

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B": HYDERABAD
(THROUGH VIRTUAL CONFERENCE)**

**BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

ITA Nos. 64 & 65/H/2020 Assessment Year: 2011-12 & 2013-14		
Dy. Commissioner of Income-tax, Circle – 1(2), Hyderabad.	Vs.	Cache Properties Pvt. Ltd., Hyderabad.
(Appellant)		(Respondent)
Revenue by:	Shri Rohit Mujumdar	
Assessee by:	Shri P. Murali Mohan Rao	
Date of hearing:	10/05/2021	
Date of pronouncement:	11/06/2021	

ORDER

PER L.P. SAHU, A.M.:

These appeal filed by the Revenue are directed against CIT(A) – 1, Hyderabad’s separate orders for AY 2011-12 & 2013-14 involving proceedings u/s 143(3) rws 147 of the Income Tax Act, 1961 ; in short “the Act”. As the facts and grounds are identical in these appeals, they were clubbed and heard together and therefore a common order is passed for the sake of convenience.

2. Briefly the facts as culled out from AY 2011-12 are that the assessee company engaged in the business of infrastructure development and rental services, e-filed its return of income for AY 2011-12 on 31/10 /2011 declaring total income at normal provisions of Rs. 4,92,10,595/- and income under book profits of Rs. 7,62,08,202/- u/s 115JB of the Act, which was processed u/s 143(1) of the Act. Subsequently, the AO noticed that the income received by the assessee on leasing properties was shown as operation income in P&L Account, and as income from house property in its return of income and also claimed deduction u/s 24(a) and, therefore, issued notice u/s 148 of the Act on 19/09/2017. After issuing statutory notices, the AO completed the assessment u/s 143(3) rws 147 assessing the total income at Rs. 8,39,01,215/- by treating the income shown by the assessee as income from business as against the income shown by the assessee under the head 'income from house property.

3. Aggrieved by the order of AO, the assessee preferred an appeal before the CIT(A) raising the grounds that the reopening of assessment is invalid and treating the income as business income by the AO.

4. The CIT(A) confirmed the action of the AO with regard reopening of assessment.

5. As regards the treating the income as business income by the AO, the CIT(A) directed the AO to treat the income from letting out of flats as income from house property following the decision of the ITAT in assessee's own case in ITA No. 571/Hyd/2018 dated 27/05/2019, on which reliance placed by the assessee.

6. Aggrieved by the order of CIT(A) the revenue is in appeal before the ITAT raising a ground that the CIT(A) erred in holding that income earned from exploitation of commercial space has to be assessed under the head income from house property instead of profits and gains of business/profession.

7. Before us, the ld. CIT-DR besides relying on the order of AO submitted that the assessee has done is as a prudent business man to grab the opportunities in both hands as a developer and as a owner of leased properties under guise of income from house property, thus claiming deduction u/s 24. He further submitted that the assessee has taken bank loans to finance his projects like any other business man and claimed the interest. He, therefore, requested the Bench to restore the order of AO.

8. The ld. AR, on the other hand, besides relying on the order of CIT(A) submitted that the assessee has received the rental income and shown under the income from house

property, which the AO treated as business income on the ground that the assessee company is engaged in the business of development of commercial properties and letting them out on rental basis which is incorrect and unjustifiable. Further, he submitted that the issue in dispute is covered by the decision of ITAT in assessee's own case and the CIT(A) following the same, directed the AO to treat its income under the head income from house property. He, therefore, submitted that the order of CIT(A) may be upheld.

9. We have considered the rival submissions and perused the material on record as well as gone through the orders of revenue authorities. We find that the issue in dispute is squarely covered by the decision of the coordinate bench of this Tribunal in assessee's own case cited supra, wherein, the coordinate bench has held as under:

“7. Having regard to the rival contentions and material on record, we find that the assessee has filed copies of its returns of income and computation of income from the AY. 2010-11 onwards upto 2016-17, wherein the assessee has offered rental income as 'income from house property' and the Assessing Officer has accepted the same till the AY. 2011-12 and it was for the first time in AY. 2012-13 that there is a change of stand by the Revenue that too pursuant to the order passed by the CIT u/s. 263 of the Act. It is seen that the ITAT has upheld the initiation of proceedings u/s. 263 of the Act, and has directed the Assessing Officer to consider the nature of transaction in line with the case laws on the subject. Thus, it cannot be said that the stand of the Revenue that the income is to be treated as 'business income' has been

upheld by the ITAT. Thus, the case laws relied upon by the assessee are not applicable to the case before us.

