(2007) 09 JH CK 0064

Jharkhand High Court

Case No: Tax Case No. 6 of 1998

Commissioner of Income Tax		APPELLANT
	Vs	
Smt. Bhagwani Devi		RESPONDENT

Date of Decision: Sept. 18, 2007

Acts Referred:

- Income Tax Act, 1961 - Section 143(3), 2(2), 22, 23, 23(1)

Citation: (2008) 175 TAXMAN 202

Hon'ble Judges: M.Y. Eqbal, J; Dabbiru Ganeshrao Patnaik, J

Bench: Division Bench

Advocate: Binod Poddar, for the Appellant; K.K. Jhunjhunwala, for the Respondent

Judgement

M.Y. Eqbal, J.
This is a reference u/s 256(1) of the income tax Act, 1961 whereby the following questions of law have been referred to this Court :--

1. Whether, on the facts and circumstances of the case and in law, the learned Tribunal was justified in deleting the addition made under the head "Income from house property" arising out of determining the annual value in respect of the portion of the house property rented out to M/s. Wool House on the basis of the rent received in respect of similar portion of the house property rented out to a third party?

2. Whether, on the facts and circumstances of the case and in law, the learned Tribunal was justified in directing that annual value of the property in respect of a portion rented to M/s. Wool House should be determined as actual rent received from M/s. Wool House, when because of the close relationship between the assessee and M/s. Wool House, the annual value should be determined on the consideration of rent receivable indicated by the rent received by the assessee from a similar portion of the building from a third party?

3. Whether, on the facts and circumstances of the case and in law, the learned Tribunal was justified in holding that the provisions of section 23(1)(b) would be applicable and reasonableness of rent agreed upon could have been examined when the rent was initially fixed, but not subsequently, considering the fact that each year''s assessment proceeding is separate and that annual value of a house property is to be determined separately each year in accordance with the provisions of the income tax Act?

The assessee owns a house property in Main Road, Ranchi. She received rent income of Rs. 1,06,800 from the tenant, namely, Canara Bank, for the 1st and 2nd floors of the building and Rs. 4,800 from M/s. Wool House for the underground portion, ground floor and mezzanine floor of the building. The assessee alleged to have received Rs. 4,800 being an annual rent from the tenant M/s. Wool House. The Assessing Officer held that for the purpose of determination of annual value, the rent received should not be taken into consideration as the assessee herself is a partner in M/s. Wool House and M/s. Wool House is a tenant in the building for more than 25 years, hence, at least, the rent which is being received from Canara Bank for the 1st and 2nd floors should have been rent for the portion occupied by M/s. Wool House. Consequently, the Assessing Officer determined the rent of the portion of the building occupied by M/s. Wool House at the same rate of rent received from Canara Bank in respect of the 1st and 2nd floors of the building premises. Accordingly, assessment was made u/s 143(3) of the said Act.

2. Aggrieved by the said order of assessment, the assessee preferred an appeal before the CIT(A). The appellate authority was of the view that there was no basis for raising the rent income on the ground that the higher rent was being received from other tenants. The appellate authority further held that the Assessing Officer should have considered that M/s. Wool House was an old tenant and that the rent was being enhanced from time to time. Consequently, the assessment order was set aside by the CIT(A).

3. Against the said order, the revenue preferred second appeal before the Tribunal. The Tribunal considering the provisions of section 23(1)(a) and section 23(1)(b) of the Act, held that sub-section (1)(b) of section 23 will apply so far the premises in occupation of the old tenant Wool House is concerned. The Tribunal, therefore, held that the CIT(A) rightly deleted the addition under the head "Income from house property" by estimating the higher rent. This is how reference has been made u/s 256(1) of the Act to this Court for answering the questions quoted hereinabove.

4. Mr. Binod Poddar, learned senior counsel appearing for the assessee, firstly, submitted that the tenanted premises in occupation of M/s. Wool House is a very old tenancy since last 25 years. The rent was determined at the letting out time on the basis of cost of construction at that time. The cost of construction at the time when the tenanted premises was let out to the said firm M/s. Wool House was very much lower as compared to that when the property was let out to Canara Bank. Learned counsel submitted that the assessee cannot unilaterally enhance the rent because enhancement was subject to an agreement with the tenant and in the absence of fair rent fixed under the provisions of the

Bihar Building (Lease, Rent and Eviction) Control Act, 1947, the rent has to be co-related with the municipal valuation and tax thereon. Learned counsel further submitted that the provisions of section 23(1)(b) would be applicable when the rent was initially fixed sometimes 25 years back. Only during that period the rent agreed upon could have been examined in the light of the provisions of section 23, but not subsequently because the assessee has no unilateral power to enhance the rent. Learned counsel lastly submitted that the provisions of section 23(1)(b) have to be applied in a fair and reasonable manner keeping in view the facts and circumstances of the case. If the provisions are applied in a mechanical way disregarding the facts and circumstances of the case, then the Assessing Officer will have to determine the rent every year because the market rent fluctuates year to year. Learned counsel put heavy reliance on the decision of the Supreme Court in Mrs. Shiela Kaushish Vs. Commissioner of Income Tax, Delhi, .

5. Mr. Jhunjhunwala, learned counsel appearing for the revenue, on the other hand, submitted that the assessee herself is a tenant of the firm M/s. Wool House and the entire ground floor, underground portion and mezzanine floor are in occupation of the firm at an annual rent of Rs. 4,800, i.e., Rs. 400 per month. Learned counsel submitted that the expected rent which the assessee can receive from the portion in occupation of M/s. Wool House cannot and shall not be less than the amount of rent being paid by Canara Bank.

