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

INCOME TAX APPEAL NO.588 OF 2012
WITH
INCOME TAX APPEAL NO.713 OF 2012
WITH
INCOME TAX APPEAL NO.720 OF 2012
WITH
INCOME TAX APPEAL NO.721 OF 2012
WITH
INCOME TAX APPEAL NO.722 OF 2012
WITH
INCOME TAX APPEAL NO.723 OF 2012

Raj Dadarkar & Associates .. Appellant.
Vs.
ACIT – CC – 46 .. Respondent.

Mr. Nishit Gandhi i/b Mr.Sameer G. Dalal for the Appellant.
Mrs. S.V. Bharucha for the Respondent.

CORAM : S.C. DHARMADHIKARI AND
A.K. MENON, JJ.

DATED : 19TH SEPTEMBER, 2014.

P.C. :

1. These appeals under section 260A of the Income Tax Act, 1961 impugn the orders passed by the Income Tax Tribunal dated 10th September, 2009.

2. We are taking the facts and the questions of law from Income Tax Appeal No.720 of 2012 and which are referred to by Mr.Gandhi appearing for the Assessee before us. The assessment

year in question is 1999-2000. The questions of law, according to the Assessee, which are substantial have been set out at page 26. They read as under :

> "(1) Whether in the facts and the circumstances of the case, and in law, the reassessment proceedings initiated and completed under section 147 read with section 143(3) of the Act was bad in law, as the notice under section 143(2) of the Income Tax Act, 1961 was issued beyond the period of limitation provided under the proviso to section 143(2) ?
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> (2) Whether in the facts and circumstances of the case, and in law, the Tribunal erred in holding that the Appellant was owner of the shopping centre within the meaning of section 22 read with section 27 of the Income Tax Act, 1961 ?
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> (3) Whether in the facts and circumstances of the case, and in law, the Tribunal was right in holding that the income earned by the Appellant from the shopping centre was required to be taxed under the head "Income from House Property" instead of the head "Profits and Gains from the Business or Profession" as claimed by the Appellant ?
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> (4) Whether on the facts and circumstances of the case, and in law, the order of the Tribunal, confirming the action of the Respondent, is perverse inasmuch as the same is based on surmises,

> conjectures and suspicions by taking into account incorrect, irrelevant and extraneous consideration while ignoring relevant materials and considerations ?"

All arguments that have been canvassed before us by the counsel pertain to question nos.2, 3 and 4. The answers thereto decide the outcome of these appeals.

3. The basic facts according to Mr.Gandhi are not in dispute. They are that a Auction was held by the Municipal Corporation of Greater Bombay. The appellant placed its bid for the same. The auction was in relation to a immovable property. The auction enabled successful bidder/purchaser to step into the property and put up the stalls or units. These could be allotted to several vendors and businessman, who can then deal with various articles and goods. Thus, what was set up is a Municipal Market but operated privately. Mr.Gandhi submits that the understanding of the tribunal on the nature of this transaction leads to above substantial questions of law.

4. In his submission, the income derived by the assessee was and should have been taxed under the head "profits and gains from the business" and not "income from house property". In relation to this conclusion of the tribunal that the income cannot

be termed as derived from business or profession but from the house property. Mr.Gandhi had invited our attention to section 27 of the Income Tax Act, 1961 which according to him defines "owner of house property", "annual charge" etc. Mr.Gandhi submits that none of the classes and particularly clause (iiib) which is part and parcel of this section was attracted inasmuch as the Commissioner of Income Tax (Appeals) rightly held that nature of rights acquired did not constitute a lease. If what was acquired is a pure license, then, even by reference to clause (f) of section 269UA of Income Tax Act which clause must be held to be incorporated in this definition, the assessee cannot be deemed to be owner of the building or part thereof. In these circumstances the income derived could never have been taxed as income from house property. Mr. Gandhi criticised the tribunal's order as being based on surmises, conjunctures and vitiated by error of law apparent on the face of the record. In his submission the tribunal has failed to consider the tests which have been evolved by the Hon'ble Supreme Court from time to time and particularly in the decision reported in ***Associated Hotels of India Ltd. vs. R.N. Kapoor AIR 1959 SC 1262,*** for all these reasons it is submitted that the appeals be admitted.

