



IN THE INCOME TAX APPELLATE TRIBUNAL "SMC", BENCH
MUMBAI

BEFORE SHRI R.C.SHARMA, AM
&
SHRI RAM LAL NEGI, JM

ITA No.341/Mum/2018 to 344/Mum/2018
(Assessment Year :2009-10,2011-12, 2013-14 & 2014-15)

M/s. Suyash Holding & Estate Developers Pvt. Ltd., 1076, Dr. E. Moses Road, Worli Naka, Mumbai – 400 218	Vs.	Income Tax Officer 8 (2)(4), Aayakar Bhavan Room No.618, 6 th Floor M.K.Road, Mumbai Maharashtra – 400 020	8
PAN/GIR No.AABCS1983N			
Appellant)	..	Respondent)	

Assessee by	Dr. K. Shivram & Ms. Neelam C. Jadhav
Revenue by	Ms. N. Hemalatha
Date of Hearing	06/06/2018
Date of Pronouncement	20/06/2018

आदेश / ORDER

PER R.C.SHARMA (A.M):

These are the appeals filed by the assessee against the order of CIT(A)-14, Mumbai dated 27/10/2017 for A.Y. 2009-10, 2011-12, 2013-14 & 2014-15 in the matter of order passed u/s.143(3) r.w.s. 147 of the IT Act.

2. Common grievance of assessee in all the years pertains to treatment of income offered under the head 'business and profession' as 'income from house property'.

3. Rival contentions have been heard and record perused.
4. Rental income offered by assessee under the head of "business and profession" was declined by the AO and treated as income from house property after having the following observation:-

2. The assessee had purchased an immovable property (flat) admeasuring about 1342 sq.ft. on the building known as Venus Apartments situated at 87, Cuffe Parade, Mumbai-400 005, in 1997-98 for a total consideration of Rs.3,53,24,387/-. During the course of assessment proceedings in the assessee's own case for A.Y. 2012-13, it was observed that assessee company had let out the said flat to its director Shri. Vipin Kumar Jain at a fixed monthly rent; of Rs.25,000/- p.m. in the year 1998 and had taken security deposit of Rs.70,00,000/- from him. The director of the assessee company Shri Vipin Kumar Jain continuously resides in the said flat at a fixed monthly rental income of Rs. 25,000/-p.m. The assessee company had offered this rental income as business income rather than Income from House Property. Other than this rental income of Rs. 3,00,000/-, the assessee has not received any income from business during the said year. On being asked, the assessee has stated that prevailing market rent of the flat was Rs. 1,00,000/- to Rs. 1,25,000/-. Therefore, after considering all the submissions filed by the assessee and after discussing the facts of the case in detail, the A.O. has passed the Assessment order for A.Y. 2012-13 treating the said rental income as income from house property. The A.O. has adopted the prevailing fair market rental value @Rs.1,50,000/- p.m. for the said flat and also given the benefit of deemed interest on the security deposit received by the assessee. The A.O. had also made additions of Business Expenses of Rs.80,426/- and disallowance u/s. 14A r.w.Rule 8D in the said order.

3. During the financial year relevant to the Assessment year, the assessee has received the same fixed rent of Rs.25,000/- p.m. as rent without adopting the fair market rental value for the said flat; In view of the above, the assessment for the year under consideration was reopened to assess the escaped income.

4. In response to the notices issued during the scrutiny proceedings, the authorized representative of the

assessee company . Smt. Priya R Mehta, from M/s. D.V. Dalai 65 Co., chartered accountants attended from time to time and filed submissions as called for.

