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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

R-13 to R-16.

\+ **ITA 290/2004**
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\+ **ITA 292/2004**
\+ **ITA 293/2004**

AGYA RAM ..... Appellant
Through: Mr. K.R. Manjani, Advocate.

versus

COMMISSIONER OF INCOME TAX, DELHI .... Respondent
Through: Mr. Rahul Chaudhary, Senior Standing Counsel with Mr. Raghvendra Kishore Singh and Mr. Anup Kumar, Advocates.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE NAJMI WAZIRI

O R D E R

% 01.08.2016

Dr. S. Muralidhar, J.:

1. These four appeals by the Assessee are directed against a common order in ITA Nos. 1867 to 1870/Del/99 for the Assessment Years ('AYs') 1990-91 to 1993-94. By the order dated 30th October 2006, the Court framed the following questions of law for consideration:

> "1. Whether the Income Tax Appellate Tribunal was correct in law and on facts in holding that the reopening of the assessment under Section 147 of the Income Tax Act, 1961, was valid and in accordance with law?

2. Whether the Income Tax Appellate Tribunal was correct in law and on facts in holding that the income derived by the appellant from licencing part of the premises is to be assessed under the head "Income from house property" under Section 22 of the Income Tax Act, 1961 and not under the head "Income from business" under Section 28 of the Income Tax Act, 1961 despite the fact the aforesaid income had regularly been assessed under the head income from business?

3. Whether in the circumstances of the case, and on the proper interpretation of the licence deeds, the Tribunal was correct in law in holding that the licence fee received by the appellant from licencing part of the premises is to be assessed under the head "Income from house property" and not under the head "Income from business" despite that the assessee had to incur expenditure in connection with such licences granted by the assessee?"

Background facts

2. The facts in brief are that the Assessee was carrying on a business under the name and style of M/s. Supreme Auto Works at B-93, Okhla Industrial Area, Phase-II, New Delhi. It is stated that the said property is owned by him with land having been given on long term lease by the Delhi Development Authority ('DDA') on which he has erected a factory premises. It is stated that the Assessee derived income from job work of repairs of batteries and was receiving licence fee from various persons for rendering services.

3. Since AY 1982-83 the Assessee gave on licence 91% of the factory premises and was receiving licence fees. According to Mr. Manjani, learned counsel for the Assessee, around that time the Assessee developed cataract in his eyes which rendered him nearly blind. As a result he ceased to carry

on any business activity. The earning of licence fees was the only source of income.

Clauses of the licence deeds

4. Mr. Manjani further pointed out that in the course of the assessment proceedings voluminous documents were filed which included copies of the licence deeds. e referred to one such licence agreement dated 18th November 1988 between the Assessee and M/s. K.K. Plastics. He drew attention of the Court to the following clauses of the licence deed:

> "1. That no rent shall be paid by the Licensee to the Licensor and this writing shall never be construed as a tenancy agreement or lease or prejudice creating any interest in the premises in favour of the Licensee which is not at all the intention of the parties here to but on the contrary merely a temporary arrangement to allow the licensee to use the aforesaid portion of the premises for Running Plastics Industry, Under the Control and Supervision of the Licensor for which purpose the Licensor shall always retain legal possession of the entire premises with him.
> .....
> 4. That neither this Licencee nor any of the rights conferred by it shall be transferred or assigned to any other person/firm/company etc. nor shall the premises or any part thereof be allowed to be used by any other person/firm/company etc.
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> 5. That the licensee shall not be entitled to put up a sign-board outside the Licensed premises as per D.D.A. rules. shed in question is being give to the Licensee in original condition i.e. "AS IT IS" terms and the Licensee will undertake any repairs or so if the same are required. He will also be responsible to keep the premises in a sanitary clean condition and shall pay the cost of making good any damage thereto or to the adjacent premises caused by the negligence or mis-use of the premises by the

Licensee or his agents, employees servants, workers etc and shall indemnify the Licensor against any loss and damage to the premises caused by fire or otherwise.

6. That the Licensee shall not be entitled to make any encroachment and shall confine himself his running of the industry strictly within the confines of the Licenced space/portion of the premises.

