

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "C", MUMBAI**

**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND  
SHRI PAWAN SINGH, JUDICIAL MEMBER**

**ITA NO. 2680/MUM/2008 : (A.Y : 2005-06)**

Mr. Ismail Abdulkarim Balwa Vs. DCIT, Range-24(3), Mumbai  
A.K. Industrial Estate, (Respondent)  
Opp. A.K. Tower, S.V. Road,  
Goregaon (West), Mumbai - 62  
**PAN : AABPB7570M** (Appellant)

**ITA NO. 2681/MUM/2008 : (A.Y : 2005-06)**

Mr. Hussein Abdulkarim Balwa Vs. DCIT, Range-24(3), Mumbai  
A.K. Industrial Estate, (Respondent)  
Opp. A.K. Tower, S.V. Road,  
Goregaon (West), Mumbai - 62  
**PAN : AABPB7572K** (Appellant)

**Assessee by : Shri R.R. Shah**  
**Revenue by : Shri M. Dayasagar (CIT-DR)**

**Date of Hearing : 28/06/2016**

**Date of Pronouncement : 30/11/2016**

**ORDER**

**PER G.S. PANNU, AM :**

The captioned appeals by the two assesseees are directed against a common order of CIT(A)-24, Mumbai dated 27.03.2008, pertaining to the Assessment Year 2005-06, which in turn has arisen from separate

orders passed by the Assessing Officer dated 28.09.2007 under section 143(3) of the Income Tax Act, 1961 (in short 'the Act').

2. Initially, the said appeals were decided by the Tribunal vide its order dated 6.7.2012, and giving effect to the orders of the Division Bench and the Third Member, the appeals of the assesseees were partly allowed. Aggrieved, the assesseees preferred appeals before the Hon'ble Bombay High Court u/s 260A of the Act. The Hon'ble Court vide order dated 29.1.2013 has set-aside the order of the Tribunal dated 6.7.2012 including the Third Member's order dated 11.6.2012 and remanded the matter to the Tribunal for fresh consideration by observing as under :-

*"In these appeals by the assessee various questions have been formulated. However, the basic controversy is brought out in question (1) as formulated which reads as under :*

*Whether on the facts and in the circumstances of the case and in law the Tribunal was right in taking the view in the order dated 6/7/2012 passed to give effect to the order of the Third Member that the rental income from the building was assessable as "Profits & Gains of Business" and not as "Income from house property" even though the Judicial Member and Accountant Member had dissented from each other on the point and the Third Member had omitted to decide the point in the gross misconception that the appellant had not raised any ground on the issue ?*

2) *In view of difference of opinion between two Members of the Tribunal on whether the rental income is taxable under the head "Profit and Gains of Business" or as "Income from House property" the matter was referred to a third Member of the Tribunal. The third Member of the Tribunal proceeded on the basis that no ground with regard to assessing rent income under the head "Income From House*

*Property” was taken by the assessee before the Tribunal. This is factually incorrect. In its appeal memo before the Tribunal at Ground 2 thereof the assessee specifically urges the aforesaid ground. In view of the above, by consent, the order of the Tribunal dated 6/7/2012 including the third Member’s order dated 11/6/2012 are set aside and the matter is remanded to the Tribunal for fresh consideration.*

*3) All the contentions of the parties are left open to be urged before the Tribunal*

*4) Both the appeals are disposed of in the above terms with no order as to costs.”*

3. Thus, in view of the directions of the Hon'ble Bombay High Court, the captioned appeals have been posted for hearing before us. At the time of hearing, the learned representative for the assessee pointed out that the facts and circumstances of the dispute in both the appeals are similar. Accordingly, the appeal in ITA No. 2680/Mum/2008 in the case of Mr. Ismail Abdulkarim Balwa is taken up as the lead case. Elaborating on the appeals filed against the original order of the Tribunal dated 6.7.2012, the learned representative for the assessee pointed out that assessee had preferred appeals before the Hon'ble High Court *qua* the Ground of appeal nos. 2 to 7 raised in the Memo of appeal before the Tribunal. Such Grounds of appeal read as under :-