5. The assessee company had claimed to be in the business of builders and developers. However, as noticed in the earlier years , and succeeding years, the assessee neither carried on any business activity nor offered any other business income except the rental income from the above said property. The Balance sheet of the assessee as on 31st March, 2009 is reproduced as under:

<i>Particulars</i>	<i>Amount in Rs.</i>
<i>Shareholder's Funds:</i>	
<i>Share capital</i>	<i>1,05,020</i>
<i>Share application money</i>	<i>2,00,00,000</i>
<i>Reserves & surplus</i>	<i>85,48,273</i>
<i>Unsecured loans</i>	<i>1,82,27,455</i>
<i>Deposit received against premises</i>	<i>70,00,000</i>
<i>TOTAL OF LIABILITIES</i>	<i>5,33,80,748</i>
<i>APPLICATION OF FUNDS</i>	
<i>Fixed Assets</i>	
<i>Premises</i>	<i>3,53,24,387</i>
<i>Investment</i>	<i>10,33,937</i>
<i>Current Assets, loans & Advances;</i>	
<i>Sundry debtors</i>	<i>5,79,215</i>
<i>Loans, Advances and Deposits</i>	<i>13,22,170</i>

<i>Cash and bank balance</i>	<i>3,77,496</i>
<i>Less: current liabilities and provisions</i>	<i>22,78,881 1,39,873</i>
<i>Net current Assets</i>	<i>21,39,008</i>
<i>Profit and Loss Account</i>	<i>1,53,83,416</i>
<i>TOTAL OF ASSETS</i>	<i>5,38,80,748</i>

5.1. On perusal of the above Balance Sheet of the assessee, it is seen that the assessee has invested all its funds including the funds brought on interest in a single premises (i.e., flat) and only miniscule amount of funds invested in other investment options. Since, the rental income is an income from house property, vide show cause notice issued dt.25.11.2016, the assessee was asked to explain "why the rental income received by it should not be computed under the head Income from House Property". In response to the same, the representative of the assessee company vide his letter dt. 28.11.2016 has stated that it is one of the main objectives of the assessee company to lease the house properties and hence rental income received is treated as business income. It is further stated that "the Hon'ble Supreme Court in the case of M/s. Chennai Properties Vs Investments Ltd vs CIT-Central-III (Civil Appeal No.4494 of 2004) had recently allowed the appeal of the assessee with regard to letting out of house property as its business activity and allowing the income to be treated as income from business and profession as against the treatment by A. O. as Income from House Property." The assessee has also relied on the decisions of the Hon'ble Supreme court in the case of Rayala Corporation (P.) Ltd (Appeal no. 6437 to 6441 of 2016 dated. August 11,2016) stating that as per the said decision "Even if the assessee has single property, the income has to be treated under the Business income".

5.2. The above explanation submitted by the representative of the assessee is considered. The explanation could not be accepted in view of the following facts and circumstances of the case.

(i) *The assessee has relied on decisions of the Hon'ble supreme court in the case of Chennai properties 85 investments Ltd., Chennai Vs CIT (Civil Appeal Nos. 4491-4494 of 2004) and Rayala Corporation Pvt. Ltd. vs, ACIT(Civil appeal No.6437 of 2016). On perusal of the decision in the case of Royals, Corporation it is seen that the assessee is in the business 'pf renting its properties and is receiving rent as its business income and shown it under the head income from Business. While deciding the appeal the Hon'ble supreme court has relied squarely on the decision in the case of. Chennai properties and Investment ltd.*

(ii) *While deciding the appeal by the Hon'ble Supreme court in the case of Chennai properties & Investments ltd., it concluded that "merely an object 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 form business and such a question would depend upon the circumstances of each case i.e., whether a particular business is letting or not". Further it is pointed out by the hon'ble Supreme court 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 his property by an owner. A commercial asset is only an asset Used in a business and nothing else, and business may be carried on which practically all things. In 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."*

From the above conclusion of the Hon'ble Supreme court it is crystal clear that by just having a word in its object clause is itself not sufficient but it should be supported by the circumstances of each case.

