

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**ITA No.56 of 2010
Date of decision:31.3.2016**

M/s Batra Palace P. Limited

.....Appellant

**Commissioner of Income Tax, Aayakar Bhawan, Rishi Nagar,
Ludhiana, Punjab**

.....Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MRS. JUSTICE RAJ RAHUL GARG**

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not? **YES**
3. Whether the judgment should be reported in the Digest?

Present: Mr. Rajiv Sharma, Advocate for the appellant-revenue.

Mr. Rajesh Katoch, Advocate for the respondent-revenue.

Ajay Kumar Mittal, J.

1. This appeal has been preferred by the appellant-assessee under Section 260A of the Income Tax Act, 1961 (in short, “the Act”) against the order dated 15.5.2009, Annexure A.1 passed by the Income Tax Appellate Tribunal, Chandigarh Bench 'A', Chandigarh (in short, “the Tribunal”) in ITA No.133/CHANDI/2009, for the assessment year 2005-06. It was admitted by this Court vide order dated November 23, 2010 to consider the following substantial question of law:-

“ Whether the ITAT was justified in reversing the order of CIT(A) and upholding the order of Assessing Officer, while treating the lease income out of leasing out commercial property to concern engaged in parallel business activities as income from House property and not income from business when the appellant has to provide various basic facilities as that to franchisee?”

2. A few facts relevant for the decision of the controversy involved as narrated in the appeal may be noticed. The appellant-assessee is a company engaged in the business of running a hotel and also earning income from house property. It filed its return of income for the assessment year 2005-06 on 30.10.2005 declaring nil income. The return was selected for scrutiny and notice under Section 143(2) of the Act was issued to the assessee on 30.10.2006. The assessee appeared before the Assessing Officer and filed reply. The appellant submitted that it was earning income by way of rent but was providing various facilities like 60 ton AC, 100% power backup, false ceiling, front elevation with glazing and flooring, sanitary facilities as per brand requirements etc. The lease was for a total period of 12 years but subject to the condition as per clause (3) of Memorandum of Understanding (MOU) that the lease rent will be subject to increase of 15% after completion of every three years. The tenant 'Pizza hut' was in the business of running Pizza Hut which had the potential of advertising the business of the assessee and introducing new customers and therefore, was beneficial for the business of the assessee and for this reason only, the assessee had offered the space to it on lease as it was not having a restaurant in its hotel which was required for running the hotel business efficiently and profitably. The tenant left the premises in a short

period. The assessee submitted before the Assessing Officer that the collaboration with Pizza Hut as lease agreement was to tide over the financial crunch period, to gain edge in business and to exploit the business opportunity in the best possible way. After examining the matter, the Assessing Officer held the income from lease of commercial property declared as business income as income from house property vide order dated 28.12.2007, Annexure A.3. Aggrieved by the order, the assessee filed appeal before the Commissioner of Income Tax (Appeals) [CIT(A)]. Vide order dated 18.11.2008, Annexure A.2, the CIT(A) partly allowed the appeal and decided the issue in favour of the assessee. Not satisfied with the order, the revenue filed appeal before the Tribunal. Vide order dated 15.5.2009, Annexure A.1, the Tribunal partly allowed the appeal and decided the issue in favour of the revenue and against the assessee while distinguishing the judgment of this court in *CIT vs. Anand Rubber and Plastics (P) Limited*, (1989) 178 ITR 301. Hence the instant appeal by the appellant-assessee.

3. Learned counsel for the appellant-assessee submitted that the Tribunal erred in reversing the order passed by the CIT(A) and upholding the order passed by the Assessing Officer. Primary reliance was placed on judgment of this Court in *Anand Rubber and Plastics (P) Limited's* case (supra). On the other hand, learned counsel for the respondent-revenue supported the impugned order.

4. We have heard learned counsel for the parties.

5. Admittedly, the assessee was owning a building in which it was running a hotel and restaurant business. A portion of the said property was

leased out to another concern for running a restaurant by the name of 'Pizza Hut'. The assessee claimed that this was done for a temporary period as the premises were vacated after two years and therefore the same had to be viewed as commercial exploitation of the asset. The Assessing Officer treated the income received from M/s Pizza Hut as income from house property instead of income from business. The CIT(A) treated the income earned by the assessee as business income. It has been categorically recorded by the Tribunal on appeal by the revenue that perusal of the memorandum of Understanding dated 27.8.2002 between the assessee and the lessee i.e. M/s Pizza Hut showed that the property in question was given for use for a period of 12 years which was renewable for a further period of 12 years. It was nowhere shown that the intention to let out was only for a temporary period. Thus, the CIT(A) was not held to be justified in concluding that the letting out was to be taken as commercial exploitation of the property. The intention of the assessee was to enjoy rental income from the letting out of the property which was rightly treated as income from house property by the Assessing officer. The relevant findings recorded by the Tribunal while reversing the order of the CIT(A) on this issue read thus:-

“17. We have considered the rival submissions carefully. The short controversy before us resolves around the accessibility of rental income derived by the assessee. The question is whether the rent is assessable as income from property or business income. It is a settled proposition that in order to address such controversy, what has to be seen is whether the asset in question is being exploited commercially by way of renting out or whether it is being rented out for the purpose of enjoying the

rental income. The Hon'ble Punjab and Haryana High Court in the case of *M/s Anand Rubber & Plastics Pvt. Limited*, 178 ITR 301 has further observed that the distinction between the two approaches is a narrow one and has to depend on certain facts peculiar to each case. In the case of *M/s Anand Rubber and Plastics Pvt. Limited* (supra), the Hon'ble High Court found it as fact that property was leased out temporarily as a commercial asset and therefore, it was held that the rental income was assessable as business income. The CIT(Appeals) has also relied upon the aforesaid judgment to decide the controversy in favour of the assessee. In this regard, we have carefully examined the facts of the present case. In the present case, the facts are that the assessee is owning a building in which it is running a hotel and restaurant business. A portion of the said property was leased out to another concern for running a restaurant by the name of Piza Hut. The claim of the assessee is that such renting was done for a temporary period as the premises were vacated after two years and therefore, such letting out of the asset has to be viewed as commercial exploitation of the assets. In this regard, we have attempted to cull out the intention of the assessee while letting out the property in question. The assessee has placed on record a copy of MOU dated 27.8.2002 with the lessee. It is evident from perusal of the same that the property in question was given over for use for a period of 12 years which was renewable for a further period of 12 years as mutually agreed upon by both the parties. From such an arrangement, it does not show that the intention to let out was only for a temporary period. No doubt, the property has been put to use by the lessee also for running a restaurant business as done by the assessee, so however, the lease cannot be termed to be for a short period or temporary. We are conscious that the property has been vacated within a period of 2 to 3 years as canvassed by the assessee. However, what is of relevance is to cull out the intention of the assessee at

the time of letting out of the property which clearly does not show that the letting out was for a temporary period. Thus, in our view, having regard to the facts and circumstances of the case, the CIT(Appeals) was not justified in inferring that the letting out in this case was to be taken as commercial exploitation of the property. The intention was clearly to enjoy rental income from the letting out of the property which in our considered opinion, was rightly brought to tax under the head 'income from house property' in the assessment order. The judgment of the Hon'ble Punjab and Haryana High Court in the case of *Anand Rubber & Plastics (P) Limited* (supra) was clearly inapplicable because of different facts. In view of the aforesaid discussion, we therefore, set aside the order of the CIT(Appeals) on this issue and restore that of the Assessing Officer.”

6. Adverting to the judgments relied upon by the learned counsel for the appellant-assessee, it may be noticed that in *Anand Rubber and Plastics (P) Limited's* case (supra), the factory premises of the assessee consisted of three portions – the main building, a front shed and a rear shed. In order to curtail the losses, production was reduced with the result that the rear shed became surplus. The said portion was leased out with a view to reduce the losses. After examining the matter, it was recorded by this court that in order to determine whether rent is assessable as income from property or business income, what has to be seen is whether the asset is being exploited commercially by the letting out or whether it is being let out for the purpose of enjoying the rent. It was held that the portion of the property was leased out temporarily as a commercial asset. Thus, the rent received was assessable as business income. Such is not the position in the present case. Herein the property was leased out for a period of 12 years as

per memorandum of understanding dated 27.8.2002 between the assessee and the lessee. Thus, this judgment was rightly distinguished by the Tribunal while reversing the order passed by the CIT(A). In ***Sultan Brothers Private Limited vs. Commissioner of Income Tax, Bombay City II***, AIR 1964 SC 1389, the Apex Court held that the rent from the building should be computed separately from the income from the furniture and fixtures and in the case of rent from the building, the assessee would be entitled to the allowances mentioned in sub section 4 of section 12 of the Income Tax Act, 1922 (in short, “the 1922 Act”) and in the case of income from the furniture and fixtures, to those mentioned in sub section 3, and that no part of the income could be assessed under section 9 or 10 of the 1922 Act. The other judgments relied upon by the learned counsel for the appellant-assessee in ***CIT vs. Superfine Cables P. Limited***, (1985) 154 ITR 532 (Del.), ***Commissioner of Excess Profits Tax, Bombay City vs. Shri Lakshmi Silk Mills Limited***, (1951) 20 ITR 451, ***CIT vs. VST Motors Pvt. Limited***, (1997) 226 ITR 155 (Mad.), ***CIT vs. Pateshwari Electrical and Associated Industries P. Limited***, (2006) 282 ITR 61 (All.), ***CIT, A.P.1 vs. Aryan Industries (P) Limited***, (1982) 138 ITR 718 (AP), ***CIT vs. Vikram Cotton Mills Limited*** (1988) 169 ITR 597 (SC) and ***ACIT vs. Rajindra Flour and Allied Industries P. Limited***, (1981) 128 ITR 402 (Del.) are also based on individual fact situation involved therein. It was held therein that each case has to be decided on its own facts. Thus, the appellant cannot derive any advantage from the said decisions.

7. In the present case, the view adopted by the Tribunal is a plausible view based on appreciation of material on record and the relevant

case law on the point. Learned counsel for the appellant-assessee has not been able to show any illegality or perversity in the impugned order. Thus, the substantial question of law is answered against the assessee and in favour of the revenue. Consequently, the appeal stands dismissed.

(Ajay Kumar Mittal)
Judge

March 31, 2016
‘gs’

(Raj Rahul Garg)
Judge