6. Before appreciating the rival contentions of the parties, I would, firstly, like to refer the relevant provisions of the Act. Section 22 of the Act deals with the provision with regard to charging of income tax under the head "Income from house property". Section 22 reads as under :

The annual value of property consisting of any building 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".

7. From a bare perusal of the aforesaid provision, it is manifestly clear that the actual value of the property consisting of any building or lands appurtenant thereto of which the assessee is the owner, shall be chargeable to income tax under the heading "Income from house property". Section 23 lays down the procedure as to how the annual value of the property shall be determined. Section 23 reads as under :--

(1) For the purposes of section 22, the annual value of any property shall be deemed to be--

(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

(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--

(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--

(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.

8. The term "annual value" has been defined in section 2(2) of the income tax Act, 1961, as under :--

2(2) "annual value" in relation to any property, means its annual value as determined u/s 23.

9. Section 23, as noticed above, inter alia, provides that annual value of any 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 or part of the property is let and the actual rent received or receivable by the owner in respect thereof.

10. The question as to how the annual value of the property shall be determined for payment of tax has been considered by the Supreme Court in a catena of decisions, some of those are referred hereinbelow.

11. In the case of New Delhi Municipal Committee Vs. M.N. Soi and Another, , the question that came up for consideration before the Supreme Court was as to what should be the criteria for determining the annual value of the property for the purpose of payment of property tax. Their Lordships observed :--

It was held in The Corporation of Calcutta Vs. Sm. Padma Debi and Others, , that it was not the actual rent received by the landlord but the "hypothetical rent which can reasonably be expected if the building is to be let" which has to be the legal yardstick of a "reasonable expectation" in an "open market". It was explained:

... an open market cannot include a "black market", a term euphemistically used to commercial transactions entered into between parties in defiance of law.

11. Thus, whatever may be our views on the reasonableness of tying down assessment, for the purposes of rating, to the concept of a rent which has been held to be fair rent in the past but does not bear a real relationship to the prevailing conditions of the market for accommodation if it was uncontrolled, we find it impossible to get over the ratio decidendi of this Court in Smt. Padma Debi"s case (supra), which we are bound to follow.

This was that, if a rent which is higher than that which can be legally demanded by the landlord and actually paid by a tenant, despite the fact that such violation of the restriction on rent chargeable by law is visited by penal consequences, the municipal authorities cannot take advantage of this defiance of the law by the landlord. Rating cannot operate as a mode of sharing the benefits of illegal rack renting indulged in by rapacious landlords for whose activities the law prescribes condign punishment.

12. Cases were referred to before us by Mr. S.T. Desai where income tax had to be paid on income illegally made even by indulging in criminal activities. In those cases, however, the basis of taxation was the actual income and not determination of what a prudent man could reasonably do to get the income. It is certainly no part of prudence for a landlord to extract higher rent than what law prescribing restrictions of rent, by rent control legislation, enjoins and then visits their infringement with penal consequences. Hence, in the case before us, the prudence of the landlord has to be assumed and judged by

normal standards to determine his "reasonable expectation". This, we think, was the ratio decidendi of Smt. Padma Debi"s case (supra), which was decided as long ago as 1962. If the law has remained unchanged despite that pronouncement by this Court, of which the law-making authorities must be deemed to be cognizant, the presumption would be that the intention, from allowing the state of the law so declared to continue, is to let rating be governed by the fixation of rent by control authorities and not by the test of actual income derived by the landlord. In other words, the concept of an "open market" applicable to such cases is not one where the landlord is absolutely free to let to anybody at any rent he can obtain and where the tenant has the corresponding freedom to offer anything he likes for any accommodation he may want to hire. As we know, the right to offer many things one possesses for either sale or hire as well as the freedom to purchase or to hire them is hedged round today with conditions imposed by law. The concept of this restricted "open market", if one may juxtapose such antithetical concepts, is well established today. The area of the "open market" is circumscribed by law. It is within this restricted area that the reasonable man"s expectations must be deemed to operate even if such a concept seems to import an element of unreality into the field of rating Legal norms often savour of some artificiality.

12. In the case of Dr. Balbir Singh v. Municipal Corpn. of Delhi [1985] 152 ITR 388 1 (SC) a similar question arose for consideration as to how value of the property shall be determined for the purpose of payment of property tax. Their Lordships observed :

It will thus be seen that under the provisions of the Delhi Municipal Corporation Act, 1957, the criteria for determining rateable value of a building is the annual rent at which such building might reasonably be expected to be let from year to year less certain deductions which are not material for our purpose. The word "reasonably" in this definition is very important. What the owner might reasonably expect to get from a hypothetical tenant, if the building were let from year to year, affords the statutory yardstick for determining the rateable value. Now, what is reasonable is a question of fact and it depends on the facts and circumstances of a given situation. Ordinarily, "a bargain between a willing lessor and a willing lessee uninfluenced by any extraneous circumstances may afford a guiding test of reasonableness" and, in normal circumstances the actual rent payable by a tenant to the landlord would afford reliable evidence of what the landlord may reasonably expect to get from the hypothetical tenant, unless the rent is inflated or depressed by reason of extraneous considerations such as relationship, expectation of some other benefit, etc. There would ordinarily be a close approximation between the actual rent received by the landlord and the rent which he might reasonably expect to receive from a hypothetical tenant. But in the case of a building subject to rent control legislation, this approximation may and often does get displaced, because under rent control legislation, the landlord cannot claim to recover from the tenant anything more than the standard rent and his reasonable expectation must, therefore, be limited by the measure of the standard rent lawfully recoverable by him. There are several decisions where the impact of rent control legislation on the determination of rateable value has been considered by this Court and

the latest amongst such decisions is that in Dewan Daulat Rai Kapoor and Others Vs. New Delhi Municipal Committee and Others, . This decision has reviewed all the earlier decisions given by this Court and as of date has spoken the last word on the subject so far as this Court is concerned and, hence, it would be instructive and helpful to refer to it in some detail." (p. 399)

