IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Sanjay Arora, AM &Shri Manomohan Das, JM

ITA No.192/Coch/2019: Asst.Year: 2012-2013
ITA No.193/Coch/2019: Asst.Year: 2015-2016

The Assistant Commissioner of Income-tax, Corporate Circle 1(2), Kochi.	vs.	Knowell Realtors India Private Limited Knowell Jairaj Building NH Byepass, Near Edappally Junction Kochi – 682 024. [PAN: AABCM 6039M]
(Appellant)		(Respondent)

Appellant by: Sri. Santosh P. Abraham, Adv.
Respondent by: Smt.J.M.Jamuna Devi, Sr.DR

Date of Hearing : 13.07.2023		Date of Pronouncement: 25.09.2023

O R D E R

Per Sanjay Arora, AM:

These are two Appeals by the Revenue agitating the appellate order dated 19.12.2018 by the Commissioner of Income-tax (Appeals)-1, Kochi '(CIT(A)'), partly allowing the assessee's appeals contesting it's assessments under section 143(3) of the Income Tax Act, 1961 ('the Act' hereinafter), dated 31.07.2017 and 08.12.2017 for assessment years (AYs.) 2012-2013 and 2015-2016 respectively. The appeals, dismissed earlier by the Tribunal u/s.268A of the Act, were subsequently restored on 16.09.2022 in view of the exception/s listed in the Board Circular No.3/2018, dated 11.07.2018, allowing the Revenue's miscellaneous applications (57 & 58/Coch/2020).

2. The brief facts of the case are that the assessee-company, incorporated on 27.09.1996 (as M.A.Agencies India Private Limited), purchased land in FY 1996-1997, commencing construction thereon in the following year, which continued up

to FY 2003-2004, even as improvements thereto continued to be effected even later. The built-up property, a commercial building, was let out to tenants in FY 1999-2000 and, accordingly, disclosedas rental income since AY 2000-2001, returning it as income from house property (IFHP). For the years under reference, however, the Revenue, in view of the revenue audit objection, since accepted by it, assessed the same as business income, as indeed the income on sale of property, returned as capital gain. This outlines the controversy attending the instant case. The assessee's view having found favour with the learned CIT(A), the Revenue is in appeal.

3.1 Before us, the Revenue reiterated it's stand of the company being in the real estate business; the object clause of it's Memorandum of Association (MoA) (copy on record), amended along with the change in the name w.e.f. 28.02.2007, reading as under:-

> "III.A. The main object of the company to be pursued on its incorporation are:
>
> (i) To carry on the business as *builders*, contractors, project managers, engineers, *property developers* and designers and to engage in the *development of plots, construction* of residential and commercial premises including flats, villas, business centers and offices, development of township and to undertake infrastructure development projects.
>
> B. The objects incidental and ancillary to the attainment of the above main objects are.
>
> (i) ……
> (ii) To sell, improve, manage, develop, exchange, lease, let, mortgage, dispose off or turn to account or otherwise deal with all or any part of the property of rights of the company and to sell and realize the proceeds of sale of any property movable or immovable against which the company may have made advances or over which the company may have any power of disposal."
>
> [emphasis, ours]

That apart, the assessee is also selling properties at good returns, i.e., as and when deemed profitable, as it has during the previous years relevant to AYs. 2011-2012 and 2013-2014, i.e., besides the years under reference.

3.2 The assessee's case, on the other hand, was based on the letting by it being on long-term lease basis in it's capacityas the owner of the house property, which was accordingly held as a fixed (capital) asset, yielding rental income, and not as stock-in-trade (SIT). There had been no regular purchase and sale of property, as sought to be made by the Assessing Officer (AO), with each sale being accompanied by strong and definite reasons. The income had been regularly returned since AY 2000-2001 as IFHP, and accepted as such, i.e., except for the years under reference (PB pg. 24). No depreciation had been claimed on the fixed assets for any of the years. On inquiry, it was explained by Sri.Abraham, the ld. counsel for the assessee, that the property sold during the year, yielding capital gain of Rs.98.01 lakhs (AY 2012-2013), was for the reason that the building had become old. Similarly, the land sold in AY 2015-2016, the second year under appeal, was for the reason that the assessee had not got a license fromGCDA to construct a commercial building thereon, placing on record a confirmation from the assessee to that effect(PB pg. 26). As to the manner in which the rental income as well as the proceeds of the property sold was utilized, it was explained by him (PB pg. 25) that the same was for the purchase of land and construction thereon, for being similarly let, yielding rental income, duly returned as IFHP. The decision in *Raja J. Rameshwar Raov. CIT*[1961] 42 ITR 179 (SC), relied upon by the Revenue, was distinguishable inasmuch as in that case it was found as a fact that the assessee had acquired land with a view to sell it later, resulting in profit from an activity that could only be described as a business activity and, income there-from, thus, business income. Further, reliance was placed by him on the decisions in *Pr.CIT v. Rungta Properties Pvt. Ltd*. [2018] 304 CTR 310 (Cal); *CIT v. Gopal Purohit* [2010] 188 Taxman 180 (Bom); and *Parekh Traders v. CIT* [1984] 150 ITR 310 (Bom).

