

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH " B "**

**BEFORE SHRI N.V. VASUDEVAN, JUDICIAL MEMBER AND
SHRI JASON P. BOAZ, ACCOUNTANT MEMBER**

| I.T.A. Nos.1642 & 1643/Bang/2014 (Assessment Years : 2010-11 & 2011-12) | | |
|--|-----|--|
| M/s. Silver Software Pvt. Ltd., No.23 & 24, EPIP I Phase, KIADB, Whitefield, Bangalore-560 066 PAN AADCS 6245H | Vs. | Dy.Commissioner of Income Tax, Circle 12(3), Bangalore. |
| Appellant | | Respondent. |

Appellant By : Shri Zain Ahmed Khan, C.A.

Respondent By : Dr.P.K. Srihari, Addl. CIT (D.R.)

Date of Hearing : 18.3.2015.

Date of Pronouncement : 29.05.2015.

O R D E R

Per Shri Jason P. Boaz, A.M. :

These appeals by the assessee are directed against the orders of the CIT (Appeals) - III, Bangalore dt.30.10.2014 for Assessment Years 2010-11 and 2011-12.

These two appeals being heard together are being disposed off by way of this common order.

2. The facts of the case, briefly, are as under :-

2.1 The assessee is a company engaged in the business of software development, testing and renting of property. For Assessment Year 2010-11, the assessee filed its return of income on 26.3.2012 declaring NIL income and claimed carry forward of business loss of

Rs.1,39,60,360. For Assessment Year 2011-12, the return of income was filed on 28.9.2012 declaring income of Rs.8,99,750. The case of the assessee was selected for both these assessment years and the assessments were completed under Section 143(3) of the Income Tax Act, 1961 (in short 'the Act') vide orders dt.15.3.2013 and 5.3.2014 wherein the income was determined at Rs.1,94,91,252 and Rs.1,94,52,163 for Assessment Years 2010-11 and 2011-12 respectively. While the assessee had declared the income earned from letting out of commercial spaces, amenities and maintenance as income under the head 'Profits and Gains from Business', the Assessing Officer was of the opinion that the Lease Agreements are composite agreements of rent for commercial space with basic fixture and fittings and since the basic necessities are inseparable from the immovable property let out by the assessee, the income received by the assessee constitutes 'rent from letting out' and was exigible to tax under the head 'Income from House Property'. In coming to this conclusion, the Assessing Officer relied on the following judicial pronouncements :-

- (i) Shambu Investments Pvt. Ltd. (2003) 263 ITR 143(SC).
- (ii) Bhoopalam Commercial Complex & Industries (262 ITR 517) (Kar).
- (iii) CIT V Sarabhai Pvt. Ltd. (2003) 263 ITR 197 (Guj)
- (iv) CIT V Poddar Cement Pvt. Ltd. (1997) 226 ITR 625 (SC).

2.2 Aggrieved by the orders of assessment for Assessment Years 2010-11 and 2011-12 dt.15.3.2013 and 5.3.2014 respectively, the assessee preferred appeals before the CIT (Appeals) - III, Bangalore. The learned CIT (Appeals) vide orders dt.30.10.2014 dismissed

the assessee's appeal on the ground that the asset owned by the assessee is being exploited as a capital asset and that the essential requirements of business such as risk of losing capital, uncertainty of the return on investment, etc., were missing. The learned CIT (Appeals) also observed that in a couple of cases, maintenance charges were not levied and the tenants were not allowed to use the common facilities. In coming to this conclusion, the learned CIT (Appeals) relied on the following judicial pronouncements :-

(i) CIT V Smt. Minal Rameshchandra (1987) 167 ITR 507 (Guj)

(ii) East India Housing & Land Development Trust V CIT (1962) 42 ITR 49 (SC)

(iii) Mahesh Investments V ACIT [55(1) ITCL 0086 (Kar)]

3. Aggrieved with the orders of the CIT (Appeals) - III, Bangalore for Assessment Years 2010-11 and 2011-12 dt.30.10.2014, the assessee has preferred these appeals before the Tribunal raising the following identical grounds :-

1. *The order of the learned CIT (A) is opposed to law, facts and circumstances of the case.*
2. *The Ld. AO has erred in holding that the income earned by the Appellant is to be taxed under the head "Income from House Property" and not under "Profits and gains from Business or Profession" and the Ld. CIT (A) erred in confirming the same.*
3. *The Ld. AO and CIT(A) ought to have appreciated the fact that the activities carried on by the Appellant constitute a complex commercial activity.*
4. *The Ld. CIT(A) ought to have appreciated that the income earned by the Assessee is on account of active business and not passive investments.*

