$~ R-39 to R-41

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

% *Date of Judgment: 31st January, 2018*

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\+ **ITA 731/2005**

M/S RAM KRISHAN ASSOCIATES ..... Appellant
.Through Mr. S. Krishnan, Adv.
versus
COMMISSIONER OF INCOME TAX ..... Respondent
Through Mr. Asheesh Jain, Sr. Standing Counsel with Mr. Shahrukh Ejaz, Adv.

AND

\+ **ITA 732/2005**

M/S RAM KRISHAN ASSOCIATES ..... Appellant
Through Mr. S. Krishnan, Adv.
versus
COMMISSIONER OF INCOME TAX ..... Respondent
Through Mr. Asheesh Jain, Sr. Standing Counsel with Mr. Shahrukh Ejaz, Adv.

AND

\+ **ITA 735/2005**

M/S RAM KRISHAN ASSOCIATES ..... Appellant
Through Mr. S. Krishnan, Adv.
versus
COMMISSIONER OF INCOME TAX ..... Respondent
Through Mr. Asheesh Jain, Sr. Standing Counsel with Mr. Shahrukh Ejaz, Adv.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR
SANJIV KHANNA, J. *(ORAL)*

The aforestated appeals under Section 260A of Income Tax Act, 1961 (Act for short) filed by M/s Ram Krishan Associates Private Limited pertain to assessment years 1994-95 and 1996-1997 to 1997-1998 and arise from order dated 14.05.2004 in I.T.A. No.3636/Del/2000, 23.06.2004 in I.T.A. No.869/02 and 20.04.2003 in ITA No. 873/2002 passed by the Income Tax Appellate Tribunal.

2. The appeals were admitted for hearing vide order dated 08.12.2006 on the following substantial questions of law:-

> *1. Whether a person though a Licensee but has exclusive rights over a property is not owner for the purposes of Section 22 of the Income Tax Act, 1961?*
>
> *2. Whether the appellant was/is entitled to 1/5th statutory deduction as claimed in view of various provisions as enshrined U/S 22 to 27 and 269UA of Income Tax or would it constitute income from other sources?*

3. To avoid prolixity we are not referring to assessment and appellate orders. We would note the relevant undisputed facts as held and found by the Tribunal.

4. M/s Asian Hotels Limited has constructed a 5-Star deluxe Hotel known as ‘Hyatt Regency Delhi’ at Bhikaji Kama Place, Ring Road, New

Delhi on land measuring 20000 sq. mts. leased to them by the Delhi Development Authority vide perpetual lease deed dated 22.07.1982. The hotel has a shopping plaza to provide essential facilities to residents and others.

5. The Appellant vide license agreement dated 14.01.1986 with M/s Asian Hotels Ltd. had acquired right to use shop Nos. U-49, U-50, U-51 and U-52 including corridor in the said shopping Plaza. The license was for a period of five years and the appellant was liable to pay license fee of Rs. 6967/- per month. The license was renewable for additional period of not exceeding five years at a time. Paragraphs 1, 2 and clause (a) of paragraph 3 of the license agreement read as under:-

> 1. *In consideration of the periodical payment hereinafter agreed to be paid by the Licencee's undertakings hereinafter set-out the Licensor hereby Licences and authorises the Licencee to enter upon and use the stipulated space for the purposes of carrying on business or trading etc. * (hereinafter called 'the authorised purpose') on the days and during the hours to be determined by the Licensor from time to time. Any change in the authorized purpose shall be made in only with the permission in writing of the Licensor.*
>
> *2. The Licensee under this agreement shall be operative for a period of 5 (five) years from the date the stipulated space is made available to the Licencee (herein after referred to as 'commencement date') for carrying out the authorised purpose. At the option of the Licencee the Licence under this Agreement shall be renewed for an additional period of not exceeding 5 (five) years at a time. *except transport, traveling agency,*

beauty parlour, book shop, florist, cosmetics, chemist, food outlets etc.

3. During the currency of this Licence, the Licencee hereby agrees with the Licensor and undertake as follows:-

(a) To pay to the Licensor a sum of Rs. 6,967/- (Rupees Six thousand nine Hundred & sixty seven only) by 10th of every month, the first of such payment to be made on commencement;

6. Paragraph 4 of the said license agreement had stipulated as under:-

4. The Licensor hereby agrees with the Licensee as follows:-

(a) To permit or cause to permit the Licensee, his servants and agent to enter and use the stipulated space;

(b) To keep or cause to be kept the premises, in which the stipulated space Licensed to the Licensee is situated, in good condition;

(c) To provide the following facility/services:-

i) Central air-conditioning facility during business hours;

ii) Cleaning and keeping in neat and tidy condition common passages, lobbies and entrances around the stipulated space;

iii) Looking after and attending to the electricity, water and sanitary fittings and pumping requirement in the common passages, lobbies, and entrances around the stipulated space; and

iv) Providing watch and ward and the maintenance services for the shopping area, provided that the Licensor shall not in any way be responsible in case of any theft, pilferages or loss;

Provided that the air conditioning and telephone services may be shut off and cut off, after giving 24 (twenty four) hours notice in writing for the purpose of altering, repairing services or overhauling any apparatus, machine, plant or installations;

Provided further that in the event of failure of the central air conditioning or the telephone installation due to any reason beyond the control of the licensor, the licensee shall have no recourse against the licensor for non provision of the above facilities/services; and

(d) To permit the licensee to use the common portion such as entrances, passages, stairways in the shopping plaza as are specifically designated by it from time to time.

7. Appellant was also required to deposit interest free security deposit of Rs.12 lakhs with the licensor for proper maintenance and compliance of the terms and conditions of the license agreement. As per Clause (d) of paragraph 5 of the license agreement, the Licensor, i.e. M/s Asian Hotels Ltd., had right to terminate the license on failure of the appellant to pay license fee on time and forfeit security deposit on such termination. The appellant was not entitled to raise any dispute in this regard. In terms of clause (e) of paragraph 5 of the license agreement security deposit was to be refunded by M/s Asian Hotels Ltd. to the appellant on expiry of the period of license and vacation of the shops in good and proper condition. On failure to refund security deposits within thirty days from the date of expiry of license and vacation of the shops, M/s Asian

Hotels Ltd. was liable to pay interest @ 2% p.a. higher than the prevailing bank lending rate from the date of vacation of the shops till payment

8. Paragraph 6 of the license agreement had permitted and gave right to the licensee/appellant to assign/transfer his/its right under this license with the written consent of the Licensor/Asian Hotels Ltd. on such terms and condition as the Licensor/Asian Hotels Ltd. may notify from time to time in this behalf. Paragraph 8 of the license agreement had stipulated as under:-

> *"8. The Licensor shall have the right to increase the amount of the consideration set out in the clause 3(a) hereof on 1st January 1985 and thereafter every 5 (five) years (in case term of the License is renewed beyond the initial period of 5 (five) years), provided, however, that such increase shall not exceeds 25%(twenty five percent) of the amount so being charged.*

9. At the outset, we record that the counsel for the appellant, and in our opinion rightly, did not contend and submit that the appellant was a lessor. He accepts that the appellant was a licensee. However, it is submitted that the rights granted under the agreement dated 14.01.1986 should be considered as ownership. The license was renewable and was renewed. Thus, the sub-license fee paid to the appellant should be treated as rent taxable under the head Income from house property. The appellant was de-facto owner and the sub-license fees was nothing but rent. Reliance was placed on the decision of the Supreme Court in ***Commissioner of Income Tax v. Podar Cement (P.) Ltd.*, (1997) 226 ITR 625 (SC) and *Raj***

***Dadarkar & Associates v. Assistant Commissioner of Income Tax*, (2017) 394 ITR 592 (SC)**.

10. Chapter IV deals with computation of total income. Section 14 states that income chargeable to tax would be classified under the heads; (i) salary, (ii) income from house property, (iii) profits and gains from business or profession, (iv) capital gains and (v) income from other sources. The last head, i.e., "income from other sources", is the residuary head. We have to examine and decide whether income in the form of sub-license fee earned by the appellant would fall under the head "income from house property".

11. Section 22 charges income on annual value of the property owned by the assessee. The said Section reads as under:-

> "**Income from house property.**
>
> **22.** The annual value of property consisting of any buildings or lands appurtenant thereto of which the assessee is the owner, other than such portions of such property as he may occupy for the purposes of any business or profession carried on by him the profits of which are chargeable to income-tax, shall be chargeable to income-tax under the head "Income from house property".

For income to be charged under the head "income from house property", the assessee must be the owner of the property.

12. The term "owner" has been defined in Section 27 of the Act in the following words:-

> "**Owner of house property", "annual charge", etc., defined.**
>
> **27.** For the purposes of sections 22 to 26—
>
> (*i*) an individual who transfers otherwise than for adequate consideration any house property to his or her spouse, not being a transfer in connection with an agreement to live apart, or to a minor child not being a married daughter, shall be deemed to be the owner of the house property so transferred;
>
> (*ii*) the holder of an impartible estate shall be deemed to be the individual owner of all the properties comprised in the estate;
>
> (*iii*) a member of a co-operative society, company or other association of persons to whom a building or part thereof is allotted or leased under a house building scheme of the society, company or association, as the case may be, shall be deemed to be the owner of that building or part thereof;
>
> (*iiia*) a person who is allowed to take or retain possession of any building or part thereof in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882), shall be deemed to be the owner of that building or part thereof;
>
> (*iiib*) a person who acquires any rights (excluding any rights by way of a lease from month to month or for a period not exceeding one year) in or with respect to any building or part thereof, by virtue of any such transaction as is referred to in clause (*f*) of section 269UA, shall be deemed to be the owner of that building or part thereof;
>
> (*iv*) [***]
>
> (*v*) [***]
>
> (*vi*) taxes levied by a local authority in respect of any property shall be deemed to include service taxes levied by the local authority in respect of the property."

13. Clauses (i), (ii) and (iii) of Section 27, it is accepted, do not apply in the present case. The appellant does not rely upon clause (iiia). Clause (iiib) relates to a person, who has acquired any right, excluding right by way of month to month lease or a lease for a period not exceeding one year, in respect of a building or part thereof, by virtue of a transaction referred to in clause (f) to Section 269UA of the Act. Clause (f) to Section 269UA of the Act reads as under:-

> "(f) " transfer",-
>
> (i) in, relation to any immovable property referred to in sub- clause (i) of clause (d), means transfer of such property by way of sale or exchange or lease for a term of not less than twelve years, and includes allowing the possession of such property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 18823 (4 of 1882).
>
> Explanation.- For the purposes of this sub- clause, a lease which provides for the extension of the term thereof by a further term or terms shall be deemed to be a lease for a term of not less than twelve years, if the aggregate of the terms for which such lease is to be granted and the further term or terms for which it can be so extended is not less than twelve years;
>
> (ii) in relation to any immovable property of the nature referred to in sub- clause (ii) of clause (d), means the doing of anything (whether by way of admitting as a member of or by way of transfer of shares in a co-operative society or company or other association of persons or by way of any agreement or arrangement or in any other manner whatsoever) which has the effect of

> transferring, or enabling the enjoyment of such property."

14. Counsel for the appellant accepts that sub-clauses (i) and (ii) of clause (f) to Section 269UA are not applicable and the appellant does not satisfy the conditions stipulated therein. Contention of the appellant that the license agreement was renewed from time to time is not a ground or reason to hold that the appellant had acquired ownership rights. The license agreement dated 14.01.1986 placed on record does not support the said contention. The new license agreements have not been placed on record. It is equally possible that the license agreement may not have been renewed. The license agreement is not a registered document. The appellant does not even claim that the license agreement is a lease deed. Even otherwise, an unregistered document or an oral lease only creates month to month tenancy and not a lease for a period exceeding one year. Conditions of clause (iiib) to Section 27, would not be therefore satisfied.

15. In view of the aforesaid discussion, it has to be held that the appellant was not an owner as defined in Section 27 of the Act. Consequently, the sub-license fee received by the appellant is not chargeable to tax under the head "income from house property". It is not the case of the appellant that the said income was chargeable to tax under the head salary, profits and gains of business or profession, or capital gains.

Thus, the said income has to be assessed under the residuary head "income from other sources".

16. Supreme Court in ***Podar Cement Private Limited*** (supra) had interpreted the term "owner" as defined in Section 27 for the purpose of Section 22 of the Act. The assessees therein had acquired rights in flats in commercial buildings upon payment of entire sale consideration, but did not have registered sale deeds in their favour. Their claim was predicated on Section 53A of the Transfer of Property Act. Accepting the plea of the assessee and relying on clause (iiia) of Section 27 of the Act, it was held that amendment made vide Finance Act, 1987 enacting clause (iiia) was declaratory and principle of contemporaneous exposition was applied. We fail to fathom how the said decision aids and help the submission made by the appellant, once it is held and accepted that the appellant was not the owner of the shops under Section 27 of the Act.

17. In ***Raj Dadakar and Associates*** (supra), the assessee therein being the highest bidder had acquired rights in the property. After demolition, the assessee had constructed 95 shops and 30 stalls of different carpet area in the market complex. It was held that the assessee was owner of the shops given on rent and in the factual matrix, rent received was taxable under the head "income from the house property" and not under the head "income from business".

18. In view of the aforesaid discussion, the questions of law have to be answered in favour of the Revenue and against the appellant-assessee. The appeals are accordingly dismissed, affirming the finding of the Tribunal, without any order as to costs.

SANJIV KHANNA, J

CHANDER SHEKHAR, J

JANUARY 31, 2018/b/VKR