

ITA No. 242 of 2003
IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income-tax)
Original Side

AZIMGANJ ESTATE PVT. LTD. Appellant
Versus
C.I.T. - III KOLKATA Respondent

For Appellant Mr. J.P.Khaitan, Sr.Advocate with
Mr. S.Das, Mrs. Sanjukta Bose and
Mr. C.S.Das, Advocates
For Respondent : Md. Nizamuddin with
Mr. Aniket Mitra, Advocates

BEFORE:

The Hon'ble JUSTICE BHATTACHARYA

The Hon'ble JUSTICE DR. SAMBUDDHA CHAKRABARTI

Date : 13th September, 2011.

THE COURT : This Appeal under Section 260A of the
Income-tax Act, 1961 ("Act") is at the instance of an
assessee and is directed against an order dated 24th June,
2003 passed by the Income-tax Appellate Tribunal, 'A' Bench,
Kolkata in ITA No. 1291(Kol) of 2002 relating to assessment
year 1998-99 by which the Tribunal allowed the appeal
preferred by the Revenue and set aside the order of the
Commissioner of Income-tax (Appeals).

Being dissatisfied, the assessee has come up with
the present appeal.

The facts giving rise to filing of this appeal may be summed up thus :

The assessee company is a property developer and builder. In course of its business activities, it constructed a building at 7, Camac Street, Kolkata - 17 in which there were some unsold flats which were appearing as stock-in-trade under the current assets in Schedule VI of the balance sheet furnished by the assessee and which were meant for sale. The costs of these unsold flats as appearing in the balance sheet was Rs.26,09,456/- and the assessee had shown the rental income of Rs.49,00,612/- under the head 'operating income' in the profit and loss account. This income was received from letting out of unsold flats which were shown as stock-in-trade in the balance sheet and meant for sale. The assessee had shown the rental income under the head "income from house property" and, thus, claimed statutory reduction of Rs.9,80,122/- being the $1/5^{\text{th}}$ on account of repair from annual letting out value of Rs.49,00,612/-.

The Assessing Officer pointed out that in the wealth tax proceedings the assessee had taken the plea that the unsold flats as shown in stock-in-trade were not assets for the purpose of Wealth Tax Act and, hence, not taxable under the said Act. The Assessing Officer took note of the fact that the Tribunal accepted the aforesaid contention in

the appeal under the Wealth Tax Act and was, therefore, of the view that since the assessee had been treating the unsold flats as stock-in-trade of its business, the income from such business assets in the nature of stock-in-trade should be treated as business income and not income from house property, as claimed by the assessee. The Assessing Officer, therefore, rejected the claim of the assessee by treating the rental income from the unsold stock-in-trade flats under the head 'income from house property' and rejected the claim of the statutory deduction on account of repair to the extent of 1/5th of the gross rental income.

Being dissatisfied, the assessee preferred an appeal before the Commissioner of Income-tax (Appeals) who, however, accepted the contention of the assessee and held that the appropriate head for the income derived by way of letting out the unsold flats should be income from house property and not business income.

Being dissatisfied, the Revenue preferred an appeal before the Tribunal below and by the order impugned in this appeal, the said Tribunal has set aside the order passed by the Commissioner of Income-tax (Appeals) and restored the one passed by the Assessing Officer.

The assessee has, thus, come up with this appeal under Section 260A of the Act.

A Division Bench of this Court at the time of admission of this appeal formulated the following substantial questions of law for determination in this appeal.

i) Whether on a true and proper interpretation of the provisions of sections 14 and 22 of the Income Tax Act, 1961 the Tribunal was justified in law in holding that the rental income derived by the appellant from letting out unsold flats held as stock-in-trade was assessable as "business income" and not under the head "income from house property" and that the appellant was not entitled to the statutory deduction for repairs and collection under section 24(1)(i) of the Act.

ii) Whether on a true and proper interpretation of sections 14 and 22 of the Income Tax Act, 1961 the rental income derived by the appellant from letting out the flats owned by it had to be classified and computed under the specific head "income from house property"

Mr. Khaitan, learned Senior Advocate appearing on behalf of the appellant has, by placing strong reliance upon the decision of the Supreme Court in the case of East India Housing and Land Development Trust Ltd. vs. Commissioner of Income-Tax, West Bengal (1961) 42 ITR, 49 has submitted before us that the distinct heads specified in the Act indicating the sources are mutually exclusive and the income

derived from different sources falling under specific heads has to be computed for the purpose of taxation in the manner provided by the appropriate section. According to Mr. Khaitan, if the income from a source falls within the specific head set out in the Act, the fact that it may indirectly be covered by another head will not make the income taxable under the latter head. By relying upon the aforesaid principle, Mr. Khaitan contends that his client has a business of developing house property and the unsold flats in question being owned by his client, income derived from such unsold flats by way of letting out so long a buyer is not procured amounts to income from house property by letting out and cannot be a business income. According to Mr. Khaitan, the nature of the stock-in-trade declared by his client being house property simplicitor, the Assessing Officer has no other alternative but to assess the income by way of letting out of such property under the head 'income from house property'.

According to Mr. Khaitan, the said decision of the Supreme Court in East India Housing and Land Development Trust Ltd. has been subsequently approved by a Constitution Bench in the case of Sultan Brothers Private Ltd. vs. Commissioner of Income-Tax, Bombay City II reported in (1964) 51 ITR 353.

Mr. Khaitan, therefore, prays for setting aside the order passed by the Tribunal and restoration of the order passed by the Commissioner of Income-tax (Appeals).

Mr. Nizamuddin, learned advocate appearing on behalf of the Revenue has, on the other hand, opposed the aforesaid contention of Mr. Khaitan and has relied upon the decision of the Supreme Court in the case of Karanpura Development Co.Ltd. vs. Commissioner of Income-Tax, West Bengal reported in (1962) 44 ITR, 362 in support of his contention that the property, though dealt with by the assessee intending to do business was, in fact, dealt with as owner. According to Mr. Nizamuddin, where an assessee has acquired property which he sells with a view to acquiring other property to be dealt with in the same manner, the assessee is, in fact, not treating them as properties to be enjoyed in the shape of rent which they yield but as a kind of circulating capital leading to profits of business, which profit might be either enjoyed or put back into business to acquire more properties for further profitable exploitation. Mr. Nizamuddin further relied upon the decision of the Gujarat High Court in the case of Commissioner of Income-Tax vs. New India Industries Ltd. reported in (1993) 201 ITR, 208 which was also relied upon by the Tribunal below. Mr.

Nizamuddin, therefore, prays for dismissal of the appeal by affirming the order passed by the Tribunal below.

After hearing the learned counsel for the parties and after going through the materials on record, we find that with regard to similar rental income in respect of unsold flats, the Assessing Officer in the past treated those income as income from house property and those decisions relating to earlier assessment years have attained finality. The moment in the proceedings under the Wealth Tax Act, the assessee contended that those unsold flats were stock-in-trade of its business and such contention was accepted by the Tribunal in the appeal preferred under the Wealth Tax Act, the Assessing Officer decided to treat the said income as income from business on the ground that the assessee itself having claimed those unsold flats as part of stock-in-trade of its business, there is no reason why the income from letting out those stock-in-trade should not be treated to be income from business.

In our opinion, we would have accepted the reasoning assigned by the Tribunal if the subject matter of stock-in-trade was not unsold flats simplicitor, but were plants, machinery, godown, etc. and in those circumstances it could be reasonably argued that income by exploiting those stock-in-trade would come under the purview of income from

business. Even in the decision of the Gujarat High Court relied upon by Mr. Nizamuddin and the Tribunal below, in paragraph (iii) at page 247 of the Report, it was pointed out that what was to be seen was whether the asset was being exploited commercially by the letting out or whether it was being let out for the purpose of enjoying the rent. According to the said decision, the distinction between the two is a narrow one and has to depend upon certain facts peculiar to each case. It was further pointed out that pure and simple, the commercial assets like machinery, plants, tools, industrial sheds or godowns having high business potentials stand on a different footing from assets like land and building. In our view, in the case before us, the subject matter of exploitation being unsold flats still owned by the assessee, the Commissioner of Income Tax (Appeals) rightly concluded that the same should be treated as income from house property by way of letting it out.

In the case of Commissioner of Income-tax West Bengal III vs. Ajmera Industries Private Ltd. (1976) 103 ITR, 245, relied upon by the Tribunal below, a Division Bench of this Court was considering a case where the assessee was carrying on business and in course of its trading activities, the assessee was using and exploiting non-factory building including its godowns. In such a fact, the Division Bench was

of the view that non-factory building including the godowns clearly constituted commercial assets of the assessee and the finding of the Tribunal in that case was that non-factory buildings including godowns were commercial assets of the company which amounted to exploiting major portion of the same by letting out to some others as business income of the assessee.

In the case before us, the unsold flats being house property, pure and simple and having fallen under the head, income from house property, as provided in section 22 of the Act, in our opinion, Commissioner of Income-tax (Appeals) rightly held that the rental income of such property should be assessed under section 22 of the Act.

We cannot lose sight of the fact that under the Act, the income of an assessee is one and various sections of the Act direct the modes in which the income is to be levied. No one of those sections can be treated as general or specific for the purpose of any one particular source of income ; they are all specific and deal with various heads in which an item of income, profits and means 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.

On consideration of the entire materials on record, we, therefore, hold that the Tribunal below committed substantial error of law in reversing the order of Commissioner of Income-tax (Appeals) and we consequently restore the order passed by the Commissioner of Income-tax (Appeals).

The appeal is, thus, allowed by answering the first question the first question in the negative and against the Revenue and the second question in the affirmative and in favour of the assessee.

In the facts and circumstances, there will be, however, no order as to costs.

Photostat certified copy of this order be made available to the parties upon compliance of usual formalities.

(BHATTACHARYA, J.)

(DR. SAMBUDDHA CHAKRABARTI, J.)