

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, 'ई', मुंबई।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES, 'E' MUMBAI**

**श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं
श्री मनोज कुमार अग्रवाल, लेखा सदस्य, के समक्ष**

**Before Shri Joginder Singh, Judicial Member, and
Shri Manoj Kumar Aggarwal, Accountant Member**

**ITA No.82/Mum/2016
Assessment Year: 2011-12**

Elcome Properties Private Ltd. 901/902, 9 th Floor, Great Eastern Summit A, Plot No.56, Sector No.15, CBD Belapur, Navi Mumbai-400614	<u>बनाम/</u> Vs.	DCIT-10(3), Aayakar Bhavan, Queens Road, Mumbai
(निर्धारिती / Assessee)		(राजस्व / Revenue)
PAN. No. AABCE8665M		

निर्धारिती की ओर से / Assessee by	Shri Ashok Puri
राजस्व की ओर से / Revenue by	Shri V. Justin-DR

सुनवाई की तारीख / Date of Hearing:	15/05/2018
आदेश की तारीख / Date of Order:	15/05/2018

आदेश / O R D E R

Per Joginder Singh(Judicial Member)

The assessee is aggrieved by the impugned order dated 21/10/2015 of the Ld. First Appellate Authority, Mumbai. The only ground agitated by the assessee is with respect to treating the income from business as income from house property and consequent allowing the expenses only to the extent of 30% of the rent received ignoring the decision in the case of Chennai Properties and Investment Ltd. (373 ITR 673)(Supreme Court).

2. During hearing, the ld. counsel for the assessee, Shri Ashok Puri, contended that the main object of the assessee is to acquire property and to let out the same, therefore, the rental income, so received is business income of the assessee. Our attention was invited to the paper book/MOA and various other pages of the paper book by claiming that the issue in hand is covered by the decision from Hon'ble Apex Court by the aforesaid decision. On the other hand, the Ld. DR, Shri V. Justin, claimed that the issue is covered by the decision in the case of Raj Dadarkar & Associates vs ACIT (Civil Appeal No.s6455-6460 of 2017),

order dated 09/05/2017. The crux of the argument is in support of the impugned order.

2.1. We have considered the rival submissions and perused the material available on record. The facts, in brief, are that the assessee is engaged in the business of letting out and renting properties for commercial purposes along with other objections, declared total income of Rs.2,41,88,353/- in its return filed on 29/09/2011. The assessee declared the rent received of Rs.2,68,03,169/- and claimed various expenses and thus the assessment was determined at Rs.2,59,80,318/- u/s 143(3) of the Act. The stand of the Revenue is that the income so arose is income from house property and therefore, he framed the assessment. On appeal before the Ld. Commissioner of Income Tax (Appeal), it was dismissed with certain directions. The assessee is in further appeal before this Tribunal.

2.2. If the observation made in the assessment order, leading to addition made to the total income, conclusion drawn in the impugned order, material available on record, assertions made by the ld. respective counsel, if kept in juxtaposition and analyzed, we find that the income of the

assessee comprises of rent received of Rs.2,68,03,169/-. The assessee claimed maintenance and other expenses recovered of Rs.65,40,452/-, DG Consumptions recovered of Rs.31,30,913/-, electricity consumption of Rs.29,97,002/- and other income of Rs.33,43,593/-. The major income derived by the assessee is rental income. The Ld. Assessing Officer asked the assessee as to why the same should not be treated as house property income. The assessee submitted that the main object of the assessee is business as per MOA, therefore, on lease of/rental income is income from business as the primary sources of income is from lease, maintenance charges, etc. We have perused the memorandum of association, written submissions of the assessee and other relevant material, wherein, it is undisputed fact that the main object of the company (as per MOA) annexed as page-Ç' of the paper book. The business of the assessee is letting on hire, leasing or other deal or trade in immovable property. Admittedly, there is a later decision dated 09/05/2017, from Hon'ble Apex court in the case of Raj Dadarkar & Associates vs ACIT, wherein, the Hon'ble Apex Court held that the ITAT is the last fact finding forum and it is for the assessee to

