आयकर अपीलीय अधिकरण "F" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "F" BENCH, MUMBAI

BEFORE SHRI JOGINDER SINGH, JUDICIAL MEMBER AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 7976/Mum/2011

(**निर्धारण वर्ष /** Assessment Year : 2007-08)

Mr. Vishwanath Acharaya, 1701-A Wing, Brook Hill Towers, Near Lokhandwala Complex, Andheri West, Mumbai – 400 058	**बनाम**/ v.	The Assistant Commissioner of Income Tax – 11(1), Aayakar Bhavan, M.K. Road, Mumbai – 400 020.
स्थायी लेखा सं./PAN : AAGPA 0144D		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by	Shri Sanjiv M. Shah
Revenue by :	Shri B. Yadagiri

सुनवाई की तारीख **/Date of Hearing : 29-9-2015**

घोषणा की तारीख /**Date of Pronouncement : 16-12-2015**

आदेश / O R D E R

PER RAMIT KOCHAR, ACCOUNTANT MEMBER :

This appeal, filed by the assessee, being ITA No. 7976/Mum/2011, is directed against the order dated 31-10-2011 passed by the learned Commissioner of Income Tax (Appeals)- 3, Mumbai (Hereinafter called "the CIT(A)"), for the assessment year 2007-08.

2. The Grounds of appeal raised by the assessee in the memo of appeal filed with the Tribunal read as under:-

"I. On the facts and circumstances of the case and in law the Ld. Commissioner of Income Tax (Appeals) [hereinafter referred to as Ld CIT(A)] in confirming the action of the Ld Assistant Commissioner of Income-Tax-11(l),Mumbai [hereinafter referred to as Ld AO] in respect of the following properties as deemed to be let out :-

• Flat at Malad

• Flat at Millat nagar I 103

• Flat at Millat Nagar 1203

• Plot at MHADA Shariq Hall

and confirming the assessment of the same under the head Income from House Property.

2. On the facts and circumstances of the case and in law the Ld. CIT (A) erred in confirming the action of the Ld AO in restricting the claim of interest to Rs.150,000/-.

3. On the facts and circumstances of the case and in law the Ld CIT (A) erred in conforming the action of the Ld AO in holding that for professional income "Appellant is liable to follow mercantile method of accounting and accordingly adding a sum of Rs.2,257,000/- in respect of income which has already been considered as income in subsequent assessment year.

4. On the facts and circumstances of the case and in law the Ld CIT (A) erred in confirming the action of Ld AO to the extent of Rs.10,00,000/- as unexplained cash-credit u/s 68 of IT Act.

5. On the facts and circumstances of the case and in law the Ld CIT (A) erred in conforming the action of the LD AO in adding a sum of Rs. l,419,000/- as cash deposit u/s 68 of IT Act.

6. That the orders of Ld CIT(A) and Ld AO are bad in law and on facts."

3. The Brief facts of the case are that assessee is a Professional Dance Director for Cinematograph films. Besides this, he runs a dance academy by the name of Ganesh Acharya Dance Academy and film production house by the name of M/s Pushpa Krishna Creations. During the course of assessment proceedings u/s 143(3) read with Section 143(2) of the Income Tax Act,

1961(Hereinafter called the "the Act"), it was observed by the learned assessing Officer (Hereinafter called "the A.O.") from the individual Balance Sheet of the assessee that the assessee owned six immovable properties, which are as under:-

Sl No.	Description of property	Book value	Remarks
1	Flat at Malad	5,42,902	
2	Flat at Yashodeep CHS Ltd.	33,79,000	
3	MHADA Premises	31,01,566	
4	Flat at Millat Nagar 1103	27,03,545	Purchased on 19.5.2006
5	Plot at Millat Nagar 1203	23,63,490	Purchased on 17.5.2006
6	Plot at MHADA Sheriq Hall	23,70,548	

The AO observed that the assessee has not offered any income under the head "Income from house property". The assessee was show caused as to why no income has been offered under the head "Income from house property" after claiming exemption with respect to one self occupied property. In reply, the assessee submitted a list of various house properties with their corresponding usage as under:-

Sl No.	Description of property	Book value	Remarks
1	Flat at Malad	5,42,902	
2	Flat at Yashodeep CHS Ltd.	33,79,000	Residence
3	MHADA Premises	31,01,566	For business of M/s Pushpa Krishna Creations
4	Flat at Millat Nagar 1103	27,03,545	
5	Flat at Millat Nagar 1203	23,63,490	Personal office
6	Plot at MHADA Sheriq Hall	23,70,548	Ganesh Acharya Dance Academy

