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Calcutta High Court

Case No: IT Appeal No''s. 115 and 846 of 2004

Poddar Projects Ltd.		APPELLANT
	Vs	
Commissioner of Income Tax and Others		RESPONDENT

Date of Decision: May 17, 2012

Acts Referred:

- Calcutta Municipal Corporation Act, 1980 - Section 170, 171, 171(4), 193, 195
- Income Tax Act, 1961 - Section 23, 23(1)

Citation: (2012) 211 TAXMAN 493 : (2013) 1 WBLR 282

Hon'ble Judges: Kalyan Jyoti Sengupta, J; Joymalya Bagchi, J

Bench: Division Bench

Advocate: J.P. Khaitan, for the Appellant;D. Shome and H.R. Dutt, for the Respondent

Judgement

K.J. Sengupta, J.

Both the appeals involved common question of fact and law and as such were heard analogously. These appeals are directed against the judgment and order of the Special Bench (E), Kolkata of the learned Tribunal, dt. 18th Dec., 2003 in relation to asst. yr. 1997-98 in connection with ITA 38 of 2001. Both the appeals were admitted by an order of this Court dt. 28th April, 2004 and as corrected by order dt. 21st May, 2004 on the following substantial question of law:

(1) Whether the learned Tribunal ought not to have held the surcharge of the municipal tax was part of the question (sic) and/or annual value for the purpose of s. 23(1) of the IT Act 1961 (hereinafter referred to as the said Act) prior to its amendment by the Finance Act 2001 w.e.f. 1st April. 2002 ?

(2) Whether on the facts and in the circumstances of the case the learned Tribunal was justified in law in holding that for the determination of annual value in accordance with the provisions of s. 23 of the said Act or question appearing therein to encompass surcharge of municipal tax in respect of property let out to a tenant

using for commercial or nonresidential purpose ?

(3) Whether the said learned Tribunal was justified in law in holding that the surcharge of municipal taxes on the consolidated rate as referred to in Kolkata Municipal Corporation Act, 1980 (hereinafter in short KMC Act) collected and recovered by the assessee as the owner of the premises from the tenants or the occupiers is part of the actual rent received by the assessee within the meaning of sub-cl. (b) of sub-s. (1) of s. 23 of the said Act ? Squarely the surcharge on the municipal taxes amounting to Rs. 26,59,954 is to be calculated for the purpose of determination of income in the head ''Income from house property''.

The short fact leading to preferring this appeal is recorded for avoiding unnecessary details in the manner as follows:

The assessee-company was having l/3rd ownership at 18, Rabindra Sarani, Kolkata--700 001 prior to the asst. yr. 1997-98, and remaining 2/3rd portion was being owned by Poddar Udyag Ltd. Subsequently under scheme of arrangement sanctioned by this Hon''ble Court in company jurisdiction, the assessee acquired approximately 50 per cent of the ownership of the said building from the asst. yr. 1997-98 onwards. Since the land and building were standing in the name of the Poddar Udyag Ltd. all formalities relating to municipal assessment were made in the name of Poddar Udyag Ltd. and this company used to collect rent from tenants. The assessee disclosed rental income from the said property under the head ''Income from house property'' from the records. The assessee collected municipal tax amounting to Rs. 27,31,070 as well as surcharge amounting to Rs. 26,59,959. The assessee included the amounts of municipal tax collected from the tenants as income from house property by way of gross rent receipt but excluded the amount of surcharge imposed by municipal authority amounting to Rs. 26,59,954 in the gross amount for the purpose of determining annual value of the property on the basis of the actual rent received within the meaning of s. 23 of the said Act.

2. The AO overruling the contention of the assessee included the amount of commercial surcharge as part of the rent for the purpose of assessment of income under the head ''Income from house property''.

3. Being aggrieved by the said decision the assessee preferred appeal before the CIT(A) who decided the aforesaid contention in favour of the assessee following decision of the learned Tribunal in the assessee''s own case for the asst. yr. 1986-87 wherein it was held that surcharge of municipal tax collected by the assessee cannot be considered to be the income of assessee. The Revenue, however did not accept this judgment in this assessment year and preferred appeal questioning correctness of earlier decision of the Tribunal relating to the asst. yr. 1986-87. The Division Bench of the Tribunal viewed that this issue required reconsideration by Larger Bench of the Tribunal. Therefore, the learned President of the Tribunal constituted the Larger Bench which has ultimately rendered decision against which present

appeal has been preferred.

