

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "A", MUMBAI**

BEFORE SHRI RAJESH KUMAR (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 332/MUM/2019
Assessment Year: 2012-13**

M/s Asset Investment Services, Shop No. 11006, Ground Floor, Bipasha CHS, Star Colony, Manpada Road, Dombivli East, Thane - 421204 PAN: AAQFA7714D	Vs.	The ITO - 26(1)(2), Room No. 701, C-12, 7 th Floor, Pratyakshakar Bhavan, Bandra Kurla Complex, Bandra East, Mumbai - 400051
(Appellant)		(Respondent)

Assessee by: Shri Viraj Mehta (AR)
Revenue by : Shri Michael Jerald (DR)

Date of Hearing: 02/03/2020
Date of Pronouncement: 21/04/2020

ORDER

PER RAM LAL NEGI, JM

This appeal has been filed by the assessee against the order dated 10.08.2018 passed by the Commissioner of Income Tax (Appeals) -38 (for short 'the CIT (A) Mumbai, for the assessment year 2012-13, whereby the Ld. CIT (A) has dismissed the appeal filed by the assessee against the assessment order passed u/s 143 (3) read with section 147 of the Income Tax Act, 1961 (for short the 'Act').

2. Brief facts of the case are that the assessee company engaged in the business of renting out commercial properties, filed its return of income declaring nil income after claiming loss of Rs. 23,62,983/-. Subsequently, notice u/s 148 of the Act was issued and the assessment order u/s 143(3) read with section 147 was passed determining the total income of the assessee at Rs. 34,95,740/- after making addition of Rs. 34,95,744/- as income from house property. The assessee challenged the assessment order before the CIT(A). The Ld. CIT(A) after hearing the assessee dismissed the assessee's

appeal and confirmed the Action of the AO. The assessee is in appeal before the Tribunal against the order passed by the Ld. CIT(A)

3. The assessee has challenged the impugned order passed by the Ld. CIT (A) on the following effective grounds:-

“1. The Ld. CIT (A) erred in confirming the action of Ld. A.O. by confirming that Rental Income received by the appellant of Rs. 34,95,740/- is taxable under the head ‘income from House property’ instead under the head ‘Profits and Gains from Business or Profession’ without appreciating the facts and circumstances of the case. Hence, taxing the rental income under the head ‘Income from House property’ is unjustified and therefore, lower authorities be directed to tax the same under the head ‘Profits and Gains from Business or Profession’ and further allow the expenses claimed by the appellant.

2. The Ld. CIT (A) erred in confirming the action of Ld. A.O. to levy interest u/s 234A and 234B of the Income Tax Act, 1961. Said calculation is erroneous and hence liable to be deleted.”

4. At the outset, the Ld. counsel for the assessee submitted before us that the only issue involved in the present case is covered in favour of the assessee by the common order dated 28.01.20 passed by the SMC Bench of the Tribunal in assessee’s appeal ITA No.331/Mum/2019 for AY 2013-14, ITA No. 334 and 333/Mum/2019 for the assessment years 2010-11 & 2011-12 respectively. The Ld. counsel further submitted that since the impugned order passed by the Ld. CIT(A) is contrary to the decision of the Tribunal, the same is liable to be set aside.

5. On the other hand, the Ld. departmental representative (DR) admitted that the tribunal has decided the identical issue in favour of the assessee in assessee’s own appeals, however, relying on the judgment of Hon’ble Punjab and Haryana High Court in the case of Batra Palace (P) Ltd. vs. Commissioner of Income Tax , (2017) 79 taxmann.com 324 (Pun & Hary.), judgment of the Hon’ble Gujarat High Court in the case of Jyoti State Vs. DCIT (2015) 54 taxman.com 410 (Guj) and the judgment of Hon’ble Madras High Court in the case of Keyaram Hotels Pvt. Ltd. vs. DCIT (2014) 52 taxman.com 469 (Madras)

submitted that in view of the ratio laid down in the aforesaid cases, there is no merit in the appeal of the assessee.

6. We have gone through the material on record including the decision of the coordinate Bench of the Tribunal in the light of the submissions of the Ld. counsel for the assessee. Vide ground No. 1 the assessee has challenged the action of the Ld. CIT(A) in confirming the findings of the AO that the rental income received by the assessee is taxable under the head income from house property instead under the head profits and gains from business. As pointed out by the Ld. counsel for the assessee, the issue involved in the present case is identical to the issue decided by the Tribunal in assessee's appeal for the assessment years 2010-11, 2011-12 and 2013-14 and the Tribunal has decided the said issue in favour of the assessee. The findings of the coordinate Bench are as under:

"7. From the record I found that that the assessee is engaged in the business of letting out property for rent as the business activity in accordance with the Partnership Deed dated 15th September 2009. It has commenced business operations by leasing out the premises vide agreement dated 26th November 2009. Assessee's main business is to lease out properties and earn income from them, the "main object clause" of the Partnership Deed reads as follows:

"whereas all the parties are desirous of joining hands to carry on the business of buying/selling/leasing/sub letting, commercial/residential properties/offices and any other business as the partners may mutually decide from time to time, in partnership, it has been mutually decide the to reduce it into writing the terms and conditions of the partnership.