4. We have heard the parties, and perused the material on record.

The Law

4.1 Income under the Act is to be assessed under any of the 6 (now 5) heads of income. Section 22 and 28 concern income from house property and business income respectively, and read as under:

Income from house property.

22. The annual value of property consisting of any buildings or lands appurtenant thereto of which the assessee is the owner, other than such portions of such property as he may occupy for the purposes of any business or profession carried on by him the profits of which are chargeable to income-tax, shall be chargeable to income-tax under the head "Income from house property."

Profits and gains of business or profession.

28. The following income shall be chargeable to income-tax under the head of "Profits and gains of business or profession" –

(i) the profits and gains of any business or profession which was carried on by the assessee at any time during the previous year:

4.2 We may next consider the law in the matter as explained and expounded by the Hon'ble Apex Court over the years.We extract from its observations in *East India Housing & Land Development Trust Ltd. vs. CIT* [1961] 42 ITR 49 (SC), one of the earliest by it, as under, to place the issue in context:

'Income-tax is undoubtedly levied on the total taxable income of the taxpayer and the tax levied is a single tax on the aggregate taxable receipts from all the sources; it is not a collection of taxes separately levied on distinct heads of income. But the distinct heads specified in s. 6 indicating the sources are *mutually exclusive* and income derived from different sources falling under specific heads has to be computed for the purpose of taxation in the manner provided by the appropriate section. *If the income from a source falls within a specific head set out in s. 6, the fact that it may indirectly be covered by another head will not make the income taxable under the latter head.*'[emphasis, ours]

The head of income under which a particular income is assessable under the Act is, thus, to be determined with reference to it's source. Ownership of house property is itself recognized as a source of income under the Act, which is irrespective of whether the same is let or not. This, apparent from s. 22, becomes abundantly clear from s. 23, deeming the annual value, i.e., the measure with reference to which the income is to be determined, as the sum for which the property might reasonably be

let from year to year. The only exception *qua* house property being the source of income is where the same is occupied by the assessee for the purpose of any business or profession carried on by him, income from which is chargeable to tax u/s. 28. Further, as clarified, the direct, or more so, source would determine the head of income, and not one under which the income may indirectly fall. The issue as to the head of income *qua* house property or business income would thus have in each case to be decided on the basis of this framework.

Letting, *per se*, as explained in *CIT v. National Storage (P.) Ltd*. [1963] 48 ITR 577 (Bom) (since affirmed in [1967] 66 ITR 596 (SC)), which thus becomes a means of realizing the annual value of a house property and, thus, is integral to it's ownership, is not 'business' under the Act. The proposition remains undiluted to date. Even if therefore the exploitation of property is one of the objects for which a company is formed, it may not, as clarified in *East India Housing & Land Development Trust Ltd.* (supra), be assessable as business income. That the property being exploited is being used for commercial purposes would though matter little. This stands reiterated in *Sultan Brothers (P.) Ltd. v. CIT* [1964] 51 ITR 353 (SC), a constitution bench decision by the Apex Court; it holding as: (pg. 358)

> "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." (emphasis, ours)

There may, however, be a case where letting of property (real estate) is itself being carried on by the assessee as his business, i.e., letting asa business? This assumes significance as in that case, ownership becomes incidental and integral to the business, which thus becomes the immediate source of income. Implicit in the concept, and an incident, of business, is a set of activities, i.e., something more and beyond letting, which is an incident of ownership alone, so that ownership of

property is a part of or an incidence of that business. That the house property is fully equipped, viz. with furniture, electrical fittings, lifts, etc., as was the case in *Sultan Bros*. (supra), would only be a case of a composite letting, implying business income (or income from other sources) where inseparable, for which the Hon'ble Court devised a test. In all such cases property is not being exploited as a capital asset, but in the capacity of a trader, and it's value realized, by way of sale or lease, as a business. That is,*the income derived is not from the exercise of property rights only, but is derived from carrying on an adventure or concern in the nature of trade. The aspect stands explained* by the Apex Court in *Karanpura Development Co. Ltd. vs. CIT* [1962] 44 ITR 362 (SC), which observations stand also extracted in it's recent decision in *Rayala Corp. Pvt. Ltd. v. Asst. CIT* [2016] 386 ITR 500 (SC):

