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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: March 25,2015

\+ **ITA 43/2014**

NIAGARA HOTELS & BUILDERS (P) LTD ….Appellant

Through Mr. Ajay Vohra, Sr. Adv. with Ms. Kavita Jha and Ms. Shraddha, Advs.

versus

COMMISSIONER OF INCOME TAX ….Respondent

Through Mr. Kamal Sawhney, Sr. Standing Counsel, Mr. B. Chakraborty and Mr. Mukul Mathur, Advs.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K.GAUBA

MR. JUSTICE R.K.GAUBA

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1. This appeal under Section 260-A of Income Tax Act, 1961 (hereafter referred to as "the Act") has been preferred by the assessee questioning the correctness of the view taken by the Income Tax Appellate Tribunal (hereinafter referred to as "the ITAT") in its order dated 30.04.2012 deciding ITA No. 901/Del/2012 and rejecting the contention of the appellant that the income claimed as rent from "space antenna" in respect of the top terrace of property described as Vikram Tower, 16, Rajendra Place, New Delhi (hereinafter referred to as "the property"), in the sum of ₹38,23,281/- for the assessment year 2008-09 was "income from house property" and instead treating it as "income from other sources".

2. The following question of law arises for consideration:-

> *" Whether on the facts and in the circumstances of the case and in law, the Tribunal erred in holding that rental income of ₹38,23,281/- earned by the appellant from terrace floor/roof area was assessable under the head "Income from other sources", as opposed to "Income from house property" returned by the appellant?"*

3. The assessee is a company incorporated under the Companies Act, 1956 having its registered office at G-6 and 7, Vikram Tower, 16, Rajendra Place, New Delhi. It is the absolute owner of the terrace floor of the property. On 31.10.2007, it entered into a formal arrangement styled as "Leave and Licence Agreement" with M/s Arvind Mills Ltd. (Telecommunication), a company incorporated under the Companies Act having corporate office at 3rd Floor, "Lingfield Plaza", S. No. 66/67, Salunke Vihar road, Wanowrie, Pune – 411 040. By virtue of the said agreement, the assessee company gave on "licence" the terrace floor as the "space for mounting a tower/mast and antenna and gen set in addition to covered space admeasuring 132 Sq. Ft. for installation of radio trunking related equipment", described in the document as "the licensed space", on a monthly licence fee on terms specified in the agreement, inclusive of payment of interest-free security deposit of ₹3,03,000/-, refundable at the time of discontinuation of the use of the space by licensee, inclusive of maintenance charges but exclusive of electricity and water charges (worked out "on the basis of present rate of house tax, etc." and subject to increase "in case the rates of taxes are increased") for ten years at ₹74,000/- for the period 01.11.2007 to 31.10.2010, at ₹85,000/- for the period 01.11.2010 to 31.10.2013, and ₹98,000/- for the period November, 2013 to 31.10.2017.

4. In terms of the above-mentioned agreement, the licence fee is payable in advance on or before 10th day of each English calendar month; the licensee is to pay charges for the electricity as per the actual consumption; licence is to terminate in case of default in payment of licence fee for a period of four months or more; and the licensee is to comply with the bye-laws, rules and regulations of the Municipal Corporation/local authorities and use the licensed space for radio-based communication and service subject to rules and regulations prescribed by the appropriate/statutory authorities. The licensee was permitted by the agreement to make a minor masonry work in the licensed space to install tower/mast and antenna equipments but not so as to cover the portion of the open space nor allow its use to any third party, with the exception of "sister concerns or subsidiaries". The terms stipulate that the licensee shall permit the licensor or its authorized agents to enter into the licensed space during the working hours upon reasonable notice for the purpose of viewing its condition, reserving the right of the licensor to carry out, without any objection or hinderance as the part of licensee, necessary repairs, alterations or improvements of the licensed space including for laying water pipes, drains, etc.