7.1 The main reason for treating rental income as 'business income of the assessee' by the A.O, is the admission of the assessee itself in its letters addressed to the A.O that its business was also of leasing or letting out of its properties. The Assessing Officer had relied upon the judgment of the Hon'ble Supreme Court in the case of Sultan Brothers (P.) Ltd., Vs. CIT (supra), wherein it was held that 'the intention or the primary object of the assessee while exploiting the property forms the nucleus of the issue'. He held that in the case before us, the primary intention was to commercially exploit the commercial properties developed by it, and hence such an intention leads to business activity. Therefore to ascertain the intentions of the assessee, the objects clauses in the Memorandum of association needs to be looked into. In compliance with our directions, the Ld. Counsel for the assessee has filed a copy of the memorandum of association of the assessee and has also filed the copy of memorandum of association of Chennai properties Ltd to distinguish the said case from the case of the assessee. The main objects of the assessee company as per memorandum of association are as under:

- "1. To carry on the business of builders, developers, real estate agents and contractors for construction or demolition work of any kind; and to purchase or otherwise acquire lands, houses, offices, workshops, buildings and premises for the purpose of that business.
2. To erect and construction roads, sewers, houses, buildings or works of every description on any land whether or not owned by the company and to demolish rebuild, enlarge, alter and improve existing plots, houses, buildings or works, to convert and appropriate any such land into and for roads and other facilities, and generally to deal with the develop the property of the company.
3. To purchase or otherwise acquire and to manufacture and deal in bricks, stone and other building materials of any kind and all implements, machinery, vehicles scaffolding and other equipment and articles used by builders and contractors.
4. To purchase, sell, develop, take in exchange, or on lease, hire or otherwise acquire, whether for investment or sale, or working the same, and real or personal estate including lands, mines, business building, factories, mill, houses, cottages, shops, depots, warehouses, machinery, plant, stock in trade, mineral rights concessions, privileges, licenses, easement or interest in or with respect to any property whatsoever for the purpose of the company in consideration for a gross sum or rent or partly in one way and partly in the other or for any other consideration and to carry on business as proprietors of flats and buildings and to let

on lease or otherwise apartments therein and to provide for the conveniences commonly provided in flats, suites and residential and business quarters.

5. To carry on the business of builders, developers, real estate agents and constrictors for construction or demolition work of any kind, and to purchase or otherwise acquire lands, houses, offices, workshops, buildings and premises for the purpose of that business.

7.2 Thus, from a literal reading of clause (4) of para III, it is clear that the assessee's business is to purchase, sell, develop, take in exchange or on lease, hire or otherwise acquire the properties and to carry on business as proprietors of lands and buildings and to let on lease (emphasis given by us) or otherwise apartments therein and to provide for the conveniences commonly provided in flats, suits and residential business quarters. Therefore, the main business of the assessee is to develop the properties and also to let out the properties on lease. In the case of Chennai properties, the said company had two properties known as 'Chennai House Esplanade' Madras and 'Fishayen Estate' at South beach road, Madras which were let out. We find that the objects of 'Chennai properties' was only to develop and let out those two to enjoy the rental income while in the case of the assessee, it is to develop the properties and also let out the properties on rent. Therefore, we are of the opinion that the objects of the assessee company are not exactly similar to the objects of the Chennai properties. In the case before us, it is seen from the computation of income for the assessment year 2014-15, that the assessee has derived rental income from only one property i.e Gumidelli Towers during the relevant previous year. We have verified the assessee's computation of income for the A.Ys 2010-11 to 2016-17 (filed by the assessee) and we found that the assessee has derived rental income only and there is no other source from which business income has been earned. There is 'income from other sources' such as interest income etc. Therefore, it is clear that in all the above years the assessee has not derived income from any other source except the rental income from the properties let out by the assessee. It is also noticed that from the A.Y 2010-11 onwards, the assessee has been deriving only rental income from the properties at Hyderabad, Mumbai, Delhi etc., and a perusal of lease deeds also shows that the assessee has been letting out the properties to the lessees for long period along with the furniture and fittings including the power back up and AC facility. Thus, there appears to be no other activity carried on by the assessee after initial set up of infrastructure required by the lessee. The annexure - A to the lease deeds lists out the facilities to be provided by the assessee to the tenant and for the sake of convenience and ready reference, the annexure - A to the lease deed between the assessee and TATA Motors Ltd., in respect of the

