

In the High Court of Judicature at Madras

Dated: 09.10.2012

Coram

The Honourable Mrs.JUSTICE CHITRA  
VENKATARAMAN

and

The Honourable Mr.JUSTICE  
K.RAVICHANDRABAABU

Tax Case (Appeal) Nos. 2336 and 2623 of 2006  
and 2169 of 2008

Commissioner of Income Tax  
Chennai ... Appellant in  
all the appeals

Vs.

M/s. Elnet Technologies Limited  
TS 140, CPT Road  
Taramani, Chennai 113 ... Respondent in  
all the appeals

T.C.(A).Nos. 2336 and 2623 of 2006 :- Tax Case (Appeals) against the the order of the Income Tax Appellate Tribunal, Madras 'A' Bench, dated 6.2.2006 and 12.6.2006 passed in I.T.A.Nos.3203/Mds/04 and 1451/Mds/2002 for the assessment year 2001-02 and 1995-96.

T.C.(A).No. 2169 of 2008 :- Tax Case (Appeal) against the the order of the Income Tax Appellate Tribunal, Madras 'B' Bench, dated 31.10.2002 passed in

I.T.A.No.1606/Mds/1999 for the assessment year 1996-97.

For Appellant : Mr.T.Ravikumar

For Respondent: Mr.C.V.Rajan

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## **JUDGMENT**

**Mrs. Chitra Venkataraman, J.**

The above Tax Case (Appeals) are at the instance of the Revenue against the order of the Tribunal relating to assessment years 2001-02, 1995-96 and 1996-97 respectively by raising the following substantial questions of law:-

"1. Whether in the facts and in the circumstances of the case the Tribunal was right in holding that the income derived from letting out of property to the tenants for the purpose of running a software technology park as 'income from business' in the hands of the owner of the property?

2. Whether in the facts and circumstances of the case, the Appellate Tribunal was right in holding that the income from letting out of building comprising separate modules with up linking facility with VSNL as income from business assessable under Section 28?"

2. T.C.(A). No. 2336 of 2006 was admitted on the above stated two questions of law, whereas, T.C.(A). Nos. 2623 of 2006 and 2169 of 2008 were admitted

only on the second substantial question of law. The Tribunal followed the order made for the assessment year 1996-97 in respect of other two assessment years under independent discussion. The assessee company was granted lease of certain extent of land by Government of Tamil Nadu for a period of 90 years under lease deed dated 18.2.2005. The assessee company is incorporated under the Companies Act. The grant of lease was for the purpose of constructing a Software Technology Park as per G.O.Ms. No. 755, Industries Department dated 26.7.90. The assessee is stated to have constructed the Technology Park which comprised of separate modules with up linking facility with BSNL. The company provided infrastructure facilities for the purpose of running IT company. The main object of the company as evident from the memorandum of association, which is relevant for the purpose of this case reads as under :-

1. To establish and provide facilities and amenities required to run, maintain, manage or administer computer centers for manufacturing or processing software packages and/ or hardware materials and components required for computer industry.
2. To establish and run data processing/computer centers and to offer consultancy and data processing and other services which are normally offered by data processing computer centers to industrial, business and other types of customers and to impart training on electronic data processing, computer software and hardware to customers and others.
3. The objects incidental or ancillary to the attainment of the main objects are given in Part B of the Memorandum of Association, which reads as under:-

1. To purchase, take on lease, acquire, hire, construct, erect, build, repair, demolish and reconstruct, develop, improve and maintain buildings, structures, apartments and to do other similar constructions and for these purposes purchase, take on lease or otherwise acquire and hold any lands and prepare layout thereon and prepare lands for building purposes and preparing building sites by consolidating or connecting or sub-dividing properties or buildings of any tenure or descriptions wherever situated or rights or interests therein or connected therewith and advancing money to and entering into contracts and arrangements of all kind with builders, tenants, occupiers and others for the purpose of achieving the objects mentioned herein.

4. In tune with the objects, the assessee is stated to have given on license the modules consisting of 3500 sq.ft. which contained high tech infrastructural facilities. In respect of income received on such license, the assessee claimed that the said income was assessable as business income. The assessee's claim was however rejected by the Assessing Officer holding that the said income was assessable as income from the property. Aggrieved by the assessment, the assessee went on appeal before the Commissioner of Income Tax (Appeals), who held that the income from the leasing of property, at best, be treated as only income from other sources and not as income from house property nor could be treated as income from business. Referring to the decisions in *Oriental Cotton Corpn. & Mills Ltd. v. CIT* [1993] 202 ITR 370, *Gujarat Ginning & Mfg. Co. Ltd. v. CIT* [1994] 205 ITR 314 and *Universal Plast Ltd. v. CIT* [1999] 237 ITR 454 Commissioner of Income Tax (Appeals) held that the objects of the company never spoke