5. Ms.Bharucha appearing for the Revenue, on the other hand, submits that pure findings of fact have been rendered by the

tribunal and as last fact finding authority it was empowered in law to do so. The order passed in Income Tax Appeal is referred by her and she submits that from the admitted facts, the transaction can safely be culled out. The transaction definitely confers rights in or with respect to any building or part thereof by virtue of the transactions which is referred in clause (f) of section 269UA in that regard. She invited our attention to paragraph 28 of the tribunal's order. The tribunal according to her, has not omitted from consideration any relevant material. The most relevant and primary material was the terms and conditions subject to which the assessee was given possession of the market area. The terms have been referred in the order itself. The terms and conditions of the auction dated 11th March, 1993 according to Ms.Bharucha clearly show that the assessee was given possession of the market area and BMC did not have possession or control of the same. The assessee was at liberty to give various stalls/shops to third parties and only restriction was that the assessee must take written permission from the Municipal Commissioner. Period for which assesee was permitted to do all this was more than 12 years. The assessee was also in-charge of day-to-day maintenance and cleanliness of the market area which was in his possession and he had to pay all taxes. In these circumstances the assessee had exclusive right of occupation of the property subject to certain restrictions. Such transaction in effect and in substance amounts to lease, according to Ms.Bharucha and therefore the tribunal's discussion with regard to the tests evolved to determine the nature of the transaction may contain certain errors or deficiencies but they are not enough to raise any substantial questions of law. She further submits that the appeals be dismissed.

6. We have with the assistance of both the counsel perused the order of the tribunal and which relies on the findings of the Commissioner of Income Tax (Appeals). We are in agreement with Ms.Bharucha that the appeals do not raise any substantial questions of law. The relevant statutory provisions are section 27(iiib) and which reads as under :

> "(iiib) a person who acquires any rights (excluding any rights by way of a lease from month to month or for a period not exceeding one year) in or with respect to any building or part thereof, by virtue of any such transaction as is referred to in clause (f) of section 269UA, shall be deemed to be the owner of that building or part thereof."

and section 269UA (f) :

> "269UA. In this Chapter unless the context otherwise requires –
>
> …. …. …..

(f) "transfer"

(i) in relation to any immovable property referred to in sub-clause (i) of clause (d), means transfer of such property by way of sale or exchange or lease for a term of not less than twelve years, and includes allowing the possession of such property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882).

(ii) in relation to any immovable property of the nature referred to in sub-clause (ii) of clause (d), means the doing of anything (whether by way of admitting as a member of or by way of transfer of shares in a co-operative society or company or other association of persons or by way of any agreement or arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, such property."

7. What we find from the record is that the terms and conditions of the auction have been referred to the agreement pursuant thereto and a copy of which was before the authorities. The assessee is a partnership firm. It was constituted under the deed of Partnership and main object was that it shall take premises on rent and sub-let them or any of business mutually agreed by the parties from time to time. The Maharashtra Housing and Area

Development Authority constructed buildings under the scheme. The buildings were thereafter managed and administered by Shyam Sunder Co-operative Society, Ram Darshan Co-operative Society and Sindhu Co-operative Society at Jariwalla compound market, Opposite Navjeevan Post Office, Lamington Road, Mumbai 400 008. There was a reservation for Municipal retail market on the plot on which MHADA had put up the construction. Therefore, MHADA handed over the ground floor (stilt portion) of the above said buildings to BMC by recovering the necessary cost. The market department of Bombay Municipal Corporation auctioned the stilt portion administering 17,925 sq. ft. located on the ground floor of the buildings developed by MHADA under PNGP scheme. This was in the year 1993. The assessee was successful bidder and was handed over possession of the said area on 28th May, 1993. This was styled as market area. The BMC also permitted sub-letting of the shops and stalls in the stilt portion vide letter dated 29th May, 1993. The assessee was permitted to carry out additions and alterations in the said portions. The terms and conditions subject to which assessee was given this area in ground floor are contained in and was to be governed by the Auction Notice/Document dated 11th March, 1993. Clause (1) provides that the area would be given on "as is where is" basis for running Departmental Store or Super Shopping Centre or similar Commercial Complex for marketable and non-marketable goods by holding public auction. Clause (3) provides that the successful bidder has to keep reserved 1/3rd of the Market area for Vegetable Retail Trade, equally, the stilt portion shall include stalls such as confectionary stalls, provision stalls, flower stalls etc. The bid charge was Rs.6 per month per sq. ft., then, clause (7) refers to the bid charges being valid for first ten years. For the succeeding ten years they shall be increased at the rate not more than one and half times of the initial charges. Clause (10) gives permission to realign or construct stalls/shops but the assessee would have to submit layout through licensed Surveyor or Architect mentioning the commodity proposed to be sold in each stall and get approval from the Deputy Municipal Commissioner. Mr.Gandhi could rely upon one of the clause (12) and which denotes that successful bidder will have no right to sell, assign, sub-let or to dispose off or part with or induct third party in possession without permission from the Municipal Commissioner. All persons who are allowed in possession by the bidder were also required to be registered with the market department. These clauses have been exclusively referred to in the order of the tribunal and particularly paragraph 15 and 16. The tribunal has not committed any error of law much less perversity in reading this document as a whole and the clauses in their entirety. The clauses read together and harmoniously point towards the assessee acquiring rights in or in respect of the building or part thereof and which rights are clearly traceable to section 269UA(f). We have reproduced those provisions only to appreciate the conclusions of the tribunal. We find that the term "transfer" as defined under section 269UA (f) is in relation to any immovable property and there are two references thereto and which are to be found from the definition of the term immovable property i.e. in section 269UA (d). The immovable property means "any land or any building or part of a building and includes, where any land or any building or part of the building is to be transferred together with any machinery, plant, furniture, fittings or other things also and any rights in or with respect to any land or any building or a part of building whether or not including any machinery, plant, furniture fittings or other things therein which has been constructed or which has to be constructed, accruing or arising from any transaction including becoming a member of the Co-operative society or acquiring shares therein but such transaction was not by way of selling, exchange or lease of such land, building or part of building. It is in these circumstances that the term "transfer" is defined in clause (f) as stated above and effect of the same may be of transferring or accepting enjoyment of the property.