produce sufficient material to show that entire income or substantial income was from the letting out the property, which was the principle business/activity of the assessee. The decision was arrived at on the basis of main objective of the company and found that letting out of the property was not the object of the company at all. In that situation, a particular decision was arrived at. Whereas, in the case of Chennai Properties (2015) 373 ITR 673 (Supreme Court), vide order date 09/04/2015, the main objects of the assessee was acquiring/holding the property and to derive rental income for such property. It was held that the income is taxable as business income. The Hon'ble Apex Court also considered the decision in Karanpura Development Company Ltd vs DCIT (1962) 44 ITR 362 (Supreme Court), East India Land Housing and Land Development Trust Ltd. vs DCIT (1961) 42 ITR 49 (Supreme Court) and Sultan Brothers pvt. Ltd. vs CIT (1964) 5 SCR 807. The Hon'ble Apex Court in Chennai Properties and Investment Ltd. held as under:-

"The appellant-assessee is a company incorporated under the Indian Companies Act. Its main objective, as stated in the memorandum of association, is to acquire the properties in the city of Madras (now Chennai) and to let out those properties. The assessee had rented out such properties and the rental income received therefrom was shown as income from business in the return filed by the assessee. The Assessing Officer, however, refused to tax the same as business income. According

to the Assessing Officer, since the income was received from letting out of the properties, it was in the nature of rental income. He, thus, held that it would be treated as income from house property and taxed the same accordingly under that head.

2. The assessee filed the appeal before the Commissioner of Income-tax (Appeals) who allowed the same by his order dated April 6, 1989, holding it to be income from business and directed that it should be treated as such and taxed accordingly. Aggrieved by that order, the Department filed an appeal before the Income-tax Appellate Tribunal which declined to interfere with the order of the Commissioner of Income-tax (Appeals) and dismissed the appeal. The Department approached the High Court. This appeal of the Department has been allowed by the High Court, vide its order dated September 5, 2002, holding that the income derived by letting out of the properties would not be income from business but could be assessed only income from house property. A perusal of the impugned judgment of the High Court would show that it has primarily rested its decision on the basis of the judgment of this court in *East India Housing and Land Development Trust Ltd. v. CIT* [1961] [42 ITR 49](#) (SC) as well as the Constitution Bench judgment of this court in *Sultan Brothers (P.) Ltd. v. CIT* [1964] 5 SCR 807*.

3. From the aforesaid facts, it is clear that the question which is to be determined on the facts of this case is as to whether the income derived by the company from letting out this property is to be treated as income from business or it is to be treated as rental income from house property.

4. We have heard the learned counsel for the parties on the aforesaid issue. Before we narrate the legal principle that needs to be applied to give the answer to the aforesaid question, we would like to recapitulate some seminal features of the present case.

5. The memorandum of association of the appellant-company which is placed on record mentions main objects as well as incidental or ancillary objects in clause III (A) and (B) respectively. The main object of the appellant company is to acquire and hold the properties known as "Chennai House" and "Firhavin Estate" both in Chennai and to let out those properties as well as make advances upon the security of lands and buildings or other properties or any interest therein. What we emphasise is that

* [1964] [51 ITR 353](#) (SC). holding the aforesaid properties and earning income by letting out those properties is the main objective of the company. It may further be recorded that in the return that was filed, the entire income which accrued and was assessed in the said return was from letting out of these properties. It is so recorded and accepted by the Assessing Officer himself in his order.

6. It transpires that the return of a total income of Rs. 2,44,030 was filed for the assessment year in question that is the assessment year 1983-84 and the entire income was through letting out of the aforesaid two properties, namely, "Chennai House" and "Firhavin Estate". Thus, there is no other income of the assessee except the income from letting out of these two properties. We have to decide the issue keeping in mind the aforesaid aspects.

7. With this background, we first refer to the judgment of this court in East India Housing and Land Development Trust Ltd.'s case which has been relied upon by the High Court. That was a case where the company was incorporated with the object of buying and developing landed properties and promoting and developing markets. Thus, the main objective of the company was to develop the landed properties into markets. It so happened that some shops and stalls, which were developed by it, had been rented out and income was derived from the renting of the said shops and stalls. In those facts, the question arose for consideration was : whether the rental income that is received was to be treated as income from the house property or the income from the business. This court while holding that the income shall be treated as income from the house property, rested its decision in the context of the main objective of the company and took note of the fact that letting out of the property was not the object of the company at all. The court was, therefore, of the opinion that the character of that income which was from the house property had not altered because it was received by the company formed with the object of developing and setting up properties.