The A.O. observed that the assessee has claimed four out of the six house properties to be used for his business purposes while the assessee is not claiming depreciation with respect to these four properties stated to be used for business purposes and since no evidence were submitted by the assessee to substantiate its claim of usage of above properties for the purpose of business, the A.O. after giving benefit of one house property for residential purpose and one for the purpose of business, computed the income under the head "Income from house property" based on 10% of the book value as under:-

Sl No.	Description of property	Book value	
1	Flat at Malad	5,42,902	
2	Flat at Millat Nagar 1103	27,03,545	
3	Flat at Millat Nagar 1203	23,63,490	
4	Plot at MHADA Sheriq Hall	23,70,548	
	Total	79,80,485	

Total book value : 79,80,485	
10% of the book value of the property	7,98,048
Less: 30% Standard Deduction	2,39,414
	5,58,634".

Thus, Rs. 5,58,634/- was added to the income of the assessee under the head "Income from house property" by the AO vide assessment orders dated 07-12-2009 passed u/s 143(3) read with Section 143(2) of the Act. Further, it was observed by the A.O. that the assessee has debited in his P&L account with interest on housing loan of Rs. 8,77,110/- and as the house properties were deemed to be let out properties, the said amount of interest cannot be allowed as business expenses and accordingly the A.O. restricted the claim of interest against the house property to Rs. 1,50,000/- by virtue of section 24(b) of the

Act vide assessment orders dated 07-12-2009 passed u/s 143(3) read with Section 143(2) of the Act.

Aggrieved by the assessment orders dated 07-12-2009 of the AO, the assessee carried the matter before the CIT(A) in appeal and submitted that the assessee is the owner of plot at MHADA Sheriq hall without super structure on the said property on which a partnership firm named M/s Sing and Swing (in which the assessee is 50% partner in the capacity of HUF) has constructed a dance rehearsal hall named as "Sheriq Hall" and this hall is being used as dance rehearsal hall. The assessee has filed copy of partnership deed, P&L account & balance sheet showing that the hall was constructed on the said property and the premises is being used as dance rehearsal hall. The assessee submitted that the said documents were submitted to the AO during remand report proceedings and no adverse comments has been made by the AO while accepting the evidence. The assessee is also using a part of the above said property for running as Ganesh Acharya Dance Academy. The assessee submitted that the assessee is owner of the plot only and not the owner of the building , hence provisions of Section 22 of the Act are not attracted with respect to this property.

Similarly, the assessee submitted that the flat at Malad was used as godown during the previous year but erroneously the usage was not indicated before the AO and hence it being used for business purpose, it cannot be brought to tax under the head "Income from house property". The assessee further submitted that the flat No. 1103 and 1203 at Millat Nagar are being used by the assessee as choreography and film production businesses separately as they cannot be used in conjunction with each other due to requirements of business necessities . The assessee also submitted that MHADA premises were actually sold during the year and the sale consideration of Rs. 15 lakhs was shown as advance against MHADA properties in the Balance Sheet. This

property was being used for film production which was later transferred to Millat Nagar premises and no income can be assessed in respect of Millat Nagar premises.The CIT(A) noted that the AO has observed that no depreciation has been claimed by the assessee on these properties which the assessee replied that even if no depreciation is claimed by the assessee but that does not mean that businesses are not carried by the assessee from the said premises.

4. The CIT(A) after considering the submission of the assessee observed that the assessee has not claimed any depreciation on the business premises.

With respect to Mhada property, the CIT(A) held that the assessee himself has shown advance of Rs.15 lacs and also NOC for sale of property by the Society was given on 02/10/2007 which means that property was not sold during the previous year and hence amount was shown as advance .The CIT(A) held that the AO has rightly treated the said property as deemed let out property.

With regard to Flat at Malad, the CIT(A) held that the assessee has himself stated that the flat as vacant during assessment proceedings. The assessee has not brought any evidence to substantiate that the flat has been used for godown nor any depreciation is claimed and hence the claim of the assessee was rejected.

With respect to claim of Flat No. 1103 and 1203 , the CIT(A) observed that these are newly acquired properties during the previous year. The claim of the assessee that these flats were used for businesses was not supported by any documentary evidence and the finding of the AO was upheld . The CIT(A) upheld the contention of the assessee that the flat was acquired in May 2006 and hence ALV should be computed for the period of occupation of flat till end of financial year 2006-07.