5. The agreement further stipulated that the tenure of the licence and its renewal would inure and stand transferred in case the title to the property changes hands without in any way "imparing the rights and privileges of the licensee". It contained an express understanding that the licence only allows "bare use and occupation of the licensed space" but so as never to confer the status of "lessee" unto the licensee, the right for passage for ingress into and egress from the licensed space to be subject to the

prescription of the licensor. The licensee, however, is permitted to deploy on 24-hours basis its own security guard with stipulation that the legal possession of the licensed space shall "always remain with the licensee".

6. The case of the appellant-assessee was taken up for assessment under Section 143(3) of the Act. The Assessing Officer (AO) by his order dated 27.12.2010 rejected the claim of the appellant regarding the income of ₹38,23,281/- on account of "rent from space and antenna" being income from house property. He noted that the property of Vikram Tower had been reflected in the fixed assets of the assessee company and the space for antenna shown in the financial statements as "stock-in-trade". By order sheet entry dated 30.11.2010, the assessee was called upon to show cause as to why this income be not treated as business income, since it had been derived from the property held as stock-in-trade.

7. The AO eventually held against the assessee and, *inter alia*, observed that the assessee is a builder/developer, the primary objective of its business being to purchase, develop and sell various properties, renting parts of the property (stock-in-trade) held by it being "only an incidental activity", and indulged in only till such time such properties were actually sold, and thus, it was engaged primarily in "complex commercial activities". The AO ruled that merely because the person is the owner of the property, it does not necessarily follow that income generated therefrom must be assessed as income from house property. In his view, for such purposes, it has to be found out as to what is the character of the property and what is the purpose for which it is used. He held that since the property was reflected as a "commercial asset", income derived therefrom will have to be assessed as business income. Referring to the ruling of Supreme Court in *CIT v.*

National Storage Pvt. Ltd. (1967) 66 ITR 596, the AO observed that the question of exploitation of the property for purposes of commerce or business is material and that it requires to be seen whether the assessee is carrying on any business in the nature of trade, commerce or manufacture.

8. The appellant-assessee was aggrieved and, thus, took out an appeal before Commissioner of Income Tax (Appeals) [hereinafter referred to as "the CIT (Appeals)"]. It submitted that the crucial test is as to what is the primary object "in exploiting the property" as against the primary object of the activities in which the assessee "company" was engaged. The assessee pointed out that it had entered upon arrangement in above nature respecting the licensed space as owner of the property and would sell only such portions of the property as it was legally permitted to do. It also submitted that only such portions of the property had been let out (to government departments or other public utility organizations) which it was not legally or contractually permitted to sell and, thus, there was no question of "turning the let out property to account". It was also submitted that the assessee (i.e. licensor vis-à-vis the agency to which the licensed space has been given) was not required to render any services.

9. The appeal was allowed by the CIT(Appeals) taking note of, amongst others, the law laid down by the Supreme Court in the case of *Karanpura Development Co. Ltd. v. CIT* (1962) 44 ITR 362. The CIT (Appeals) noted that for scrutiny of such claim as at hand, it required to be examined as to whether the assessee could exploit the property as its owner; as to what was the dominant object of letting out the property; as to whether the income was earned as owner of the property or some further activities/services were

involved; and, as to whether any complex commercial activity is involved in letting out the property.

10. On the basis of material examined, the CIT (Appeals) concluded as under:-

> *"...the appellant had let out the structures on the terraces of the buildings to various companies and government departments for housing their communication equipments and antennas and did not render any other services to them. It is also a fact that the appellant was not entitled to sell any space on the terraces of the buildings. Therefore, it had to exploit the property as owner only and it was not an interim arrangement to let out the property pending final sale. The dominant object of the letting out was to enjoy and utilize the property as owner. No complex commercial activity was involved in the process of earning rental income ..."*

11. The CIT (Appeals) also rejected the contention of the Revenue founded on the fact that the property in question is shown as stock-in-trade holding that such classification by itself would not change the true character of the receipts for purposes of taxation and took note of the fact that the income on this account had been claimed as "income from house property" and consistently so accepted by the AO while completing the assessment under Section 143(3) for the preceding six years. Observing that nothing had been brought on record to suggest that facts for the period in question in any manner differed from those prevailing in the previous years, she upheld the contentions of the assessee and allowed the deduction in terms of Section 24 (a) of the Act.