8. The tribunal extensively refers to all the terms and conditions, effect and substance of the transaction to arrive at a factual conclusion that in the present case the assessee can be

termed as owner for the purposes and limited to the Income Tax Act, 1961. The income that he derives from the users or occupiers of the stalls or units in the market area is from house property. We do not see as to how the tribunal's order and above factual conclusions can be held to be vitiated because the tribunal either refers to some tests evolved by the Hon'ble Supreme Court to then arrive at the conclusion that the transaction can be termed as a lease. The confusion that is normally made and by the courts of limited jurisdiction in arriving at such factual conclusion is what would be nature of the transaction namely lease or license but that can hardly enable us to entertain and admit these appeals. We must look into the nature of the transaction, the rights that have been acquired by the assessee. The inescapable conclusion is that they are in the nature of "transfer" as defined in above clause of section 269UA (f) and in relation to immovable property. If the rights and which we have referred to have been acquired by the assessee and duration of the same, so also renewal thereof from time to time, the reciprocal obligations in the terms and conditions definitely go to show that in the given facts and circumstances he becomes owner of the immovable property. The income that he derives in relation to the house property has been classified rightly as such.

9. In the light of above factual conclusions we do not refer to any of the judgments and about which Mr.Gandhi seriously

complains that same have been omitted by the tribunal as well. The tribunal was not required to decide anything with relation to the rights and whether that can be termed as "lease" under the Transfer of Property Act, 1882 or license under Easement Act, 1952. The tribunal for the purposes of and limited to the Income Tax Act, 1961 was called upon to decide what is nature of the income that the assessee has derived, whether it is in relation to the business or whether it is on account of house property. It is for concluding this that the tribunal had to refer to the nature of rights acquired by the assessee. In such circumstances nothing can be derived either by the tests evolved in the judgments of the Supreme Court or judgment of this Court in Income Tax Appeal No.559 of 2007 and Income Tax Appeal No.686 of 2007. Those are admitted on distinct questions and which related to the undisputed position of the assessee therein being termed as "owner of the immovable property". Equally, we do not find that the order passed by this Court in Writ Petition No.726 of 2011 instituted by Assessee against the Municipal Corporation and others on 31st January, 2012 can be of any assistance. A demand notice was issued by the Corporation calling upon the assessee to pay property tax in respect of stalls. The argument of the assessee had been noted by this Court and there was clear stipulation that the tax liability vests with the Corporation. By reference to that and certain other documents, this Court concluded that the understanding between the parties has been that the tax liability vests with the Corporation. The plausible conclusion that the Corporation is owner of the property and for the purpose of payment of property taxes can therefore be of no assistance to the assessee. The nature of the rights derived from the Auction, the Agreemeny and further that the Assessee can deal with the property by inducting third parties goes to show that he is a owner thereof within the meaning of the Income Tax Act, 1961. The factual conclusion can well be held to be plausible and as arrived at in the present case.

10. For all the aforesaid reasons we do not find that the appeals raise any substantial questions of law. The appeals are dismissed. No costs.

(A.K. MENON,J.) **(S.C. DHARMADHIKARI,J.)**