Commercial Space situated on the Forth Floor of Gumidelli Towers, Begumpet, Hyderabad, is reproduced hereunder:

- "a. 20 workstations*
- b. Electrical Works*
- c. Light fittings*
- d. A/C low side works*
- e. Data & Voice networking*
- f. Smoke detectors & provisions for keeping fire extinguishers at prominent places.*
- g. Sprinklers*
- h. UPS cabling*
- i. Storage units in the open areas, cubicles & cabins*
- j. False ceiling*
- k. Painting*
- l. Flooring - tiles / carpets*
- m. Roller blinds*

Lessor confirms that it shall provide good quality materials for the interiors and warrants that any defect in the interiors would be rectified, repaired and made good at its own cost, to the satisfaction of the lessee, during the first 6 months from the date such interior, fitting and fixture work is completed and certified by the Lessor.

7.3 We have also noticed that the lease rental is to be paid to the lessor only after the lessor i.e assessee herein, completes all the interior, fittings and furniture works and has provided the infrastructural facilities and materials to the lessees as per Annexure - A to the agreement. Therefore, it is not mere bare structure that is provided by the assessee to the tenant on rent but it is with furniture and fixtures along with power back up and AC facility. The Ld. Counsel for the assessee has relied upon various decisions in favour of his arguments let us therefore examine the applicability of the said decisions to facts of the case before us.

i) The judgement of the Hon'ble Supreme Court in the case of Raj Dadarkar and associates (supra); In this case, we find that the Hon'ble Supreme Court was dealing with an assessee who was allotted, premises which was a bare structure i.e pillar / column, Sans even four walls. In terms of the allotment the assessee had to make entire premises fit to be used as market including construction of walls, construction of entire common amenities like toilet block etc. The assessee therein had filed the return offering the income to tax under the head 'profits and gains of business or profession' whereas the A.O computed the income from

shops and stalls under the head 'income from house property'. The Tribunal had held that the assessee's income was to be treated as income from house property which was confirmed by the Hon'ble High Court and the Hon'ble Supreme Court confirmed the order of the Tribunal holding it to be income from house property. For coming to this conclusion, the Hon'ble Supreme Court has considered the factual findings of the ITAT that the assessee there in had let out the shops / stalls to various occupants on a monthly rent and collected charges for minor repairs, maintenance, water and electricity and as per the allotment letter, the assessee was bound to incur all these expenses and the assessee had collected extra money from the lessees. The ITAT also held that the assessee collected 20% of monthly rent as service charges which were used for services like providing electricity, water etc. which was inseparable from basic charges on rent. The Tribunal had held that the assessee has not established that he was engaged in any systematic or organized activities of providing services to the occupiers of the shops / stalls so as to construe the receipts from them as business income and it was held to be 'income from house property'.

ii) In the case of *Keyaram Hotels Private Limited*, (2015) 63 taxmann.com 301(SC), the Hon'ble Supreme Court has held that where the assessee was not engaged in any business activity, rental income earned from letting out of commercial complex would be assessed as income from house property and not as business income.

iii) The Hon'ble Bombay High Court, in the case of *Gundecha Builders*, reported in (2019), 102 taxmann.com 27 (Bombay), has held that where the assessee was engaged in the business of development of real estate project, rental income received from unsold portion of the property constructed by it was assessable to tax as income from house property. For coming to this conclusion, the Hon'ble High Court followed its earlier decision in the case of *CIT Vs. Sane & Doshi Enterprises*, (2015) 377 ITR 165/232 Taxman 452/58, we find that SLP against the said decision has been admitted by the Apex Court as reported in [2017] 77 taxmann.com 288(SC).

iv) The Hon'ble Punjab & Haryana High Court in the case of *Batra Palace (P.) Ltd. Vs. CIT*, reported in [2017] 79 taxmann.com 324 (P&H), held that where it is not shown that the intention was to let out the properties for a temporary period, it was the intention of the assessee to enjoy the rental income from the letting out the property and hence it was to be treated as income from house property.

v) The Hon'ble Apex Court in the case of *Sultan Brothers (P) Ltd.*, reported in [1964] 51 ITR 353 (SC) has held that where property has

been let out fully equipped and furnished for running a hotel, it could not be said that letting of building amounts to doing business and rental income could not be assessed as business income u/s 10 of 1922 Act.

7.4 By applying the rationale of the above decisions, we find that the fact that the property let out is a commercial complex is not sufficient to treat the rental income therefrom as 'Business Income'. The tests to be applied are; 1) the tenure of the lease, 2) the objects of the company; 3) the intention of the company; and 4) the services provided or activities carried on by the assessee after letting out of the property. Though one of the objects of the company is to let out the properties on lease / rent, it is not clear whether the intention is to earn rental income only from the properties constructed / developed by it. On perusal of the returns of income for earlier assessment years, we find that the assessee had let out properties at Hyderabad, Mumbai & Delhi, but the income from said properties is not offered during the relevant assessment year. So, whether such properties were let out since they were unsold during the relevant period and whether they were sold subsequently to which, there is no rental income during the relevant assessment year is not clear from the details filed before us. As held by the Hon'ble Bombay High Court in the case of Gundecha Builders (supra), rental income from unsold flats is to be assessed on 'income from house property'. Further, as held by the Hon'ble Courts in cases cited supra, unless the assessee is carrying on a systematic and organized activity to exploit the property commercially, it cannot be taxed as business income. We find that except for creating the infrastructure as per the requirement of the lessee, the assessee is not providing any other service during the year as is evident from the profit and loss account of the assessee for the relevant assessment year. The only expenses claimed by the assessee are interest, salaries & administrative expenses. Therefore, it is clear that the assessee's intention is to enjoy the rental income on a long term basis by leasing out the premises and not to exploit the same commercially on short term basis.

7.5 In view of the same, we are inclined to accept the contentions of the assessee that the rental income is to be assessed as 'income from house property' as offered by the assessee and as accepted by the Revenue in the earlier years up to A.Y 2011-12. Accordingly, assessee's appeal is allowed."

As the issue under consideration is materially identical to that of the decision of the ITAT in assessee's own case cited supra, respectfully following the same, we uphold the order

of the CIT(A) in directing the AO to treat rental income of the assessee as income from house property, as the decision of the CIT(A) is in consonance with the decision of the ITAT and dismiss the ground raised by the revenue on this issue.

10. As the facts and ground are similar in 2013-14 to that of AY 2011-12, following the decision therein, we dismiss this appeal of the revenue.

11. In the result, both the appeals of revenue are dismissed. A copy of this common order be placed in the respective case files.

Pronounced in the open court on 11th June, 2021.

**Sd/-
(S.S. GODARA)
JUDICIAL MEMBER**

**Sd/-
(L. P. SAHU)
ACCOUNTANT MEMBER**

Hyderabad, Dated: 11th June, 2021.

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copy to :

<i>1</i>	<i>The DCIT, Circle – 1(2), Room No. 724, 7th Floor, "B" Block, IT Towers, Hyderabad.</i>
<i>2</i>	<i>M/s Cache Properties Pvt. Ltd., 1-10-39 to 44, Ground Floor, Gumidelli Towers, Begumpet, Hyderabad.</i>
<i>5</i>	<i>CIT(A) –1, Hyderabad.</i>
<i>6</i>	<i>Pr. CIT - 1, Hyderabad</i>
<i>7</i>	<i>ITAT, DR, Hyderabad.</i>
<i>8</i>	<i>Guard File.</i>