Their Lordships further observed :

We may now turn to consider the second category of premises in regard to which the rateable value is required to be determined. This category comprises premises which are partly self-occupied and partly tenanted.

Now, as we have pointed out above, it is the premises as a whole which are liable to be assessed to property tax and not different parts of the premises as distinct and separate units. But while assessing the rateable value of the premises on the basis of the rent which the owner may reasonably expect to get if the premises are let out, it cannot be overlooked that where the premises consist of different parts which are intended to be occupied as distinct and separate units, the hypothetical tenancy which would have to be considered would be the hypothetical tenancy of each part as a distinct and separate unit of occupation and the sum total of the rent reasonably expected from a hypothetical tenant in respect of each distinct and separate unit would represent the rateable value of the premises. Now obviously the rent which the owner of the premises may reasonably expect to receive in respect of each distinct and separate unit cannot obviously exceed the standard rent of such unit and the assessing authorities would therefore have to determine the standard rent with a view to fixing the upper limit of the rent which can reasonably be expected by the owner on letting out such unit to a hypothetical tenant. How is this to be done ?" (p. 411)

13. In another case Dewan Daulat Rai Kapoor and Others Vs. New Delhi Municipal Committee and Others, , the question that fell before the Supreme Court was relating to the assessment of annual value for levy of house tax where the building is governed by the provisions of the rent control legislation but the standard rent has not been fixed. Their Lordships observed :

But more than the decision in the Life Insurance''s case it is the Guntur Municipal Council''s case (1970) 2 SCR 423, which is nearest to the present cases and is almost indistinguishable. In that case also, as in the present cases, the standard rent of the building was not fixed by the Controller and under the Andhra Pradesh Rent Act, which applied in the town of Guntur, in the absence of fixation of the fair rent, it was lawfully competent to the landlord to recover rent in excess of the fair rent determinable under that Act. Moreover, the Andhra Pradesh Rent Act did not prescribe any clear-cut formula to be applied mechanically for statutorily determining the standard rent, but it was left to the Controller to fix the standard rent having regard to, (a) the prevailing rates of rent in the locality for the same or similar accommodation in similar circumstances during the 12

months prior to 5-4-1944; (b) the rental value entered in the property tax assessment book of the concerned local authority relating to the period mentioned in clauses (a) and (e) and the circumstances of the case, including any amount paid by the tenant by way of premium or any other like sum in addition to rent after 5-4-1944, with a provision for allowance of increase depending on the quantum of the rent so arrived at. The discretion left to the Controller to fix the fair rent was thus much larger than that under the Delhi Rent Control Act, 1958, and yet it was held that, even though the fair rent was not fixed by the Controller, the annual value was limited by the measure of the fair rent determinable under the Act. The view taken was that there was no material distinction between buildings, fair rent of which has been actually fixed by the Controller, and those in respect of which no such rent has been fixed and even if the fair rent has not been fixed by the Controller, the upper limit of the fair rent payable in accordance with the principles laid down in the Act is bound to enter into the determination of the rent which the landlord could reasonably expect to receive from a hypothetical tenant. The principle of this decision applies wholly and completely in the present cases and, following that principle, it must be held that the annual value of a building governed by the Delhi Rent Control Act, 1958, must be limited by the measure of standard rent determinable under that Act. The landlord cannot reasonably expect to get more rent than the standard rent payable in accordance with the principles laid down in the Delhi Rent Control Act, 1958. It is true that the standard rent of the building not having been fixed by the Controller, the assessing authority would have to arrive at its own figure of standard rent by applying the principles laid down in the Delhi Rent Control Act, 1958, for determination of standard rent, but that is a task which the assessing authority would have to perform as a part of the process of assessment and in the Guntur Municipal Council"s case (supra), this Court has said that it is not a task foreign to the function of assessment and has to be carried out by the assessing authority. When the assessing authority arrives at its own figure of standard rent by applying the principles laid down in the Act, it does not, in any way, usurp the function of the Controller, because it does not fix the standard rent which would be binding on the landlord and the tenant, which can be done only by the Controller under the Act, but it merely arrives at its own estimate of standard rent for the purpose of determining the annual value of the building. That is a perfectly legitimate function within the scope of the jurisdiction of the assessing authority." (p. 714)

14. In the case of Bhagwant Rai and others Vs. State of Punjab and others, , the fact of the case was that the appellant was having a house in Sangrur. For the assessment year 1987-88, the respondents have assessed the rateable value of the house at Rs. 1,50,472.50 after giving standard deductions under the Punjab Municipal Act, 1911. The basis on which the property was assessed was the rent being received by the appellant from State Bank of India to whom they had let out at Rs. 12,687 per month. The question fell for consideration was whether the actual rent received by the appellant from the tenant would be the measure for determining annual value. The Supreme Court, after considering the similar decisions in the case of M.N. Soi (supra) and in the case of Dr. Balbir Singh (supra), held :

