IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: A: NEW DELHI

BEFORE SHRI G.S. PANNU, HON'BLE VICE PRESIDENT
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA Nos. 4199/Del/2014 & 2335/Del/2016
Assessment Years: 2010-11 & 2012-13

Active Securities Ltd, 17 B, MGF House, Asaf Ali Road, New Delhi 110002.	Vs	ITO, Ward-1(2), Range-1, New Delhi.

PAN: AAACA5733B

(Appellant) (Respondent)

Assessee by	:	Shri Puneet Agarwal, Adv. Shri Rishabh Mishra, Adv.
Revenue by	:	Shri Kanv Bali, Sr. DR
Date of Hearing	:	28.02.2024
Date of Pronouncement	:	27.05.2024

ORDER

PER ANUBHAV SHARMA, JM:

Both the appeals filed by the asssessee are against the impugned orders dated 10.06.2014 & 09.03.2016 u/s. 143(3) (ii) of the Income Tax Act, 1961 (hereinafter referred as 'the Act') passed by Commissioner of Income Tax –I & IV, New Delhi (Appeals or hereinafter referred as the Ld. First Appellate Authority) in Appeals against an assessment orders dated 21.03.2013 & 12.11.2014 passed by Income Tax Officer, Ward 1(2), Range-1, New Delhi, (hereinafter referred as the

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Assessing Officer or in short AO) passed u/s. 143(3)(ii) of the Act, for the Assessment Years 2010-11 & 2012-13 respectively.

2. The assessee company is a limited company engaged in the business of construction of commercial complex and to act as builders, colonizers etc. The case of assessee is that it has constructed a commercial complex on a plot of land measuring 1.447 acres in Shikandarpur Chowk, Sector-28, Gurgaon, Haryana, consisting of offices spaces along with amenities and other infrastructure facilities. Since the complex could not be sold at due to lull period prevailing in the real estate market the assessee vide a 'Commercial Lease Agreement' dated 14.07.2008 leased a part of the commercial complex measuring 1,56,451 per sq feet of the area to Emaar MGF Land Ltd., (hereinafter further referred as 'Emaar MGF') @ Rs. 80 per sq feet, which was later on reduced retrospectively w.e.f 01.04.2009 to Rs. 60 per sq feet vide a rectification deed of lease dated 10.01.2010. During the year under consideration the assessee offered lease rental of Rs. 10,87,64,735/- for A.Y. 2010-11 and Rs.5,00,09,463/- for AY 2012-13received from Emaar MGF.

3. The Assessing Officer was of the view that the rental income is actually income from house property and not business income or income from other sources. The Assessing Officer granted standard deduction of 30% as per Section 24 of the Act. The Assessing Officer further disallowed certain expenses claimed by the assessee in return of income.

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4. The case of the assessee is that there was composite rent received which included not only rent of premises but also includes various services which were suppose to be rendered like electricity, telephone lines, fax lines, water, repair & maintenance, insurance & carpentry repairs etc. It was also submitted to the Assessing Officer that in the audited account assessee company has claimed various expenses which have been incurred for providing various facilities/services as the composite rent includes various services. It was also submitted that after the rectification deed of 01.04.2009 when rent was reduced from Rs. 80 per sq feet to Rs. 60 per sq feet it was agreed that the tenant shall be liable to pay electricity charges also as per meter reading. The assessee company claimed that the reduction in rent was carried out with a view that user shall bear various expenses which were earlier incurred by the assessee company. It was particularly mentioned that post this rectification deed the services are limited to providing of elevator services and other miscellaneous services.

4.1 The Assessing Officer having examined the nature of services concluded that the services are so grouped that they are inseparable from letting out of the building premises or the other party will not accept the letting out without the provision of these services. The AO observed that services are not critical for the letting of the premises and even Emaar MGF also does not mention in the agreement that without the provision of the services the letting is not acceptable. The AO concluded that services are basic amenities and cannot be said to be

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substantive in themselves to fall into separate head of income as letting out of the premises as per the agreements is not dependent on provisions of these services. Relaying various judicial decisions the AO concluded that the rental income is not the business income of the assessee company but income from house property and further deprecation on the same was also not allowable. It was held that, depreciation shall be disallowed for AY 2010-11 and no allowance for depreciation for AY 2009-10 shall be accorded to the assessee company.

5. In appeal before the CIT(A), on behalf of assessee same set of arguments as before the AO were raised. It was further submitted that leasing out of commercial property should be considered under the head business income as the object of the assessee is to lease out the commercial complex for the purpose of commercial use which is based on the intention of the assessee to remain in its business and to exploit the commercial asset for commercial purpose only. It is also submitted that the lease income from other assets i.e. other than building cannot in any way be taxed under the head income from house property and they can be taxed either under the head business income or income from other sources. It was submitted that the action of AO in not accepting the composite rent of all assets and treating the same as income from house property is beyond the provisions of Act. In this context, it was submitted that in A.Y. 2010-11 AO has disallowed the depreciation of Rs. 6,98,81,906/- which includes depreciation of Rs. 2,81,24,572/- on assets other than building on the belief that entire income from leasing of business assets

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is income from house property. The CIT(A) was not satisfied and concluded as follows:-

5.3 I have carefully considered the submissions of the Ld. AR and perused the order passed by the AO. I find that the assessee has rented out the premises (which is a commercial complex) along with all interiors furnishing, installations etc. during the previous year 2009-10 and has earned rental income out of it. I have also perused the detail of assets submitted by the appellant. I find that the appellant has rented out the the part of the commercial complex admeasuring 1,56,451 square feet of the area @ Rs.80 per square feet vide commercial lease agreement dated 14.7.2008. Thereafter, the appellant entered into an amendatory and rectification lease deed dated 10th January, 2010 with retrospective effect from 1.4.2009 by which the rate of rent was reduced from Rs.80 per square feet to Rs.60 per square feet on the stipulation that the user shall be liable to pay electricity charges as per meter billing and power backup charges for running DG set and water charges as per meter reading. On perusal of clause 3 and clause 4 of the amendatory agreement, I find that the reduction in the rent was on account of miser position of the user and not that the user will incur expenses for the services provided by the appellant. It is a normal practice that the electricity charges, water and other consumable are to be borne by the user and not by the appellant.

5.3.1 The contention of the appellant that it has incurred expenditure for the various services provided is not borne from the record. I find that schedule XI of the audited account of the appellant company shows the following expenditure:

Head	*For the year ended March 31, 2010 (Rs.)*	*For the year ended March 31, 2009 (Rs.)*
Legal & Professional Charges	*4,66,235*	*2,33,781*
Auditor's remuneration	*11,030,*	*5,515*
Rates & taxes	*3,680*	*2,75,429*
Communication Expenses	*-*	*6,606*
Freight & Octroi	*-*	*1,05,970*
Office maintenance expenses	*-*	*4,000*
Business promotion expense	*-*	*14,754*
Printing & Stationary	*-*	*14,754*
Repair &Maintenance	*9,65,411*	*1,09,089*
Fuel Charges	*-*	*92,57,613*
Consumables	*-*	*5,650*
Insurance	*4,23,739*	*2,21,451*
Total	*18,70,098*	*1,13,63,816*

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It can be seen from the above table that the appellant has not incurred any expenses during the year under consideration on account of communication, office maintenance, fuel charges and consumables. Thus, the claim of the appellant that the rent received was a composite income is not correct and not borne from the facts on record. The lease deed was in respect of the building and lease rent was fixed @ Rs.80 per square feet vide lease deed dated 14.7.2008 which was later on reduced to Rs.60 per square feet vide amendatory lease deed dated 10.1.2010 with retrospective effect from 1.4.2009. The lease deed does not mention that the rate fixed per square feet was partly for the building and partly for any other assets. I find that the kind of services being provided by the appellant company are routine in nature and none of the services so provided are of such kind that they can be considered inseparable from the letting out of the building for rent. I further find that the lease deed was in respect of the building and in order to lease out the building, the appellant provided certain amenities as part of the building as without these amenities, the user would have not taken the building on rent. Therefore, I do not find any merit in the submissions of the Ld. AR that the rent received by the appellant was a composite income and should be apportioned between the building and other assets. In view of the above discussion, the submissions of the Ld. AR are rejected.

