



REPORTABLE

IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

ON THE 22nd DAY OF AUGUST, 2022.

BEFORE

HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN

&

HON'BLE MR. JUSTICE VIRENDER SINGH

INCOME TAX APPEAL NO.1 OF 2022.

Between:-

**PR. COMMISSIONER OF INCOME TAX-1,
CHANDIGARH.**

.....APPELLANT.

**(BY SH. VINAY KUTHIALA, SENIOR
ADVOCATE WITH SH. DIWAN SINGH
NEGI, ADVOCATE)**

AND

**M/S NOOR RESORTS PRIVATE LIMITED,
RIVERSIDE, PARGANOO, BHUNTAR,
DISTT. KULLU (H.P.) THROUGH ITS
MANAGING DIRECTOR.**

.....RESPONDENT.

*This appeal coming on for admission before notice
this day, **Hon'ble Mr. Justice Tarlok Singh Chauhan,**
delivered the following:*

J U D G M E N T

OMP(M) No. 39 of 2022.

The appeal is deemed to be filed within time in view of the order passed by the Hon'ble Supreme Court. Therefore, this application seeking condonation of delay in filing the appeal is misconceived and dismissed as such.

OMP No.563 of 2022.

2. For the reasons stated in the application, the delay in refiling the appeal after removing objections, is condoned. The application stands disposed of.

INCOME TAX APPEAL NO.1 OF 2022.

3. The facts giving rise to the instant appeal are that the assessee is a Private Limited Company engaged in the business of renting of immovable properties. The assessee electronically filed its return of income for the Assessment Year 2014-15 on 26.09.2014 declaring NIL income and claiming refund of Rs.1,96,140/-. The return was processed under Section 143(1) of the Income Tax Act (for short 'Act') and later the case was selected for scrutiny. The Assessing Officer ('A.O.') assessed the income of the assessee under Section 143(3) of the Act at Rs.1,34,832/- after making two additions: (1) Rs.34,832/- under Section

40(a)(ia) of the Act and (2) Rs.1,00,000/- out of expenses debited to the tune of Rs.9,48,281/- in the P & L Account under the heads of Telephone and vehicle expenses by observing element of personal usage. The assessee had been engaged in the business of renting of immovable properties and the A.O. allowed income received from letting out of shops as business income. Later on, the Revenue Audit Party has raised an objection that income derived from letting out of the shops is not business income but income from house property.

4. Thereafter, the Principal Commissioner of Income Tax (in short 'Pr. CIT') exercised its revisionary powers under Section 263 of the Act and observed that the assessment order dated 16.09.2016 was not only erroneous but also prejudicial to the interest of Revenue by making following points:-

(a) It was noticed that the assessee had earned rental income of Rs.26,63,438/- which had been shown as "Income from Business & Profession" rather than showing the same as "Income from House Property" and that the said income was further set off against the various expenses claimed viz. directors remuneration, depreciation and other expenses resulting into net profit of

Rs.28,903/- only. A show cause notice dated 04.10.2018 was issued to the assessee asking to explain as to why the rental income received may not be treated as "Income from House Property" rather than considering the same as "Income from Business & Profession". In response the assessee furnished a chart on 28.11.2018 explaining that if the rental income was to be assessed as its "Income from Business & Profession" the resultant loss of Rs.7,70,160.40 would be much higher than the resultant loss of Rs.3,89,226/- declared by the assessee. It was further submitted that since the loss assessed was lesser than the loss to be assessed, if the rental income was to be considered as income from House Property. The assessee also furnished a chart showing the closing stock as on 31.03.2014 of Rs.51,98,161/- pertaining to two different plots of land which were stated to be available for sale being part of its stock in trade. It was submitted that since the assessee was dealing in the business of real estate development and merely because due to slump in the market, the stock in trade remained same at the beginning and at the end of the year, it could not be held that the business was discontinued.

