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

\+ ITA 1117/2008

COMMISSIONER OF INCOME TAX ..... Appellant
Through Mr. N.P. Sahni, sr. standing counsel.

Versus

MAYAR INDIA LTD. ..... Respondent
Through Mr. Rajiv K. Garg and Mr. Ashish Garg, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V.EASWAR

ORDER

% **26.03.2012**

Vide order dated 18th January, 2011, the following substantial question of law was framed:-

> "(i)Whether the ITAT was correct in law in deleting the addition of Rs.62,75,155/- made by the Assessing Officer for treating it as income from house property and not business income?"

2. Having heard learned counsel for the parties, we feel that another substantial question of law is required to be framed to decide

the issues raised:-

> "(ii) Whether the finding of the ITAT that the income from renting out of the property at F-83, Okhla Industrial Area, Phase-I, New Delhi should be taxed under the head "income from business" and not under the head "income from house property" is perverse?"

3. As we have heard the learned counsel for the parties, we proceed to pronounce our decision. Learned counsel for the Revenue has pointed out that similar additions were made in the following assessment years by treating the rental income as "income from the house property" and not income taxable under the head "income from business". However, the said findings were reversed by the CIT (Appeals) and affirmed by the ITAT. Revenue, it is stated, did not prefer any appeal against the order of the ITAT for the reason that the assessment had been completed under the MAT provisions i.e. under Section 115JB and the tax was on the lower side than the prescribed limit. The statement made by the learned senior standing counsel is taken on record.

4. The respondent-assessee is a company and for the assessment year 2002-03 it had filed its return of income dated 30th October, 2002 declaring total income of Rs.1,53,11,558/-. The Assessing Officer, as noticed above, held that the rental income received from the property was taxable under the head "income from house property" and not

under the head "income from business". The reasons given by Assessing Officer read as under:-

> "5. During the course of hearing the assesse was asked by the show cause notice dated 13.01.2005 as to why:
>
> (a) Income from rent should not be taxed as income from house property head only.
>
> (b) Loss on Capital WIP shown as sale in the revised return should not be disallowed in absence of evidence as to sale of products.
>
> 6. Reply to above was received by letter datd 24.1.2005 in which assessee has submitted as under:
>
> (a) The property is still a commercial industrial property. The assessee has not closed down its business and had no intention that the property will not be used for its business purpose in future by the assessee company; the income arising from leasing of the property cannot be treated as income house property.
>
> In view of above, the assessee company treated the income from leasing of the industrial property as income from business.
>
> (c) From the above photocopies your honour will appreciate that the production in Biotech Division was started w.e.f. 1st January, 2002 and the first sale was made on 5th January, 2002 vide bill no.001 from its Biotech Division which proves that the business was commenced w.e.f. 1st January, 2002. Once the business is set up and commenced, all the expenses incurred thereafter for the running of the business are allowable as revenue expenditure. Therefore the expenditure of Rs.67.24 lakhs incurred after the commencement of business is allowable as revenue expenditure. The working of the revenue expenditure claimed in revised return of Rs.67.24 is as under:
>
> *Expenses allowable as revenue* *Amount(in laks)*
>
> Total preoperative Expenses

(As pre details given below)	152.62
Less: Claimed as Capital Exp. Incurred Upto 31.12.2002 except incurred for Purchase of fixed assets	82.98
Expenditure claimed as revenue Expenses Incurred after 31.12.2001	69.64
Less: Royalty (Treated Separately)	2.40
Total Expenses claimed in Computation Of income as revenue expenses	67.24

(C) If according to the revenue laws, the assessee is entitled to treat a sum as revenue expenditure, then that legal right of the assessee is not self stopped by the treatment given by the assessee to it in its own books of account. In what manner the assessee shown a transaction in its books does not affect the nature of the transaction. In this regard, we rely on the following judgments in which it was laid down by the Honorable Supreme Court that "the nature of entries in the books of account is not conclusive proof of transaction."

7. The reply of the assessee has been considered. It is clear that rent receipts from fixed house property will be treated as income from House Property only and allowable deduction u/s24 of the I.T. Act, 1961 would be given. During the year under consideration the assessee has shown rental receipts of Rs.99 lacks under the head Other Sources in the Profit and Loss A/c. Same is now to be taxed under head Income from House Property and deduction of Rs.935493 shown as rates and taxes would be deducted there from."

5. It is noticeable that in reply dated 24th January, 2005, the assessee himself had stated that they had started production in the Biotech Division w.e.f. 1st January, 2002. In paragraph (a) the assessee had stated that the property was still a commercial property and they had

not closed down the business and had no intention that the prop would not be used for commercial purposes by the assessee-company. The aforesaid two statements are relevant and important when we notice the legal position and findings recoded by the CIT (Appeals) and the tribunal.

6. The Commissioner of Income Tax (Appeals) has reversed the findings given by the Assessing Officer, recording as under:-

> "12.11 In my opinion, the case of the Appellant is duly covered by the aforesaid observation of the Honorable Madras High Court as the Appellant in this case has let out the industrial premises temporarily after shifting its branch to Mayar Towaer, 12 Yamuna Marg, Civil Lines, Delhi and accordingly the property at Okhla, Delhi has become surplus which was exploited by the Appellant as the business assessed and the Appellant was also getting maintenance charges from the tenant for the proper up keep of the building as per the maintenance agreement enter into. I therefore, set aside the order of the Assessing Officer on this issue and direct the Assessing Officer to assess the income earned by the Appellant from the letting out of the commercial industrial premises under the heads income from business."

7. Before the Commissioner of Income Tax (Appeals) in the written submissions dated 5th May, 2005, the respondent-assessee had stated as under:-

> "That the assessee company was using the property bearing no.F-83, Okhla Industrial Area,

Phase I, New Delhi for its business purpose since its purchase. As the assessee company shifted its whole business activities from Okhla to Mayar Towers, 12 Yamuna Marg, Civil Lines, Delhi, the said property was given on lease to M/s ALF LIMITED for a short period of three years on 25th August, 2000 vide agreement dated assessee had given it on lease to earn income from the vacant industrial property, it does not mean that the property is still a commercial industrial property. The assessee has not closed down its business activity and had no intention that the property will not be used for its business purpose in future. The income arising from leasing of the industrial property cannot be treated as income from house property."

8. The assessee had also stated as under:-

"12.2 In view of above, the income derived from letting of industrial property shall be treated as income assessable under the head business income.

12.3 We further state that the assessee is entitled to exploit it industrial property to his best advantage and the he may also either by using it himself personally or by letting it out to some body else.

12.4 x x x x x x x x x

12.5 In the case of the assessee, the industrial property is let out temporary while the assessee is carrying on his other business activities. The commercial property was used by the assessee as such in the beginning and later on after shifting its branch to Mayar Tower, 12, Yamuma Marg, Delhi from F-83, Okhla, Phase-I, New Delhi, the property at Okhla has become surplus which was exploited by the assessee by letting it out to other for a short period of three years. Therefore, it is a clear case of exploiting the business assets by the assessee otherwise than employing them for his own use for making the profit for that business.

In this regard, we rely on the judgment of Hon'ble Supreme Court in the case of Universal Plast Vs. CIT (SC) 237 ITR 154.

12.6 In view of the above, the income so derived from letting out of industrial property temporarily is assessable under the head "business income".

9. The Revenue preferred an appeal against the aforesaid finding before the tribunal, which by the impugned order dated 31st October, 2007, has been dismissed. The tribunal in the impugned order has recorded as follows:-

"47. It has been held by the Hon'ble Supreme Court that no precise test can be laid down to ascertain whether income received by the assessee from lease and let out of assets would fall under the head profits and gains of business or profession and it is a mixed question of law and facts and has to be determined from the point of view of a business man 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. It has further been held that 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 the business altogether or to come back and restart the same and in case where only 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 in his own use for making profit for that business. Looking to the facts of the present case in the light of above mentioned principles laid down by the Hon'ble Supreme Court, it will be a case of exploiting the business

assets otherwise then employing the same for assessee's own business for making profit for that business. During the year under consideration assessee has shifted its business premises to another place and in the meanwhile by retaining a small portion of the said premises balance premises was let out for a period of 3 years. Thus there was intention of the assessee to exploit the business asset. The assessee has not closed down its business activities but has only shifted its premises from one place to another. Applying these principles to the facts of the present case it will be held that income earned by the assessee from letting out such premises was income from business. Apart from the decision in the case of Universal Plast Ltd. (supra) the decision relied upon by the CIT (A) in the case of the CIT v. V.S.T. Motors (supra) also support the case of the assessee which has been dealt with by the CIT(A) in his order. In this view of the situation we find that the CIT (A) has rightly held that the lease income received by the assessee was assessable under the head "business income" and the order of CIT (A) in this regard is upheld. This ground of the revenue is dismissed."

10. The Revenue with this appeal has filed a copy of the lease agreement dated 25th August, 2000 and copy of the maintenance agreement dated 25th August, 2000, between the assessee and the tenant. The relevant clauses of the lease agreement read as under:-

"2. The period of the lease shall be for a term of 36 months commencing from the 25th day of August, 2000 and expiring on 24th day of August, 2003. The Lessee has an option to renew this Agreement for a further period of 36 months on the same terms and conditions as laid down in this Agreement. Such option shall be exercised by the

Lessee 60 days before the date of expiry of the Agreement. The Lessee also undertakes to hand-over vacant & peaceful possession of the said premises after expiry of 6 years from the date of the Agreement i.e. 24th day of August, 2006. After the initial period of 3 years a fresh lease deed will be executed.

3. The Lessee shall pay to the Lessor a sum of Rs.6,00,000/- (Rupees Six lacs only) per month as lease charges subject to the deduction of tax at source as applicable under the Income Tax Act or any other Act. The said lease charges shall be payable by the 7th of the respective month.

4. Both the Lessor and the Lessee have agreed to carry out the various civil work listed in the Annexure-A of this lease, like painting/gunniting/plastering/increasing the height of the wall etc. as well as to ensure the required power and water supply connections. The Lessee also has to carry out certain civil work as mentioned in the Annexure-A. Carrying out of the proposed civil work would prevent the Lessee from fully utilizing the aforesaid premises. Therefore, during the first thirty days after the signing of this Agreement the lease charges shall be NIL and for the fifteen days thereafter Lease charges shall be Rs.3,57,043/-. Thus, the lease charges of Rs.6,00,000/- per month as stipulated under clause 3 shall be payable 45 days after the signing of this Agreement."

XXXXX

"12. The Lessee can terminate this Agreement by given a written notice of six months to the Lessor. However, the Lessee can exercise this right only after twelve months from commencement of this Agreement.

13. The Lessee shall be entitled to decorate or renovate at its own cost the Leased Premises and shall be entitled at their own cost to install electrical appliances like coolers, air conditioners, computers and required electrical/cabling

connection, to also put up slotted angles, shelves, wall units, partitions etc. and remove the same at the time of expiry or earlier determination of this Agreement. Removal of the aforesaid items at the time of vacating the premises and consequences thereof shall be treated as normal wear and tear. However, no structural changes shall be made without the approval of the Lessor."

11. Learned counsel for the respondent-assessee has relied upon clause 9(c) of the agreement, which reads as under:-

"9. The Lessee hereby covenants with the Lessor as under:
(a) x x x x x x
(b) x x x x x x
(c)Not to damage in any way the walls, partition, ceiling etc., of the Leased premises and to keep the same in good order and condition however reasonable wear and tear and loss or damage by irresistible force or act of God excepted."

12. As per the maintenance agreement dated 25th August, 2000, an amount of Rs.2,25,000/- monthly was payable by the lessee i.e. the second party to the respondent-assessee i.e. the first party subject to the deduction of Income Tax at Source at the rate of 22% or such other rate as may be revised from time to time. The lessee had agreed in paragraph (2) to carry out the various civil work as mentioned in Annexure A to the lease agreement as without carrying out the said civil work, lessee would be prevented from utilizing the aforesaid premises.

13. Clause 9 (c) of the aforesaid lease agreement merely refers to the

walls, partition, ceiling, etc. of the leased premises and states that same should be kept in good order and condition. What is relevant and material is that as per clause 4 of the lease deed dated 25th August, 2000, the lessee and the lessor had agreed to carry out various civil works listed in the Annexure-A as without carrying on the said work, the ~~assessee~~ lessee would be prevented from utilizing the said premises. The right of cancellation/termination of lease was given to the lessee and not to the lessor. Under clause 13, the lessee was entitled to install electrical appliances like coolers, air conditioners, etc.

14. We may now note that the assessee had himself stated in the letters written to the Assessing Officer and the CIT (Appeals) that they had continued to undertake business. They had shifted from the premises to Civil Lines Area. It is not a case of the respondent-assessee that any plant, equipment or machinery were given on lease to the tenant. We may also note that the tribunal has recorded various inferences including that the assessee was continuing the business activities, without noticing the nature and character of the activity undertaken from Okhla, Phase-I and the activity at Civil Lines. It is obvious that Biotech Division required plant and machinery. No reference has been made to the lease deed dated 25th August, 2000 and the terms and conditions mentioned therein. No reference is also made

to the communications addressed by the assessee to the Asses Officer and the CIT (Appeals). Merely carrying on business or stating that the property was commercial property, does not help or support the stand of the assessee. The submission that the lease was temporary has to be supported and pleaded on some basis and foundation. No reason is stated. Mere ipse dixit or statement is not suffice. The stand of the assessee before the Assessing Officer was that the assessee "had no intention that the property will not be used for its business". This it is rightly submitted ~~that~~ ~~this~~ is different from stating that the lease was temporary in nature, with the intention to restart the business from the property.

15. We may, in this connection, refer to the decision of the Supreme Court in ***Universal Plast Ltd. Vs. CIT*** (1999) *237 ITR 454* wherein it has been observed as under:-

> "(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 ;

> (4) if only 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."

16. It is clear from the aforesaid paragraph that to arrive at a legal conclusion, factual aspects have to be ascertained. Without noticing the factual aspects including the contentions, clauses of the lease agreement and maintenance agreement, the tribunal has erred in reaching and giving its conclusions without any discussion. Inferences have been drawn without referring to the material/evidence. Therefore, an erroneous order has been passed.

17. In view of the aforesaid discussion, we answer the second substantial question of law quoted above in negative i.e. in favour of the appellant-Revenue and against the assessee and an order of remit is passed to the tribunal to decide the issue in question afresh and give a finding on the nature, character and type of letting, examine the contentions of the parties with reference to the material on record including the written submissions made by the assessee as well as the lease and maintenance agreements dated 25th August, 2000.

Thereafter, the tribunal should apply the legal ratio as expounded by the Supreme Court in the case of ***Universal Plast. Ltd.****(supra)*. The first question is therefore not required to be answered.

18. To cut short the delay, the parties will appear before the Assistant Registrar of the tribunal on 7th May, 2012, when a date of hearing will be fixed. No costs.

SANJIV KHANNA, J.

R.V.EASWAR, J.

MARCH 26, 2012
NA/VKR