4. By the impugned judgment and order the Special Bench of the learned Tribunal held that the surcharge as referred to in KMC Act and collected by the assessee as the owner of the premises from the tenants/occupiers, is part of actual rent received by the assessee within the meaning of sub-cl. (b) of sub-s. (1) of s. 23 of the said Act; consequently, it has to be included for the purpose of determination of income under heading ''Income from house property''.

5. Assailing above decision the learned senior counsel for the appellant contends that commercial surcharge under s. 171(4) of the KMC Act is imposed because of use of commercial and non-residential purpose of the property by the tenant. The character of the commercial surcharge has been examined by the Hon''ble Supreme Court in the case of Calcutta Gujrati Education Society and Another Vs. Calcutta Municipal Corporation and Others, and it is held that though the landlord is primarily liable for the surcharge but it is paid by him on behalf of the tenant. Thus it is not borne by the landlord. Sometimes it may be agreed between the landlord and tenant that the rent is inclusive of all taxes in which case the surcharge when paid by the landlord is borne by him/landlord. Under the provisions of ss. 230 and 231 of the KMC Act the landlord recovers the surcharge from the tenant. It is also possible that the agreement may be drawn between the landlord and tenant wherein the tenant shall be asked to pay the municipal tax in addition to the rent. If such be the agreement the landlord can recover the surcharge from the tenant by resorting to the provisions of ss. 230 and 231 of the KMC Act. In such a case, surcharge is not borne by the owner. The fiction created by s. 231 that the landlord can effect recovery of the municipal tax as if it was a rent payable to him by itself shows that such tax is not rent as commonly understood. The said fiction under the said Act limited in its operation for recovery of the municipal tax by the landlord cannot be extended to s. 23 of the said Act. He therefore, contends that whether surcharge forms part of the rent ought not to have been decided without calling for or examining the tenancy agreements. He relying on the decision of the Supreme Court in case of Abdul Kader Vs. G.D. Govindaraj (D) by Lrs., asserts that the said question should not have been decided only with reference to the provisions of the KMC Act. He drawing our attention to proviso to s. 23(1) submits that in respect of the property occupied by the tenant, the municipal tax to the extent borne by the owner shall be deducted in the year of actual payment. The said proviso throws light on how the word "rent" under s. 23(1)(b) should be construed. The deduction under the proviso can be allowed only if the amount to be deducted forms part of the rent in the first place. No deduction can be made in respect of the municipal taxes in terms of the proviso if the same does not form part of the rent. In other words he submits further that in terms of the proviso only the municipal tax borne by the owner can be deducted. The proviso makes it clear that where landlord pays the municipal tax out of the rent he is entitled to deduction of such municipal tax.

6. His further contention is that the amount of surcharge which has been collected by it from the tenants is not borne by the appellant and as such the proviso will not apply in its case. He relied on two decisions in this regard--one is of this Court and another is of the Supreme Court, in case of Commissioner of Income Tax Vs. Gillanders Arbuthnot and Co. Ltd., and Commissioner of Income Tax, Calcutta Vs. Dalhousie Properties Ltd., respectively. He contends object of the proviso to s. 23 is that where the tenant of the property had undertaken to bear any part of the taxes levied by local authority the owner cannot be allowed to claim deduction in respect thereof. In that case annual value was to be determined by deducting the tax levied by the local authority for paying which the owner had assumed the responsibilities. Therefore, he contends that the said amount of surcharge collected by its client cannot be said to be part of the rental income in any sense. Therefore, this portion must be excluded from the income for the purpose of computation of tax.