(b) The Pr. CIT observed that the assessee was owner of shops on the ground floor and basements in SCO Nos. 126 & 127, Sector 8C, Madhya Marg, Chandigarh. First floor and second

floors of these SCOs were stated to be already sold by the assessee within a year of its purchase in the year 2005-06. The said shops and basements were let out during the year under consideration against which it has earned rental income of Rs.26,63,438/- as disclosed in the return of income. He further observed that in the balance sheet, the said property was shown as its "investment asset" and not part of "stock in trade". According to the Pr. CIT the aforesaid property was the only property which was given at annual lease rent right from its beginning of the acquisition or purchase i.e. from the year 2005-06 till date. He further pointed out that no ancillary services were rendered by the assessee to its tenants and it had let out the premises on monthly lease rent right from the beginning of the acquisition or purchase and the AO had not verified the lease deeds executed by the assessee.

The Pr. CIT observed that it was categorically specified in the lease deed that the lesser (the assessee) shall at its own cost keep the demised premises in substantial repair and tenable condition, it shall carry out major, heavy and/or structure repairs and keep the demised premises both exterior and interior in good orders whereas, all minor repairs of interiors is the responsibility of the tenant or lessee and that the penalty was provided on lessee in case the lease rent was not

paid on time. The statutory dues and other charges including municipal taxes, service tax, property tax, water and electricity charges etc. as per actual basis, were to be borne/paid by the lessee or tenant only and that the lease agreement was renewed after the expiry of lease period on fresh terms and conditions mutually agreed upon by both the parties. Therefore, merely because the MOA of the assessee company having one of its main objects to carry on the business of real estate dealers and developers including purchase and sale of land, land development, colonization, purchase, sale construction and letting out of houses, flats and farm houses would not make the rental income to be assessed under the head "Income from House Property" particularly in view of the judgment of the Hon'ble Apex Court in the case of M/s Raj Darekar and Associates Vs. CIT reported in 394 ITR 592 (SC) and in the case of M/s Sultan Brothers Pvt. Ltd.(supra). He therefore set aside the assessment order passed by the A.O. and directed the A.O. to reassess or recomputed the income by conducting further enquiry as well as duly taking into account consideration of the fresh evidence brought on record including the MOA of the assessee company and the legal position while replying upon certain case laws, on this issue.

5. Aggrieved by the order of the Pr. CIT, the assessee preferred an appeal before the Income Tax Appellate Tribunal, Chandigarh ('ITAT, Chandigarh'), who vide order dated 11.11.2020 allowed the appeal of the assessee and granted the following reliefs:-

“(i) The ITAT vide order under consideration held that in the present case, the main object of the assessee in its MOA is to carry on the business of Real Estate Dealers and Developers including purchase and sale of land, land development, colonization, purchase, sale, construction and letting out of houses, flats, farm houses. However, as per Clause 19 of the aforesaid MOA, the assessee was authorized to sell, improve, alter, manage, develop exchange, lease, mortgage, dispose of etc. of the business lands, property, assets, etc. in whole in part in such manner and on such terms as the Directors may think fit. Therefore, the income of the assessee received on lease out property was its business income.

(ii) The ITAT further held that it can not be said that the view taken by the A.O. was wrong and if the view taken by the A.O. was one of the possible vide the assessment order dated 10.09.2016 passed by him cannot be considered to be erroneous. For the aforesaid view, we are fortified by ratio laid down by the Hon'ble Supreme Court in the case of CIT vs Max India Ltd.

(2007) 295 ITR 282 wherein it has been held as under:-

“The Phrase “prejudicial to the interest of the revenue” in section 263 of the Income Tax Act, 1961 has to be read in conjunction with the expression “erroneous” order passed by the Assessing Officer. Every loss of Revenue as a consequence of an order by the Assessing Officer cannot be treated as prejudicial to interests of the Revenue. For example, when the Assessing Officer adopts one or two causes permissible in law and it has resulted in loss of Revenue or where two views are possible and the Assessing Officer has taken one view with which the Commissioner does not agree, it can not be treated as an erroneous order prejudicial to the Revenue, unless the view taken by the Assessing Officer is unsustainable in law”.