> '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*.' (pg. 377)

It's observations in the following para, at pages 377-378, are as under:

> 'Ownership of property and leasing it out may be done as a part of business, or it may be done as land owner. *Whether it is the one or the other must necessarily depend upon the object with which the act is done*. It is not that no company can own property and enjoy it as property, whether by itself or by giving the use of it to another on rent. Where this happens, the appropriate head to apply is "income from property" (s. 9), even though the company may be doing extensive business otherwise. But a company formed with the specific object of acquiring properties not with the view to leasing them as property*but to selling them or turning them to account even by way of leasing them out as an integral part of its business, cannot be said to treat them as landowner but as trader*. The cases which have been cited in this case both for and against the assessee-company must be applied with this distinction properly borne in mind. *In deciding whether a company dealt with its properties as owner, one must see not to the form which it gave to the transaction but to the substance of the matter*.'[emphasis, ours]

The larger bench decisions by the Hon'ble Apex Court in *East India Housing & Land Development Trust Ltd.* (supra); *Karanpura Development Co. Ltd.* (supra); and *Sultan Brothers Pvt. Ltd.* (supra), which are in agreement, sum up, to our mind, the

law in the matter, which is then to be applied to the facts of the case at hand. The only exception to the income by way of letting of his house property by the assesee being assessable as income from house property is thus where it is by way of an inseparable letting along with other assets, which exception is carved by the statute itself, or where the income derived is *from carrying on an adventure or concern in the nature of trade, a matter of fact.* This understanding of law remains undisturbed, and toward which we have perused the decisions up to it's recent decisions, as in *Rayala Corp. Pvt. Ltd. v. Asst. CIT* [2016] 386 ITR 500 (SC) and *Raj Dadarkar & Associates v. Asstt. CIT* [2017] 394 ITR 592 (SC); it relying upon and applying the law enunciated by it per its earlier decisions cited supra.The matter, given the clear law, becomes essentially a matter of fact, which also explains the varying decisions in different cases.

4.3 It is therefore immaterial whether the house property yielding rental income is a residential or a commercial property; the nature of income in either case being it's lettable value and, source, the ownership of the property. The test deciding whether the same would be, in the facts and circumstances of the case, a business income or income from house property; the line of difference being thin, is if the property leasing is an integral part of the assessee's business, a manner of exploiting and realizing it's value in his capacity as trader, which may or may not be in addition to sale thereof, whereby the said realization is in lump-sum. This may be accompanied by an activity/s with a view to add value to the property, as SIT of the business, further endorsing the inference of it being a business.

Determination

4.4 We find the said test as decisively satisfied in the facts and circumstances of the instant case. The assessee-company, to begin with, stands incorporated for *real estate development*, the object and, rather the only object, it has undertaken and systematically pursued since it's inception, i.e., even for the period prior to 28.02.2007, whereat it's mandate was entirely different, i.e., manufacture of

consumer and industrial goods (PB pgs. 12, 13), even as the object clause B (i.e., Objects incidental and ancillary to the attainment of the main objects [B (ii)], reproduced hereinbefore, continued to be the same. As explained in *Sultan Bros*. (supra), a commercial asset is only an asset used in a business and nothing else, and business may be carried on with practically all things.*How would, then, it matter whether the property constructed is a commercial or a residential premises*? In both the cases the purpose is to realize it's value, either by way of sale or lease, i.e., to turn it to account. In fact, that is what it's object clause B(ii) states, which, in view of the changed main object, becomes ineffect a part thereof or, in any case, in complete harmony therewith. *How else, one may ask, would a company generate revenue from it's undertaking*? The rental income is, thus, only a manner of realizing it's value, i.e., turning it to account, as a part of it's business model. From the stand-point of the company, it is immaterial whether, therefore, a part of the property is sold at a profit, as it does a flat at Kakkanad for Rs.65 lakh on 20.10.2014, purchased on 06.09.2011 for Rs.45 lakh, after effecting improvement thereto costing Rs.16.33 lakh, yielding it thus a gain of Rs.3.67 lakh, or sell it's building, a godown, let since FY 1997-98, on 13.07.2011, i.e., during the previous year relevant to AY 2012-2013, for the reason that it had become old, necessitating repairs and improvement which may presumably not yield it commensurate return. In each case, the sum realized, as indeed the rent received over the years, is, after meeting expenses, ploughed back in the business, purchasing and constructing landed property for being, similarly, either sold at a profit or leasing it. Where it found the land purchased (purchased for Rs.78.80 lakhs on 02.05.2012), which was out of the sale proceeds of the godown sold during FY 2011-2012, could not be subject to commercial construction, i.e., its intended user, the same was immediately disposed of on 19.05.2014, i.e., *for a business reason*, even if at a meager profit of Rs. 1.20 lacs. The same could be held as a capital asset inasmuch as its location would only be appropriate, awaiting again in value over time, but was sold at near par once it was found that it did not serve

abusiness purpose. The assessee is thus undertaking *the business of real estate development, of which leasing, as is sale, an integral and a regular part*.

