

IN THE INCOME TAX APPELLATE TRIBUNAL  
BANGALORE BENCH 'C', BANGALORE

BEFORE SHRI. SUNIL KUMAR YADAV, JUDICIAL MEMBER

AND

SHRI. ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

I.T.A No.806/Bang/2015  
(Assessment Year : 2010-11)

M/s. Prestige Garden Constructions P. Ltd,  
The Falcon House No.1, Main Guard Cross Road,  
Off Infantry Road, Bengaluru 560 001 .. Appellant  
PAN : AABCP2901E

v.

Deputy Commissioner of Income-tax,  
Circle – 5(1)(2), Bengaluru .. Respondent

Assessee by : Shri. Padamchand Khindha, CA  
Revenue by : Dr. Sibichen K. Mathew, CIT

Heard on : 25.05.2016  
Pronounced on : 10.06.2016

**ORDER**

**PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER :**

Through this appeal, assessee assails an order, dt.23.03.2015, passed by the Pr. CIT, u/s.263 of the Income-tax Act, 1961 ('the Act' in short).

Grounds taken by the assessee is reproduced hereunder :

*1.1 The learned Principal Commissioner of Income tax, Bangalore 5, Bangalore has erred in concluding that income / loss from business of operation and maintenance of Forum Value Mall, Whitefield, Bangalore is assessable under the head 'Income from house property.'*

*1.2 The learned Principal Commissioner of Income tax, Bangalore 5, Bangalore has erred in not appreciating that*

*(a) in the instant case letting out of the property along with provision of other services, amenities and facilities constituted the business carried on by the assessee;*

*(b) there was a commercial exploitation of the property in distinction to mere letting out, leading to the income being characterized as business income.*

*1.3 The decision relied on by the learned Principal Commissioner of Income tax, Bangalore 5, Bangalore is distinguishable on both facts and law.*

*1.4 On facts and in the circumstances of the case and law applicable, income / loss from the business of operation and maintenance of Forum Value Mall, Whitefield, Bangalore is assessable under the head 'Profits and gains of business' as declared by the assessee in the return of income and as assessed to tax by the learned assessing officer in the order passed under section 143(3) for the year under consideration.*

*2.1 Without prejudice, the learned Principal Commissioner of Income tax, Bangalore 5, Bangalore, has erred in concluding that the assessment order passed by the assessing officer is erroneous and prejudicial to the interests of the revenue under section 263 of the Income tax Act, 1961.*

*2.2 On the facts and in the circumstances of the case and law applicable, the assessment order passed by the assessing officer is not erroneous in so far as it is prejudicial to the interests of the revenue and consequently the order passed by the learned Principal Commissioner of Income tax, Bangalore 5, Bangalore is bad in law and liable to be quashed.*

*3.1 In view of the above and other grounds to be adduced at the time of hearing, the appellant prays that the order passed by the learned Principal Commissioner of Income tax, Bangalore 5, Bangalore under section 263 be quashed or in the alternative the income /loss from the business of operation and maintenance of Forum Value Mall, Whitefield, Bangalore be held as assessable under the head 'Profits and gains of business'.*

02. Facts apropos are that assessee doing the business of real estate and commercial space had filed return of income on 14.10.2010, declaring business loss of Rs.19,00,83,981/-. Notice u/s.143(2) of the Act, was issued to the assessee on 27.09.2011 and this was responded to by the assessee. Representative of the assessee appeared before the AO. AO states in the assessment order that the representative had furnished relevant details and documents. Assessment was completed accepting the loss returned by the assessee.

03. On 05.03.2015, notice u/s.263 of the Act, was issued to the

assessee by the Pr. CIT. According to him, assessee had admitted income from rentals under the head 'profits and gains of business or profession', whereas the proper head was 'income from house property'. By considering the receipt of business income, assessee, in the opinion of Pr. CIT, had claimed huge depreciation and consequent loss. As per the Pr. CIT, acceptance of the return of the assessee by the AO was erroneous and prejudicial to the interests of Revenue. To the above show-cause notice, assessee filed a reply stating that the property was let out along with services and amenities. As per the assessee, income received from letting out the property which was accompanied by provision of service amenities and facilities would be in the nature of income from trading operation and not from exercise of property rights.

04. However the Pr. CIT was not impressed by the above reply. According to him, by virtue of the decision of Hon'ble Apex Court in the case of Shambhu Investment P. Ltd, V. CIT [263 ITR 143], a property once let out, whether it was furnished or unfurnished, if the intention was to receive rental income then such income would be assessable under the head 'income from house

property'. He held that the assessment done by the AO was not only erroneous but also prejudicial to the interests of Revenue. As per the Pr. CIT, assessee's income had to be assessed under the head 'income from house property'. He set aside the order with a direction to the AO to do the assessment afresh after giving an opportunity to the assessee.

