IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Income Tax Appeal No. 369 of 2015
Date of Decision: 27.09.2016

Sunil Kumar Gupta ..Appellant

versus

Assistant Commissioner of Income Tax, Circle-II, Amritsar.

..Respondent

CORAM: HON'BLE MR. JUSTICE S.J.VAZIFDAR, CHIEF JUSTICE.
HON'BLE MR. JUSTICE DEEPAK SIBAL, JUDGE.

Present : Mr. Avneesh Jhingan, Advocate, for the appellant.
Mr. Denesh Goyal, Advocate, for the respondent.

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S.J.VAZIFDAR, CHIEF JUSTICE

This is an appeal against the order of the Income Tax Appellate Tribunal confirming the order of the Commissioner of Income Tax (Appeals) in respect of the issue that falls for consideration. The appeal pertains to the assessment year 2002-03.

2. The appeal is admitted on these following substantial questions of law which really raise only one point.

i) Whether in the facts and circumstances of the case the maintenance charges could be included as part of rent?

ii) Whether in the facts and circumstances of the case interpretation given to Section 23 of Income Tax Act, 1961 is correct?

iii) Whether in the facts and circumstances of the case the maintenance charges given by the sub sub licensees to builder can be included as part of rent?

iv) Whether in the facts and circumstances of the case orders Annexures A-1 to A-3 are sustainable in law?

3. The appellant is a sub-licencee of an apartment admeasuring 367 sq. feet in a commercial building. The assessee entered into a sub-sub-licence agreement dated 03.05.2000 with one M/s RSM & Company. Clause-1 of the sub-sub-licence agreement reads as under:-

> "1. That the Sub-Licencee hereby demises unto the Sub-Sub-Licencee all that the Demised Premises comprised of the area known and identified as Flat No. 412, measuring about 367 sq. ft. (super area), situated on the fourth floor of the commercial building known as World Trade Centre Barakhamba Lance, Connaught Circus, New Delhi-110001 and more specifically described in schedule I hereinbelow for the term of 2 (two) years commencing from the 1.5.2000 together with the right in the Sub-Sub-Licence and their employees and authorized agent/agents/visitors and staff to use in common with the other Sub-Sub-Licencee/occupants of the Building at all times during the terms of Sub-Sub-Licence Agreement hereby created for Office purpose connected with the Demised Premises, but not for any other purpose.
>
> (i) The main gate, doors, entrance hall, passages and the staircase and landings of and in the building leading to the Demised Premises for unrestricted ingress to and egress from the Building and the Demised Premises; and
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> (ii) The passenger lifts, provided that nothing greater in weights and bulk other than handbags, brief case and attached cases shall be taken into passenger lifts;
>
> and the Sub-Sub-Licencee paying and yielding therefore unto the Sub-Licencee during the said period of terms:-
>
> (a) Rent in respect of the Demised Premises calculated @ Rs.40/- (Rupees Forty only) per sq. ft. (Super Area) total monthly rent is Rs.14,680/- (Rupees Fourteen thousand six hundred eighty only) of the area comprised in the Demised Premises, the said rent be paid quarterly in advance. The first payment, however, will be for two months (May & June, 2000).
>
> (b) In addition to the monthly rent, monthly and proportionately for any part of the month, all maintenance charges payable to the Builders, M/s Bharat Hotels Limited, as per their current bills in respect of the Demised Premises. Presently the maintenance charges fixed by the Builders are Rs.14.22 (Rupees fourteen and paisa twenty two only) per sq. ft. per month. All reasonable and future enhancements, if any, will also be to the Sub-Sub-Licencee account. Any abnormal increase will be to the Sub-Licencee account. However, any increases in maintenance charges due to increase in electricity tariff by N.D.M.C. would be to Sub-Sub-Licencee account."

4. The question is whether the maintenance charges payable under sub-clause (b) of Clause-1 of the Sub-Sub-Licence Agreement can be included as a part of the rent.

Mr. Jhingan, learned counsel appearing on behalf of the appellant firstly contended that the maintenance charges are payable by the sub-sub-licencee directly to the builder and not to the sub-licencee i.e. the assessee.

5. This is contrary to the plain language of Clause-1. After sub-clause (ii) are the words *"and the Sub-Sub-Licencee paying and yielding thereto unto the Sub-Licencee during the said period of terms"*. This is followed by sub-clause (a) which specified the rent and sub-clause (b) which specified the maintenance charges. Sub-clauses (a) and (b), however, must be read with these words. So read it is clear that the sub-sub-licencee is to pay to the sub-licencee the maintenance charges. Sub-clause (b) cannot be read in isolation. If the words that immediately precede, sub clauses (a) and (b) are to be read as limited to clause (a), there would have been no need to identify sub-clauses (a) and (b). Sub-clause (a) would have been merged with these words and sub-clause (b) would have been an independent clause. The words in sub-clause (b) "all maintenance charges payable to the builders" identify the maintenance charges and not the payee. In other words sub-clause (b) requires the sub-sub-licencee to pay the assessee all the maintenance charges payable to the builder. It does not require the sub-sub-licencee to pay the same to the builder.

6. Mr. Jhingan submitted that as a matter of fact, the sub-sub-licencee has been paying the maintenance charges to the builder.

7. If that is so, it is pursuant to an understanding between the assessee and the sub-sub-licencee and not as per the terms of the agreement.