There is, thus, no substance or merit in the assessee's claim of it being a capital asset, or income by way of lease rent being not a business income. In fact, it not claiming depreciation on it's buildings is also consistent with the property yielding revenue by way of rent being held for turning them to account by realizing their value thus. It is, rather, a claim of depreciation that would support it's case of the building/s being a capital asset, in which case the transfer value would be assessable on it's transfer as capital gain u/s.45 r/w s.50. The Revenue has, regarding it as a business asset, held as SIT, rightly not assessed income arising on its transfer as capital gain, invoking s.50C. That is, the non-charge of depreciation does not assist the assessee's case in any manner, being, on the contrary, consistent with the Revenue's stand of land – which is in any case not subject to depreciation (*CIT v. Alps Theatre* [1967] 65 ITR 377 (SC)), and building, being held as SIT, realizable on transfer, either by way of sale or lease, i.e., as a part of its business.

Other Arguments

4.5 The assessee claiming a past history of acceptance of income arising thus as income from house property, is, again, misplaced. This is as there is nothing on record to suggest, much less show, such an acceptance, denoting an affirmative action on the part of the Revenue. Even as confirmed during hearing, all the so called assessments in the past, or even subsequently (up to AY 2022-23/PB pg. 24) have in fact been per processing of it's returns u/s.143(1)which, by definition, is not an assessment, whereby only *prima facie* adjustments, apparent from the face of the return, could be made. Even as there is no estoppel against law, there has clearly been no examination of the assessee's case for any of the preceding or even succeeding years, so as to claim Revenue having taken a stand, much less consistent.

4.6 As regards the judicial precedents relied upon, we find nothing therein contrary to what stands stated herein. It is the *ratio decidendi* of a decision which

constitutes the judicial precedence, with we, rather, relying on that by the Apex Court, whose decisions are binding on all, and being either way, itself shows that the decisions in each case, given the clear law, turns on the facts of the case. For example, in *Rungta Properties Pvt. Ltd.* (supra), there was no material to show that the assessee carried on business of property development. It is in this view of the matter that it was held that the object clause of MoA cannot be treated as a determining factor. We have, on the contrary, found the assessee's activities as consistent with it's object clause; it, rather, changing the object clause in February 2007 to bring it's activities within the frame work of it's charter. The Apex Court has recently in *CIT v. Glowshine Builders and Developers Pvt. Ltd*. [2023] 454 ITR 249 (SC) clarified that to examine whether a particular transaction is a sale of the capital asset or a business transaction, multiple factors, such as frequency of trade; volume of trade; nature of the transactions over the years, etc., are required to be examined. The same, it would be seen, is in complete agreement with the law explained by it per a series of decisions, beginning *G. Venkataswami Naidu & Co. v. CIT* [1959] 35 ITR 594 (SC), with that in *Raja J. Rameshwar Rao* (supra) being consistent therewith; the business activity in that case being plotting of land. It would be noticed that even as we have concurred with the Revenue in conclusion, our findings are not wholly in agreement therewith; we finding the assessee-company as not holding an asset awaiting suitable time for its disposal, as the AO claims, but seeking to realize it upon development, which defines it's business. The sale in the same form (i.e., as undeveloped land) is again guided by considerations of business inasmuch as the property could not be developed in the manner intended. As in the case *Raja J.Rameshwar Rao* (supra), we *find the assessee to be engaged in a continuous and systematic activity of business in real estate development*. The cited decisions would accordingly not further the assessee's case.

5. We, accordingly, setting aside the impugned order, uphold the assessment as framed, assessing the capital gains and income from house property as business income. We decide accordingly.

6. In the result, the Revenue's appeals are allowed.

Order pronounced on September 25, 2023 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963

Sd/-	Sd/-
(Manomohan Das)	(Sanjay Arora)
Judicial Member	Accountant Member

Cochin; Dated: September 25, 2023
Devadas G*

Copy to:
1. The Appellant.
2. The Respondent.
3. The Pr. CIT concerned.
4. The Sr. DR, ITAT, Cochin.
5. Guard File.

Assistant Registrar
ITAT/Cochin