12. The Revenue questioned the correctness of the order of the CIT (Appeals) by ITA No. 901 (Del)/2012 before the ITAT which reversed the findings recorded by the first appellate authority, treating the income in

question as neither income from house property nor "income from business" and instead classifying it as "income from other sources" through reasoning set out in Para 2.6 of its order as under:-

> *"2.6 In order to answer the aforesaid question, it is necessary to find out the true nature of the asset as to whether it is a fixed asset or stock-in-trade. The admitted facts in this connection are that the assessee has been renting the space and small rooms constructed on terraces for the last 9 years. Thus, the intention is not to sell the space on the terrace as stock-in-trade but hold on to it as a fixed asset. Therefore, it is held that the asset has been wrongly classified in accounts and for the purpose of law it should be taken as a fixed asset. Now, we have to decide as to whether the space and small rooms on the terraces constitute house property, i.e., building and land appurtenant thereto. The space on the terrace is taken on rent for mounting antennae and other instruments for reception of electro-magnetic signals or transmission thereof. For this purpose open pieces of land can also be taken on hire. However, that would require construction of high towers on which the instruments and antennae may be mounted for reception or transmission of electromagnetic signals so as to avoid obstruction by buildings in the vicinity. The terraces are found most suitable as they obviate the necessity of constructing towers to avoid shadow region occurring on account of obstruction from tall buildings in the vicinity. Thus, in essence the main purpose of hiring terraces is to have open space for mounting antennae and other instruments. The terrace does not have any appurtenant land. Therefore, the agreement of renting and hiring terraces is in essence an agreement of hiring space and not building and land appurtenant thereto. The existence of small rooms on the terrace is incidental to hiring the space as some spare parts may have to be kept there and the personnel attending to the antennas may use them for routine servicing and repairs. ...the income is rightly assessable either as business income or income from other sources and not as property income. From the facts brought on record, it transpires that the letting out is*

> *for three years but extendable up to 9 years on the option of the parties. Therefore, it is not a case where systematic activity of lending space is being carried out so as to render it as a business activity. Thus, the income is rightly assessable under the head "income from other sources". It may be mentioned here that Tribunal will be within its right to correct the head of income although it may not be in a position to enhance the income. Treating the income to be taxable under the residuary head as against the business income as taxed by the AO does not lead to enhancement of income. Therefore, we are entitled to correct the head of income."*
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> [emphasis supplied]

13. As observed in the majority view in *Nalinikant Ambalal Mody v. CIT* (1966) 61 ITR 428 (SC), the issue as to whether an income falls under one head or another has to be decided according to the common notions of practical men, for the Act does not provide complete guidance in such regard.

14. In rejecting the claim of the assessee in the case at hand treating the receipts in question as either income from business or income from other sources, reference has been made to the rulings in the cases reported as *CIT v. National Storage Pvt. Ltd.* (supra) and *Mukherjee Estate (P.) Ltd. v. Commissioner of Income-tax* (2000) 244 ITR 1 (Cal.), but improperly so.

15. In *National Storage Pvt. Ltd.* (supra), the assessee had purchased a plot of land and constructed thereon a building in the nature of godown. In the super-structure, thus built, certain vaults were developed with the objective of making them available on licence basis to film distributors for storing cinema films, the ground floor being reserved for purposes of examination, cleaning, waxing and rewinding of films. The licensees were permitted access to the vaults, the entry being regulated and the exclusive

possession of the premises retained by the licensor. The assessee/licensor was responsible for maintaining a regular staff, *inter alia*, providing services in the nature of fire-proofing, railway booking counter, canteen, etc. Against this factual backdrop, it was held that the income derived was not income generated from the exercise of property rights but on account of carrying on trade. Holding that the letting out of the space from which the assessee derives income has to have a definite and identifiable nexus with the business of the assessee, it was ruled that such income was bound to be treated as income from business and not as income from house property. The court held that the assessee was in occupation of the entire premises and providing special services to the licensee. Thus, the fee received was held to be income derived not from the exercise of property rights but in the nature of income gained from carrying on an adventure or concern in the nature of trade.