Thus, it is settled law that the actual rent received from a tenant is not the measure for determination of the annual rateable value, but the reasonable standard rent expected to be received under the relevant Rent Act. The view taken by the authorities is, therefore, clearly illegal." (p. 442)

15. Mr. Poddar put heavy reliance on the decision of the Supreme Court in the case of Sheila Kaushish (supra). The fact of the case was that the assessee constructed a warehouse in Delhi sometime in 1961 at a total cost of Rs. 4,13,000. The warehouse consisted of two portions on the ground floor, one on the North and the other on the South and also a mezzanine floor and a first floor. On 19-3-1962, the assessee let out the whole of the first floor to the American Embassy at the rent of Rs. 5,810 per month and subsequently on 1-4-1964, she let out the Northern portion of the ground floor together with the mezzanine floor to the same tenant at the rent of Rs. 6,907 per month and on 7-12-1964, the Northern portion of the ground floor was let out to the same tenant at the rent of Rs. 6,640 per month. Thus, the entire warehouse was let out by the assessee to the American Embassy with different portions let out under different tenancies commencing on different dates. On 17-7-1967, however, a new lease was entered into between the assessee and the American Embassy for letting out of the entire warehouse at the rate of Rs. 34,797 per month and this lease came into effect from 1-4-1968. The assessee thus started receiving rent at the rate of Rs. 34,797 per month in respect of the entire warehouse from 1-4-1968. The question arose in the course of assessment of the assessee to income tax for the assessment years 1969-70 and 1970-71 as to how the annual value of the warehouse should be determined for the purpose of chargeability to income tax under the head "Income from house property". The Supreme Court considered the relevant provisions of the Delhi Rent Control Act vis-a-vis the income tax Act and held that even if the standard rent of the building has not been fixed by the controller u/s 9 of the Act, the annual value of the building u/s 23(1) must be held to be standard rent determined under the provisions of the Rent Act and not actual rent recovered by the landlord from the tenant. Their Lordships of the Supreme Court held :

Though two questions have been formulated by this Court as arising out of the order of the Tribunal dated 28-9-1973, it is the first which really formed the subject-matter of controversy between the parties and since, in our view, that question has to be answered in favour of the assessee, it is not necessary to embark upon a consideration of the second question. So far as the first question is concerned, it stands concluded by the recent decision of this Court in Dewan Daulat Rai Kapoor and Others Vs. New Delhi Municipal Committee and Others, . There were three appeals decided by a common judgment in that case and the question which arose for determination in these appeals was as to how the annual value of a building should be determined for levy of house tax where the building is governed by the provisions of the Rent Act, but the standard rent has not yet been fixed. One of these appeals related to a case where the building was situate within the jurisdiction of the New Delhi Municipal Committee and was liable to be assessed to house tax under the Punjab Municipal Act, 1911, while the other two related

to cases where the building was situate within the limit of the Corporation of Delhi and was assessable to house tax under the Delhi Municipal Corporation Act, 1957. The house tax under both statutes was levied with reference to the ''annual value'' of the building. The ''annual value'' was defined in both statutes in the same terms, barring a second proviso which occurred in section 116 of the Delhi Municipal Corporation Act, 1957, but was absent in section 3(1)(b) of the Punjab Municipal Act, 1911. This proviso was, however, not material as it dealt with a case where the standard rent was fixed under the provisions of the Rent Act, while in none of the cases before the Court was the standard rent fixed in respect of the building involved in such case. According to the definition given in both statutes, the ''annual value'' of a building meant the gross annual rent at which the building might reasonably be expected to let from year to year. The controversy between the parties centered round the question as to what is the true meaning and effect of the expression ''the gross annual rent at which such house or building... may reasonably be expected to let from year to year'' occurring in the definition in both statutes. The argument of the municipal authorities was that since the standard rent of the building was not fixed by the Controller u/s 9 of the Rent Act in any of the cases before the Court and in each of the cases the period of limitation prescribed by section 12 of the Rent Act for making an application for fixation of the standard rent had expired, the landlord in each case was entitled to continue to receive the contractual rent from the tenant without any legal impediment and hence the annual value of the building was not limited to the standard rent determinable in accordance with the principles laid down in the Rent Act, but was liable to be assessed by reference to the contractual rent recoverable by the landlord from the tenant. The municipal authorities urged that if it was not penal for the landlord to receive the contractual rent from the tenant, even if it be higher than the standard rent determinable under the provisions of the Rent Act, it would not be incorrect to say that the landlord could reasonably expect to let the building at the contractual rent and the contractual rent therefore provided a correct measure for determination of the annual value of the building. This argument was however rejected by the Court and it was held that even if the standard rent of a building has not been fixed by the Controller u/s 9 of the Rent Act, the landlord cannot reasonably expect to receive from a hypothetical tenant anything more than the standard rent determinable under the provisions of the Rent Act and this would be so equally whether the building has been let out to a tenant who has lost his right to apply for fixation for the standard rent by the reason of expiration of the period of limitation prescribed by section 12 of the Rent Act or the building is self-occupied by the owner. Therefore, in either case, according to the definition of ''annual value'' given in both statutes, the standard rent determinable under the provisions of the Rent Act and not the actual rent received by the landlord from the tenant would constitute the correct measure of the annual value of the building. The Court pointed out that in each case the assessing authority would have to arrive at its own figure of the standard rent by applying the principles laid down in the Rent Act for determination of the standard rent and determine the annual value of the building on the basis of such figure of the standard rent. The Court, on this view, negatived the attempt of the municipal authorities in each of the cases to determine the annual value of the