*“2. The learned CIT(A) erred in holding that letting out of immovable property belonging to AOP M/s. Ornate Enterprises was commercial in nature and thereby holding that the rent income in respect thereof is assessable as business income.*

*Your appellant submits that the rent income in respect of letting of immovable property ought to have been taxed under the head "income from house property".*

*3. The learned CIT(A) erred in holding that the Assessing Officer was justified in invoking Explanation 5 to section 32 and thereby thrusting upon the appellant the depreciation on the building belonging to AOP M/s. Ornate Enterprises from A.Y 2002-03.*

*Your appellant submits that the letting out of building was not assessable as "profits and gains of business or profession" and therefore the action of the Assessing Officer in thrusting upon the depreciation on building is incorrect in law and the same ought to be reversed.*

*4. The learned CIT(A) erred in confirming the action of Assessing Officer in taxing the capital gain derived by the appellant on sale of building belonging to AOP M/s. Ornate Enterprises as short term capital gain applying the provisions of section 50.*

*Your appellant submits that under the facts and in the circumstances of your appellant's case the learned CIT(A) ought not to have applied the provisions of section 50 in respect of the building.*

*5. The learned CIT(A) erred in not holding that there is no block of assets namely "buildings" as the building under consideration only consisted of one building and not more than one building.*

*Your appellant submits that the building belonging to AOP M/s. Ornate Enterprises does not constitute "Block of Assets" and therefore the provisions of section 50 are not applicable in respect of sale of building belonging to AOP M/s. Ornate Enterprises.*

*6. The learned CIT(A) erred in directing the Assessing Officer to apportion the sale proceeds of Rs.3,40,00,000 between land and building on a reasonable basis and thereby directed to compute short term capital gain in respect of building and long term capital gain in respect of land.*

*Your appellant submits that under the facts and in the circumstances of your appellant's case the learned CIT(A) ought to have held that the entire sale consideration of Rs.3,40,00,000 was assessable in computing the long term capital gain instead of bifurcating the same and attributing consideration to building and computing the short term capital gain u/s 50.*

*Your appellant further submits that the CIT(A) ought to have categorically apportioned the sale consideration between land and building instead of directing the Assessing Officer to apportion the same on reasonable basis.*

7. *The learned CIT(A) erred in directing the Assessing Officer to set off the unabsorbed depreciation against the capital gain on sale of land and building as per the provisions of the Act instead of specifically directing him to allow the same as provided in section 32(2) of the Act.*

*Your appellant submits that the CIT(A) ought to have categorically held that the unabsorbed depreciation is allowable under the Act instead of giving general direction to allow the same as per the provisions of the Act."*

4. The learned representative for the assessee further explained that the moot question that has a bearing on the aforesaid grounds was as to whether the rental income earned by the assessee out of the immovable property belonging to the Association of Person (AOP), M/s. Ornate Enterprises was assessable under the head 'income from house property' or as 'profit and gains of business'. Insofar as the crystallisation of said point of dispute is concerned, the Id. CIT-DR has not differed with the learned representative for the assessee.

5. Be that as it may, the directions of the Hon'ble High Court require us to consider the matter afresh because not only the earlier order passed by the Division Bench of the Tribunal dated 6.7.2012 has been set-aside, but also the order passed by the Third Member dated

11.6.2012. Accordingly, we may refer to the fact-situation which has a bearing on the controversy to be adjudicated.

6. In brief, the relevant facts are that the assessee under consideration, i.e., Mr. Ismail Abdulkarim Balwa filed a return of income for Assessment Year 2005-06 on 16.8.2005 declaring a total income of Rs.23,19,140/- which, *inter-alia*, included Long Term Capital Gain on sale of immoveable property of M/s. Ornate Enterprises at Rs.66,01,513/-. In context of such Long Term Capital Gain, the relevant facts can be summarized as follows. The assessee alongwith two others, namely Mr. Abdulkarim Ebrahim Balwa and Mr. Hussein Abdulkarim Balwa acquired a plot of land at Village Malad (W), Mumbai admeasuring 6250.60 sq. mtrs. as per a Consent Terms dated 15.12.1987, a copy of which has been placed in the Paper Book at pages 90 to 91. The three co-owners jointly constructed a building on the land, named Ornate Enterprises and also opened a joint bank account in the said name. The construction was carried out between 1996 to 1999 and the share in the property was as follows – Mr. Ismail Abdulkarim Balwa (i.e. assessee) – 45%; Mr. Hussein Abdulkarim Balwa – 45%; and, Mr. Abdulkarim Ebrahim Balwa – 10%. Thus, the two assesseees before us have shares of 45% each in the said property. The said property was given on a monthly tenancy basis as per Tenancy agreement dated 15.3.1999 from 1.4.1999 onwards. The learned representative for the assessee has provided a history of treatment of rental income for the last 5 assessment years in a tabular form, which is as under :-

	Assessment Years				
	2001-02	2002-03	2003-04	2004-05	2005-06
Rent	1,44,000	2,04,000	2,76,000	2,16,000	1,44,000
Less :					
Expenses incurred					
Electricity charges	4,797	6,310	10,480	9,710	11,530
Bank Charges	300	50	271	422	485
Insurance/Misc. exp	0	0	5,650	3,240	0
Income declared	1,38,903	1,97,640	2,59,599	2,02,628	1,31,985

7. The learned representative pointed out that in none of the assessment years, any depreciation was claimed or allowed in the hands of any of the co-owners. Now, on 24.9.2004 the said property being land and building alongwith small furniture and water pump was sold for a consideration of Rs.3,40,00,000/- to M/s. Modi Motors Agencies Pvt. Ltd. in terms of a Sale Deed, a copy of which has been placed in the Paper Book at pages 100 to 117. Accordingly, in the return of income filed, assessee declared Long Term Capital Gain on such sale at Rs.66,01,513/- after considering the indexed cost of acquisition.

8. The Assessing Officer, however, has differed with the assessee with regard to the nature of the gain earned by the assessee on the sale of the property in question. The Assessing Officer observed that the assessee has consistently declared income earned from immovable property by way of rent as 'income from business' because assessee was debiting various expenses pertaining to such income in the Profit & Loss Account. For the said reason, the Assessing Officer observed that

the building in question was a depreciable asset and, therefore, depreciation on it was allowable even though the assessee had not claimed it. In this context, the Assessing Officer has referred to Explanation-5 to Sec. 32 of the Act, which came into force w.e.f. Assessment Year 2002-03, which prescribes that depreciation is to be allowed in respect of an asset owned by the assessee whether or not assessee has claimed it. Therefore, the Assessing Officer calculated depreciation in respect of the building, furniture and water pump allowable for the Assessment Years 2002-03, 2003-04 and 2004-05 and computed the Written Down Value (WDV) as on the beginning of the instant Assessment Year, i.e., 1.4.2005 at Rs.1,07,77,294/-. Considering that depreciation stood allowed because of the operation of law, Assessing Officer treated the Capital Gain arising from sale of such depreciable asset as Short Term Capital Gain in view of the provisions of Sec. 50 of the Act. As a consequence, the Assessing Officer reworked and re-characterised the gain on sale of the property as Short Term Capital Gain. It may also be stated at this stage that while computing the Capital Gain, the Assessing Officer has not allowed any benefit for the cost of acquisition of land stated to be Rs.9,00,277/-. Be that as it may, the Assessing Officer has reworked the Short Term Capital Gain assessable in the hands of the assessee at Rs.1,04,50,218/- against the Long Term Capital Gain of Rs.66,01,513/- declared by the assessee in his return of income.

9. Against the aforesaid factual matrix, it is quite clear that the pertinent dispute which needs to be thrashed out is as to whether the rental income in question is assessable as profits from business or as

income under the head 'house property' because the Assessing Officer has treated the property as a depreciable asset fundamentally on the ground that the rental income earned therefrom is to be taxed as 'business income'. In this context, the rival counsels have made their submissions.

10. The plea of the learned representative for the assessee is that the income from property is liable to be treated as income assessable under the head 'house property' because the assessee is not in the business of developer or builder or renting of properties. It is pointed out that though the building in question was a commercial property, but it was not a business asset so as to treat the rental income therefrom as 'business income'. The learned representative explained that though the assessee had shown the income received from the co-ownership property as 'business income', so however, the same would not *ipso facto* be determinative of the question involved because the character and nature of the income from property would not change due to a particular stand of the assessee. In this context, the learned representative vehemently argued that if the intent of the assessee was to have considered it as a business venture of the co-ownership, then assessee would have claimed depreciation in each of the years, which he has not done. Therefore, it cannot be regarded as a business or a depreciable asset. For all intents and purposes, the co-ownership property was a capital asset which has been exploited for earning rental income and, therefore, the mistaken declaration in the return of income would not change the correct head of income under which the rental income has to be assessed, i.e., income from house property. At

this point, the learned representative vehemently pointed out that the mistake in declaring the income under a wrong head of income by the assessee does not entitle the income-tax authorities to hold it against the assessee inspite of the legal position being otherwise. In this context, he has referred to the judgment of the Hon'ble Gujarat High Court in the case of *Chokshi Metal Refinery, 107 ITR 63 (Guj)* and also the judgment of the Hon'ble Bombay High Court in the case of *Dattatraya Gopal Shette, 150 ITR 460 (Bom)* wherein having regard to the CBDT Circular No. 14(XL-35) of 1955 dated 11.4.1955 it has been held that the Revenue is not to take advantage of an assessee's ignorance in order to collect more tax out of him than what is legitimate.

11. Further, the learned representative for the assessee has referred to the terms and conditions of the Tenancy agreement to point out that no special services or amenities were to be provided to the tenant and, therefore, it is a case of tenancy *simplicitor*. Thus, the rental income is rightly to be taxed as 'income from house property'.

12. On the other hand, the Id. CIT-DR appearing for the Revenue has relied upon the orders of authorities below and pointed out that the action of assessee by showing income earned from the said immoveable property as 'business income' proves that it was a business asset and consequently, the Assessing Officer made no mistake in treating it as a depreciable asset and on sale of such an asset, Capital gain is required to be determined in terms of Sec. 50 of the Act as Short Term Capital Gain.

13. We have carefully considered the rival submissions. There is a plethora of judicial pronouncements on the issue whether rental income from a property is assessable as 'business income' or as 'income from house property'. So however, it is a trite law that the issue would have to be decided in the light of the prevailing facts and circumstances of each case. In the instant case, the property in question was let out in terms of a Tenancy agreement dated 15.3.1999, a copy of which has been placed in the Paper Book at pages 52 to 59. We have perused the said Tenancy agreement. Some of the salient features of the property and the terms of Tenancy agreement are as follows. The property in question is a co-ownership property and the same has been let out to the tenant, M/s. Autoland India Pvt. Ltd. who is using it for carrying out day to day business of automobile workshop, etc. It is also quite clear that apart from providing of right to use the property as a tenant, no other complex or specific services are being provided by the assessee-landlord. In fact, the agreement does not contain reference to any other services or amenities that are linked to the rental income which primarily relates to the usage of property by the tenant. Under these circumstances, in our view, it is a case where the assessee has earned rental income by exploiting the property as a capital asset and it is not a case where the letting out is to be perceived as an adventure in the nature of trade or business. Even otherwise, it is well established that one is expected to look at the letting-out from the point of a businessman to find out whether the same is being carried out as an act of business or it is a mere exploitation of the ownership of the property. It is also a fact in the present case that the assessee or the other two

co-owners or even the co-ownership AOP are not involved in any business activity of renting of properties or even as developers or builders. Therefore, it is a case where the income by way of rent has been earned in the course of exploitation of the ownership of property which quite clearly is liable to be assessed as 'income from house property'. Therefore, we find enough weight in the plea of the assessee that rental income derived from such property is liable to be considered under the head 'income from house property'.

14. Now, we may take up the objections of Assessing Officer in this regard. Firstly, according to the Assessing Officer, assessee has declared the income from co-ownership of the property as 'business income'. Such a computation for the last 5 years has been tabulated in the earlier part of this order. The year-wise tabulation also shows that against the rental income, the co-ownership has claimed certain small expenses on account of electricity charges, bank charges and insurance, etc. At the time of hearing, the learned representative for the assessee had explained that insurance expenses were relatable to the property insurance and the electricity expenses were with respect to the electric poles provided in the compound and small bank charges were claimed against the rental income. The learned representative pointed out that the said expenses were very small, but indeed he conceded that the claim was wrong because while computing 'income from house property', the said expenses were not allowable. But the important point is that the said mistake by the assessee is not fatal so as to prevent the income-tax authorities from revisiting the issue to find out the true nature and character of the income. On this aspect, it is a

well-settled proposition that the income-tax authorities cannot merely go by the position taken by the assessee, howsoever erroneous it may be, without taking into consideration the applicable legal position. In the context of the said proposition, the learned representative for the assessee has correctly placed reliance on the judgments of the Hon'ble Gujarat High Court in the case of *Chokshi Metal Refinery (supra)* and also the Hon'ble Bombay High Court in the case of *Dattatraya Gopal Shette (supra)*. In fact, the judgment of the Hon'ble Supreme Court in the case of *Mahalaxmi Sugar Mills Co. Ltd., 160 ITR 920 (SC)* goes to say that even in case where assessee failed to claim a benefit, the same would not relieve the income-tax authorities of the duty to allow a particular benefit which is otherwise available to the assessee in law. Therefore, the mere *factum* of assessee declaring income from the co-ownership property as 'business income' is not conclusive of the head under which such income is assessable. Even otherwise, on facts also, we find that the claim of assessee for deduction of small amounts of expenses, viz., electricity charges, insurance and bank charges is not prejudicial to the interest of the Revenue because if the computation was to be made under the head 'income from house property', assessee would have been entitled to statutory allowances against the rental income permissible u/s 24(a) of the Act @ 30%, implying that the income forming part of the total income would have been even lower than what has been returned by the assessee. Therefore, even on this aspect, we do not find any justifiable reason with the income-tax authorities to shut out the case of assessee to evaluate the nature of rental income as being assessable under the head 'income from house property'.

15. Another significant aspect, which has been vehemently brought out by the Revenue, is that the depreciation is deemed to have been allowed and, therefore, the property is to be considered as a business asset. In fact, it has been repeatedly asserted by the assessee that no depreciation claim has been made by the assessee and nor it has been allowed in any of the assessment years either in the hands of the assessee or even the other co-owners. On this issue, our attention was specifically drawn by the learned representative for the assessee to the discussion in the assessment order whereby the Assessing Officer observes that *“the depreciation has been allowed in respect of the aforementioned assets, therefore, the capital gain arising from the sale of these assets have to be treated as short term capital gain in view of the provisions of section 50 of the Income Tax Act”*. It has been vehemently asserted that the assessment records do not show that any depreciation has been actually allowed in respect of the asset in question. The aforesaid assertions of the assessee have not been negated before us on the basis of any cogent material. In fact, at this stage, it would also be pertinent to refer to the status of assessment in the case of another co-owner, Mr. Abdulkarim Ebrahim Balwa, wherein the gain on sale of the property has been accepted by the Assessing Officer as declared by the assessee, i.e. as Long Term Capital Gain in an assessment finalised u/s 143(3) of the Act dated 7.12.2007 for the very same Assessment Year of 2005-06. A copy of the said assessment order in the case of Mr. Abdulkarim Ebrahim Balwa has been placed in the Paper Book at pages 129 to 130. At pages 123-128 of the Paper Book are placed the copies of correspondence with the Assessing Officer in

the case of Mr. Abdulkarim Ebrahim Balwa, which clearly show that the Assessing Officer was aware about the sale of property in question, as also the stand of the assessee before him that such income was Long Term Capital Gain. In fact, at page 127 of the Paper Book is placed a query letter dated 27.11.2007 issued by the Assessing Officer in the case of Mr. Abdulkarim Ebrahim Balwa, wherein the assessee was called upon to explain the Long Term Capital Gain on the sale of the impugned property and its assessability in the hands of the assessee co-owner. Thus, it is a case where similar income in the hands of a co-owner of the property has been accepted as to be assessable as Long Term Capital Gain. Under these circumstances, the moot point is whether the Revenue is permitted to adopt a contrary position, where under identical circumstances in the case of a co-owner, the stand similar to that of assessee has been accepted? The answer is quite obvious and the need for uniformity in approach on similar issues arising in the case of different assessees by the Income-tax authorities cannot be overemphasised. There are several judicial pronouncements in support of the aforesaid proposition. For instance, in the case before the Hon'ble Punjab High Court in the case of *Jaswant Rai, 107 ITR 477 (Pun & Har)* where valuation of property in the hands of one co-sharer for the same assessment year had been valued at a particular figure, it was ruled that a higher figure could not be adopted by the income-tax authorities in the case of other co-sharer. Similarly, in the case of *S. Muthukarupan, 163 Taxman 45 (Mad)* before the Hon'ble Madras High Court, a co-sharer had declared lease rental on account of a theatre. The Assessing Officer held that the lease rent declared by the tenant was low vis-a-vis the prevailing market rent and accordingly, estimated

assessee's share in lease rentals and made addition to the total income. The Tribunal noted that in the case of other 5 co-owners, returned income from the same property had not been disturbed by the income-tax authorities and held the action of Assessing Officer unreasonable for picking out and enhancing the income of one of the co-owners only. The aforesaid decision of the Tribunal was approved by the Hon'ble Madras High Court by noticing that the same was based on correct appreciation of evidence. Therefore, even on the principle of maintaining uniformity of approach under identical circumstances, we find that the impugned action of Assessing Officer is untenable.

16. In conclusion, we therefore hold that the stand of assessee to the effect that the rental income in question was to be treated of the nature assessable under the head 'income from house property' and not as 'business income' deserves to be accepted. As a consequence, we find no reason for the Assessing Officer to have re-characterised and recomputed the income from sale of co-ownership property as Short Term Capital Gain by invoking the provisions of Sec. 50 of the Act. Thus, we uphold the stand of assessee and set-aside the order of CIT(A) and direct the Assessing Officer to recompute the income of assessee in view of our aforesaid decision.

17. Apart from the aforesaid, no other points have been raised by the assessee at the time of hearing. Accordingly, the appeal of the assessee is allowed, as above.

18. Insofar as appeal in ITA No. 2681/Mum/2008 in the case of another co-owner, Mr. Hussein Abdulkarim Balwa is concerned, as the facts and circumstances in the said appeal are *pari materia* to those considered by us in ITA No. 2680/Mum/2008, for Assessment Year 2005-06, our decision therein shall apply *mutatis mutandis* in this appeal also.

19. Resultantly, the appeals of the assesseees are allowed, as above.

Order pronounced in the open court on 30<sup>th</sup> November, 2016.

Sd/-

Sd/-

**(PAWAN SINGH)**  
**JUDICIAL MEMBER**

**(G.S. PANNU)**  
**ACCOUNTANT MEMBER**

Mumbai, Date : 30<sup>th</sup> November, 2016

\*SSL\*

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "I" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar  
I.T.A.T, Mumbai