* IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON :11.10.2012
PRONOUNCED ON:31.10.2012

\+ **ITA 18/1999**
COMMISSIONER OF INCOME TAX ..... Appellant
versus
M/S ANSAL HOUSING FINANCE AND LEASING CO. LTD. ..... Respondent

ITA 56/2001
COMMISSIONER OF INCOME TAX ..... Appellant
versus
M/S ANSAL PROPERTIES & INDUS. LTD ..... Respondent

ITA 57/2001
COMMISSIONER OF INCOME TAX ..... Appellant
versus
M/S ANSAL PROPERTIES & INDUS.LTD ..... Respondent

ITA 105/2001
COMMISSIONER OF INCOME TAX ..... Appellant
versus
M/S ANSAL HOUSING & CONSTRUCTION LTD. ..... Respondent

ITA 107/2001
COMMISSIONER OF INCOME TAX ..... Appellant
versus
M/S ANSAL PROPERTIES & INDUSTRIES LTD. ..... Respondent

ITA 109/2001
COMMISSIONER OF INCOME TAX ..... Appellant
versus
M/S ANSAL PROPERTIES & INDUSTRIES LTD. ..... Respondent

ITA 114/2001
COMMISSIONER OF INCOME TAX ..... Appellant
versus
M/S ANSAL HOUSING & CONSTRUCTION LTD. ..... Respondent

ITA 177/2001
COMMISSIONER OF INCOMET TAX ..... Appellant
versus
M/S ANSAL PROPERTIES & INDUSTRIES LTD. ..... Respondent

ITA 88/2002
COMMISSIONER OF INCOME TAX ..... Appellant
versus
M/S ANSAL PROPERTIES & INDUSTRIES LTD. ..... Respondent

ITA 111/2003
COMMISSIONER OF INCOME TAX ..... Appellant
versus
M/S ANSAL PROPERTIES & INDUSTRIES LTD. ..... Respondent

ITA 321/2003
COMMISSIONER OF INCOME TAX ..... Appellant
versus
M/S ANSAL PROPERTIES & INDUSTRIES LTD. ..... Respondent

ITA 498/2003
COMMISSIONER OF INCOME TAX ..... Appellant
versus
M/S ANSAL HOUSING & CONSTRUCTION LTD. ..... Respondent

ITA 227/2004
COMMISSIONER OF INCOME TAX ..... Appellant
versus
M/S ANSAL HOUSING & CONSTRUCTION LTD. ..... Respondent

ITA 336/2004
COMMISSIONER OF INCOME TAX ..... Appellant
versus
M/S.ANSAL PROPERTIES & INDUSTRIES LTD. ..... Respondent

ITA 529/2004
COMMISSIONER OF INCOME TAX ..... Appellant
versus
M/S ANSAL HOUSING & CONSTRUCTION LTD. ..... Respondent

ITA 690/2004
COMMISSIONER OF INCOME TAX ..... Appellant
versus
M/S ANSAL HOUSING & CONSTRUCTION LTD. ..... Respondent

ITA 212/2005
COMMISSIONER OF INCOME TAX ..... Appellant
versus
M/S. ANSAL HOUSING AND CONSTRUCTION LTD. ..... Respondent

….**Appellant**
Through : Sh. Abhishek Maratha, Sr. Standing Counsel with Ms. Anshul Sharma, Advocate.
….**Respondents**
Through : Sh. Ajay Vohra, Ms. Kavita Jha and Sh. Somnath Shukla, Advocates.
Sh. Satyen Sethi and Sh. Arta Trana Panda, Advocates.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT

% The following questions of law were framed in relation to the above appeals, and in respect of which the present common judgment is delivered:

1) Whether in the circumstances the ITAT is correct in holding that expenses incurred on the maintenance of accommodation provided to its employees and executives in Iraq is not disallowable?

2) Whether on the facts and in the circumstances of the case, the Hon'ble ITAT is correct in holding that the depreciation claimed on motor cars purchased and used in Iraq is allowable to the assessee?