building on the basis of the actual rent received by the landlord and observed that the annual value of the building must be held to be limited by the measure of the standard rent determinable on the principles laid down in the Rent Act and it could not exceed such measure of the standard rent. Now this was a decision given on the interpretation of the definition of ''annual value'' in the Delhi Municipal Corporation Act, 1957, and the Punjab Municipal Act, 1911, for the purpose of levy of house tax, but it would be equally applicable in interpreting the definitions of ''annual value'' in sub-section (1) of section 23 of the income tax Act, 1961, because these definitions are in identical terms and it is impossible to distinguish the definition of ''annual value'' in sub-section (1) of section 23 of the income tax Act, 1961, from the definition of that term in the Delhi Municipal Corporation Act, 1957, and the Punjab Municipal Act, 1911. We must therefore hold, on an identical line of reasoning, that even if the standard rent of a building has not been fixed by the Controller u/s 9 of the Rent Act and the period of limitation prescribed by section 12 of the Rent Act for making an application for fixation of the standard rent having expired, it is no longer competent to the tenant to have the standard rent of the building fixed; the annual value of the building according to the definition given in sub-section (1) of section 23 of the income tax Act, 1961, must be held to be the standard rent determinable under the provisions of the Rent Act and not the actual rent received by the landlord from the tenant. This interpretation which we are placing on the language of sub-section (1) of section 23 of the income tax Act, 1961, may be regarded as having received legislative approval, for, we find that by section 6 of the Taxation Laws (Amendment) Act, 1975, sub-section (1) of section 23 has been amended and it has now been made clear by the introduction of clause (b) in that sub-section that where the property is let and the annual rent received or receivable by the owner in respect thereof is in excess of the sum for which the property might reasonably be expected to let from year to year, the amount so received or receivable shall be deemed to be the annual value of the property. The newly added clause (b) clearly postulates that the sum for which a building might reasonably be expected to let from year to year may be less than the actual amount received or receivable by the landlord from the tenant. We are, therefore, of the view that in the present case the standard rent determinable under the provisions of the Rent Act must be taken to be the annual value within the meaning of sub-section (1) of section 23 of the income tax Act, 1961, and the actual rent received by the assessee from the American Embassy cannot of itself be taken as representing the correct measure of the annual value.

We must therefore address ourselves to the question as to what would be the standard rent of the warehouse determinable under the provisions of the Rent Act for the assessment years 1969-70 and 1970-71 the relevant accounting years being 1-4-1968 to 31-3-1969, and 1-4-1969 to 31-3-1970. Now ''standard rent'' is defined in section 2(k) to mean the standard rent referred to in section 6 or where the standard rent has been increased u/s 7, such increased rent. Section 6 lays down different formulae for determination of standard rent according to different situations. Clause (A) of sub-section (1) enacts provisions for determination of standard rent in case of residential premises,

but we need not refer to those provisions, since we are concerned in the present case not with residential premises but with a warehouse which constitutes non-residential premises. The provisions applicable for determination of the standard rent in the case of non-residential premises are set out in clause (B) of sub-section (1) and there also, we are concerned only with sub-clause (2) because the warehouse was admittedly let out for the first time after 2-6-1944. Since the standard rent of the warehouse was not at any time fixed under the Delhi and Ajmer Merwara Rent Control Act, 1947, or the Delhi and Ajmer Rent Control Act, 1952, the standard rent was liable to be determined under para (b) of sub-clause (2) which provides that "the rent calculated on the basis of seven and one half per cent per annum of the aggregate amount of the reasonable cost of construction and the market price on the land comprised in the premises on the date of the commencement of the construction" shall be taken to be the standard rent of the premises. There is a proviso to this para which says that "where the rent so calculated exceeds twelve hundred rupees per annum, this clause shall have effect as if for the words "seven and one half per cent" the words "eight and five-eights per cent" had been substituted." But all these provisions for determination of standard rent are subject to the overriding provision enacted in sub-section (2) which provides in clause (b), which is the clause applicable in the present case since the warehouse was constructed on or after 19-6-1955, that in case of such premises..... "the annual rent calculated with reference to the rent agreed upon between the landlord and the tenant when such premises were first let out shall be deemed to be the standard rent for a period of five years from the date of such letting out". Now, the first floor of the warehouse was first let out at the rent of the Rs. 5,810 per month from 19-3-1962, and, therefore, under clause (b) of sub-section (2) the rent of Rs. 5,810 per month would be the standard rent of the first floor of the warehouse for the period of five years from 19-3-1962, up to 18-3-1967, and thereafter the standard rent would have to be determined under para (b) sub-clause (2) of clause (B) of sub-section (1) and this latter figure would represent the standard rent of the warehouse determinable under the provisions of the Rent Act for the accounting years 1-4-1968 to 31-3-1969, and 1-4-1969 to 31-3-1970. The next portion of the warehouse let out to the American Embassy was the Northern portion of the ground floor together with the mezzanine floor for the period of five years from 1-4-1964, up to 31-3-1969, under clause (b) of sub-section (2) and thereafter it would have to be determined under para (b) of sub-clause (2) of clause (B) of sub-section (1). Thus, for the accounting year 1-4-1968 to 31-3-1969, the standard rent of the Northern portion of the ground floor and the mezzanine floor determinable under the provisions of the Rent Act would be Rs. 6,907 per month while for the accounting year 1-4-1969 to 31-3-1970, the standard rent would be that determinable under para (b) of sub-clause (2) of clause (B) of sub-section (1). That leaves the Southern portion of the ground floor which was first let out to the American Embassy at the rent of Rs. 6,640 per month from 7-12-1964, and according to clause (b) of sub-section (2), the standard rent of this portion would be Rs. 6,640 per month for the period of five years from 7-12-1964, up to 6-12-1969, and thereafter it would be determinable under para (b) of sub-clause (2) of clause (B) of sub-section (1). Thus, for the accounting years 1-4-1968 to 31-3-1969, and 1-4-1969 to 6-12-1969, the

