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

+ ITA NOs.670/2005, 672/2005 & 944/2005

% Date of Decision : 15th November, 2011.

THE COMMISSIONER OF INCOME TAX ..... Appellant
Through Mr. Sanjeev Sabharwal, Sr. Standing counsel

versus

M/S SARDAR EXHIBITORS P. LTD. ..... Respondent
Through None

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

1. Whether Reporters of local papers 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?

SANJIV KHANNA,J: (ORAL)

These three appeals are under Section 260A have been filed by the Revenue and relate to assessment years 1997-98, 1998-99 and 1999-2000 in the case of Sardar Exhibitors Pvt. Ltd., respondent herein.

2. The following identical substantial question of law arises for consideration and is being answered :

> "Whether the ITAT, in the facts and circumstances of the case, was right in upholding the deletion of the additions made by the Assessing Officer with respect to the annual letting value of the property in question?"

3. The Assessing Officer in the assessment order for three assessment years has observed and held that premises/portion of property No.74-75, Scindia House, New Delhi was let out by the respondent to one A-One, Tours and Travels Pvt. Ltd. on a monthly rent of Rs.3,000/- per month.

4. During the course of assessment proceedings for the assessment year 1997-98, information was received from the Deputy Commissioner of Income Tax, Circle 25(1), New Delhi under whose jurisdiction A-One, Travels and Tours Pvt. Ltd. were assessed that they had sub-let the portion in their occupation to DHL World Wide Express vide lease deed dated 21st November, 1996 on a monthly rent of Rs.1,60,000/- w.e.f. 1st December, 1996. The aforesaid information was confronted to the assessee, who accepted the averments but submitted that A-One, Travels and Tours Pvt. Ltd. was a old tenant and had paid a further security of Rs.3,50,000/- for the sub-letting rights. It may be noted that the assessee had tried to conceal that A-One, Travels and Tours Pvt. Ltd. was a sister concern though in fact the said company was a sister concern of the respondent assessee having common shareholders and directors. The Assessing Officer in the three assessment years held that the ratable value of the property should be computed under Section 23(1)(c) [sic. Should be 23(1)(a)] and the rental income should be taken at Rs.1,60,000/- per month.

5. The assessee preferred appeals and succeeded before the CIT(Appeals) in all the three years and as it was held that A-One, Travels and Tours Pvt. Ltd. was an independent and separate assessee in whose favour tenancy agreement was entered into in 1991 and the agreement permitted sub-letting with prior permission. It was further held that A-One Travels and Tours Pvt. Ltd. was a protected tenant under the rent control legislation. The rent received by the two entities namely, the respondent-assessee and A-One Travels and Tours Pvt. Ltd., was to be assessed in their respective hands depending upon the rental income received by them.

6. Revenue preferred appeals but the Tribunal has not agreed with their contention and their stand. Tribunal has held that A-One Travels and Tours Pvt. Ltd. was an independent entity and it was not the case of the Assessing Officer that the lease between the respondent and A-One Travels and Tours Pvt. Ltd. was a device to avoid tax. A-One Travels and Tours Pvt. Ltd. was entitled to sub-let the premises and they had exercised said right.

7. We have heard the counsel for the appellant Mr. Sanjeev Sabharwal, Sr. Standing counsel and examined factual matrix as recorded by the tribunal and the legal issue raised in the present appeal. There is no appearance on behalf of the respondent assessee.

8. Section 23(1) of the Act, before the amendment with effect from 1st

April, 2002, consisted of two clauses and was as under:

> "**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
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> (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:
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> Provided further that the annual value as determined under this sub-section shall,--
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> (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--
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> (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 the 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 days 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 exceeds 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 1.--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 received or receivable by the owner for the period 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."

9. We are concerned with clause(b) which states that when a property or

a part thereof is let the actual rent received or receivable by the owner in excess of the sum referred in clause (a) would be deemed to be the annual value. Under clause (a) annual value would be deemed to be the sum for which property might be reasonably be expected to let from year to year. Therefore if the computation under clause (b) is lower or less than the annual value under clause (a), the former clause applies. The sum receivable under clause (a) would depend upon the rent control legislation, if applicable, to the property.

10. The assessment order shows that the Assessing Officer had invoked Section 23(1)(a) and had came to the conclusion that the actual rent received by the petitioner was understated as A-One Travels and Tours Pvt. Ltd. was a sister concern and therefore he had computed the sum payable or reasonable rent under Clause (a) of Section 23(1) of the Act. This, as per the Assessing Officer, would be same as the rent received by A-One Travels and Tours Pvt. Ltd. from their tenant, which was a transaction at arm's length and not a transaction between sister concerns or related persons.

11. Section 23 of the Act has been interpreted by a Full Bench of this Court in ***Commissioner of Income Tax Vs. Moni Kumar Subba*** (2011) 333 ITR 38 (Del) (FB). In the said decision it has been observed:

> "16. 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 to be made under the Income Tax laws. If there is a change in circumstances because of passage of time, viz., the annual value 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:
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> > "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." "

12. We may also reproduce what has been held in paragraph 9 of the said decision, which reads:

> "9. 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."

13. We may record that the tribunal has wrongly stated that A-One Travels and Tours Pvt. Ltd. is not a sister concern of the respondent-assessee. This fact and close connection/association was admitted by the respondent-assessee before the Assessing Officer.

14. Keeping in view the aforesaid discussion and the decision of the Full Bench we deem it appropriate to remit the matter to the Tribunal for a fresh consideration and decision after examining and keeping in mind the ratio and the law expounded by the Full Bench. The tribunal will also examine whether rental income earned by A-One Travels and Tours Pvt. Ltd. was

taxed under the head 'income from house property' or was taxed as 'business income' or 'income from other sources'. This may be relevant as the case set up by the respondent-assessee is that the Revenue has not suffered as the entire rental income has been taxed in the hands of the respondent-assessee and A-One Travels and Tours Pvt. Ltd. We clarify that we have not expressed any opinion whether or not the rent received by A-One Travels and Tours Pvt. Ltd. can be taxed or not taxed in the hand of the assessee under Section 23(1) of the Act. We have not held that if A-One Travels and Tours Pvt. Ltd. have been taxed, then the appellant cannot be taxed. These questions are left open.

15. Question of law is thus answered partly in favour of the Revenue and against the respondent. No costs.

SANJIV KHANNA,J

R.V.EASWAR, J

NOVEMBER 15, 2011
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