



2024:KER:86268

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR.JUSTICE K.V.JAYAKUMAR

TUESDAY, THE 19TH DAY OF NOVEMBER 2024/28TH KARTHIKA, 1946

I.T.A.NO.38 OF 2023

APPELLANT(S)/ASSESSEE:

M/S KNOWELL REALTORS (INDIA) PVT. LTD.,
KNOWELL JAIRAJ BUILDING, NH BYPASS,
NEAR EDAPPALLY JUNCTION, COCHIN,INDIA,
PIN - 682024

BY ADV.SMT.MITHA SUDHINDRAN
BY ADV.SRI.SOURADH C. VALSON
BY ADV.SMT.ANGELINA JOY
BY ADV.SRI.RIJI RAJENDRAN

RESPONDENT(S)/REVENUE:

ASSISTANT COMMISSIONER OF INCOME-TAX,
ASSISTANT COMMISSIONER OF INCOME-TAX,
CORPORATE CIRCLE 1(2), COCHIN, PIN - 682018

BY SRI.JOSE JOSEPH, SC, INCOME TAX DEPARTMENT

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON
13.11.2024 ALONG WITH I.T.A.NO.39/2023, THE COURT ON
19.11.2024 DELIVERED THE FOLLOWING:



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THE ASSISTANT COMMISSIONER OF INCOME TAX,
CORPORATE CIRCLE 1(2), KOCHI, PIN - 682018

BY SRI.JOSE JOSEPH, SC, INCOME TAX DEPARTMENT

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON
13.11.2024, ALONG WITH I.T.A.NO.38/2023, THE COURT ON
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“C.R.”**J U D G M E N T****Dr. A.K. Jayasankaran Nambiar, J.**

These I.T. Appeals impugn the common order dated 25.09.2023 in I.T.A.Nos.192/Coch/2017 and 193/Coch/2019 pertaining to assessment years 2012-13 and 2015-16.

2. The brief facts necessary for disposal of these I.T. Appeals are as follows:

The appellant is a company incorporated on 27.09.1996. The issue involved in these appeals is regarding the head of income under which the receipts of rent collected by the appellant in relation to leased property should be classified for the purposes of the Income Tax Act [hereinafter referred to as the “I.T. Act”]. The said classification has a bearing on the treatment to be accorded to the receipts obtained by the appellant consequent to the sale of some of the said properties. The appellant had been declaring the receipts as Income from House Property during the various assessment years, and the returns so filed by the appellants were accepted by the Department in the past. For the assessment years



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2012-13 and 2015-16 however, the Department took a different stand and assessed the rental receipts under the head 'Business Income'. Consequently, the amounts received by the appellant on the sale of the property also came to be assessed as business income and not as capital gains as declared by the appellant.

3. Aggrieved by the assessment orders, the appellant preferred appeals before the First Appellate Authority. The Commissioner of Income Tax (Appeals) allowed the appeals and directed the Assessing Authority to treat the rental income under the head 'Income from House Property' and the income from the sale of house property during the previous year relevant to the assessment year as 'capital gains'. The Revenue, therefore, carried the matter in further appeals before the Income Tax Appellate Tribunal. The Tribunal initially dismissed the appeals after finding that the amount involved in the appeals was less than the threshold amount prescribed under the Central Board Direct Taxes Circulars [CBDT Circulars] for pursuing litigation. While dismissing the appeals, the Appellate Tribunal, in its order dated 29.08.2019, also reserved the liberty of the Department to approach the Tribunal for a recall of its order if it was found that the appellant's case fell within one of the exceptional situations envisaged under the CBDT Circulars for the pursuit of the appeals.



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4. Acting on the liberty so reserved to it, the Revenue moved a rectification application on 10.03.2020, pointing out that the assessment of the appellant for the assessment years in question was based on an audit objection and, therefore, an exceptional circumstance as envisaged in the CBDT Circulars. This contention was accepted by the Tribunal, which allowed the rectification application by an order dated 16.09.2022 and restored the appeals to its file. The Revenue's appeals were thereafter heard by the Appellate Tribunal, and by a common order dated 25.09.2023, the Tribunal allowed the appeals. It is against the said order of the Tribunal that the appellant/assessee is before us through these I.T. Appeals raising the following substantial questions of law:

- i. Whether the Hon'ble ITAT erred in considering the application u/s 254(2) of the Act, beyond the period of statutory limitation?
- ii. Whether the act of recalling its own order transgresses the ambit of rectification bestowed upon the Hon'ble ITAT u/s 254(2) of the Act and amounts to review?
- iii. Whether the Hon'ble ITAT, when considering an appeal u/s 253 of the Act, can rely solely on the Memorandum of Association of the Assessee company to determine the nature of its operation, while ignoring other pertinent factors?
- iv. Whether the Departmental acceptance of categorization of income from similar sources during previous assessment years creates a legitimate expectation that such categorization is appropriate?
- v. Whether the Hon'ble ITAT was right in holding that the income from the sale of a property held as a capital-asset should be categorized as business income instead of income from House Property?

5. As is apparent from a perusal of the questions of law raised, the appellant's contention before us are essentially twofold:



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(i) On merits, it is contended that the Appellate Tribunal fell in error in categorizing the appellant's income as business income. It is contended that the income was always classified under the head 'Income from house property' and there was no change in circumstance warranting a change in classification of the head of income. It followed therefore that the income from sale of immovable properties had to be seen as 'capital gains' and not as 'business income' for the purposes of taxation. (ii) On the aspect of limitation, it is contended that the Appellate Tribunal could not have heard the Revenue's appeals on merits after having dismissed the appeals by relying the CBDT Circulars. While liberty was granted by the Tribunal to the Revenue to seek a restoration of the appeals under certain specified conditions, the liberty so granted could not extend the time limit prescribed under the I.T. Act for preferring restoration/rectification/recall petitions. It is pointed out that what the Revenue preferred before the Appellate Tribunal were rectification petitions under Section 254 (2) of the I.T. Act and they could not have been entertained by the Tribunal if they were filed beyond the period prescribed under the Statute. It followed therefore that the impugned order of the Tribunal was void being wholly without jurisdiction.

6. We have heard Smt.Mitha Sudhindran, the learned counsel for the appellant and Sri.Jose Joseph, the learned Standing Counsel



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for the Income Tax Department.

7. On a consideration of the rival submissions, we find that it is not in dispute that in the years prior to and subsequent to the assessment years that fall for consideration in these appeals, the income of the appellant assessee has been assessed under the head 'Income from House Property' and not as 'business income'. No doubt, it is open to the Department to categorise the income of an assessee differently for different assessment years, if there are changes noticed in the circumstances that led to the earning of income. In fact, the Revenue would contend that during the previous years relevant to the assessment years under consideration in these appeals, there were sales effected of properties acquired in the recent past, and when the said transactions were viewed against the backdrop of the stated objects in the Memorandum of Association of the appellant company, there was ample material to hold that the transactions in question were in the nature of a business activity and the income earned therefrom, in the nature of business income. However, we are of the view that the requirement of ensuring uniformity and consistency in tax assessments cannot be overlooked, especially while categorizing the nature of the activity carried on by an assessee to earn its income for the purposes of taxation. In these appeals we are concerned with an assessee who has been consistently seen as deriving income from letting out



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house property owned by it. It is on that basis that it has been assessed in all the assessment years prior to, and subsequent to, the assessment years under consideration in these appeals. Merely for the reason that in the said assessment years, the assessee effected a sale of some of its properties, it cannot be seen as having embarked upon a business of buying and selling properties in those years, even if it was authorized to do such business as per its Memorandum of Association. The sale of properties by the assessee in the two years under consideration in these appeals must be seen as merely incidental to the activity of letting out of properties for rent carried out by it in the years prior and subsequent to the said two years. The said sale transactions cannot have the effect of changing the very nature of the income earning activity consistently carried on by the assessee, and accepted by the Department. Thus, we are of the view that the income derived by the assessee, from the sale of properties owned by it, during the two years under consideration in these appeals, can only be assessed under the head of 'capital gains' and not as 'business income'.

8. As for the aspect of limitation, we find considerable force in the contention of the learned counsel for the appellant that the Appellate Tribunal did not have the jurisdiction to consider the rectification application belatedly preferred by the Revenue, based on the liberty granted to it by the Tribunal while dismissing the



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Revenue's appeals in the earlier round of litigation. The Appellate Tribunal being a creature of the Statute cannot extend its jurisdiction beyond what is expressly conferred on it under the Statute **[Madan Lal Arora v. The Excise & Taxation Officer, Amritsar - [AIR 1961 SC 1565]; Smt.Ujjam Bai v. State of Uttar Pradesh - [AIR 1962 SC 1621]]**. Consequently, it could not have granted a liberty to the Revenue to file rectification applications to restore the appeals beyond the period permitted under the Statute. The time permitted for filing an application under Section 254 (2), for rectifying a mistake in an order passed by the Appellate Tribunal under Section 254 (1) is six months from the end of the month in which the order under Section 254 (1) was passed. In the instant cases, the applications under Section 254 (2) were preferred by the Revenue beyond the said period and it was these applications that the Appellate Tribunal allowed while restoring the appeals to file and passing final orders thereon against the appellant assessee.

9. It is also debatable whether, while restoring the appeals before it and deciding them against the assessee, after having dismissed the appeals earlier citing low tax effect, the Appellate Tribunal was merely exercising its power of rectification of mistakes or whether it was in effect exercising a power of review that it did not have under the Statute. In either event, the exercise by the



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Appellate Tribunal was without jurisdiction and hence *void ab initio*. If that be the case, then notwithstanding that the assessee did not impugn the order of the Appellate Tribunal restoring the appeals before this Court earlier, we consider it well within our powers to consider the jurisdictional challenge in the appeals now before us **[Union of India and Another v. British India Corporation Ltd. and Others - [(2003) 9 SCC 505]; Lachhmi Sewak Sahu v. Ram Rup Sahu and Others - [AIR 1944 PC 24]; Shridhar C Shetty (Deceased) Thru LR's v. The Additional Collector & Competent Authority & Ors. - [AIR Online 2020 SC 712]; M.M. Thomas v. State of Kerala and Another - [(2000) 1 SCC 666]].**

In the result, these appeals succeed and they are allowed by setting aside the impugned orders of the Appellate Tribunal, and by answering the questions of law raised therein in favour of the assessee and against the Revenue.

Sd/-
DR. A.K.JAYASANKARAN NAMBIAR
JUDGE

Sd/-
K.V. JAYAKUMAR
JUDGE

prp/



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APPENDIX OF I.T.A.NO.38/2023PETITIONER'S ANNEXURES:

- Annexure A A TRUE COPY OF THE ASSESSMENT ORDER FOR AY 2012-13 DATED 18-03-2015
- Annexure B A TRUE COPY OF THE ORDER DATED 31-01-2017 ISSUED U/S 263 OF THE INCOME TAX ACT
- Annexure C A TRUE COPY OF THE NOTICE ISSUED BY THE ASSESSING OFFICER ON 10-08-2016
- Annexure D A TRUE COPY OF THE REVISED ASSESSMENT ORDER DATED 31-07-2017
- Annexure E A TRUE COPY OF THE DEMAND NOTICE DATED 31-07-2017 ISSUED U/S 156 OF THE INCOME TAX ACT
- Annexure F A TRUE COPY OF THE COMMON ORDER OF CIT(A) IN APPEAL NO. ITA 106/CIT(A)-1/2017-18 AND APPEAL NO. 16/CIT-A/2017-18 DATED 19.12.2018
- Annexure G A TRUE COPY OF THE COMMON ORDER DATED 29-08-2019 OF THE HON'BLE ITAT IN ITA 192/COCH/2019 AND ITA 193/COCH/2019
- Annexure H A TRUE COPY OF M.A.57/COCH/2020, DATED 10-03-2020, FILED U/S 254(2) OF THE INCOME TAX ACT
- Annexure I TRUE COPY OF THE ORDER OF THE HON'BLE ITAT IN M.P.57/COCH/2020, DATED 16-09-2022
- Annexure J A TRUE COPY OF THE DEMAND NOTICE DATED 28-11-2023 ISSUED BY THE DEPUTY COMMISSIONER OF INCOME TAX, COR-CIR.1(1), KOCHI



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APPENDIX OF I.T.A.NO.39/2023

PETITIONER'S ANNEXURES:

- Annexure A A TRUE COPY OF THE ASSESSMENT ORDER FOR AY 2015-16 DATED 8-12-2017
- Annexure B A TRUE COPY OF NOTICE U/S 142(1) DATED 30-06-2016
- Annexure C A TRUE COPY OF NOTICE U/S 143(2) DATED 08-04-2016
- Annexure D A TRUE COPY OF THE DEMAND NOTICE DATED 08-12-2017 ISSUED U/S 156 OF THE ACT
- Annexure E A TRUE COPY OF THE ORDER OF CIT(A) IN APPEAL NO. ITA 106/CIT(A)-1/2017-18 AND APPEAL NO. 16/CIT-A/2017-18 DATED 19-12-2018
- Annexure F A TRUE COPY OF THE COMMON ORDER OF THE HON'BLE ITAT IN ITA 192/COCH/2019 AND ITA 193/COCH/2019 DATED 29-08-2019
- Annexure G A TRUE COPY OF M.P.58/COCH/2020, DATED 10-03-2020, FILED U/S 254(2) OF THE INCOME TAX ACT
- Annexure H TRUE COPY OF THE ORDER OF THE HON'BLE ITAT IN M.P.58/COCH/2020, DATED 16-09-2022
- Annexure I A TRUE COPY OF THE DEMAND NOTICE DATED 28-11-2023 ISSUED BY THE DEPUTY COMMISSIONER OF INCOME TAX, KOCHI

RESPONDENTS ANNEXURES: NIL.

//TRUE COPY//

P.S. TO JUDGE