standard rent of the Southern portion of the ground floor determinable under the provisions of the Rent Act would be Rs. 6,640 per month, while for the remaining portion of the accounting year from 7-12-1969 to 31-3-1970, the standard rent would be determinable under para (b) of sub-clause (2) of clause (B) of sub-section (1). The annual value of the warehouse for the purpose of chargeability to income tax for the assessment years 1969-70 and 1970-71 would have to be determined on the basis of the standard rent of different portions of the warehouse determinable under clause (b) of sub-section (2) and para (b) of sub-clause (2) of clause (B) of sub-section (1) of section 6 of the Rent Act as discussed above." (p. 440)

16. In the case of Shri Bipinbhai Vadilal Family Trust (No. 1) v. CIT [1994] 208 ITR 1005 1 (Guj.), a similar question came before the Gujarat High Court. In that case, property was gifted to a family trust and its value was shown as Rs. 2,15,000 in the gift deed. Within a few days it was let out to the brother of the settlor on a rent of Rs. 500 per month. The ITO took into consideration the location of the property, the built-up area of the bungalow, the area of the plot in which the bungalow was built-up, rise in price of the land and building and non-availability of such building and fixed rent of the building for the purpose of determining the annual value. The matter was ultimately referred to the High Court u/s 256(1) for opinion. The High Court answering the reference in favour of the revenue held as under :

Admittedly, Bipinbhai had, by indenture dated 25-3-1971, settled a trust appointing his wife and one practising advocate as the trustees. On 29-3-1971, the said Bipinbhai made a gift of the said bungalow in favour of the trustees so as to form part of the initially settled trust property. Admittedly, the value of the said property was shown therein as Rs. 2,15,000. It appears that immediately thereafter, the property was let out on 1-4-1971, to the brother of the settlor, one Suhas Vadilal, for a sum of Rs. 500 per month. Admittedly, no lease deed or rent deed was executed in that connection. According to the assessee, on the basis of the rent agreed to be paid by Suhas Vadilal, the annual letting value of the property could be computed at Rs. 6,000 only. It has been found by the Tribunal that the agreed rent of Rs. 500 was just one-third of the expected monthly rent of Rs. 1,500. There are various factors which affect the rental of premises and no hard and fast rule can be laid down for all cases. The criterion of reasonable return to the landlord from the property would be a fair criterion and the percentage of return on the value of the property adopted by the Tribunal cannot be said to be in any manner unjust or improper. The authorities have valued the property in question in its actual physical condition taking into account all the relevant factors which would have a bearing on the annual value of the property. Having regard to the facts and circumstances it cannot be said that the finding that the rent of Rs. 500 per month was nominal, is in any way perverse or unreasonable. On the basis of the report of the approved valuer and taking into account other relevant factor, the income tax Officer had arrived at Rs. 18,000 to be the annual value of the property. The same figure is arrived at by the Tribunal even by computation on the basis of annual return at the rate of 8.4 per cent. In our opinion, the authorities have arrived at a

correct conclusion as regards the annual value of the property and the finding would be essentially a finding of fact.

In view of the above discussion, the questions referred to us are answered in the affirmative, in favour of the revenue and against the assessee." (p. 1008)

17. Now, I shall discuss some of the relevant provisions of the rent control legislation applicable in the State of Bihar and the State of Jharkhand called as "Jharkhand Building (Lease, Rent and Eviction) Control Act, 2000". Section 5 of the Act lays down the provisions of determination of fair rent of buildings in occupation of tenants. Section 5 reads as under :

5. Determination of fair rent of buildings in occupation of tenants. --(1) When, on application by the landlord or by the tenant in possession of a building or otherwise, the Controller has reason to believe that the rent of that building is low or excessive, he shall hold a summary inquiry and record a finding.

(2) If, on a consideration of all the circumstances of the case, including any amount paid by the tenant by way of premium or any other like sum in addition to the rent, the Controller is satisfied that the rent of the building is low or excessive he shall determine the fair rent for such building.

18. Section 6 of the Act prescribes procedure of determination of fair rent of buildings not in occupation of tenants. Section 6 reads as under :

6. Determination of fair rent of buildings not in occupation of tenants. --The Controller may, on his own motion, and shall on the application of the landlord or a prospective tenant and after making such inquiry, as he may think fit, determine the fair rent for any building not in the occupation of a tenant.

19. Section 7 of the Act confers power to the Controller to redetermine the fair rent in certain cases. Section 7 reads as under :

7. Redetermination of fair rent in certain cases.--(1) If at any time after the fair rent of a building has been determined u/s 5 or 6 it appears to the Controller that subsequent to such determination some addition, improvement of alteration not included in the repairs, which the landlord is bound to make under any law, contract or custom, has been made to the building at the landlord"s expense, the Controller may after making such inquiry, as he thinks fit, redetermine the fair rent of the building.

(2) Any increase in the fair rent allowed under sub-section (1) shall not in any month exceed 5/8 per cent of the cost of addition, improvement or alteration.

20. From a perusal of the provisions of the aforementioned sections, it is manifestly clear that the fair rent of the buildings can be determined both at the instance of the landlord

and also at the instance of the tenant in the occupation of the building and also, in certain cases, as contemplated u/s 7 of the Act.

21. Section 8 is a relevant provision which provides that while determining fair rent, the Controller shall give due regard to the matters described in the said sections and also in the rules made thereunder. Section 8 reads as under :

8. Matters to be considered in determining fair rent. --(1)(a) For the purposes of this Act, the fair rent of building shall be determined as for a tenancy from month to month.

(b) The fair rent of a building shall be determined in accordance with the rules framed for this purpose.

(c) In determining the fair rent of any building u/s 5 or 6, the Controller shall have due regard to the prevailing rates of rent in the locality for the same or similar accommodation in similar circumstances at any time during the twelve months preceding the first day of December, 1980, and to the increased cost of repairs, and in the case a building which has been constructed after that date, also to any general increase in the cost of site and building construction.

22. From a reading of the aforesaid provisions it is clear that the provisions prescribed for fixation of fair rent for those buildings which are let out to tenants, the Controller has to satisfy himself that the rent being paid by the tenant is either excessive or low. The satisfaction of the Controller is the prime consideration.

23. Section 98 of the Bihar Municipal Act, 1922, lays down the procedure of assessment of taxes on the annual value of holdings. Section 98 reads as under :

98. Annual value of holdings. --The annual value of a holding shall be deemed to be the gross annual rental at which the holding may reasonably be expected to let.

(2) If there be on the holding a building or buildings, the actual cost of erection of which can be ascertained or estimated and which is or are not intended for letting or for the residence of the owner himself, the annual value of such holding shall be deemed to be an amount which may be equal to but not exceed, seven and half per centum on such cost, in addition to a reasonable ground rent for the land comprised in the holding :

Provided that, where the actual cost so ascertained or estimated exceeds one lakh of rupees, the percentage on the annual value to be levied in respect of so much of the cost as in excess of one lakh of rupees shall not exceed one-fourth of the percentage determined by the Commissioner u/s 104.

(3) The value of any machinery or furniture which may be on a holding, shall not be taken into consideration in estimating the annual value of such holding under this section.

24. As per section 23(1)(a) of the income tax Act, 1961, the annual value of any property shall be deemed to be the sum for which the property might reasonably be expected to let from year to year. In other words, assessment shall have to be made of the value as provided under the Act. The fact that the owner has not earned any income from the property is entirely irrelevant. What was charged u/s 22 was the annual value of the ownership of the property irrespective of the fact whether or not any income was either actually received or had accrued to the assessee. The word "reasonably" used in section 23(1)(a) is very important. What the owner might reasonably expect to get from a hypothetical tenant, if the building were let from year to year, affords the statutory yardstick for determining the annual rent. The actual rent payable by a tenant to the landlord would, in normal circumstances, afford reliable evidence of what the landlord might reasonably expect to get from a hypothetical tenant, unless the rent is inflated or depressed by reason of extraneous considerations such as relationship, expectation of some other benefits. But where rent of the building is subject to rent control legislation, this approximation may and often does get displaced.

25. What the law contemplates by "annual value" is not actual rent received by the owner of the property but a notional income which is to be gathered from what a hypothetical tenant would pay for the property under assessment. If actual rent is received that would be an important factor for the taxing authorities to consider, but that would not in every case be the annual proper value. Municipal valuation also is not the only test that should be applied in determining the annual value.

26. In the case of Commissioner of Income Tax Vs. Hemraj Mahabir Prasad Ltd., , the Calcutta High Court observed :

If the property is let out to a tenant who sub-lets it and gets a higher rent the same cannot be a determining factor for assessing annual value u/s 23(1) at the hands of the lessor where the creation of the tenancy or the lease is found to be genuine. Such a valuation has since been consistently accepted by the Department. There seems to be no reason for deviation from the consistent view taken by the learned Tribunal on the alleged ground that the lessee received a higher amount of rent. The interpretation has to be made on the reasoning that even if a person does not earn any income on account of the house not being let out he is still liable to pay income tax on the notional value under clause (a). Inasmuch as if it is let out then it would not be the actual rent received but would be a notional rent. The words "actual rent received" would be the rent received by the assessee actually, not the rent received by the lessee, which the assessee does not receive actually. We cannot overlook the existence of the expression "actual receipt" and interpret the same to mean a notional receipt. If we hold so, it would give an uncannalised, unbridled and unguided power on the Assessing Officer to determine the valuation on any imaginary amount though the lessor does not receive such amount. It is the income from the house on which tax is charged. It does not mean what he would have earned if he were in the position of the lessee and had the opportunity to get a better rent." (p. 529)

27. In the case of John Tinson & Co. (P.) Ltd. v. CIT [2006] 157 Tax. 410, the Delhi High Court considered the following questions :

1. Whether the Assessing Officer is duty bound to compute the "annual value of property" or "the sum for which the property might reasonably be expected to be let" as contemplated by sections 22 and 23 of the income tax Act, 1961, only on "standard rent" basis if he disbelieves the rent stated to be receivable by the assessee ?

2. Whether computation under sections 22 and 23 of the income tax Act, 1961, must be on standard rent basis irrespective of whether this exercise has been carried out by the Rent Controller ?" (p. 413)

While considering the questions, the Court observed :

Section 23 stipulates the method by which the annual value of any property should be assessed to tax u/s 22. Section 23(a) states that the annual value of property shall be deemed to be the sum for which it may reasonably be expected to let from year to year. The Assessing Officer would invariably have to carry out and complete this computation. This is for the reason that section 23(b) envisages that even where the property is let out and the Assessing Officer accepts the veracity of the sum stated by the owner to be receivable by it as rent, this actual rent if it is higher than the "sum for which the property might reasonably be expected to let" (viz., standard rent) the actual rent would constitute the basis of computation of taxation. The difference is that where the property has not been rented out or where the rent stated by the assessee/owner is found by the Assessing Officer not to be the actual rent, the latter would have to meticulously calculate the "sum for which the property might reasonably be expected to let", whereas in other instances he would have to arrive at a rough and ready computation so as to ensure that the tax basis is the actual rent if it is higher than the "reasonable" rent. In other words, the section leaves no room for the assessee to contend that it is only the "reasonable" rent and not the "actual" rent which should be taken into account by the Assessing Officer. This is the conclusion articulated by the High Court of Calcutta in CIT v. Satya Co. Ltd. [1994] 75 Tax. 193. This is exactly the opinion of the High Court of Madras as is evident from a reading of Commissioner of Income Tax Vs. Parasmal Chordia, in which it has been opined that the provisions of section 23(1)(a) apply to both owner occupied property and property which is let out and that the measure of valuation to determine the said annual value must be the same for both the cases, viz., the standard or fair rent.

The next question is whether it is permissible or reasonable for the Assessing Officer to conduct an enquiry into market rents prevailing in the contiguous areas for the purposes of computing the sum for which the property might reasonably be expected to let. There is a plethora of precedents on this issue, all enunciating that "reasonable" rent can only be the "standard" rent. After analysing the decisions of the Apex Court in Amolak Ram Khosla Vs. Commissioner of Income Tax, Delhi II, , Dewan Daulat Rai Kapoor and Others Vs. New Delhi Municipal Committee and Others, and Mrs. Shiela Kaushish Vs.

Commissioner of Income Tax, Delhi, , this Court has laid down in Commissioner of Income Tax Vs. Raghubir Saran Charitable Trust, , that the ITAT was justified in holding that the market rent of the property could not be more than the standard rent. In Raghubir Saran Charitable Trust (supra), the Assessing Officer had incorrectly computed the market rent of the house and had added the difference between the market rent so calculated and rent which was being actually paid. The same result was reached in L. Bansidhar and Sons Vs. Commissioner of Income Tax, , where, however, it was clarified that the position stood changed with effect from the 1976 amendment, after which the actual rent would be relevant only if it is higher than the standard rent. Once again the decision of this Court in Commissioner of Income Tax Vs. Vinay Bharat Ram and Sons (HUF) and Others, is topical. The Department had assailed the following remand order of the Commissioner (Appeals). The Assessing Officer is directed to redetermine the annual value of the property in accordance with my findings, he will limit the same to the higher of the following (a) the municipal valuation, (b) the fair rent determinable under the Rent Control Act, and (c) the actual rent paid by the assessee. This direction I feel fairly and reasonably gives effect to the pronouncements of the Supreme Court on the subject from time to time. The ITAT had affirmed the remand order. The Division Bench of this Court was of the view that no substantial question of law had arisen, and the appeal of the Department was dismissed. We may only add and clarify that the words "municipal valuation" would in the syntax of the present income tax Act and of municipal taxation statutes be synonymous and interchangeable with "standard rent"." (p. 413)

28. Coming back to the instant case, as noticed above, the assessee let out first and second floor of the building premises to Canara Bank on an annual rent of Rs. 1,06,800 whereas the annual rent in respect of the underground portion, ground floor and mezzanine floor of the building in occupation of M/s. Wool House at Rs. 4,800. Admittedly, the business of M/s. Wool House is run by the relatives of the assessee who is also one of the partners in the said business. Although under the Jharkhand Rent Control Act, both the landlord or the tenant can approach the Rent Controller for determination of fair rent/standard rent, but neither the assessee nor the tenant firm M/s. Wool House ever approached the Controller for determination of fair rent of the ground floor of the premises. In such circumstances, if the annual rent being paid by the tenant M/s. Wool House is less than the fair rent/standard rent of the tenanted premises, then the amount of rent paid by the tenant cannot and shall not determine the value of the property.

29. After having considered the relevant provisions of different Acts and the law laid down by the Supreme Court and different High Courts, we are of the view that when the Assessing Officer is satisfied that the annual rent alleged to have been received by the assessee in respect of the house property owned by the assessee is much lower than the expected rent receivable from the tenanted premises, then in the event no fair rent or standard rent has been fixed by the Rent Controller in respect of that property, the Assessing Officer shall be entitled to determine the annual value of the property and the

expected rent receivable for the purpose of assessing tax payable by the assessee under the head "Income from house property". We, therefore, answer the question of law accordingly. As a result, we hold that the assessing authority shall determine the expected rent payable in respect of the premises occupied by M/s. Wool House and while doing so, the assessing authority shall follow the law and guidelines provided under the Rent Control Act.

M.Y. Eqbal, J.

I agree.