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

Decided on: 25.10.2018

\+ **W.P.(C) 10572/2018 & CM Nos.41219-20/2018**

AMBIENCE DEVELOPERS & INFRASTRUCTURE PVT.LTD. ..... Petitioner

Through : Dr. Rakesh Gupta, Mr. Somil Agarwal, Mr. Rohit Kumar Gupta and Ms. Monika Ghai, Advs.

versus

COMMISSIONER OF INCOME TAX ..... Respondent

Through : Mr. Zoheb Hossain, Sr. Standing Counsel with Mr. Deepak Anand, Jr. Standing Counsel for Revenue.

\+ **W.P.(C) 10627/2018 & CM Nos.41373-74/2018**

AMBIENCE HOTELS & RESORTS PVT.LTD. ..... Petitioner

Through : Dr. Rakesh Gupta, Mr. Somil Agarwal, Mr. Rohit Kumar Gupta and Ms. Monika Ghai, Advs.

versus

COMMISSIONER OF INCOME TAX ..... Respondent

Through : Mr. Zoheb Hossain, Sr. Standing Counsel with Mr. Deepak Anand, Jr. Standing Counsel for Revenue.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A.K. CHAWLA

S. RAVINDRA BHAT, J.

1. These two writ petitions – one by M/s Ambience Developers and Infrastructure Pvt. Ltd. (hereafter as "ADI") – being W.P.(C)No.10572/2018 and the other by M/s Ambience Hotels and Resorts Pvt. Ltd. (hereafter as "AHR") – being W.P.(C)No.10627/2018 challenge two common orders of the Income Tax Appellate Tribunal (hereafter as "ITAT"). The ITAT rejected- by the first impugned order (dated 07.07.2017, hereafter "the main order" or "main judgment") the appeals filed before it; by the second impugned order (dated 13.08.2018) ITAT rejected the

applications filed by the ADI and AHR under Section 254(2) of the Income Tax A (hereafter as "the Act").

2. The brief facts are that the original assessment was completed in the cases of both the petitioners i.e. ADI and AHR, on 31.12.2009 at ₹24,03,030/- and ₹5,73,28,357/- respectively under Section 143(3) of the Act. The CIT subsequently set aside the assessment invoking its powers under Section 263 and directed the AO to assess their lease income from the rental/lease of shops and other spaces in the hotel assessees hands after making proper inquires and verifications. During these proceedings, the AO noticed that the ADI had projected lease and license charges of ₹29,18,07,201/- including lease rental of ₹6,27,84,240/- relating to leasing of retail spaces in Ambience Hotel, Gurgaon. He further noticed that the space in question was owned by AHR but the assessee i.e. ADI showed its income from letting out the shop and spaces in its hand on the basis of the agreement between ADI and AHR. The consideration for that agreement was ₹75 crores. The AO therefore, concluded that since the income of ₹6,40,78,420/- was a lease rental and had been taxed in the hands of the owner i.e. ADI, the provisions of Section 22 of the Act were to be invoked; the rental income was therefore, taxed in the hands of the owner AHR. The AO did not reduce the amount of ₹6,27,84,240/- from ADI's income and assessed it in its hands, on protective basis by making a substantive addition in respect of the income of AHR. Thus, the AO assessed AHR's total income at ₹4,41,54,580/- under Section 143(3) read with Section 263 of the Act. Both ADI and AHR appealed to the CIT who dismissed their pleas.

3. Aggrieved the said two assessees approached the ITAT. By its order dated 07.07.2017, the ITAT – after noticing the contentions made by the two assessees before it, and considering the agreement of 31.03.2008, entered into between two of them i.e. ADI and AHR, held as follows:

> *"14. When we peruse the recitals of the Agreement (supra) reproduced above particularly clause 4, it goes to unequivocally prove that the second party to the Agreement (supra) namely, ADIPL is entitled to receive the rent or the charges from the tenants/occupants during the currency of this agreement. When ADIPL has got rights and interest in the property in question by virtue of the Agreement (supra) w.e.f 31.03.2008 then it is*

estopped by its own act and conduct from showing the income from the rental of the shopsand rental space in its hands for the earlier period prior to 31.03.2008.

