REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA No.499 of 2008**
with
ITA No.803 of 2007, ITA No.1113 of 2008, ITA No.388 of 2010, ITA No.516 of 2010, ITA No.1034 of 2010 & ITA No.1240 of 2010.

RESERVED ON: FEBRUARY 18, 2011
% PRONOUNCED On: MARCH 30, 2011

1) ITA No.499 of 2008

COMMISSIONER OF INCOME TAX, DELHI CENTRAL III . . . Appellant

through : Mr. Sanjeev Sabharwal, Sr. Standing Counsel.

VERSUS

MONI KUMAR SUBBA . . .Respondent

through: Mr. C.S. Aggarwal, Sr. Advocate with Mr. Manish Sharma, Mr. Prakash Kumar and Mr. Vishal Malhotra, Advocates.

2) ITA No.803 of 2007

COMMISSIONER OF INCOME TAX, DELHI CENTRAL III . . . Appellant

through : Mr. Sanjeev Sabharwal, Sr. Standing Counsel.

VERSUS

Mr. M.K. SUBBA . . .Respondent

through: Mr. C.S. Aggarwal, Sr. Advocate with Mr. Manish Sharma, Mr. Prakash Kumar and Mr. Vishal Malhotra, Advocates.

3) ITA No.1113 of 2008

COMMISSIONER OF INCOME TAX, DELHI CENTRAL III . . . Appellant

through : Mr. Sanjeev Sabharwal, Sr. Standing Counsel.

VERSUS

MONI KUMAR SUBBA . . .Respondent

through: Mr. C.S. Aggarwal, Sr. Advoca with Mr. Manish Sharma, Mr. Prakash Kumar and Mr. Vishal Malhotra, Advocates.

4) ITA No.388 of 2010

COMMISSIONER OF INCOME TAX, CENTRAL III, NEW DELHI
. . . Appellant

through : Mr. Sanjeev Sabharwal, Sr. Standing Counsel.

VERSUS

MONI KUMAR SUBBA . . .Respondent

through: Mr. C.S. Aggarwal, Sr. Advocate with Mr. Manish Sharma, Mr. Prakash Kumar and Mr. Vishal Malhotra, Advocates.

5) ITA No.516 of 2010

COMMISSIONER OF INCOME TAX, CENTRAL III, NEW DELHI
. . . Appellant

through : Mr. Sanjeev Sabharwal, Sr. Standing Counsel.

VERSUS

SHRI MONI KUMAR SUBBA . . .Respondent

through: Mr. C.S. Aggarwal, Sr. Advocate with Mr. Manish Sharma, Mr. Prakash Kumar and Mr. Vishal Malhotra, Advocates.

6) ITA No.1034 of 2010

COMMISSIONER OF INCOME TAX . . . Appellant

through : Mr. Sanjeev Sabharwal, Sr. Standing Counsel.

VERSUS

MIRACLE EXPORTERS PVT. LTD. . . .Respondent

through: Mr. Rajiv Nanda with Ms. Rachna Saxena, Advocates.

7) ITA No.1240 of 2010

COMMISSIONER OF INCOME TAX, NEW DELHI . . . Appellant

through : Mr. Sanjeev Sabharwal, Sr. Standing Counsel.

VERSUS

MIRACLE EXPORTERS PVT. LTD. . . .Respondent

through: Mr. Rajiv Nanda with Ms. Rachna Saxena, Advocates.

CORAM :-

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE MANMOHAN

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. Vide common orders dated August 16, 2010 passed in ITA No.803 of 2007, ITA No.499 of 2008 and ITA No.1113 of 2008, reference was made to the Full Bench. Since the issue involved in other appeals was also identical to these three appeals, the Division Bench referred those appeals also to the Full Bench to be heard along with these appeals. This is how all these appeals came up for hearing. During the arguments of these appeals, it was also agreed that the lead case where the reference would be answered is ITA No.499 of 2008. It was also conceded by the counsel for all the parties that answer to the referred question would lead to the decision on merits in the appeals itself and, therefore, we not only answer the reference, but the appeals be also finally decided by this Court. With these preliminary and introductory remarks, we

take up the facts which appear in ITA No.499 of 2008 and t nature of reference made by the Division Bench vide orders dated August 16, 2010. Since learned counsel for the parties were also unanimous that the facts as recorded in the orders dated August 16, 2010 are correctly reproduced for answering this reference, it would be convenient for us to reproduce those facts, without any fear of contradiction:

> "1. The assessee had filed the return for the Assessment Year 2001-02 declaring an income of Rs.2,52,510/-. While framing the assessment under Section 143(1) of the Income Tax Act (hereinafter referred to as 'the Act'), the Assessing Officer (AO) found that the assessee had let out property bearing No.267, Masjid Moth, Uday Park, New Delhi. The total rent received for the part period was Rs.6.95 lakhs. In fact, monthly rent agreed between the assessee (landlord) and the tenant was Rs.90,000/-. However, the assessee had also taken security deposit of Rs.8.58 Crores, which was interest free, *i.e.*¸ the tenant had given the aforesaid security deposit on which no interest was payable by the assessee/landlord to the tenant. In the subsequent Assessment Year, another property, *viz.*, 87, Adhichini, New Delhi was also rented out to the same tenant and interest fee security money of 2.20 Crores was taken in respect of this tenancy. In this manner, total security deposit became available to the assessee at Rs.10.78 Crores. The AO came to the conclusion that interest on interest free security deposit was an important fact for consideration while determining the fair rent within the meaning of Section 23(1)(a) of the Act. He, therefore, added a sum of Rs.30.41 lakhs as notional interest, which would have been earned by the assessee on the aforesaid security deposit kept with the assessee by the tenant and included the same in the income of the assessee for the purpose of taxation.
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> 2. The assessee filed an appeal there against before the CIT (Appeals). CIT (A) allowed the appeal and deleted the aforesaid addition. It was now the turn of Revenue to challenge the order of the CIT (A), which thereby preferred appeal before the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal'). However, that appeal of the Revenue has been dismissed by the Tribunal vide its impugned order dated 15.12.2006. Not satisfied with this outcome, the Revenue has preferred the instant appeal under Section 260A of the Act raising the following question of law:
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> > "Whether the I.T.A.T. was correct in law in holding that notional interest on the interest free security deposits is not rent liable to be included in the income from house property under the Income Tax Act, 1961?"

The same substantial question of law also arose in the subsequent assessment years 2002-03 and 2003-04.

3. Section 22 of the Act deals with income from house property and states that annual value of the property of the description specified therein shall be chargeable under the head of 'income from house property'. Section 23 of the Act provides the manner in which annual value of any property is to be determined for the purposes of computing the income from house property. Thus Section 23 provides the formula for ascertaining the annual value of property in the following manner:

> "**Section 23**
>
> **ANNUAL VALUE HOW DETERMINED.**
>
> (1) For the purposes of section 22, the annual value of any property shall be deemed to be -
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> (a) The sum for which the property might reasonably be expected to let from year to year; or
>
> (b) Where the property is let and the annual rent received or receivable by the owner in respect thereof is in excess of the sum referred to in clause (a), the amount so received or receivable :
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> Provided that where the property is in the occupation of a tenant, the taxes levied by any local authority in respect of the property shall, to the extent such taxes are borne by the owner, be deducted (irrespective of the previous year in which the liability to pay such taxes was incurred by the owner according to the method of accounting regularly employed by him) in determining the annual value of the property of that previous year in which such taxes are actually paid by him :
>
> Provided further that the annual value as determined under this sub-section shall, - (a) In the case of a building comprising one or more residential units, the erection of which is begun after the 1st day of April, 1961, and completed before the 1st day of April, 1970, for a period of three years from the date of completion of the building, be reduced by a sum equal to the aggregate of -
>
> (i) In respect of any residential unit, whose annual value as so determined does not exceed six hundred rupees, the amount of such annual value;
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> (ii) In respect of any residential unit whose annual value as so determined exceeds six hundred rupees, an amount of six hundred rupees;

(b) In the case of a building comprising one or more residential units, the erection of which is begun after the 1st day of April, 1961, and completed after the 31st day of March, 1970, but before the 1st day of April, 1978, for a period of five years from the date of completion of the building, be reduced by a sum equal to aggregate of -

(i) In respect of any residential unit whose annual value as so determined does not exceed one thousand two hundred rupees, the amount of such annual value;

(ii) In respect of any residential unit whose annual value as so determined exceeds one thousand two hundred rupees, an amount of one thousand two hundred rupees;

(c) In the case of a building comprising one or more residential units, the erection of which is completed after the 31st day of March, 1978 but before the 1st day of April, 1982, for a period of five years from the date of completion of the building, be reduced by a sum equal to the aggregate of -

(i) In respect of any residential unit whose annual value as so determined does not exceed two thousand four hundred rupees, the amount of such annual value;

(ii) In respect of any residential unit whose annual value as so determined exceeds two thousand four hundred rupees, an amount of two thousand four hundred rupees;

(d) In the case of a building comprising one or more residential units, the erection of which is completed after the 31st day of March, 1982 but before the 1st day of April, 1992, for a period of five years from the date of completion of the building, be reduced by a sum equal to the aggregate of - (i) In respect of any residential unit whose annual value as so determined does not exceed three thousand six hundred rupees, the amount of such annual value;

(ii) In respect of any residential unit whose annual value as so determined exceeds three thousand six hundred rupees, an amount of three thousand six hundred rupees.

Explanation: For the purposes of this sub-section, "annual rent" means - (a) In a case where the property is let throughout the previous year, the actual rent received or receivable by the owner in respect of such year; and

(b) In any other case, the amount which bears the same proportion to the amount of the actual rent

for which the property is let, as the period of twelve months bears to such period.

Explanation 2 : For the removal of doubts, it is hereby declared that where a deduction in respect of any taxes referred to in the first proviso to this sub-section is allowed in determining the annual value of the property in respect of any previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1984 or any earlier assessment year), no deduction shall be allowed under the first proviso in determining the annual value of the property in respect of the previous year in which such taxes are actually paid by the owner.

(2) Where the property consists of - (a) A house or part of a house in the occupation of the owner for the purposes of his own residence, - (i) Which is not actually let during any part of the previous year and no other benefit therefrom is derived by the owner, the annual value of such house or part of the house shall be taken to be nil; (ii) Which is let during any part or parts of the previous year, that part of the annual value (annual value being determined in the same manner as if the property had been let) which is proportionate to the period during which the property is in the occupation of the owner for the purposes of his own residence, or, as the case may be, where such property is let out in parts, that portion of the annual value appropriate to any part which was occupied by the owner for his own residence, which is proportionate to the period during which such part is wholly occupied by him for his own residence shall be deducted in determining the annual value.

Explanation :- The deduction under this sub-clause shall be made irrespective of whether the period during which the property or, as the case may be, part of the property was used for the residence of the owner precedes or follows the period during which it is let;

(b) More than one house in the occupation of the owner for the purposes of his own residence, the provisions of clause (a) shall apply only in respect of one of such houses, which the assessee may, at his option, specify in this behalf;

(c) More than one house and such houses are in the occupation of the owner for the purposes of his own residence, the annual value of the house or houses, other than the house in respect of which the assessee has exercised an option under clause (b), shall be determined under sub-section (1) as if such house or houses had been let.

Explanation :- Where any such residential unit as is referred to in the second proviso to sub-section (1)

is in the occupation of the owner for the purposes of his own residence, nothing contained in that proviso shall apply in computing the annual value of that residential unit.

(3) Where the property referred to in sub-section (2) consists of one residential house only and it cannot actually be occupied by the owner by reason of the fact that owing to his employment, business or profession carried on at any other place, he has to reside at that other place in a building not belonging to him, the annual value of such house shall be taken to be nil :

Provided that the following conditions are fulfilled, namely:-

(i) Such house is not actually let, and

(ii) No other benefit therefrom is derived by the owner."

xxx xxx xxx

5. According to the AO, in the normal course of letting out of property, the advance rent/security deposits varies from six months to three years. Even if three years', security deposit is to be taken into consideration, the amount would be much lower than the actual amount of Rs.8.58 Crores in respect of the property at Masjid Moth. The same would be the position in respect of Adhichini property. He also relied upon the bye-laws of Municipal Corporation of Delhi as per which where the value of interest free security deposit or advance is in the excess of six months' rent, an amount equal to 12.5% of the amount, depending on the prevailing bank rate, shall be added to the amount of rent received by the landlord to determine the reteable value of the premises. On the basis of this formula, he worked out 12% interest on the excess amount of security deposit and added a sum of Rs.30.41 lakhs.

6. Before the CIT (A), the contention of the assessee was that the expression 'expected to let from year to year' as appearing in Section 23(1)(a) would mean that only standard rent or actual rent, whichever is higher has to be adopted for the purpose of Section 23(a). In the present case, the annual rent was higher than the standard rent and, therefore, no addition could be made. The CIT (A) went by the rateable value of the property as fixed by the MCD, *viz.*, Rs.2,02,240/- with effect from 01.04.1994. On this basis, he opined that the actual rent was more than the said rateable value and therefore, as per Section 23 (1)(b), the actual rent would be the income from house property and there could not have been any further additions.

7. The Tribunal while accepting the aforesaid approach of CIT (A), has held that the annual value cannot exceed the standard rent and the fair rent under the Rent Control Act and where the standard rent is not fixed, the rateable value of the property as fixed by the Municipal Corporation

would be a good guide. According to the Tribunal, this was the view taken by various Courts and number of judgments of the Calcutta, Bombay and Madras High Courts, apart from some decisions of different Benches of the Tribunal are relied upon. The Tribunal denounced the approach of the AO stating that he had not adhered to the provisions of Section 23(1)(a) or Section 23(1)(b) of the Act, as he neither determined the annual value of the property as per Section 23(a) of the Income Tax Act nor by adopting the value as determined by the NDMC or in accordance with the provisions of the Delhi Rent Control Act, if applicable in the case of the assessee. Further, he had also not compared the actual rent received with the annual letting value (ALV) of the property determined under Section 23(a) for the purpose of the tax under Section 22 thereof. Applying the principle enumerated by it and as mentioned above, on the basis of various judgments, to the facts of the present case, the learned Tribunal held that notional income on account of interest free security deposits received by the assessee could not be considered for determining the ALV of the property.

4. Clause (c) of Section 23 (1) of the Act admittedly does not apply to the facts of these appeals, as none of these properties remained vacant during the whole or any part of the previous year. Properties remained let out during the entire year. Therefore, Clause (b) of Section 23 (1) of the Act comes into play. It was also conceded that Clause (a) of Section 23 (1) is applicable in those cases where property is not let-out at all during the entire year. In such cases, the exercise is to be done to ascertain as to what would be the sum, i.e., the rent which the property might fetch if let-out from year to year. It would mean that 'fair rent' which the property can fetch, when if let-out, is to be arrived at. However, learned counsel for the Revenue before the Division Bench and also before us submitted that even while ascertaining the annual letting value for the purposes of Clause (b) of Section 23 (1), it is necessary to determine the 'fair rent' in terms of Clause (a). It was for this reason, learned counsel had argued that actual rent at which the property had been let-out is to be

compared with the fair rent which the property might reasonably be expected to let out from year to year and higher of the two is to be taken as annual letting value. Mr. Sabharwal, learned counsel for the Revenue, exemplified the same by submitting that to arrive at the annual value of the property, one has to examine as to what would be the rent, which it is expected to receive. If the annual rent actually received is more than that, the said sum shall be treated as income from house property. On the other hand, if it is lesser than the amount at which the property can reasonably be expected to let from year to year, then the amount determination as per Clause (a) shall be the income from house property. The legal position as put forward by Mr. Sabharwal is correct and there cannot be any quarrel about the same. The entire question is as to how to determine the 'fair rent' when the property is already let out, particularly when the assessee, as landlord has received a huge amount of security deposit from the tenant, which gives an impression that actual rent received is suppressed.

5. As noted above, the Assessing Officer, in these circumstances, took into consideration the notional interest which interest free security would fetch and added that to the actual rent received to arrive at 'fair rent' and consequently the annual letting value.

6. The CIT (A), on the other hand, preferred to adopt rateable value of the property fixed by the Municipal Corporation even when that was done way back in the year 1996. In a case like this, the standard rent which could be arrived at applying the formula laid down in the Delhi Rent Control Act is not applicable, as property in question is not covered by the Delhi Rent Control Act. The fault in

both these approaches of AO as well as CIT (A) has been observ by the Division Bench in the following manner:

> "12. In this backdrop, the important question which arises for determination is: what is the fair rent of the properties, which were let out in the instant case? The mistake committed by the AO was that he did not address this issue and straightway proceeded to add notional interest on the interest free security deposit. On the other hand, the CIT(A) gave primacy to the rateable value of the property fixed by the Municipal Corporation of Delhi vide its assessment order dated 31.12.1996, as per which the rateable value of the property in question was fixed @ 2,02,240/- with effect from 01.04.1994, in the absence of any further assessment order having been passed by the MCD resulting in any enhancement in rateable value. The Tribunal, on the other hand, has observed that the fair rent of the property under Section 23(1)(a) can be decided on the basis of fair rent fixed by the local Municipal Corporation laws or under the Delhi Rent Control Act."

7. The Division Bench thereafter discussed the case law cited before it and summed up the position as under:

> "16. The reading of the aforesaid case law brings out the following position in so far as considering of notional interest under Section 23 (1) (a) of the Act is concerned:-
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> (i) The Bombay High Court in ***J.K. Investors*** (supra) left this question open. However, it categorically held that the AO was required to determine the "fair rent" which the property might reasonably be expected to earn.
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> (ii) The Calcutta High Court as well as the Division Bench of this Court has categorically held that Section 23 does not permit such calculation of the value of the benefit of interest-free deposit as part of the rent.
>
> (iii) While doing so, the Courts have adopted the rateable value of the property to be calculated either under the Rent Control Act or under the Municipal Laws."

8. On this basis, the case at hand was discussed and the questions which arose for consideration and referred to the Larger Bench are spelt out in Paras 17 & 18 of the order which need to be reproduced:

> "17. In so far as the present case is concerned, the Delhi Rent Control Act is admittedly not applicable as the rent was more than Rs 3500/- per month. No doubt, the annual value determined by the MCD is less than the actual rent. However, the moot question is that when it is found that such rateable value fixed by the Municipal authorities may not represent the correct value, would that still be taken as a yardstick for the purpose of Section 23(1)(a) of the Act. The agreed monthly rent is Rs. 90,000/- which comes to Rs. 10.8 lakhs per year. In addition, the assessee, as landlord, was given a security deposit of Rs. 8.58 crores, which was interest free. The security deposit is more than and twices the capital value at the property on the annual rent by the assessee. Giving of such a huge security deposit, which does not carry any interest, would not appeal to the reason when the rent is a meager amount of Rs. 90,000/- per month.
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> 18. Section 23(1) (a) of the Act states that annual value of the property shall be deemed to be the same for which the property might reasonably be accepted to let from year to year. In a case like this, the Assessing Officer might ultimately form an opinion that there would be reasonable expectation that the property would fetch higher rent than the contractual rent, even when the contractual rent is more than the annual value fixed by the MCD. The question would be as to whether in such circumstances, he may ignore the annual value fixed by the Municipal authorities and come to a conclusion that the property would reasonably fetch a rent, which is more than the actual rent received? To put it otherwise, can the Assessing Officer, in such circumstances, take into consideration the notional interest to arrive at the same which the property might reasonably be accepted to let for year to year? If so, the next question would be whether it can be done in all cases or in some glaring cases like the present one where security deposit is not equivalent to six months to three years of rent but completely disproportionate to the actual contractual rent? Even if the notional interest is not to be added, can such a huge interest free security deposit (which does not appear to have any rationale with the agreed rent) be totally ignored while determining the "fair rent" which the property might reasonably be expected to yield? Or else, in a case like this, can it be inferred that the tenant paid part rent by giving interest free deposit and agreed rent is not what reflected in the lease deed, but part of its is hidden in the form of security?"

9. Before we proceed to answer the aforesaid questions, we may recapitulate here the admitted position in these appeals:

(a) In all these cases in addition to contractual rent, substantial amount by way of interest free security is given. The security deposit is many times more than the annual rent received by the assessee.

(b) Nonetheless, the annual letting value arrived at by t Municipal Corporation is less than the contractual rent received by these assessees.

(c) The AO while arriving at the 'fair rent' has added notional interest on the aforesaid security to the actual rent received to arrive at the annual letting value.

(d) In none of these cases, the provisions of Delhi Rent Control Act apply. Therefore, question of fixing of standard rent as per the formula laid down in Delhi Rent Control Act would not be relevant. We are making these remarks for the reason that it is an admitted position if the property is covered by the Delhi Rent Control Act, then the standard rent under the said Act could be treated as 'fair rent' in view of various judgments. The counsel for the parties conceded to this position and therefore, we need not elaborate on this, moreso when it does not even arise for consideration.

10. With this, we revert back to the moot question, viz., how to determine the 'fair rent' of the property and then to find out as to whether actual rent received is less or more than the 'fair rent' so that higher of two is taken as annual letting value under Section 23 (1) (b) of the Act. For this purpose, we first discuss the validity of approach taken by the AO, viz., whether it is permissible to add notional interest of interest free security deposit and add the same to the actual rent received for arriving at annual letting value. Even the Division Bench while making reference did not countenance the aforesaid formula adopted by the AO as is clear from Para 12 of the reference order wherein it is observed as under:

> "12. In this backdrop, the important question which arises for determination is: what is the fair rent of the properties, which were let out in the instant case? The mistake committed by the AO was that he did not address this issue and straightway proceeded to add notional interest on the interest free security deposit……."

11. The aforesaid conclusion is correct. We may record that permissibility of adding notional interest into actual market rent received was not approved by the Calcutta High Court in the case of ***Commissioner of Income Tax Vs. Satya Co. Ltd.***[(1997) 140 CTR (Cal) 569] and categorically rejected in the following words:

> "There is no mandate of law whereby the AO could convert the depression in the rate of rent into money value by assuming the market rate of interest on the deposit as the further rent received by way of benefit of interest-free deposit. But s. 23, as already noted, does not permit such calculation of the value of the benefit of interest-free deposit as part of the rent. This situation is, however, foreseen by Schedule III to the WT Act and it authorises computation of presumptive interest at the rate of 15 per cent. as an integral part of rent to be added to the ostensible rent. No such provision, however, exists in the Act. That being so, the act of the AO in presuming such notional interest as integral part of the rent is ultra vires the provision of s. 23(1) and is, therefore, unauthorised. Though what has been urged on behalf of the Revenue is not to be brushed aside as irrational, yet the contention is not acceptable as the law itself comes short of tackling such fact-situation."

12. This view of the Calcutta High Court has been accepted by a Division Bench of this Court as well in the case of ***Commissioner of Income Tax Vs. Asian Hotels Limited*** **[(2008) 215 CTR (Del.) 84]** holding that the notional interest on refundable security, if deposited, was neither taxable as profit or gain from business or profession under Section 28(iv) of the Act or income from house property under Section 23(1)(a) of the Act. Rationale given in this behalf was as under:

> "A plain reading of the provisions indicates that the question of any notional interest on an interest free deposit being added to the income of an assessed on the basis that it may have been earned by the Assessee if placed as a fixed deposit, does not arise. Section 28 (iv) is concerned with business income and is distinct and different from income from house property. It talks of the value of any benefit on perquisite, "whether convertible into money or not" arising from "the business or the exercise of a profession." It has been explained by this Court in Ravinder Singh that Section 28 (iv) can be invoked only where the benefit or perquisite is other than cash and that the term "benefit or amenity or perquisite" cannot relate to cash payments. In the instant case, the AO has determined the monetary value of the benefit stated to have accrued to the assessed by adding a sum that constituted 18% simple interest on the deposit. On the strength of Ravinder Singh, it must be held that this rules out the application of Section 28 (iv) of the Act.
>
> 9. Section 23(1)(a) is relevant for determining the income from house property and concerns determination of the annual letting value of such property. That provision talks of "the sum for which the property might reasonably be expected to let from year to year." This contemplates the possible rent that the property might fetch and not certainly the interest in fixed deposit that may be placed by the tenant with the landlord in connection with the letting out of such property. It must be remembered that in a taxing statute it would be unsafe for the Court to go beyond the letter of the law and try to read into the provision more than what is already provided for. The attempt by learned counsel for the Revenue to draw an analogy from the Wealth Tax Act, 1957 is also to no avail. It is an admitted position that there is a specific provision in the Wealth Tax Act which provides for considering of a notional interest whereas Section 23(1)(a) contains no such specific provision."

13. We approve the aforesaid view of the Division Bench of this Court and Operative words in Section 23 (1)(a) of the Act are "the sum for which the property might reasonably be expected to let from year to year". These words provide a specific direction to the Revenue for determining the 'fair rent'. The AO, having regard to the aforesaid provision is expected to make an inquiry as to what would be the possible rent that the property might fetch. Thus, if he finds that the actual rent received is less than the 'fair/market rent' because of the reason that the assessee has received abnormally high interest free security deposit and because of that

reason, the actual rent received is less than the rent which t property might fetch, he can undertake necessary exercise in that behalf. However, by no stretch of imagination, the notional interest on the interest free security can be taken as determinative factor to arrive at a 'fair rent'. Provisions of Section 23(1)(a) do not mandate this. The Division Bench in ***Asian Hotels Limited (supra)***, thus, rightly observed that in a taxing statute it would be unsafe for the Court to go beyond the letter of the law and try to read into the provision more than what is already provided for. We may also record that even the Bombay High Court in the case of ***Commissioner of Income Tax*** Vs. ***J. K. Investors (Bombay) Ltd.***, [(2001) 248 ITR 723 (Bom.)] categorically rejected the formula of addition of notional interest while determining the 'fair rent' in the following manner:

> ".....Before concluding we may point out that under Section (23)(1)(b), the word "receivable" denotes payment of actual annual rent to the assessee. However, if in a given year a portion of the actual annual rent is in arrears, it would still come within Section (23)(1)(b) and it is for this reason that the word "receivable" must be read in the context of the word "received" in Section(23)(1)(b). In the light of the above interpretation, **notional interest cannot form part of the actual rent as contemplated by Section (23)(1)(b) of the Act**. We once again repeat that whether such notional interest could form part of the fair rent under Section (23)(1)(a) is expressly left open."

14. It is, thus, manifest that various Courts have held a consistent view that notional interest cannot form part of actual rent. Hence, there is no justification to take a different view that what has been stated in ***Asian Hotels Limited (supra)***.

15. The next question would be as to whether the annual letting value fixed by the Municipal Authorities under the Delhi Municipal

Authority Act can be the basis of adopting annual letting value for the purposes of Section 23 of the Act. This question was answered in affirmative by the Calcutta High Court in ***Satya Co. Ltd. (supra)*** on the ground that the provisions contained in the Delhi Municipal Corporation Act for fixing annual letting value is *pari materia* with Section 23 of the Act. The Court opined that the fair rent fixed under the Municipal laws, which takes into consideration everything, would form the basis of arriving at annual value to be determined under Section 23(1)(a) and to be compared with actual rent and notional advantage in the form of notional interest on interest free security deposit could not be taken into consideration. It is clear from the following discussion therein:

> "6. With regard to question Nos. (5) and (6) which are only for the asst. yrs. 1984-85 and 1985-86 the further issue involved is whether any addition to the annual rental value can be made with reference to any notional interest on the deposit made by the tenant. When the annual value is determined under sub-cl. (a) of sub-s. (1) of s. 23 with reference to the fair rent then to such value no further addition can be made. The fair rent, takes into consideration everything. The notional interest on the deposit is not any actual rent received or receivable. Under sub-cl. (b) of s. 23(1) only the actual rent received or receivable can be taken into consideration and not any notional advantage. The rent is an actual sum of money which is payable by the tenant for use of the premises to the landlord. Any advantage and/or perquisite cannot be treated as rent. Wherever any such perquisite or benefit is sought to be treated as income, specific provisions in that behalf have been made in the Act by including such benefit, etc., in the definition of the income under s. 2(24) of the Act. Specific provisions have also been made under different heads for adding such benefits or perquisites as income while computing income under those heads, e.g., salary, business. The computation of the income under the head House property is on a deemed basis. The tax has to be paid by reason of the ownership of the property. Even if one does not incur any sum on account of repairs, a statutory deduction therefore is allowed and where on repairs expenses are incurred in excess of such statutory limit, no deduction for such excess is allowed. The deductions for municipal taxes and repairs are not allowed to the extent they are borne by the tenant. However, even

> such actual reimbursements for municipal taxes, insurance, repairs or maintenance of common facilities are not considered as part of the rent and added to the annual value. Accordingly, there can be no scope or justification whatsoever for making any addition for any notional interest for determining the annual value.
>
> Whatever benefit or advantage which is derived from the deposits - whether by way of saving of interest or of earning interest or making profits by investing such deposit - the same would be reflected in computing the income of the assessee under other heads.
>
> In our view there is no scope for making any addition on account of so-called notional interest on the deposit made by the tenant, since there is no provision to this effect in s. 22 or 23 of the IT Act, 1961."

16. In fact, this is the view taken even by the Supreme Court in the case of ***Shiela Kaushish Vs. CIT*** **[1981] 131 ITR 435 (SC)** on account of similarity of the provisions under the municipal enactments and Section 23 of the Act.

17. It is on this basis that in the present case, the CIT (A) gave primacy to the rateable value of the property fixed by the Municipal Corporation of Delhi vide its assessment order dated 31.12.1996 and on this basis, opined that the actual rent was more than the said rateable value and therefore, as per Section 23 (1)(b), the actual rent would be the income from house property and there could not have been any further additions.

18. Since the provisions of fixation of annual rent under the Delhi Municipal Corporation Act are *pari materia* of Section 23 of the Act, we are inclined to accept the aforesaid view of the Calcutta High Court in ***Satya Co. Ltd. (supra)*** that in such circumstances, the annual value fixed by the Municipal Authorities can be a rationale yardstick. However, it would be subject to the condition that the annual value fixed bears a close proximity with the assessment year in question in respect of which the assessment is

circumstances because of passage of time, viz., the annual val was fixed by the Municipal Authorities much earlier in point of time on the basis of rent than received, this may not provide a safe yardstick if in the Assessment Year in question when assessment is to be made under Income Tax Act. The property is let-out at a much higher rent. Thus, the AO in a given case can ignore the municipal valuation for determining annual letting value if he finds that the same is not based on relevant material for determining the 'fair rent' in the market and there is sufficient material on record for taking a different valuation. We may profitably reproduce the following observations of the Supreme Court in the case of ***Corporation of Calcutta Vs. Smt. Padma Debi,*** **AIR 1962 SC** 151:

> "A bargain between a willing lessor and a willing lessee uninfluenced by any extraneous circumstances may afford a guiding test of reasonableness. An inflated or deflated rate of rent based upon fraud, emergency, relationship and such other considerations may take it out of the bounds of reasonableness."

16. Thus the rateable value, if correctly determined, under the municipal laws can be taken as ALV under Section 23(1)(a) of the Act. To that extent we agree with the contention of the learned Counsel of the assessee. However, we make it clear that rateable value is not binding on the assessing officer. If the assessing officer can show that rateable value under municipal laws does not represent the correct fair rent, then he may determine the same on the basis of material/ evidence placed on record. This view is fortified by the decision of Patna High Court in the case of ***Kashi Prasad Kataruka v. CIT*** **[1975] 101 ITR 810**.

17. The above discussion leads to the following conclusions:

(i) ALV would be the sum at which the property may reasonably let out by a willing lessor to a willing lessee uninfluenced by any extraneous circumstances,

(ii) An inflated or deflated rent based on extraneous consideration may take it out of the bounds of reasonableness,

(iii) Actual rent received, in normal circumstances, would be a reliable evidence unless the rent is inflated/deflated by reason of extraneous consideration,

(iv) Such ALV, however, cannot exceed the standard rent as per the Rent Control Legislation applicable to the property,

(v) if standard rent has not been fixed by the Rent Controller, then it is the duty of the assessing officer to determine the standard rent as per the provisions of rent control enactment,

(vi) The standard rent is the upper limit, if the fair rent is less than the standard rent, then it is the fair rent which shall be taken as ALV and not the standard rent.

19. We may also add that in place like Delhi, this has now become redundant inasmuch as the very basis of fixing property tax has undergone a total change with amendment of the Municipal Laws by Amendment Act, 2003. Now the property tax is on unit method basis.

20. In the present case, the AO added notional interest on the interest free security for arriving at annual letting value. Since that was

not permissible, the effect would be that such assessment w rightly set aside by the CIT (A) and the Tribunal. Therefore, the orders would not call for any interference. These appeals are, thus, dismissed on this ground. Once we hold this, the very basis adopted by the AO to fix annual letting value was wrong and therefore, no further exercise in fact is required by us in these appeals.

21. We would like to remark that still the question remains as to how to determine the reasonable/fair rent. It has been indicated by the Supreme Court that extraneous circumstances may inflate/deflate the 'fair rent'. The question would, therefore, be as to what would be circumstances which can be taken into consideration by the AO while determining the fair rent. It is not necessary for us to give any opinion in this behalf, as we are not called upon to do so in these appeals. However, we may observe that no particular test can be laid down and it would depend on facts of each case. We would do nothing more than to extract the following passage from the Supreme Court judgment in the case of ***Motichand Hirachand Vs. Bombay Municipal Corporation,*** **AIR 1968 SC 441**:

> "It is well-recognized principle in rating that both gross value and net annual value are estimated by reference to the rent at which the property might reasonably be expected to let from year to year, Various methods of valuation are applied in order to arrive at such hypothetical rent, for instance, by reference to the actual rent paid for the property or for others comparable to it or where there are no rents by reference to the assessments of comparable properties or to the profits carried from the property or to the cost of construction."

22. We have also taken note of the judgment of the Bombay High Court in the case of ***J.K. Investors*** (supra) wherein the Court

hinted that various factors may become relevant in determining the 'fair rent'. The precise observations of the Court in the said judgment are as under:

> "At the cost of repetition it may be mentioned that under **Section (23)(1)(a), the Assessing Officer has to decide the fair rent of the property. While deciding the fair rent, various factors could be taken into account. In such cases various methods like the contractors method could be taken into account**. If on comparison of the fair rent with the actual rent received, the Assessing Officer finds that the actual rent received is more than the fair rent determinable as above, then the actual rent shall constitute the annual value under Section (23)(1)(b) of the Act. Now, applying the above test to the facts of this case, we find a categorical finding of fact recorded by the Tribunal that the actual rent received by the assessee was more than the fair rent. Under the above circumstances, in view of the said finding of fact, we do not see any reason to interfere.

23. Subject to the aforesaid observations, insofar as the present appeals are concerned, we find that the manner in which the AO determined annual letting value was not correct. Finding no merits in these appeals, the same are dismissed.

(CHIEF JUSTICE)

(A.K. SIKRI)
JUDGE

(MANMOHAN)
JUDGE

MARCH 30, 2011
pmc