8. It is evident from the main object clause that assessee is into the business of leasing properties. Thereby, in no manner it can be concluded that assessee is not in business activity' of renting its properties. Hon'ble Apex Court at Page nos. 772-773 in the case of Narain Swadeshi Weaving Mills vs Commissioner of Excess Profits Tax IR 1955 SC 176, (1954) 26 ITR 765 SC, 1955 1 SCR 952 stated as under:-

"Business" as defined in section 2(5) of the Excess Profits Tax Act includes amongst others, any trade, commerce or manufacture or any adventure in the nature of trade, commerce or manufacture.

The first part of this definition of "a business" in the Excess Profits Tax Act is the same as the definition of a business in section 2(4) of the Indian Income-tax Act. Whether a particular activity amounts to any trade, commerce or manufacture or any adventure in the nature of trade, commerce or manufacture is always a difficult question to answer. On the one hand it has been pointed out by the Judicial Committee in Commissioner of Income-tax v. Shaw Wallace & Co. ((2932) IL.R. 59 Cat 1343), that the words used in that definition are no doubt wide but underlying each of them is the fundamental idea of the continuous exercise of an activity. The word "business" connotes some real, substantial and systematic or organised course of activity or conduct with a set purpose. On the others hand, a single and isolated transaction has been held to be conceivably capable of falling within the definition of business as being an adventure in the nature of trade provided the transaction bears clear indicia of trade. The question, therefore, whether a particular source of income is business or not must be decided according to our ordinary notions as to what a business is. The case of Commissioner of Excess Profits Tax Bombay City. Shri Lakshmi Silk Mills Ltd. {[1952] S.C.R. 1), decided by this Court is clearly distinguishable' There the, respondent company which was formed for the purpose of manufacturing silk cloth installed a plant for dying silk yam as a part of its business. During the relevant chargeable accounting period, owing to difficulty in obtaining silk yarn on account of the war, it could not make any use of this plant and it remained idle for some time. In August, 1943, the plant was let out to another company on a monthly rent. The question arose whether the income received by the respondent company in the chargeable accounting period by way of rent was income from business and assessable to excess profits tax. It should be noted that in that case the respondent company was continuing its business of manufacturing silk cloth. Only a part of its business, namely, that of dying silk yam had to be temporarily stopped owing to the difficulty in obtaining silk yarn on account of the war. In such a situation, this Court held that that part of the assets did not cease to be commercial assets of that business since it was temporarily put to different use or let out to another and accordingly the income from the assets would be profits of the business irrespective of the manner in which that asset was exploited by the company. This Court clearly indicated that no general principle could be laid down which would be applicable to all cases and that each case must be decided on its own circumstances according to ordinary common sense principles. In the case before

*us the assessee firm's business had entirely closed. It no longer manufactured any ribbons and laces. It had accordingly no further trading or commercial activity. It could not in fact use the plant, machinery, etc., after the land and the buildings where they were installed had been sold to the company. In these circumstances the assessee firm let out the plant, machinery, etc., on an annual rent of Rs. 40,000. These facts are very similar to those found in *Jnlgnd Revenue Commissioners v. Broadway Car Co. Ltd.* (11946] 2 A.E.R. 609). There the war conditions had reduced the company's business to very small proportions. In that situation it was observed that in that case the company dealt with part of its property which had become redundant and was sublet purely to produce income - a transaction quite apart from the ordinary business activities of the company. The ratio decidendi in that case which was noticed in the judgment of this Court appears to us to apply to the facts found in the present case apart from the findings under section 10A. Applying also the common sense principle to the fact so found it is impossible to hold that the letting out of the plant, machinery, etc., was at all a business operation when its normal business activity had come to a close, it is interesting to note that sub-sections (3) and (4) of section 12 of the Indian Income-tax Act recognise that letting out of plant, machinery, etc., may be a source of income falling under the head "other sources" within that section and not necessarily under the head "business" dealt with in Section 10 of that Act. In the facts and circumstances of this case, therefore, the letting out of the plant, machinery, etc., cannot be held to fall within the body of the definition of "business" under section 2(5) of the Excess Profits Tax Act. In this view of the matter it is not necessary for us to express an opinion as to the meaning or implication of the proviso to that definition or rule 4(4) of Schedule I to the Act. In our opinion, in the facts and circumstances of this case, question No, 3 should have been answered in the negative.*

*“ 9. In the case of *Universal Plast Ltd. v. CIT* [1999] 237 ITR 454 (SC), the general principles relating to income from leasing out the assets of the business by an assessee were laid down as under:*