15. In the given circumstances, the ld. CIT (A) has rightly upheld the addition of Rs.4,39,48,968/- in the hands of AHRPL under the head income from house property by returning following findings :

> *"5.1.5. On perusal of the details on record, I find that the appellant company, ADIPL even after showing the above lease income in its hands, had declared loss for the year under consideration in its return, whereas the appellant company i.e. AHRL was running into profits. In my considered view, the entire arrangement was made by the appellant to avoid incidence of tax in its hands. Reliance is placed in the present case on the judicial pronouncement of the Hon'ble Apex court in the case of Smt. Tara Devi Aggarwal, which is clearly applicable in this case. ADIPL, a loss making company, i.e. the appellant company AHRL, a profit making company in its return to be assessed in its hands in order to assist the appellant company to avoid tax payment. Section 60 is merely a declaratory of a principle which is well settled under the Income Tax law, namely, the profits on their coming into existence attract tax at that point and the revenue is not concerned with the subsequent application of the profits."*

16. In view of what has been discussed above, we are of the considered view that the assessee, ADIPL in this case is not entitled for relief being beneficial owner on the basis of the judgment of Poddar Cement Pvt. Ltd. (supra) which is not applicable to the facts and circumstances of the case rather an agreement (supra) between AHRPL and ADIPL is a camouflage particularly in the face of the admitted fact that AHRPL being owner of property in question claimed TDS of Rs.1,09,32,212/- without offering corresponding income for taxation to evade the payment of tax to the state exchequer. So, we find no illegality or perversity in the findings returned by ld. CIT (A) in the impugned order dated 01.10.2013 under challenge vide ITA No.355/Del/2014. However, when substantive addition qua the same amount of Rs.6,27,84,240/- has already been made in case of AHRPL, there is no question confirming the protective addition of Rs.6,27,84,240/- in case of ADIPL by the ld. CIT (A) because one income cannot be taxed twice. So, ITA Nos.354/Del/2014 & 355/Del/2015 filed by the assessee are hereby dismissed. Consequently, ITA No.413/Del/2014 filed by the Revenue is also dismissed having been become infructuous."

4. The assessees had approached this court but withdrew the appeals on the plea that they had preferred rectification application and that in the event of their plea not

being accepted, the liberty be reserved. Accordingly, their appeals were dismissed withdrawn.

5. The miscellaneous applications under Section 254(2), filed by the ADI and AHR were on identical terms. These applications relied upon the judgment in *Honda Siel Ltd. v. Commissioner of Income Tax,* 295 ITR 466 (SC) and urged that the decision cited before the ITAT in its main order of 07.07.2017 had not considered the written synopsis. The assessee highlighted that the so-called transfer which was the basis for bringing to tax the rental income, in fact was not a transfer of assets but that the consideration of ₹75 crores was paid for obtaining the right to manage and carrying on business. In this regard, the assessees relied upon *Commissioner of Income Tax v. Rungamatee Tea & Industries,* (1993) 199 ITR 282 (Cal); *Rayala Corporation Pvt. Ltd. v. Assistant CIT,* (2014) 363 ITR 630 (Mad.) and also on the decisions for the proposition that the legal character of a *bona fide* transaction cannot be ignored. For the latter, principle reliance was placed on *Commissioner of Wealth Tax v. Arvind Narootam,* (1988) 173 ITR 479-487 (SC); *Banyan and Berry v. Commissioner of Income Tax,* (1996) 222 ITR 831-851 (Guj.) and other decisions. As to their argument that the income was not assessable in the hands of the legal owner, the assessees relied upon *Dalmia Cement Ltd. v. Commissioner of Income Tax,* (1999) 237 ITR 617 (SC) as well as amended Section 2(47) which defines transfer. Furthermore, other decisions too were cited.

6. The ITAT by the impugned order noticed its decisions as well as rulings of the Supreme Court in *Honda Siel Ltd.* (supra) and after extracting operative portions of is previous decisions, held as follows :

> *"4. Aforesaid findings returned by the Tribunal after hearing authorized representatives of the parties are purely factual findings and no apparent mistake n record has been pointed out. For the argument sake, findings returned by the Tribunal may be wrong as contended by the ld. AR for the assessee, but there is no mistake apparent on record in the findings returned by the Tribunal. Moreover, issue involved is decided on the basis of facts, evidence collected by the lower Revenue authorities and the case law relied upon by the assessee was found to be not applicable to the facts and circumstances of the case.*
>
> *5. So far as question of incorporating the word "camouflage" in para 16 of the order dated 07.07.2017 passed by the Tribunal in ITA*

No.355/Del/2017 &354/Del/2017 as pointed out by the ld. AR for the assessee is concerned, the same has been used in furtherance of the discussion made in the preceding paras and is in no way intended to cause harm to the business reputation of the assessee. Considering the aforesaid facts and legal position, we find no merits in the misc. applications filed by the assessee, hence the same are hereby dismissed."

7. It is contended on behalf of the petitioner that the Act does not clothe the taxing authority with any jurisdiction to rewrite the terms of the agreement, which plainly in this case did not suggest that the parties, were dealing with each other in any manner other than at arm's length. Furthermore, there is no suggestion of any collusion between the parties. As independent entities, both the assessees had the right to organize their businesses in the terms best suited to their model of commerce. It was highlighted that the judgment of the Supreme Court in *CIT v. Poddar Cement Ltd.*, 226 ITR 625, had considered the expression "owner" in the context of Section 22 where the assessee did not have the title over a property which was otherwise in his possession and enjoyment. It was contended that the court took note of the commercial realities and held that the person entitled to enjoy the income from the property was liable to tax but not the legal or registered owner. Any arrangement by which any individual or person comes in possession of the property with right to enjoyment, ought to be treated as the owner rather than a titular or nominal owner.

8. Dr. Rakesh Gupta, learned counsel also urged the purport of the amendment to the Act by the Finance Act of 1987, which extended the definition of transfer under Section 2(47). It was submitted that this proposition was urged but the same was completely overlooked by the ITAT in its main orders. Given the mandate of the Supreme Court's ruling in *Honda Siel Ltd.* (supra), rectification had to be resorted.

9. It was urged that the agreement dated 31-03-2008 between the two assessees i.e. ADI and AHR, was an entirely *bona fide* business transaction and plain and unambiguous in its terms. It created certain rights and obligations which were acted upon and gave the assessee company an overriding title to the income derived from leasing of the shops. In this regard, reliance was placed upon *Commissioner ofIncome Tax v. Sitaldas Tirathdas,* (1961) 41 ITR 367 (SC); *Commissioner of Income Tax v. Bijali Cotton Mills Pvt. Ltd.,* (1979) 116 ITR 60 (SC) and *Dalmia Cement Ltd. v.*

Commissioner of Income Tax, (1999) 237 ITR 617 (SC). It was submitted that ITA completely overlooked – in the main order as well as in the subsequent order, made under Section 254(2), in the present case, the salient principle behind Section 27(iii)(b) of the Act. Given these facts, the legal character of the transactions on 31.03.2008 could not be ignored and characterized as a camouflage without there being any case set up in that regard by the AO or the Appellate Tribunal.

10. Learned counsel, Dr. Rakesh Gupta, submitted that not dealing with binding authorities was an error, capable of rectification. It was submitted that the ITAT pointedly ignored and overlooked several authorities cited by the petitioners. He relied upon the authority of *Honda Siel Ltd.* (supra) which held *inter alia* as follows:

> *"The purpose behind enactment of section 254 (2) is based on the fundamental principle that no party appearing before the Tribunal, be it an assessee or the Department, should suffer on account of any mistake committed by the Tribunal. This fundamental principle has nothing to do with the inherent powers of the Tribunal. One of the important reasons for giving the power of rectification to the Tribunal is to see that no prejudice is caused to either of the parties appearing before it by its decision based on a mistake apparent from the record. "Rule of precedent" is an important aspect of legal certainty in rule of law. That principle is not obliterated by section 254 (2) of the Income-tax Act, 1961. When prejudice results from an order attributable to the Tribunal's mistake, error or omission, then it is the duty of the Tribunal to set it right. Atonement to the wronged party by the court or Tribunal for the wrong committed by it has nothing to do with the concept of inherent power to review. In the present case, the Tribunal was justified in exercising its powers under section 254 (2) when it was pointed out to the Tribunal that the judgment of the coordinate bench was placed before the Tribunal when the original order came to be passed but it had committed a mistake in not considering the material which was already on record. The Tribunal has acknowledged its mistake, it has accordingly rectified its order. In our view, the High Court was not justified in interfering with the said order. For the aforestated reasons, the impugned judgment of the High Court is set aside and the order passed by the Tribunal allowing the rectification application filed by the assessee is restored."*

11. Learned counsel for the revenue urged that the original assessment, had accepted at face value cost the transaction based on which ADI declared the rental income as its own. This led to the Commissioner exercising his power under Section 263. The revisional order was the subject matter of appeal to the ITAT, which noted

that the hotel (owned by the AHR) needed funds for its project and ADI had spar funds. Both the companies therefore, entered into an agreement whereby ADI gave interest free refundable deposit of ₹75 crores to the hotels. AHR gave to the developer i.e. ADI the right in some retail spaces in the hotel premises for managing, leasing and to receive an appropriate revenue. The ITAT clearly held that the AO had not considered the taxability of the lease amount in the proper hands under the provision of Section 60 and Section 53A of the Transfer of Property Act and that the matter required full inquiry and analysis with respect to the agreement and the underlined transactions. Therefore, without expressing any opinion, the matter was restored to the file of the AO. This order was sought to be challenged by the assessees; however, the appeals (ITA Nos.891/2015 and 899/2015) were permitted to be withdrawn on 28.01.2016.

12. It was argued that in the subsequent round, the AO took notice of the entire transaction as well as of the judgments which the assessees relied upon – including *Commissioner of Wealth Tax v. Arvind Narootam*, (1988) 173 ITR 479-487 (SC); *Banyan and Berry v. Commissioner of Income Tax*, (1996) 222 ITR 831-851 (Guj.); *CIT vs Dhawan Investment and Trading Company Ltd.* (1999) 238 ITR 486 (Cal.); *Commissioner of Income Tax v. Hansraj Gupta*, 137 ITR 195 (Delhi) and held that the amounts were properly taxable in the hands of AHR and not in the hands of ADI. Learned counsel relied upon the terms of the agreement which were extracted by the Tribunal in its impugned order and submitted that the refundable deposit was an interest free deposit, for an initial period of three years, extendable for a total period of 10 years. This meant that the owner enjoyed the benefit of substantial amount of ₹75 crores in lieu of permitting the annual letting, to be diverted to AHR.

13. It was highlighted that ADI even after showing lease income, declared loss for the year under consideration whereas AHR showed profits. The AO subsequently held that the amount was properly taxable in the hands of the owner. The CIT in fact used the word "tax avoidance". In these circumstances, the finding of the Tribunal that the agreement was a camouflage, could not be said to be unwarranted. It was submitted that the *Honda Siel Ltd.* (supra) had no application to the circumstances of the case because the ITAT considered all possible arguments – as is evident from the

express reference to *Poddar Cement Pvt. Ltd.* (supra) in its main judgment 07.07.2017.

Analysis and Findings

14. A close analysis of the facts reveals that in A.Y. 2008-09, AHR was constructing a five- star deluxe hotel at Ambience Island, Gurugram; in those premises, certain retail premises too were created and constructed. The hotel is adjacent to Ambience Mall, owned by ADI. AHR said that during F. Y. 2007-08, it needed funds for completing the hotel project; it entered into an agreement with ADI. Under that agreement (dated 31.03.2008), ADI paid ₹ 75 crores interest free deposit to the company. This enabled it (ADI) to enjoy the rental income from certain specified retail spaces of AHR. AHR contended, in the remanded assessment proceedings that by terms of the agreement ADI became owner of lease rental of said specified retail spaces and accordingly; it (ADI) declared the said rental in its return of income for A.Y.2008-09. It was urged by AHR that since it secured interest free deposit of ₹ 75 crores and ADI was allowed to enjoy the rentals from specified retail spaces, the income (from those lease rentals) "belonged" to it, i.e. ADI and not to AHRL. The AO disagreed, and, after noticing Section 22 of the Act (as well as distinguishing the authorities cited by the assesses, held as follows:

> *"The deposit of Rs. 75,00,00,000/- is not a justification for not offering the income of rent from these properties in it$ hand. It is not the sweet will of the assessee to offer income in his own hand or in the hand is of some other entity. Income has to be offered and taxed in the person in whose hands it has to be taxed as per provisions of law. In the present case assessee is the right full owner of the shops and retail space and as per provisions ofSection-22 of the Act, reproduced above income from letting out these shops and retail spaces is to be taxed in the assessee's hand. Under such circumstances the assessee's claim is not acceptable.*
> *8. The assessee has relied upon various judgments of the Hon'ble Courts. However, it is respectfully observed that none of the j1.1dgments apply to the assessee's case as facts and circumstances of those cases are entirely different from the assessee's case.*
> *9.. The assessee has claimed that by giving · interest free deposit M/s Ambience Developers and Infrastructure Pvt. Ltd. has become owner of the lease rental and that the TDS has been made in the name of that company.*

However there is no concept of ownership of income·. The Income belongs to the person having rightful ownership of the property. Therefore, this argument of the assessee is also not acceptable.
10. Thus, keeping in view he provisions of law and in view of the judgment of the Hon'ble Delhi High Court in the case of CIT vs Hans Raj Gupta (Supra) the rental income of Rs.6,27 ,84,2.40/- from letting out the shops and retail space of the assesee is charged to tax the assessee's hands. Assessee's total income is computed accordingly.
11. After considering the facts and circumstances of the case and in view of the above observations, the income of the assesee is computed as under:

Total Income as per order u/s 250/143(3)	*Rs.205,615/-*
Income from house property (as discussed)	*Rs.6,27,84, 240/-*
Deduction u/s 24	*Rs.1,88,35,272/-/-*
	Rs.4,39,48,968/-

12. Assessee's total income is, accordingly, assessed at Rs.4,41,54,580/-· Credit for prepaid taxes is allowed. Detailed computation of tax and interest is given in the enclosed ITS-150 which is part of this order. Issue notice of demand and necessary forms."

15. The Appellate Commissioner, who heard the assessees' appeals, found that the contentions on its behalf with respect to applicability of Section 22 and reporting of rental income in ADI's hands without merit. He relied on Section 60 and held that the provision envisioned the following, i.e.

i) The payer owns an asset.

ii) The ownership ·of asset not transferred and is in fact retained.

iii) The income from the asset is transferred to any person, under a settlement, trust, covenant; agreement or arrangement.

iv) The transfer may be revocable or may not be revocable.

v) The transfer may be effected at any time (may be before the Commissioner of Income Tax Act or otherwise).

16. Thereafter it was held that:

"5.1 This section provides that where an assessee purports to transfer income arising to such person (but not the source of it) in such a way that under, the instrument of transfer the income no longer arises to such person or is received by such person, such an arrangement is to be ignored for the purpose of this transaction. Though under such arrangement or transfer made by the person who is assessed to tax, may, in law arise to another person, it would be treated to be continuing to arise to the transferor itself. It can hence be interpreted as transfer of income alone without there being a transfer of the source of that income and it is a mere

application of profits. If the above conditions are satisfied, the income from the asset transferred would be taxable in the hands of the transferor.

…. *……*

5. 1.1.2 The present case the appellant company .M/s. Ambience Hotels & Resorts Ltd. (AHRI, for short shall be referred as such hereafter) operates a five star Hotel and also is having certain spaces like shops/retail spaces in the ground floor and part of the first floor, which were leased by the company to various brands and earned rental income out of them. The appellant company i.e. AHRL (Ambience Hotels & Resorts Ltd) was in need of funds to complete a hotel project, entered into an agreement with another company namely M/s. Ambience Developers & Infrastructure Pvt. Ltd. (referred hereafter as ADIPL), who was in the business of leasing retail spaces. AHRL gave unfettered rights to let out and manage its shops/retail ~pc;1ces and to receive and appropriate to its own account all receipts and receivables from leasing of the said space to AIDPL against the payment of Rs. 75 crores, which was given by AIDPL to AHRL as interest free refundable deposit. Accordingly, the lease rentals of the said space of AHRL amounting to Rs.6,27,84,240/- was shown as income by AIDPL in its return of income for the assessment year under consideration while the same was not shown by AHRL in its return of income under the said agreement dated 31.03.2008. On the basis of the facts of the case mentioned above, it is an undisputed fact that the retail spaces/shops owned by AHRL in the ground floor and-part of the first floor not transferred to ADIPL, whereas the income from these properties in the form of "lease rent" was transferred to ADIPL. The facts of this case are directly in league with the provisions laid down in section 60 of the I.T. Act, 1961. According to this section, where there is a transfer of "income" without the "transfer of the asset", the income is to be assessed in the hands of the transferor company, i.e. AHHL. AHRL has alienated or assigned the source of income i.e. lease rentals so that the income no longer belongs to it and in such a way that it would not be liable to be taxed upon the Income arising · from such leasing activity of these properties thereafter. However it is pertinently mentioned here that the said agreement dated 31-03-2008, the appellant company did not transfer the ownership of the said properties in favour of ADIPL. The appellant company AHRL has only created a charge in respect of the lease rent and no doubt ADIPL was given unfettered rights that empowered it to collect lease rent from the- tenants, and the deed also provided in clause 4 that the tenant by paying the amount of rent would be discharging their obligation towards rent. Section 60 is quite clear in its implication and provides no scope for any ambiguity. It makes it clear where the asset was not transferred but the income thereof alone was transferred, such income was assessable in the hands of the transferor i.e. AHRL who is the owner of the property.

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5.1.4Income tax Act provides the assessment of income from the "House Property" in the hands of the owner, irrespective of the fact whether it is the owner who actually enjoys the income or someone else. In the present case for determining the annual let out value of the property, full value of the rent derived by the appellant company including the portions i.e. ground floor and part of the first floor are a subject matter of charge. Computation of property income has to be done by deducting from the annual let out value (ALV) reduced by the amount of municipal taxes, and certain amounts, description which are set out in section 24 of the I.T. Act, 1961. It is well settled, that where income falls in a particular head, its computation has to be made under the same head. An agreement in this case is only a matter of convenience, and it is an application simpliciter of income, after it had accrued to AHRL. Therefore; the Assessing Officer has rightly assessed the income of the appellant u/s 22 because it continued to be the owner of the property."

17. The narrow question is whether in the facts of this case, the ITAT's decision rendered in 2017, rejecting the petitioners' arguments- and therefore, its appeal, suffered from a mistake calling for rectification. *Honda Siel* (supra) is relied upon to say that the original order- dismissing the appeal, was erroneous. In *Honda* it was held that the power of rectification was conferred upon the ITAT to ensure that *"no prejudice is caused to either of the parties appearing before it by its decision based on a mistake apparent from the record."* The Supreme Court relied on the *"Rule of precedent"* and added that *"When prejudice results from an order attributable to the Tribunal's mistake, error or omission, then it is the duty of the Tribunal to set it right."*

18. Since the Appellate Commissioner and the ITAT relied on Section 60 and held that income had been diverted under a revocable transfer or arrangement, it would be useful to notice that provision- as well as Section 63, in this regard. They are extracted as follows:

"60. Transfer of income where there is no transfer of assets- All income arising to any person by virtue of a transfer whether revocable or not and whether effected before or after the commencement of this Act shall, where there is no transfer of the assets from which the income arises, be chargeable to income-tax as the income of the transferor and shall be included in his total income."

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Section 63. "Transfer" and "revocable transfer" defined- for the purposes of Sections 60,61 and 62 of this Section-

(a) a transfer shall be deemed to be revocable if -

(i) it contains any provision for the re-transfer directly or indirectly of the whole or any part of the income or assets to the transferor, or

(ii) it, in any way, gives the transferor a right to re-assume power directly or indirectly over the whole or any part of the income or assets;

(b) "transfer" includes any settlement, trust, covenant, agreement or arrangement."

19. In the present case, the agreement between the two assessees contained, *inter alia*, the following stipulations:

"1. That In consideration of above-said deposit of Rs. 75,00,0001- (Rupees Seventy-Five Crores Only), the First Party doth hereby agrees to gram and assign in favour of the Second Party all its rights and interest to lease and manage the Said Space or any part thereof and to receive and appropriate to its own account all receipts and receivables from the leasing of Said Space or any part thereof.
2. That the aforesaid sum of Rs.75,00,00,000/ (Rupees Seventy Five Crores only)has been paid by the Second Party to the First Party (the receipt whereof the First Party hereby admits and acknowledges) as an interest-free refundable deposit. The First Party may refund the said interest-free deposit by giving a one-year notice in writing, at any time after the initial period of three years. However, the tenure of this agreement shall not exceed 10 years and First Party shall refund the said refundable security deposit to the Second Party simultaneously the Second Party shall surrender its rights for sub-letting and managing the Said Space to the First Party.
3. That this agreement shall be deemed to be effective from the date of this Agreement or the date of the Agreement for Taking Possession for Fit Out(s) entered into with tenants/occupants of the various retail spaces comprising the said space or any part thereof by the First Party, whichever is earlier.
4. That the Second Party shall be entitled to receive the month (rent or other charges/including the arrears of rent/ charges if any from the tenants or persons in occupation of their respective portion in the Said Space in its own name and all these tenants/occupants shall be deemed to be the tenants/ occupants of tire Second Party and the Second Party shall have the right to receive the rent or charges from them during the currency of this Agreement and also to deal/negotiate with the said tenants occupants in the manner the Second Party deem fit and proper."

20. It is evident that the agreement is not indefinite; it confers a right to recei rentals, for which a consideration of ₹75 crores was paid. The agreement could be rescinded, after 3 years, by giving back the deposit; the arrangement could not exceed 10 years in all. Clause 4 stated, significantly, that AHR's tenants were deemed to be that of ADI.

21. In *Dalmia Cement* (supra) the owner of two cement factories situated in Pakistan, by an agreement in writing dated 24-7-1962 agreed to sell and transfer to one Maneckji, its properties and assets in Pakistan represented in the two factories. Subsequent to the agreement, the parties entered into a supplemental agreement on 2-11-1962. The assessee in its return of income for AY1964-65 on 30-6-1964 recorded the total income as ₹ 24 lakhs odd but later revised it downwards to ₹1.4 lakh; the same pattern was repeated for AY 1965-66, reflecting a loss of ₹ 2.45 lakh. The original return did not include profits from the working of the two Pakistan factories but only the interest income for the two-year period from 1-10-1962 to 30-9-1964 which however was deleted in the revised return on the ground of non-receipt of the same.

22. The High Court's judgment, which ruled that income had accrued to the assessee/appellant, till the date of sale, was overturned by the Supreme Court, which held as follows:

> *"12. While at the first blush the reasoning seems to be rather attractive but on consideration of the issue on a wider perspective the High Court cannot but be said to be in clear error. For the year 1965-66 when the order of assessment was made, the profits were ascertained on 30-9-1964 and the property was itself transferred, as such question of accrual of profit on account of the transferred assets does not and cannot arise. Be it noted that completion of sale transaction ought to be attributed its normal meaning and in this regard contextual facts should also be looked into and considered in the proper perspective. The sale transaction in fact has taken place and as such there being any contingency, as was there at the earlier point of time, does not arise. The event has taken place and the supplemental agreement dated 2-11-1962 makes the situation clear and categorical. The parties agreed the relevant date to be 30-9-1962 and not the completion of sale. Clause 3 of the agreement to which the High Court made a special reference and interpreted that by reason of the contingent event which would be subsequent to the accrual of profits, the profit cannot but be treated to be in the hands of the assessee does not withstand the test of correctness. The High Court has not laid any importance to the event*

which stands completed by reason of the sale agreement. There is no question of enabling the assessee to retain the profit in its own hand after the "sale agreement". The event as noticed above, has taken place and by reason of the event and in terms of the provisions of the agreement question of tracing the profit in the hands of the assessee does not and cannot arise. In any event profits of a business do not accrue from day to day but at the end of the accounting year. Profits were ascertained on 30-9-1964 when the property was transferred as such for the year 1965-66 as noted above, so question of profit accruing to the assessee does not arise. As a matter of fact the profit stands diverted to the purchaser in terms of and in accordance with the agreement dated 24-7-1962 read with the supplemental agreement dated 2-11-1962 and the date of actual transfer of the factory in question which, in fact, had taken place on 30-9-1964 does not alter the situation. The income stands diverted by an overriding title as a matter of fact even before the accrual."

23. It is immediately clear that what weighed with the Supreme Court was the fact that the parties had *expressly agreed that the transfer would be effective from the anterior date in 1962, and not the actual date of completion of sale.* These singular facts, in the opinion of the court, made all the difference- there was a clear sale; the parties agreed the effective date to be an anterior one. However, in this case, the express terms of the agreement clearly showed that the arrangement was finite and also revocable (by one year's notice and refund of deposit). Pertinently, the judgments that the petitioner now relies on, apart from *Dalmia* (i.e *Rungamatee Tea & Industries, Poddar Cement, Arvind Narottam*) were all cited and considered by the CIT (A) after the AO's order, on remand in the earlier round. This court is also of the opinion that like in *Dalmia*, the facts in *Rungamatee*, clearly showed that the transaction by which the assets were handed over possession were not just for their management, but *preparatory to their sale.* The purchaser took possession of the assets from the owner and managed them till conveyance, the subsequent year; the Calcutta High Court held in these circumstances, as follows:

"Section 60 of the Act cannot have any application to the facts and circumstances of this case inasmuch as the income is derived not because of the transfer of assets but because the management and possession and the right to carry on the business operations had been given to the assessee even before the conveyance was executed. The profit arises out of sale of and manufactured and not from the ownership of the tea garden. The agreement has been acted upon and the agreement clearly provides that the agreement would come into effect from April 1, 1973, and, accordingly,

provision has been made in the agreement itself as to what would happen during the period before the sale is completed by the execution of the conveyance. In our view, the transfer of title to the property in this case will not have any relevance or bearing on the question of assessment of the income in the hands of the assessee who, under the agreement itself, obtained the possession and the right to run the tea estate and also to earn profit therefrom."

24. The decision in *Poddar* (supra) did not involve interpretation of Section 60 at all; the question which the court had to address itself to, was whether in the absence of a conveyance or sale deed, the rental income received by various assessees was income from property (Section 22 of the Act) or income from other sources (Section 56 of the Act). The Supreme Court ruled that transfer (of the property) did not mean a *stricto sensu* conveyance of the title and all underling title, but included possession, and other associated rights arising from the execution of an agreement to sell.

25. This court is of opinion that the main judgment of the ITAT took note of the authority in *Poddar Cement* (supra). The ITAT also had before it, the reasoning of the CIT (A) who had noticed all the judgments cited by the assessees – which found place in the written note submitted to the ITAT in their appeal. Therefore, it cannot be said that the tribunal ignored or overlooked material facts or law. Furthermore- perhaps crucially, the lower authorities concurrently found that ADI, despite reporting the lease income in its hands, declared loss for the year under consideration in its return whereas AHR declared profits. In these circumstances, their view was that the arrangement was made to avoid incidence of tax in AHR's hands.

26. In view of the above discussion, it is held that there is no infirmity in the impugned orders of the ITAT, dated 07.07.2017 and 13.07.2018. The writ petitions therefore, have to fail and are dismissed without order on costs.

S. RAVINDRA BHAT, J.

A. K. CHAWLA, J.

OCTOBER 25, 2018