5.3. The facts and circumstances of the present case.. are completely different from the above mentioned cases on which the decisions were given by the Hon'ble Supreme court. In the present case, the assessee has invested almost all its resources like Share , capital, Reserves and Surplus and Unsecured loans to invest in -a single residential flat amounting to Rs. 3.53 crores(approx.) and ho other resources were left with the company to do a business or invest in any other avenues. Only a miniscule amount of Rs. 10 (lacs approx..) was given by company as loans and advances, Rs. 10 lacs(approx.) invested in shares and an amount of Rs. 13 lacs(approx..) was

left as bank balances. The company is not doing any sort of business from many years. The investment in flat ,is shown as Asset of the company and not as stock in trade. The said flat purchased by the assessee after investing all its funds has been given to its director on a fixed rent of Rs. 25,000/- p.m from the year 1998 to till date without citing any reason for not increasing the rent. In support, the copy of the rent agreement dtd. 31.03.1,908 has been submitted by the assessee stating that the said flat is given on rent for a period of one year for a rent of Rs. 25,000/- p.m and in case the agreement is to be extended then the rent of Rs. 30,000/- p.m is to be paid after one year. The agreement was also not registered and it is made on a stamp paper. Further, supplementary agreement dtd. 05.04.1999 is prepared it is agreed to renew the agreement for further period of five years at the same fixed rate of Rs. 25,000/- p.m without citing any reasons. Lease agreement was not submitted for the further period.

5.4. At this juncture, the issue that arises for a consideration is as to whether the income offered by the assessee under the head "Business and Profession" is correct, or as to whether the income' needs to be assessed under the head "Income from House Property".

5.5. In order to come to a conclusion about the correct head of income under which head the receipt is taxable, it would be necessary to run through the relevant provisions of the Income Tax Act, more specifically Section 14, which deals with the heads of income and the Chapter IV-<p, which deals with Income from House Property! While considering this issue, it is also necessary to discuss; in detail, the facts of the present case, which includes whether the property in question (residential flat) was owned by the assessee or not and whether the assessee had let out the property withor without any added services provided by it to the lessee. The primary issue, of course, is whether the receipt is assessable as "Income from House Property" or "Income from Business 85 Profession". The issue at hand is one which is interlinked to both facts of the case and the legal position. It is, therefore, necessary that the facts of the case are discussed in greater detail before coming to the legal position.

5.6. In this case the assessee has shown a premises valuing at Rs. 3,53,24.387/- in the fixed assets schedule annexed to the Balance Sheet. The said property purchased in the year 1997-98. An amount Rs. 3,00,000/- being a "Rent on premises" has been

credited in the P&L Account under the head "income from Business". Thus, it is clear that that the assessee is the owner of the premises which has been let out for earning rent income. It is a well settled law that the income derived from the property has to be taxed under, 'the head Income from House Property. The Hon'ble Apex Court has held in the case of CIT vs Chugandas & Company [1965] 55 ITR 17, '(SG) that income received from the building will be shown under the head income from house property and not under the head profit and gains of the business, even if an assessee carries on business of purchasing and selling building.

*5.7. Further, where the assessee is the owner of building on leasehold land, rental income is income from house property even though letting out is an objective of the assessee company, as held by the Hon*ble Calcutta High Court and the Patna High Court, delivered in the cases of Tinsukia Development Corporation Ltd vs err (120 ITR 466) and in CJT Vs Mithila Properties Publications & Contract Enterprises Private Limited (228 ITR 713), respectively. The facts of the case of the assessee, in the instant case, being identical, the ratios laid down by the Hon'ble Calcutta High Court and the Patna High Court are squarely applicable to the facts of the case.*

5.8. Further, reliance is also placed on the decision of Hon'ble Supreme Court delivered in the case of Sambhu Investments Ltd. Reliance is also placed on the decision of Apex Court in the case of Bihar State Co.op Bank Ltd. vs CIT [1960] 39 ITR 114 (SC) wherein it was held that it does not matter any way how the assessee has chosen to show a particular income in the return of income submitted by it. The income is to be charged / taxed under the appropriate head of income. '

In view of the above, it is held that the rent income received by the assessee is to be assessed under the head Income from House Property.

