

DDR

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO. 1583 OF 2017

The Pr. Commissioner of Income Tax-6 ..Appellant
vs.
City Centre Mall Nashik Pvt. Ltd. ..Respondent

.....
Mr. A.R. Malhotra a/w. Mr. N.A. Kazi for the appellant.
Mr. S. Sriram a/w. Mr. B.V. Jhaveri for respondent.

.....
**CORAM : NITIN JAMDAR &
M.S.KARNIK, JJ.**

DATE : 13 JANUARY 2020

P.C.:-

By this Appeal, the Appellant has challenged the order passed by the Income Tax Appellate Tribunal, 'C' Bench, Mumbai, dated 23 September 2016 in Income Tax Appeal No. 1783/Mum/2015 pertaining to the Assessment Year 2010-11.

2. The Appellant – Revenue has raised following questions as the substantial questions of law in this Appeal :-

“(A) Whether, on the facts and in the circumstance of the case and in law, the Hon’ble Tribunal was justified in holding that the assessee had exploited its property commercially by way of complex commercial activities and hence, the rental income received by the assessee to be taxable as income from business and not under the head “Income from House Property” ?

(B) Whether, on the facts and in the circumstance of the case and in law, the Hon'ble Tribunal was justified in ignoring the settled position of law that where the main contention is to simply let out property or any part of it, the resultant income must be assessed as income from house property and the amenities such as electricity, cooling towers, elevators and car parking provided by the assessee to its tenants were incidental to the letting out of the property and could not be termed as complex commercial activities to justify the assessment of rental income as income from business ?

(C) Whether, on the facts and in the circumstance of the case and in law, the Hon'ble Tribunal was justified in directing the assessing officer to decide the issue of disallowance of unpaid service tax under Section 43B of the Income Tax Act by following the decision rendered by Hon'ble Bombay High Court in the case of Ovira Logistics Pvt. Ltd. (ITA No.1023 of 2013 dated 17 April 2015) without appreciating that Department has not filed SLP owing to tax effect being lower than the prescribed monetary limit for filing further appeal?"

3. The questions of law No. (A) and (B) are overlapping and relate to the nature of the income as to whether it is from the Business or from House Property.

4. The question No. (C) relates to unpaid service tax under Section 43B of the Income Tax Act. It is an agreed position at the bar that the issue stands covered against the Appellant – Revenue in view of the following decisions of this Court :

(i) *Commissioner of Income-Tax v. Ovira Logistics P.Ltd. - [2015] 377 ITR 129 (Bom)*

It is informed that even SLP against the decision in the above case have also been dismissed by the Supreme Court.

(ii) *Principal Commissioner of Income-Tax v. Tops Security Ltd. [2019] 415 ITR 212 (Bom).*

(iii) *Commissioner of Income-tax-2, Mumbai v. Knight Frank (India) (P.) Ltd. - [2016] 72 taxmann.com 300 (Bombay).*

The SLP filed by Revenue against decision in *Tops Security Ltd. (supra)* is dismissed by the Supreme Court on 19 March 2019.

Hence this question is answered against Appellant – Revenue.

5. For the questions No. (A) and (B), a brief narration of the facts would be necessary. The Respondent – Assessee is a private limited company incorporated with an object of construction and running of commercial and shopping malls. The Respondent – Assessee set up a commercial complex-cum-shopping mall and the operations commenced during the financial year 2009-10. According to the Respondent – Assessee the total project cost was from its own funds and loan facilities. The mall / commercial complex had lower ground and ground floor plus four floors and a Multiplex with 5 screens and also a parking lot which can accommodate approximately 600 cars and 700 two wheelers and an Auditorium for public entertainment. The Respondent –

Assessee let out various shops in this commercial complex/mall dealing with various products, such as grocery, household goods, textiles and garments, furniture, electronic goods, jewellery, etc. Apart from letting out the premises, the Respondent – Assessee provided various services to the occupants of the said premises such as security services, housekeeping, maintenance, lightening, Air condition repairing, marketing and promotional activities, advertisement and such other activities. When the premises were let out on leave and license basis, compensation was also based on the revenue sharing basis.

6. For the relevant assessment year 2010-11, the Respondent – Assessee declared its income under the head Income from Business. The Assessing Officer, however, treated the same as Income from House Property. The Respondent – Assessee filed an appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) by order dated 27 January 2015 dismissed the Appeal. Thereafter, the assessee filed an Income Tax Appeal before Tribunal, which has been allowed by the impugned order.

7. We have heard Mr. Malhotra, learned counsel appearing for the Appellant and Mr. S. Sriram, learned counsel appearing for the Respondent.

8. Mr. Malhotra, learned counsel for the Appellant firstly submitted that a detailed order was passed by the Commissioner of Income Tax (Appeals) considering all facts, however, the decision of the Tribunal is not a reasoned one. Secondly, he submitted that the Respondent – Assessee has shown income of Rs.1,23,41,567/- which clearly indicates that the Respondent – Assessee has other source of income and therefore, decision in the case of *Chennai Properties and Investments Ltd. v. Commissioner of Income-Tax - [2015] 373 ITR 673 (SC)* which is foundation relied upon, thereafter, cannot be applied. He submitted that in the case of *Chennai Properties (supra)*, the Court was considered the fact situation whether the entire income was from the commercial complex and it is in that context that the Supreme Court laid down the dicta. He also submitted that in case of *Raj Dadarkar (supra)*, this fact has been categorically noted by the Supreme Court while commenting upon the law laid down in *Chennai Properties*. Mr. Malhotra, thirdly submitted that facts as present in the case clearly showed that the income was from House Property and the conclusion of the Tribunal is illegal and perverse. He submitted that the revenue sharing which is one of the ground putforth by the Respondent – Assessee cannot be stand alone for consideration. He submitted that in these circumstances, the impugned order passed by the Tribunal cannot be sustained and give rise to the above mentioned substantial questions of law.

9. The first contention raised by Mr. Malhotra is regarding question of reasoning in the decision of the Tribunal. It cannot be stated that the decision of the Tribunal is an elaborate one but what the reading of the decision it is seen that the reference is made to all the relevant facts which are necessary to make distinction between a Income from Business and the Income from House Property. Once these factors have been referred to as existing, we cannot straight away come to the conclusion that the impugned order was not a reasoned to give rise to question of law.

10. The second contention of Mr. Malhotra is that the Respondent – Assessee has other substantial source of income. This contention is based on an erroneous factual premise. Mr. Sriram, learned counsel for the Respondent – Assessee pointed out that a typographical error has occurred in the assessment order wherein dividend income is shown as Rs.1,23,41,567/-. He has pointed out from the compilation of the documents which was before the Tribunal, more particularly the balancesheet wherein other income is referred to as Rs.17,25,740/-. He pointed out that these amounts were the deposits received from the persons to whom the premises were let out in the mall and the same was invested in the Mutual Fund and this dividend and the interest thereupon and the profit of sale of the Mutual Fund constituted the amount of Rs.17,25,740/-. He submitted that income cannot be considered as an independent income neither it is a substantial

one. In the facts of the case it is not necessary for us to comment on the absolute proposition advanced by Mr. Malhotra that it is only in those circumstances when the entire income is arising out of the commercial complex that it can be considered as income from the business and no other source of income must exist. We find that the dividend income in the present case is from the deposits received from the licensees which was invested in the Mutual Fund and the amount is not substantial as contended.

11. Turning now to the third contention of Mr. Malhotra. The question as to whether a income is to be treated from Business or from House Property comes up consideration of the Court's often.

In the case of *Principal Commissioner of Income Tax-6, Pune v. Krome Planet Interiors (P.) Ltd.*¹, the Court considered the case in identical facts of a commercial complex and mall. The Court took into consideration the various facilities provided by the assessee therein. The facilities were : lightening arrangement, installation of water cooled split Air conditioners, elevators, security system, fire prevention, garbage collection and disposal system, dining arrangement for occupants, installation of water purifier and rest room facilities. The Court noted that the assessee had taken loan facilities, license period was for short duration and also provided range of common facilities and amenities to the

1 [2019] 107 taxmann.com 443 (Bombay)

occupiers. The Court also referred to the decision in the case of *Raj Dadarkar & Associates v. Assistant Commissioner of Income-tax, CC-46²* .

12. In the matter at hand, the object of the Respondent – Assess is clearly to acquire, develop, let out the commercial complex. It is clear from the objects with which the assessee was incorporated to derive income from running and maintaining the shopping mall. The relevant objects as per Memorandum of Association are as follows :

“(A) Main Object of the Company as per Memorandum of Association :-

Object No.1 :- To acquire by purchase, exchange or otherwise deal in land, estates, building, halls, dwelling houses and to do various types of construction of buildings, commercial complexes, houses, halls, officer premises, shops, shopping malls, cinema halls clubs And maintaining for shopping arcade, mall, shops, dwelling houses, office premises and other commercial and educational purposes

(B) Other objects of the Company as per Memorandum of Association :

Object No.34 :- To carry on business of running a Super shop, shopping mall, Multi shop, Departmental Stores, chain Stores, Speciality stores ...

Object No. 35 :- To build, construct, establish, own, take on lease, purchase, or exchange or otherwise acquire, hold, maintain and manage industrial, commercial or residential buildings, factory premises,

²[2017] 81 taxmann.com 193 (SC)

..... clubs, theaters, Cinemas or other show houses, meeting and lecture halls, libraries, health resorts and sanitariums, gardens, bazaar, car parks and markets and to let, shublet, give on lease ...”

The objects are narrated in the impugned order. The activities and the amenities provided by the Respondent – Assessee have been reproduced in the order of the Tribunal, which read thus :-

“Complex Commercial Activity – The Company has to provide the following services to the licensees/occupants in order to enable them to earn more revenue from the Mall operation, which would in turn result into more revenue for the Company from Mall operations :

- a) 24 hrs Mall Security Services, Housekeeping services, gardening, pest control for the common area of the mall.*
- b) Maintenance & regular cleaning of the common areas of the mall & elevation of the building, exterior and interior cleaning of the mall, landscaping, providing and maintaining wash rooms & toilets, garbage removal & disposal from the common area etc.*
- c) Lightening of the common areas & Power supply through 100% power back up.*
- d) Air conditioning of common area.*
- e) Regular repair & maintenance of lifts, escalators, air conditioning plants, generators pumps & other plant & machinery.*
- f) Marketing & Promotional activities of the mall in general.*
- g) Providing space for Advertising in the mall premises at various places in the mall.*

- h) Organizing various events & programmers at regular intervals & at the time of festivals to promote the foot fall in the mall.*
- i) Providing & maintaining common parking facilities.*
- j) Providing assistance in market survey, customer complaints etc. to the occupants.*
- k) Providing piped music in the mall.*
- l) Fire detection & protection system in the common areas.*
- m) Providing facilities for loading & unloading and easy access to service Lift.*
- n) Providing canteen space for the employees of the occupants.*
- o) Providing facilities for play area for Kids & entertainment zone & food court zone.”*

The Respondent – Assessee has provided even marketing and promotional activities and also organising various events and programs. This being done by the Respondent – Assessee also in the context of the revenue sharing agreement copies of which have been placed on record. A perusal of one such agreement shows that the Appellant – Revenue receives not only license fee of the amounts specified therein and percentage of net revenue. In some of the agreements the compensation is either license fee or percentage of net revenue, whichever is higher. Though Mr. Malhotra has sought to contend that the revenue sharing is not stand alone criteria, it can be taken into consideration with totality

of the circumstances. The Intention of the Assessee is also a material circumstance and the objects of Association, the kind of services rendered clearly point out that the Income is from Business. All the factors cumulatively taken demonstrate that the assessee had intended to enter into a Business of renting out commercial space to interested parties. The other income is only an income which is a dividend income from the deposits received from the Business income.

13. Therefore, considering all these factors which have been enumerated above and referred to by the Tribunal, the findings rendered by the Tribunal on assessment of the factual position before it that the income in question has to be treated as Business Income cannot be called perverse assessment of facts, necessary test for such determination have been employed by the Tribunal. Therefore, the question of law as proposed has to be answered against the Appellant – Revenue. The Appeal does not give rise to any substantial question of law. The same is dismissed.

(M.S.KARNIK, J.)

(NITIN JAMDAR, J.)