7. Mr. Shome learned advocate appearing on behalf of the Revenue and Mr. H.R. Dutt, learned advocate appearing on behalf of municipal authority in the aforesaid two appeals advance common argument. However, Mr. Shome argued in detail and his argument was adopted by Mr. Dutt. He contends that consolidated tax payable by the owner under KMC Act includes surcharge on consolidated rate payable in respect of the premises used for commercial or non-residential purposes. While submitting about the meaning of consolidated rate he invited our attention to s. 2(20) of KMC Act and s. 22(3) of the said Act. They also referred to ss. 170, 171 and 193 of the KMC Act to submit that primary liability to pay consolidated rate including surcharge in respect of the tenanted premises is on the owner of the premises. They submitted that merely because the KMC Act empowers the owner to recover the surcharge from the tenant does not discharge the owner of the premises from its primary liability to pay the surcharge to the municipal corporation. They contend further that when tenant is allowed to use the premises for commercial or non-residential purposes it would certainly include whatever amount is payable by the tenant for the use of premises for commercial purpose. Therefore, surcharge collected by the owner from the tenant would certainly constitute rent paid for the use of premises for commercial purposes. The amount including surcharge, received by the assessee from the tenant for use and occupation of the tenanted premises for non-residential or commercial purposes is to be treated as actual rent received for the purpose of determination of annual value within the meaning of s. 23 of the said Act and tax including surcharge imposed by the municipal corporation and actually paid by the assessee during the relevant year is to be deducted therefrom as per 1st proviso to s. 23 of the said Act. In support of their contention they have relied on the following authorities : (i) (1990) 2 CLJ 310, (ii) Chowringhee Sales Bureau (P) Ltd. Vs. Commissioner of Income Tax , West Bengal,

8. We have heard the learned counsel for the parties and having read carefully the aforesaid questions formulated at the time of admission and having considered argument advanced by the learned counsel for the parties, the issue basically

involved in this matter is whether the receipt on account of commercial surcharge over and above the municipal rates from the tenants/occupants do form part of income from house property or exigible to tax, though the same is really to be paid by the occupants namely, tenants under the KMC Act.

9. We have gone through the judgment of the learned Tribunal. We think conjoint reading of ss. 4 and 5 of the said Act will throw light to determine above issue. We thus set out the said two provisions:

4. (1) Where any Central Act enacts that income tax shall be charged for any assessment year at any rate or rates, income tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions (including provisions for the levy of additional income tax) of this Act in respect of the total income of the previous year of every person....

4. (1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which--

(a) is received or is deemed to be received in India in such year by or on behalf of such person; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year; or

(c) accrues or arises to him outside India during such year....

10. It will appear from s. 5 of the said Act that whether the income is really appropriated for its own purpose or not is not the germane of the matter and it would be clear from s. 5(1)(a) of the said Act, once the income is received the same is exigible to tax. Ultimately, if it is found the same is not enjoyed or appropriated by the assessee as being his own, the amount so received would be deducted from its total income.

11. Neither of the learned counsel has disputed the legal position that commercial surcharge has to be paid under the KMC Act, 1980, and is to be paid by the actual occupants if it is used for commercial or nonresidential purposes, be it tenant or the owner himself. For this purpose we set out the relevant portion of s. 171, sub-s. (4) of the KMC Act.

171...

(4) Notwithstanding the provisions of sub-s. (2) and sub-s. (9), the Corporation may, where any land and building or hut or portion thereof is used for commercial or non-residential purpose, levy of a surcharge or the property tax on such land or building or hut or portion thereof at such rate not exceeding fifty per cent of the property tax as the Corporation may from time to time determine.

12. Therefore, under the law the user occupant (here the tenant) is under obligation to pay the surcharge. It is significant that it has not been mentioned how it is to be paid or recovered. The said sub-s. (4) merely provides for charging but does not say that occupant has to pay and/or deposit to the corporation authority; had it been the position then there would not have been problem in this case. It is contended by Mr. Khaitan so also we note that by an agreement this can be worked out obliging the tenant to pay directly or the owner takes the responsibility to pay rate including the surcharge realizing the same with rent. According to him rent does not include surcharge then receipt thereof cannot be treated to be the income from house property. He puts it differently that surcharge has no co-relation with the receipt of the rent. Sec. 193 of the KMC Act provides for incidence and payment of property tax on lands and buildings:

193. Incidence of property tax on lands and buildings.--(1) The property tax on land and buildings shall be primarily leviable.--

(a) if the land or building is let, upon the lessor;

(b) if the land or building is subject, upon the superior lessor;

(c) if the land or building is subject, upon the person in whom the right to let such land or building vests.

