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

\+ **ITA 308/2016**

JAY METAL INDUSTRIES PVT. LTD. ..... Appellant
Through: Mr. Salil Kapoor, Advocate with Ms. Soumya Singh, Ms. Ananya Kapoor, Mr. Sumit Lal Chandani, Advocates.

Versus

COMMISSIONER OF INCOME TAX-V, ... Respondent
Through: Mr. Rahul Chaudhary, Senior Standing Counsel with Mr. Sanjay Kumar, Advocate.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE PRATHIBA M. SINGH

O R D E R

% 13.07.2017

Dr. S. Muralidhar, J.:

1. The Appellant, Jay Metal Industries Private Limited, has filed an appeal under Section 260A of the Income tax Act, 1961 ('Act') against the impugned order dated 18th December, 2015 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 4836/Del/2012 for the Assessment Year ('AY') 2009-10.

Question involved

2. The question of law that is sought to be urged is whether the ITAT was right in confirming the order of the Assessing Officer ('AO') and reversing the order of the Commissioner of Income Tax ['CIT (A)'] and holding that the income received by the Assessee from letting of the premises in question had to be assessed as 'income from other sources'

under Section 56 (2) (iii) of the Act and not as 'income from hou property'?

Background facts

3. The background facts are that the Assessee which has its registered office at E-56, Greater Kailash-I, New Delhi entered into a lease deed dated 5th October 2007 with Feedback Ventures Private Limited ('Lessee') whereby the basement, ground floor, first floor and second floor of the building at Plot No. 811, Udyog Vihar, Phase-V, Gurgaon, Haryana ('the premises in question') were given on rent to the Lessee for a period of four years.

4. The relevant preamble clauses of the lease deed read as under:

> "(a) The Lessors represent that they are fully seized and possessed plot and built-up area Basement, Ground Floor, First Floor and Second Floor of the Building Plot No. 811, Udyog Vihar, Phase-V, Gurgaon, Haryana (hereinafter referred to as premises and entitled to create a lease.
>
> (b) The Lessors have agreed to lease to the Lessee the premises with fully furnished, centrally air conditioned and with adequately power backed through a 200 KVA diesel generator set, which the Lessees have agreed to take for period of 48 months and upon the terms and conditions set out herein below beginning from 1st Sept 2007."

5. Certain other clauses of the lease deed relevant to the present case read thus:

> "2 (c) The Lessor shall provide a sanctioned load of 210 KVA electricity connection through an independent transformer installed at the premises. The Lessee agrees to pay directly to the concerned department all charges for electricity and water consumed by the lessee in the premises. The electricity charges will be based on the

consumption shown by the meter on the basis of the bill receiv from Haryana Electricity Board. The water charges will be paid by the Lessee on the basis of the bill received from Haryana Water Authority. Both Electricity and water charges will be paid by the lessee directly to the departments on the basis of Bills received from time to time.

2 (d) The Lessor shall hand over the office with furniture & fixture 200 KVA diesel generator and adequate air conditioners to the Lessee in good working condition. The Lessee agrees to pay directly all charges towards maintenance of the premises including comprehensive maintenance of Generator. Air conditioner and other fixture and findings as per Annexure 'A'."

Assessment proceedings

6. The Assessee filed its return of income for the AY 2009-10 on 22nd September, 2009 declaring income of Rs. 98,56,790. The return was picked up for scrutiny and notice was issued to the Assessee on 16th September, 2010 under Section 143 (2) of the Act.

7. The assessment order dated 5th December, 2011 passed by the AO noted that by an order dated 1st November, 2011, the Assessee was asked to show cause as to why income from letting out premises in question "should not be treated as composite rent as per the provisions of Section 56 (2) (iii) of the Act." The AO further noted that no reply to the said question was received from the Assessee. The AO then proceeded to reproduce the observations of the AO on the same issue raised during the assessment proceedings for the AY 2008-09. The submissions of the Assessee in those proceedings were *inter alia* as under:

> "The said premises are furnished and centrally air conditioned with power backup. The furnishing of building is just ordinary and comprises of minor part of the whole value of the property. Similarly, centrally air conditioning is also an integral part of

> building. Since, the said property is owned by and belongs to t Assessee, there is no question of treating the rental income as composite rental income."

8. The AO rejected the above contentions and held that "the rental income declared by the Assessee at Rs. 82,45,000 is held to be composite rent and assessed as per the provisions of Section 56 (2) (iii) of the Act." Consequently, the amount of Rs. 24,73,500 claimed for deduction under Section 24 (a) of the Act was disallowed and added back to the net income of the Assessee.

Appeal before the CIT (A)

9. Before the CIT(A), the Assessee pointed out that the issue had been decided in its favour for the AY 2008-09 by an order dated 25th February 2011 of the CIT (A). In its order dated 27th July, 2012, while allowing the appeal of the Assessee, the CIT(A) quoted from the earlier assessment order dated 25th February, 2011 for the AY 2008-09 wherein it was *inter alia* held as under:

> "In the present case, the Assessee made a lease agreement on 5.10.2007 with M/s. Feedback Ventures Private Limited in respect of the premises situated at building No. 811 comprising of basement, ground floor, first floor and second floor which was leased out during the year under consideration on monthly rent of Rs. 9,10,000/- with the amenities like wooden cabins and wooden empanelling, central air conditioning ,adequate power back up through a 200 KVA diesel generator. Without these amenities, the bare building is of no use, which is a common feature in any property. For a property to be used as residential certain kinds of amenities and fixtures would be required or else people cannot inhabit it – such as kitchen, ventilations, electrical fittings etc. and the same goes for a commercial property – without some amenities such as provision for air-conditioning and cabins, it cannot be useful for any purpose. Therefore, just because there is something

> beyond the bare structure that is being provided, it cannot be sa that these amenities are not part of the property itself However, since these amenities are not separate assets such as Plant and machinery, the provisions of section 56(2) do not apply here. Further, in the case of letting of the machinery, plant or furniture, section 56(2)(iii) of the Act is applicable, but only letting of building with certain amenities, this provision is not applicable and in that event, the income from letting out is chargeable under the head 'Income from house property'. The rent for the building would not come under the purview of section 56(2)(iii) of the Act."

10. The CIT(A) agreed that the Assessee as the owner of the building was exploiting the property by letting out the same and realizing income by way of rent. It was held that such rental income was liable to be assessed under the head of 'income from house property'. Accordingly, the AO was directed to allow deduction under Section 24 (a) of the Act.

Impugned order of the ITAT

11. The Revenue then went in an appeal before the ITAT. By the impugned order dated 18th December, 2015 allowing the appeal of the Revenue, the ITAT followed the decision of this Court in ***Garg Dyeing & Processing Industries v. ACIT (2013) 212 Taxman 160 (Del)*** and held that the income from letting had to be treated as composite rental income and, therefore, the claim of deduction under Section 24 (a) of the Act was inadmissible. It was noted that "the essential ventilators and electric fitting in a kitchen cannot be compared with the amenities of wooden cabins and empanelment, central air-conditioning facility supported by power backup through 200 KVA generator set which is inseparable from the letting of the building and the income from such letting of building shall be chargeable to income tax under the head 'income from other

sources." The order of the AO was restored and the order of the CIT(A) was set aside.

Submissions of the Assessee

12. Mr. Salil Kapoor, learned counsel appearing for the Appellant/Assessee submitted that the Lease Deed dated 5th October, 2007 was only for lease of the building and did not provide for any separate rent for the amenities. Initially the building had been let out without the amenities to a previous tenant who had then bought the equipment and fixtures. When that lease came to an end, the Assessee had purchased the equipment and fixtures from the said previous tenant.

13. Mr Kapoor pointed out that even as per the lease deed dated 5th October 2007 entered into with the lessor, the predominant purpose was to lease out the building. The equipment and fixtures were incidental to and inseparable therefrom. Therefore, Section 56 (2) (iii) of the Act was not attracted. Mr. Kapoor submitted that the decision in ***Garg Dyeing & Processing Industries v. ACIT*** (*supra*) was distinguishable on facts. Mr. Kapoor emphasized that the Assessee had not claimed depreciation on plant and machinery, fixtures and fittings etc. Reliance was placed on the decision of the Division Bench of the Kerala High Court in ***Dr. P.A. Varghese v. Commissioner of Income Tax (1971) 80 ITR 180 (Ker).***

14. Alternatively, Mr. Kapoor submitted that in the event that the Court was not inclined to accept the plea of the Appellant that the entire rental income should be treated as 'income from house property', then only a certain portion thereof representing the income from furniture, fittings, air-conditioning etc. should be treated as 'income from other sources'.

For that purpose, the matter should be remanded to the AO for prop determination after separate valuation of the building and the air-conditioning, furniture, fittings etc. In support of this plea, Mr. Kapoor relied upon the decision of the Karnataka High Court in ***CIT v. Mysore International Hotels Pvt. Ltd (2010) 322 ITR 116 (Kar).***

15. Finally, Mr. Kapoor submitted that if the Revenue insisted that the rental income should be treated as 'income from house property', then the Assessee was entitled to the benefit of depreciation under Section 57 (iii) of the Act.

Submissions of the Revenue

16. Mr. Rahul Chaudhary, learned Senior standing counsel for the Revenue, on the other hand, placed considerable reliance on the decision of this Court in ***Garg Dyeing & Processing Industries v. ACIT*** (*supra*). Mr. Chaudhary pointed out that in the present case the lease deed itself made it clear that it was a composite one i.e., both for the land as well as the machinery and furniture. The Assessee had made a conscious choice as a result of which the entire rental income had to be treated as income from other sources. Mr. Chaudhary submitted that the Assessee could have considered entering into separate lease agreements, one for the building and the other for the machinery, furniture and fittings etc., in which case the Assessee could have treated the rent for the building as income from house property.

Analysis and Reasons

17.1 The basic test for determining whether a lease for the letting of a building together with fixtures etc is a composite one was laid down by

the Supreme Court in ***Sultan Bros. (P) Limited v. CIT (1964) 51 ITR 353***. In the above decision, the Supreme Court was dealing with Section 12 (3) and (4) of the Indian Income Tax Act, 1922 which correspondence Section 56 of the Act. There the Assessee had constructed a building for the purpose of running a hotel and for certain ancillary purposes. With this objective, the Assessee equipped with the building, furniture and fixtures. The lease deed in that case provided for a monthly rent of Rs. 5,950 for the building and hire of Rs. 5,000 for the furniture and fixtures.

17.2 The Department disallowed the claim of the Assessee stating that the entire sum received under the lease was to be treated as 'income from other sources'. While the rent receipt for the building was treated as 'income from house property', the rent received on account of furniture and fixtures alone was held to be admissible under 'income from other sources'.

17.3 However, the Supreme Court accepted the Assessee's claim by holding that 'when a building, plant, machinery or furniture are inseparably let, the Act contemplates the rent for the building as a residuary head of income'. The Court observed as under:

> "It seems to us that the inseparability referred to in sub-Section (4) is an inseparability arising from the intention of the parties. That intention may be ascertained by framing the following questions: Was it the intention in making the lease – and it matters tot whether there is one lease or two, that is separate leases in respect of the furniture and the building – that the two should be enjoyed together? Was it the intention to make the letting of the two practically one letting? Would one have been let alone and a lease of it accepted without the other? If the answers to the first two questions are in the affirmative, and the last in the negative then, in our view, it has to be held that it was intended that the lettings

> would be inseparable. This view also provides a justification f taking the case of the income from the lease of a building out of Section 9 and putting it under Section 12 as a residuary head of income. It then becomes a new kind of income, not covered by Section 9, that is income not from the ownership of the building alone but an income which though arising from a building would not have arisen if the plant, machinery and furniture had not also been let along with it."

18. Section 56 (2) (iii) of the Act reads as under:

> **56.** (2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head "Income from other sources", namely:
> **...**
>
> (iii) where an Assessee lets on hire machinery, plant or machinery belonging to him and also buildings, and the letting of the buildings is inseparable from the letting of the said machinery, plant or furniture, the income from such letting, if it is not chargeable to income-tax under the head "Profits and gains of business or profession."

19. In the present case, the preamble clauses clause of the lease deed, extracted hereinbefore, make it plain that what was given on rent to the Lessee was not just the basement, ground floor, first floor and second floor of the building but also the fixtures, furniture which included the air-conditioning and power backup through a 200 KVA diesel generator set. In particular, Clause 2 (d) makes it clear that the Lessor had to hand over the office "with furniture & fixture, 200 KIVA diesel generator and adequate air conditioners to the Lessee in good working condition."

20. There can be no manner of doubt that the Lease Deed was a composite one and the rental receipts thereunder answered the description in Section 56 (2) (iii) of the Act.

21.1 In ***Dr. P.A. Varghese v. Commissioner of Income Tax*** (*supra*), while the construction of the building owned by the Assessee was in progress, the Assessee entered into an agreement with the Export Promotion Council to lease the second floor and part of the first floor of the building to the Council.

21.2 Under the Lease Agreement, the Assessee agreed to provide the necessary partitions, lavatories, closets, air-conditioners, fluorescent tubes, electric meters, water supply etc. According to the Assessee, the Agreement evidenced a hire of machinery, plant and furniture along with the building, and that the income received thereunder was 'income from other sources' falling under Section 56 (2) (iii) of the Act.

21.3 The AO rejected the contention and assessed the income as 'income from house property'. After the Appellate Authority and the Tribunal upheld the above view, the matter came before the High Court by way of reference. Before the High Court, there were no such two lettings in that case. The amenities which the Assessee had provided in the building formed part of the building. In other words, it was held that the income from the letting of the building by the Assessee to the Council was assessable as 'income from house property' and 'not from other sources'. The High Court observed that the Agreement "does not make out a letting of any machinery, plant or furniture. The rent is fixed for the building with all the amenities mentioned in the agreement." On facts, it was found that "there is only one letting in this case, and that is of the building."

22. However, in the present case, as already discussed, it is plain th letting is not merely of the building but a composite letting of both, the building as well as the equipment, furniture etc. and thereby Section 56 (2) (iii) of the Act was attracted. Applying the test laid down in ***Sultan Bros.*** (*supra*) the income from the letting in the hands of the Assessee was "a new kind of income" which could be considered to be income from house property since the income not from the ownership of the building alone "but an income which though arising from a building would not have arisen if the plant, machinery and furniture had not also been let along with it."

23. The Court is, therefore, not persuaded to take a view different from that by the ITAT in the present matter. Consequently, the question urged, viz., whether the ITAT erred in holding that the rental income should be treated as 'income from other sources', is answered in the negative i.e., in favour of the Revenue and against the Assessee.

No case for remand to the AO

24. On the further question as to whether the matter should be sent back to the AO for determination as to what extent of the rental income should be treated as income from other sources, the Court is of the view that this is a plea being taken for the first time by the Assessee as an alternative plea. It is, in fact, in this context that a categorical plea was taken by the Assessee in its written submissions before the ITAT, which reads thus:

> "5. The rent is entirely for the land and building as the facilities constitutes insignificant value. Section 56 (2) (iii) of the Income Tax Act, 1961 is applicable where the Assessee mainly lets on hire machinery, plant, fixtures and also building and letting of building is inseparable from the said machinery plant or furniture."

25. There was no alternative plea as is urged before this Cou Consequently, the Court is not inclined to entertain this alternative plea of the Assessee.

Claim for depreciation

26. However, the last plea made by the Assessee is that in that event the entire income from the letting is treated as 'income from source sources', it cannot be deprived of the corresponding deduction in terms of Section 57 (iii) of the Act. The Revenue too has not disputed the fact that the Assessee has not claimed depreciation.

27. Accordingly, it is directed that while giving the appeal effect, the AO will grant the Assessee the benefit of Section 57 (iii) of the Act.

Conclusion

28. The Court, accordingly, affirms the impugned order of the ITAT and disposes of the appeal in the above terms.

S.MURALIDHAR, J

PRATHIBA M. SINGH, J

JULY 13, 2017
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