6. Income from House property - Annual value:

6.1. It is a well settled law that where the assessee has taken interest free security deposits from concerns to whom certain assets were leased out by the assessee and the amount of such deposit was abnormally very high vis-a-vis the market practice. The said security deposit is held as a sham device to circumvent the real rent and hence notional interest on such security deposit has to be assessed as income from house property. Reliance in

this regard placed on the judgement of Hon'ble Punjab and Haryana High Court delivered in e case of CIT vs K.Street Light Electric Corporation [2011] '3\$\$ ITR 8 / 244 CTR 647. Further, it has also been held by the judiciary, that rate of interest on cost can also be the basis for determining; fair .rent, if there is no better way to estimate rent. The Hontole G,uJ£.rat Court in the case of M/s. Sakarlal Balabhai vs. ITO [1975] 100 ITR & 97 (Guj) has ruled that in absence of any better way of estimating rent, the rate of interest on cost of building and land may prqvi4e;a reasonable basis for determining the annual letting value, .pf/'thi property and more particularly when the property is occupied by. the owner. It is pertinent to mention here that in the instant case the let out property has been given to the director. Hence, the ratio of this case law is squarely applicable since the property has not been ler/out at the market rate.*

6.2 In view of the above, it is held that the rent of Rs.3.00 lacs p.a. received from the tenant, (who was also director of company) which was purchased in the year 1997- 98 for a sum of Rs.3,53,24,387/- and against which a security deposit of Rs.70,00,000/- have been received, is not the sum of which the property might reasonably be expected to let out from year to year by virtue of provisions of section 23(l)(a) of the Act.

6.3 It is also pertinent to mention that during the course of assessment proceedings for the A.Y. 2012-13, the assessee itself had admitted that flats have been rented out in the same society raising from Rs.1.00 lac per month to Rs.1.25 lacs per month with an upfront security deposit of Rs.5 lacs to Rs.6 lacs. Keeping in view the cost of indexation generally adopted, the fair market rent is computed on the basis of value determined in the assessment order for the A.Y.2012-13 as well as the fair market rent as quoted by the assessee company.

6.4 Further, keeping in mind the cost of inflation index given by' the department for valuing the property; the property which was acquired in the year 1997-98 for a sum of Rs.3,53,24,387/- would be^t costing to Rs.6,21,11,158/- in the financial year 2008-09 relevant to A.Y.2009-10. It is also pertinent that the rate of return on the let out property in the market is generally determined @ 4% per annum on the cost of the let out premises. Hence, the rate of return @ 4% on the let out property in the instant case which, on the indexed ' cost, amounts to Rs,24,84,446/-. In view of this, the notional rent

could be determined around Rs. 24.90 lacs per annum in the case of assessee.

6.5 It is also relevant to examine the rate of return on¹ the security deposit of Rs.70.00 lacs received by the assessee for the premises let out. The interest which the assessee has got benefited is worked out @15% per annum on the security deposit of Rs.70.00 lacs which amounts to Rs. 10,50,000/-. Moreover the assessee 'has credited Rs.3.00 lacs as annual rent from the said property. Thus, the notional rent for the assessee could be worked out at Rs. 13,50,000/-.

6.6 After taking into consideration the deposit amount received by assessee from the tenant and its expected annual yield of interest it is held that the sum at which the property might reasonably be expected to let out in this instant case is Rs. 14,40,000/- p.a. (24,90,000 - 10,50,000) which is effectively Rs. 1,20,000/- p.m. excluding the notional interest calculated on the deposit received' in view of the provisions of section 23(l)(a) of the Act; The 'said rent income is assessed under the head Income from House Property after giving standard deduction as prescribed u/s 24(a) of the I.T. Act. However, no deduction on account, of municipal taxes/property taxes is being allowed since no supporting documentary evidence has ,been furnished by the assessee.