about the assessee using the module by itself, but it only allowed others to use the facilities on payment. The income was from investment made on modules. Hence, he reasoned out that the income from the assessment could be assessed as income from other sources. The assessee went on appeal before the Income Tax Appellate Tribunal. The Revenue did not file any appeal as against the order of the Commissioner of Income Tax (Appeals) in holding the receipt as income from other sources. Adverting to the Memorandum of Association, the Tribunal held that the main purpose of the assessee company was not letting out a mere building to the clients, but by providing the infrastructural facilities necessary for running the IT company. Referring to the series of case law relied on by the assessee as well as by the Revenue, the Tribunal held that the income could only be assessed as business income. In so holding, it also referred to the decision of the Tribunal in the case of *CIT v. Chennai Properties & Investments Ltd.* [RA. No. 1262 (Mds)/1992 in I.T.A. No. 2922 (Mds)/1985], which was taken on reference before this Court. Thus, the appeal filed by the assessee was allowed. Aggrieved by the order of the Tribunal, the Revenue is on appeals before this Court.

5. Learned standing counsel for the Revenue referred to the Memorandum of Association and pointed out that in the memorandum, there is no clause or reference about assessee leasing out the property as business proposition and that the income could be treated as income from business. Referring to the decisions in *CIT v. Chennai Properties & Investments Ltd.* [2004] 266 ITR 685, he submitted that when the assessee having the lease for 90 years, exploited the property by constructing modules with all infrastructure facilities for use by IT companies and

leasing out the same and realized the income by way of rent. The said rental income was to be assessed only as the income from house property. Referring to the decision of the Apex Court in *Sultan Bros. (P.) Ltd. v. CIT* [1964] 51 ITR 353, which was applied by this Court in the decision *Chennai Properties & Investments Ltd. (supra)*, learned standing counsel for the Revenue submitted that the Tribunal committed an error in holding that the income from the lease property would only be treated as income from business. He also referred to the decision in *CIT v Chennai Properties & Investments Ltd.* [2008] 303 ITR 33 (Mad.), *CIT v Ideal Garden Complex (P.) Ltd.* [2012] 340 ITR 609, *CIT v. Chennai Properties & Investments Ltd.* [2005] 274 ITR 117, *Shambhu Investment (P.) Ltd. v. CIT* [2003] 263 ITR 143 in support of his contention that the income received on leasing of the property with all the facilities could not be taken otherwise as income from other sources or as income from business.

6. Per contra, learned counsel for the assessee supporting the order of the Tribunal pointed out that when the Commissioner of Income Tax (Appeals) had held that the income had to be assessed only as income from other sources, admittedly, the Revenue had not challenged the reasoning of the Commissioner of Income Tax (Appeals) and it was the assessee, who preferred the appeal to the Tribunal. Thus, as far as the Revenue is concerned, the reasoning of the Tribunal is binding and in the event of this Court not upholding the order of the Tribunal, the income would be assessable as income from other sources.

7. Leaving that aspect aside, admittedly, the objects of the company clearly pointed out that the purpose

of formation of the company was for establishing and providing facilities so as to lease it out to others for running a computer software company. Going by the objects, the irresistible conclusion is that the income earned is only business income and no fault could be found on the decision of the Tribunal. He further pointed out the decision of the Apex Court in *Sultan Bros. (P.) Ltd. (supra)* and submitted that the question is as to whether the income could be taxed as business income or otherwise has to rest on the various clauses of the Articles of Association particular concern. Thus, on reading the memorandum of association, he submitted that rightly the Tribunal came to the conclusion that the income has to be assessed only as income from business.

8. Heard learned standing counsel for the Revenue as well as learned counsel for the assessee and perused the materials available on record.

9. In the decision in *Sultan Bros. (P.) Ltd. (supra)*, the Apex Court pointed out that the question as to whether particular letting is business or not has to be decided in the circumstances of each case. The Apex Court pointed out that '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'.

10. The said decision was applied in the decision in *S.G. Mercantile Corpn. (P.) Ltd. v. CIT [1972] 83 ITR 700 (SC)*, wherein the Supreme Court pointed out that the liability to tax under Section 9 of the Income Tax Act, 1922 is of the owner of the buildings or land appurtenant thereto. In case the assessee is the owner of the buildings or lands appurtenant thereto,

he would be liable to pay tax under Section 9 even if the object of the assessee in purchasing the landed property was to promote and develop a market thereon. The Apex Court pointed out that the ownership of property and leasing it out may be done as a part of business, or it may be done as land-owner. Whether it is the one or the other must necessarily depend upon the object with which the act is done. It further pointed out that, 'the distinct heads specified in section 6 indicating the sources are mutually exclusive and income derived from different sources falling under specific heads has to be computed for the purpose of taxation in the manner provided by the appropriate section'. Referring to the decision in *East India Housing & Land Development Trust Ltd. v. CIT* [1961] 42 ITR 49 (SC), the Apex Court pointed out that if the income from a source falls within a specific head set out in section 6, the fact that it may indirectly be covered by another head will not make the income taxable under the latter head. Thus, holding the Supreme Court held that the paramount consideration which would weigh is whether the acquisition of the property was by way of investment and whether the property was let out because of the assessee having a title in the same or whether the acquisition and letting out of the property constituted the business and trading activity of the assessee.

