

PETITIONER:
COMMISSIONER OF INCOME TAX, CALCUTTA

Vs.

RESPONDENT:
M/S. PARK HOTEL (P) LTD., 15, PARK STREET, CALCUTTA-16.

DATE OF JUDGMENT 05/01/1995

BENCH:
B.P. JEEVAN REDDY, S.B. MAJMUDAR

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

B.P. JEEVAN REDDY J.

1. Leave granted. Heard the counsel for both the parties.
2. The Commissioner of Income Tax, Calcutta, has preferred this appeal against the judgment of the Calcutta High Court in Income Tax Reference No.88/1986, answering the question referred at the instance of the assessee, in favour of the assessee. The question referred under Section 256(1) of the Income Tax Act is "Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the income as received by M/s. Surrendra Overseas Limited, be assessed as the income of the assessee from business from lease-hold interest?"
3. Under a deed of assignment, dated 3rd September, 1966, the assessee obtained the leasehold interest, for the unexpired period of lease, in respect of premises Nos.3,5,7,9,11,13 & 15, Park Street, Calcutta, from Credit Transactors. In the accounting year relevant to the Assessment Year 1971-72, the assessee executed a sub-lease in respect of a portion of its leasehold interest in favour of M/s. Surrendra Overseas Limited, another limited company "associated with the assessee". The deed of sub-lease was, however, not registered though it is said that M/s. Surrendra Overseas Limited, paid a premium of Rs.63,13,000/- and was also paying a rent of Rs.15,000/- p.a. in consideration of the said sub-lease. M/s. Surrendra Overseas Limited, was receiving the rental income from the property subleased to it. The income so received by M/s. Surrendra Overseas Limited was sought to be taxed in its hands as 'income from house property', to which Surrendra Overseas objected. The matter was carried to the Tribunal, which held in I.T.A. No.519(Cal.)/1976-77, that since M/s. Surrendra Overseas Limited, is not the owner of the said house property, the income from that house property cannot be taxed in its hands. An application for making a reference under Section 256(1) of the Act filed by the Revenue was rejected by the Tribunal.

For the assessment years in question i.e., 1975-76 to 1979-80, the Income Tax Officer sought to include the rental income received by M/s. Surrendra Overseas in the assessment

of the assessee. The assessee objected to the same contending that inasmuch as it has transferred a portion of its leasehold interest in favour of M/s. Surrendra Overseas, the income received from the properties so transferred to M/s. Surrendra Overseas Limited cannot be included in its total income. The Income Tax Officer rejected the objection relying upon *Sri Ganesh Properties Ltd. v. Commissioner of Income-Tax, West Bengal* (44 I.T.R. (1962) 606), *Sakarchand Chhaganlal v. Controller of Estate Duty, Gujarat* (73 I.T.R. (1969) 555) and *Bengal Jute Mills Co., Ltd., Calcutta v. Commissioner of Income-Tax, Central, Calcutta* (17 I.T.R. (1949) 308).

4. The assessee appealed to the Commissioner of Income Tax (Appeals) who recorded a finding that "the income from the leasehold property should be assessed under the head 'business'". He did not give any specific direction with respect to the quantum of income. Pursuant to the appellate order, the Income Tax Officer passed an order under Section 251 of the Act giving effect to the appellate order. He assessed the income from leasehold property as income from business.

Against the order of the Commissioner of Income Tax (Appeals) aforesaid (dated 5.10.1982) the Revenue filed an appeal before the Tribunal contending that the Commissioner (Appeals) was not justified in directing the income from leasehold property to be assessed as income from business. According to Revenue, it was liable to be assessed as income from house property. The Tribunal dismissed this appeal.

The assessee preferred an appeal against the aforesaid orders of the Income Tax Officer passed under Section 251 of the Act. The Commissioner of Income Tax (Appeals) while affirming his earlier order that the said income should be assessed as income from business, held that the income received by M/s. Surrendra Overseas Limited from the properties sub-leased to it, should not be included in the total income of the assessee. Against this order, the Revenue preferred an appeal to the Tribunal. The Tribunal referred to its aforementioned orders in the appeal preferred by M/s. Surrendra Overseas Limited and held that in the absence of a registered deed of sub-lease, the assessee continued to be liable to tax on the income received from the said property. It rejected the contention of the assessee that the said income was only a notional one and not actual or real income. The Tribunal directed that (i) the income from leasehold property should be assessed as income from business and (ii) that the income which has to be assessed as income from business from leasehold interest, should be the income as received by M/s. Surrendra Overseas Limited. The assessee thereupon applied for and obtained the reference of the above question for the opinion of the High Court.

5. We must pause here and mention a fact to clear the ground. While setting out the facts in its judgment, the High Court has stated a new fact which we are not able to find either in the order of the Tribunal or in the order of the Commissioner of Income Tax (Appeals). The High Court has observed that "a multi-storeyed building had been constructed in the said portion under sub-lease and M/s. Surrendra Overseas Limited, had let out the same to various tenants and has been collecting rent from such tenants". In the context in which the said observation occurs, it gives an impression as if the High Court was saying that the multi-storeyed building was constructed by M/s. Surrendra Overseas Limited in the premises sub-leased to it, though not so stated specifically. We are, however, of the opinion

that in the absence of any specific statement to that effect, it would not be proper to read the said observation as stating that the multi-storeyed complex was constructed by M/s. Surrendra Overseas. None of the orders of the authorities under the Act say that Surrendra Overseas had constructed a multi-storeyed structure in the premises subleased to it by the assessee. We shall, therefore proceed on the footing that the multi-storeyed building referred to by the High Court was constructed by the assessee itself and that the sub-lease in favour of M/s. Surrendra Overseas Limited was of certain premises including the said multi-storeyed building. We are saying so also because in a reference under Section 256(1), no new facts can be introduced by the High Court.

Now coming to the merits, we are of the opinion that the matter must go back to the High Court for more than one reason. Firstly, it is not clear to us whether the question referred pertains only to one issue viz., whether the income received by Surrendra Overseas should be included in the total income of the assessee or does it also comprehend the other issue viz., whether the said income should be assessed under the head "income from house property" or under the head "profits and gains of business or profession". The question as framed is capable of being construed both ways. In this connection, a fact to be noted is that on an earlier occasion the Tribunal had opined that the said income should be assessed as income from business. Whether that issue got concluded then itself or was it also in issue in the present proceedings? If it was not in issue in the present proceedings, then why did the High Court refer to the decision in S.G. Mercantile Corporation Private Limited v. Commissioner of Income-Tax, Calcutta (83 I.T.R. 91972) 700)which deals with this issue only? This matter requires to be clarified.

Secondly, we find that the High Court has not addressed itself to the main issue upon which the Tribunal had allowed the Revenue's Appeal viz., inasmuch as the sub-lease was not effected under a registered document, interest in the property does not pass and, therefore, the income in question continues to be the income of the assessee. It has also not dealt with the reasoning of the Tribunal that by accepting the assessee's plea, the income in question would go untaxed altogether inasmuch as the said income has been held not taxable in the hands of M/s. Surrendra Overseas Limited.

For these reasons, the appeal is allowed the judgment of the High Court is set aside and the matter is remitted to the High Court for a fresh disposal of the reference in accordance with law and in the light of the observation made herein.