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

\+ ITA 1287/2011

CIT ..... Appellant
Through Mr. Abhishek Maratha, Sr. Standing Counsel & Ms. Anshul Sharma, Advocate.

Versus

EAGLE THEATRES ..... Respondent
Through Mr. Salil Aggaral, Mr. Ravi Pratap Mall & Mr. Prakash Yadav, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V.EASWAR

O R D E R

% 21.12.2011

CM No. 22762/2011

This is an application for condonation of delay of one day in filing the appeal. Learned counsel for the respondent-assessee, who is present on advance notice, states that he has no objection if the application is allowed and the delay is condoned. Accordingly the application is allowed.

The application stands disposed of.

ITA No. 1287/2011

The Revenue by the present appeal under Section 260 of the Income Tax Act, 1961 (Act, for short) impugns order dated 31st January, 2011 passed by the Income Tax Appellate Tribunal (tribunal, for short) on three grounds.

(i) Reduction of valuation of scrap from Rs.32,70,000/- to Rs.16,35,000/-.

(ii) Inclusion of Rs.1.48 crores paid to the tenant/licensee for vacation for computation of long term capital gains.

(iii) Direction of remit on the question of payment made to employees on closure of the cinema hall at Mumbai.

2. The respondent-assessee sold a cinema hall in Mumbai in the period relevant to the assessment year 2007-08 for Rs.27,70,00,000/-. In the sale deed it was mentioned that Rs.15,00,000/- was attributable to furniture, fixture, equipment and AC plant. This figure was not disputed or interfered with by the Assessing Officer. The Assessing Officer, however, felt that the building or the superstructure was sold and was required to be valued and the gain treated as short-term capital gain. This was necessary as the building was part of the block of the asset on which depreciation had been claimed. The Assessing Officer accepted that the building/superstructure was to be valued as scrap or salvage as the building was to be demolished and re-

constructed. The respondent-assessee had submitted that tl salvage value of the building/super structure should be valued at Rs.1,00,000/-. This was rejected by the Assessing Officer, who valued the salvage of superstructure/building at Rs.100/- per square feet and accordingly computed the salvage along with all the superstructure/building at Rs.32,70,000/-. The Assessing Officer further noticed that the depreciated value of the building/superstructure as per the block of assets was Rs.70,085/-. He accordingly assessed the short-term capital gain on the building/superstructure as Rs.31,99,915/-.

3. The CIT (Appeals) did not interfere with the order passed by the Assessing Officer. On further appeal, the tribunal after examining the facts of the case held that the scrap or salvage cannot be valued at Rs.1,00,000/-. Looking at the facts and circumstances of the case, it was held that the salvage value should be taken at Rs.50/- per square feet and accordingly estimated the scrap value of the building/superstructure at Rs.16,35,000/-.

4. From the facts stated above, it is apparent that the Assessing Officer had treated the scrap or salvage value of the superstructure/building at Rs.100/- per square feet, without making any reference to material or justifying the basis of the

said calculation. In these circumstances, the tribunal had no option but to apply a thumb rule but had accordingly treated the scrap/salvage value of the building/superstructure as Rs.16,35,000/-. It may be noted that the plant, machinery and furniture in the building have been separately valued at Rs.15,00,000/- and accordingly on the said amount the respondent assessee was liable to pay short-term capital gains. In view of the fact that the Assessing Officer did not himself make any factual analysis or study or state the basis for computing the scrap/salvage value, we are not inclined to interfere with the order passed by the tribunal.

5. The second question relates to payment of Rs.1.48 crores, which was paid by the assessee to the tenant/licensee, who was running a canteen/refreshment stall in the cinema hall. The CIT(Appeals) and the ITAT have given a categorical finding that payment of this Rs.1.48 crores to the stall owner under the agreement dated 25th April, 2006 is related to the subsequent sale transaction, which the respondent-assessee had entered into with the third party on 6th July, 2006. They have rejected the contention of the Assessing Officer that there was no link or connection between the same. With regard to the date of tenancy also, the CIT(Appeals) and the ITAT have recorded a

finding that the stall owner was given rights way back in 197 They have referred to the material on record including the balance sheet etc. to prove and establish the said factum. The Assessing Officer did not dispute the actual payment of Rs.1.48 crores by the respondent-assessee to the said stall owner.

6. The findings recorded by the tribunal, read as under:

> "**13.** We have carefully considered the rival submissions in the light of the material placed before us. It is true that when a person proposes to sell some property, then, the intended buyer will prefer for unencumbered property. The property which is already occupied by tenants would not fetch market rate as there will always be a fear in the mind of the intended buyer that the tenant may or may not vacate the property. Before arriving at a settled price, it will be ensured by the intended buyer that he got the vacant and peaceful possession of the property. It cannot be disputed that Minerva Refreshments Stall were running stalls in the premises of the assessee. Though the Assessing Officer has disputed the date of commencement of the tenancy as copy of agreement dated 12-12-1971 has not been produced, but it has been brought on record by the assessee that it has been running stalls in the premises of the assessee since long. If the Assessing Officer had any doubt about such fact, he could have conducted inquiries in that regard. No material has been brought on record to suggest that the facts were contrary to the contentions raised by the assessee. Moreover, the capital gain tax at the same rate has also been paid by M/s Minerva Refreshments Stall on the amount

> received by them on account of vacancy of the property. The Ld. CIT(A) has also taken into consideration the floor situation in the Mumbai to support the contention of the assessee that the agreement dated 12-12-1971 may have lost in those circumstances. Thus, keeping in view all these facts, learned CIT(A) has arrived at a conclusion that payment made by the assessee for vacancy of the property had a link with the sale of property and, therefore, was entitled for set off against sale consideration. We find no infirmity in such findings recorded by the CIT(A). Hence, we decline to interfered(sic) in the deletion made by him and this ground of the revenue is dismissed."

7. Learned counsel for the Revenue submitted that payment to the stall owner for vacating/relinquishing his right to operate and manage the canteen/refreshment stall cannot be regarded as "cost of improvement". He relies upon ***V.S.M.R. Jagadishchandran versus Commissioner of Income Tax***, [1997] 227 ITR 240 (SC). In the said case, the assessee had sold a house and plots in the assessment year 1975-76. The house which was sold was mortgaged by the assessee, which was repaid/discharged by the buyer out of the sale proceeds. Therefore, the amount payable by the buyer to the mortgagee was treated as a part of the sale consideration. The assessee claimed that the mortgage debt should be treated as cost of acquisition or cost of improvement. This contention was

rejected. The mortgage was not for purchase or for making improvements in the said property. The mortgage was created after the house was purchased by the assessee himself and was for purposes unrelated and unconnected the utilization of the property. It was not for perfecting the title or improving the house. In ***RM. Arunachalam vs. Commissioner of Income Tax***, (1997) 227 ITR 222, it was held that the discharge of the mortgaged debt by payment which was created by previous owner is an expense or cost incurred for acquisition or perfecting an imperfect title. Thus when an assessee inherits/purchases a property which is already mortgaged and incurs an expense to redeem the mortgage and improves his title, which was incomplete and imperfect, the cost incurred is treated as cost of acquisition itself.

8. The Bombay High Court in ***Commissioner of Income-tax v. Miss Piroja C. Patel*** [2000] 242 ITR 582 (Bom) had examined the question whether payment made to hutment dwellers for vacating land would constitute cost of improvement under section 48(ii). It was held as under:

> "The short point which arises for consideration in the present matter is whether compensation paid by the assessee and other co-owners to the

> hutment dwellers for vacating the land was an allowable expenditure within the meaning of section 48 read with section 55 of the Income-tax Act, 1961. The answer to this question will depend on whether the expenses incurred by the assessee and other co-owners constitute cost of improvement under section 48(ii). The said point is covered by the judgment of the Division Bench of this court in the case of CIT v. Shakuntala Kantilal [1991] 190 ITR 56 and the judgment of the Division Bench of this court in the case of Hardiallia Chemicals Ltd. v. CIT [1996] 218 ITR 598. On eviction of the hutment dwellers from the land in question, the value of the land increases and, therefore, the expenditure incurred for having the land vacated would certainly amount to cost of improvement. Accordingly, the above question is answered in the affirmative, i.e., in favour of the assessee and against the Department. The reference accordingly stands disposed of with no order as to costs. Issuance of certified copy expedited."

9. Similarly, the Karnataka High Court in ***Mrs. June Perrett v. Income-tax Officer***, (2008) 298 ITR 268(Kar), has held that payment to execute an order of eviction and to evict an unauthorized occupant can be treated as cost of improvement, inter alia, observing as under:

> "Then the last question to be considered by us is, whether the amount spent by the executors to secure an order of eviction to evict unauthorised occupant

has to be treated as expenditure in connection with the transfer of property ?

The executors could have sold the property even without evicting the unauthorised occupant. If such an attempt were to be made by the executors, no man of prudence would have come to buy the property, since the unauthorised occupant were claiming adverse possession of the property. In order to clear the cloud cast on the property, the executors were required to file a civil suit. Any expenses incurred in connection with such suit has to be treated as expenditure in order to transfer the property. Our view is supported by the judgment of the Bombay High Court in the case of CIT v. Miss Piroja C. Patel reported in [2000] 242 ITR 582. In the aforesaid case, certain eviction proceedings were initiated to evict the unauthorised occupant from the land. Due to eviction of the unauthorised occupant from the house, the value of the property was increased and the expenditure incurred for vacating the land has been treated as cost of improvement. Similarly, in this case also, if the unauthorised occupant had not been evicted, the value of the property would have been decreased instead of increasing. Therefore, we have to treat the expenditure incurred by the executors to evict the unauthorised occupant as an amount spent towards cost of improvement of the property. In the circumstances, we have to answer the question of law framed in favour of the assessee."

10. In the present case, as per the facts found by the tribunal and the CIT (Appeals), there was a canteen/refreshment stall in the cinema hall which was in occupation of a tenant/licensee since 1971. The property was to be sold. In order to procure and get proper value and effectuate the sale, the respondent assessee paid Rs.1.48 crores to the tenant/licensee to vacate the property. These are the factual findings recorded by the tribunal and have been noticed above. We fail to understand why the said sum cannot be set of from the sale consideration as it was incurred solely and exclusively in connection with the transfer. We, therefore, need not examine and go into the question whether the amount paid was towards "cost of improvement". The said amount has to be allowed because it was incurred in view of facts found, wholly and exclusively connected and linked with transfer/sale. In similar circumstances, the Andhra High Court in ***Naozar Chenoy v. Commissioner of Income-tax*** [1998] 234 ITR 95 (AP) has observed as under:

> "As regards the expenditure incurred by the assessee towards payment of the amount to the tenants for vacating the premises, which is the subject-matter of the sale transaction, we are of the view that it has nexus with the transaction as without the tenants vacating the

> premises, the building cannot be sold. Therefore we are of the view that the said expenditure was incurred for effecting the transaction and therefore he is entitled for deduction of the amounts incurred towards vacation of the tenants, in computing the capital gain of the building sold."

The stand of the Revenue cannot be accepted on the second contention.

11. The last issue pertains to payment of Rs.66,88,679/- to the employees. The tribunal has passed an order of remit to the Assessing Officer to re-examine the said issue after recording several aspects including the contradictory findings of the Assessing Officer. It was noticed that the Assessing Officer had proceeded in haste and the respondent-assessee was denied fair and full opportunity. The respondent has a cinema theatre in Delhi which it continues to operate and from which the respondent continues to earn business income. Further, the business operations in the cinema hall in Mumbai continued even after the sale till December, 2006 under a contractual agreement between respondent-assessee and the purchaser. Keeping in view the factual disputes and the failure of the Assessing Officer at the initial stage to go into and examine the said issue in detail on the ground of paucity of time, justify the

order of remit passed by the tribunal.

12. The appeal is accordingly dismissed. No order as to costs.

SANJIV KHANNA, J.

R.V. EASWAR, J.

DECEMBER 21, 2011
VKR