*6.7 Therefore, an amount of Rs. 14,40,000/- is treated as income house property and standard deduction u/s. 24(b) of Rs. 4,32,000/- (@ 30% of Rs. 14,40,000/-) is allowed. **Hence, an amount of Rs. 10,08,000/-(14,40,000 -4,32,000) is added under the head income from house property. Penalty proceedings U/s. 271(1)(c) are separately initiated for furnishing inaccurate particulars of income leading to concealment of income.***

5. By the impugned order, CIT(A) confirmed the order of AO against which assessee is in further appeal before us.

6. It was argued by learned AR that the assessee is engaged in the business of Real Estate, and the main object of the assessee company is to carry on business of builders and

developers, ownership of flats, structures of residential, offices, invest in and hold such properties and also rent, hire, lease such properties etc., The copy of Memorandum of assessee company shows this as the main object of the company. During the year 1997-1998 the assessee company purchased the premises which was leased out on Rent to Mr. Vipin Kumar Jain Director of the assessee company having monthly rent of Rs.25,000/- and security deposits of Rs.70,00,000/-. From the year 1997-1998, the assessee company treated the same as Business Income in its return of income and the same has been accepted by the department in every year.

7. As per learned AR, the assessee company is consistently treating the rental income as income from business since F.Y. 1997-98 which was not denied or objected by the department. The issue under consideration is squarely covered by the decision of the Hon'ble Supreme Court in Rayala Corporation Pvt. Ltd. vs. ACIT (2016) 386 ITR 0500 (SC) and Chennai Properties & Investments Ltd. Vs. CIT (2015) 373 ITR 0673 (SC), Supreme Court held that even if the assessee has only one property, the income from the property can be treated as Business Income and other business expenses can be allowed if the main object of the assessee is to give property on rent/ hire.

8. As per learned AR in assessee company's own case for AY 2008-09, AY 2010-11 and AY 2012-13, the CIT(A) held that rental income earned by the assessee treated as income from business and not as income from house property. From the year 1997 - 1998, the assessee Company treated the same as Business Income in its return of income and the same has been accepted by the department in every year.

9. Learned AR argued that keeping in view the main object clause of the assessee company and applying judicial pronouncements as laid down by the Hon'ble Supreme Court as discussed above, there is no merit in the action of the lower authorities for treating the rental income as income from 'House Property'. Furthermore, the judicial consistency also requires that there should not be deviation from the conclusions already arrived unless there is a change in the facts and circumstances. However, there is no change in the facts and circumstances during the years under consideration. Accordingly, AO should be directed to assessee rental income so received under the head of income from business and profession.

10. As per learned AR during the years under consideration, AO has changed his opinion and issued notice u/s. 148 treating the rental income as income from 'house property'. During assessment proceedings the AO vide its notice u/s.148(1) dated 08/11/2016 had asked the assessee, why an income

received from renting of house property should be taxed under the head "Income from House Property".

11. It was submitted before the AO that assessee company has always treated the rental income as business income since 1997. However, the Assessing Officer has completed the assessment by treating business income as income from house property.

12. We have considered rival contentions and carefully gone through the orders of the authorities below. We had also deliberated on the judicial pronouncements referred by lower authorities in their respective orders as well as cited by learned AR during the course of hearing before us. From the record we found that assessee has purchased only one flat which was also let out to one of its Directors of the company on rent which was found to be much lower than the market rate of the property. There is no other transaction of assessee of letting out the house property nor assessee has any other house property for doing the business of letting out. The decision relied on by learned AR in case of *Chennai Properties Vs Investments Ltd* and *Rayala Corporation Pvt. Ltd (supra)* are not applicable to the peculiar facts of instant case. So far as in those cases, assesseees were actually engaged in commercial exploitation of property, whereas in the instant case only one flat was taken by the assessee and

which was also let out to its Directors and not in the open market to carry reasonable rent. Even in the objects of the company only passing reference was made to the activity of renting the property. However, from the act of the assessee over the period of time, we do not find any such activity having been undertaken by the assessee to assess business profit by letting out the property. Property let to the Director at a fixed monthly rent cannot be treated as business of the assessee. Even as per initial agreement dated 31/03/1998 the rent of the property was fixed at Rs.25,000/- per month and deposit of Rs.70 lakhs was taken. The initial period of lease was one year. It was also mentioned in the agreement that if it extends further one year, lease rent could be Rs.30,000/- per month. However, contrary to this agreement, the assessee made a supplementary agreement on 05/04/1999, through which lease was extended for a further period of five years, a monthly rent was reduced to Rs.25,000/- per month and other conditions remain unchanged. We also found that same rent was continuing till date without any change after entering into supplementary agreement with the Director on 05/04/1999, even the rental agreement is not made and lease of the property was extended through oral agreement only. While deciding the appeal by the Hon'ble Supreme court in the case of Chennai properties & Investments Ltd., it concluded that "merely an object 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 form business

and such a question would depend upon the circumstances of each case i.e., whether a particular business is letting or not". Further it is pointed out by the hon'ble Supreme court 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 his property by an owner. A commercial asset is only an asset Used in a business and nothing else, and business may be carried on which practically all things. In 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."