3) Whether on the facts and in the circumstances of the case, the learned I is correct in holding that the expenses claimed by the assessee under the heads provisions for completed expenses and expenses incurred on completed project is allowable even though the Department has not accepted the system of accounting followed by the assessee?

4) Whether the assessee was liable to pay income tax on the annual letting value of unsold flats owned by it under the head "income from house property"?

5) Whether the deduction permitted to the assessee under Section 32AB on interest income, was justified in the circumstances of the case?"

6) Whether the assessee could validly claim 100% depreciation on shuttering and scaffolding, for purchase of parts or sections of such equipments?

2. At the outset, counsel for the parties submit that the first three questions have been answered in a previous judgment of the Court, dated 25th September, 2012 in ITR 112-113/1997, in favour of the assessee. In this view of the matter, since identical facts are involved in these appeals, in respect of the same assesse, the said first three questions are answered in favour of the assessee, and against the revenue.

Question No. 4 Whether the respondent could have been assessed on the basis of ALV of the unsold flats?

3. The facts relevant to the issue raised relate to the addition on account of annual letting value (ALV) of flats, added on notional basis are that the assessee-company engages itself in the business of development of mini-townships, construction of house property, commercial and shop complexes etc. In the assessment completed for the year under consideration, the AO assessed the ALV of flats which the assessee had constructed, but were lying unsold under the head "Income from house property". The assessee however, contended that the said flats were its stock-in-trade and therefore the ALV of the flats could not be brought to

tax under the head "Income from house property". The AO however did not a[illegible] the stand of the assessee, and therefore, added the notional value of unsold flats to the total income of the assessee. On appeal by the assessee, the CIT(A) however set aside the addition made by the AO. The revenue's appeal to the Tribunal was unsuccessful.

4. It is argued on behalf of the revenue that in the present case, regardless of whether income was earned from the vacant flat, the assessee had to, in its capacity as owner, pay tax on the ALV. Counsel emphasized the fact that tax incidence did not depend on whether the assessee actually rented out with the intention of carrying on business, but on the mere factum of ownership. Counsel for the revenue relied on the decision of the Calcutta High Court, in *Azimganj Estate (P) Ltd v CIT* (ITA 242/2003, decided on 13-9-2011) and contended that in that case too under identical circumstances, when the builder assesse had vacant flats, which were let out, the Court held that the rental income was assessable not under the head of profits or income from business, but as properly assessable under the head income from house property. It was submitted that as long as the assessee continued to be owner of the vacant flats, it had to be assessed under the head of income from house property; since there was no letting out, the basis of assessment had to be ALV, which was rational and scientific.

5. Counsel for the assessee argued that there is no universal rule as urged by the revenue. It was submitted that unlike in the case cited, i.e. *Azimganj Estates,* the assessee in the present case did not actually let out the vacant flats; it was not even in the business of renting out its flats, unlike in the case of *East India Housing and Land Development Trust v CIT* (1961) 42 ITR 49, or in *Sultan Brothers v CIT* 54 ITR 353. Learned counsel submitted that letting out vacant or other properties was not part of the business or objectives of the assessee, and its

case stands on a better footing than the other judgments, because in fac assessee did not derive an income as a result of letting out. Counsel underlined that income tax is a levy on the income received, and not only notional calculations. In other words, the levy of income tax is for receipts, and not for notional amounts. It is also argued, in the alternative, that the flats cannot be taxed on the basis of their ALV, notionally because the owner is an occupant, and such occupation is in the course of, and for the purpose of business, as a builder.

6. This Court has considered the submission of parties. In *East India Housing and 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 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 cases where there is a letting out of premises and collection of rents the assessment on property basis may be correct but not so, where the letting or sub letting is part of a trading operation The dividing line is difficult to, find but in the case of a company with its professed objects and the manner of its activities and the nature of its dealings 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 profi exploitation."

7. In *Sultan's case* [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 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 vs C.I.T.* 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 s... 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 *Commissioner of Income Tax 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 vs Commissioner Of Income-Tax* 1960 (39) ITR 327 (Mad) 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 :*
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> > *"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 *Karanpura Development Co. Ltd. vs. 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 land owner. 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 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 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. 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 and Co.* [1965] 55 ITR 17 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 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 I2(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, Sultan,* and *Karanpura,* 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* indicates that in

every case, the Court has to discern the intention of the assessee; in this cas intention of the assesse 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 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 agains assessee.

