* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ ITA No.654/2008

\# CIT, DELHI-IV, NEW DELHI ..... Appellant
Through: Ms. P.L. Bansal with Mr. M.P. Gupta & Mr. Sanjeev Rajpal, Advs.

versus

$ D.S. PROMOTERS & DEVELOPERS PVT. LTD..... Respondent
^ Through: Mr. Kaanan Kapur, Adv.

Date of Hearing : April 22, 2009

% Date of Decision : May 01, 2009

CORAM:
* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE RAJIV SHAKDHER

1. Whether reporters of local papers may be allowed to see the Judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the Judgment should be reported in the Digest? Yes

VIKRAMAJIT SEN, J.

1. Admit. The following questions, as have been proposed on behalf of the Revenue in this Appeal, are framed:-

a) Whether ITAT was correct in law in treating the amount of Rs.15,07,644/- received by the assessee from J&K Bank Ltd. as “Business Income” and not “Income from Other Sources”?

(b) Whether ITAT was correct in law in treating the amount of Rs.52,80,000/- received by the assessee from Total Care(India) Pvt. Ltd. as “Business Income” and not “Income From Other Sources”?

(c) Whether ITAT was justified in law in treating the receipt of Rs.51,00,000/- from Shivalik Tyres Limited as "Business Income" and not "Income from Other Sources"?

2. This Appeal under Section 260A of the Income Tax Act, 1961 (Act for short) assails the concurrent findings of the CIT(A) and the ITAT to the effect that the rental income received by the Assessee from J&K Bank Limited in respect of its property at Lajpat Nagar, New Delhi was business income; that the income received by the Assessee from Total Care (India) Pvt. Ltd. as well as Shivalik Tyres Ltd. in respect of the building in South Extension, New Delhi was also business income. The Lajpat Nagar property is directly owned by the Assessee, whereas the South Extension property has been leased out to the Assessee. Section 22 of the Act prescribes that the annual value of property, of which the Assessee is the owner, other than such portions of such property as he may occupy for the purposes of any business shall be chargeable to Income Tax under the head "Income from house property". If the property is exploited as a business, the profits and gains derived from the business are chargeable to Income Tax under the head "Profit and Gains of business or profession" in terms of Section 28 of the Act. Incomes, which do not fall in heads of income carved out under the Act, viz. Salaries, or Income from House Property, or Profits and gains of business or profession, or Capital gains are subject to Income Tax under the head "Income from any other sources".

3. The case of the Revenue argued before us, as was unsuccessfully done before the CIT(A) as well as the ITAT, is that the income derived by the Assessee from the two properties is taxable as “Income from other sources”. Deductions available to the Assessee under the head “Profits and gains of business” are wider and more beneficial than what is available under the head “Income from other sources”.

4. It is always salutary to keep in sight the enunciation of the law in *K.Ravindranathan Nair –vs- CIT*, [2001] 247 ITR 178(SC) : 2001(1) SCC 135 to the effect that the Tribunal is the final fact finding Authority and its decision can be successfully assailed before the High Court only if it is palpably perverse. Perversity has been defined as indicative of an action, opinion or conclusion which could not reasonably be arrived at. Even an incorrect conclusion would be perverse or mala fide only if it is patently deliberate. Very recently, this view finds reiteration in *CIT –vs- Mukundray K. Shah*, [2007] 290 ITR 433(SC) where their Lordships have observed that the High Court ought not to have interfered with a finding of fact which was not perverse. In *CIT –vs- P. Mohanakala*, (2007) 6 SCC 21 the Supreme Court has held that the concurrent findings of fact, predicated on material available on the record, cannot constitute questions of law much less substantial questions of law. A similar appreciation of law is to be found in *Commissioner of Agricultural Income Tax –vs- M.N. Moni*,

(2007) 10 SCC 584 decided by a Three-Judge Bench. In *T.Ashok Pai –vs- CIT, Bangalore*, (2007) 7 SCC 162 their Lordships have held that the High Court should not ordinarily disturb the finding by the ITAT on questions of fact and a question of law would arise, if at all, only after accepting the findings of fact to be correct. In *Sir Shadi Lal Sugar and General Mills Ltd. –vs- CIT, Delhi*, (1987) 4 SCC 722 it has been opined that the High Court on a Reference was not justified in interfering with findings of fact arrived at by the Tribunal which had been rendered only after duly considering the entire evidence. In *CIT, Gujarat –vs- Cellulose Products of India Ltd.*, (1991) 4 SCC 467 a Three-Judge Bench observed that once "the tribunal after considering the evidence produced before it on a question of fact records its finding, it cannot be interfered with in a reference by the High Court unless such finding was not supported by the evidence, was perverse or patently unreasonable".

5. The leading case pertaining to the head under which "income from property" is to be assessed to Income Tax is *Sultan Brothers Private Ltd. –vs- CIT, Bombay City II,* [1964] 51 ITR 353. The Assessee had constructed a building which it had fitted with fixtures and furnishings and had let it out on lease fully equipped and furnished for the purposes of running a hotel at a monthly rent of Rupees 5,950/- and monthly hire of Rupees 5,000/-. Their Lordships noted that the object of the Assessee was to acquire land

and buildings and after investments either sell or let them out. It was laid down that whether a particular letting is business activity or otherwise has to be decided in the circumstances of the each case; the determination would be from the perspective of the businessman; a commercial asset is only an asset used in a business and nothing else. In *East India Housing and Land Development Trust Ltd. –vs- CIT, West Bengal*, [1961] 42 ITR 49 it has been held that income derived from the shops and stalls constructed by the Assessee was income received from property and did not partake of the nature of income from profits and gains from business. *Karanpur Development Co. Ltd. –vs- CIT, West Bengal*, [1962] 44 ITR 362 lays down that the transactions of acquiring leases and granting sub-leases are in the nature of trading within the objects of the company and not enjoyment of property as land owner. Ownership of property and leasing it out could either be as business or as a land owner and the arrangement determines in which of the two categories it falls. It is the substance and not the form of the matter that must be ascertained. *S.G. Mercantile Corporation P. Ltd. –vs- CIT, Calcutta*, [1972] 83 ITR 700 is a precedent for the proposition that dealing with any real property, as also the activity of taking a property on lease, setting up a market thereon and letting out shops and stalls in the market can constitute business activity. Our attention has been drawn to *CIT –vs- Chennai Properties and Investments Ltd.*,

[2004] 266 ITR 685 where the Division Bench of the Madras High Court had come to the conclusion that the assessee, as owner of the building, intended only to realize rent by leasing out the property and consequently the income could not have been assessed to tax as profits and gains from business. This was also the verdict in *CIT –vs- Superfine Cables P. Ltd.*, [1985] 154 ITR 532(Del).

6. This distillation of precedents must now be applied by us to the facts of the case. As has already been noted, the Assessee was the owner of property in Lajpat Nagar. Specially noted was the fact that the prominent object of the Assessee is "to purchase develop, take in exchange or on lease or otherwise acquire lands, houses, farm house, buildings, sheds industrial or otherwise and other fixtures on land and buildings and to let them out on lease, rent, contract or any other agreements as may be deemed fit to or but, construct improve, sell ,exchange mortgage lands, houses, flats, sheds, factories sheds and buildings apartments to any person on terms and conditions as may be deemed fit or to hold, maintain sell, allot, houses apartments, sheds or buildings thereof to the shareholders or to any other person". Even after scrutiny carried out for Assessment Year 1997-1998 to 2000-2001 the receipts were accepted as business income, which was indubitably a plausible view. Since no fresh facts had been brought to light, the consistency rules had been applied. We find no error in this

conclusion. Question (a) is answered in the affirmative and in favour of the Assessee.

7. On the second question, the Assessing Officer had arrived at the conclusion that the transaction between the Assessee and Total Care (India) Pvt. Ltd. was not a business arrangement and on the understanding of the various clauses of the Franchise Agreement dated 1.5.2000 concluded that it was essentially a letting of property. However, since the Assessee was not an owner thereof, it could obviously not have been taxed under the head of "Income from house property" and, therefore, would have to be assessed under the head "Income from other sources". The CIT(A) has also discussed the various clauses in the Franchise Agreement in great depth and detail, but has held that the income/commission received by the Assessee from Total Care(India) Pvt. Ltd. was business income. He observed that the premises were chosen by Total Care(India) Pvt. Ltd. firstly because of the location and secondly because of the large number of walk-ins since a restaurant, as well as a Bar, was being run within the same building; the businesses were complimentary to each other; the appellant had covenanted not to open a competing business; Total Care(India) Pvt. Ltd. relied on the expertise of the Assessee with respect to display of goods; the appellant exercised control over the opening and closing of the showroom by Total Care(India) Pvt. Ltd.; since Total Care(India) Pvt. Ltd. could not achieve desirable

levels of sales, the Agreement had been terminated. In its place a restaurant by the name of Gourmet Gallery had been opened. The Tribunal had also made an in-depth study of the agreements as also the user to which the entire building in South Extension had been put. It noted that the business of the Assessee, apart from dealing in properties, was also the running of restaurants; that the assessee's purpose was to commercially exploit the business asset, that is, building in South Extension in respect of which it had invested a sum of approximately Rupees 1.3 crores for renovations; that the premises have been earlier utilized to run a store selling garments under the trade name Golden Arch. The thinking of the Tribunal was largely influenced by the manner in which the entire building had been utilised. We find no reason to dislodge the concurrent findings of fact, as there is no perversity in the conclusion arrived at. Question (b) is accordingly answered in the affirmative and in favour of the Assessee.

8. So far as the third question is concerned, the CIT(A), as well as the ITAT, had taken note of the fact that the Assessee had also been in the restaurant business. All throughout the Assessee was also running its own Bar and had even offered the use of its Bar Licence to Shivalik Tyres Ltd., in the event that the latter had failed to obtain its own. Shivalik Tyres Ltd. was already engaged in the business of restaurant in the name of Orlando at Noida, whilst the Assessee was running Gourmet Gallery. The Assessee

had taken a decision to exploit its business assets by entering into an arrangement with Shivalik Tyres Ltd. related to the restaurant business. The fact that the minimum guarantee amount was stipulated in the agreement to ensure the minimum returns of the investment made by the Assessee could as well be a business decision as it could be a lease agreement. Nothing turns on it. Since these concurrent findings of fact are not perverse and to the contrary are relevant, Question (c) is answered in the affirmative and in favour of the Assessee.

9. The Appeal is dismissed but with no orders as to costs.

(VIKRAMAJIT SEN)
JUDGE

May 01, 2009
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(RAJIV SHAKDHER)
JUDGE