(2) The property tax on any land or building which is the property of the Corporation and the possession of which has been delivered under any agreement or licensing arrangement, shall be leviable upon the transferee or licence, as the case may be.

(3) The liability of the several owners of any land or building constituting a single unit of assessment, which is or purports to be severally owned in parts of flats or rooms, for payment of property tax or any instalment thereof payable during the period of such ownership shall be joint and several:

Provided that the municipal Commissioner may apportion the amount of property tax on such land or building among the co-owners.

(4) Notwithstanding the resting of any land in the State under the Calcutta Thika Tenancy (Acquisition and Regulation) Act, 1981, in the case of any land comprised in a Thika tenancy, the property tax assessed in respect of such land and any hut or building made thereon shall be primarily leviable upon the Thika tenant.

13. Thus, in this case the assessee being the lessor and/or landlord and/or owner is under obligation to pay the consolidated rates of taxes on the land and buildings. The aforesaid section has not given any statutory right to recover any portion of the rate. This could be worked out and settled between the landlord and the tenants and the amount of rent can be fixed inclusive of taxes. However, in case of commercial surcharge the statute has provided special remedy for the landlord, under s. 195, sub-s. (2) which provided as follows:

195....

(2) An occupier, from whom any sum is recovered under sub-s. (1), shall be entitled to be reimbursed by the person primarily liable for the payment of such sum, and may, in addition to have recourse to other remedies that may be open to him, deduct the amount so recovered from the amount of any rent becoming due from time to time from him to such person.

14. Similarly s. 231 provides as follows:

231. Mode of recovery.--If any person primarily liable to pay any property tax on any land or building and is entitled to recover any such from an occupier of such land or building, he shall have, for recovery thereof, the same right and remedies as if such sum were rent payable to him by the person from whom he is entitled to recover such sum.

15. Thus, under the conjoint reading of the aforesaid provisions of the KMC Act the owner is enjoined with statutory right to recover commercial surcharge from occupants and on recovery of the same it is his obligation to pay to the corporation authorities. It will appear from the definition of s. 2(20) that consolidated rates includes the surcharge levied on the consolidated rate under the Act. Therefore, it is not correct to contend that the surcharge does not have any correlation with the rate. We thus are unable to agree to Mr. Khaitan''s contention that the payability of the surcharge by the tenant should be kept outside the purview of the rental income from house property as it is not really appropriated or retained by the owner as ultimately it has to be paid or it has to be worked out otherwise by way of agreement. We do not feel usefulness of Mr. Khaitan''s contention that as because the amount of surcharge is primarily payable by the occupier/tenant the same loses its character on receipt on account of rent. It is true on reading of the provision of the KMC Act the amount collected by way of commercial surcharge cannot be appropriated or enjoyed by the owner of the property so collected as it is to be paid to the corporation authorities but then it is receipt of total income within the meaning of s. 5 of the said Act.

16. The provisions of the said Act nowhere make distinction as far as concept of income is concerned from enjoyment and appropriation point of view. The moment the amount collected in relation to any transaction whatever may be the nomenclature that receipt has to be termed income. Here the commercial surcharge is receivable or received in connection with the legal relationship of landlord and tenant. This principle has been well settled long time back as has been correctly pointed out by Mr. Shome appearing with Mr. Dutt in the case of Chowringhee Sales Bureau (P) Ltd. vs. CIT (supra). Here, the dealer in furniture sells as auctioneer and effected such sale acting as an auctioneer and while doing so, the dealer/auctioneer realized in addition to the commission, a sum of Rs. 32,986 received as sales-tax. This amount was credited separately in its accounts book under the head ''Sales-tax

collection account''. The appellant did not pay back the amount of sales-tax to the actual owner of the goods, nor did it deposit the amount of sales-tax realized in the State Exchequer. Plea was taken that the statutory provision fixing liability upon it was not valid. The appellant did not refund the amount from whom it had been collected in the cash memos issued by the appellant to the purchasers in the auction sales. The appellant was shown as the sellers. In this factual background the Court held that a sum of Rs. 32,986 realized as sales-tax by the appellant company in its character as an auctioneer, forms part of the trade or business receipt. The Court did not accept the accounting system of the apportionment of the aforesaid amount, which has held that it was trading receipt then has to be brought within the purview of taxibility.

17. This case was followed in number of cases not only by the Supreme Court but also by various High Courts, In the case of Sinclaire Murray and Co. (P) Ltd. Vs. The Commissioner of Income Tax, Calcutta, following the ratio in the case of Chowringhee Sales Bureau (P) Ltd. (supra) the Supreme Court held that if an amount collected by way of tax in connection with the sale and if it is paid then the same does lose the character of income from business or trading receipt. If the money is withheld and not paid to the taxing authority or not refunded to the purchaser this amount so received has to be treated as trading receipt and as such exigible to tax.

18. Similar view was taken in the case of Plastic Products Engg. Co. Vs. Commissioner of Income Tax, following the ratio laid down previously by the Supreme Court in the case of Chowringhee Sales Bureau (P) Ltd. (supra) and in the case of Sinclair Murray & Co. (P) Ltd. (supra).

19. In the case of The K.C.P. Limited Vs. Commissioner of Income Tax, Bangalore, the Supreme Court following the ratio in the cases of Chowringhee Sales Bureau (P) Ltd. (supra) Sinclair Murray & Co. (P) Ltd. (supra) and Plastic Products Engg. Co. (supra) has held amongst other that the amount collected by the dealer in connection with the sale on account of excise duty was treated to be part of the price of purchase and as such it was treated to be trade receipt and it was exigible to tax.

20. We cannot resist our temptation to note the English decision in case of Paprika Ltd. & Anr. vs. Board of Trade (1944) 1 All ER 372 and to quote relevant portion thereof as follows:

When the seller passes on the tax and the buyer agrees to sales-tax in addition to the price, the word ''tax'' is really part of the entire consideration and the distinction between the two amounts-tax and the price-loses all significance.

Lawrence, J., in that case in His Lordship''s own words expressed as follows:

Wherever a sale attracts purchase tax, that presumably affects the price which the seller who is liable to pay the tax demands, but it does not cease to be the price which the buyer has to pay even if the price is expressed as x plus purchase tax.

21. Then again in another English decision in Love vs. Norman Wright (Builers) Ltd. (1944) 1 All ER 618, Lord Justice Goddard expressed as follows:

...Where an article is taxed, whether by purchase tax, customs duty or excise duty, the tax becomes part of the price which ordinarily the buyer will have to pay. The price of an ounce of tobacco is what it is because of the rate of tax, but on a sale there is only one consideration though made up of cost plus profit plus tax, so, if a seller offers goods for sale, it is for him to quote a price which includes the tax if he desires to pass it on to the buyer, if the buyer agrees to the price it is not for him to consider how it is made up, or whether the seller has included tax or not.

22. From the aforesaid discussions and reading of the ratio of these decisions we find conceptual similarity in case when commercial surcharge collected is by the owner assessee of the house it becomes part of rent. Consequently, we hold that the moment the commercial surcharge is recovered irrespective of the provisions of the agreement entered into by and between the landlord and tenant it immediately becomes exigible to tax as rental income from house property for agreement binds the parties thereto and it becomes irrelevant the moment it is found to be in conflict with legal provision on the subject. We are unable to accept the argument of Mr. Khaitan that receipt of the commercial surcharge is not part of the rent. We fail to comprehend how the decisions cited by him are helpful. Those decisions nowhere laid down that the income receipt by way of commercial surcharge from the occupants and/or tenants cannot be part of the rent and collection of this amount has got a separate and distinct character. However, the moment it explained to the IT authority that amount was collected by way of commercial surcharge and the same is paid to the corporation authorities then the amount so deposited shall be deducted from the taxable income in that particular year. If the argument of Mr. Khaitan is accepted that commercial surcharge cannot be treated as receipt by way of rent as income from house property, and if it is withheld and not deposited then the very object of imposition of commercial surcharge under KMC Act will be frustrated until the same is recovered. The decisions cited by him, therefore in the facts and circumstances of this case are distinguishable and not relevant at all to the germane of the matter. Therefore, we do not find any illegality and infirmity in the judgment of the learned Tribunal. We hereby affirm it.