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8. That the Licencee shall not be entitled to make any additions/alterations without obtaining prior approval of the Licensor in writing.

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10. That the Licensee can terminate this Licence by giving three months notice in writing to the Licensor or by paying amount equal to three months Licence Fee in Lieu of the notice period.

.....

13. That the working hours of the aforementioned portion of the factory premises shall be fixed by the Licensor from time to time.

14. That this temporary licence is being given for the use of the above portion of the back side to the Licencee constructed by the Licensor in the rear-courtyard of the main factory building No. B-93 Okhla Industrial Area, Phase-II, New Delhi-110 020, without any sanction/authorisation from any competent authority. The walls of the portion described in the foregoing are brick built with steel frame under the roof of described in the preamble. The portion is served by right hand passage lane of the factory and the entry and exist of the Licencee and his personal shall remain restricted to the side and the space and to no other area."

5. There are other clauses in the licence deed which according to Mr. Manjani indicated that the arrangement was not one of lease but of licence. Mr. Manjani pointed out that Assessee had been filing regular returns from

AY 1982-83 onwards. For the AY 1982-83 a loss was declared and the licence fee was shown as business income. This return was picked up for scrutiny and an assessment order passed under Section 143(3) of the Income Tax Act, 1961 ('Act') accepting the treatment of the licence fee by the Assessee as business income. He further pointed out that from AY 1983-84 till AY 1989-90 the Assessee in his returns consistently disclosed the licence fee as business income. The returns for all these years i.e. AYs 1982-83 till 1989-90 were processed under Section 143(1)(a) of the Act. The following table depicts the details in regard to the filing of returns from AY 1982-83 till 1989-90:

A.Year	Licence fee received	Income declared	Income assessed	Licence fee assessed as	Assessed U/S
1982-83	15,900	(loss) 36,540	(loss) 35,920	Business Income	143 (3)
1983-84	22,100	(loss) 22,100	15,640	Business Income	143 (1)(a)
1984-85	58,925	2830		Business Income	
1985-86	1,73,085	2657		Business Income	
1986-87	2,29,722	24303	24300	Business Income	143(1)(a)
1987-88	2,38,150	23,256	23,256	Business Income	143(1)(a)
1988-89	2,45,675	28,187	28,187	Business Income	143(1)(a)
1989-90	3,28,356	48,511	48,511	Business Income	143(1)(a)

6. For AY 1990-91, the Assessee filed a return on 30th October 1990 declaring an income Rs. 59,124. The return was filed along with copies of the statement of income, trading account, profit and loss account and balance sheet. The income was processed under Section 143(1)(a) of the Act by an intimation dated 30th March 1991.

Reasons for reopening of assessments

7. The above assessment was sought to be reopened by the issuance of a notice under Section 148 of the Act on 15th September 1994. In response to the said notice, the Assessee filed a return declaring the same income as is disclosed in the original return filed on 30th October 1990 i.e. Rs. 59,124. By a letter dated 1st December 1994, the Assessing Officer ('AO') conveyed to the Assessee the reasons for reopening the assessment as under:

> "It was found that you have camouflaged your rental income as business income in the guise of licence fee so in resulting your having sham rental income under the Head "Business and Professional" as against the head "Income from House Property". Higher deduction was claimed and income has escaped assessment".

Order of the AO

8. In the ensuing assessment proceedings, by an assessment order dated 20th March 1997, the AO completed the assessment under Section 143(3) read with Section 148 of the Act determining the total income of the Assessee as Rs. 2,78,120. The AO made an addition of Rs. 2,53,886 by assessing the licence fee of Rs. 3,44,632 received by Assessee under the head 'income from house property'. The AO also made an addition of Rs. 24,238 by estimating net income from job work. The expenses claimed against the

various heads against business income were disallowed. In the assessment order, the AO referred to the fact that licence fee had been received from 11 persons and the agreements entered into with each of them had been placed on record. He noted that all the receipts issued by the said persons were for use of part of the property at B-93 Okhla Industrial Area, Phase-II, New Delhi of which the Assessee was the owner. The AO also noted the statement made by the Assessee to the Inspector to the effect that he has received "rent which is called licence payment". The AO relied upon the above statement to state that the licence fee was nothing but rent for use of the part of the premises of which the Assessee was the owner and as such it was assessed under the head 'income from house property'.