The sum of the rent and the maintenance charges are, therefore, payable by the sub-sub-licencee to the assessee. That then is the annual value of the property being the actual rent received or receivable by the assessee.

8. In any event the maintenance charges ought to be included as a part of the rent. Sections 22 and 23 of the Income Tax Act, 1961 as they stood at the relevant time read as under:-

> **"Income from house property.**
>
> **22.** The annual value of property consisting of any buildings or lands appurtenant thereto of which the assessee is the owner, other than such portions of such property as he may occupy for the purposes of any business or profession carried on by him the profits of which are chargeable to income-tax, shall be chargeable to income-tax under the head "Income from house property".
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> **Annual value how determined.**
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> **23.** (1) For the purposes of section 22, the annual value of any property shall be deemed to be—
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> (*a*) the sum for which the property might reasonably be expected to let from year to year; or
>
> (*b*) where the property or any part of the property is let and the actual rent received or receivable by the owner in respect thereof is in excess of the sum referred to in clause (*a*), the amount so received or receivable; or
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> (*c*) where the property or any part of the property is let and was vacant during the whole or any part of the previous year and owing to 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 :
>
> **Provided** that the taxes levied by any local authority in respect of the property shall be deducted (irrespective of the previous year in which the liability to pay such taxes was incurred by the owner according to the method of accounting regularly employed by him) in determining the annual value of the property of that previous year in which such taxes are actually paid by him.
>
> *Explanation.*—For the purposes of clause (*b*) or clause (*c*) of this sub-section, the amount of actual rent received or receivable by the owner shall not include, subject to such rules as may be made in this behalf, the amount of rent which the owner cannot realise.
>
> (2) Where the property consists of a house or part of a house which—
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> (*a*) is in the occupation of the owner for the purposes of his own residence; or
>
> (*b*) 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 other place in a building not belonging to him,
>
> the annual value of such house or part of the house shall be taken to be *nil*.
>
> (3) The provisions of sub-section (2) shall not apply if—
>
> (*a*) the house or part of the house is actually let during the whole or any part of the previous year; or
>
> (*b*) any other benefit therefrom is derived by the owner.
>
> (4) Where the property referred to in sub-section (2) consists of more than one house—
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> (*a*) the provisions of that sub-section shall apply only in respect of one of such houses, which the assessee may, at his option, specify in this behalf;
>
> (*b*) the annual value of the house or houses, other than the house in respect of which the assessee has exercised an option under clause (*a*), shall be determined under sub-section (1) as if such house or houses had been let."

The amendment is not relevant for the purpose of this appeal.

9. The ambit of the term "rent" in these sections is wide. It includes any amount which is paid in consideration of the property being let. The maintenance charges must form a part of the rent. The proviso to sub-section (2) of section 23 suggests that where the legislature intended deducting any amount in determining the annual value of the property it did so specifically. More important, it indicates that rent includes even taxes levied by local authorities. The same are however to be deducted in determining the annual value of the property of that previous year in which such taxes are actually paid by the assessee. Thus if the taxes are not paid they cannot be deducted. In that event they remain included in the annual value of the property. The proviso does not include the maintenance charges paid by the assessee.

10. If the maintenance charges are not included in the rent, it would enable an assessee to avoid paying tax on the true annual value of the property. Under section 23(1) for the purpose of section 22 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. The amount of rent would also be dependent upon the common facilities of a building. The better the facilities, qualitatively and or quantitatively, the higher the rent. It can hardly be suggested that the annual value of a property which provides several common amenities such as a swimming pool, gymnasium, security car, parking and elevators would be the same as the annual value of a property in the same area but without these facilities. The actual rent received would be much higher where the facilities are better. Section 23 provides that 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 or where the property is let, the actual rent received or receivable by the owner whichever is higher. In either case the rent that is received in respect of the premises in a building where the common amenities are better is bound to be higher than the rent that is expected to be received or is received in a building where the amenities are not as good.

12. Where the agreement provides that the owner shall pay the amounts for the common facilities, maintenance charges, outgoings etc. it is obvious and reasonable to presume that the same is factored into the rent, fee or compensation payable by the lessee or the licencee. In that event the same cannot be added to the rent agreed to be paid. However, if the maintenance charges etc. are stipulated to be payable by the licencee or the lessor it must form a part of the rent for the purpose of computing the annual value of the property.

13. A view to the contrary would enable a party to undervalue the annual value of the property for the purpose of section 23 by the simple expedient of providing for the payment of the maintenance charges etc. and the rent separately.

14. The maintenance charges must be included as part of the rent for the purpose of computing the annual value of the property. The assessee is not prejudiced thereby in any event. We are informed that the amounts received under the sub-sub-licencee had been brought under the head "Income from house property". Section 24 provides that the income chargeable under the head "Income from house property" shall be computed after making the deductions specified therein. Under clause (a) of Section 24, a sum equal to thirty percent of the annual value is liable to be deducted. The assessee has, therefore, the benefit of deductions under section 24 as well as under the proviso to section 23 of the Act.

15. In the circumstances, the questions of law are answered in favour of the revenue and against the assessee.

16. The appeal is accordingly dismissed.

(S.J.VAZIFDAR)
CHIEF JUSTICE

(DEEPAK SIBAL)
JUDGE

27.09.2016
'ravinder'

Whether speaking/reasoned	√Yes/No
Whether reportable	√Yes/No