16. In *Mukherjee Estate (P.) Ltd.* (supra), the issue concerned income generated by the assessee by letting out space for putting up hoardings for display of advertisements. Noticeably, there was an irrefutable finding of fact recorded by the ITAT that it was the hoardings which had been let out instead of space on the roof for putting up all such hoardings. In these facts and circumstances, the Calcutta High Court took the view that the income from the hoardings could not be taken as income from house property since hoardings were not part of the building.

17. In *Karanpura Development Co. Ltd.* (supra), the Supreme Court had ruled as under:-

> *"Ownership of property and leasing it out may be done as a part of business, or it may be done as landowner. Whether it is*

the one or the other must necessarily depend upon the object with which the act is done. It is not that no company can own property and enjoy it as property, whether by itself or by giving the use of it to another on rent. Where this happens, the appropriate head to apply is "Income from property' ...even though the company may be doing extensive business otherwise. But 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... 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"

[emphasis supplied]

18. The above view was reiterated in *S.G. Mercantile Corporation P. Ltd. v. CIT* (1972) 83 ITR 700 (SC).

19. The crucial test is as to whether the letting out has a definite nexus with the business of the assessee. In our opinion, the approach of both the AO and the ITAT in the case at hand has been totally misdirected. Wrong classification of the licensed space in the books of account as stock-in-trade cannot change the character of the transaction concerning its eventual exploitation. The use of the expression "leave and licence" in the agreement entered with M/s Arvind Mills Ltd. (Telecommunication) may be debatable. The fact remains that the use of the terrace floor has been handed over to the licensee not only for setting up the tower/mast on which antenna is to be mounted but also for construction of a room where the watch/ ward staff can be stationed and space used for storage purposes.

20. Unlike the case of *Mukherjee Estate (P.) Ltd.* (supra) where no space on the terrace floor was let out (the income generated being restricted to the

display of advertisement on the hoardings provided), in the case of the assessee here, the licensee is virtually given exclusivity in utilizing the terrace floor for achieving the objectives set out in the agreement. There is no parallel with the case of *National Storage Pvt. Ltd.* (supra), where the giving of vault spaces in the building developed was the dominant purpose of the business activity undertaken by the assessee.

21. In the case at hand, the building the top terrace of which is the subject of focal attention here has been developed for its various portions to be sold or let out with no possibility of the terrace floor being subjected to such utilization. The assessee continues to be the owner of the terrace floor. It has conceivably no other purpose to be served by such property as is held on the terrace floor, except the exploitation of the licensed space for gaining the income that cannot be treated as either income from business or income from other sources. The income was thus rightly returned as income from house property.

22. We do not approve of the logic employed by ITAT in rejecting the claim of it being income from house property. The terrace floor cannot exist in the air. It is part of the building which has been constructed on the land beneath the super-structure. It is, therefore, not correct to hold that the terrace does not have any appurtenant land. We, therefore, reject the conclusion of ITAT that the agreement of renting and hiring terrace is in essence for hiring space and not hiring building or land appurtenant thereto.

23. For the above reasons, we answer the question of law in the affirmative in favour of the assessee. In the result, we set aside the impugned order passed by ITAT and restore the view taken by the CIT (Appeals).

24. The appeal stands disposed of accordingly.

R.K.GAUBA
(JUDGE)

S. RAVINDRA BHAT
(JUDGE)

MARCH 25, 2015
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