Order of the CIT (A)

9. Aggrieved by the above order, the Assessee filed an appeal before the Commissioner of Income Tax (Appeals) ['CIT (A)']. An additional ground was raised challenging issuance of notice under Section 148 of the Act. Inter alia it was submitted that there was nothing on record to show that the Assessee had earned income more than what was disclosed by him and there was no material available to the AO to come to the conclusion that there was any escapement of income. According to the Assessee, the reopening of the assessment was based merely on a change of opinion.

10. By the time the order dated 12th January 1999 was passed, the assessments for three other AYs i.e. 1991-92 to 1993-94, were reopened by the AO by issuing notices under Section 148 of the Act and appeals for those

AYs were also filed by the Assessee before the CIT (A). In the common order dated 12th January 1991 for the four AYs 1990-91 to 1993-94, the CIT (A) negatived the plea raised by the Assessee to the reopening of the assessment under Section 148 of the Act on the ground that proper reasons had been recorded by the AO in each of the years. However, the CIT (A) accepted the plea of the Assessee that the licence fee received by him ought to be taxed as income from business and not as income from house property. The CIT (A) analysed the licence deed and came to the conclusion that "the Assessee was exploiting the commercial assets (factory shed) to receive licence fees as the Assessee's business was not going on probably. But income received from such exploitation can only be taken as 'Business income' and not 'Property income'."

11. Further it was noted by the CIT (A) that the AO mainly relied on the statement of Petitioner made to one of the Inspectors. However, the fact remained that "i) the assessee was exploiting the commercial asset (Factory) to get such licence fees, ii) the assessee was in supervision and control of the factory sheds and had not parted with the tenancy rights of the said premises, iii) working hours and other relevant operations were controlled by the assessee, iv) expenditure for supervision charges, etc., were incurred by the assessee and not by the licensees, v) the agreements clearly proved that the agreements were not in the nature of tenancy agreements." Consequently, the expenses relating to the receipt of the above income was also allowed by the CIT (A) in the hands of the Assessee as 'business expenditure'.

Order of the ITAT

12. Aggrieved by the above order of the CIT(A), the Revenue went in appeal before the ITAT. By the impugned order, the ITAT allowed the appeals filed by the Revenue and dismissed the cross objections filed by the Assessee on the issue of reopening of assessments under Section 148 of the Act. According to the ITAT, "when we examine the totality of facts and circumstances, we feel that the assessee is exploiting the shed with an idea to generate a rental income for security. Merely because the word 'license' has been used instead of rent will not make the difference. Be it license or be it renting the fact remains that the assessee is depending on this source of income as a substantial source of income." Accordingly, the order of the AO was confirmed and the order of the CIT (A) was set aside.

13. As far as the challenge to the reopening of the assessments under Section 148 of the Act is concerned, the ITAT rejected it on the ground that income had not been charged by the Assessee under the right head and this itself was a good reason to reopen the assessments.

Submission of counsel

14. Mr. Manjani, relied on the decision of this Court dated 8th October 2015 in W.P.(C) No. 1874 of 2013 ***(Turner Broadcasting Systems Asia v. Deputy Director of Income Tax)***, to urge that the reopening of the assessments under Section 148 of the Act was not valid as there was no material available with the AO to come to the conclusion that the Assessee had camouflaged 'rental income' as 'business income'. Reliance was also placed on the decisions in ***Commissioner of Income Tax v. Orient Craft Limited***

(2013) 354 ITR 536 (Del), Swati Saurin Shah v. Income-tax Officer [2016] 70 taxmann.com 72 (Guj) and ***Priya Desh Gupta v. Commissioner of Income Tax (2016) 385 ITR 452 (Del)***. He also relied on the *Commentary on the Transfer of Property Act, 1882* by Nandi, 3rd Edition, 2010 to draw a distinction between a 'licence' and a 'lease'.

15. Countering the above submissions, it was submitted by Mr. Rahul Chaudhary, learned Senior Standing Counsel for the Revenue that after the decision dated 18th May 2016 by this Court in W.P. (C) No. 1393 of 2002 (***Indu Lata Rangwala v. Deputy Commissioner of Income Tax***) there was no need for the AO to base his reasons to believe that the income had escaped assessment on fresh tangible material since the initial returns for the AY in question were processed under Section 143(1) of the Act. While the AO was required to record reasons, they did not require to be based on any fresh tangible material. He submitted that the AO came to a reasoned conclusion that the licence fee being projected as business income was in fact income from house property and the same was accepted by the ITAT. He accordingly submitted that there was justification for reopening assessments under Section 148 of the Act. On the issue of treating the licence fees as business income he supported the orders of the AO and the ITAT.

Question (i)

16. At the outset it requires to be noticed that the reopening of the assessments for the AYs in question was sought to be done within a period of four years from the end of the AY in which the return was filed. The

second feature is that as far as the AYs in question i.e. AY 1990-91 to 1994-95 is concerned they were processed under Section 143(1)(a) and not under Section 143(3) of the Act. Therefore, for the purposes of reopening of the said assessments, in light of the law explained by this Court in ***Indu Lata Rangwala v. Deputy Commissioner of Income Tax*** (*supra*) there was indeed no requirement that the AO had to base his reasons to believe that the income had escaped assessments on some fresh tangible material. In ***Indu Lata Rangwala v. Deputy Commissioner of Income Tax*** (*supra*), after noticing the decisions of the Supreme Court in ***Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers (P) Limited (2007) 291 ITR 500 (SC)*** and ***Deputy Commissioner of Income-tax v. Zuari Estate Development & Investment Co. Ltd. (2015) 373 ITR 661 (SC)***, this Court summarised the legal position, *inter alia*, as under:

> "35.6 Whereas in a case where the initial assessment order is under Section 143 (3), and it is sought to be reopened within four years from the expiry of the relevant assessment year, the AO has to base his 'reasons to believe' that income has escaped assessment on some fresh tangible material that provides the nexus or link to the formation of such belief. In a case where the initial return is processed under Section 143 (1) of the Act and an intimation is sent to the Assessee, the reopening of such assessment no doubt requires the AO to form reasons to believe that income has escaped assessment, but such reasons do not require any fresh tangible material.
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> 35.7 In other words, where reopening is sought of an assessment in a situation where the initial return is processed under Section 143 (1) of the Act, the AO can form reasons to believe that income has escaped assessment by examining the very return and/or the documents accompanying the return. It is not necessary in such a case for the AO to come across some fresh tangible material to form 'reasons to believe' that income

has escaped assessment.

> 35.8 In the assessment proceedings pursuant to such reopening, it will be open to the Assessee to contest the reopening on the ground that there was either no reason to believe or that the alleged reason to believe is not relevant for the formation of the belief that income chargeable to tax has escaped assessment."

17. In the present case, however, the Assessee did contest the reopening on the ground that there was no reason to believe that income had escaped assessment and that in any event the reason to believe as recorded was not relevant for the formation of belief that income chargeable to tax had escaped assessment. It is in the above background that the Court is called upon to examine whether the reasons recorded by the AO for reopening the assessments for the aforementioned AYs satisfied the requirement of the law. Although the AO may not have required fresh tangible material to form such reasons to believe, he should have, after examining the returns and/or the documents accompanying the returns, set out at least the *prima facie* reasons for arriving at the reason to believe that income had escaped assessment for the AYs in question.

18. The Court finds that the reasons tend by the AO are in fact conclusions. By simply using the word 'camouflage' and 'sham rental income', the AO is not relieved of the obligation of explaining why he came to the above conclusion. Admittedly, the Assessee had placed on record the licence deeds which contain the clauses that have been extracted hereinbefore. A reading of the said clauses reveals that the Assessee made it clear to the party taking the space on licence that it was not an arrangement of lease and that the

payment being received was not to be treated as 'rent'. Even though the AO has used the word 'camouflage' there is no material other than the licence deeds and the licence receipts for the AO to come to the conclusion that there was any attempt at camouflaging. The basis for forming the reasons to believe has not even been set out.

