naturally rent realized from such splitting out a part of business operations. In this regard we would like to place reliance on the decision of the coordinate bench of the Bangalore tribunal in the case of ITO versus Information Technology Park Ltd reported in (2012) 49 SOT 491 (Bang.) (Trib) wherein it was held that:-

“Assessee had developed a technology Park, and let out its building along with amenities and facilities. Since the assessee is carrying on a commercial complex activity of setting up software technology Park with his various facilities and amenities the income derived from the lessees is to be taxed as business income and not as income from house property.”

Hence in view of the aforesaid facts and circumstances and respectfully following the judicial precedents relied upon hereinabove, we hold that the rental income derived from godowns are to be taxed only as income from business. Accordingly the ground no. 1 raised by the revenue is dismissed.

10. Respectfully following the decision of the Tribunal, we uphold the order of the Id. CIT(A) and dismiss this appeal of the revenue.

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

Kolkata, the 1st day of March, 2018.

Sd/-
[Waseem Ahmed]
Accountant Member

Sd/-
[N.V. Vasudevan]
Judicial Member

Dated :01.03.2018
{SC SPS}

Copy of the order forwarded to:

1. Deputy Commissioner of Income Tax, Circle-13(1), Kolkata

Ayakar Bhavan Poorva

6th Floor

R. No. 610

110, Shantipally

Kolkata - 700 107

2. Calcutta Mumbai Truck Terminal Ltd

545, G.T. Road (South)

Howrah - 711102

3. CIT(A)-

4. CIT- ,

5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By order

Senior Private Secretary
Head of Office/ D.D.O. ITAT, Kolkata Benches