

**IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI**  
**BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAM LAL NEGI, JM**

ITA Nos.4988 & 4989/Mum/2017  
(Assessment Years: 2013-14 & 2014-15)

Asst. CIT-9(2)(2) Room No. 665A, 6 <sup>th</sup> Floor, Aayakar Bhavan, M. K. Road, Mumbai-400 020	Vs.	M/s. E-city Projects Construction Pvt. Ltd. 844/4, Fun Republic, Shah Industrial Estate, Off New Link Road, Andheri (W), Mumbai-400 053
PAN/GIR No. AABCE 5486 E		
<b>(Appellant)</b>	:	<b>(Respondent)</b>

<b>Appellant by</b>	:	Shri R. Manjandtha Swamy
<b>Respondent by</b>	:	Shri Jay Bhansali

<b>Date of Hearing</b>	:	22.11.2018
<b>Date of Pronouncement</b>	:	04.02.2019

**ORDER**

Per Shamim Yahya, A. M.:

These are appeals by the Revenue are directed against the order of the learned Commissioner of Income Tax (Appeals)-16, Mumbai ('Id.CIT(A) for short) dated 28.04.2017 and pertains to the assessment years (A.Y.) 2013-14 and 2014-15.

2. The common grounds of appeal read as under:

(i) "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred on facts and in law in not upholding the action taken by the AO in treating the rental income from Operating Family Entertainment Center cum Mall and Maintenance Charges amounting to Rs 11,54,78,977/- (Rs.11,39,49,851/- for A.Y. 2014-15) and Rs 4,38,39,422/- (Rs.4,16,51,261/- for A.Y. 2014-15) respectively as "Income from House Property" against the assessee's claim of "Profit and Gains from Business or Profession"

(ii) "Whether on the facts and in the circumstances of the case and in law, The Ld.CIT(A) has erred on facts and in law in completely ignoring the decision of the Hon'ble Supreme Court in the case of Shambhu Investment (P) Ltd vs CIT(2003) 184CTP (SC) 91: (2003) 263 ITR 143(SC) wherein it is held that income derived by an assessee by letting out furnished premises on monthly rent basis to various parties alongwith various services, is assessable as income from property and not business income"

(iii) "Whether on the facts and in the circumstances of the case and in law, the Ld.

CIT(A) has erred in allowing the interest expenditure of Rs.1,73,96,877/- (Rs.1,56,33,173/- for A.Y. 2014-15) u/s 24 b of the Act by treating the income from House property as business income ignoring the fact that the expense was not incurred for acquiring, constructing or repairing the house property.

3. Since the facts are identical, we are referring to the facts and figures from A.Y. 2013-14.

4. Brief facts of the case are that the assessee filed its return of income on 28.09.2013 declaring the total loss of Rs.4,44,43,112/-. Return of income was revised on 30.03.2015 revising the claim of TDS credit, keeping total income at Rs.4,44,43,112/-. The case was selected for scrutiny and assessment u/s. 143(3) of the Act was completed on 14.03.2016, by treating income from family Entertainment Centre cum Malls as 'Income Tax House Property' after disallowing interest of Rs.1,73,96,877/- and Income from Other Sources of Rs.26,40,710/- against Rs.14,49,085/-.

5. Upon the assessee's appeal, the ld. CIT(A) decided the issue in assessee's own case following the earlier year's ld. CIT(A)'s order which was affirmed by the ITAT. The ld. CIT(A) held as under:

6.1.1. Ground no.1, 2 & 4 pertains to income from family Entertainment Centre Cum Malls which has being treated as income from house property by the A.O whereas the appellant has claimed it as business income. In the assessment order, the Ld. A.O. had mentioned that the appellant company had income of Rs.16,19,59,106/consisting of operating income amounting to Rs.11,54,78,974/-, maintenance charges of Rs.4,38,39,422/- and other income of Rs.26,40,710/-. According to the A.O, the rental income and other indirect income are not the business income. The income earned by the appellant from letting out of the property was taxed by the A.O under the head 'income from house property' and not under the head 'Income from Business'.

6.1.2 While doing so, the Ld. A.O had relied upon the appellant's own case for A.Y 2008-09, 2009-10, 2010-11, 11-12 and 2012-13. My Ld. predecessor has decided the case of the appellant for AY 11-12 on the grounds involved vide order No CIT(A) - 16/IT-50/DCIT 8(1)12014-15 dated 11.04.2014 as under:

"The A.O's order, the contentions of the appellant as well as materials on record have being considered. The same issue had come up for consideration in appeal for A.Y 200809, wherein the CIT ('A)-16, Mumbai had followed his own order on similar

issue in A.Y 2007-08 vide his order dated 16.09.2010 in Appeal No CIT (A)-161IT-36912009-10 he held that income from the commercial complex is to be treated as income from business and the interest income is to be treated as income from other sources. In A.Y 2009-10, in Appeal order dated 09.11.2012 in Appeal No CIT(A)-161ACIT(OSD)8(1)/IT-17112011-12 it was held that " ...income shown in the schedule '0' as 'other income' includes interest received, apart from miscellaneous income and the latter includes primarily helmet income, media barrier deal promotion cash income, atrium corporate deal, lost and found leasing DG set income etc. and the latter have being directed to be treated as business income in the earlier years appellate orders. Since the facts and the circumstances remain the same in the present year under appeal viz. A.Y 2009-10 following the order of my predecessor CIT(A)'s in A.Y 2007-08 and 2008-09 the Assessing officer is directed to treat the income from commercial complex as income from business and interest income as income from other sources. Accordingly the grounds 1&3 are partly allowed.

Since the facts are similar in the present appeal for A.Y 2010-11, following the appeal for A.Y 2010-11, following the appeal orders in earlier years in A.Y 2010-11, 77w A.O. is directed to treat the income from the commercial complex as income from business and interest income as income from other sources. Ground No 1 to 3, thus are partly allowed.'

6.13 Also based on the same facts and merits, in appellant's own case for A.Y. 2012-13, I have allowed the appeal, Further, Department filed an appeal against order of the CIT(A) for A.Y. 2010-11 and Hon'ble Tribunal has decided the appeal of the Department in ITA No. 5696/Mum/2013 dated 07.08.2015. The earlier years case of the appellant for A.Y. 2007-08, 2008-09 and 2009-10 has also being decided by the Hon'ble Tribunal in ITA No. 8390, 1435 & 1230/Mum/2010, 2012 & 2013 respectively. After considering the arguments of both sides, the Hon'ble Tribunal has held as under:

"As held by the Hon'ble Calcutta High Court in the case of Shambhu Investment Pvt Ltd. (2001) 249 ITR 47(Cal) which has being subsequently affirmed by the Hon'ble Supreme Court, what has to be seen in this context 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 to let out the property or any portion thereof, the same must be considered as income from house property. In case it is found that the very intention is to exploit the property by way of complex commercial activity, in that event it must be held as business income. In our opinion, the facts of the assessee's fall under the latter category as the intention of the assessee clearly was to exploit the commercial property by way of complex commercial activities and it was not a case letting out the property owned by the assessee companies simpliciter. The rental income was not received by the assessee companies merely because of the ownership of the property but the same was received because of the commercial activity carried out on by the, of operating and running Malls which brought that rental income. The rental income and service charges thus were received by the assessee company as business income during the course of its business carried on by them of operating and running the malls is a commercial activity and as rightly held by the Id. CIT(A), the said income primarily arising from the exploitation of commercial assets by way of complex commercial activity constituted the business income of the assessee company.

It is observed that the decision of the co-ordinate bench of this Tribunal in the case of *Ws. Khandelzval Estate P. Ltd (supra)* cited by the id. Counsel for the assessee also supports the case of the assessee. In the said case, the income received by the assessee from the operation of shopping malls in the form of rent and service charges was held to be business income of the ITA 8390/M/10, ITA 1435, ITA 1436/m/12 & ITA 1430/15 assessee by the Tribunal holding that giving space with services and facilities of varied and wide nature would definitely constitute a business and the relationship between the parties in such case is distinguished from that merely of a landlord and tenant relationship. We therefore find no infirmity in the impugned orders of the id. CIT(A) treating the operational income received by the assessee companies from running of malls in the form of rent and service charges as their business income and upholding the same on this issue, we discuss these appeals filed by the revenue."

In view of the above, respectfully following the Tribunal order (supra) in assessee's own case, the grievance of the department is found to be without merit and is rejected as such."

In the instant case, the facts are *peri metria* with A.Y's 2009-10 and 2010-11 had been decided by Hon'ble ITAT.-Respectfully following the judgment of Dle ITAT, income received by the appellant from the operation of shopping mall form of rent and service charges is held to be business income. Accordingly, No. 1, 2 and 4 are allowed.

6. Against the above order, the Revenue is in appeal before us.
7. We have heard both the counsel and perused the records. The Id. Departmental Representative (Id. DR for short) relied upon the order of the Assessing Officer.
8. Per contra, the Id. Counsel of the assessee submitted that the issue is duly covered in favour of the assessee by the Hon'ble High Court decision and ITAT decision in assessee's own case. He referred to the following decisions in assessee's own case:
  - a) CIT vs. M/s. E-City Project Construction Pvt. Ltd. (in ITA No.149 of 2015 and others vide order dated 18.07.2017) – Hon'ble Bombay High Court
  - b) JCIT(OSD)-9(2)(2) vs. M/s. E-City Project Construction Pvt. Ltd. (in ITA No. 3352/Mum/2016 vide order dated 28.03.2018) – ITAT
  - c) ACIT vs. M/s. E-City Project Construction Pvt. Ltd. (in ITA No. 5097/Mum/2016 vide order dated 30.10.2017) - ITAT
9. Upon careful consideration, we find that the issue is squarely covered in favour of the assessee by a series of ITAT order in assessee's own case. Moreover, the Hon'ble Bombay High Court in the order dated 18.07.2017 has held as under:

6. With the assistance of learned counsel for the respective parties, we have gone through the Judgments of the Tribunal and the Authorities, so also, have considered their submissions.