5.4 find that the case laws relied upon by the Ld AR are not applicable to the facts of the case as they were decided on different facts. Therefore, the same are distinguished on facts. Further, I find that the Hon'ble Jurisdictional High Court of Delhi has considered the issue of taxability of income from house property in the case of CIT Vs. Ansal Housing Finance & Leasing Co. Ltd. in ITA No. 18/1999 and ITA No. 56-57/2001 in their judgment dated 31.10.2012. Their lordships have discussed the whole jurisprudence on the issue in detail in para 6 to 15. For the sake of the convenience, the same are reproduced as follows:

> *6. This Court has considered the submission of parties. In East India Housing & Land Development Trust (supra) the assessee, incorporated with the object of buying and developing landed properties and promoting and developing markets, purchased land in Calcutta and set up a market. The question was whether the income realized from the tenants of those shops taxable as "business income" under section 10 of the Income-tax Act or "income from property" under Section 9. The Supreme Court held that the income derived by the company from shops and stalls was income received from property and fell under the specific head described in Section 9. The character of that income was not altered either because it was received by a company with the specific object of setting up markets, or because the company was required to obtain a licence from the Municipality to maintain sanitary and other services, and resultantly had to maintain staff and to incur expenditure. The income did not become "profits or gains" from business within the meaning of Section 10. The character of the income altered merely because some stalls were occupied by the same occupants and the remaining stalls were occupied by a shifting class of occupants. The primary source of income from the stalls was the occupation of the stalls and it*

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was a matter of little moment that the occupation which was the source of income was temporary. It was held that:

"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 subletting 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 I with, its property, it: is possible to say on which side the operations fall, and to what head the income is to be assigned.

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 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" (s. 9), 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 The cases which have been cited in this case both for and against the assessee company must be applied with this distinction properly borne in mind. 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. The Californian Copper Syndicate case ((1904) 5 T. C 159) illustrates vividly dealings with mineral rights and concessions by a company as part of the objects of its business, or, in other words, in the doing of the business. The Calcutta cases and the case of Fry v. Salisbury House Estate Ltd. (1930 A. C. 432) illustrate the contrary Proposition. There, the property, though dealt with by a company intending to do business, was dealt with as landowner. The intention in those cases was not to derive profit by business done with those properties but to derive income by renting them out Where a Company acquires properties which it sells or leases out with a view to acquiring other properties to be dealt with in the same manner, the company is not treating them as properties to be enjoyed in the shape of rents which they yield but as a kind of circulating capital leading to profits of business, which profits may be either enjoyed- or put back into the business to acquire more properties for further profitable exploitation."

7. In Sultan Bros (P.) Ltd. v. CIT[1964] 51 ITR 353 the Supreme Court held that: "It seems to us that the inseparability referred to in sub-section (4) is an inseparability arising from the intention of the parties. That intention may be ascertained by framing the following questions : Was it the intention in making the lease-and it matters not whether there is one lease or two, that is, separate

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leases in respect of the furniture and the building-that the two should be enjoyed together ? Was it the intention to make the letting of the two practically one letting ? Would one have been let alone and a lease of it accepted without the other ? If the answers to the first two questions are in the affirmative, and the last in the negative then, in our view, it has to be held that it was intended that the lettings would be inseparable. This view also provides a justification for taking the case of the income from the lease of a building out of section 9 and putting it under section 12 as a residuary head of income. It then becomes a new kind of income, not covered by section 9, that is, income not from the ownership of the building alone but an income which though arising from a building would not have arisen if the plant, machinery and furniture had not also been let along with it.

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whether a particular letting is business has to be decided in the circumstances of each case. Each case has to be looked at from a businessman's point of view to find out whether the letters was the doing of a business or the exploitation of his property by its owner."

8. In S G. Mercantile Corpn. (P.) Ltd. v. CIT AIR 1972 SC 732 it was held that: "It is noteworthy that the liability to tax under section 9 of the Act is of the owner of the buildings or lands appurtenant thereto. In case the assessee is the owner of the buildings or lands appurtenant thereto, he would be liable to pay tax under the above provision even if the object of the assessee in purchasing the landed property was to promote and develop market thereon. It would also make no difference if the assessee was a company which had been incorporated with the object of buying and developing landed properties and promoting and setting no markets thereon. The income derived by such a company from the tenants of the shops and stalls, constructed on the land for the purposes of setting up market, would not be taxed as "business income" under section 10 of the Act... "

9. Again, in the case of CIT v. Vikram Cotton Mills Ltd. AIR 1988 SC 460. it was observed that whether a particular income is income from business or from investment must be decided according to the general commonsense view of those who deal with those matters in the particular circumstances and the conduct of the parties concerned. In O. Rm. Sp. Sv. Firm v. CIT[1960] 39 ITR 327 the Madras High Court held that:

"Under the Indian Income-tax Act, 1922, the income of an assessee is one and section 7 to 12 of the Act direct the modes in which the income-tax is to be levied. No one of those sections can be treated to be general or specific for the purpose of any particular source of income. They are all specific and deal with the various heads in which an item of income, profits and gains of an assessee falls. These sections are mutually exclusive and where an item of income falls specifically under one head it has to be charged under that head and no other."

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No doubt in that case the learned judges had to decide whether the interest on securities, which fall under section 8 of the Income-tax Act, also came within the scope of section 10 of that Act. But what applies to section 8 obviously also applies to section 9 in relation to section 10. What has to be computed for purposes of assessment under section 9 cannot be brought within the scope of section 10 of the Income-tax Act. With reference to the interest on securities what the Supreme Court laid down was :

"Income from interest on securities falls under section 8 of the Act and not under section 10; it cannot be brought under a different head of income, viz., profit and gains of business under section 10, even though the securities are held by a banker as part of his trading assets in the course of his business."

Therefore, the fact that the house properties in question constituted the stock-in-trade or the trading assets of the assessee firm made no difference to the question, was the income from these properties assessable under section 9 or under section 10 of the Income-tax Act. It was assessable only under section 9, and it was correctly assessed under section 9 of the Income-tax Act in the course of the proceedings to assess the assessee to income-tax."

10. In Karan Pura Development Co. Ltd. v. CIT[1962] 44 ITR 362 (SC) the Supreme Court indicated the possibility that the ownership of property and leasing it out may be done either as part of business or as landowner. The relevant observations, are as follows:

"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" (s. 9) 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 of 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 the business, cannot be said to treat them as landowner but as trader."

11. This court is conscious about indivisibility of the levy of income tax, which are neither general or specific for the purpose of any source of income, as held in United Commercial Bank Ltd. v. CIT[1957] 32 ITR 688. where the Supreme Court observed that:

"No one of those sections can be treated to be general or specific for the purpose of any one particular source of income; they are all specific and deal with the various heads in which an item of income, profits and gains of an assessee falls.

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These sections are mutually exclusive and where an item of income falls specifically under one head it has to be charged under that head and no other."

12. Likewise, in CIT v. Chugandas & Co. [1965] 55 ITR 17 (SC) it was held that business income was broken up under different heads under the Income-tax Act only for the purpose of computation of the total income and by that break up the income did not cease to be the income of the business. Therefore, the court observed that:

"The heads described in Section 6 and further elaborated for the purpose of computation of income in Sections 7 to 10, and 12, 12A, 12AA and 12B are intended merely to indicate the classes of income : the heads do not exhaustively delimit sources from which income arises."
It was also held that:

"even if an item of income is earned in the course of carrying on a business, it will not necessarily fall within the head "profits and gains of business" within the meaning of section 10 read with section 6(iv). If securities constitute stock-in-trade of the business of an assessee, interest received from those securities will for the purpose of determining the taxable income be shown under the head "interest on securities" under section 8 read with section 6(ii) of the Act. Similarly, dividends from shares will be shown under section 12(1A) and not under section 10. If an assessee carries on business of purchasing and selling buildings, the profits and gains earned by transactions in buildings will be shown under section 10, but income received from the buildings so long as they are owned by the assessee will, be shown under section 9 read with section 6(iii)."

13. In the present case, the assessee is engaged in building activities. It argues that flats are held as part of its inventory of stock-in-trade, and are not let out. The further argument is that unlike in the other instances, where such builders let out flats, here there is no letting out and that deemed income - which is the basis for assessment under the ALV method, should not be attributed. This Court is of the opinion that the argument, though attractive cannot be accepted. As repeatedly held, in East India, Housing & Land Development Trust's case (supra) Sultan Bros's case (supra) and Karan Pura Development Co. Ltd.'s case (supra) the levy of income tax in the case of one holding house property is premised not on whether the assessee carries on business, as landlord, but on the ownership. The incidence of charge is because of the fact of ownership. Undoubtedly, the decision in Vikram Cotton Mills Ltd.' case (supra) indicates that in every case, the Court has to discern the intention of the assessee; in this case the intention of the assessee was to hold the properties till they were sold. The capacity of being an owner was not diminished one whit, because the assessee carried on business of developing, building and selling flats in housing estates. The argument that income tax is levied not on the actual receipt (which never arose in this case) but

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on a notional basis, i.e. ALV and that it is therefore not sanctioned by law, in the opinion of the Court is meritless. ALV is a method to arrive at a figure on the basis of which the impost is to be effectuated. The existence of an artificial method itself would not mean that levy is impermissible. Parliament has resorted to several other presumptive methods, for the purpose of calculation of income and collection of tax. Furthermore, application of ALV to determine the tax is regardless of whether actual income is received; it is premised on what constitutes a reasonable letting value, if the property were to be leased out in the marketplace. If the assessee's contention were to be accepted, the levy of income tax on unoccupied houses and flats would be impermissible - which is clearly not the case.

14. As far as the alternative argument that the assessee itself is occupier, because it holds the property till it is sold, is concerned, the Court does not find any merit in this submission. While there can be no quarrel with the proposition that "occupation" can be synonymous with physical possession, in law, when Parliament intended a property occupied by one who is carrying on business, to be exempted from the levy of income tax was that such property should be used for the purpose of business. The intention of the lawmakers, in other words, was that occupation of one's own property, in the course of business, and for the purpose of business, i.e. an active use of the property, (instead of mere passive possession) qualifies as "own" occupation for business purpose. This contention is, therefore, rejected. Thus, this question is answered in favour of the revenue, and against the assessee.

15. The next question which arises, is deduction under section 32AB on interest income. This arises for consideration in ITA Nos. 18/1999, 56/2001 and 114/2001. In all the concerned years the assessee had claimed benefit under Section 32AB(l)(b) contending that it had utilized amounts during the previous year for purchase of new machinery or plant. The Appellate Commissioner had allowed its claim, and in some instances, the Tribunal did so. The revenue urges that the assessee was not entitled to claim the benefit, since it did not carry on eligible business at the relevant time. The assessee, on the other hand, counters by contending that the eligibility for the benefit was never in issue, or questioned by the tax authorities, and what was in fact considered as well as decided was the correct method of computation.

5.5 In view of the facts and circumstances of the case as discussed in para 5.3, para 5.3.1 and judicial pronouncement on the issue, respectfully following the judgment of Hon'ble High Court reproduced above, I hold that the AO was fully justified in treating the income from the renting out the commercial complex as income from house property and in making the addition. The same is, therefore, confirmed. Ground no. 3 & 4 are rejected.

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6. Assessee is in appeal raising following grounds in A.Y. 2010-11 which cover the other year also:-

"Ground No.1:

The Ld. Commissioner of Income Tax (Appeals) - IV, New Delhi (hereinafter referred to as 'CIT(A)') has erred in law and in the fact & circumstances of the case by passing the order dated 10.06.2014 under section 250 of the Income Tax Act, 1961 (hereinafter referred to as "The Act') as the order passed by the CIT(A) is against the provisions of the Act.

Ground No. 2:

The Ld. CIT(A) has erred in law and on facts of the case in confirming the addition made by the Assessing Officer (hereinafter referred to as "AO") by treating the rental income earned by the assessee from commercial properties as Income under the head House Property instead of Income from business.

Ground No. 3:

The Ld. CIT(A) has erred in Law and on facts of the case in confirming the disallowance amounting to Rs.10,55,911 made by the AO on account of expenditure incurred by the appellant on provision of services and other leased amenities (including air conditioners, furniture etc.) along with the premises leased out to Emaar MGF Land Ltd. The CIT(A) has confirmed the opinion of the AO that since the rental income shall be treated as income from house property and expenditure on maintenance of assets are already covered by statutory deduction under section 24(a) of the Act, therefore, the same are not allowable to be claimed as deduction against other incomes in the profit and loss account.

Appellant prays that the disallowance of expenditure of Rs.10,55,911 should be deleted as the receipts from lease of commercial assets should be treated as income from business and profession and therefore the deduction of expenditure on maintenance of assets shall be allowed. Hence, the contentions of the learned AO which have been confirmed by CIT(A) are against the law and accepted judicial pronouncements.

Ground No. 4:

The CIT(A) has erred in confirming the disallowance made by the AO on account of depreciation amounting to Rs.6,98,81,906 on assets utilized in the business on the presumption that the rental income should be treated as income from house property and charge of depreciation is already covered by the statutory deduction under section 24(a) of the Act.

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Ground No. 5:

Without prejudice to the above grounds, the CIT(A) has erred in confirming the disallowance amounting to Rs. 2,81,24,572 on account of depreciation on assets other than building by treating entire income from leasing as income from house property without dividing the same proportionately between income from house property and income from business.

Appellant prays that the entire income from rental cannot be regarded as income from house property by any stretch of imagination and therefore, disallowance of depreciation of Rs.2,81,24,572 on assets other than building shall be deleted.

Ground No. 6:

The appellant prays that he may be allowed to add, amend, alter or forego any of the above grounds of appeal as the circumstances may warrant.

Ground No. 7:

The above grounds are without prejudice to each other."

7. Heard and perused the record.

8. The ld. AR challenging the conclusions drawn by ld. Tax Authorities below as submitted that the appellant was incorporated to construct and sell properties) and never intended to exploit such properties) through lease thereof. However, due to lull in the real estate market, the appellant was not able to find an appropriate buyer offering a suitable price bid/offer for the property. Thus, the appellant, with a view to ease its liquidity and cash flow position, decided to lease out the building to Emaar MGF vide 'Commercial Lease Agreement' dated 14.07.2008 (w.e.f. 01.01.2009) for a temporary period of 9 years. The appellant, it is submitted, leased out the property to avoid keeping the property idle and earn lease rental, till any potential buyer offering the right price was found.

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8.1 It was further submitted that under the aforesaid Commercial Lease agreement, the appellant never intended to part away with the property and the same was leased out for a temporary period to tide over the crisis condition prevailing in the real estate market. Ld. AR submitted that it is a well settled legal position that in cases where the property is leased out only for the purpose of meeting the business requirements of the assessee for a limited period of time and to tide over a difficult period/market crisis, the lease rentals would be taxed under the head 'Profits and gains from business'. Attention in this regard was invited to the decision of the Supreme Court in the case of ***CIT v. Vikram Cotton Mills Ltd.: 169 17R 597,*** wherein the Hon'ble Court held that in cases of lease of assets, the intention of the lessor is of significance to determine the nature of rental income earned thereupon from such lease. The relevant part of the judgment relied is reproduced hereunder:

> *"14. In each case the intention has to be gathered from the facts and circumstances of the case as to whether the commercial asset was intended to be exploited by the assessee or whether it was intended to be used by letting it out for a temporary period.*
>
> *In the context of these facts, it was a possible conclusion that the assessee intended that there should be a temporary suspension of the business for the purpose of reconstruction of the company and for that matter there must be stoppage of the user of the machinery by the assessee. It was a temporary lease though for 10 or 19 years on renewal and after the expiry of the period the property was to revert back to the assessee. It is predominantly a matter of intention. Intention is an inference to be drawn from the relevant facts.*
>
> *XXX*
>
> *16. On that basis, applying the correct principle, the Tribunal found that the intention was not to part with the machine but to lease it out for a temporary period as a part of exploitation. In such a circumstance, it could not be said that no business was carried on*

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and the income derived from the machine letting was only a rent income. There was a temporary suspension of business for a temporary period for an object to tide over the crisis condition. There was never any act indicating that the assessee never intended to carry on the business.

17. In the background of these principles and in the facts and circumstances of the case so found, we cannot say such a finding of the Tribunal was either perverse or not sustainable."

8.2 Reference, in this regard was also made to the decision of Hon'ble Supreme Court in the case of ***Universal Plast Ltd. vs. CIT: 237 ITR 454 (SC),*** wherein, the apex Court laid down the following test in order to determine whether lease rental would be taxable as 'business income':

"In the light of various decisions of the Supreme Court, the propositions are—

1) no precise test can be laid down to ascertain whether income (referred to by whatever nomenclature, lease amount, rents, licence fee) received by an assessee from leasing or letting out of assets would fall under the head 'Profits and gains of business or profession';

2) it is a mixed question of law and fact and has to be determined from the point of view of a businessman in that business on the facts and in the circumstances of each case, including true interpretation of the agreement under which the assets are let out;

3) where all the assets of the business are let out, the period for which the assets are let out is a relevant factor to find our whether the intention of the assessee is to go out of business altogether or to come back and restart the same; and

4) if only or a few of the business assets are let out temporarily while the assessee is carrying out his other business activities, then it is a case of exploiting the business assets otherwise than employing. them for his own use for making profit for that business; but if the business never started or has started but ceased with no intention to be resumed, the assets also will cease to be business assets and the transaction will only be exploitation of property by an owner thereof, but not exploitation of business assets.

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8.3 Ld. AR submitted that relying on the principles laid down by the Hon'ble Supreme Court in the case of Universal Plant (supra), the Hon'ble Delhi Bench of the Tribunal in the case of ITO vs. Skipper Properties (P.) Ltd.: 118 TTJ 111, under similar circumstances, held that rental income earned from letting out of a property due to difficult market conditions and with no intention to close down the normal business operations, would be taxable as 'business income'.

> *"13. We have carefully considered the rival submissions in the light of material placed before us. There is no material on record to controvert the fact that for shorter period the assessee had leased out its theatre to two parties mentioned above and the reasons were stated to be the difficult market conditions and the poor health of Director who was looking after such business of the assessee, [reference can be made to para 2.2 page 13 of the order of CIT (A)].*
>
> *The period for which such lease was given as can be seen from the order of CIT(A) is from assessment year 1998-99 till 31-3-2000. Earlier to this assessee has been carrying out the activity of exhibiting films in its theatre and such income of the assessee was being declared and assessed under the head 'Profit and gains of business or profession'. These facts also have not been controverted by the revenue. Thus, the contention of the assessee that leasing out of the theatre was for a shorter period cannot be rejected. It is also the contention of the assessee that before leasing its income was being assessed under the head Income from business' and after 1-4-2000 also it carried out similar activity and shown the income under the head 'Income from business'. For the year under consideration these receipts have been assessed under the head 'Income from house property' only on the basis that the assets were leased out. As pointed out earlier the contention of the assessee that such receipts are assessable under the head 'Profit and gains of business or profession' are two fold. Firstly, on the ground that a consistent approach should be adopted by the department and as this income has been assessed in earlier and subsequent years as income from business it should be assessed as income from business for the year under consideration also. Secondly, on merits it is the contention of the assessee that looking into the shorter period of leasing out that too for the reasons of difficult market conditions and poor health of the Director, the activity of leasing out the premises cannot be held to be non-business, activity in the light of the decisions referred to in earlier part of this order.*
>
> *14. Looking into the fact that leasing is for a shorter period and it has not been shown that the intention of the assessee was to go out of the business altogether, the contention of the assessee has to be accepted that it cannot be considered to be a non-business activity. Reference can be made to the decision of the Hon'ble Supreme Court in the case*

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of Universal Plast Ltd. (supra) wherein their Lordships after considering various case laws have summarized the position of law on this issue as follows :—

1) no precise test can be laid down to ascertain whether income (referred to by whatever nomenclature, lease amount, rents, licence fee) received by an assessee from leasing or letting out of assets would fall under the head 'Profits and gains of business or profession';

2) it is a mixed question of law and fact and has to be determined from the point of view of a businessman in that business on the facts and in the circumstances of each case, including true interpretation of the agreement under which the assets are let out;

3) where all the assets of the business are let out, the period for which the assets are let out is a relevant factor to find out whether the intention of the assessee is to go out of business altogether or to come back and restart the same; and

4) if only or a few of the business assets are let out temporarily while the assessee is carrying out his other business activities, then it is a case of exploiting the business assets otherwise than employing them for his own use for making profit for that business; but if the business never started or has started but ceased with no intention to be resumed, the assets also will cease to be business assets and the transaction will only be exploitation of property by an owner thereof, but not exploitation of business assets. "

15. The case of the assessee falls within the situation as envisaged at Sl. No. 3 as in the present case all the assets of the business owned by the assessee have been leased out. If such is a situation then the period for which the assets are let out is a relevant factor. It has already been pointed out that the period of lease is short and thereafter the intention of the assessee is relevant to find out that whether assessee intents to get out of business altogether or he is intended to come back and restart the same. From the facts it is clear that after leasing out the property the assessee had come back to its business and had restarted the same. Thus, the assessee has fulfilled both these factors/tests and, therefore, applying the ratio of aforementioned decision of Hon'ble Supreme Court in the case of Universal Plast Ltd. (supra) it is to be held that such income was assessable as income from business."

8.4 Reliance was also placed on the decision of the Hon'ble Bombay High Court in the case of ***CIT vs. Mohiddin Hotels P. Ltd. & Ors.: 284 ITR 229***, wherein, the Hon’ble Court while holding rental income to be 'business income' held that period (in this case, tenure of the agreement was 20 years) for which a business asset is let out is a relevant factor for determining whether such income would fall under the

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head 'business income' or 'income from house property'. Relevant finding of the Court as relied reads as under:

> *"It is true that the period for which the business assets are let out is always a relevant factor in finding out whether the intention of the Assessee is to let out the business assets permanently and if the Assessee had never started the business, an inference may be drawn that the Assessee intended to exploit the property and not the business assets but the intention of the parties has to be gathered from the over- all facts and not the isolated circumstances. It is settled legal position that each case has to be decided on its own facts including the construction of the agreement under which the assets have been let out or handed over to a third party and no precise test can be applied to ascertain as to under which head the income received by the asses see from leasing or letting out the assets should fall. The longer duration of the agreement could have been for many reasons."*
>
> To similar effect are the following decisions:

- CEPT v. Shri Lakshi Silk Mills Ltd 20 ITR 451 (SC)
- Maltex Malsters Ltd. CIT 243 Taxman 581 (P&H)
- Sri Hanuman Sugar & Industries Ltd. vs. CIT: 266 ITR 106 (Cal)
- Palmshore Hotels (P.) Ltd. vs. CIT: 252 Taxman 191 (Ker)
- Hyderabad Distilleries & Wineries Pvt. Ltd. vS. ACIT (Del ITAT) (Refer Pg 22-43, r.f. @ Pg 38)

9. In view of the aforesaid, it was submitted that rental income received from letting out of a property due to difficult market conditions in the real estate market and with no intention to close down the normal business operations, would be taxable as 'business income' as opposed to 'income from house property' assessed by the assessing officer. Even otherwise, considering that the building was constructed with the object of commercially exploiting by way of selling, the commercial exploitation of such property by way of letting, instead of selling, forms an integral part of the main object/business and, therefore, for that reason as

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well, such rental income would be taxable as 'business income' as against 'income from house property' alleged by the assessing officer in the impugned order. Reference, in this regard was placed on the decision of the Hon'ble Supreme Court in the case of ***Karanpura Development Co. Ltd. vs. CIT: 44 ITR 362***, wherein, according to ld. AR, under similar circumstances, the Court while characterizing the assessee as a trader, held that rental income earned from letting out of the property would be taxable as 'business income'. Relevant finding of the Court as relied reads as under:

> *"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 is not that no company can own property and enjoy it as property, whether by itself or by giving the use of it ta another on rent. Where this happens, the appropriate head to apply is "income from property" (section 9), 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. The cases which have been cited in this case both for and against the assessee company must be applied with this distinction properly borne in mind. 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. The Californian Copper Syndicate case (supra) illustrates vividly dealings with mineral rights and concessions by a company as part of the objects of its business, or, in other words, in the holding of the business. The Calcutta cases and the case of Fry v. Salisbury House Estates Ltd. [1930] AC 432; 15 Tax Cas. 266 (H)illustrate the contrary proposition. There, the property, though dealt with by a company intending to do business, was dealt with as landowner. The intention in those cases was not to derive profit by business done with those properties but to derive income by renting them out. Where a company acquires properties which it sells or leases out with a view to acquiring other properties to be dealt with in the same manner, the company is not treating them as properties to be enjoyed in the shape of rents which they yield but as a kind of circulating capital leading to profits of business, which profits may be either enjoyed or put back into the business to acquire more properties for further profitable exploitation."*

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10. Further, it was submitted that vide Commercial Lease agreement dated 14.07.2008, the appellant undertook to provide a commercial complex to Emaar MGF equipped with substantive facilities/amenities/assets such as telephone lines, fax lines, EPABX system, signage boxes, internet lines, air conditioners, fire extinguishers refills, hand dryers, furniture, electricity charges, water charges, etc., for the purpose of commercial use in lieu of composite rent receivable thereon. An exhaustive list of facilities and amenities provided by the appellant to Emaar MGF alongwith the office space is enlisted in Exhibit "A" appended to the Commercial Lease agreement. The relevant clauses of the agreement corroborating the fact that the appellant leased out a commercial complex office space alongwith amenities/ facilities to Emaar MGF were relied and which are reproduced as under:

> "……………….
>
> Whereas
>
> E. The owner owns a plot of land admeasuring 1.447 acres in Sikandarpur Chowk, sector, 28, Gurgaon, Haryana reserved and approved for commercial use by the Haryana Urban Development Authority (HUDA).
>
> F. AND WHEREAS Owners has constructed a commercial complex on the said plot named as Business Park (hereinafter referred as "Commercial complex") consisting of offices with basements for parking and services. The said commercial complex is a commercial asset for the owner and has been incorporated in books of accounts accordingly.
>
> G. AND WHEREAS Owner is competent to lease the office space with provision of standard facilities and amenities enlisted in Exhibit "A" (hereinafter referred as "facilities and amenities".
>
> H. AND WHEREAS User is desirous of taking lease office space with provision of facilities and amenities (description appended as Exhibit "A" to this agreement), has approached Owner to lease commercial complex comprising of 156,451/-sq. ft marked as

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Exhibit "B", to the agreement, in the said Building, situated at Sikandarpur Chowk, Sector,28, Gurgaon, Haryana for running and operating its office for commercial purpose. The Owner agreed to make available for lease of the office space along with facilities and amenities (hereinafter referred as "leased commercial premises" or "leased commercial premises and utilities") for 9 years on the terms and condition mentioned below.

NOW THEREFORE IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:

19. The owner hereby gives on lease to the User and the User hereby take on commercial lease for a period of 9 years, from I" January, 2009 till 31" December, 2017, with reset after every three years, office space comprising of 156,451/- sq. ft area on various floors, as earmarked by the User marked as Exhibit B of agreement in the said Building with provision of facilities and amenities (description amended as Exhibit "A" to this Agreement), situated at Sikandarpur Chowk, Sector,28, Gurgaon, Haryana for running and operating its office for commercial purpose. However the owner will handover space as ear marked by the user immediately on signing of this lease deed for fit outs and installation of various facilities by the user as per its requirements.

23. The above charges specified under clause 3 is inclusive of House Tax/ Property Tax or any other levies as currently imposed by the local authorities or may be imposed by the local authorities in the future, back up power for running DG sets, other facilities and amenities including the car parking space in the basement and other administration expenses for the leased office space as agreed between the parties upto limits specified in the Exhibit "A". In respect of usage of certain facilities above the limits, the User will pay for the water charges, charges for electricity, telephone and other facilities and amenities fixed as metered charged in addition to the existing charges as herein above provided.

24. The leased commercial premises will be used by the user as its office for commercial purpose only. User will comply with the rules of the Building adopted and altered by Owner from time to time and will cause all of its agents, employees, invitees and visitors to do so; all changes to such rules will be sent by owner to user in writing."

10.1 It was submitted that on perusal of the aforesaid clauses (clause 'F', 'H' and 19 in specific) and exhibit 'A' to the agreement, it can clearly be established that the appellant did not simply provide a building on lease simpliciter; instead provided a commercial complex equipped with various amenities/facilities for the purpose of commercial use by Emaar MGF in lieu of composite/inseparable rent. Accordingly, it should be appreciated that the rent was received from renting of the commercial complex, equipped with various facilities and services as a whole, as

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opposed to building/house property simpliciter, which was outside the provisions of taxation under the head 'income from house property' under section 22 of the Act.

10.2 Ld. AR submitted that Commercial Lease Agreement dated 14.07.2008 was retrospectively amended w.e.f. 01.04.2009 vide Amendatory and Rectification Deed of Lease' dated 10.01.2010. As per the Amendatory Agreement, the rate of rent was reduced from Rs. 80 per square feet to Rs.60 per square feet on the stipulation that Emaar MGF would be liable to pay electricity charges (as per meter billing) and power back up charges for running D.G. set and water charges, which were hitherto incurred and borne by the appellant.

10.3 Ld. AR submitted that on perusal of various clauses of the 'Amendatory and Rectification Deed of Lease', it is clearly evident that there has been no change in the primary intention/ object of the appellant qua leasing out the commercial complex for the purpose of commercial use to maar MG for commercial purposes alongwith facilities/amenities and the only amendment was with respect to reduction in the rate of rent, without any change in the nature of services/facilities provided by the appellant by way of renting out a complex commercial structure.

10.4 Attention was invited to the provisions of section 22 of the Act which provides that the annual value of any building or land appurtenant thereto, other than the portion of such building/land occupied by the assessee for the purposes of the business would be taxable under the head 'income from house property'.

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10.5 Ld. AR submitted that in the present case, let out is not of merely land or building appurtenant thereto, but let out of land and building coupled with various facilities, which constitutes dominant part of lease agreement, in lieu of composite/inseparable rent. Analogy for the aforesaid can be drawn from the provisions of clause (ili) of sub section (2) of section 56 of the Act, which provides that in case an assessee lets on hire plant and machinery or furniture alongwith building and the letting of such building is inseparable from letting of the said machinery/furniture, then the income from such letting, if not chargeable to income tax under the head 'Profits and gains of business or profession'; would be taxed as income from other sources'

10.6 In that view of the matter, as per the provisions of section 56(2)(iii) of the Act, rental income earned from letting out of a building equipped with various amenities/facilities would either be taxable as 'business income' or 'income from other sources' and the same is not automatically taxable under the head 'income from house property'.

10.7 Attention in this regard was also invited to the decision of the Hon'ble Karnataka High Court in the case of CIT vs. Velankani Information Systems (P.) Ltd.: 265 CTR 250, wherein the Court held that in case the property is leased as a whole alongwith amenities/facilities, then the lease rental received therefrom would be taxable as business income. The finding of the Court as relied reads as under:

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"24. This doctrine of inseparability finds a place in these two provisions. The inseparability referred to in the said provision is arising from the intention of the parties.

25. We have to find out in that context what was the intention of the parties in entering into the lease transaction. It is not the number of agreements, which are entered into between the parties which is decisive in determining the nature of transaction. What is the object of entering into more than one said transactions is to be looked into. However, if for enjoyment of lease, the subject matter of all the agreements is necessary, then notwithstanding the fact that there are more than one agreement or one lease deed, the transaction is one. As all the agreements are entered into contemporaneously and the object is to enjoy the entire property viz: building, furniture and the accessories as a whole which is necessary for carrying on the business, then the income derived there from cannot be separated based on the separate agreement entered into between the parties. What has to be seen is, what was the primary object of the assessee while exploiting the property. If it is found applying such principle that the intention is for letting out the property or any portion thereof, the same may be considered as rental income or income from properties. In case, if it is found that the main intention is to exploit immovable property by way of complex commercial activities, in that event it must be held as business income.

26. Sub-section (1) of Section 56 makes it clear that income of every kind which is not be excluded from the total income under this Act shall be chargeable to income tax under the head "Income from other sources", if it is not chargeable to income-tax under any of the heads specified in section 14, items A to E. Sub-section (2) of Section 56 specifically states that the incomes shall be chargeable to income-tax under the head 'Income from other sources'.Clause (ii) of Section 56(2) provides that income from machinery, plant or furniture belonging to the assessee and let on hire, if the income is not chargeable to income-tax under the head'profits and gains of business or profession'. Clause (iti) also provides that where an assessee lets on hire machinery, plant or furniture belonging to him and also buildings, and the letting of the buildings is inseparable from the letting of the said machinery, plant or furniture, the income from such letting, it is not chargeable to income-tax under the head profits and gains of business or profession'. Therefore the intention of the legislature is explicit. The provision is clear, i.e. if the letting of building, plant, machinery and furniture is inseparable, the income from such letting should ordinarily fall within the head 'profits and gains of business or profession. But for any reason, if it does not fall under that head, it shall fall under the head income from "other sources", but certainly not under the heading income from House property. If the intention is to exploit commercial property by putting up construction and letting it out for the purpose of getting rental income, then notwithstanding the fact that the furniture and fittings are provided to the lessee, the income from the building fall under the head 'income from house property. But if the assessee is in the business of taking land, putting up commercial buildings thereon and letting out such buildings with all furniture as his

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profession or business, then notwithstanding the fact that he has constructed a building and he has also provided other facilities and even if there are two separate rental deeds, it does not fall within the heading of income from house property. Therefore, firstly what is the intention behind the lease and secondly what are the facilities given along with the buildings and documents executed in respect of each of them is to be seen. Thirdly it is to be found out whether it is inseparable or not. If they are inseparable and the intention is to carry on the business of letting out the commercial property and carrying at complex commercial activity and getting rental income therefrom, then such a rental income falls under the heading of profits and gains of business or profession. In fact, any other interpretation would defeat the very object of introduction of Section 80-lA as well as the scheme which is framed by the Government for development of industrial parks in the country. In that view of the matter, the finding recorded by the Appellate Authority as well as the Tribunal is in accordance with law and does not suffer from any legal infirmity which calls for interference. Accordingly, the substantial questions 1 and 2 are answered in favour of the assessee and against the revenue."

10.8 To the similar effect the following decisions, wherein it has repeatedly been held that in cases where primary object of letting out of property with other amenities is exploitation of a commercial asset, lease rental received is not taxable under the head of income from house property, were relied:

- Karanpura Development Co. Ltd. vs. CIT: 44 ITR 362 (SC)
- CIT vs. Velankani Information Systems (P.) Ltd.: 265 CTR 250 (Kar)
- CIT vs. Mohiddin Hotels P. Ltd. & Ors.: 284 ITR 229 (Bom)
- CIT vs. Goel Brothers: 331 ITR 344 (All)
- PCIT vs. M/s Krome Planet Interiors Pvt. Ltd.: ITA No. 282 of 2017 (Bom)
- CIT vs. M/s Oberon Edifices & Estates (P) Ltd.: ITA No. 166 of 2016 (Ker)
- Pr. CIT vs. M/s Krome Planet Interiors Pvt. Ltd.: ITA No. 282/2017 (Bom)
- CIT vs. M/s Oberon Edifices & Estates (P) Ltd.: ITA No. 166/2016 (Ker)
- M.M. Creations vs. ACIT: 165 ITD 534 (Del Trib)
- M.S. Luvish Projects (P.) Ltd. vs. DCIT: 175 TTJ 153 (Mum Trib)
- DCIT vs. Magarpatta Township Development & Construction Co.: 150 TTJ 590 (Pun) (Refer Pg 132-153, r.f.@Pg 142)
- ENN ZEN Enterprises (P.) Ltd. vs. ACIT: 45 ITRT) 382 (Chandigarh ITAT)
- Global Tech Park (P.) Ltd. vs. ACIT: 119 TTJ 421 (Bang)

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11. Ld. AR, without prejudice submitted that lease rental is taxable under section 56 of the Act. He submitted that as per the provisions of clause (iti) of sub section (2) of section 56 of the Act, in case an assessee lets on hire plant and machinery or furniture alongwith building and the letting of such building is inseparable from letting of the said machinery/furniture, then the income from such letting, if not chargeable to income tax under the head 'Profits and gains of business or profession', would be taxed as 'income from other sources'.

11.1 He submitted that in the present case, without prejudice to the aforesaid submission that such lease rental would be taxed as 'business income', the same can be taxed under the head 'income from other sources' and accordingly, expenses incurred for earning of such income would be allowed as deduction under clause ii) of section 57 of the Act. Accordingly, expenses aggregating to Rs. 10,55,911, tabulated below, incurred for the purpose of earning lease rental of Rs. 10,87,64,735 would be allowable under section 57 of the Act:

S.No	Particulars	Amount
1	EKO pro engineers (P) Ltd. Evm Monitoring	24.266
2	ETA Melco Engg Co (P) Ltd. AMC	3,76,652
3	Goojar mal Ganpat Rai (P) Ltd., Repair charges for utronic sensor	16,527
4	ThyssenKrupp Elevator (India) (P) Ltd. AMC for elevator	83,768
5	Voltas AMC of AC	1,01,644
6	Daga Trading Co (P) Ltd. Repair work at building	29,315
7	Insurance	4,23,739
	Total	**10,55,911**

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11.2 Further, the appellant is also entitled to claim depreciation of Rs. 6,98,81,906 including depreciation of Rs. 2,81,24,572 in relation to assets other than building). Reliance, in this regard was placed on the decision of the Hon'ble Delhi High Court in the case of Jay Metal Industries (P) Ltd. vs. CIT: 396 ITR 194, wherein, the Court, under similar circumstances, held that rental income received from letting out of building alongwith furniture, fixtures, etc., would be taxable under the head 'income from other sources' and accordingly, depreciation would be allowable in terms of provisions of section 57(iii) of the Act. The relevant finding of the Court as relied reads as under:

> *"Claim for depreciation*
>
> *26. However, the last plea made by the Assessee is that in that event the entire income from the letting is treated as 'income from source sources', it cannot be deprived of the corresponding deduction in terms of Section 57 (iii) of the Act. The Revenue too has not disputed the fact that the Assessee has not claimed depreciation.*
>
> *27. Accordingly, it is directed that while giving the appeal effect, the AO will grant the Assessee the benefit of Section 57 (iii) of the Act."*

11.3 To the similar effect the following decisions, wherein, the Court/Tribunal allowed deduction of expenditure incurred for earning lease rental, taxed as 'income from other sources were relied:

- *Garg Dyeing & Processing Industries vs. ACIT: ITA 319/2012 (Del)*
- *Oriental Building & Furnishing Co. Ltd. vs. DCIT: 53 ITD 198 (Del Trib.)*
- *Serendipity Apparels (P.) Ltd. vs. ITO: 78 Taxmann.Com 154 (Ahmedabad - Trib.)*
- *M.M. Creations v ACIT: 165 ITD 534 (Delhi - Trib.)*

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11.4 In that view of the matter, it was submitted that in case lease rental is assessed as 'income from other sources', expenses incurred for earning such income needs to be allowed against such income in terms of provisions of clause ii) of section 57 of the Act.

12. In the rebuttal submissions Ld. SR.DR contended that Assessee is not engaged in business of leasing of commercial complexes as the main object of the assessee is not leasing of object of the assessee is not leasing of building/. complex etc. Support for the same was drawn from the main objects of Memorandum of Association '(MOA) and report of the Tax Auditor. The Ld. Sr. DR then submitted that MOA is not placed on the paper book and the relevant clauses reproduced in order of CIT(A) suggest that appellant was not on business of leasing.

12.1 Ld. Sr. DR contended that basic and requite expenses such as salary, telephone, electricity, housekeeping were not incurred by the assessee to establish the assessee was in business of leasing. It has been stated that expenses debited to P&L account were incurred by lessee (Emaar MGF land Ltd.) and reimbursed by the assessee. Ld. Sr. DR submitted that the assessee has not received reimbursement Of Rs. 1.43 crores spent on duel charges for DG set, which were required to be paid/borne by lessee.

12.2 Ld. Sr DR submitted that It was submitted that the assessee the claimed that the desired complex is under construction, and the same is leased to commercially exploit it for temporary period. The said fact is not acceptable as not CWIP is

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appearing in books. It was submitted that Appellant's intention was to treat the complex leased as stock-in-trade. Thus, appellant not entitled to depreciation on stock-n-trade. Since, decisions are taken by Emaar MGF Land Ltd. (ultimate holding company) and expenses also incurred by it, which are later reimbursed by the appellant company, the appellant is incorporated to only enjoy rental income and, therefore, said income cannot be taxed as business income. It was also submitted that the contention of the appellant that it had constructed the complex to sell but the same is let out due to lull period in the real estate market, is a new contention nor raised before lower authorities. The appellant must not be allowed to raise such new contention.

12.3 It was Submitted by Ld. Sr. DR that the Commercial lease agreement dated 14.07.2008 dated is incomplete. As regards this we can observe here that Ld. AR had explained that commercial lease agreement dated 14.07.2008, copy placed at pages 82-86 of the paperbook is complete [with relevant Exhibit A]. The numbering at page 83 of the paperbook starts from Point E and Clause 19, which is a typographical error in the original agreement.

12.4 Services, plant and machinery, furniture and fixtures are integral part of building and no additional services has been provided by the appellant to the user lessee.

13. Now as we appreciate the material before us and the submissions in the light of law relied it comes up that there is actually no quarrel to the fact that leasing of

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commercial building was not the main object contained in MOA of the appellant company. The complex at Sikanderpur was constructed with the main object of selling the same and not for leasing. However, as we go through the amended MOA, copy of which is filed by Ld. Sr. DR only, it can be seen that the company had one of its objects:

> *"75. To carry on the business of contractors, builders, housing finance, broker dealers and estate agents.*
>
> *…….*
>
> *79. To carry on the business of construction, maintenance and development of buildings including residential, commercial and industrial buildings, colonies, hotels, mills and factory's sheds and buildings, workshop's buildings, cinema's houses buildings, bungalows, quarters, offices, flats, plots, chawls, club, resorts, banquet halls, tenements, roads, bridges and other immovable properties."*

13.1 The claim of appellant is that due to lull in the real estate market, the appellant was not able to find an appropriate buyer offering a suitable price bid/offer for the property. Thus, the appellant, as part of its business activity, and with a view to ease its liquidity and cash flow position, decided to lease out the commercial complex equipped with all amenities, furniture and fixtures, AC units, DG Sets etc. to Emaar MGF Land Ltd. as a business strategy. This plea is not a new plea but a mere explanation of the reasons for letting the out the property which was actually built for selling out. Assessee had completed the construction of the subject commercial complex, which was capitalized in the books of accounts, on such completion. Ld. AR is justified to contend that the only submission of the assessee before the lower authorities was that the area

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surrounding the subject property was not fully developed at the time of completion and, therefore, was not fetching the desired price for sale. It was submitted that, on further development of the area in future. The reference was made to page 28 of PB- CIT(A) submissions; and page 64-submissions before AO. Further it comes up that appellant had categorically stated before the lower authorities, i.e., assessing officer and the CIT(A) that - "As a prudent business person, the assessee has taken a decision of letting its commercial property instead of keeping it idle and earning lease rent for its use, till it finds potential buyer at right price" [refer pages 57-78 @ 64 of PB- Submissions before AO dated 20.10.2014; and page 21-56 @ 28 of PB- CIT(A) Submissions]. The explanation only establishes how the subject property was a business asset held for the purpose of sale, and temporary letting out was thereof for the purpose of meeting the business requirements of the assessee for a limited period of time and to tide over a difficult period/market crisis.

13.2 Then the case of appellant is that that the appellant had let-out commercial complex equipped with various amenities and facilities as a whole, as opposed to building/house property simpliciter, which was outside the provisions of taxation under the head 'income from house property' under section 22 of the Act. It is at the outset submitted that the incurrence or non-incurrence of such expenses by the appellant is not at all relevant for the issue at hand. It is not the case/ submission of the appellant that since certain services were to be provided by the appellant;

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therefore the lease income was inclusive of such services charges and thus taxable as business income.

13.3 As we examine the question of expenditures made by the appellant, it comes up that Schedule 14-Other expenses' of audited financial statements (page 16 of PB) shows various expenses aggregating to Rs.1.74 crores incurred by the appellant and same is attributable to its part such as rates and taxes, insurance expenses, fuel charges, repairs and maintenance etc. Indeed certain expenses/ payments were made by the lessee (holding company) on behalf of the appellant company, which was later reimbursed to by the assessee. But that does not hamper the case of the assessee rather strengthens the same as the amount spent was not set off against the consideration receivable from the user. It shows that expenditure account was separate and entries were made on basis of who had paid for the head of expenditure. No adverse inference can be drawn from such reimbursement. We find substance in the case of appellant that the reimbursement of expenses supports the case of the appellant is as much as, the aforesaid proves that the expenses attributable to the obligation of the appellant as per the terms of the lease were borne by the appellant on reimbursement to the lessee/Emaar MGF. Then during financial year 2011, there was further revision in the terms of lease agreement according to which expenses of, inter alia, electricity and running of DG sets were agreed to be borne by the owner appellant and not user lessee. This establishes the fact that building as a whole was held as commercial asset and was exploited for

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generating the revenue from operations by the appellant was not mere rental income.

13.4 Then examining the question of depreciation we are of view that the condition precedent for claiming depreciation under section 32 of the Act is that the asset must be put to use for business purpose. In the present case, the subject asset, i.e, commercial complex was put to use for the purpose of business by way of lease, and therefore claim of depreciation thereon is justified. We find logic in the contention of Ld. AR that even if the composite rent is treated as income from other sources under section 56(2)iii), the depreciation is clearly admissible in terms of section 57(ii) of the Act. His reliance on Jay Metal Industries (P) Ltd. vs. CIT: 396 ITR 194 (Del), Oriental Building & Furnishing Co. Ltd. vs. DCIT: 53 ITD 198 (Del Trib.), Serendipity Apparels (P.) Ltd. vs. ITO: 78 Taxmann. Com 154 (Ahmedabad - Trib.), is appropriate.

13.5 It may be noted that leased building may be a - (1) building simpliciter, without any facilities/infrastructure; or ii) a building with various/ substantial amenities, plants and machineries, furniture etc. While the former shall undisputedly be taxable under the head of income from house property, the latter would be outside the ambit of taxation under that head.

14. After taking into consideration the aforesaid, we are of the considered view that there is substance in the case of the appellant that the premises was not rented out as a building standalone, but, the building was converted into a ‘commercial

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asset' by providing extensive utility services to the occupant. In this context, we take note of the relevant clauses of the lease deed dated 14.07.2008 made available at pages 79-86 of the paper book and we consider it relevant to reproduce the relevant clauses:-

> "……………….
>
> Whereas
>
> E. The owner owns a plot of land admeasuring 1.447 acres in Sikandarpur Chowk, sector, 28, Gurgaon, Haryana reserved and approved for commercial use by the Haryana Urban Development Authority (HUDA).
>
> F. AND WHEREAS Owners has constructed a commercial complex on the said plot named as Business Park (hereinafter referred as "Commercial complex") consisting of offices with basements for parking and services. The said commercial complex is a commercial asset for the owner and has been incorporated in books of accounts accordingly.
>
> G. AND WHEREAS Owner is competent to lease the office space with provision of standard facilities and amenities enlisted in Exhibit "A" (hereinafter referred as "facilities and amenities".
>
> H. AND WHEREAS User is destrous of taking lease office space with provision of facilities and amenities (description appended as Exhibit "A" to this agreement), has approached Owner to lease commercial complex comprising of 156,451/-sq. ft marked as Exhibit "B", to the agreement, in the said Building, situated at Sikandarpur Chowk, Sector,28, Gurgaon, Haryana for running and operating its office for commercial purpose. The Owner agreed to make available for lease of the office space along with facilities and amenities (hereinafter referred as "leased commercial premises" or "leased commercial premises and utilities") for 9 years on the terms and condition mentioned below.
>
> NOW THEREFORE IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:
>
> 19. The owner hereby gives on lease to the User and the User hereby take on commercial lease for a period of 9 years, from I" January, 2009 till 31" December, 2017, with reset after every three years, office space comprising of 156,451/- sq. ft area on various floors, as earmarked by the User marked as Exhibit B of agreement in the said Building with provision of facilities and amenities (description amended as Exhibit "A" to this Agreement), situated at Sikandarpur Chowk, Sector,28, Gurgaon, Haryana for running and operating its office for commercial purpose. However the owner will handover space

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as ear marked by the user immediately on signing of this lease deed for fit outs and installation of various facilities by the user as per its requirements.

23. The above charges specified under clause 3 is inclusive of House Tax/ Property Tax or any other levies as currently imposed by the local authorities or may be imposed by the local authorities in the future, back up power for running DG sets, other facilities and amenities including the car parking space in the basement and other administration expenses for the leased office space as agreed between the parties upto limits specified in the Exhibit "A". In respect of usage of certain facilities above the limits, the User will pay for the water charges, charges for electricity, telephone and other facilities and amenities fixed as metered charged in addition to the existing charges as herein above provided.