(iii) The ITAT further held that by considering the rental income received by the assessee as “business income” which was consistently claimed by the assessee in the preceding years also and the department had accepted the same, the assessment order passed by the A.O. was not prejudicial to the interest of the Revenue, particularly when the loss would have been more than Rs.7,70,160.40 instead of Rs.3,89,226/-, if the rental income as to be considered as “income from house property”, instead of “business income” as declared by the assessee.”

6. The decision of the ITAT has been assailed by the Revenue on the ground that the ITAT has considered only Clause-19 of the Memorandum of Association (MOA) by

ignoring Clause-3 of the same. Additionally, it has been urged that the ITAT erred in holding that the rental income earned by the assessee has rightly been claimed under the head "income from business or profession"

7. We have heard the learned counsel for the appellant.

8. It has come on record that during the course of the original proceedings, the A.O. had issued a questionnaire to the assessee. In response to the same, the assessee filed reply and attached documents, which were duly considered by the A.O. which is a substantial proof of the fact that the A.O. had made inquiries. It is on the basis of the inquiry that it was concluded that the rental income as shown by the assessee was considered to be "business income" as had been done in the preceding years since the inception of the business of the assessee. However, this finding was not agreed to by the Pr. CIT and the matter was again remitted back to the A.O.

9. However, the ITAT in order to resolve this controversy considered the object and ancillary object as mentioned in the MOA, more particularly, Clauses-3 and 19 thereof and came to the conclusion that the assessee was

authorized to lease out the property which in the instant case had been done in respect of First floor and Second floor, SCO Nos. 126 and 127, Sector 8C, Chandigarh.

10. It was further concluded that the said activity of leasing out was undertaken by the assessee company from the very beginning when those assets were purchased and, therefore, it could not be said that this activity was only for the year under consideration. It was also concluded that even in the earlier years the income received from the leased out properties was considered as “business income” as Clause-19 of the MOA authorized the assessee to lease out the property which was an ancillary activity.

11. It is on this reasoning that the order passed by the A.O. was upheld and we have not been persuaded enough to take a contrary view as the findings so recorded are based on a complete appreciation of Clause-3 as also Clause-19 of the MOA and are in tune with the law laid down by the Hon’ble Supreme Court.

12. The Hon’ble Supreme Court in ***Chennai Properties and Investments Limited, Chennai vs. Commissioner of Income Tax Central III, Tamilnadu***

(2015) 14 SCC 793 held that where the assessee is a company whose main object of business is to acquire properties and to let out properties, the rental income received therefrom was taxable as “income from business” and not “income from house property”.

13. This view was taken after following the ratio of the judgment of the Constitution Bench of the Hon’ble Supreme Court in **Sultan Brothers (P) Ltd. vs. Commissioner of Income Tax AIR 1964 SC 1389: (1964) 5 SCR 807**, wherein it was held that each case has to be looked at from businessman’s point of view to find out whether the letting was doing of a business or the exploitation of the property by the owner. It shall be apposite to reproduce the relevant observations made in **Chennai Properties’s case** (supra) which read as under:-

“9. Before we refer to the Constitution Bench judgment in the case of Sultan Brothers (P) Ltd. v. CIT, AIR 1964 SC 1389, we would be well advised to discuss the law laid down authoritatively and succinctly by this Court in '[Karanpura Development Co. Ltd. v. Commissioner of Income Tax, West Bengal](#) (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, number of judgments of other jurisdictions, i.e. Privy Counsel, House of Lords in England and US Courts were taken note of. The position in law, ultimately, is

summed up in the following words: (Karanpura Development Case, ITR p. 377)

“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.”

10. 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.

11. No doubt in Sultan Brothers (P) Ltd.'s case, Constitution Bench judgment of this Court has clarified that merely an entry in the object 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: (AIR p. 1391, para 7)

“7....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.”

12. 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.”

14. The aforesaid decision was thereafter followed by another Bench of the Hon'ble Supreme Court in ***Rayala Corporation Private Limited vs. Assistant Commissioner of Income Tax (2016) 15 SCC 201*** in which the position of law was succinctly reiterated and followed and it was held as under:-

“9. Upon hearing the learned counsel and going through the judgments cited by the learned counsel,

we are of the view that the law laid down by this Court in the case of Chennai Properties and Investments Ltd. v. CIT (2015) 14 SCC 793 shows the correct position of law and looking at the facts of the case in question, the case on hand is squarely covered by the said judgment.