15. The next question which arises, is deduction under Section 32 AB 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 32 AB (1)(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.

16. This court is of the opinion that the question is no longer *res integra,* and is covered by the decision of the Supreme Court in *Apollo Tyres Ltd v CIT* 255 ITR 273. It was held, in that decision that if a business qualifies for the benefit granted under Section 32AB, if an assessee carries on business covered by that provision, and

> *"has utilized any amount during the previous year for the purchase of new plant or machinery then it is entitled to a set off of a sum equal to 20 per cent of the profit of such eligible business as computed in the accounts of the assessee which account has been audited in accordance with sub-section (5) of Section 32AB"*

17. In the present case, the approach of the tax authorities, as well as the Tribunal, was to compute the benefit of set off, in the manner described, and approved in *Apollo Tyres.* The Court also notices that the eligibility or entitlement of the assessee to claim the benefit, was never questioned in the proceedings before the lower authorities. Accordingly, the question is answered in favour of the assessee, and against the revenue.

18. The last question pertains to admissibility of 100% depreciation for [illegible] assessee had claimed it was eligible for such benefit, in respect of each section of tabular scaffolding, used in its construction business. The AO on the other hand allowed 33% depreciation, holding that each section did not qualify for plant and the entire scaffolding and shuttering had to be taken as plant for the purpose of 100% depreciation only if its total cost was below Rs.5000/-. The CIT (Appeal) and ITAT however, reversed this view. Both the Appellate Commissioner and the ITAT took note of previous orders of the Tribunal.

19. Learned counsel for the Revenue contended that the depreciation granted was incorrect as Courts have to apply durability and functionality test if something is durable and not inter-connected or inter-dependent and has functional independent utility this alone can it be said to constitute "*Plant"*. Reliance was placed upon the decision reported as *CIT Vs. Vijaya Enterprises* 332 ITR 235. Counsel for the Revenue emphasised that the Andhra Pradesh High Court specifically rejected a similar claim by builder for eligibility for 100% depreciation under first proviso to subsection 232 (1)(ii).

20. Counsel for the assessee on the other hand argued that the question as to whether the shuttering is independent or inter-dependent or constitute an inter-connected element of a plant is no longer *res integra* since in a previous decision of this Court, concerning the assessee (i.e. *CIT Vs. Ansal Properties and Indus. Oversees Project*s, ITR 241/1992 decided on 16.08.2010) it was held that such claim for 100% depreciation, in respect of parts of scaffolding and shuttering is admissible and in that position the Court had relied upon two judgments of the Rajasthan and Madras High Courts i.e. *CIT Vs. Mohta Construction Co*. (2005) 273 ITR 276 and CIT Vs. Alagendran Finance Limited (2003) 264 ITR (269).

21. This Court considered the submissions. Although the Revenue's argum to be attractive and plausible, this Court is of the opinion that the previous ruling in *Ansal Properties and Indus. Overseas Projects*, did consider the matter in detail. The Court also took into consideration, the other judgments of the Rajasthan and Madras High Courts. It took note of a previous judgment in *JCIT Vs. Anatronics General Co. (P) Ltd.* (2001) 247 ITR 25, where the assessee company used to supply bottles. The Court upheld the contention that each bottle constituted plant and was eligible for 100% depreciation. In view of this settled position and also having regard to the fact that in any event, the value of the shuttering in the present case would have been written off within a couple of years, this Court is of the view that the impugned order and finding of the ITAT in this regard do not call for any interference. The question of law is answered in favour of the assessee and against the Revenue.

22. In view of the above discussion and conclusions, the revenue's appeal succeeds in part, in so far as taxability of the assessee, on the basis of the ALV of the unsold flats. All other questions in all the appeals are answered in favour of the assessee.

The Appeals are disposed of in the above terms without any order on costs.

(S.RAVINDRA BHAT)
JUDGE

(R.V. EASWAR)
JUDGE

31st October, 2012