- (i) no precise test can be laid down to ascertain whether income (referred to by whatever nomenclature, lease amount, rent or licence fee) received by an assessee from leasing or letting out of assets) would fall under the head "Profits and gains of business or profession";*
- (ii) it is a mixed question of law and fact and has to be determined from the point of view of a businessman in that business on the facts and*

- in the circumstances of each case, including true interpretation of the agreement under which the assets are let out;*
- (iii) *where all the assets of the business are let out, the period for which the assets are let out is a relevant factor to find out whether the intention of the assessee is to go out of business altogether or to come back and restart the same;*
- (iv) *if only a few of the business assets are let out temporarily, while the assessee is carrying on his other business activities, then it is a case of exploiting the business assets otherwise than employing them for his own use for making profit for that business; but if the business never started or has started but ceased with no intention to be resumed, the assets also will cease to be business assets and the transaction will only be exploitation of property by an owner thereof.*

10. *In the case of Chennai Properties & Investments Ltd. V. CIT (2015) 373 ITR 673, Hon“ble Supreme Court held as under:-*

“Fact:- The assessee-company was incorporated with main objective, as stated in the Memorandum of Association.) to acquire the properties in the city and to let out those properties. Held:- 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 "Firhauin 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 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 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. (Para 5) 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'.”

11. *In the case of Rayala Corporation (P) ltd. V. ACIT (2016) 386 ITR 500, Hon“ble Supreme Court held as under:*

Facts:- The assessee company was in the business of renting its properties and was receiving rent as its business income. The assessee company claimed that the said income should be taxed under the head 'Profits and gains of business or profession' and not under the head 'Income from house property'. In the instant appeal before the High Court, the revenue argued that leasing and letting out of shops and properties was not the main business of the assessee-company as per Memorandum of Association and, therefore, the income earned by the assessee-company should be treated as income earned from house property.

Held:- Submissions made by the learned counsel appearing for the Revenue is to the effect that the rent should be the main source of income or the purpose for which the company is incorporated should be to earn income from rent, so as to make the rental income to be the income taxable under the head "Profits and Gains of Business or Profession. It is an admitted fact in the instant case that the assessee company has only one business and that is of leasing its property and earning rent therefrom. Thus, even on the factual aspect, we do not find any substance in what has been submitted by the learned counsel appearing for the Revenue. The judgment relied upon by the learned counsel appearing for the assessee squarely covers the facts of the case involved in the appeals. The business of the company is to lease its property and to earn rent and therefore, the income so earned should be treated as its business income. In view of the law laid down by this Court in the case of Chennai Properties & Investment Ltd. (supra) and looking at the facts of these appeals, in our opinion, the High court was not correct while deciding that the income of the assessee should be treated as Income from House Property.

12. *Applying the judicial pronouncements as stated above to the facts of the instant case, I found that assessee was mainly in the business of leasing of properties and its substantial income was also from leasing of properties. The assessee was carrying out all the activities which are relevant for earning the income for these properties by extending various facilities. Thus, I found that holding of said properties and earning income by letting out those properties is the main objective of the assessee. The income arising therefrom is necessarily assessable under the head Income from Business and profession and assessee is eligible to get deduction in respect of expenditure incurred for earning the aforesaid income and also depreciation on the business assets so held. It is also*

admitted fact that assessee has only one business and that is of leasing its property and earning rent therefrom. The assessee has carried out various activities for earning such income by rendering various services as required. Under these facts and circumstances, I can safely conclude that the main intention of assessee was to exploit the immovable property by way of complex commercial activities, therefore income so earned by exploiting the property has to be taxed on as business income.

13. In view of the above discussion, I do not find any merit in the action of AO for treating the income as income from house property. The facts and circumstances in all the years under consideration are perimatria, therefore, following the reasoning given hereinabove, I direct the AO to assess the income under the head "income from business and profession."

7. The SMC Bench of the Tribunal has held in the aforesaid decision that the assessee is engaged in the business of leasing out property on rent. In our considered opinion, the facts of the cases relied upon by the revenue are different from the facts of the assessee's case, therefore the ratio laid down in the said cases does not apply to the present case. Since the SMC Bench of the Tribunal has already decided the identical issue in favour of the assessee in assessee's own appeals referred and discussed above and since the revenue has not pointed out any material change in the facts of the present case, we do not find any reason to take a different view. Hence, respectfully following the decision of the coordinate Bench, rendered in assessee's appeals for the previous and subsequent years, discussed above, we allow ground No. 1 of the appeal of the assessee and set aside the order passed by the Ld CIT(A). Accordingly, we direct the AO to assess the income of the assessee under the head income from business and profession in terms of the order dated 28.01.2020 passed by the SMC Bench in assessee's appeals discussed above.

8. Ground No 2 of the appeal is consequential hence does not need adjudication.

In the result, appeal filed by the assessee for assessment year 2012-2013 is allowed.

Order pronounced on 21st April, 2020 under rule 34(4) of the ITAT Rules, 1963.

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 21/04/2020

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/ Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
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आदेशानुसार/ BY ORDER,

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आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai