(1990) 08 CAL CK 0042

Calcutta High Court

Case No: IT Reference No. 91 of 1987

Commissioner of Income Tax	APPELLANT
Vs	
Smt. Nayeema Momen	RESPONDENT

Date of Decision: Aug. 30, 1990

Acts Referred:

- Income Tax Act, 1961 - Section 22, 23, 256(1)

Citation: (1994) 73 TAXMAN 498

Hon'ble Judges: Bhagabati Prasad Banerjee, J; Ajit K. Sengupta, J

Bench: Division Bench

Advocate: H.M. Dhar, for the Appellant;

Judgement

Ajit K. Sengupta, J.
In this reference u/s 256(1) of the income tax Act, 1961 (''the Act'') for the assessment year 1982-83 the following question of law has been referred to this Court:

Whether, on the facts and in the circumstances of the case and on a correct interpretation of the two lease deeds dated 1-12-1980 and 17-2-1981, the Tribunal was justified in law in holding that investments of Rs. 2,15,755 made by the lessees in the construction of the third and fourth floors of the building did not have any characteristic of rent and in that view, in further holding that 1/10th of the said amount is not assessable in the hands of the assessee as rent ?

Shortly stated, the facts are that the assessee owns a house property at 30, Circus Avenue, Calcutta-17. She undertook the construction of a five-storeyed building in the said premises but could complete the construction up to the second floor. Roofs of the third and fourth floors were laid but the construction could not be completed owing to lack of funds. The assessee leased out the third and fourth floors to A.B. Chowdhury and S.A. Salim by means of two several lease deeds dated 1-12-1980 and 17-2-1981, respectively. The terms of the two lease deeds are similar and they, inter

alia, provided that the lessees would complete the construction of the third and fourth floors. They were permitted to sub-let the demised premises to tenants. It was further stipulated that A.B. Chowdhury and S.A. Salim would pay Rs. 2,500 and Rs. 1,500 per month, respectively, as rent to the lessor. The lessees in turn sub-let the third and fourth floors to a common sub-lessee, namely, Ceat Tyres of India Ltd., under two separate tenancy agreements, both dated 17-3-1981 and obtained interest-free advances from the sub-lessee for the purpose of completing the construction of third and fourth floors. The two lessees invested Rs. 1,17,480 and Rs. 98,000, respectively, in the construction of the two floors. The total investments made by them in the construction amounted to Rs. 2,15,755. In accordance with the terms of the sub-leases, A.B. Chowdhury and S.A. Salim were to receive monthly rent of Rs. 5,600 and Rs. 4,400, respectively, from the common sub-tenant besides service charges at the rate of Rs. 2,800 and Rs. 1,650 per month.

2. The ITO was of the view that the expenses incurred by the lessees in completing the construction of the third and fourth floors should be treated as advance of loan for ten years which was the period of lease fixed under the two lease deeds and that 1/10th portion of the amount should be treated as rental income of the assessee for the assessment year 1982-83. The ITO thus added Rs. 21,575 being 1/10th of the total investments made by the lessees in the construction of the two floors as rent in the total income of the assessee.

3. The assessee appealed to the AAC before whom it was contended on behalf of the assessee that since the lessees took lease of the third and fourth floors under valid lease agreements from the assessee and obtained advance of fund from their common tenant, the ITO was not justified in treating the expenses incurred by the lessees as advance of loan for ten years and treating 1/10th thereof as rental income of the assessee. It was further contended that the investments made by the lessees were capital in nature and the same would not be taxed even in the hands of the lessees.

4. The AAC was of the view that the essential conditions for assessing the income of the property as per the provisions of sections 22 to 23 of the Act are not fulfilled so as to tax the rental income of the above two floors in the hands of the assessee. The AAC was further of the view that the expenses incurred by the lessees in the construction of the third and fourth floors are capital in nature and, hence, cannot be taxed in anybody''s hands including the assessee. The AAC, accordingly, deleted the addition of Rs. 21,575.

Against the order of the AAC the revenue came up in appeal before the Tribunal. The Tribunal held that the investments made by the two lessees for the construction of the aforesaid two floors did not have any characteristic of rent and this amount in any event has been regarded as capital receipt.

5. At the hearing no one appeared for the assessee. Mr. Dhar appearing for the revenue has reiterated the stand taken by the ITO.

6. Admittedly, the assessee could complete the construction up to the second floor. Roofs of the third and fourth floors were laid but the construction could not be completed owing to lack of funds. Thereupon the assessee entered into two several lease agreements with the two lessees being Mr. A.B. Chowdhury and Mr. S.A. Salim, who after obtaining loan from one common sub-tenant completed the construction of the said two floors.

The terms of the two several lease agreements entered into by and between the assessee and the two lessees are identical. It is true that the lease was for only 10 years from the date of the execution of the respective lease agreements. By the said deeds of lease the respective lessees were granted the right to sub-let and demise the premises wholly or in part to different monthly tenants or to licensees with previous information to the lessor in writing, that is, the assessee. It was also provided that the lessees shall have to complete the construction of the third floor and fourth floor at their own costs and each of the lessees shall also be entitled to make any addition or alteration or change in the demised premises at his own cost as per sanctioned plan but all such constructions shall become the properties of the lessor.

From the deeds of lease certain facts would be evident.

The two lessees were liable to pay monthly rent in respect of the third and fourth floors of the premises owned by the assessee for a period of 10 years; the lessees shall have to complete the construction of the third and fourth floors at their own cost and all such constructions shall become properties of the lessees. There is no stipulation to the effect that the amount incurred by the lessees in the constructions of the third and fourth floors would be repayable by the lessor or that it would be adjusted against the rent payable by them. There was no materiel on record which could lead to the conclusion that the amount spent by the two lessees in construction of the two floors was in the nature of advance made to the assessee by way of rent.

7. On the facts and in the circumstances of the case it must be held that the construction of the respective floors was made by the two lessees and since such construction would become the property of the lessor, the investment by the lessees may be treated to have been made on behalf of the assessee. There was no element of advance by way of rent to the assessee. There is no material to hold that there was a reduction in the rent because of the right given to the two lessees to construct the said two floors and to complete the construction thereof and to sub-let such floors to the sub-tenants. Unless there is material to show that the rent which was charged by the assessee was not a fair rent or reasonable rent and indirectly the lessor received from the lessees an advance by way of rent, it cannot

be held that the investment made by the lessees in terms of the agreements would represent rent in the hands of the assessee. At best the amounts spent by the lessees would be treated as a capital receipt in the hands of the assessee as the said investments were made on behalf of the assessee. We do not find any reason to interfere with the finding of the Tribunal and, accordingly, we answer the question referred to this Court in the affirmative and in favour of the assessee. There will be no order as to costs.

Banerjee, J.

I agree.