11. In considering whether the income arising on the leasing of the property was business of the assessee, one has to get into the nature of the business of the assessee to find out the receipts are assessable under the head of income from house property or as business income and if receipts does not fall in any of those classified heads, would fall consideration under the residuary head of income as income from other sources.

12. In the decision in *Chennai Properties & Investments Ltd. (supra)*, this Court elaborately considered the decisions on the subject and on facts, came to the conclusion that as the owner of the building, the rental income received by the assessee on exploiting the property by letting out the same was liable to be assessed under the head 'Income from house property'. A reading of the decision referred to above thus shows a common thread of reasoning that in deciding whether the income on leasing out the property could be treated as income from property or business, the question has to be considered in the circumstances of each case and in the case of assessee being a company, the question has to be considered in the background of the object of the company and whether it is for leasing out the property or as a business to earn income.

13. Applying the said rulings to the facts of the case, on going through the articles of association, we agree with the contention of the assessee that the income received from the leasing out of the property with all amenities and facilities would be income from business only and can not be assessed either as income from house property or as income from other sources.

14. We had extracted in preceding paragraphs the main objects of the company as contained in Clauses (1) and (2) of Part A. A reading of Clauses (1) and (2) of Part A shows vast difference between two clauses. Clause(1) of Part A is regarding objects as to establish and provide facilities and amenities required to run, maintain, manage or administer computer centers for manufacturing or processing software packages and/or hardware materials and components required for computer industry. Clause (2) is regarding

establishing and running of a data processing/computer centers and to offer consultancy and data processing and other services which are normally offered by data processing computer centers to industrial, business and other types of customers and to impart training on electronic data processing, computer software and hardware to customers and others. Thus, in contradistinction to clause (2) which is about establishing and running data processing/computer centers, clause (1) is to establish and provide facilities required to run the computer industry. If the assessee is intended to establish and provide for facilities for running computer industry by assessee itself, then clause (1) would have been worded differently in similar line as worded in Clause (2) of Part A. Considering the difference in the language in clauses (1) and (2) of Part A, we have no hesitation in accepting the plea of the assessee that leasing of the modules with all facilities is part of the business of the assessee. Clause (1) of part A of the memorandum of Association is specific and relevant clause.

15. To achieve the object of Clause (1) of Part A, Clause (1) of Part B provides for objects which are incidental or ancillary to the attainment of the main objects. Clause (1) of Part B enables the company to take on lease, acquire, hire, construct, erect, build, repair, demolish and reconstruct, develop, improve and maintain buildings, structures, apartments and to do other similar constructions and for these purposes purchase, take on lease or otherwise acquire and hold any lands and prepare layout thereon and prepare lands for building purposes and preparing building sites by consolidating or connecting or sub-dividing properties or buildings of any tenure or descriptions wherever situated or rights

or interests therein or connected therewith and advancing money to and entering into contracts and arrangements of all kind with builders, tenants, occupiers and others for the purpose of achieving the objects mentioned herein.

16. Thus, read in the context of Clause (1) of Part B and Clause (1) of Part A, we hold that when the company had taken lands on 90 years lease with the objects of constructing I.T. Company with all its infrastructural facilities, the same was for the purpose of establishing and providing the amenities required to run, maintain, manage or administer computer centers for manufacturing or processing software packages and/ or hardware materials and components required for computer industry, to exploit it as a business proposition. In the face of these clauses, we have no hesitation in confirming the order of the Tribunal, thereby, holding that the lease rentals are assessable as business income only. In the circumstances, rejecting the Tax Case (Appeals). No costs.

(C.V.,J)

(K.R.C.B.,J)

Index : Yes/No

09.10.2012

Internet : Yes/No

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To

1. The Commissioner of Income Tax, Chennai
2. The Income Tax Appellate Tribunal, Madras A bench  
Chennai
3. The Income Tax Appellate Tribunal, Madras B bench

Chennai

CHITRA VENKATARAMAN,J.  
AND  
K.RAVICHANDRABAABU,J.

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Tax Case (Appeal) Nos.2336 & 2623  
of 2006 and 2169 of 2008

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