10. The submissions made by the learned counsel appearing for the Revenue are to the effect that the rent should be the main source of income or the purpose for which the company is incorporated should be to earn income from rent, so as to make the rental income to be the income taxable under the head "Profits and Gains of Business or Profession". It is an admitted fact in the instant case that the assessee company has only one business and that is of leasing its property and earning rent therefrom. Thus, even on the factual aspect, we do not find any substance in what has been submitted by the learned counsel appearing for the Revenue.

11. The judgment relied upon by the learned counsel appearing for the assessee squarely covers the facts of the case involved in the appeals. The business of the company is to lease its property and to earn rent and therefore, the income so earned should be treated as its business income.

12. In view of the law laid down by this Court in the case of Chennai Properties (supra) and looking at the facts of these appeals, in our opinion, the High court was not correct while deciding that the income of the

assessee should be treated as Income from House Property.”

15. Similarly, in ***Raj Dadarkar and Associates vs. ACIT, CC-46 (2017) 14 SCC 476***, the legal position was reiterated in the following manners:-

“17. There may be instances where a particular income may appear to fall in more than one head. These kind of cases of overlapping have frequently arisen under the two heads with which we are concerned in the instant case as well, namely, income from the house property on the one hand and profits and gains from business on the other hand. On the facts of a particular case, income has to be either treated as income from the house property or as the business income. Tests which are to be applied for determining the real nature of income are laid down in judicial decisions, on the interpretation of the provisions of these two heads. Wherever there is an income from leasing out of premises and collecting rent, normally such an income is to be treated as income from house property, in case provisions of [Section 22](#) of the Act are satisfied with primary ingredient that the assessee is the owner of the said building or lands appurtenant thereto. [Section 22](#) of the Act makes ‘annual value’ of such a property as income chargeable to tax under this head. How annual value is to be determined is provided in [Section 23](#) of the Act. ‘Owner of the house property’ is defined in [Section 27](#) of the Act which includes

certain situations where a person not actually the owner shall be treated as deemed owner of a building or part thereof. In the present case, the appellant is held to be “deemed owner” of the property in question by virtue of [Section 27\(iib\)](#) of the Act. On the other hand, under certain circumstances, where the income may have been derived from letting out of the premises, it can still be treated as business income if letting out of the premises itself is the business of the assessee.

18. What is the test which has to be applied to determine whether the income would be chargeable under the head “income from the house property” or it would be chargeable under the head “Profits and gains from business or profession”, is the question. It may be mentioned, in the first instance, that merely because there is an entry in the object clause of the business showing a particular object, would not be the determinative factor to arrive at a conclusion that the income is to be treated as income from business. Such a question would depend upon the circumstances of each case. It is so held by the Constitution Bench of this Court in [Sultan Bros. \(P\) Ltd. v. CIT](#), (1964) 5 SCR 807 and we reproduce the relevant portion thereof: (AIR p.1391, para 7)

“7.... 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."

16. In view of the above settled legal position with which we are duty bound to respectfully agree, more particularly, when we do not find any later and recent contrary view to the aforesaid legal position, no fault can be found with the order of the ITAT. Thus, we are clearly of the opinion that once the property in question is used as business asset and the exclusive business of the assessee-company or firm is to earn income by way of rental or lease money, then such rental income can be treated only as "business income of the assessee" and not as income from "house property".

17. Apart from the above, we notice that no doubt this is a case which falls under the exception laid down in Para 10 (c) of the CBDT Circular dated 20.08.2018. The tax effect otherwise involved in the instant case is barely Rs.8,04,740/- which again dissociates us from interfering with the order passed by the ITAT, more especially, for the reasons as already stated above.

18. In view of the aforesaid discussion, we find no merit in this appeal and the same is accordingly dismissed. ◇

(Tarlok Singh Chauhan)
Judge

(Virender Singh)
Judge

22nd August, 2022.
(krt)