8. Before we refer to the Constitution Bench judgment in the case of Sultan Brothers (P.) Ltd., we would be well advised to discuss the law laid down authoritatively and succinctly by this court in Karanpura Development Co. Ltd. v. CIT [1962] [44 ITR 362](#) (SC). That was also a case where the company, which was the assessee, was formed with the object, inter alia, of acquiring and disposing of the underground coal mining rights in certain coal fields and it had restricted its activities to acquiring coal mining leases over large areas, developing them as coal fields and then sub-letting them to collieries and other companies. Thus, in the said case, the leasing out of the coal fields to the collieries and other companies was the business of the assessee. The income which was received from letting out of those mining leases was shown as business income. Department took the position that it is to be treated as income from the house property. It would be thus, clear that in similar circumstances, identical issue arose before the court. This court first discussed the scheme of the Income-tax Act and particularly six heads under which income can be categorised/classified. It was pointed out that before income, profits or gains can be brought to computation, they have to be assigned to one or the other head. These heads are in a sense exclusive of one another and income which falls within one head cannot be assigned to, or taxed under another head. Thereafter, the court pointed out that the deciding factor is not the ownership of land or leases but the nature of the activity of the assessee and the nature of the operations in relation to them. It was highlighted and stressed that the objects of the company must also be kept in view to interpret the activities. In support of the aforesaid proposition, a number of judgments of other jurisdictions, i.e., Privy Council, House of Lords in England and the US Courts were taken note of. The position in law, ultimately, is summed up in the following words (page 377 of 44 ITR) :

"As has been already pointed out in connection with the other two cases where there is a letting out of premises and collection of rents the assessment on property basis may be correct but not so, where the letting or sub-letting is part of a trading operation. The dividing line is difficult to find ; but in the case of a company with its professed objects and the manner of its activities and the nature of its dealings with its

property, it is possible to say on which side the operations fall and to what head the income is to be assigned."

9. After applying the aforesaid principle to the facts, which were there before the court, it came to the conclusion that income had to be treated as income from business and not as income from house property. We are of the opinion that the aforesaid judgment in Karanpura Development Co. Ltd.'s case squarely applies to the facts of the present case.

10. No doubt in Sultan Brothers (P.) Ltd.'s case, a Constitution Bench judgment of this court has clarified that merely an entry in the objects clause showing a particular object would not be the determinative factor to arrive at an conclusion whether the income is to be treated as income from business and such a question would depend upon the circumstances of each case, viz., whether a particular business is letting or not. This is so stated in the following words :

"We think 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 his property by an owner. We do not further think that a thing can by its very nature be a commercial asset. A commercial asset is only an asset used in a business and nothing else, and business may be carried on with practically all things. Therefore, 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. We find nothing in the cases referred to support the proposition that certain assets are commercial assets in their very nature."

11. We are conscious of the aforesaid dicta laid down in the Constitution Bench judgment. It is for this reason, we have, at the beginning of this judgment, stated the circumstances of the present case from which we arrive at irresistible conclusion that in this case, letting of the properties is in fact is the business of the assessee. The assessee, therefore, rightly disclosed the income under the head "Income from business". It cannot be treated as "Income from the house property". We, accordingly, allow this appeal and set aside the judgment of the High Court and restore that of the Income-tax Appellate Tribunal. No orders as to costs.

Civil Appeal Nos. 4491-4493 of 2004

12. The appeals are disposed of in terms of the aforesaid order in Civil Appeal No. 4494 of 2004."

In the aforesaid case, the Hon'ble Apex Court, considering the main objects of the assessee, nature and source of income, held that letting out of property was in fact the business of the assessee, therefore, was rightly disclosed as income from business and cannot be treated as income

from House property. Respectfully, following the aforesaid decision, the main objects of the assessee and other material available on record, we are of the view that income from letting out of the property by the assessee has to be treated as business income, therefore, appeal of the assessee is allowed.

Finally, the appeal of the assessee is allowed.

This Order was pronounced in the open court in the presence of Ld. representative from both sides at the conclusion of hearing on 15/05/2018.

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 15/05/2018

Shekhar, P.S.नि.स.

Sd/-

(Joginder Singh)

न्यायिक सदस्य / JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant (Respective assessee)
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai,
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai