IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1213 OF 2011

Commissioner of Income Tax-12]
R. No.265, 2nd Floor]
Ayakar Bhavan, Mumbai-400 020.] ..Appellant

-*Versus*-

Tip Top Typography]
58, Sheth Chambers]
Dr. V. B. Gandhi Marg, Fort]
Mumbai-400 023.] ..Respondent

ALONG WITH

INCOME TAX APPEAL NOS.2447/2011, 5363/2010, 5489/2010, 673/2011, 732/2011, 1316/2011, 1468/2011, 2108/011, 2115/2011, 2116/2011, 2161/2011, 411/2012, 753/2012, 754/2012, 974/2012, 819/2012, 820/2012, 821/2012, 827/2012, 1182/2012, 1472/2012, 106/2014, 195/2014, 342/2014, 343/2014, 657/2014, 676/2014 and 944/2014.

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Mr. P. C. Chhotaray for the Revenue in ITXA Nos.1213/2011, 1316/2011, 106/2014, 195/2014, 342/2014, 343/2014, 657/2014, 676/2014 and 944/2014.

Mr. Tejveer Singh for the Revenue in ITXA Nos. 2447/2011, 753/2012, 754/2012, 974/2012, 819/2012, 820/2012, 821/2012, 827/2012 and 1182/2012.

Mr. Vimal Gupta, Senior Advocate, with Ms. Padma Divakar for the Revenue in ITXA Nos.2108/2011 and 1472/2012.

Mr. Abhay Ahuja for Revenue in ITXA Nos.5363/2010, 5489/2010, 673/2011, 732/2011 and 411/2012.

Mr. Suresh Kumar for the Revenue in ITXA Nos.1468 of 2011 and 2161/2011.

Ms. A. Vissanjee with Mr. S. J. Mehta for the Assesssee in ITXA Nos.2447/2011, 2116/2011, 2115/2011, 2161/2011, 753/2012, 754/2012, 794/2012, 819/2012, 820/2012, 821/2012, 827/2012 and

1182/2012.
Mr. R. Murlidharan i/b. M/s. Rajesh Shah & Co. for the Assessee in ITXA Nos.1213/2011.
Mr. Subhash Shetty for Assessee in ITXA Nos.5363/2010, 5489/2010, 673/2011, 737/2011 and 411/2012.
Ms. Vasanti B. Patel for the Assessee in ITXA Nos.106/2014, 195/2014, 342/2014, 343/2014, 657/2014, 676/2014 and 944/2014.
Mr. Prakash Shah with Mr. Jas Sanghavi i/b. PDS Legal for the Respondent in ITXA No.1468/2011.

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CORAM: S.C. DHARMADHIKARI
AND
B.P. COLABAWALLA, JJ.

RESERVED ON : 2nd JULY, 2014

PRONOUNCED ON: 8th AUGUST, 2014.

J U D G M E N T (PER S. C. DHARMADHIKARI, J.)

1] In all these appeals, we are concerned with the following substantial question of law:-

> "(i) Whether on the facts and circumstances of the case and in law, Tribunal was right in holding that the fair rental value specified in section 23(1)(a) is the municipal value or actual rent received whichever is higher and not the annual letting value on the basis of comparable instances as adopted by the Assessing Officer, though the property under consideration was not covered by the Rent Control Act?
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> (ii) Whether on the facts and circumstances of the case and

in law, Tribunal was right in remitting the matter back to the file of the Assessing Officer with direction to verify the rateable value fixed by the Municipal Authorities and if the same is less than the actual rent received, then the actual rent received should be taxed?"

Some of the appeals have been admitted but we shall proceed to Admit the rest of them on the above mentioned substantial questions of law. The Respondents therein waive service. By consent heard forthwith.

2] Similarly, there are appeals in which arguments were canvassed on the basis that the rent control legislation operating in the State is applicable but the parties are not at *idem* on the quantum of rent. Therefore, the proceedings in that behalf and particularly for fixation of standard rent were not initiated under the rent control legislation. Therefore, the Assessing Officer took upon himself the responsibility of fixing the fair/standard rent. Whether this step taken by the Assessing Officer is permissible in law or otherwise is the further question. Similarly, in some of the appeals, there is not an agreement of tenancy but of leave and license. Thereunder, license fee has been agreed between the parties. Further, the quantum of security deposit has also been stipulated in the agreement. Therefore, the question arises as to whether

the security deposit which though refundable but without interest can be taken into consideration for holding that the agreed license fees does not reflect the market trend or market rate prevailing in the area.

3] For the purposes of answering these questions we would refer to the facts in Income Tax Appeal No.1213 of 2011. The assessment year in question therein is 2005-06. The brief facts are that the return of income for assessment year in question was filed on 31st August, 2005 declaring total income at Rs.3,12,520/-. The same was processed under section 143(1) of the Income Tax Act, 1961 (for short the 'I.T. Act'). The case was selected for scrutiny. The Assessing Officer noticed that the respondent-assessee had let out commercial premises admeasuring about 8118 sq.ft. built up area consisting of office premises along with Car parking open space in the building “Seth House” in a prime locality at Dr. V. B. Gandhi Road, Mumbai-23. The premises were given to a related concern namely M/s. Reliance Industries Ltd. for Rs.3,60,000/- and a sum of Rs.5,25,00,000/- was received as interest free security deposit. The Assessing Officer noticed that the rent received by the assessee was nominal and the circumstantial evidence indicated that the fair market value was higher. Therefore, he obtained instances of the rental amount prevailing in the market and particularly in the area and confirmed that

the property was not covered by the Rent Control Act. On the basis of such comparable instance, the annual letting value as provided under section 23(1)(a) was determined at Rs.85,72,608/- as against Rs.3,60,000/- shown by the assessee. The assessment order dated 24th December, 2007 copy of which is at Annexure-A was passed and being aggrieved thereby the assessee preferred an appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) by his order dated 11th December, 2008 confirmed the action of the Assessing Officer. A copy of the Commissioner's order is at Annexure-C.

4] The assessee, thereafter, carried the matter in appeal to the Income Tax Appellate Tribunal and by an order dated 31st March, 2010 the matter was remitted back to the Assessing Officer. The Tribunal directed him to verify the rateable value fixed by the Municipal authorities and if the same is less than Rs.3,60,000/-, then, the actual rent received should be taxed. Copy of this order of the Tribunal is annexed as Annexure-E to this memo of appeal.

5] It is aggrieved by this order of the Tribunal that the revenue has approached this Court in appeal under section 260A of the Income Tax Act raising the above substantial questions of law.

6] Mr. Chhotaray, learned counsel, appearing for the revenue in these appeals submitted that the language of section 23(1)(a) of the Income Tax Act, 1961, for short the I.T. Act is clear. That has no relation to the rateable value determined by the municipal corporation. It has also no relation to any deposits or security amount obtained by the assessee like the respondents. Therefore, the attempt is to depress the rent. When such attempts are noticed, then, it can never be intended by the law that the Assessing Officer is obliged to adopt the municipal value. In the present case the matter has been completely distorted by the assessee. The reference to section 23(1)(b) is misplaced. The element of municipal property tax rate has, therefore, no relevance. On facts also, the relationship is admitted. The Assessing Officer has made a comparative study and analysed the prevailing rate. Mr. Chhotaray, therefore, submits that the findings at page 16 and 18 of the paper book would reflect that there was nothing erroneous or illegal in the manner in which the Assessing Officer proceeded to determine the rent. Mr. Chhotaray submits that section 23(1)(a) refers to a reasonable expectation with regard to the rent that can be obtained if the premises are let. The Assessing Officer has clearly gone by this requirement of the section. Mr. Chhotaray submits that the Assessing Officer had correctly determined the rent and his finding has been upheld by the Commissioner. The Assessee did not

appear before the Commissioner but his absence cannot be said to be fatal more so, when the assessee had complete opportunity to argue its case before the Tribunal.

7] Criticizing the Tribunal's order, Mr. Chhotaray submits that the Tribunal has observed nothing with regard to the approach of the Assessing Officer. The Tribunal does not hold that the course adopted by the Assessing Officer is imperssible in law. In para-14 of the order, Tribunal has agreed with the Assessing Officer that there is a possibility of the rent or compensation being shown at lower rate and it can be determined by taking recourse to section 23(1)(a), then, there was no need to freeze the rent or the quantum thereof with the figure of the annual letting value as determined by the Mumbai Municipal Corporation. Thus, there is a patent error of law committed by the Tribunal. Merely, because the words “might be reasonably expected to be let” are inserted by the legislature in section 23(1)(a) that does not mean that the Assessing Officer is bound by the valuation made by the Municipal Corporation. That is a complete misreading of the section. Mr. Chhotaray submits that the municipal valuation cannot be the sole and only criterion. The municipal valuation is not binding on the Assessing Officer. He can independently determine the rent which can be fetched by the assessees.

In doing so he can make local enquiry including from brokers and refer to the agreements between parties. He can also refer to the valuation by the State Government and for the purposes of recovery of State taxes. Mr. Chhotaray submits that there is a tendency to accept deposit of a hefty sum. Even a nominal rent which is higher than the municipal determination is taken as the basis for such security deposit. Mr. Chhotaray submits that if the intent of the legislature was to make an assessment by municipal valuation alone, then, that would have been clearly spelled out in law. Mr. Chhotaray, therefore, referred to Rule 4, 5, 6 and 7 of the Wealth Tax Rules in this behalf.

8] Mr. Chhotaray also submitted that the Tribunal has solely relied upon its own order in the case of Park Paper Industries Ltd. which is delivered in the case of a self-occupied property. At the same time, the Tribunal failed to note that there is a contrary view taken in the case of the Income Tax Officer V/s. M/s. Baker Technical Services Private Ltd. Income Tax Appeal No.5262, 5264/Mum/2006. In such circumstances, Mr. Chhotaray submits that the impugned order be set aside and the appeal be allowed.

9] Mr. Chhotaray also submits that the Assessing Officer was of the view that the monthly rent shown was very low and did not represent the

correct fair rental value of the property under section 23(1)(a) of the Act. Under section 23(1)(a), the annual value of the property shall be deemed to be the sum for which the property might reasonably be expected to let from year to year (henceforth referred to as fair rental value of the property). The section mandates the Assessing Officer to determine the fair rental value of the property under section 23(1)(a). The Assessing Officer made enquiries to find out the comparable rent prevailing in the vicinity. He has prepared a chart of the comparable cases showing that the monthly rent per sq. ft. in the vicinity ranged between Rs.79 to Rs.110 per sq. ft. instead of Rs.3.70 per sq. ft. shown by the assessee. The information collected by the Assessing Officer was confronted to the assessee.

10] The assessee contended that the gross municipal rateable value of the property was Rs.39,572/- per annum which came to Rs.3298/- per month. As per the assessee the municipal rateable value represented the fair rental value of the property in the market under section 23(1)(a) and since the rent received was much more than the municipal rateable value, the annual value shown by the assessee should be accepted in view of section 23(1)(b) of the Act. Section 23(1)(b) provides that if the actual rent received is more than the fair rental value under section 23(1)(a),

then the actual rent received should be adopted as the annual value.

11] At the time of the hearing it was pointed out by the revenue that , according to the theory behind the provision relating to the income from house property, annual value of the property is a hypothetical income from the property representing the sum for which the property might reasonably be expected to let from year to year. It is an artificial or assumed income. The actual rent received is not material in determination of the annual value. Annual value is the inherent attribute of the property to be determined by adopting various methods.

12] It was pointed out that reading both the provisions 23(1)(a) and 23(1)(b) together would show that determination of annual value is a two-step process. The first step is to determine the fair rental value in the market under section 23(1)(a). This is the most important part. Thereafter, the second step is to refer to section 23(1)(b) which provides that if the actual rent received is more than the fair rental value determined under section 23(1)(a), then the actual rent received would be deemed to be the annual value. It was pointed out that in the captioned case, there is no applicability of section 23(1)(b) since the annual value, as determined by the Assessing Officer, is much more than the actual rent received.

13] Mr. Chhotaray further submits that annual value is a statutory hypothetical figure. The provisions of section 23(1)(a) mandates the Assessing Officer to determine this value. It simply states that the annual value is the sum for which the property might reasonably be expected to let from year to year. It does not speak anything else. The Assessing Officer determines the annual value by taking various factors into account. He may take recourse to different recognized methods. One important method is to find the prevailing market rate of rent in the area. In order to find it out, he may make inquiry with let out properties in the locality, make enquiry with the brokers, use internet for knowing the prevailing rate in the area, take the help of a valuer, adopt any other method. After collecting the information, the assessee is confronted with the data gathered and after considering his objections suitable adjustments are made to determine the correct annual value. It is submitted that valuation is an art and there are recognized methods. The Assessing Officer is capable of making the valuation on his own by adopting the appropriate method. Each property is unique so far its annual value is concerned. It is not correct to impose a standard annual value for all properties in a locality. Valuation of a property is distorted because of relation between parties, collusion, heavy security deposit. Therefore, each case needs to be addressed on its own facts and Assessing Officer is competent to handle

this issue. It is respectfully submitted that this is the correct approach to determine the annual value. It is important to note that the order of the Assessing Officer is subject to judicial scrutiny. The Assessing Officer should be left alone to perform this function as required by law.

14] Mr. Chhotaray submits that municipal rateable value is not a reliable data for determining the annual value under the Income Tax Act. It is invariably seen that the municipal value is much below the fair rental value of the property. The valuation is outdated. In such a situation, the municipal value is not a reliable data for determining the annual value for section 23(1)(a) of the Income Tax Act. Hence, adopting the municipal value for determining the annual value under the Income Tax Act would lead to substantial loss of revenue. The objectives of the local authorities and the Income Tax Departments are entirely different. Municipal Authorities are concerned with the collection of property tax in order to provide the civic amenities. They would rest content in prescribing the rate for a particular area and would not be bothered about accurately determining the income from a particular property which is the objective of the Income Tax Department. The municipal rateable value is also subject to litigation. It is impossible to develop any mechanism by which the Income Tax Department would keep track of the appeal proceedings in

municipal cases and adopt the modifications. The Income Tax Department is not equipped to liaise regularly with municipal authorities in order to perform its own function of making an assessment. Also most of the returns are accepted without scrutiny and unless there is clear exposition of law, the assessee would show low income from house property which will lead to loss of revenue. It would be unfair to require the Income Tax Department to adopt the municipal valuation even if it notices gross and glaring undervaluation in municipal valuation. The Income Tax Department has no control over the municipal valuation. Under the law, there is no reference to the municipal valuation. There is no case for introducing the element of municipal valuation in the income tax law. The process of municipal valuation of different states is different. The local authorities have their own priorities. For example, Mumbai has now switched over to the capital value system where the municipal value is at a certain percentage of the capital value of the property. Properties with area up to 500 sq. ft. would not pay the higher rate. The concept of determining the fair rent of the property is no longer there. Therefore, there would no longer be any commonality in the wordings of the provisions of the section 23(1)(a) of the Income Tax Act and the provisions of the Municipal Act which is the main plank of the argument for adopting the municipal value for income tax. Income Tax Department

is accountable for collection under the Income Tax law and should not be dependent on municipal system which is not accountable to it. Therefore, the annual value of the property under the income tax law should be delinked from the municipal valuation. Municipal valuation can at best be a factor to be considered by the Assessing Officer and nothing more than that. The Assessing Officer can reject the municipal valuation for valid reasons.

15] Mr. Chhotaray then submits that heavy security deposit is a factor to be taken judicial notice of. In many cases heavy security deposits running into crores of rupees are taken by the landlord as a consequence of which the amount of rent is reduced. It is accepted by the assessees that there is an inverse correlation between the amount of security deposit and the amount of rent. If the security deposit is more, the amount of rent is less and vice versa. Thus the rent fluctuates according to the amount of security deposit. Annual value is an artificial statutory figure which is germane to the property. It should be, by and large, same for a particular property and should not vary according to the quantum of security deposit. This goes against the very theory of annual value unanimously propounded by all the judgments. It needs to be judicially recognized that security deposit is a factor to be taken into account in determining the

annual value. The Courts have not found favour with the idea of calculating the notional value of interest on the security deposit and increase the rent to that extent. But to completely ignore the effect of security deposit on the amount of rent fixed between the parties would lead to ignoring the ground reality of the transactions when it is openly admitted that one of the main objectives behind heavy security deposit is to reduce rent and this would result in eventually determining a wrong annual value. It is submitted that a rebuttable presumption may be raised against assessees accepting security deposit beyond a certain normal amount that, they have benefited to the extent of the notional interest on the security deposit and the annual value should be increased by this notional interest. The assessee would be free to rebut this presumption with valid reasons.

16] Mr. Chhotaray has relied upon the following decisions in support of his above contentions.

1) (1981) 128 ITR 315 - Bhagawan Dass Jain V/s. Union of India and Others;

2) (1975) 100 ITR 97 – Sakarlal Balabhai V/s. Income Tax Officer, Special Investigation Circle IV, Ahmedabad and Another;

3) AIR 1968 Supreme Court 441 (V 55 C 97) – Motichand Hirachand

and others V/s. Bombay Municipal Corporation;

4) AIR 1962 Supreme Court 151 (V 49 C 28) – The Corporation of Calcutta V/s. Sm. Padma Debi and others;

5) AIR 2011 Supreme Court 1940 – Mohammad Ahmad & Anr. V/s. Atma Ram Chauhan & Ors.;

6) (1975) 101 ITR 810 – Kashi Prasad Kataruka V/s. Commissioner of Income Tax, Bihar;

7) (2001) 248 ITR 723 – Commissioner of Income Tax V/s. J. K. Investors (Bombay)Ltd.;

8) Order of Allahabad High Court in case of Sewa Ram Oil Mills V/s. Commissioner of Income Tax;

9) Order of Madras High Court dated 4th April, 2003 in case of N. Nataraj V/s. Deputy Commissioner of Income Tax and

10) (2011) 333 ITR 38 – Commissioner of Income Tax V/s. Moni Kumar Subba.

17] Mr. Chhotaray's submissions were adopted by Mr. Tejveer Singh appearing for the revenue in Income Tax Appeal Nos. 2447/2011, 819/2012, 820/2012, 821/2012, 827/2012, 1182/2012, 753/2012, 754/2012 and 794/2012 and Mr. Suresh Kumar.

18] Mr. Abhay Ahuja appearing for the revenue in some of the appeals submitted that in Income Tax Appeal No.5489 of 2010, the questions of law arise out of the letting of two flats by the private limited companies to its Directors. The flats are in a building known as Samudra Gaurav Apartments, Worli, Mumbai. The facts of the case in the first matter viz. Income Tax Appeal No. 5489 of 2010 for assessment year 2005-06 are that the assessee by reason of its holding two class 'A' shares of M/s. Samudra Gaurav Apartment Pvt. Ltd. from the year 1980 was entitled to use and occupy two flats admeasuring 5142 sq. ft. each with four covered garages bearing No.E-1, E-2, E-6 and E-13 of which the assessee has been given possession. The assessee derives income from house property. The aforesaid property has not been included in the block of assets against which the aggregate rental income for each of the years is shown as Rs.60,000/- consisting of Rs.30,000/- from each of the directors. The Assessing Officer found that the property in question is Worli sea facing, and looking to the size of the flats, location of the property, car parking facility and use of the garden, the rent of Rs.2500/- per month for each flat to each of the directors is very low and he therefore called upon the assessee to explain why the ALV of the above flats should not be determined within the meaning of section 23(1) of the Income Tax Act, 1961. The Assessing Officer relying upon the records of the Sub-Registrar

of Properties, circle Worli during the previous year under consideration showed the prevailing rate of Rs.8919/- per sq. ft. whereas the assessee recorded return from the property at the rate of 12% p.a. That would be about Rs.90/- per sq. ft. per month and upon further confirmation of the same on the basis of spot enquiry made by the inspector of the fair rental value of the area during the subject period which was ranging between Rs.80/- to Rs.100/- per sq. ft. per month, the Assessing Officer held that the assessee company has been charging only Re.1/- per sq. ft. per month from its Directors. He, therefore, adopted the lowest rent of Rs.80/- per sq. ft. for the relevant assessment year and calculated the rental value of two flats (5142 sq.ft.) at Rs.4,11,360/- p.m. and the annual rental at Rs.49,36,320/-.

19] Mr. Ahuja further submits that with respect to the assessee's claim that it could not charge rent higher than the deemed standard rent i.e. rent on 01.10.1987, the Assessing Officer held that the claim was not tenable as the standard rent had not been fixed by a Court under section 8(1)(c) of the Maharashtra Rent Control Act, 1999 upon an application for the same as could have been done by the assessee. Thus the assessee had deliberately foregone its right to fix standard rent higher than the artificially low rent being charged on 01.10.1987 and had not even

availed off the benefit of annual 5% permissible increase under the Maharashtra Rent Control act, 1999 obviously because the Director being the tenant of the assessee company. The Assessing Officer held that the rent at which the property can be reasonably let out is definitely much more than the rent being charged from the director tenants. The Assessing Officer relied on the two judgments of Dewan Daulat Rai Kapoor V/s. New Delhi Municipal Committee and Anr.]122 ITR 700 (SC)] and T. V. Sundaram Iyengar and Sons Ltd. V/s. CIT [241 ITR 420 (Mad)]. The assessee filed appeal against the order of the Assessing Officer mainly on the ground that the Assessing Officer erred in not considering the provisions that the Annual Value of the property situated in a area where Rent Control Law applies cannot exceed the standard rent as per Maharashtra Rent Control Act, 1999. The assessee submitted that as per Municipal Records the fair market value of the said property was Rs.24,288/- per year and the rent of Rs.30,000/- for each of the properties being higher should be taxed as rental income. The Commissioner of Income Tax (Appeals) upheld the Assessing Officer's order including the finding that the assessee had not taken any recourse to section 8(1) of the Maharashtra Rent Control Act, 1999 for fixation of standard rent. The Commissioner of Income Tax (Appeals) also gave a finding that the assessee's attempt to take protection of the Maharashtra Rent Control act,

1999 was inconsistent and highly contradictory. He found that on the assessee's own showing the rate by the Municipal Corporation of Greater Bombay was Rs.24,288/- and the rent received by the assessee was Rs.60,000/-. Accordingly he gave a finding that the assessee itself had given a go-by to the provisions of section 10 of the Maharashtra Rent Control Act, 1999 and concluded that the assessee had taken the property outside the purview of the Maharashtra Rent Control Act, 1999 and the assessee could not take cover under it for income tax purposes. The Commissioner of Income Tax (Appeals) also relied upon the cases of Dewan Daulat Rai Kapoor V/s. New Delhi Municipal Committee and Anr. (supra) and T. V. Sundaram Iyengar & Sons (supra), and held that the Assessing Officer was right in fixing the rent of property at Rs.4,11,360/- per month. In appeal before the Tribunal, on the finding of the lower authority that the Maharashtra Rent Control Act, 1999 was violated on the basis that the assessee received rent over and above the standard rent, the assessee submitted that the property was tenanted for a long time and the provisions of the Maharashtra Rent Control Act, 1999 protect the tenant and also postulates that if rent was fixed prior to the implementation of the Maharashtra Rent Control Act, 1999, the rent fixed will become standard rent under the Act and accordingly the assessee is covered under the provisions of the Maharashtra Rent Control Act, 1999. The Income

Tax Appellate Tribunal held that (i) the assessee has given property on rent to Mr. T. B. Ruia long back and on his death Mrs. Asha Ruia became the tenant and there was a revised agreement dated 14.08.2008. In all the years the Assessing Officer has been accepting rent received by the assessee company and the assessment order for one of the years viz. Assessment year 2004-05 is under section 143(3) of the Income Tax Act, 1961 (ii) it was already established that while invoking provisions of section 23 of the Income Tax Act, 1961, the Assessing Officer has to consider municipal rateable value, or standard rent or actual rent received, whichever is higher and set out the various paragraphs of the decision of the Tribunal in the case of ITO v/s. Makrupa Chemicals (P)Ltd. [108 ITD 95 (Bom)] stating that the methodology for arriving at the annual value of property under the provisions of section 23(1) of the Income Tax Act, 1961 was given therein; (iii) that the property is a tenanted property and the tenant is a protected tenant as per the orders of the Court and since the rent received by the assessee is more than the standard rent/municipal rateable value, the Assessing Officer has no option than to accept the rent received by the assessee. He accordingly directed the Assessing Officer to accept the rent offered by the assessee and determine the income from the house property accordingly. Similar facts exist for assessment year 2005-06 in the case of Commissioner of

Income Tax-Central III V/s. Ramrikhdas Balkison & Sons Pvt. Ltd. (ITXA 5356 of 2010) as well as for assessment year 2006-07 in the case of Commissioner of Income Tax-Central-III V/s. Ramgopal Ganpatrai & Sons Pvt. Ltd. (ITXA 732ofo 2011) and Commissioner of Income Tax-Central-III V/s. Ramrikhdas Balkison & Sons Pvt. Ltd. (ITXA 673 of 2011).

20] Mr. Ahuja, therefore, submits that findings by the Tribunal that the revised agreement is dated 14.08.2000 and after the enactment of the Maharashtra Rent Control Act, 1999 are vitiated in law. No finding was rendered by the Tribunal on the submission of the assessee that if rent was fixed prior to the implementation of the Maharashtra Rent Control act, 1999, the rent fixed will become standard rent under the Act. Even otherwise there is neither any evidence nor finding that the standard rent was fixed under section 7(14)(a) or section 8(1) nor the case falls under section 6 of the Maharashtra Rent Control Act, 1999. There is no finding by the Tribunal that standard rent was fixed in accordance with section 8(1) of the Maharashtra Rent Control Act, 1999. In fact, there is a clear statement by the assessee in the statement of facts in the appeal before Commissioner of Income Tax (Appeals) that as per Municipal Records the fair market value (and not standard rent) of the said property was Rs.24,288/- per year. The Tribunal appears to have erroneously

considered this figure as the standard rent. Therefore, finding by the Tribunal that rent received is more than the standard rent and the Assessing Officer has no option but to accept the rent received as the basis, is also erroneous. Even assuming without admitting that the said rent received from each director per year is Rs.30,000/- that would be in violation of section 10 of the Maharashtra Rent Control Act, 1999 and take the assessee's case outside the ambit of the Rent Control legislation, which has been the case of the revenue. Also finding by the Tribunal that since rent received by the assessee is more than the municipal rateable value, the Assessing Officer has no option than to accept the rent received as per the decision in ITO V/s. Makrupa Chemicals (P)Ltd. (supra) is erroneous as it presupposes that the assessee is outside the purview of the Rent Control Act whereas the Tribunal itself has given a finding that the property is a tenanted property and the tenant is a protected tenant as per the orders of the Court. On the issue of earlier years, it is submitted that only for assessment year 2004-05 the assessee's stand appears to have been accepted under section 143(3) but for no other year. Every year is a separate unit of assessment. In any event the Tribunal has decided the matter on merits and not on the basis of earlier years. It is submitted that if this Court holds that the property is outside the purview/ambit of the Maharashtra Rent Control Act, 1999, the appellant revenue craves leave of

this Court to adopt the arguments and submissions made by Shri P.C. Chhotaray in the case of Commissioner of Income Tax-12 V/s. Tip Top Typography (ITXA 1213 of 2011), and submit that Court be pleased to allow the appeals upholding the orders passed by the Assessing Officer and Commissioner of Income Tax (Appeals) determining ALV of the property. Alternatively, if this Court holds that the case of the assessees herein falls within the purview of the Maharashtra Rent Control Act, 1999, then, it is submitted on behalf of the appellant revenue that as no standard rent has been fixed by a Rent Controller or a Court either as per section 7(14)(a) or in accordance with section 8(1) of the Maharashtra Rent Control Act, 1999, nor is there any finding by the Tribunal that any standard rent was fixed prior to the Maharashtra Rent Control Act, 1999, this Court be pleased to apply the principles laid down by the Hon'ble Supreme Court in the case of Dewan Daulat Rai Kapoor v/s. New Delhi Municipal Committee and Anr. (supra). In the event, this Court finds that the assessee's case/property falls within the ambit of the Maharashtra Rent Control Act, 1999 it is submitted that this Court be pleased to consider remanding the matters back to the Assessing Officer to arrive at the figure of standard rent by applying the principles laid down in Maharashtra Rent Control Act, 1999 for determination of standard rent and determine the annual value of the property on the basis of such figure of standard rent.

21] Mr. Ahuja has relied upon the following judgments in support of the above contentions:-

1) (1980) 122 ITR 700 – Dewan Daulat Rai Kapoor V/s. New Delhi Municipal Committee and Another;

2) (2000) 241 ITR 420 – T. V. Sundaram Iyengar and Sons Ltd. V/s. Commissioner of Income Tax;

3) (2008) 298 ITR 413 (Jharkhand) – Commissioner of Income Tax V/s. Shrimati Bhagwani Devi.

22] On the other hand, Mr. Murlidhar and Mr. Jasani appearing for the assessee in some of the appeals so also Mr. Prakash Shah would submit that the expression "sum for which the property might reasonably be expected to let from year to year" is considered and explained in Circular No.204 dated 24th July, 1976. That Circular explains the provisions of the Taxation Laws (Amendment) Act, 1975. Prior to the insertion of section 23(1)(b) by this Amendment Act, 1975 the annual value of house property could only be determined on the basis of section 23(1)(a) and not on the basis of actual rent received for the property. The Central Board of Direct Taxes has explained the rationale for the amendment and hence reliance is placed by Shri Murlidhar on the wording of the Circular 204 dated 24th July, 1976. Mr. Murlidhar submits that the Central Board

of Direct Taxes recorded the annual value under section 23(1)(a) as being equal to the municipal valuation of the property. He submits that this Circular holds the field and has not been withdrawn. It will bind the revenue under section 119 of Income Tax Act. Then, Mr. Murlidhar has placed reliance upon a judgment of the Calcutta High Court in the case of Commissioner of Income Tax V/s. Smt. Prabhavati reported in (1983) 141 ITR 149. Mr. Murlidhar relied upon the observations at page 424 of the report and urged that the wording of section 143 of the Bombay Municipal Corporation Act, 1888 contains identical expression/words namely that the rateable value has to be determined on the basis of the rent which such rent or building might reasonably be expected to be let from year to year. Similar principle is laid down in the case of Motichand Hirachand reported in AIR 1968 Supreme Court 441.

23] Mr. Murlidhar, then, relied upon the decision of this Court in the case of M.V. Sonavala V/s. Commissioner of Income Tax reported in (1989) 177 ITR 246. Mr. Murlidhar also relied upon the decision of this Court in the case of Smt. Smitaben N. Ambani V/s. Commissioner of Wealth Tax reported in (2010) 323 ITR 104. He has also relied upon the decision of the Calcutta High Court in the case of Commissioner of Income Tax V/s. Satya Co. Ltd. and the decision of the Full Bench of Delhi High

Court in the case of Commissioner of Income Tax V/s. Mani Kumar Subba (2011) Vol.333 ITR 838. Mr. Murlidhar, therefore, submits that in all these decisions it has held that the rateable value fixed by the Municipal Corporation cannot be ignored or brushed aside. If the correctness of the municipal valuation was never disputed by the department, then, the same should be adopted as the annual value of the premises. In all these decisions, therefore, the principle laid down is that the department will have to bring in material to show as to how the municipal rateable value does not represent the correct rent.

24] In the facts of the case namely Tip Top Typography, Mr. Murlidhar submits that the respondent-assessee had received a refundable security deposit of Rs.5.25 crores and had spent a sum of Rs.65 lakhs on renovation of the premises. If the municipal rateable value of the premises is to be taken into consideration, then, the Tribunal's order cannot be said to be perverse or vitiated by an error of law apparent on the face of the record. Mr. Murlidhar submits that Municipal Corporation is a responsible body entrusted in imposing as much legitimate tax as possible, and therefore, its valuation constitutes a safe guide for determining the annual value of the property. He, therefore, submits that the appeal of the revenue be dismissed.

25] Ms.Vissanjee, learned counsel, appearing in the other appeals submits that the language of section 154 of the Mumbai Municipal Corporation Act, 1888 is in pari materia with section 23(1)(a). The test for determining the rateable value under the Mumbai Municipal Corporation Act and the annual letting value under section 23(1)(a) of the Income Tax Act is identical. Both statutes contemplate fixation of rateable/annual value at the reasonable amount of rent which can be expected by the owner from a hypothetical tenant. The basis of charge of income from house property is its 'annual value'. The annual value is a deemed or notional figure based on which the owner is subjected to tax irrespective of whether or not the property has been let. The only exceptions are (i) a property which is occupied by the owner for the purpose of his business (ii) a property occupied by the owner for the purpose of his own residence or cannot actually be occupied by the owner by reason of the fact that owing to his employment, business or profession carried on at any other place, he has to reside at that place in a building not belonging to him [section 23(2)(a) and (b)]. The exception in (ii) above is not available if the house or any part is actually let during the whole or part of the previous year or any other benefit is derived by the owner. [section 23(3)]. And further exception in (ii) above is limited to one house which the assessee at his option may specify [section 23(4)].

It is because an assessee is assessable to income from house property on a notional figure even if the property is not let out that section 23(1)(a) uses the expression 'reasonably be expected to let'. It is for this reason that the municipal rateable value has been correctly adopted for the purpose of determining the annual value under section 23(1)(a). The proposition by the Revenue that the Assessing Officer can adopt the 'fair rent' based on information obtained from local enquiries, brokers and the internet is totally unwarranted. In cases where the property is let out, ordinarily the license fee agreed between a willing licensor and a willing licensee uninfluenced by any extraneous circumstances would afford reliable evidence of what the landlord might reasonably expect to get from a hypothetical tenant. If such rent is higher than the municipal rateable value, the provisions of sub-clause (b) of section 23(1) would apply. The action of the Assessing Officer in determining the annual value by (i) imputing notional interest on the security deposit to the actual rent received while separately assessing the income earned on the security deposit (equivalent to 12 months advance license fee) offered to tax under the head 'other sources' [Reclamation Real Estate Co. India Pvt. Ltd.] (ii) adopting the rent fetched by another premises in the same building as the annual letting value in the case of the assessee [Reclamation Properties India Pvt. Ltd. & Reclamation Realty India Pvt. Ltd.] in place of the rent

receivable has been rightly reversed by the Tribunal. So also the action of the Assessing Officer in reopening past assessments to reassess the annual letting value based on the rent fetched by some other premises has been rightly rejected by the Tribunal. Ms. Vissanjee, therefore, submits that the appeal be dismissed.

26] Mr. Prakash Shah appearing in Income Tax Appeal No.1468 of 2011 submits that this appeal challenges the order passed by the Income Tax Appellate Tribunal in Income Tax Appeal No.2587/MUM/2009 dated 16th July, 2010 in respect of the assessment year 2005-06. The respondent is the owner of a commercial property at Kandivali(W), Mumbai. The respondent has let out the first floor admeasuring 4625 sq.ft to 9 entities, which are group entities in 1992. These entities have in turn sub-let the premises to Saraswat Co-operative Bank Ltd. The Assessing Officer accepted the transaction between the tenants and Saraswat Co-operative Bank Ltd. as genuine and the rent payable by the tenants to the respondents as Annual Letting Value within the meaning of section 23 of the Income Tax Act, 1961. It is urged by Shri Shah that though the tenants filed their respective returns of income and offered the rent received by them from Saraswat Bank for taxation what transpired thereafter is that the annual rateable value determined by the

Brihanmumbai Mahanagarpalika was set aside by the Small Causes Court at Mumbai. The Small Causes Court, Mumbai had held that the municipal valuation cannot be based on the amount received by the tenants (group entities) from sub-tenant (M/s. Saraswat Bank). The rateable value has to be determined on the rent paid by the group entities (tenants) to the owner namely the respondent-assessee. It is in these circumstances that in the return of income, the respondent-assessee stated accordingly. However, the Assessing Officer determined the Annual Letting Value on the amount or quantum which was received by the tenant from the sub-tenant. The Assessing Officer added the difference between the rent received by the respondent-assessee from the tenants and the amount received by the tenants from the sub-tenant. For the first time in the assessment year 2005-06, the Assessing Officer held that the transaction between the respondents and the tenants is camouflage and colourable device to evade the tax.

27] An appeal was preferred before the Commissioner of Income Tax (Appeals) against the addition made by the Assessing Officer and the said appeal was partly allowed on 4th February, 2009. By the impugned order, the Tribunal set aside the Annual Letting Value determined by the Assessing Officer and sustained by the Commissioner of Income Tax

(Appeals). The Tribunal held that the transaction between the respondents and the tenants is not a colourable device. It is submitted, therefore, the tax effect, as stated by the revenue in the memo of appeal is Rs.6.84 lakhs which is much below Rs.10 lakhs. Therefore, no appeal can be filed to the Tribunal. Further and without prejudice, there is a pure finding of fact and which cannot be said to be perverse. All the tenants except one have offered the amount received from the sub-tenant to tax. The transaction between the respondent-assessee and the group entities is held to be genuine. It is purely a commercial transaction and cannot be said to be entered into for avoiding taxes. It may be that, there is an interest free deposit which has been made by the tenants with the respondents. However, no interest free security deposit was received by the Saraswat Bank from the respondent-assessee. Hence the transactions entered between the respondent and the tenants were at arm's length and the Annual Letting Value cannot be the rent received by the tenants from the sub-tenant. Further, it is submitted that where a property is let out and subsequently tenant's sub-let the same property for higher rental income, the higher rental income earned by the tenant from the same property cannot be taken as Annual Letting Value in the hands of owner for computing the income from house property. It is submitted that the Annual Letting Value in the present case is the actual rent received from

the tenants. It is submitted that this Court in case of Akshay Textiles Trading and Agencies Pvt. Ltd. (supra) has held that Annual Letting Value is the rent received or receivable by the assessee-owner from the tenants irrespective whether the tenants have received higher rent by subletting. The premises are within Greater Mumbai and are covered by the rent control legislation. The Annual Letting Value for the purpose of municipal tax is held to be the rent paid by the tenants to the respondent determined by the competent court. The Assessing Officer was bound to take the rateable value fixed by the competent Court for the purpose of municipal tax as the Annual Letting Value. It is submitted that it is a well settled position that the rent received by the respondent or standard rent of property whichever is higher is the Annual Letting Value for the purpose of section 23(1) of the Act. It is also submitted that this issue had come up in earlier assessments of the respondent and the rent received by the respondent was accepted as Annual Letting Value by the department since assessment years 1993-94 (first year), 1994-95 and 1996-97. All these assessments were completed under section 143(3) and after elaborate discussion the rent received by the respondent was accepted as Annual Letting Value. There are no changes in the facts and circumstance of the case to deviate from the Annual Letting Value determined by the Assessing Officer in the previous assessment years. In general, doctrine of 'Res

Judicata' does not apply to Income Tax Proceedings. However, it appears that conclusion reached based on identical facts in the previous years need not be given a go by in the absence of any compelling circumstance. In this respect, reliance is placed on following decisions:

1) Radhasoami Satsang 193 ITR 321 (SC);

2) Berger Paints India Ltd. V/s. CIT 266 ITR 99 (SC);

3) Baijnath Brijmohan & Sons Ltd. 161 ITR 234 (Bom);

4) H A Shah 30 ITR 618 (Bom); and

5) CIT V/s. Paul Brothers 216 ITR 548 (Bom).

28] Mr. Shah submits that in view of the above submissions, the impugned order passed by the Tribunal needs to be upheld and appeal filed by the revenue is liable to be dismissed.

29] For properly appreciating the rival contentions it would be necessary to make a reference to section 22 and 23 of the Income Tax Act, 1961. Section 22 falls in Chapter IV of the Income Tax Act which is entitled as computation of total income. Section 14 is the first section appearing in this Chapter and it sets out the heads of income. By section 14(A) the expenditure incurred in relation to the income which has to be excluded from the total income is set out. Then, there is a sub-

title/heading “A. Salaries”. Section 15 to 17 deal with salaries, deductions from salaries and salary, perquisites in lieu of salary.

30] Then, comes the heading “C. Income from house property”. Section 22 falling thereunder states that the annual value of property consisting of any building or lands appurtenant thereto, of which the assessee is the owner, excluding such portions of such property as he may occupy for the purpose of any business or profession carried on by him and profits shall be chargeable to income tax under the head income from house property.

31] Section 23 states that for the purpose of section 22, the annual value of property shall be deemed to be under clause (a), the sum for which the property might reasonably be expected to be let from year to year or under clause (b) when the property or any part of the properties are let and the actual rent received or receivable by the owner in respect thereof, is in excess of the sum which is referred to in clause (a). Then, the amount so received or receivable would be deemed to be the annual value for the purposes of section 22. There is a third category where the property or any part of it has been let but was vacant during the whole or any part of the previous year and because of such vacancy the actual rent received or receivable by the owner in respect thereof, is less than the sum referred to in clause (a) the amount so received or receivable will be the

annual value. Thereafter there is a proviso and which refers to the deduction towards tax levied by any local authority in respect of the property and these have to be deducted in determining the annual value of the property of that previous year in which such taxes are actually paid by the assessees. Then, there is an explanation and which states that for the purpose of clause (b) or (c) of sub-section (1) the amount of actual rent received or receivable by the owner shall not include, subject to the rules, the amount of rent which the owner cannot realize. By sub-sections (2) and (3) it has been clarified that the annual value in view of the circumstances set out in this sub-section will be taken to be nil but sub-section (2) of section 23 if will not apply in the circumstances set out by sub-section(3). If the owner has more than one house then, how the annual value has to be determined, is set out in sub-section (4) of section 23.

32] Thus, the scheme is that income from house property shall be taken as a component of the income chargeable to tax. How that income from house property has to be 'computed' is then provided by the legislature. That is the annual value of the property. Thus, the legislature deems the annual value firstly to be the sum for which the property might reasonably be expected to be let from year to year. In the event, the property which

consists of any buildings or lands appurtenant thereto, the actual rent received or receivable by the owner in respect thereof if in excess of the sum referred to in clause (a), it is that amount so received or receivable which shall be deemed to be the annual value for the purposes of computing the tax under the head income from house property.

33] In the present appeals, the arguments proceed on the footing that in computing the annual value of house property under section 23 (1)(a) is the Assessing Officer required to adopt the municipal rateable value of the property. However, in all the appeals before us, the factual position is that the property or part thereof is let or given on leave and license basis. The Assessing Officer has disbelieved the assessees in computation or calculation of income from house property. In the opinion of the Assessing Officer and the revenue, the amount received towards rent or compensation either coupled with an interest free security deposit or otherwise as reflected and shown in the accounts of the assessees is not the market rent or market value. Therefore, it would be open for the Assessing Officer to doubt or question the same. Thereafter, the Assessing Officer is free to determine the amount which the property may fetch. In other words, the sum for which the property might reasonably be expected to be let from year to year can be determined by him.

34] The Assessing Officer, therefore, in the Appeal No.1213 of 2011 referred to the rental income shown under the head "income from house property". The assessee disclosed that after claiming deduction from municipal taxes, repairs, the net income from house property is Rs.2,49,882/- in the Profit and Loss Account for the year consideration though the assessee credited rental income of Rs.3,60,000/-.

35] The Assessing Officer called upon the assessee to furnish the details of the property let out. Although the Assessing Officer refers to the transaction as letting what the assessee produced was a copy of the leave and license agreement. The leave and license agreement is dated 1st April, 2004. On perusal of the above, Assessing Officer noted the facts which we have referred in some details in the opening paragraphs of this judgment. We may proceed on the premise that the Assessing Officer was empowered and equally justified in calling upon the assessee to substantiate the quantum received but what we find is that the assessee furnished certain details. Those details are referred to in para-3 of the assessment order. Thereafter, the Assessing Officer issued a notice under section 142(1) of the Income Tax Act and the assessee was called upon to furnish an explanation as to why the income from house property should not be computed by estimating the annual value as per provisions of section

23(1)(a) of the Income Tax Act. The assessees representative addressed letters and urged that no estimation is required to be made as the quantum reflects the prevailing rate or value in the market. From the record it appears that the Assessing Officer in the letter dated 12th December, 2007 set out certain instances and which he termed as comparable. He submits that these instances are of leave and license agreement. Therefore, the rate per sq.ft. and based on which the license fees are determined would demonstrate as to how the amount decided or determined as license fees by the assessee with the related party M/s. Reliance is lesser than the prevailing rate.

36] Thereafter, the Assessing Officer dealt with the stand of the assessee and which was supported by the assessee by some decisions of Courts of law. This is evident from paras-3.8 onwards. The Assessing Officer held that the assessee has let out the premises to M/s. Reliance Industries Ltd. for a period of 33 months as per the leave and license agreement entered into between the assessee and M/s. Reliance Industries Ltd. dated 1st April, 2004. The Assessing Officer held that the relationship between the assessee firm and the tenants is established as both belong to the Reliance Group. Then, he held that the annual value of the premises let out by the assessee can be estimated as per the provisions of section 23(1)(a) and

the estimate can be of an amount higher than the standard or 'fair rent' determined as per the Rent Control Act/municipal rateable value.

37] At the same time, the Assessing Officer refers to certain instances, in para 3.11.1 of his order, of properties in respect of which annual value had been estimated by the Assessing Officer under section 23(1)(a) of the Income Tax Act, 1961 on these properties which had not been let out. Therefore, only notional rent was estimated.

38] In the case before us what the Assessing Officer and the other authorities so also the revenue feels that despite the assessees producing before them the relevant documents evidencing the letting out of properties, the income derived therefrom is not in tune or par with the prevailing market rate. Therefore, an estimation can be done in terms of section 23(1)(a) of the Income Tax Act. During such estimation the Assessing Officer is not bound by either standard rent or the ratable value for the purposes of municipal taxation determined by the municipal authorities.

39] It is this controversy which is being dealt with by us. In the case of ***Commissioner of Income Tax V/s. J. K. Investors (Bombay) Ltd. (2001) 248 ITR 723*** a Division Bench of this Court was considering a question of

law, whether notional interest on interest free deposit received by the assessee against letting of property could be taken into account in the cases falling under section 23(1)(b) of Income Tax Act, 1961. In other words, whether such interest would form part of annual rent received or receivable under this provision.

40] The facts that are noted by the Division Bench are that the assessee purchased premises in a building and which premises were let out to M/s. Raymond Woollen Mills Ltd. from 1st October, 1991. The assessee purchased the premises in the previous year relevant to the assessment year 1992-93. The Lessee agreed to deposit the amount as a security deposit for the due performance of the lease. The assessee was not to pay any interest on the security deposit to the lessee. The premises were covered by the provisions of the Bombay Rent Act, 1947. The Assessing Officer held that for the purposes of section 23(1)(b) and though the annual rent received or receivable was higher than the expected rent, still the notional interest for the interest free deposit would be the sum total of the rent actually received plus this notional interest. That notional interest was calculated by the Assessing Officer at a rate at which the assessee borrowed funds. This order of the Assessing Officer was confirmed in appeal by the Commissioner of Income Tax (Appeals). Being

aggrieved by this order, the assessee carried the matter in the Tribunal. The Tribunal on facts found that the actual rent received by the assessee, even without taking into account the notional interest, was more than the annual value determinable under section 23(1)(a) of the Act and it is for this reason that the Department invoked only section 23(1)(b) of the Act. The Tribunal concluded that section 23(1)(b) only applied to cases of actual rent being received by the assessee and that the said section does not apply to cases falling under section 23(1)(a) which permits adoption of notional value as annual letting value of the property. Hence, the Tribunal allowed the appeal.

41] This Court, on facts further noted that the department has invoked section 23(1)(b) of the Act and not section 23(1)(a). Further the Tribunal held that an annual rent received by the assessee even without taking account the notional interest was more than Annual Letting Value of the property determinable under section 23(1)(a) of the Income Tax Act. The Division Bench of this Court referred to the judgment of the Calcutta High Court in the case of ***Commissioner of Income Tax V/s. Satya Co.Ltd. (1994) 75 Taxman 193 and a judgment of the Madras High Court in the case of Commissioner of Income Tax V/s. Ratanchand Chordia (1997) 228 ITR 626***. The Division Bench further held as under:-

"In this matter, we are required to consider the scheme of taxation of income from house property. Section 22 says that the measure of income from house property is its annual value. The annual value is to be decided in accordance with section 23. In this matter, we are required to consider the scheme of taxation of income from house property. Section 22 says that the measure of income from house property is its annual value. The annual value is to be decided in accordance with section 23. Sub-section (1) of section 23, by virtue of the amendment with effect from the assessment year 1976-77, has two limbs, namely, clauses (a) and (b). Clause (a) states that the annual value is the sum for which the property might reasonably be expected to be let from year to year. Clause (b) covers a case where the property is let and the actual rent is in excess of the sum for which the property might reasonably be expected to be let from year to year. In other words, insertion of clause (b) by the Taxation Laws (Amendment) Act, 1975 covers a case where the rent for a year actually received by the owner is in excess of the lawful rent which is known as the fair rent or standard rent under the rent control legislation. The provision of section 23(1)(a) apply both to owner occupied property as also to property which is let out and the measure of valuation to decide the annual value is the standard rent or the fair rent. Section 23(1)(b) only applies to cases where the actual rent received is more than the reasonable rent under section 23(1) (a) and it is for this reason that section 23(1)(b) contemplates that in such cases the annual value should be decided on the basis of the actual rent received. As stated hereinabove, in this case, the

department has invoked section 23(1)(b) which, as stated hereinabove, proceeds on the basis that the actual rent received by the assessee is more than the reasonable rent under section 23(1)(a). The Tribunal has also found that the actual rent received by the assessee, even without taking into account the notional interest,was more than the annual value determinable under section 23(1)(a). This finding of fact has not been challenged by the department in this appeal. On the contrary, the department has contended that in this case section 23(1)(b) was applicable. They have not relied on the provisions of section 23(1)(a). The question as to whether notional interest could have been taken into account under section 23(1)(a) does not arise in this appeal and we do not wish to go into that question in this appeal. However, the moot point which needs to be considered in this case is whether notional interest could form part of the actual rent received by the assessee under section 23(1)(b). It is important to note that the property is covered by the provisions of the Bombay Rent Act. The scheme of section 23(1)(b), in contradistinction to section 23(1)(a), shows that fair rent is the basis to determine the annual value of a property. This was the sole basis prior to the assessment year 1975-76. However, after the amendment of section 23(1) by the Taxation Laves (Amendment) Act, 1975, the legislature has clearly laid down under section 23(1)(b) that when the actual annual rent received or receivable is in excess of the fair rent determinable under section 23(1)(a), then such higher actual annual rent would constitute the annual value of the property. It is important to bear in mind that under section 22, the measure of

income from house property is its annual value. The annual value is to be decided in accordance with section 23(1). By, virtue of the amendment, clause (a) states that annual value is the sum for which the property might reasonably be expected to be let from year to year whereas clause (b) covers a case where the property is let and the actual rent is in excess of the sum for which the property might reasonable be expected to be let from year to year. In our view, this later insertion of clause (b) by the Taxation Laws (Amendment) Act. 1975 is meant to cover a case where the rent per annum actually received by the owner is in excess of the fair rent or the standard rent under the rent control legislation. Now, in this case, the department has invoked section 23(1)(b). Now, in this case, it has been found that the actual rent received by the assessee is more than the fair rent even without taking into account notional interest. Generally, the fair rent is fixed even under the B.M.C. Act and the Rent Act by taking into account various principles of valuation, viz., contractor's method, the rent method etc. However, that exercise is undertaken to decide the fair rent of the property. In that connection, the actual rent received by the lessor also provides a piece of evidence to decide the fair rent of the property. However, under the Income Tax Act, the scheme is slightly different. Section 23(1)(b) provides that where the actual rent is more than the fair rent, the actual rent would be the annual value of the property. In the circumstances, the value of the notional advantage, like notional interest in this case, will not form part of actual rent received as contemplated by section 23(1)(b). At the cost of repetition it may be mentioned that under

section 23(1)(a), the assessing officer has to decide the fair rent of the property. While deciding the fair rent, various factors could be taken into account. In such cases various methods like contractors method could be taken into account. If on comparison of the fair rent with the actual rent received, the assessing officer finds that the actual rent received is more than the fair rent determinable as above, then actual rent shall constitute the annual value under section 23(1)(b). Now, applying the above test to the facts of this case, we find a categorical finding of fact recorded by the Tribunal that the actual rent received by the assessee was more than the fair rent. Under the above circumstances, in view of the said finding of fact, we do not see any reason to interfere."

42] The Division Bench expressly kept open the question as to whether notional interest can form part of the "fair rent" under section 23(1)(a) of the Income Tax Act, 1961.

43] It also appears that both, the judgment in the case of Satya & Co. (supra) rendered by a Division Bench of the Calcutta High Court and the judgment of this Court in the case of J.K. Investors (Bombay) (supra) were considered by the Full Bench of the Delhi High Court on which decision heavy reliance is placed by the counsel for the assessee. The Full Bench was called upon to decide as to how to determine "fair rent" of the property and, then, to find out as to whether the actual rent received is

less or more than the "fair rent" so that higher of the two is taken as Annual Letting Value under section 23(1)(b) of the Income Tax Act.

44] The factual and admitted position before the Delhi Full Bench was in addition to the contractual rent, substantial amount by way of interest free deposit is given, the security deposit is many time more than the annual rent received by the assessee. Nonetheless, the Annual Letting Value arrived at by the Municipal Corporation was less than the contractual rent received by the assessees. The Assessing Officer while arriving at the "fair rent" had added notional interest on the security deposit to the actual rent received to arrive at the Annual Letting Value. None of the cases before the Full Bench involved applicability of the Delhi Rent Control Act. Therefore, question of fixing standard rent in terms of this Act did not arise. However, it was admitted that if the property is covered by Delhi Rent Control Act then the standard rent under the said Act can be treated as "fair rent" in view of various judgments.

45] In the above backdrop, the Full Bench held as under:-

> *With this, we revert back to the moot question, viz., how to determine the "fair rent" of the property and then to find out as to whether actual rent received is less or more than the "fair rent" so that higher of two is taken as annual letting value under Section 23 (1) (b) of the Act. For this purpose, we first discuss the*

validity of approach taken by the AO, viz., whether it is permissible to add notional interest of interest free security deposit and add the same to the actual rent received for arriving at annual letting value. Even the Division Bench while making reference did not countenance the aforesaid formula adopted by the AO as is clear from Para 12 of the reference order wherein it is observed as under:

"12. In this backdrop, the important question which arises for determination is: what is the fair rent of the properties, which were let out in the instant case? The mistake committed by the AO was that he did not address this issue and straightway proceeded to add notional interest on the interest free security deposit.

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."

This view of the Calcutta High Court has been accepted by a Division Bench of this Court as well in the case of Commissioner of Income Tax Vs. Asian Hotels Limited [(2008) 215 CTR (Del.) 84] holding that the notional interest on refundable security, if deposited, was neither taxable as profit or gain from business or profession under Section 28(iv) of the Act or income from house property under Section 23(1)(a) of the Act. Rationale given in this behalf was as under (page 493):

"A plain reading of the provisions indicates that the question of any notional interest on an interest free deposit being added to the income of an assessed on the basis that it may have been earned by the Assessee if placed as a fixed deposit, does not arise. Section 28 (iv) is concerned with business income and is distinct and different from income from house property. It talks of the value of any benefit on perquisite, "whether convertible into money or not" arising from "the business or the exercise of a profession." It has been explained by this Court in Ravinder Singh that Section 28 (iv) can be invoked only where the benefit or perquisite is other than cash and that the term "benefit or amenity or perquisite" cannot relate to cash payments.

In the instant case, the AO has determined the monetary value of the benefit stated to have accrued to the assessed by adding a sum that constituted 18% simple interest on the deposit. On the strength of Ravinder Singh, it must be held that this rules out the application of Section 28 (iv) of the Act.

Section 23(1)(a) is relevant for determining the income from house property and concerns determination of the annual letting value of such property. That provision talks of "the sum for which the property might reasonably be expected to let from year to year." This contemplates the possible rent that the property might fetch and not certainly the interest in fixed deposit that may be placed by the tenant with the landlord in connection with the letting out of such property. It must be remembered that in a taxing statute it would be unsafe for the Court to go beyond the letter of the law and try to read into the provision more than what is already provided for. The attempt by learned counsel for the Revenue to draw an analogy from the Wealth Tax Act, 1957 is also to no avail. It is an admitted position that there is a specific provision in the Wealth Tax Act which provides for considering of a notional interest whereas Section 23(1)(a) contains no such specific provision."

We approve the aforesaid view of the Division Bench of this Court and Operative words in Section 23 (1)(a) of the Act are "the sum for which the property might reasonably be expected to let from year to year". These words provide a specific direction to the Revenue for determining the "fair rent". The Assessing Officer, having regard to the aforesaid provision is expected to make an

inquiry as to what would be the possible rent that the property might fetch. Thus, if he finds that the actual rent received is less than the "fair/market rent" because of the reason that the assessee has received abnormally high interest free security deposit and because of that reason, the actual rent received is less than the rent which the property might fetch, he can undertake necessary exercise in that behalf. However, by no stretch of imagination, the notional interest on the interest free security can be taken as determinative factor to arrive at a "fair rent". The Provisions of Section 23(1)(a) do not mandate this. The Division Bench in Asian Hotels Limited [2010] 323 ITR 490 (Delhi), thus, rightly observed that in a taxing statute it would be unsafe for the Court to go beyond the letter of the law and try to read into the provision more than what is already provided for. We may also record that even the Bombay High Court in the case of Commissioner of Income Tax Vs. J. K. Investors (Bombay) Ltd., [(2001) 248 ITR 723 (Bom.)] categorically rejected the formula of addition of notional interest while determining the "fair rent".

It is, thus, manifest that various Courts have held a consistent view that notional interest cannot form part of actual rent. Hence, there is no justification to take a different view that what has been stated in Asian Hotels Limited [2010] 323 ITR 490 (Delhi).

The next question would be as to whether the annual letting value fixed by the Municipal Authorities under the Delhi Municipal Corporation Act can be the basis of adopting annual letting value for the purposes of Section 23 of the Act. This question was

answered in affirmative by the Calcutta High Court in Satya Co. Ltd. [1997] 140 CTR (Cal) 569 on the ground that the provisions contained in the Delhi Municipal Corporation Act for fixing annual letting value is in pari materia with Section 23 of the Act. The Court opined that the fair rent fixed under the Municipal laws, which takes into consideration everything, would form the basis of arriving at annual value to be determined under Section 23(1)(a) and to be compared with actual rent and notional advantage in the form of notional interest on interest free security deposit could not be taken into consideration. It is clear from the following discussion therein:

"6. With regard to question Nos. (5) and (6) which are only for the assessment years 1984-85 and 1985-86 the further issue involved is whether any addition to the annual rental value can be made with reference to any notional interest on the deposit made by the tenant. When the annual value is determined under sub-clause (a) of sub-section (1) of section 23 with reference to the fair rent then to such value no further addition can be made. The fair rent, takes into consideration everything. The notional interest on the deposit is not any actual rent received or receivable. Under sub-clause (b) of section 23(1) only the actual rent received or receivable can be taken into consideration and not any notional advantage. The rent is an actual sum of money which is payable by the tenant for use of the premises to the landlord. Any advantage and/or perquisite cannot be treated as rent. Wherever any such perquisite or benefit is sought to be treated as income, specific provisions in that behalf have been made in the Act by

including such benefit, etc., in the definition of the income under section 2(24) of the Act. Specific provisions have also been made under different heads for adding such benefits or perquisites as income while computing income under those heads, e.g., salary, business. The computation of the income under the head 'House property' is on a deemed basis. The tax has to be paid by reason of the ownership of the property. Even if one does not incur any sum on account of repairs, a statutory deduction therefore is allowed and where on repairs expenses are incurred in excess of such statutory limit, no deduction for such excess is allowed. The deductions for municipal taxes and repairs are not allowed to the extent they are borne by the tenant. However, even such actual reimbursements for municipal taxes, insurance, repairs or maintenance of common facilities are not considered as part of the rent and added to the annual value. Accordingly, there can be no scope or justification whatsoever for making any addition for any notional interest for determining the annual value.

Whatever benefit or advantage which is derived from the deposits - whether by way of saving of interest or of earning interest or making profits by investing such deposit - the same would be reflected in computing the income of the assessee under other heads.

In our view there is no scope for making any addition on account of so-called notional interest on the deposit made by the tenant, since there is no provision to this effect in s. 22 or 23 of the IT Act, 1961."

In fact, this is the view taken even by the Supreme Court in the case of Mrs. Shiela Kaushish Vs. CIT [1981] 131 ITR 435 on account of similarity of the provisions under the municipal enactments and Section 23 of the Act.

It is on this basis that in the present case, the Commissioner of Income Tax (Appeals) gave primacy to the rateable value of the property fixed by the Municipal Corporation of Delhi vide its assessment order dated December 31, 1996 and on this basis, opined that the actual rent was more than the said rateable value and therefore, as per Section 23 (1)(b), the actual rent would be the income from house property and there could not have been any further additions.

Since the provisions of fixation of annual rent under the Delhi Municipal Corporation Act are in 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. [1997] 140 CTR (Cal) 569 that in such circumstances, the annual value fixed by the Municipal Authorities can be a rational 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 Assessing

Officer 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, 153.

> *"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."*

Thus the rateable value, if correctly determined, under the municipal laws can be taken as ALV under Section 23(1)(a) of the Act. To that extent we agree with the contention of the learned Counsel of the assessee. However, we make it clear that rateable value is not binding on the assessing officer. If the assessing officer can show that rateable value under municipal laws does not represent the correct fair rent, then he may determine the same on the basis of material/ evidence placed on record. This view is fortified by the decision of Patna High Court in the case of Kashi Prasad Kataruka v. CIT [1975] 101 ITR 810.

The above discussion leads to the following conclusions:

(i) ALV would be the sum at which the property may be reasonably let out by a willing lessor to a willing lessee

uninfluenced by any extraneous circumstances.

(ii) An inflated or deflated rent based on extraneous consideration may take it out of the bounds of reasonableness.

(iii) Actual rent received, in normal circumstances, would be a reliable evidence unless the rent is inflated/deflated by reason of extraneous consideration.

(iv) Such ALV, however, cannot exceed the standard rent as per the Rent Control Legislation applicable to the property.

(v) if standard rent has not been fixed by the Rent Controller, then it is the duty of the assessing officer to determine the standard rent as per the provisions of rent control enactment.

(vi) The standard rent is the upper limit, if the fair rent is less than the standard rent, then it is the fair rent which shall be taken as ALV and not the standard rent.

We would like to remark that still the question remains as to how to determine the reasonable/fair rent. It has been indicated by the Supreme Court that extraneous circumstances may inflate/deflate the "fair rent". The question would, therefore, be as to what would be circumstances which can be taken into consideration by the Assessing Officer while determining the fair rent. It is not necessary for us to give any opinion in this behalf, as we are not called upon to do so in these appeals. However, we may observe that no particular test can be laid down and it would depend on facts of each case. We would do nothing more than to extract the following passage from the Supreme Court judgment in

the case of Motichand Hirachand Vs. Bombay Municipal Corporation, AIR 1968 SC 441, 442 :

"It is well-recognized principle in rating that both gross value and net annual value are estimated by reference to the rent at which the property might reasonably be expected to let from year to year. Various methods of valuation are applied in order to arrive at such hypothetical rent, for instance, by reference to the actual rent paid for the property or for others comparable to it or where there are no rents by reference to the assessments of comparable properties or to the profits carried from the property or to the cost of construction."

46] We have and after careful reading of the provision in question and the conclusion of the Full Bench of the Delhi High Court councluded that a different view cannot be taken. We respectfully concur with the view taken in this Full Bench decision of the Delhi High Court.

47] We are of the view that where Rent Control Legislation is applicable and as is now urged the trend in the real estate market so also in the commercial field is that considering the difficulties faced in either retrieving back immovable properties in metro cities and towns, so also the time spent in litigation, it is expedient to execute a leave and license agreements. These are usually for fixed periods and renewable. In such

cases as well, the conceded position is that the Annual Letting Value will have to be determined on the same basis as noted above. In the event and as urged before us, the security deposit collected and refundable interest free and the monthly compensation shows a total mismatch or does not reflect the prevailing rate or the attempt is to deflate or inflate the rent by such methods, then, as held by the Delhi High Court, the Assessing Officer is not prevented from carrying out the necessary investigation and enquiry. He must have cogent and satisfactory material in his possession and which will indicate that the parties have concealed the real position. He must not make a guess work or act on conjectures and surmises. There must be definite and positive material to indicate that the parties have suppressed the prevailing rate. Then, the enquiries that the Assessing Officer can make, would be for ascertaining the going rate. He can make a comparative study and make a analysis. In that regard, transactions of identical or similar nature can be ascertained by obtaining the requisite details. However, there also the Assessing Officer must safeguard against adopting the rate stated therein straightway. He must find out as to whether the property which has been let out or given on leave and license basis is of a similar nature, namely, commercial or residential. He should also satisfy himself as to whether the rate obtained by him from the deals and transactions and documents in relation thereto can be applied or

whether a departure therefrom can be made, for example, because of the area, the measurement, the location, the use to which the property has been put, the access thereto and the special advantages or benefits. It is possible that in a high rise building because of special advantages and benefits an office or a block on the upper floor may fetch higher returns or vice versa. Therefore, there is no magic formula and everything depends upon the facts and circumstances in each case. However, we emphasize that before the Assessing Officer determines the rate by the above exercise or similar permissible process he is bound to disclose the material in his possession to the parties. He must not proceed to rely upon the material in his possession and disbelieve the parties. The satisfaction of the Assessing Officer that the bargain reveals an inflated or deflated rate based on fraud, emergency, relationship and other considerations makes it unreasonable must precede the undertaking of the above exercise. After the above ascertainment is done by the Officer he must, then, comply with the principles of fairness and justice and make the disclosure to the Assessee so as to obtain his view.

48] We are not in agreement with Shri Chhotaray that the municipal rateable value cannot be accepted as a bonafide rental value of the property and it must be discarded straightway in all cases. There cannot

be a blanket rejection of the same. If that is taken to be a safe guide, then, to discard it there must be cogent and reliable material.

49] We are of the opinion that market rate in the locality is an approved method for determining the fair rental value but it is only when the Assessing Officer is convinced that the case before him is suspicious, determination by the parties is doubtful that he can resort to enquire about the prevailing rate in the locality. We are of the view that municipal rateable value may not be binding on the Assessing Officer but that is only in cases of afore-referred nature. It is definitely a safe guide.

50] We have broadly agreed with the view taken by the Full Bench of the Delhi High Court. Hence, the issue of determination of the "fair rental value" in respect of properties not covered by or covered by the Rent Control Act is to be undertaken in terms of the law laid down in the Full Bench decision of the Delhi High Court.

51] We quite see the force in the arguments of Ms. Vissanjee that ordinarily the license fee agreed between the willing licensor or a willing licensee uninfluenced by any extraneous circumstances would afford reliable evidence of what the landlord might reasonably be expect to get from a hypothetical tenant. She has in making this submission, answered

the issue and summed up the conclusion as well. Then, it is but natural and logical that in the event, the transaction is influenced by any extraneous circumstances or vitiated by fraud, or the like that the Assessing Officer can adopt a "fair rent" based on the opinion obtained from reliable sources. There as well, we do not see as to how we can uphold the submissions of Mr. Chhotaray that the notional rent on the security deposit can be taken into account and consideration for the determination. If the transaction itself does not reflect any of the afore-stated aspects, then, merely because a security deposit which is refundable and interest free has been obtained, the Assessing Officer should not presume that this sum or the interest derived therefrom at Bank rate is the income of the assessee till the determination or conclusion of the transaction. The Assessing Officer ought to be aware of several aspects and matters involved in such transactions. It is not necessary that if the license is for three years that it will operative and continuing till the end. There are terms and conditions on which the leave and license agreement is executed by parties. These terms and conditions are willingly accepted. They enable the license to be determined even before the stated period expires. Equally, the licensee can opt out of the deal. A leave and license does not create any interest in the property. Therefore, it is not as if the security deposit being made, it will be necessarily

refundable after the third year and not otherwise. Everything depends upon the facts and circumstances in each case and the nature of the deal or transaction. These are not matters which abide by any fixed formula and which can be universally applied. Today, it may be commercially unviable to enter into a lease and, therefore, this mode of inducting a 'third party' in the premises is adopted. This may not be the trend tomorrow, therefore, we do not wish to conclude the matter by evolving any rigid test.

52] We have also noted the submissions of Shri Ahuja. We are of the opinion that even in the cases and matters brought by him to our notice, it is evident that the Assessing Officer cannot brush aside the rent control legislation, in the event, it is applicable to the premises in question. Then, the Assessing Officer has to undertake the exercise contemplated by the rent control legislation for fixation of standard rent. The attempt by the Assessing Officer to override the rent control legislation and when it balances the rights between the parties has rightly been interfered with in the given case by the Appellate authority. The Assessing Officer either must undertake the exercise to fix the standard rent himself and in terms of the Maharashtra Rent Control Act, 1999 if the same is applicable or leave the parties to have it determined by the Court or Tribunal under that

Act. Until, then, he may not be justified in applying any other formula or method and determine the "fair rent" by abiding with the same. If he desires to undertake the determination himself, he will have to go by the Maharashtra Rent Control Act, 1999. Merely because the rent has not been fixed under that Act does not mean that any other determination and contrary thereto can be made by the Assessing Officer. Once again having respectfully concurred with the judgment of the Full Bench of the Delhi High Court, we need not say anything more on this issue.

53] Thus, apart from the three aspects namely of a municipal valuation, of obtaining interest free security deposit and the properties being covered by the Maharashtra Rent Control Act but no standard rent thereunder is fixed, our attention has not been invited to any other case. Suffice it to hold that in those cases and to which our attention is not invited the principles laid down in the decisions of the Hon'ble Supreme Court and referred to by the Full Bench of the Delhi High Court would govern the enquiry.

54] As a result of the above discussion, we are of the opinion that wherever the Assessing Officer has not adhered to the above principles, and his finding and conclusion has been interfered with, by the higher Appellate Authorities, the revenue cannot bring the matter to this Court as

no substantial question of law can be arising for determination and consideration of this Court. Then, the findings by the last fact finding Authority, namely the Tribunal and against the revenue shall have to be upheld as they are consistent with the facts and circumstances brought before it. If they are not vitiated by any perversity or error of law apparent on the face of the record, the appeals of the revenue cannot be entertained. They would have to be accordingly dismissed.

(B.P.COLABAWALLA, J.) **(S.C. DHARMADHIKARI, J.)**

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