19. The Court also finds that the ITAT has not engaged with the detailed reasoning of the CIT (A) on an analysis of the licence deed leading to the conclusion that the licence fees received by the Assessee was in fact his only business for the AYs in question. The CIT (A) too overlooked the legal position and simply concluded that the AO had recorded proper reasons. The Court is of the view that none of the authorities paid attention to the requirement of the law that reasons, even *prima facie*, and not conclusions, needed to be recorded by the AO for reopening the assessments. Reference had to be made to the materials that formed the basis of such reasons even if such materials may not be fresh ones and already formed part of the record. The reasons to believe should have a link with an objective fact in the form of information or materials on record.

20. Consequently, the Court is satisfied that the reopening of the assessments for the AYs in question by the AO did not satisfy the requirement of the law in terms of Sections 147 and 148 of the Act. Question (i) is accordingly answered in the negative i.e., in favour of the Assessee and against the Revenue.

Questions (ii) and (iii)

21. Questions (ii) and (iii) are next taken together for consideration. The factors that ought to have been taken note of by the ITAT were that the Assessee had consistently shown the licence fee as business income from AY 1982-83 onwards. The return for AY 1982-83 was picked up for scrutiny and an assessment order passed under Section 143(3) of the Act accepting the stand of the Assessee that the licence fee was in the nature of business income. This stand was continued by the Assessee for all the AYs that followed, including the AYs in question. As already noticed, the CIT(A) elaborately discussed the clauses of the licence deed to come to the conclusion that what was being collected by the Assessee was in fact a licence fee and not rent. The second factor was that the Assessee virtually had no business since 1982-83 and his only source of income by way of business was the licence fee that was collected. The ITAT has in the impugned order not given any reason for disagreeing with the CIT (A) and has simply confirmed the order of the AO that the licence fee constituted income from house property and not business income.

22. Learned counsel for the Assessee referred to the decision of the Supreme Court in ***Universal Plast Ltd. v. Commissioner of Income-Tax (1999) 237 ITR 454(SC)*** where it is held that no precise test can be laid down to ascertain whether income received by an Assessee from licensing or letting out of asset would fall under the head profits and gains of business or profession since it was a mixed question of law and fact and has to be determined from the point of view of a businessman in that business on the facts and in the circumstances of each case.

23. In ***Chennai Properties & Investments Ltd. v. Commissioner of Income Tax (2015) 373 ITR 673 (SC)***, the Court accepted the plea of the Assessee in that case that where the main line of business was letting of property then the income therefrom should not be treated as 'income from house property' but 'business income'.

24. In ***Associated Hotels of India Ltd. v. R.N. Kapoor AIR 1959 SC 1262***, a distinction was drawn between a licence and a lease. If the document gives only a right to use the property while it remains in the possession and control of the owner thereof it will be a licence. Where the legal possession continues therefore to be with the owner with the licencee making use of the property it could still only be a licence.

25. In ***Quadarat Ullah v. Municipal Board, Bareilly AIR 1974 SC 396***, it was observed "if an interest in immovable property, entitling the transferee to enjoyment, is created, it is a lease; if permission to use land without right to exclusive possession is alone granted, a licence is the legal result."

26. In the facts and circumstances of the present case, in light of the specific clauses of the licence deed, the Court is satisfied that the income earned by the Assessee from the licence fee could not be characterised as rent and, therefore, income from house property. The Court is of the view that the AO and the ITAT were in error in coming to a contrary conclusion. They appear to have overlooked that the Assessee had consistently treated the licence fees collected as business income since AY 1982-83. In ***Commissioner of Income Tax v. Neo Poly Pack (P) Ltd. (2000) 245 ITR 492 (Del)*** in similar

circumstances, applying the rule of consistency, the Court declined to frame a question of law urged by the Revenue that the licence fee earned by the owner of the property ought to be treated as income from house property and not business income.

27. For all the aforementioned reasons, Question Nos. (ii) and (iii) are also answered in the negative i.e. in favour of the Assessee and against the Revenue. The impugned order of the ITAT and the corresponding order of the AO on the above issues for the AYs in question are set aside.

28. The appeals are allowed but in the circumstances with no order as to costs.

S. MURALIDHAR, J

NAJMI WAZIRI, J

AUGUST 01, 2016
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