IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCHE "A", PUNE

BEFORE SHRI SHAILENDRA KUMAR YADAV, JUDICIAL MEMBER
AND SHRI G.S. PANNU, ACCOUNTANT MEMBER

ITA Nos.314 & 315/PN/2013
(Assessment Years : 2007-08 & 2008-09)

Income Tax Officer,
Ward 1(4), Pune. .... Appellant

Vs.

Surya Incubation Clusters Pvt. Ltd.,
214, Surya Plaza, L.B.S. Road,
Navi Peth, Pune – 411 030.

PAN : AAGCS6363B .... Respondent

Department by	:	Mrs. Sunita Rao
Assessee by	:	Mr. C. V. Gupte
Date of hearing	:	19-06-2014
Date of pronouncement	:	24-06-2014

ORDER

PER G. S. PANNU, AM

Both the captioned appeals by the Revenue are directed against a consolidated order of the Commissioner of Income Tax (Appeals)-I, Pune dated 30.11.2012 which, in turn, has arisen from the respective assessment orders dated 30.12.2009 and 26.11.2010 passed by the Assessing Officer u/s 143(3) of the Income-tax Act, 1961 (in short "the Act") pertaining to the assessment years 2007-08 and 2008-09 respectively.

2. In both the appeals, although the Revenue has raised multiple Grounds of Appeal but the solitary common issue relates to the income derived by the assessee by way of license fee from letting out a commercial property, which according to the Revenue is assessable as 'income from house property' whereas the CIT(A) has held it to be assessable as 'business income'.

3. In brief, the relevant facts are that the respondent-assessee is a company incorporated under the provisions of the Companies Act, 1956,

whose specific objective was of providing state of the art office space along with other facilities specially useful for the newly start-up business units. In pursuance of this object the assessee company developed a commercial complex, named as 'IndiaCo iCenter Plaza'. Since the assessment year 1999-2000, assessee company was earning income by way of license fee by giving out the use of office space along with other facilities in the premises IndiaCo iCenter Plaza to various users. The income so earned by the assessee was being offered as 'business income' and it is emerging from record that till the assessment year preceding to the assessment year 2007-08, such income was being accepted by the Department as business income. In this context, the learned counsel for the respondent-assessee also referred to an assessment order passed u/s 143(3) of the Act dated 27.09.2007 for assessment year 2005-06 wherein income derived by way of 'license fee' from letting out of the aforesaid commercial property was accepted as 'business income'. Be that as it may, for the assessment years 2007-08 and 2008-09, which are the subject-matter of appeal before us the Assessing Officer took the view that the main/dominant object emerging from the leave and license agreement with the users of the office space in the impugned property reflected that it was an arrangement for leasing out of the property on a monthly rent. According to the Assessing Officer, it was a normal rental arrangement and merely because assessee was also providing certain other services like, security, electrical installations, gensets, furniture, etc., the arrangement could not be seen independent of the main activity of renting out of the property. Therefore, according to the Assessing Officer, such income was liable to be assessed under the head 'income from house property' and not as 'business income'. In this manner, for the assessment year 2007-08, the gross license fee received by the assessee from the users of the property i.e. Rs.72,80,371/- was assessed under the head 'income from house property' after allowing deduction for municipal taxes interest paid etc., which resulted in net income of Rs.31,97,008/- under the head 'income from house property'.

4. Assessee carried the matter in appeal before the CIT(A) assailing the order of the Assessing Officer both in law and on facts. The CIT(A) has since accepted the plea and held that the income earned by the assessee by letting out the property was assessable as 'business income', having regard to the ratio of the judgement of the Hon'ble Bombay High Court in the case of CIT vs. Associated Building Co. Limited, 137 ITR 339 (Bom). The following discussion in the order of the CIT(A) is relevant to appreciate the manner in which the plea of the assessee has been upheld :-