7. No straitjacket formula can be laid down to conclude as to an income being a 'income from the house property' or 'business income'. The same will have to be decided based on facts existing in each case.

8. It does not appear to be a matter of debate that prior to the Assessment Year 2006-07, consistently the Assessing Officer has accepted that the income derived to the Respondent/Assessee by way of rent is a business income. The deviation is from the Assessment Year 2007-08. One of the ground raised is that there is demerger of the Company and that is why the Assessing Officer has right to revisit the facts and arrive at an independent conclusion.

9. The Company which is demerged is E-City Entertainment Pvt. Ltd. The properties of the said demerged Company are divided in the present Assessing Companies. It is not disputed that E-City Entertainment was assessed till the Assessment Year 2005-06 and the income derived by the said Company by way of rent was always assessed as 'business income'.

10. There is no dispute with the proposition that the principle of *res judicata* would not apply, however principle of consistency has to be considered.

11. Even in a case of *Sultan Brothers (P.) Ltd.* (referred to *supra*), the Apex Court has observed that a small entry in the object clause showing a particular object would not be a determinative factor to arrive at a conclusion, whether the income is to be treated as 'income from business' and as such a question would depend upon the circumstances of each case i.e. whether particular business is letting or not.

12. The said Judgment was considered by the Apex Court in the case of *Chennai Properties & Investments Ltd.* (referred to *supra*) The Apex Court, after considering the Judgment in case of *Sultan Brothers (supra)* in the facts and circumstances of the said case, has held the 'rent income' to be a 'business income'. In the said case, the main object, as culled out in the Memorandum of Association of the said Assessee Company, was to acquire the properties in the City of Madras and to let out those properties. The Assessee has rented two properties and the rental income received thereby was shown as income received from business in the return filed by the Assessee. The Apex Court observed that there is no other income of the Assessee except the income from letting out these two properties. Upon considering the main object of the Company, the Apex Court held that the income from rent ought to be treated as 'business income'.

13. In the case of *Raj Dadarkar & Associates* (referred to *supra*), the income of the Assessee therein from rent was not the sole income. It was observed by the Apex Court, in the said case, that the Assessee has not established that he was engaged in any systematic or organized activity of providing service to the occupiers of the shops/stalls so as to constitute the receipts from them as business income. It was for the Appellant to produce sufficient material on record to show that its entire income or substantive income was from letting out of the property, which was the principal business activity of the Assessee.

14. In the present case, the facts are otherwise. The substantive income of the Assessee is from leasing out the shop/stalls.

15. The Tribunal in its Judgment, while appreciating the facts, has observed that the various malls are built by Assessee and are operated from the year 2001. The operational income received from the said activity, in the form of rent, and other service charges was consistently offered to tax as its business income in the earlier years and the same was accepted by the Department as a business income. After demerger, both the Assessee

Companies took over the assets and liabilities of the demerged Company and continued the same business of operating and running the malls. The Tribunal has considered the nature of the business activities of the Assessee Company, as well as, terms and conditions of the relevant agreements, under which the commercial space in the mall was given on hire by the Assessee Companies to the concerned parties. It also considered the various services provided by the Assessing Companies during the course of operation and running of the Family Entertainment Centre-cum-malls. On appreciation of facts, the Commissioner (Appeals) and the Tribunal have concurrently arrived at a conclusion that the intention of the Assessing Companies was to commercially exploit the property by way of complex commercial activities and it was not a case of letting out the property simplicitor. The rental income and the service charges thus were received by the Assessee Company as business income during the course of business carried out by them of operating and running a Mall as a commercial activity. The facts of the present case are much similar to the case of *Chennai Properties and Investments Ltd.* (referred to *supra*).  
16. We find that the appreciation of evidence by the Commissioner (Appeals) and Tribunal is not perverse and the finding arrived at by them is plausible one.

10. Respectfully following the precedents as above, we uphold the order of the Id. CIT(A).

11. In the result, this appeal by the Revenue is dismissed.

*Order pronounced in the open court on 04.02.2019*

Sd/-  
(Ram Lal Negi)  
Judicial Member

Sd/-  
(Shamim Yahya)  
Accountant Member

Mumbai; Dated : 04.02.2019

Roshani, Sr. PS

**Copy of the Order forwarded to :**

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

BY ORDER,

(Dy./Asstt. Registrar)  
ITAT, Mumbai