05. Aggrieved by the above order, assessee is now before us in appeal. Ld. Counsel for the assessee submitted that AO during the course of assessment proceedings had issued a notice dt.24.12.2012, u/s.142(1) of the Act, placed at page 25 of the paper book. According to him specific questions regarding break-up of rental income received by the assessee, party-wise break up of the lease deposits, details of expenditure incurred and details of sundry creditors were raised. As per the Ld. AR, through its reply placed at page 28 of the paper book, assessee had given all the above details including sample lease deeds. Further as per the Ld. AR, sample lease deeds, copies of which have been placed at paper book-II, pages 1 to 266, clearly proved that it was an inseparable renting of the property and facilities. Specifically placing reliance

on paper book page 45, viz., Schedule 3 to the lease agreements, Ld. AR submitted that it fastened on the assessee, duty to provide house-keeping, maintenance, cleaning, maintenance of sewerage, management of security services, air-conditioning, provision of electricity to common areas, pest control and even power back-up. According to him these were inseparable from the contract of renting out of the premises. Lease was a composite one. As per the Ld. AR, AO was very well aware of this position. It was after verifying the lease deeds, that the AO came to the conclusion regarding the nature of income of the assessee in the original assessment. Ld. AR submitted that assessee's income was rightly considered under the head 'income from business' and not income from 'income from house property'. Thus as per the Ld. AR, AO having taken a possible view which was a lawful one, Pr.CIT could not invoke the powers vested on him u/s.263 of the Act. AO had carried out enquiries, he had received replies, and he had considered such replies. Thereafter he had passed such assessment orders u/s.143(3) of the Act. As per the Ld. AR, there was no error in the order much less any order which caused prejudice in the order of the AO. Ld. AR placed specific reliance on one judgment

of Hon'ble Karnataka High Court in the case of CIT v. Prestige Estate Projects Ltd [ITA.119/2014, dt.03.06.2014]. As per the Ld. AR it was held by the Hon'ble Karnataka High Court that rental income based on lease deeds, through which facilities were also to be provided to the lessor, where such facilities were inseparable would fall only under the head 'profits and gains from business or profession'. As per the Ld. AR assessee in the above case was a sister concern of the assessee here and the said decision was also related to renting out a similar mall called Forum Mall as that of the assessee here. Thus according to him, view taken by the AO was perfectly legal and lawful.

06. Per contra, Ld. DR submitted that the case of Prestige Estate Projects Ltd (supra) relied on by the assessee was clearly different, since Prestige Estate Projects Ltd was acting through an agent. On the other hand assessee here had directly leased out the areas to various tenants. According to him, judgment of Hon'ble Apex Court in the case of Shambu Investments P. Ltd (supra) clearly applied. Facilities provided by the assessee were basic essential facilities that was sine qua non for renting out the

property. As per the Ld. DR there was nothing special in providing such services and the AO had taken a patently unlawful view. As per the Ld. DR AO had not applied his mind and never made enquiries though he had received the copies of the lease deeds from the assessee. Absence of enquiry, rendered the order of the AO erroneous and prejudicial to the interests of Revenue. Reliance was placed on the Hon'ble Madras High Court in the case of CIT v. Chennai Properties & Investments Ltd [(2015) 266 ITR 685], that of Hon'ble Madras High Court in the case of Keyaram Hotels Ltd v. DCIT [ 373 ITR 494], that of Hon'ble Calcutta High Court in the case of CIT vs. Maithan International [375 ITR 123] and that of Calcutta High Court in the case of CIT v. Active Traders P. Ltd [214 ITR 583].

07. We have perused the materials and heard the rival contentions. Notice issued by the AO during the course of original assessment proceedings has been placed at paper book page 25 and 26. Page 26 brings out the details that were called from the assessee. This is extracted below for brevity :

1. Kindly produce the breakup of the rental income along with the documents.
2. Kindly produce the detailed working of maintenance and marketing income.
3. Kindly produce the details of the addition made to the fixed assets.
4. Kindly produce the party wise details of the unsecured loans.
5. Kindly produce the party wise breakup of the interest paid towards the loan.
6. Kindly produce the party wise breakup of the loans and advance as given in schedule 9 in the balance sheet.
7. Kindly provide the details of sundry creditors in the following format along with confirmation.

S. No	Name & address of the party along with PAN	Opening balance as on 1.4.2009	Debit	Credit	Closing balance as on 31.3.2010

8. Kindly produce the party wise breakup of the lease deposits.
9. Kindly provide the breakup of rates & taxes.
10. Kindly produce the ledger account of following expenses along with bills and vouchers and TDS details.
  - a. Business promotion & Marketing
  - b. Legal & Professional charges.
  - c. Management fee

08. Assessee had given a reply to the above and filed copies of the lease deeds. A perusal of one of the lease deeds placed at paper book pages 1 to 15 does show that assessee had to give a number of facilities and services to the lessees which included the following :

iii) The Lessor shall provide the services as per the scope set out herein below:

a) Housekeeping of all common areas:

- Atrium
- Links- walkways on all the floors and common passages
- All Staircases
- Terraces including utility services
- All open spaces in the complex
- Basements
- Common Toilets
- Plant & equipment rooms

b) Maintenance and cleaning of all vertical areas:

- Glass façade all over the building
- Store façade (Only outside)

- Windowpanes on the exterior of the building and also in common areas. However, glass panels and shop front's glass panels are Lessee's responsibility.