5. *The Ld. AO ought to have taxed the maintenance charges received by the Appellant under the head "Profits and gains from Business or Profession" and not under "Income from House Property".*
6. *The Ld. Commissioner of Income Tax (Appeals) failed to appreciate the fact that, the assessee had not let out the building as it is, and the assessee is providing other services also which is nothing but carrying on business.*
7. *The Ld. Commissioner of Income Tax (Appeals) failed to appreciate the fact that, the amount paid by the tenants is not only rent but it includes charges towards providing services, and the amount payable by the tenants is a composite amount.*
8. *The Ld. Commissioner of Income Tax (Appeals) failed to appreciate the fact that, the facts of the case of the Shambhu Investments Pvt Ltd on which the Assessing officer has relied is entirely different from the facts of the assessee's case.*
9. *The learned CIT (Appeals) ought to have appreciated that the appellant was providing maintenance facilities to its tenants apart from letting out its premises.*
10. *The CIT (Appeals) erred in not deleting the interest charged u/s.234A and 234B of the Act.*

Both these appeals were heard together and are disposed of by this common order since the grounds raised are identical.

4. The Ground at S.No.1 is general in nature and therefore no adjudication is called for thereon.

5. In the Ground at S.No.10, the assessee denies itself liable to be charged interest under Section 234A and 234B of the Act. The charging of interest is consequential and mandatory and the Assessing Officer has no discretion in the matter. This proposition has been upheld by the Hon'ble Apex Court in the case of

Anjum H Ghaswala (252 ITR 1) and we, therefore, uphold the action of the Assessing Officer in charging the said interest. The Assessing Officer is, however, directed to recompute the interest chargeable u/s. 234A and 234B of the Act, if any, while giving effect to this order.

6.1 Grounds at S.Nos.2 to 9 : The crux of these grounds raised is in respect of whether the income earned by the assessee is to be taxed under the head 'Income from House Property' or 'Income from Business.'

6.2 The learned Authorised Representative was heard in the matter and filed written submissions dt.18.3.2015 in support of the assessee's claim that the income earned by the assessee from letting out of commercial spaces, amenities and maintenance be assessed to tax as 'Income from Business' as declared by the assessee and not as 'Income from House Property' as held by the authorities below.

6.3 Per contra, the learned Departmental Representative supported the impugned order of the learned CIT (Appeals) and prayed that the assessee's appeals be dismissed.

6.4.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial decisions cited and placed reliance upon by both parties. Before us, it was submitted that the assessee is engaged in the business of letting out its commercial spaces on "fully furnished plug and play" basis wherein the assessee, apart from providing space to operate from, is also providing

appropriate, adequate and sophisticated infrastructure which would enable the occupants to commence their commercial operations right from day one; thereby obviating the occupants from the necessity of incurring capital expenditure for setting up of infrastructure and retaining the responsibility of maintenance and security of the premises with the assessee. Inviting reference to Schedule - II of the Lease Agreements, placed at pages 14,29,45, etc of the assessee's paper book, it was submitted that the assessee is providing the following additional amenities with the commercial space as a composite service :-

- a. Work Station and Chairs.
- b. Discussion Tables.
- c. Storage Units.
- d. Wooden & Carpet Floors.
- e. Access Control Doors with Access Cards.
- f. Projector.
- g. Power back up in the form of UPS.
- h. Coffee Machines.
- i. Diesel Generators
- j. Working internet connection along with routers and Local Area Network (LAN) cables.
- k. Server Rooms and anti-static flooring.
- l. Water & Electricity.
- m. Centralised Air-conditioning.
- n. Fire Fighting Equipment at Vantage points.
- o. Telephone Lines.
- p. Designated Canteen Space and Food facility for the occupants.
- q. Parking Space.

6.4.2 Drawing reference to Schedule III of the Lease Agreements enclosed at pages 16, 46, 61 of the assessee's paper book, it was submitted that the assessee was also responsible for providing various maintenance facilities listed hereunder :-

- (i) Round the clock security
- (ii) Insurance of the premises.
- (iii) Parking Management.
- (iv) Maintenance of common areas, land scaped areas and common electrical installations.
- (v) Maintenance and operation of elevator, bore well and generator.
- (vi) Collection and payment of electricity and water bills.
- (vii) Upkeep of common areas.

6.4.3 It was submitted that in terms of the Lease Agreements, it is evident that the assessee was responsible for maintenance of the common areas such as basement, terrace, car park, lobby, landscape, compounds and staircase, as also the maintenance of facilities in the common area such as lifts, diesel generators, plumbing and fire fighting system for which the assessee had appointed a house keeping agency. It was further submitted that by no stretch of imagination can work stations with white boards and network plugs, access control devices, hand dryers, fire extinguishers, projectors and coffee vending machines, certain facilities for employees, 24/7 power supply, etc be termed as "basic fixture & fittings" like tables, chairs, light, fans and "standard amenities" like provision of water, electricity and security , as concluded by the Assessing Officer .

6.4.4 It was submitted that the activity carried on by the assessee was not a simple case of letting out of buildings for rent, but involves the carrying on of a complex commercial activity in which various amenities and fit-outs provided were customized to enable the user of the buildings to commence its specialized business.

In this regard reliance was placed on the decision of the Hon'ble Apex Court in the case of CIT V National Storage Pvt. Ltd. (66 ITR 596) wherein the Hon'ble Apex Court while distinguishing the significance of merely letting out of a bare building and a building braced up with various amenities had held as under :-

"In our view, the High Court was right in holding that the assessee was carrying on an adventure or concern in the nature of trade. The assessee not only constructed vaults of special design and special doors and electric fittings, but it also rendered other services to the vault-holders. It installed fire alarm and was incurring expenditure for the maintenance of fire alarm by paying charges to the municipality. Two railway booking offices were opened in the premises for the dispatch and receipt of film parcels. This, it appears to us, is a valuable service. It also maintained a regular staff consisting of a secretary, a peon, a watchman and a sweeper, and apart from that it paid for the entire staff of the Indian Motion Picture Distributors' Association an amount of Rs.800 per month for services rendered to the licensees....."

6.4.5 In support of its contention that the income derived from providing the facility on "plug and play basis" is to be classified under the head 'Income from Business', the assessee placed reliance on the decision of the co-ordinate bench of this Tribunal in the case of DCIT V Velankani Information Systems Pvt. Ltd. in ITA No.1507 to 1510/Bang/2010 dt.30.3.2012. The assessee has furnished an item-wise comparison of the services rendered and facilities provided by it vis-à-vis those provided in the case of M/s. Velankani Information Systems P. Ltd. (supra) as listed out at pages 4 to 6 of the cited order; which are as under :-

| | | |
|----------------|---|-------------------------------------|
| Sl. No. | Velankani Information Systems P Ltd. V/s. DCIT | In the case of the Appellant |
|----------------|---|-------------------------------------|

| | | |
|----|---|--|
| a. | <i>Provision of common reception area for all lessees</i> | <i>The Appellant has earmarked a common reception area, furnished it and appointed a Receptionist to cater to all the Lessees</i> |
| b. | <i>Provision of lifts and undertaking the responsibility of its maintenance</i> | <i>The Scope of Maintenance has been provided in Schedule III of the Agreements enclosed in pages 16, 31, 46 etc. of the paper book wherein the Appellant is not only providing the elevators but has also undertaken the responsibility of maintaining them. The Appellant has insured the premises.</i> |
| c. | <i>Comprehensive Insurance of the premises</i> | |
| d. | <i>Provision of necessary furniture & fixtures along with necessary outlets for electricity, telecom & internet</i> | <i>The Appellant has provided necessary furniture & fixtures detailed in Schedule II of the Agreements enclosed in pages 15, 29, 45, etc. which include workstations with outlets for electricity telecom & internet, chairs, pin boards, projectors, coffee machines, toilet fixtures, wooden/carpeted floor, access control devices with access cards, server rooms with anti-static flooring & racks, smoke detectors, fire alarm systems, fire extinguishers among others.</i> |
| e. | <i>Responsibility of repairs and maintenance of exterior structure and interiors of leased premises</i> | <i>The Appellant has also undertaken responsibility of periodical maintenance of the building while also ensuring maintenance & upkeep of common areas such as basement, terrace, car park areas, lobby, corridors, staircases, compounds & landscape. For this very purpose, the Appellant has appointed a housekeeping agency. Reference is drawn to Schedule III of the Agreements enclosed in pages 16, 31, 46 etc. of the paper book as also Clause 4 of the Agreements dealing with Maintenance.</i> |
| f. | <i>Responsibility of house-keeping</i> | |
| g. | <i>Provision & maintenance of landscape</i> | |
| h. | <i>Provision of parking facilities to the lessees and engaging services of</i> | <i>The Appellant has also allotted earmarked parking spaces to its Lessees and undertaken the responsibility of Parking Management in terms of</i> |

| | | |
|-----------|--|---|
| | <i>parking attendants</i> | <i>the Agreement while also catering to additional requirements of car park spaces.</i> |
| <i>i.</i> | <i>Responsibility of providing plumbing & janitor services</i> | <i>Attention is drawn to Para 4.3 & 9.4 of the Agreements enclosed in the paper book wherein the Appellant has undertaken the responsibility of plumbing services and toilet fittings in the leased premises as well as common areas.</i> |
| <i>j.</i> | <i>Provision of electricity 24/7 and 100% power back-up</i> | <i>The Appellant has undertaken the responsibility of ensuring power supply 24/7. The Appellant makes arrangements for water and water is supplied to them free of cost. The Appellant has installed UPS in the leased premises and power generators are on stand-by mode 24 hours a day. In the event of breakdown of generators, the Appellant has undertaken to provide alternate power to the occupants. The operation and maintenance of water pump, generators, electrical installations, air conditioners is the responsibility of the Appellant. The Appellant has also undertaken responsibility of procuring additional power and collection & payment of electricity & water bills. Reference is drawn to Para 9 and Schedule III of the Agreements on pages 7, 23, 38, etc. and pages 16, 31, 46 etc. of the paper book respectively.</i> |
| <i>k.</i> | <i>Responsibility of supplying water</i> | |
| <i>l.</i> | <i>Provision of air conditioning facility and responsibility of maintaining the same</i> | |
| <i>m.</i> | <i>Provision of canteen area</i> | <i>The Appellant has earmarked a canteen area in the premises and is providing food to the employees of the Lessees on a daily basis. The occupants are charged separately on head count basis for the facilities utilized by them. Reference is drawn to Para 5 of the agreements on Pages 4, 20, 50 etc. of the paper book.</i> |
| <i>n.</i> | <i>Provision of Telecom &</i> | <i>The tenants occupying the Appellant's premises are software companies mostly subsidiaries of</i> |

| | | |
|--|----------------------------|---|
| | <i>Internet facilities</i> | <i>international companies. Data security, integrity & confidentiality ranks high in their list of priorities. The risk of compromise of data security and confidentiality is high with the use of common shared networks. Hence, the occupants insist upon installing their own servers to meet their technical requirements and eradicate the risk of compromise of data security and confidentiality. However, the Appellant has provided optical fiber network cables with server racks & panels on one side to plug in the servers and workstations on the other side with sockets to plug in the systems. In effect, the plug & play functionality is provided.</i> |
|--|----------------------------|---|

In our view, it is evident from the details of the above table that there is very little to distinguish between the services rendered and facilities provided by the assessee with those provided in the case of Velankani Information Systems Pvt. Ltd. (supra).

6.4.6 In the case of Velankani Information Systems Pvt. Ltd. (supra), the co-ordinate bench referred to a similar matter that had come up for consideration before another co-ordinate bench of the Tribunal in the case of Global Tech Park Pvt. Ltd. (2008) 119 TTJ (Bang) 421, wherein following the decision of the Hon'ble Apex Court in the case of National Storage Pvt. Ltd. (supra) it was held that providing ward and watch, maintenance of common area, maintenance of light in the common area, supply of water, providing lift, installation of electric transformer, power to the lessees, providing generator, over-head water tanks, maintenance of

drainage, etc. clearly establishes that the entire activity is structured in an organized manner to earn profit out of investment made by the assessee as a commercial venture and held that the rental income received in these factual circumstances is to be assessed as business income. The co-ordinate bench in the case of Velankani Information Systems P. Ltd. (supra) while rendering its decision distinguished the judgment of the Hon'ble High Court of Karnataka in the case of M/s. Bhoopalam Commercial Complex & Industries reported in 262 ITR 517 which has been relied upon by the Assessing Officer.

6.4.7 The Id. CIT(A) in the impugned order was of the view that the facts of the assessee's case were distinguishable from those in the afore-mentioned judicial decisions on the ground that in the case on hand, the primary object of the assessee is not to set up Software Park. According to the assessee, after selling the software business with about 200 employees in Sept., 2008, the assessee invested Rs.2.61 Crores during the F.Ys 2009-10 and 2010-11 on additions to the building (details at pages 136 and 139 of assessee's paper book) with the primary intention of setting up new infrastructure of approx. 54,000 sq. ft. which can accommodate about 750 persons and is conducive for software companies to establish their office set ups overnight on plug and play basis. It was submitted that to fund this construction and interior works, the assessee raised a term loan of Rs.3.23 Crores from Corporation Bank @ 14.25% interest per annum. It is submitted that with some of

the lessees such as Meridium International Inc. and Kanchi Technologies Ltd., the assessee has proceeded further to cater to their specific requirements in respect of layout of the premises and furniture. The assessee submits that in the light of the above, it can be clearly said that the primary intent of the assessee was to set up a software park and that this premises is being exploited as a business asset.

6.4.8 The learned CIT (Appeals) was also of the view that the essential requirements of a business as prescribed by the Hon'ble High Court of Gujarat in the case of CIT V Smt. Minal Rameshchandra (supra) are missing in the case on hand. The assessee submits that having invested Rs.2.61 Crores on setting up of infrastructure over a period of approx. 2 years, it faces the uncertainty of return to be received from the investment and the risk of losing the capital invested in the event the building premises is not occupied by tenants, as well as defaulting on the Bank Term Loan which result in the assessee losing the premises. According to the assessee, in the course of operations, it faces unforeseen impediments in the form of power cuts, water shortage, break down of amenities, tenants vacating the premises before expiry of lease period which need to be catered to immediately. It is contended that in the case on hand, there is risk, uncertainty and unforeseen hurdles which have been laid down as essential requirements of a business by the Hon'ble High Court of Gujarat in the case of Smt. Minal Rameshchandra (supra).

6.4.9 The learned CIT (Appeals) was of the view that the decision of the Hon'ble Apex Court in the case of East India Housing & Land Development Trust Ltd. (supra) is applicable to the facts of the case on hand. The cited case was one where the company was incorporated with the object of buying and developing land and properties and promoting and developing markets. Thus, the main objective was to develop landed properties into markets. It so happened that some shops and stalls, which were developed by the company, had been rented out and income was derived from the renting out of the said shops and stalls. In those factual circumstances, the question that arose for consideration was whether the rental income received was to be treated as 'Income from House Property' or 'Income from Business.' The Hon'ble Apex Court, while holding that the income shall be treated as 'Income from 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 house property had not altered because it was received by the company formed with the object of developing and setting up of properties. The facts of the case on hand, however, are different in the sense that the assessee here, apart from providing space has also provided various other amenities as listed out at paras 6.4.1 and 6.4.2 of this order (supra). We, therefore,

find that the facts of the case on hand are different and distinguishable from the aforesaid decision relied on by the learned CIT (Appeals).

6.4.10 Similarly, in the case of Mahesh Investments (supra), the rent received was for letting out of only the commercial space, without any amenities, furniture and fixtures or the undertaking of any maintenance activities, was held to be exigible to tax as 'Income from House Property.'

6.4.11 What emerges from the above discussion from para 6.1 to 6.4.10 of this order (supra), is that the question of whether the rental income derived by the assessee from letting out of property is to be treated as 'Income from House property' is essentially to be decided on the basis of the facts and circumstances of each particular case. The scheme of the Income Tax Act, 1961 contains 6 heads of income under which income can be categorized / classified. These heads of income are, in a sense, exclusive of one another and the income which falls under one head cannot be assigned to or taxed under another head. Therefore, the deciding factor is not the ownership of the land or the leases thereof, but the nature of the activity of the assessee and the nature of the operations in relation to them. In the case on hand, considering the nature of the assessee's dealings with the property, apart from letting them out and the manner and extent of its activities, inter alia, like providing of ward and watch, security, maintenance of common area and lighting thereof, fire safety, supply of water, providing lifts, installation of electric

transformers, generators, water tanks, etc. and as listed out at paras 6.4.1 and 6.4.2 of this order (supra); go to clearly establish that the entire activity is conducted in an organized manner to earn profits out of the investment made by the assessee as a commercial venture. We are therefore of the considered opinion that the operations of the assessee in earning the rental income received from leasing out of the building properties would fall under the head 'Income from Business' and not 'Income from House Property' as held by the authorities below and consequently allow the assessee's appeal.

7. In the result, the assessee's appeals for Assessment Years 2010-11 and 2011-12 are allowed.

Order pronounced in the open court on 29th May, 2015.

Sd/-
(N.V.VASUDEVAN)
Judicial Member

Sd/-
(JASON P BOAZ)
Accountant Member

*Reddy gp