(2014) 07 KAR CK 0135

In the Karnataka High Court

Case No : Income Tax Appeal No. 756 of 2008(T-IT)

Always New APPELLANT

Vs

The Income Tax Officer RESPONDENT

Date of Decision : 04-07-2014

Acts Referred:

Citation : (2014) 07 KAR CK 0135

Hon'ble Judges : N. Kumar, J;B. Manohar, J

Bench : Division Bench

Advocate : A. Shankar and M. Lava, Advocates for the Appellant; K.V. Aravind, Advocates for the Respondent

Judgement

N. Kumar, J.—This appeal is preferred by the assessee, challenging the order passed by the authorities, which has treated the disputed income as the income from other sources.

2. The assessee is a partnership firm carrying on the business under the name and style "M/s. Always New". It is in the business of garments. To carry on this business, the property bearing No. 181, Commercial Street, Bangalore, was taken on lease from its owner. The said premises was taken on lease for a period of five years commencing from 1.4.2000. The entire premises could not have been used for his business and had suffered loss; the assessee entered into an agreement dated 10.10.2000 under which the assessee sublet the portion of the building to M/s. Java Coffee Company Limited, to carry on the business of coffee shop on a rent of Rs. 27,500/- per month. The terms of the agreement show that it is the minimum he is entitled to, otherwise he is entitled to 7.5% of the net sales. Therefore, it was contended that it is in the nature of licence. The said arrangement was terminated with effect from 31.10.2001. During the relevant accounting period, the assessee had received a sum of Rs. 19,25,000/-. The assessee treated the said income as income from business. Now all the authorities have held that it is to be treated as income from other sources and not from business.

3. This appeal was admitted on 13.11.2008 to consider the following substantial questions of law:

"1) Whether the Tribunal was justified in law in holding that the income arising from the agreement with Messrs. Java Coffee Company is to be assessed as income from other source and not as income from business on the facts and circumstances of the case?

2) Whether the Tribunal was justified in law in not holding that alternatively the receipt was assessable as income from house property on the facts and circumstances of the case?"

4. We have heard the learned Counsel for the parties.

5. The Apex Court had an occasion to consider this question elaborately in more than one judgment. In the case of Commissioner of Excess Profit Tax, Bombay City Vs. Sri Lakshmi Silk Mills Ltd., , it was held that, "if a commercial asset was not capable of being used as such, then its being let out to others did not result in an income which was the income of the business, but it could not be said that an asset which was acquired and used for the purpose of the business ceased to be a commercial asset of that business as soon as it was temporarily put out of use or let out to another person for use in his business or trade. The yield of income by a commercial asset was the profit of the business irrespective of the manner in which that asset was exploited by the owner of the business. He was entitled to exploit it to the best advantage and he might do so either by using it himself personally or by letting it out to somebody else. The view that in order to constitute business income, the commercial asset must at the time it was let out be in a condition to be used as a commercial asset by the assessee himself was not correct."

In that case, the assessee-company was a manufacturer of silk cloth and as a part of its business, it installed a plant for dyeing silk yarn. During the chargeable accounting period, January 1, 1943, to 31st December, 1943, owing to difficulty in obtaining silk yarn on account of the war, it could not make use of this plant and it remained idle for some time. In August 1943, it was let out to a person on a monthly rent. The question was whether such sum representing the rent for five months realised by the assessee was chargeable to excess profits tax as profits of business or was income from other sources and was, therefore, not chargeable to excess profits tax. It was held by the Apex Court that it was a part of the normal activities of the assessee''s business to earn money by making use of its machinery by either employing it in its own manufacturing concern or temporarily letting it to others for making profit for that business when for the time being it could not itself run it and that the dyeing plant had not ceased to be a commercial asset of the business and the sum representing the rent for five months received from the lessee by the assessee was, therefore, income from business and was chargeable to excess profits tax.

6. Following the aforesaid judgment, the Apex Court in the case of Commissioner

of Income Tax, Lucknow Vs. Vikram Cotton Mills Ltd., held that, in each case, the intention has to be gathered 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. It depends upon the facts and circumstances of each case. When the intention was not to part with the assets, but to lease it out for a temporary period as a part of exploitation, it could not be said that no business was carried on and the income derived by the Company from letting out the machinery was only rental income. There was a temporary suspension of business for a temporary period with the object of tiding over the crisis condition. There was never any act indicating that the company never intended to carry on the business in the future.

In such circumstances, the income derived by way of lease rent from the letting out of its assets was assessable to tax under the head "Profits and gains of business". 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.

7. The Apex Court in the case of S.G. Mercantile Corporation P. Ltd. Vs. Commissioner of Income Tax, Calcutta, held that, "the residuary head of income can be resorted to only if none of the specific heads is applicable to the income in question; it comes into operation only after the preceding heads are excluded".

8. In this background, when we look into facts of this case, the assessee took the premises on lease to carry on its business in garments. The lease premises is a commercial asset. In the course of carrying on business, they sustained losses. They did not need the entire commercial asset. Therefore, they entered into an agreement to make available a portion of the commercial asset for carrying on coffee business under an agreement. The agreement stipulates that the assessee is entitled to 7.5% of the net sales of that business subject to the condition that they should get a minimum of Rs. 2,75,000/- per month.

9. It is also not in dispute, nine months thereafter the said agreement came to be terminated; the total amount received by the assessee under that arrangement is Rs. 19,25,000/- for the relevant period. That amount represents the consideration received by the assessee for permitting the agreement holder to exploit the commercial asset. It is left to the discretion of the assessee to exploit a commercial asset in the manner in which he may exploit the commercial asset by personally carrying on the business or by permitting others to carry on the business. He is not the owner of the said commercial asset. Therefore, the income derived from exploitation of that commercial asset is a part of his business income and therefore, it has to be assessed under the heading "profits or gains from business or profession" and not "from other sources of income" as done by the authorities.

10. In that view of the matter, the impugned orders cannot be sustained. The

first substantial question of law is answered in favour of the assessee and against the Revenue. Consequently, it is not necessary to answer the second substantial question of law. Hence, we pass the following order:

"The appeal is allowed. The impugned orders passed by the authorities are hereby set aside."

Parties to bear their own costs.