13. From the above conclusion of the Hon'ble Supreme court it is crystal clear that by just having a word in its object clause in itself not sufficient but it should be supported by the circumstances of each case. The facts and circumstances of the present case are completely different from the above mentioned cases on which the decisions were given by the Hon'ble Supreme court. In the present case, the assessee has invested almost all its resources like Share capital Reserves and Surplus and Unsecured loans to invest in -a single residential flat amounting to Rs. 3.53 crores(approx.) and no other resources were left with the company to do a business or invest in any other avenues. Only a miniscule amount of Rs. 10 (lacs approx..) was given by company as loans and advances, Rs. 10 lacs(approx.) invested in shares and

an amount of Rs. 13 lacs(approx..) was left as bank balances. The company is not doing any sort of business from many years. The investment in flat is shown as Asset of the company and not as stock in trade. The said flat purchased by the assessee after investing all its funds has' been given to its director on a fixed rent of Rs. 25,000/- p.m from the year 1998 to till date without citing any reason for not increasing the rent. We also found that even though assessee has offered the income under the head 'business and profession', however, no depreciation has been claimed as per I.T. provisions in respect of alleged business assets in the profit and loss account over these years. It was also mentioned in the lease agreement that the property was purchased for the purpose of trading and it is being temporarily leased because market conditions are not good, even though market conditions improved, the assessee neither sold the property nor even increased the rent. Thus, the conduct of the assessee over the years shows that the main purpose of acquisition was to provide the same to the Director at a very nominal rent. Considering totality of the facts and circumstances of the case, we do not find any merit for treating the rental income under the head 'business'.

14. So far as assessee's contention regarding consistency in treatment of income is concerned, we found that return filed by the assessee in earlier year was just processed u/s.143(3) only in one year when the claim was declined, the assessee filed appeal before the CIT(A) and the CIT(A) has accepted the same. Learned DR filed a letter to the effect that

appeal was not filed by the Department because of the tax effect. Merely not filing appeal by the Department on the ground of low tax effect, cannot be treated at par to the fact that Department has accepted assessee's claim of nature of income having been earned by it. In the case of Rayala Corporation Pvt. Ltd. the Hon'ble Supreme Court has just followed the decision in the case of and Chennai Properties & Investments Ltd., the facts of which we have already discussed hereinabove in detail and the same is not applicable to the facts of the present case as discussed above. We also found that AO has dealt with the issue threadbare and has dealt with each and every argument of the learned AR for not treating rental income as income from business.

15. In view of the above discussion and keeping in view the peculiar facts and circumstances of the instant case, we do not find any infirmity in the order of lower authorities for not treating rental income as income from business and profession.

16. So far as contention of learned AR with regard to the computation of ALV is concerned, we are in agreement with the AR that AO has not properly computed the ALV. Accordingly, ALV is directed to be computed on the basis of principle laid down in the decision of Jurisdictional High Court in the case of Tip Top Typography 368 ITR 300. We direct accordingly.

17. So far as allowance of minimum business expenditure to run the company is concerned, we are of the view that minimum expenditure to

maintain status of company is required to be allowed. These expenditure are to be allowed to be set off against the income from house property as per the provision of Section 71 of the IT Act. So far as reopening is concerned, as per the reasons recorded, we are in agreement with the lower authorities that there was sufficient reason to reopen the assessment.

18. In the result, appeal of assessee is allowed in part in terms indicated hereinabove.

Order pronounced in the open court on this 20/06/2018

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 20/06/2018

Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai