

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

&

THE HONOURABLE MR. JUSTICE R. NARAYANA PISHARADI

WEDNESDAY, THE 27TH DAY OF MARCH 2019 / 6TH CHAITHRA, 1941

ITA.No. 166 of 2016

AGAINST THE ORDER OF THE INCOME TAX APPELLATE TRIBUNAL, COCHIN
BENCH IN ITA NO.369/COCH/2013 DATED 06/06/2016 FOR THE ASSESSMENT
YEAR 2009-10

APPELLANT/RESPONDENT/RESPONDENT/REVENUE

THE COMMISSIONER OF INCOME TAX
THIRUVANANTHAPURAM

BY ADVS.

SRI.CHRISTOPHER ABRAHAM, INCOME TAX DEPARTMENT

SRI.K.M.V.PANDALAI INCOME TAX DEPARTMENT

RESPONDENT/APPELLANT/APPELLANT/ASSESSEE:

M/S. OBERON EDIFICES & ESTATES (P) LTD
THE ARCADE, KARAMANA, TRIVANDRUM.

BY ADVS.

SRI.NEMISH NIRANJAN ZAVERI

SRI.SHERRY SAMUEL OOMMEN

SRI.SUKUMAR NAINAN OOMMEN

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 20.03.2019,
THE COURT ON 27.03.2019 DELIVERED THE FOLLOWING:

'C.R'

**C.K.ABDUL REHIM
&
R.NARAYANA PISHARADI, JJ.**

I.T.Appeal No.166 of 2016

Dated this the 27th day of March, 2019

J U D G M E N T

R.Narayana Pisharadi, J

Shopping is no longer mere purchasing products. Shopping malls have transformed what was once an activity merely based on need and necessity to an experience of enjoyment and entertainment.

2. What is the head of income – whether it be "income from house property" or "profits and gains of business" – under which the rental charges received by the assessee company on letting out the shop rooms in the mall constructed by it is liable to be assessed under the Income Tax Act, 1961 (hereinafter referred to as 'the Act')? This is the substantial question of law that needs to be answered in this appeal filed by the revenue.

3. The assessee is a company engaged in the business of construction and promotion of residential and commercial complexes. The assessee constructed a shopping mall by name 'Oberon Mall' in Kochi in the property owned by its sister concern and let out the shop rooms. In the revised return of income filed by the assessee on 06.04.2011 (which was beyond the prescribed time) for the assessment year 2009-10, an amount of Rs.80,09,364/- received by it on letting out the shop rooms, was shown as income from business. The assessing officer treated this amount as income from house property and after deducting municipal taxes and statutory benefit of 30%, computed tax on the balance amount of Rs.54,41,293/- and passed assessment order dated 29.12.2011 under Section 143(3) of the Act.

4. The assessee challenged the assessment before the Commissioner of Income Tax (Appeals). But the appeal was dismissed by order dated 27.03.2013. The assessee challenged the aforesaid order before the Income Tax Appellate Tribunal. The Tribunal found that the disputed amount is business income of the assessee and allowed the appeal. The revenue has come up in appeal challenging the

order of the Tribunal.

5. We have heard learned counsel for the appellant as well as the respondent.

6. Learned counsel for the revenue has contended that the assessee had let out the rooms in the shopping mall and the rental charges received by the assessee are liable to be treated as income from house property and not business income. Learned counsel would contend that the issue is squarely covered by the decision of this Court in **Attukal Shopping Complex Private Limited v. Commissioner of Income tax : [2003] 259 ITR 567** and also the decision of the Hon'ble Supreme Court in **Shambhu Investment Private Limited v. Commissioner of Income Tax : [2003] 263 ITR 143**. Learned counsel for the revenue has also placed heavy reliance upon the decision of the Apex Court in **Raj Dadarkar v. Assistant Commissioner of Income Tax : [2017] 394 ITR 592** in support of his contention.

7. On the other hand, learned counsel for the assessee/respondent invited our attention to the relevant provisions in the Act and contended that the amount

received by the assessee by letting out the rooms in the shopping mall cannot be considered as income from house property. Learned counsel would contend that letting out the shop rooms in the mall amounts to commercial exploitation of the building constructed by the assessee and it is a part of the business activity of the assessee company. Learned counsel has cited a plethora of decisions in support of his contentions.

8. Section 22 of the Act reads as follows:

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

9. A bare reading of Section 22 of the Act would show that, in order to attract that provision, the assessee must be the owner of the building or the land appurtenant to it and he shall not be occupying it for the purpose of any

business or profession carried on by him the profits of which are chargeable to income tax. Section 22 of the Act itself indicates that merely because a person is the owner of the property it does not follow that the income therefrom should be assessed under the head "income from house property". Exception is made in the Section itself for the portions of the property as may be occupied for the purpose of business or profession carried on by the assessee, the profits of which are chargeable to income tax.

10. In **Commissioner of Income Tax v. M/s Poddar Cement Private Limited : AIR 1997 SC 2523**, the Hon'ble Supreme Court has held that, inspite of the settled position that under the common law 'owner' means a person who has got valid title legally conveyed to him after complying with the requirements of law, in the context of Section 22 of the Act, having regard to the ground realities and further having regard to the object of the Income Tax Act, namely, 'to tax the income', owner is a person who is entitled to receive income from the property in his own right. Therefore, in the instant case, we are not concerned whether the assessee is the real owner of the

land in which the shopping mall is constructed. It is an admitted fact that the assessee was entitled to receive the rental charges of the shop rooms leased out and it had received such charges. It follows that the assessee is the owner of the shop rooms let out, for the purpose of Section 22 of the Act.

11. Now, the question arises whether letting out of the shop rooms in the mall by the assessee was part of its business activity or not. Section 9(i) of the Income Tax Act, 1922 was substantially the same as Section 22 of the new Act. Dealing with the scope of Section 9 of the old Act, in **Sultan Brothers Private Limited v. Commissioner of Income Tax : AIR 1964 SC 1389**, the Constitution Bench has held that, whether a particular letting, is business has to be decided in the circumstances of each case. 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.

12. In **Karanpura Development Company v. Commissioner of Income Tax : AIR 1962 SC 429**, the Apex Court has held that, in the case of a company with its

professed objects and the manner of its activities and the nature of its dealing with its property, it is possible to find the nature of its operations and to what head the income is to be assigned. A company formed with the specific object of acquiring properties not with the view to leasing them as property but to selling them or turning them to account even by way of leasing them out as an integral part of its business, cannot be said to treat them as landowner but as trader. It has been held that in deciding whether a company dealt with its properties as owner, one must see not to the form which it gave to the transaction but to the substance of the matter.

13. In **Karnani Properties Limited v. Commissioner of Income Tax : AIR 1972 SC 2315**, the question referred to the High Court for its opinion was whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in holding that the services rendered to the tenants, by supplying electrical energy, hot and cold water and maintenance of lifts and other amenities, constituted a business activity of the assessee and as such the income arising therefrom was

assessable under Section 10 of the Income Tax Act, 1922. The High Court answered the question in the negative and in favour of the revenue. The assessee took up the matter in appeal to the Apex Court. Allowing the appeal, the Apex Court held that the services rendered by the assessee to its tenants were the result of its activities carried on continuously, in an organized manner, with a set purpose and with a view to earn profits and therefore, those activities have to be considered as business activities.

14. In Universal Plast Limited v. Commissioner of Income Tax : AIR 1999 SC 1641, the Hon'ble Supreme Court has held that no precise test can be laid down to ascertain whether income (referred to by whatever nomenclature, lease amount, rents, licence fee) received by an assessee from leasing or letting out of assets would fall under the head "profits and gains of business or profession" and that it is a mixed question of law and fact and has to be determined from the point of view of a businessman in that business on the facts and in the circumstances of each case including true interpretation of the agreement under which the assets are let out.

15. In **Raj Dadarkar** (supra), the Apex Court has held that, merely because there is an entry in the object clause of the business showing a particular object, it would not be a determinative factor to arrive at a conclusion that the income has to be treated as 'income from business'. It has been held that such a question would depend upon the circumstances of each case and the matter has to be determined on the facts of each case.

16. The decision of the Constitution Bench in **Sultan Brothers** (supra) was taken note of by the Apex Court in the decision in **Chennai Properties and Investments Limited v. Commissioner of Income Tax : [2015] 373 ITR 673**. In that case, the main object of the assessee company, as stated in the memorandum of association, was to acquire properties in the City of Madras and to let out those properties. The assessee had rented out two properties and the rental income received thereby was shown as income received from business in the return filed by it. The Apex Court observed that the assessee had no other income except the income from letting out the two properties. Upon considering the main object of the

company, the Apex Court held that the income from rent ought to be treated as business income.

17. A conspectus of the decisions referred to above makes it evident that each case has to be considered on its own facts to determine whether the income obtained by letting out property constitutes income from house property or business income. An owner of a commercial asset is entitled to exploit it to the best advantage. He may do so either by using it by himself or by letting it out. Whether a particular income received by the assessee as a result of the activities carried on by him is business income or rental income depends upon the manner of exploitation of the assets. In each case, the intention has to be gathered as to whether the asset was intended to be commercially exploited by the assessee or whether it was intended to be used by mere letting out. If it is found that the main intention is to simply let out the property or any part of it, resultant income must be assessed as income from house property. But if the main intention is found to be exploitation of property by way of commercial activities, then resultant income must be held as business income.

18. In the instant case, in the memorandum of association of the assessee company, the main objective of the company is stated as follows:

"To carry on the business of builders and promoters of residential and commercial complexes, to carry on the business of construction of all type of industrial, commercial, residential and institutional projects and to purchase, construct and market land, houses, flats, commercial complexes and real estates and to act as agents and distributors and suppliers and dealers of building materials, construction equipments, electrical and sanitary equipments."

19. Learned counsel for the respondent has made great emphasis on the aforesaid objective of the company stated in its memorandum of association. He has contended that the main business of the company is construction and promotion of residential and commercial complexes and letting out of the shop rooms in the shopping mall constitutes part of its business activity.

20. It is stated that the assessee company is managing and conducting the shopping mall. It is stated that the company is actively engaged in the day to day

operations and the management of the mall which includes house keeping services, customer support, technical and electrical support, security, car parking facilities, maintenance of lifts and escalators etc. It is stated that the assessee is not merely a passive owner of the shopping mall who has let out the rooms and who only collects the rent. It is also stated that the assessee has employed more than 100 persons in the shopping mall for the operation and management of the mall.

21. The Income Tax Appellate Tribunal has taken into consideration the fact that the assessee has exploited immovable property for commercial activities. The Tribunal has observed that providing shopping facilities to customers is a commercial activity. The Tribunal has further noted that it is the responsibility of the assessee company to maintain and upkeep the common areas in the mall and provide the facilities in the mall. In such circumstances, the Tribunal has found that the disputed income of the assessee is from exploitation of the immovable property for business purposes and it is essentially business income.

22. Learned counsel for the revenue has not been able

to show that the findings made by the Tribunal are in any way perverse. The Income Tax Appellate Tribunal, being the last forum in so far as factual determination is concerned, the findings made by it on factual aspects have to be treated as final, unless they are perverse.

23. Learned counsel for the revenue has placed heavy reliance upon the decisions in **Attukal Shopping Complex** (supra), **Shambhu Investment** (supra) and **Raj Dadarkar** (supra) and contended that the issue involved is squarely covered by these decisions.

24. In **Shambhu Investment** (supra), the Hon'ble Supreme Court has not laid down any dictum with regard to charging of income to tax under any particular head. The Apex Court has only affirmed the decision of the Calcutta High Court in **Commissioner of Income Tax v. Shambhu Investment Private Limited : [2001] 249 ITR 47**, in which, on the facts of that case the High Court had held that the income of the assessee shall be treated as income from house property. But, it is to be noted that the dictum laid down by the Calcutta High Court in the aforesaid decision is as follows:

"What has to be seen is what is the primary object of the assessee while exploiting the property. If it is found applying such test that the main intention is for letting out the property or any portion thereof, the same must be considered as rental income or income from property. In case it is found that the main intention is to exploit the immovable property by way of complex commercial activities, in that event it must be held as business income".

The dictum laid down as above by the Calcutta High Court, which stands affirmed by the Apex Court, does not in any way support the contentions of the revenue in the present case. Rather, the aforesaid dictum, on the facts and circumstances of the present case, is in favour of the assessee.

25. **Attukal Shopping Complex** (supra) has dealt with a different fact situation. It was a case in which the assessee had purchased immovable property and constructed shop rooms and let them out. The Income Tax Appellate Tribunal in that case found that the income of the assessee had to be divided as income from property and income from business. The decision of the Tribunal was

upheld by this Court. Therefore, the decision in **Attukal Shopping Complex** (supra) cannot be found applicable to the facts of the present case.

26. Learned counsel for the revenue has also placed heavy reliance upon the decision of the Apex Court in **Raj Dadarkar** (supra). In that case there was a clear finding made by the Income Tax Appellate Tribunal that the assessee did not establish that he was engaged in any systematic or organised activity of providing service to the occupiers of the shops/stalls so as to constitute the receipts from them as business income and on that basis the Tribunal had found that the assessee received income by letting out shops/stalls and the income has to be treated as income from house property. After taking note of the aforesaid findings made by the Income Tax Appellate Tribunal, the Apex Court held that the Income Tax Appellate Tribunal, being the last forum in so far as factual determination is concerned, those findings had attained finality and no effort was made to show that the aforesaid findings were perverse. The Apex Court also took note of the fact that the assessee did not produce sufficient

materials on record to show that its entire income or substantial income was from letting out of the property which was the principal business activity of it. The situation in the present case is different. It is to be noted that in the present case, the finding of the Tribunal, which is the final authority on facts, is in favour of the assessee.

27. In the instant case, it is not a letting out of property simpliciter, without anything more. A host of services are being provided by the assessee at the shopping mall. The assessee is engaged in a complex set of activities at the shopping mall. Management of the shopping mall is done by the assessee. The basic purpose is commercial exploitation of the property. The assessee has earned the income not merely by letting out the shop rooms but also by providing amenities and facilities at the shopping mall. Such amenities and facilities are not the basic facilities required for occupation of a shop room by a tenant. They are the special facilities for running the shopping mall and are meant to attract the customers and provide them the comfort and convenience of shopping. In cases where the income received is not from the bare letting out the

property but on account of the facilities and services rendered, the operations involved in such letting out is in the nature of business and the income derived therefrom has to be treated as business income and not income from property. The income derived by the assessee cannot be regarded as simply from the exercise of property right. Where the assessee company has developed the shopping mall and let out the same by providing a variety of services, facilities and amenities in the mall, it can be found that the primary intention of the assessee was commercial exploitation of the property and where it has derived substantial part of its income by such activity, which constitutes its main business, the income so derived would be business income of the assessee. We, therefore, agree with the view of the Tribunal that the income derived by the assessee by letting out the shops in the mall has to be assessed as income from business and not as income from house property.

28. On the basis of the discussion above, we find that the amount received by the assessee company on letting out the shop rooms in the mall constructed by it has

to be treated as business income and it has to be assessed to tax under the head "profits and gains of business" and not under the head "income from house property". The substantial question of law is answered in favour of the assessee and against the revenue.

Consequently, the appeal is dismissed. No costs.

(sd/-)

C.K.ABDUL REHIM, JUDGE

(sd/-)

R.NARAYANA PISHARADI, JUDGE

jsr

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PS to Judge