24. The leased commercial premises will be used by the user as its office for commercial purpose only. User will comply with the rules of the Building adopted and altered by Owner from time to time and will cause all of its agents, employees, invitees and visitors to do so; all changes to such rules will be sent by owner to user in writing."

“EXHIBIT "A"
Accommodation Services for period ____ to ____. Please retain
as per actual facilities provided>>

Accommodation Services Costs per month (INR)	Units Allowed	Cost per unit
Repair & Maintenance		
Electricity	<<Specify the units>>	
Additional Hours electricity - rate per hour		
Diesel General Set		
Mail & Canteen Management		
Insurance		
Telephone lines	<<Actual user charges>>	<<Specify the rate>>
Fax lines	<<<Actual user charges>>	<<Specify the rate>>
EPABX System	<<Actual user charges>>	<<Specify the rate>>
Signage boxes		
Internet lines		
Water		
Gym		
Minor purchases		
Carpentry Repairs		
Plumbing work		
Random Main		
Electrical purchases		
Alba AMC (Annual Maintainence Contract)		
Projectors AMC		
Air Conditioners		
Fire Extinguisher refills		
Hand dryers		

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Grp 4 Security House keeping Keyboard cleaning Electrical Main Shredders (AMC +Spares) Co2 flooding sys Furniture Main Carpet, Partition & Chairs Dry-cleaning Pest Control Other Administrative services (receptionist, secretarial services, data processing, conference room etc)		

15. The aforesaid clauses of the lease deed when read with Exhibit-A makes it very apparent that the user was not given possession of the premises as a tenant alone, but, was given the possession of the premises which was held as a commercial asset by the appellant and the charges agreed to be paid were not for occupation of the building along, but, for all the facilities and amenities mentioned in the aforesaid Exhibit-A. Various substantial infrastructure apart from the building such as AC plants, DG Sets. lifts and escalators, internet lines, fax lines, EPABX fire extinguishers, electrical purchases, water system, hand dryers, shredders, CO2 flooding system, carpets, etc. were leased by the appellant company, along with the building, which added substantial value to the building and the lease rentals. The same cannot be said to be inseparable from letting out of the building premises. Assessee is no expected to establish that if these services, amenities and facilities were not available the other party would not have accepted the letting out. The tax authorities should not expect that business entities were supposed to explain, with precision and accuracy, every decision they make, to

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based on commercial expediency, as understood by the said authority. The tax authority should take notice of transformation of business needs based on new business culture and environment. The 'user' here is not mere tenant but had accepted the possession of building, as a whole, with desired services and amenities made available by the appellant, so that no time, energy and resources are wasted in customizing the building to the needs of 'user', occupant.

16. The fact that in respect of certain facilities, limits were put up and the user was supposed to pay over and above the limits on consumption basis firmly establishes the fact that it was not merely a tenancy/lease agreement, but, the intention was to exploit the commercial asset. After going through the s

17. Lastly, the ld. DR has primarily relied two judgements in the case ***Shambhu Investments (P) Ltd. vs. CIT [2003] 129 Taxman 70 (SC)*** and ***East India Housing and Land Development Trust Ltd. vs. CIT [1961] 42 ITR 49 (SC).*** The judgement of the Hon'ble Supreme Court in the case of ***Shambhu Investments (P) Ltd.*** has been considered by the coordinate Bench in the case of M.M. Creations (supra) as relied by Ld. AR and we consider it relevant to reproduce paras 20 to 23 as below:-

> *"20. It is settled legal position that each case has to be decided on its own facts including construction of the agreement, under which assets have been let out or handed over to a third party and no precise test can be applied to ascertain, as to under which head income received by assessee from leasing or letting out of assets should fall. The and longer duration of agreement could have been for many reasons. The fact that all licences, permissions and no objection certificates required for leasing the building*

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to be obtained in the name of assessee is a pointer to aspect that assessee intended to exploit business assets.

21. Section 22 of Income-Tax Act deals with income from house property and it reads thus:

> *"22. Income from house property.--The annual value of property consisting of any buildings or lands appurtenant thereto of which the assessee is the owner, other than such portions of such property as he may occupy for the purposes of any business or profession carried on by him the profits of which are chargeable to income-tax, shall be chargeable to income-tax under the head 'Income from house property'."*

22. It needs no emphasise that when a specific head of charge is provided for income from house property, rents or other income from ownership of house property has to be under this head and no other head. However, for an income from house property it should be covered by section 22. By a catena of decisions, courts, time and again, have held that where subject matter that is let out or given on licence is not a bare tenement but is a complex one like the one in present facts and circumstances, income derived therefrom which is not separable as income from letting out building and "income letting out from furniture, plant and machinery", etc., such and composite income shall not be covered by income from house property. In the present case rental income received from lease of building is not derived either wholly or even substantially from the ownership of the property. The income is not derived from mere letting of a tenement but income is derived from a complex of letting substantial part of which is other than bare tenement. It is further observed from bare reading of agreements that arrangement in the present case, is in the course of and as a part of business of company and enterprise which it has entered upon is of providing special facilities.

23. We also find that decision Hon'ble Calcutta High Court in CIT vs. Shambhu Investment Pvt. Ltd reported in 249 ITR 47, which was approved by Hon'ble Supreme Court in judgment reported at 263 ITR 143, their Lordships had an occasion to elaborately deal with judicial precedents on whether rental income could be taxed under head business profits, and their Lordships concluded as follows:

> *"Taking a sum total of aforesaid discussions, it clearly appears that merely because income is attached to any immovable property cannot be the sole factor for assessment of such income as income from property; what has to be seen is what was the primary object of the assessee while exploiting the property. If it is found, applying such test, that main intention is for letting out*

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> *the property, or any part thereof, the same must be considered as rental income or income from property. In case, it is found that the main intention is to exploit the immovable and property by way of complex commercial activities, in that event, it must be held as business income.*
>
> *8. It is thus clear that when a property is exploited by way of "complex commercial activities", income so earned by exploiting the property is to be taxed as business income. Viewed in this perspective, and having regard to the fact that it is not a case of simplicitor renting of premises but significant value addition to premises by providing all incidental and support services to facilitate cine shooting and related activities, the income is earned by complex commercial activities which can only be taxed under the head business income. The fact that it is clearly a commercial adventure, involving marketing and promotions as also appropriate improvisations on a case to cases basis, takes these receipts out of the ambit of income under the head property income. Similarly, as regards classification of the nature of payments in the TDS certificates, nothing on turns on the same because the nature of payment, as the law is well settled, need not be the same in the hands of the recipient as in the case of the payer. That apart, it is only elementary that definition of 'rent' in Section 194I is not conclusive of taxability of the related income under the head 'income from house property'. The conclusions arrived at by the Ld. CIT (A) thus do not call for any interference."*

24. Respectfully following decision of Hon'ble Supreme Court in the case of Shambhu Investment Pvt. Ltd vs CIT (supra) and discussions herein above, we are of considered opinion that rental income earned by assessee from lease of building would be taxable under the head "income from business and profession". Ld. AO is directed to grant depreciation on building while computing income from business as per law. Accordingly ground No. 1 and 2 raised by assessee stands dismissed.

18. The judgement of the Hon'ble Supreme Court in the case of ***East India Housing and Land Development Trust Ltd. (supra)*** has also been considered in the case of ***CIT vs. Velankanni Information System (P) Ltd. (supra)*** by the Hon'ble Karnataka High Court and Hon'ble Court observed that in this case, the activities were very restricted and consisted only of any owning property

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and collecting of land. There was no exploitation of the property for commercial or business purposes in this case. However, before us appellant has established that the properties were held as commercial assets and same was exploited for business purposes.

19. Thus, we are of the considered view that Ld. Tax Authorities have fallen in error in changing the head of income from 'Business income' to 'Rental income' and accordingly the disallowance of expenditure and denial of depreciation on this account is not sustainable. The grounds raised in both the appeals are allowed. Consequently, the appeals are allowed.

Order pronounced in the open court on 27.05.2024.

Sd/- Sd/-

(G.S. PANNU)
VICE PRESIDENT

(ANUBHAV SHARMA)
JUDICIAL MEMBER

Dated: 27th May, 2024.

dk

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi

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