> *"8. I have perused the submissions made along with the documents furnished during appellate proceedings. It is noted that the appellant company's main objects as per the Memorandum of Association (details of which are given at para 5 supra) are to provide a variety of office infrastructure facilities under one roof called "incubation clusters", to technocrats and start up business owners. With this objective, the appellant has availed term loan from Shree Suvarna Sahkari Bank Ltd., on mortage of the title deeds and property documents, to construct the property named "IndiaCo icentre" located at 214, Navi Peth, Pune. The building owned by the appellant consists of 5 floors, having built up area of about 27,000 sq.ft. Subsequently, these premises have been let out by start up companies and small entrepreneurs. It is seen that the leased premises have wooden fixtures for work static cupboards, electrical fittings and 24 hours generator back up. The other services provided include, inter alia, the following :*
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> *a) Conference rooms*
> *b) Rest rooms*
> *c) Two/ four wheeler parking*
> *d) Cafeteria / pantry*
> *e) 24 hour security*
> *f) Conference equipments such as LCD projector, PA system etc.*
> *g) Telephone lines/ instruments*
> *h) ISP & net work service*
> *i) Cleaning & sanitation services.*
>
> *9. All these services cannot be described as standard and uniform services in any rental agreement. The appellant has argued that execution of lease agreements was done essentially to protect appellant's ownership rights over the cabins. Further, the letting out the cabins was inseparable from providing the services referred to above, such as conference facilities, internet facilities and telephone connectivity, as these*

could not be availed of without the use of cabins. These submissions are considered in the light of the Hon'ble Mumbai High Court's observations in CIT vs. Associated Building Company Ltd. (137 ITR 339) wherein it was held that services and facilities such as use of air conditioning plant, use of auditorium alongwith equipment and use of canteen were all of complex nature and supply of these services, could, in no sense, be regarded as a mere better exploitation of property. It was held

> *"It is in the light of the principles laid down in the aforesaid decision that we have to resolve the controversy raised before us. We have already stated the facts earlier. It is important to recapitulate that the building in question was constructed as early as in 1920 and was let out at that time. The air-conditioning plant was put up and the auditorium constructed several years later, in 1949. The maintenance of the air-conditioning plant requires the service of a sizeable staff, some of whom would have to be specialised in the work of maintaining an air-conditioning plant. Similarly, along with the auditorium, which was constructed, additional services have been provided like the use of a film projector, tape-recorder, microphone and so on. A canteen is also being run. Running of all these activities would necessarily involve the maintenance of a staff and close supervision. The object of these activities is to earn income. These services or facilities, namely, of the use of the air-conditioning plant, the use of the auditorium along with the equipment and the use of the canteen, are all of a complex nature and the supply of these services can, in no sense, be regarded as a mere better exploitation of the property, namely, the said building. In these circumstances, it appears to us that the Tribunal was, with respect, justified in holding that the carrying on all these activities amounted to carrying on business and the income derived from the same was business income as claimed by the assessee".*

10. It is seen that the appellant in the owner of a commercial asset. As per the main objects of the appellant company's Memorandum of Association, it has undertaken to provide office infrastructure to start up companies. The income earned is not simply by way of rent, but also varied/ Complex services, such as security, electricity back up, internet, conference, telephone lines, cafeteria etc. Though the lease and license agreement mentions a consolidated figure, by way of license fee or compensation, the invoices show billing separately for cabin, computer terminal, AC, tubes, fans, UPS, ISP, network service and net-switch charges. No doubt, other services such as conference with equipment (LCD, PA system) pantry, parking, security etc. are mentioned as complementary but appellant states that these are included in the license fee itself.

11. During the course of appellate proceeding, the learned Authorised Representative has drawn my attention to the fact that the municipal taxes charged by Pune Municipal Corporation are as per commercial rates and electricity tariff charged by MSEB are also at commercial tariff rates, applicable to commercial properties. Further, during the impugned years, substantial expenses have been incurred on diesel expenses for generator used for centralized air-conditioning and power back-up, and also on security services for the building in question. He therefore submitted that the facts of the case are on all fours with the facts of the case in DCIT Vs Magarpatta Township Developer & Construction Co. [ITA No. 822/PN/2011 date 18.09.2012] as decided by Pune Bench of ITAT.

12. I have perused the aforestated. decision. The Pune ITAT has on the basis of the following decision, decided the issue in favour of the assessee:

i) CIT Vs Goel Builders (2010) 235 CTR 472 (AU)

ii) Mohiddin Hotels (2006) 284 ITR 229 (Bom)

iii) Gesco lorporation Ltd. (2009) 31 SOT 32 (Mum)

iv) Harvinder Pal Mehta (HUF) Vs DCIT (2009) 122 TTJ 163 (Mum)

13. In the Magarpatta Township case (cited supra) it was held that extensive services & amenities were provided alongwith huge investment of land, building & plant & machinery which would certainly amount to an organized structure for carrying out business activities. Similarly, in the present case, as discussed in the preceding paragraphs, the appellant created a commercial infrastructure with complex & varied services such as conferencing, internet services, pantry, security, etc. The occupation of space was thus unseparable from the provision of these services & amenities. It was therefore not imply a tenancy agreement as argued by the Assessing Officer but letting out of commercial space along with several complex services, which cannot be stated to be routine services.

The income from letting out is thus, directed to be assessed as business income in the hands of the appellant. Ground No.1 to 8 for A.Y. 2007-08 and Ground No.1 to 10 for A.Y. 2008-09 are thus allowed."

5. Against the aforesaid decision of the CIT(A), Revenue is in appeal before us. Before us, the learned Departmental Representative has vehemently submitted that the CIT(A) erred in treating the income from letting out of the premises IndiaCo iCenter Plaza as 'business income' when it was abundantly clear that such income is assessable as income from house property. The learned Departmental Representative has also referred to the judgement of the Hon'ble Supreme Court in the case of Shambhu Investment (P) Ltd. vs. CIT, (2003) 263 ITR 143 (SC) in support of the case of the Revenue.

6. On the other hand, the learned Representative for the respondent-assessee pointed out that the assessee was formed with the primary object of providing office space along with other necessary facilities required for businesses especially the start-up companies. It is with this objective that assessee had leased out the premises in its complex IndiaCo iCenter Plaza.

The learned counsel has referred to the factual aspects of the lease arrangements, which have been noted by the CIT(A) in para 8 of the impugned order, to point out that the services provided by the assessee to the users of the premises clearly establish that it is a case where a commercial property has been exploited as a business venture. In sum and substance, reliance has been placed on the conclusion drawn by the CIT(A).

7. We have carefully considered the rival submissions. The crux of the controversy before us relates to the taxability of 'license fee' earned by the assessee by allowing various licensees to use and occupy the office space in premises 'IndiaCo iCenter Plaza' developed and owned by the assessee. As per the Revenue, the leave and license arrangement is merely a tenancy agreement by way of which assessee is allowing the licensees to use the premises along with certain complementary services and therefore the same is assessable as income under the head 'house property'. The sum and substance of the argument of the Revenue is based on the premise that the leave and license arrangement is primarily to allow use of the immovable property by the licensees. On the contrary, as per the assessee, the objective of the leave and license arrangement is not to merely let out of the space but also to provide other complex services and therefore qua the assessee the entire gamut of activities have to be seen as a business venture. Therefore, as per the assessee, the license fee earned from carrying out of such activities is to be taxed as 'business income'.

8. It is a trite law that merely because an income arises from exploitation of immovable property, it would not *ipso facto* be assessable under the head 'income from house property'. What is required to be appreciated is the peculiar facts and circumstances of each case to decide whether a particular rental income is assessable under the head 'house property' or not. In the case of CIT vs. Shambhu Investment Pvt. Ltd. (2001) 249 ITR 47 (Cal), the

Hon'ble High Court was considering a situation where assessee had let out a portion of premises and the tenancy arrangement also included an arrangement to allow the occupants use of table space, together with furniture and fixtures. The assessee had also received security deposits covering the entire cost of the property. Under these circumstances, the Hon'ble High Court held that income derived by the assessee from the premises was assessable as income from 'house property' and not as 'business income', as contended by the assessee. In coming to such conclusion, the Hon'ble High Court held that if the main intention of the assessee is to let out the property, the income must be considered as rental income assessable under the head 'income from house property. So however, if the primary object is to exploit the immovable property by way of complex commercial activities, in that event the income received therefrom must be held to be assessable as "business income". By applying the aforesaid proposition, the Hon'ble High Court having regarding the facts of the case before it came to conclude that the assessee therein was deriving rental income by merely letting out the property which was assessable under the head 'income from house property'. The aforesaid judgement of the Hon'ble Calcutta High Court has since been approved by the Hon'ble Supreme Court in the case of Shambhu Investment (P) Ltd. (supra).

9. In the background of the aforesaid legal proposition, we may examine the facts of the present case. In the present case, the CIT(A) has brought out from the Memorandum of Association of the assessee that the main object of assessee company was to provide young technocrats and start-up business owners with various facilities, including 'office infrastructure facilities', development facilities, etc. under one roof called 'incubation clusters'. The Memorandum of Association of the assessee company, a copy of which has been placed at pages 6 to 44 of the Paper Book, support the aforesaid factual finding of the CIT(A). In such 'incubation clusters', assessee's objective was to provide all logistics support services like state of the art office space,

discussion rooms, board rooms, equipments, computers, internet connection, phone lines, printers, messaging services, printing services, communication facilities, etc.. It has been explained by the learned counsel in the course of hearing that in pursuance to aforesaid objects, assessee company constructed and developed a facility, named, 'IndiaCo iCenter Plaza' at Pune. The office space alongwith other facilities in the said complex have been let out to start-up companies and small entrepreneurs. The leased premises comprise of 5 floors and built-up area of about 27,000 sq.ft.. The leased out facilities include office space, wooden fixtures for work static cupboards, electrical fittings and 24 hour generator back-up, use of conference rooms, Rest rooms, security services, cafeteria/pantry etc., which have been detailed by the CIT(A) in para 8 of her impugned order. On the aforesaid basis, the CIT(A) has arrived at a factual finding that the income is not earned simply by renting out an office space, but it has been earned by renting out space alongwith providing facilities/complex services as stated above. The CIT(A) has also appreciated that though the leave and license agreement mentioned a consolidated figure by way of 'license fee', so however, the invoices raised by the assessee show separate billings for the use of cabins, computer terminals, electrical fittings, UPS, network services, net-switch charges, etc.. In the background of the aforesaid factual matrix, it is quite clear that it is not a case where the license fee has been earned from merely letting out of office space, but has been earned as a result of undertaking composite activities, comprising of leasing of office space and providing services of cafeteria/pantry, conference rooms and equipments such as LCD projectors, PA system etc., use of computer terminals, electrical fittings, UPS, network services and net-switch charges, etc.. The providing of such services along with the office space cannot be regarded as exploitation of the immovable property for earning rentals but it is a case where the commercial property has been exploited by undertaking complex commercial activities and therefore such income has to be held assessable as 'business income'. In our considered opinion, having regard to the material and facts on record, the CIT(A) made no mistake in following the judgement of the Hon'ble Bombay High Court in the case of Associated Building Co. Limited (supra) and holding that the impugned 'license fee' received from the users of the office infrastructure facilities in 'IndiaCo iCenter Plaza' was assessable as 'business income' and not under the head 'income from house property'. We hereby affirm the aforesaid decision of the CIT(A).

10. Before parting, it was also be appropriate to note that for assessment year 2005-06 under identical circumstances the 'license fee' earned by the assessee from users of the infrastructure facilities in IndiaCo iCenter Plaza has been accepted by the Assessing Officer himself in a scrutiny assessment as 'business income'. Before us, no material has been lead by the Revenue to show any change of facts during the year under consideration. Therefore, even on the principles of the consistency, we find that the Assessing Officer erred during the year under consideration in treating the license fee earned by the assessee as assessable under the head 'income from house property' as against 'business income' declared by the assessee.

11. In conclusion, we hereby affirm the order of the CIT(A) and accordingly, the Revenue fails in the both the appeals, as facts and circumstances are identical in the captioned years.

12. In the result, both the appeals of the Revenue are dismissed.

Order pronounced in the open Court on 24th June, 2014.

Sd/-	**Sd/-**
(SHAILENDRA KUMAR YADAV)	**(G. S. PANNU)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Pune, Dated : 24th June, 2014.

Sujeet

Copy of the order is forwarded to: -

1) The Assessee;
2) The Department;
3) The CIT(A)-I, Pune;
4) The CIT-I, Pune;
5) The DR “A” Bench, I.T.A.T., Pune;
6) Guard File.

By Order

//True Copy//

Sr. Private Secretary
I.T.A.T., Pune