

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

INCOME TAX APPEAL NO. 3424 OF 2010

Commissioner of Income-tax – 9]
Room No.315, Aayakar Bhavan,]
M.K. Road, Mumbai – 400 020.] ... Appellant

Vs

M/s. Pelican Investments Pvt. Ltd.,]
601, Sunbeam, Perry Cross Road,]
Bandra (West), Mumbai – 400 064.] ... Respondent

Mr. Vimal Gupta i/b Ms. Padma Divakar for the Appellant.

Mr. Subhash Shetty for the Respondent.

**CORAM : S.J. VAZIFDAR, &
M.S. SANKLECHA, JJ.**

TUESDAY, 21ST AUGUST, 2012

JUDGMENT : [Per S.J. Vazifdar, J.]

1. This is an appeal under section 260-A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal dated 30th October, 2009, dismissing the appellant's appeals, ITA Nos.1611/Mum/2008 and 4730/Mum/2008, pertaining to assessment

years 2004-05 and 2005-06, respectively. The present appeal pertains to ITA No.1611/Mum/2008.

2. The appeal is admitted on the following substantial questions of law and heard finally :

(A) Whether, on the facts and in the circumstances of the case, the Hon'ble Tribunal in law was right in holding that the rent and compensation of Rs.60,27,027/- received by the assessee is to be charged under the head business income and not under the head "Income from House Property" as held by the Assessing Officer in the order under section 143(3) of the Income Tax Act, 1961?

(B) Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was justified in following its orders for assessment year 2003-2004 treating the rental

income under the head “Profits and gains from business”, ignoring the provisions of section 27(iib) read with section 269 UA(f) of the Income Tax Act, 1961, according to which, the period of lease exceeding 12 years, the income is assessable under the head “Income from house property” in assessment year 2003-2004 and onwards?

The question sought to be raised in paragraph 6.3 of the appeal was not pressed.

3. The respondent - assessee filed its return of income on 29th October, 2006, declaring a total loss of Rs.48,626/-. The Assessing Officer made an order under section 143(3). The annual value under section 23(1)(a) was computed at Rs.60,27,027/-. A deduction under section 24 at 30% amounting to Rs.18,08,108/- was allowed. He, accordingly, assessed a sum of Rs.42,18,919/- to be income from house property.

4. The Commissioner of Income Tax (Appeals) allowed the respondent's appeal against the inclusion of compensation received in respect of agreements under the head "Income from house property" on the basis of the previous decision of the Commissioner of Income Tax for the assessment year 2003-04 and the fact that there were no change in circumstances since then. The Tribunal upheld the order in this regard.

5. Mr. Vimal Gupta, the learned counsel appearing on behalf of the appellant submitted that the respondent is deemed to be the owner of the property licenced to it by Hotel Leelaventure Limited as the license was for a period not less than twelve years. Accordingly, the compensation paid to the respondent by the sub-licencees constituted income from house property. He relied upon sections 22, 27(iiiib) and 269UA(d) and (f) of the Act, which read as under :-

"Income from house property.

22. The annual value of property constituting 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”.

“Owner of house property”, “annual charge, etc. defined-

27. For the purposes of section 22 to 26 —

.....

(iii-b) 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 269-UA, shall be deemed to be the owner of that building or part thereof;”

269UA — In this Chapter, unless the context otherwise requires,—

.....

(d) “immovable property” means -

(i) any land or any building or part of a building, and includes, where any land or any building or part of a building is to be transferred together with any machinery, plant, furniture, fittings or other things, such machinery, plant, furniture, fittings or other things also.

Explanation.- For the purposes of this sub-clause, “land, building, part of a building, machinery, plant, furniture, fittings or other things” include any rights therein;

(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 53-A of the Transfer of Property Act, 1882 (4 of 1882).

Explanation.—For the purposes of this sub-clause, a lease which provides for the extension of the term thereof by a further term or terms shall be deemed to be a lease for a term of not less than twelve years, if the aggregate of the term for which such lease is to be granted and the further term or terms for which it can be so extended is not less than twelve years;

.....”

6. The question is whether in the facts of this case, it can be said that the period of the licence created in favour of the respondent exceeded twelve years as contended on behalf of the appellant.

7(A) By an agreement dated 7th November, 1984, Hotel Leelaventure Limited (HLL) granted the respondent (referred to therein as the Sole Concessionaire), a licence in respect of an area admeasuring about 450 square meters on the terms and conditions stated therein. Clauses 1 and 4 (i)(a) thereof read as under :

“(1) The Hotel Company hereby gives to the Sole Concessionaire (Respondent) and the Sole Concessionaire takes from the Hotel Company on licence basis the said shopping arcade for a period of 11 years commencing from the date of occupation certificate of the shopping arcade.

.....

(4) *The Sole Concessionaire shall observe and perform the following terms and conditions and stipulations, namely :*

(i)(a) To pay to the Hotel company compensation for the said licence commencing from the date of occupation certificate, at the rate of Rs.150/- per sq. mtr. per month during the period of the licence and pro-rata compensation for any broken period, which compensation shall be paid monthly on or before the 10th day of the month following the month for which it is due and for any broken period at the end of such period.”

(B) The occupation certificate of the shopping arcade was obtained on 28th November, 1987. The agreement, therefore, came to an end on 27th November, 1998 i.e. 11 years from the date of the occupation certificate in respect of the shopping arcade.

8. It is important to note that under the agreement, the respondent was not entitled to renew the same upon the expiry of the period of 11 years from the date of the occupation certificate of the shopping arcade. It is also important to note that this agreement was entered into before the above provisions of the Act came into force. Section 27(iiiib) and 269UA(f) came into force with effect from 1st April, 1988 and 1st October, 1996, respectively. It cannot, therefore, be said that

the agreement was structured by the parties thereto to get over the said provisions.

9. Thereafter, the respondent and HLL entered into a fresh agreement dated 24th January, 1999, by which HLL granted the respondent (referred to therein as the Sole Concessionaire) a licence in respect of the same premises. The last recital and clauses 1 and 4(i)

(a) of the agreement read as follows :

“AND WHEREAS, the parties have agreed to enter into a further agreement w.e.f. 28th November, 1998.”

“(1) The Hotel Company hereby gives and the Sole Concessionaire and the Sole Concessionaire takes from the Hotel Company on licence basis the said shopping arcade for a period of 10 years commencing from 28th November, 1998.

.....

(4) The Sole Concessionaire shall observe and perform the following terms and conditions and stipulations, namely :

(i)(a) To pay to the Hotel company compensation for a period of three years commencing upto 31/03/2001 at th rate of Rs.150/- per sq. mtr. per moth and thereafter for a period upto 28th November, 2008 at the rate of Rs.250/- per sq. mtr., per month and pro-rata compensation for any broken period, which compensation shall be paid monthly on or before the 10th day of the month following the month for which it

is due and for any broken period at the end of such period.”

The duration of this agreement was 10 years. The consideration was also substantially enhanced.

10. Mr. Gupta submitted that the sum of the duration of the licence under the two agreements ought to be considered for the purpose of section 269UA(f). If that was so, the duration of the licence would be for 21 years. The above provisions would then stand attracted.

11. The submission, however, is not well founded. Firstly, it was not contended that the agreements were a camouflage to conceal a licence of twenty one years or to circumvent the said provisions of the Act. Indeed, that could not have been the case. As we noted earlier, the first agreement was entered into on 7th November, 1984 before the provisions came into force. Section 27(iii b) and 269UA(f) came into force with effect from 1st April, 1988 and 1st October, 1996, respectively.

12. There was no connection whatsoever between the two agreements. The appellant has not indicated any factors which would establish any connection between the two agreements. They have not been able to indicate any factors on the basis of the agreements or even otherwise which would indicate that the latter agreement was a continuation of the first agreement. Nor have they been able to establish that at the time of entering into the first agreement, the parties had agreed or even contemplated entering into a further agreement for any duration at all.

13. On the other hand, the agreements establish beyond doubt that they are separate and distinct. For instance, neither the respondent nor HLL had a right to renew the first agreement. This is the clearest indication that the subsequent agreement was separate and distinct and was entered into on the basis of fresh negotiations.

14. The important terms and conditions of the agreements viz. the duration and the consideration are also different. The duration of the licence under the first agreement was 11 years, whereas it is for a

period of 10 years under the subsequent agreement. More important is the fact that the consideration under the second agreement is substantially higher than under the first agreement. It is obvious that the consideration was negotiated afresh. There is not even a whisper in the first agreement about any subsequent agreement.

15. Section 269UA(f) does not operate differently merely because the licensee under different agreements is the same. It is always open to a licensor and a licensee to enter into different agreements for different periods. There is nothing in the above provisions that warrants the periods under the various agreements being clubbed.

16. The mere fact that the same licensee continues under consecutive agreements would make no difference. If a licensee enters into a fresh agreement upon the expiry of the earlier agreement, it would be pointless his vacating the premises and immediately reoccupying it. That would be an unnecessary, hollow formality. His not doing so cannot constitute two or more distinct agreements to be a single composite agreement even for the purpose of computing the

duration of the period of the licence.

17. It would be a different matter altogether if it were established that the different licence agreements were, in fact, a camouflage for one composite agreement for a period of 12 years or more. That, at the cost of repetition, is neither the appellant's case nor established on the basis of the record. The record, in fact, indicates the contrary.

18. Added to this is the fact that the department had accepted the respondent's case throughout. It is only for the assessment years 2003-04 onwards that the present contention had been raised. There were, as noted by the Commissioner of Income Tax (Appeals), no change in circumstances which would warrant a different view being taken.

19. The questions are, therefore, answered in favour of the respondent – assessee.

20. In the circumstances, the appeal is dismissed. There shall be no order as to costs.

M.S. SANKLECHA, J.

S.J. VAZIFDAR, J.