c) Maintenance of:

- Drain, Sewage system, water treatment plant, etc.
- Lifts and Escalators
- Common signage

d) Landscaping:

- Cleaning and maintaining of gardens and other landscaped areas
- Manuring and disinfecting
- Maintenance and provision of indoor plants in common areas.

e) Equipment Maintenance and operation:

The Lessor shall maintain and operate all the systems and services installed in the complex of the Mall (excluding the systems etc. owned by the Lessee) viz. generators, Water treatment plants, fire fighting and alarm systems, sewer treatment plants, lifts, escalators, etc. If the maintenance services are outsourced, the Lessor will be responsible for selecting and coordinating with such agency.

f) Security Services of the areas outside the Premises.

g) Air conditioning, mechanical ventilation and Power Back up of the common areas including basements.

h) Electricity to the common areas including basements.

i) Pest control services for the common areas

09. Rent payable by the lessees is given in Schedule 2 of the agreement which reads as under :

1. Rent: Rs 100/- per square feet per month for 2,592 sq ft Super Built-up Area of the Premises amounting to Rs 2,59,200/- (Rupees Two Lakhs Fifty Nine Thousand and Two Hundred Only) per month.
2. Due Date: The Rent shall be paid monthly in advance by the 7<sup>th</sup> day of each English calendar month.
3. Rent Commencement Date: The payment of Rent shall commence from (a) the expiry of rent free period OR (b) the date of commencement of sales by the Lessee in the Premises, whichever is earlier.

10. There is no break-up of the rent between facilities and shop area rented out. Obviously the lease deeds were composite. No doubt consistent view taken by various courts including Hon'ble Apex Court is that an assessee, even if it was in the business of real estate, income earned from letting out of property was to be assessed under the head 'income from house property'. Exception to this rule is where letting of the building was inseparable from letting of the plant, machinery and furniture in which case circumstance alone, it could be treated as income from business. This position of law has been clearly enunciated by the Hon'ble Madras High Court in the case of Keyaram Hotels (supra), after considering its own judgment in the case of Chennai Properties & Investments Ltd, (supra). AO was aware that assessee was in the business of real estate development and leasing of commercial space. This

mentioned in the first sentence of the assessment order passed u/s.143(3) of the Act, which was the subject matter of the revisionary proceedings. So it is not a case where AO had not made enquiries. He was aware that assessee was into real estate development and leasing of commercial space. Assessee was required to file copies of lease deeds, specifically mentioning the types of services to be given by the assessee. AO thereafter assessed the income of the assessee was to be considered under the head 'income from business'. We cannot say that it is an illegal or unlawful view which was not possible in the facts and circumstances of the case.

11. The question whether rental income received from a Mall should be treated as income from business or house property had come up before the Hon'ble jurisdictional High Court in the case of Prestige Estate Projects Ltd, (supra). Substantial question of law raised before the Hon'ble jurisdictional High Court is reproduced hereunder :

*"Whether on the facts and in the circumstances of the case the Tribunal is justified in law in holding that the rental income received from Forum Mall, Eva Mall and UB City should be treated as "Income from Business" and not as "Income from House Property" despite a specific agreement between the landlord and tenant contemplating a landlord tenant relationship and rental income being paid every month as held by the Apex Court in the case of Shambhu Investments (263 ITR 143)?"*

12. Their Lordship had followed the judgment in the case of CIT v. Velankani Information Systems (P) Ltd [(2013) 218 Taxman 88], and held that when the intention was to carry on the business of letting out commercial property and complex commercial activity resulting in rental income, then such rental income would fall under the head profits and gains of business of profession. Thus we cannot say that the view taken by the AO was one which was not possible under law.

13. Coming to the judgment of Hon'ble Calcutta High Court in the case of Maithan International (supra), relied on by the Ld. DR, question there was whether there was inadequate enquiry which led the AO to assume incorrect facts that rendered the order erroneous and prejudicial to the interests of Revenue. Revenue has not been able to show here as to what fact was erroneously assumed by the AO during the course of assessment proceedings.

14. As for the judgment in the case of Active Traders P. Ltd (supra), the question there was whether AO had failed to enquire on the genuineness and credit worthiness of the shareholders of the assessee company. Facts were entirely different in the said case.

15. We are therefore of the opinion that the order of the AO did not suffer from any error since he had taken a view which was a possible and lawful one. May be the view taken by the AO was debatable but it would not render the order erroneous in so far as it was prejudicial to the interests of Revenue. We therefore set aside the order of Pr. CIT.

16. In the result, appeal of the assessee stands allowed.

Order pronounced in the open court on 10<sup>th</sup> June, 2016.

Sd/-

Sd/-

(SUNIL KUMAR YADAV)  
JUDICIAL MEMBER

(ABRAHAM P GEORGE)  
ACCOUNTANT MEMBER

MCN\*

Copy to:

1. The assessee
2. The Assessing Officer
3. The Commissioner of Income-tax
4. Commissioner of Income-tax(A)
5. DR
6. GF, ITAT, Bangalore

By Order

Assistant Registrar

