A.F.R

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

Present :- The Hon'ble Justice SURYA PRAKASH KESARWANI
The Hon'ble Justice RAJARSHI BHARADWAJ

ITA/168/2010

M/S. OBEROI BUILDING & INVESTMENT (P) LIMITED

Vs.

COMMISSIONER OF INCOME TAX – II, KOLKATA & ANR.

For the Petitioner	**:-**	**Mr. Akhilesh Kr. Gupta, Adv.** **Ms. Akshara Shukla, Adv.**
For the Respondent	**:-**	**Mr. Smarajit Roychowdhury, Adv.**
Lastly heard On	**:-**	**28.11.2023**
Judgement On	**:-**	**15.12.2023**

SURYA PRAKASH KESARWANI, J.

1. Heard Shri Akhilesh Kumar Gupta, learned counsel for the appellant and Shri Smarajit Roychowdhury learned counsel for the Income Tax Department/respondents.

2. This appeal arises from the order dated 23.07.2010 in ITA No.330 (Kol) of 2008 [assessment year 2005-06]: Income Tax Officer / Ward-6(3), Kolkata v. M/s. Oberoi Building & Investment (P) Ltd.,

Kolkata passed by the Income Tax Appellate Tribunal, 'C' Bench, Kolkata.

Vide order dated 04.10.2010, this Court framed the following substantial questions of law:-

I. Whether on the facts and circumstances of the case and on a true and proper interpretation of the agreement, the income arising from sub-licensing of shops and establishment along with the various services which are rendered to the sub-licensed shopkeepers can be treated as income liable to be assessed under Section 22 of the Act or the said income being composite income arising from part exploitation of shops and establishment which are sub-leased as commercial assets and the services which are rendered to the shopkeepers can be treated as income arising from business falling under Section 28 of the Act?

II. Whether on the facts and in the circumstances of the case, the licence agreement dated 25th April 1972 could be construed so as to constitute transfer within the meaning of Section 269UA(f) and the assessee could be treated as deemed owner under Section 27(iiib) of the Income Tax Act?

Facts:

3. Briefly stated facts of the present case are that the assessee is a Private Limited Company incorporated on 14.03.1972. It is a subsidiary of M/s East India Hotels Limited, now renamed as EIH Limited (hereinafter referred to in short EIH) The assessee-company

entered into a leave and lisence agreement with EIH dated 25.04.1972 for 5665 sft. of Office space for a period of 50 years in Oberoi Sheraton Hotel at Bombay, on certain terms and conditions as mentioned in the said agreement. As per the said agreement, the assesse-company is to pay compensation for each month on or before the 10th day of the month following the month for which it is due. As per clause 2(xiv) of the said agreement, the leave & licence granted to the assessee company is irrevocable for the period mentioned. The assessee-company had sub-let/sub licenced the said space to different persons on certain terms and conditions. As per sub-lisencing agreement, the assesse-company has given the space from 28.09.1991 till 31.12.2022 for carrying on the business of jems, jewellery and gift articles on a fixed fee. The assesse-company has shown the total contribution received from letting out shops of Rs. 13,90,260/- against which it has claimed expenses of Rs. 10,60,560/- towards contribution for licence fee and other charges. The assesse-company has shown receipts and the expenses under the head “business income”. The Assessing Officer has observed that the assesse is having irrevocable right for 50 years over the shopping space and considering the decision of the Apex Court in the case of CIT vs. Poddar Cements Ltd. (1997) 226 ITR 625 (SC) and Section 27(iiib) of the Income Tax Act, the income derived by the assesse from letting out shopping space is to be assessed under the head “income from house property” and not as “income from business”.

4. Aggrieved with the assessment order, the appellant assessee had filed an appeal before the Commissioner of Income Tax (Appeal) which was allowed, holding that the income derived by the appellant assessee from letting out of shopping space to different persons is business income. Aggrieved with the order of CIT (A) the Income Tax Department had filed an appeal being ITA No. 330 (KOL)/2008 : Assessment Year 2005-06, before the Income Tax Appellate Tribunal "C" Bench Kolkata which has been allowed by the Income Tax Appellate Tribunal by the impugned order dated 03.07.2010. Aggrieved, the appellant assessee has filed the present appeal which has been admitted by this Court on the substantial questions of law quoted in Para (2) above.

Submissions:

5. Learned counsel for the appellant submits that leave and license agreement dated 25.04.1972 was entered by the appellant assessee with M/s. East India Hotels Limited [now renamed as EIH Limited). The assessee was incorporated with the object in the Memorandum of Association to acquire on license or by purchase, lease, exchange, hire or otherwise lands and property of any nature or premises in any part of India and to license or sub-license or lease or sub-lease or let, such lands or property or premises or any part thereof. Thus, the main business of the assessee is the business of letting out / licensing property. He submits that under the agreement in question, the assessee obtained a leave and license of 5,665

square feet office space for a period of 50 years in Oberoi Sheraton Hotel at Bombay. This office space was sub-licensed / sub-let to some persons along with various facilities and a composite sum was charged as consideration. The income derived from the aforesaid business was always disclosed by the assessee in its income tax returns as income from business, since 1972. The Income Tax Department always accepted the aforesaid income as business income. It is only in the assessment year 2005-06 that the assessing officer assessed the income from sub-licensing/ sub-letting as income from house property and not as income from business. The assessee filed an appeal before the CIT (Appeal) which was allowed by the CIT (Appeal) vide order dated 07.01.2008. Aggrieved, the Income Tax Department preferred an appeal before the Income Tax Appellate Tribunal, which was allowed by the impugned order passed in ITA No.330 (Kol) of 2008. Aggrieved, the assessee appellant has filed the present appeal. In the assessment year 2006-07, the assessing officer again assessed the income from sub-licensing / sub-letting as income from house property. The assessment order was carried in statutory proceedings and by order dated 26.07.2017 in ITA 1640/Kol/2014 (Assessment Year 2006-07), the ITAT, after taking into consideration its earlier order as impugned in the present appeal, allowed the appeal of the assessee and held the income to be income from business. To come to the aforesaid finding, the ITAT has referred to several judgments of Hon'ble Supreme Court as well as

the order of the ITAT passed in the case of Bombay Plaza. He further submits that even in assessment years subsequent to the assessment year 2006-07, the assessing officer has always assessed the similar income as income of the assessee from business. He, therefore, submits that under the facts and circumstances of the case, the present appeal deserves to be allowed and both substantial questions of law deserved to be answered in favour of the assessee and against the Revenue and any amount deposited by the assessee or recovered by the department against the demand raised by the assessing officer, deserves to be refunded with interest in accordance with law. Judgment relied upon by the assessing officer while passing the assessment order, is clearly distinguishable on facts of the present case and has no application. He submits that relevant judgments interpreting the law have been referred in paragraph 6 of the order in ITAT/16/Kol/2014 dated 26th July, 2017 relating to assessment year 2006-07 which the appellant also relies in support of its contention. Learned counsel for the appellant further submits that on bare perusal of the deed of license under which the assessee had obtained leave and license of the property in question from M/s. East India Hotels Limited, the transaction is in the nature of license. This sub-letting has been done by the assessee to several persons not only for accommodation but as a composite transaction coupled with several facilities and in view thereof received consideration which the assessee has disclosed as business income, whereas the assessing

officer has incorrectly, baselessly and against settled law treated as income from house property.

6. Learned counsel for the respondents submits that there is no res judicata in revenue matters and therefore, even if in one assessment year, the assessing officer has assessed the income in question as income from house property, rejecting the claim of the assessee by treating it as income from business; but that cannot be disturbed by this Court and the order of the Income Tax Appellate Tribunal deserves to be upheld. Referring to the assessment order learned counsel for the respondent submits that the assessee is a deemed owner of the property in question under Section 27(iiib) of the Income Tax Act, 1961 and the transaction in question and leave and licence is transfer within the meaning of Section 269UA(f)(i) of the Act. Therefore, the income is question is correctly assessed assessing officer and upheld by the tribunal treating it as income from house property.

Discussion and finding:

7. We have carefully considered the submissions of learned counsels for the parties and perused the record of the appeal.

8. Undisputedly the appellant assessee obtained an area approximately 5,60,065 sqft. from EIH under a leave and licence agreement dated 25.04.1972 for a period of 50 years on certain terms and conditions including certain facilities. **As per Memorandum of Association** of the appellant assesse, as reproduced in paragraph 2.6

of the order of the CIT appeal dated 07.01.2008; Clause III Part B (objects anciliary to the main objects) provides as under:-

"to acquire on a licence, premises suitable for housing and accommodating shops, boutiques, stores, offices, showrooms for the purpose of making the same available on the basis of lease and licence or sub-licence (and not for leasing or renting the same out) to any person, firm or company."

9. The afore quoted objects has been reproduced by the CIT (Appeal) in Paragraph 2.6 of its order. The appellant assessee, after obtaining the space under the leave and licence agreement dated 25.04.1972, had entered into a sub-licensing agreements with different persons. Along with the space provided to the sub-licensee, the appellant assessee also provided them number of services and charged a composite amount as consideration for sub-licensing and services. **The services provided by the appellant assessee to sub-licensees are mentioned in paragraph 27 of the Sub-lisence Agreement which are reproduced below:-**

"27. Subject to the Provisions of the next clause, the Company hereby agrees to provide or cause to be provided the following services with regard to the Stipulated Space.

(a) Central airconditioning facilities during business hours;

(b) Central telephone operating service for incoming calls;

(c) Central piped music in the passages;

(d) Cleaning and keeping in neat and tidy conditions, common passages, lobbies and entrances around the Stipulated Space;

(e) Looking after and attending to the electricity, water and sanitary fittings and plumbing requirements in the common passages, lobbies and entrances around the Stipulated Space;

(f) Providing a few Watch and Ward services for the shopping area, provided that the Company shall not in any way be responsible in case of any theft, pilferage or loss.

(g) Providing advertising and sales promotional facilities by various means and media for the goods and services available in the Shopping Area."

10. From the facts as noted above it is evident that the appellant assessee has obtained 5665 sqft. of space under a leave and licence agreement dated 25.04.1972 from EIH Limited and has sub-licensed the space to several persons under a sub-licence agreement, along with certain services as aforementioned and for that received a composite amount as consideration on monthly basis.

11. The assessee claimed that the sum received by it for sub-licensing, is business income but the assessing officer has not accepted it and taxed the receipts as income from house property. The CIT (Appeal) allowed the appeal of the assessee and held the income to be income from business. The ITAT, after referring to section 27 (iiib) of the Income Tax Act defining the term "deemed owner" and Section 269UA(f) of the Act defining the word "transfer";

held that the income derived by the assessee is "Income from House Property."

12. While coming to the aforesaid conclusion, the ITAT has committed a manifest error of law to ignore the object and business activity of the appellant assessee company, and misunderstood the nature of transaction of sub-license.

13. As per assessment order of the appellant assesse, the total income disclosed as per income tax return was Rs. 1,32,710/-. It was disclosed to be from business. The Assessing Officer has treated the total contribution received from shops Rs. 13,90,260/- (against which the assessee booked expenses amounting to Rs. 10,60,561/-) towards compensation for licence fees (as per profit and loss accounts) amounting to Rs. 13,90,260/-) to be rental income under the head "income from house property" and after allowing deduction under Section 24 (a) computed the income from house property at Rs. 9,73,182/-.

14. As per objects in the Memorandum of Association and also as per assessment order, the assessee is engaged in business of licensing the space in question. In this regard the findings recorded by the Assessing Officer in the Assessment Order is reproduced below:-

"During the relevant previous year the assesse engaged in dealing in real estate and investment in shares. The income mainly consisted of 'contribution from shops.'

15. In the of Rajdadarkar and Associates versus ACIT, CC-46 (2017) 14 SCC 476 (17) Hon'ble Supreme Court has observed that wherever there is an income from leasing out of the premises and collecting rent, normally such an income is to be treated as income from house property but under certain circumstances, **It can stated be treated as business income if letting out of the premises itself is the business of the assessee.**

16. In **Chennai Properties and Investments Limited Versus Commissioner of Income Tax (2015) 373 ITR 673 SC :** 2015 14 SCC 793 Hon'ble Supreme Court quoted with approval the judgment of privy council (reported in 44 ITR page 377) and applying the law laid down in Sultan Brothers (P) Limited Versus CIT (1964) 51 ITR 353 (SC) and Karanpura Development Company Limited Versus CIT (1962) 44 ITR 362 (SC): AIR 1962 SC 429, **held as under.**

> *"Before we refer to the Constitution Bench judgment in the case of Sultan Brothers (P.) Ltd., we would be well advised to discuss the law laid down authoritatively and succinctly by this court in Karanpura Development Co. Ltd. v. CIT [1962] 44 ITR 362 (SC). That was also a case where the company, which was the assessee, was formed with the object, inter alia, of acquiring and disposing of the underground coal mining rights in certain coal fields and it had restricted its activities to acquiring coal mining leases over large areas, developing them as coal fields and then*

sub-leasing them to collieries and other companies. ***Thus, in the said case, the leasing out of the coal fields to the collieries and other companies was the business of the assessee.*** *The income which was received from letting out of those mining leases was shown as business income. Department took the position that it is to be treated as income from the house property. It would be thus, clear that in similar circumstances, identical issue arose before the court. This court first discussed the scheme of the Income-tax Act and particularly six heads under which income can be categorised/classified. It was pointed out that before income, profits or gains can be brought to computation, they have to be assigned to one or the other head. These heads are in a sense exclusive of one another and income which falls within one head cannot be assigned to, or taxed under another head. Thereafter, the court pointed out that* ***the deciding factor is not the ownership of land or leases but the nature of the activity of the assessee and the nature of the operations in relation to them.*** *It was highlighted and stressed that* ***the objects of the company must also be kept in view to interpret the activities.*** *In support of the aforesaid proposition, a number of judgments of other jurisdictions, i.e., Privy Council, House of Lords in England*

and the US Courts were taken note of. ***The position in law, ultimately, is summed up in the following words (page 377 of 44 ITR):***

"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."*

After applying the aforesaid principle to the facts, which were there before the court, it came to the conclusion that income had to be treated as income from business and not as income from house property. We are of the opinion that the aforesaid judgment in Karanpura Development Co. Ltd.'s case squarely applies to the facts of the present case.

No doubt in Sultan Brothers (P.) Ltd.'s case, a Constitution Bench judgment of this court has clarified that merely an entry in the objects clause showing a particular object

would not be the determinative factor to arrive at an conclusion whether the income is to be treated as income from business and such a question would depend upon the circumstances of each case, viz., whether a particular business is letting or not. This is so stated in the following words:

"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."*

We are conscious of the aforesaid dicta laid down in the Constitution Bench judgment. It is for this reason, we have, at the beginning of this judgment, stated the circumstances of the present case from which we arrive at irresistible conclusion that in this case, letting of the

properties is in fact is the business of the assessee. The assessee, therefore, rightly disclosed the income under the head "Income from business". It cannot be treated as "Income from the house property". We, accordingly, allow this appeal and set aside the judgment of the High Court and restore that of the Income-tax Appellate Tribunal. No orders as to costs.

17. In Royla Corporation Private Limited Versus Assistant Commissioner of Income Tax (2016) 386 ITR 500 (SC) Hon'ble Supreme Court considered the question as to whether the income received by way of renting by the assessee engaged in business of renting its properties and receiving rent is business income or income from house property when the assessee company is engaged in business of renting of its properties. The Hon'ble Supreme Court found that the business of the assessee was of renting its property and earning rent therefrom and therefore the income so earned should be treated as its business income.

18. Thus, as per Memorandum of Association the object of the assesse company anciliary to the main object is to acquire on licence premises suitable for housing, accommodating shops, boutiques, stores, offices, showrooms for the purpose of making available on the basis of lease or licence and sub-lisence. The Assessing Officer himself recorded a specific finding in the Assessment Order that during the previous year relevant to the assessment year in question

the assesse was engaged in the business of real estate and its income mainly consisted from contribution from shops. Since the object of the assesse company and its activity is the business of renting/lisencing/sub-lisencing shops etc. and it derived income mainly from the aforesaid business activity, therefore, the income from contribution/sub-lisencing derived by the assesse is business income and not income from house property. The law laid down by Hon'ble Supreme Court in Chennai Properties and Investment Ltd.(supra) and Royla Corporation Private Limited (supra) are applicable on facts of the present case. Hence, we hold that the income in question of the appellant assesse is business income and not income from house property.

19. Apart from above, we find that the appellant assessee is engaged in business of sub-licensing/sub-letting the space in question since the year 1972. The revenue has not disputed the fact that except for the assessment year 2005-06, income of the appellant assessee for all the years has been accepted as income from business. For the assessment year 2006-07, the assessing officer again held the income from letting/sub-licensing of space in question to be income from house property. The matter was carried by the appellant assessee up to appeal before the Income Tax Appellate Tribunal 'B' Bench Kolkata in ITA No. 1640/KOL/2014 and the Tribunal, after referring to its earlier order from which the present appeal arose, held that the income of the appellant assessee from

sub-licensing/letting of the space is a business income. The aforesaid order of the Income Tax Appellate Tribunal dated 26.07.2017 in ITA No. 1640/KOL/2014 (AY) 2006-07 is stated to have been accepted by the respondent Income Tax Department, which fact has not been disputed by the learned counsel for the respondent before us. Therefore, except for the assessment order in question, the appellant assessee's income from sub-letting/sub-licensing the space in question, has always been accepted by the respondent Income Tax Department as, income from business. Under the circumstances when the respondent Income Tax Department has always accepted the income of the appellant assessee from sub-licensing/sub-letting of the space in question, to be income from business, then the respondent cannot take a contrary stand in the present appeal.

20. For all the reasons aforestated the appeal is allowed. The substantial questions of law are answered in favour of the assessee and against the revenue. The impugned order dated 23.07.2010 in ITA No. 330 (KOL) of 2008: Assessment year 2005-06, passed by the Income Tax Appellate Tribunal 'C' Bench Kolkata, is hereby set aside and the order of the CIT (A) – 6 Kolkata dated 07.01.2008 is affirmed. Any amount already deposited by the assesse towards the demand in question, shall be refunded to the assesse forthwith by the concerned authority.

21. Urgent certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(SURYA PRAKASH KESARWANI, J.)

I agree

(RAJARSHI BHARADWAJ, J)

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