With respect to the claim of the assessee that the assessee is only the owner of the plot at Mahada and structure therein do not belong to the assessee as same was constructed by partnership firm M/s Sing & Swing , it was held by the CIT(A) that the assessee has not raised the claim before the AO. The CIT(A) rejected the contention of the assessee that the building on the plot was not owned by the assessee . The CIT(A) also held that even if the said plot was given to the afore-said partnership firm , no rent is received from the partnership firm by the assessee and no copy of utilization of plot by the firm has been filed by the assessee. The CIT(A) relied upon the decision in the case of D M Vakil v. CIT(Bom.) 14 ITR 298 , Indian City Properties Ltd. v. CIT (Cal) 55 ITR 262, East India Housing and Land Development Trust Limited v. CIT (SC) 42 ITR 49 wherein it is held that the owner of property is liable to be charged to House Property Income. Thus, the CIT(A) upheld the orders of the AO.

The CIT(A) after considering the submission of the assessee, restricted the disallowance to 8% of market value of the property after referring to the provisions of section 7(1) of the Wealth Tax Act, 1957 read with Schedule III , from which the assessee will be granted deduction of municipal taxes and the standard deduction @30% as provided under the Act.

Similarly, the CIT(A) restricted the claim of interest of the assessee to Rs. 1,50,000/- by virtue of provisions of section 24(b) of the Act as in the opinion of the CIT(A), the property was lying vacant during the year and has been rightly considered to be deemed let out property by the A.O.

5. Aggrieved by the orders of the CIT(A), the assessee is in further appeal before the Tribunal.

6. The ld. Counsel for the assessee submitted that the assessee has filed additional evidences before the CIT(A) which the CIT(A) refused to admit and the said evidences were not considered by the CIT(A). It was submitted before us that the notional income based upon the book value/market value of the property cannot be brought to tax as these is no scheme or provisions in the Act to compute the annual letting value (ALV) to compute income from house property based upon the book value/market value of the property. Similarly , the assessee submitted that since the property at Millat nagar was used for business purposes, hence, the interest cannot be restricted to Rs. 1,50,000/- as the amount has been paid by the assessee on housing loan availed for the acquisition of Millat Nagar property and the said property is being used for business purposes.

6. The ld. D.R., on the other hand, relied upon the orders of authorities below.

7. We have considered the rival contentions and perused the material available on record. We observed that the Hon'ble Bombay High Court in the case of CIT v. Tip Top Typography, (2014) 48 Taxmann.com 191 (Bom) has laid down the principles for computation of income from house property u/s 22 and 23 of the Act. The relevant extracts of judgment of Hon'ble Bombay High Court are reproduced as under :

> ***"43.*** *It also appears that both, the judgment in the case of Satya Co. Ltd. (supra) rendered by a Division Bench of the Calcutta High Court and the judgment of this Court in the case of J.K. Investors (Bombay) Ltd. (supra) were considered by the Full Bench of the Delhi High Court on which decision heavy reliance is placed by the counsel for the assessee. The Full Bench was called upon to decide as to how to determine "fair rent" of the property and, then, to find out as to whether the actual rent*

received is less or more than the "fair rent" so that higher of the two is taken as Annual Letting Value under section 23(1)(b) of the Income-tax Act.

44. *The factual and admitted position before the Delhi Full Bench was in addition to the contractual rent, substantial amount by way of interest free deposit is given, the security deposit is many time more than the annual rent received by the assessee. Nonetheless, the Annual Letting Value arrived at by the Municipal Corporation was less than the contractual rent received by the assessees. The Assessing Officer while arriving at the "fair rent" had added notional interest on the security deposit to the actual rent received to arrive at the Annual Letting Value. None of the cases before the Full Bench involved applicability of the Delhi Rent Control Act. Therefore, question of fixing standard rent in terms of this Act did not arise. However, it was admitted that if the property is covered by Delhi Rent Control Act then the standard rent under the said Act can be treated as "fair rent" in view of various judgments.*

45. *In the above backdrop, the Full Bench held as under:—*

'With this, we revert back to the moot question, viz., how to determine the "fair rent" of the property and then to find out as to whether actual rent received is less or more than the "fair rent" so that higher of two is taken as annual letting value under Section 23(1)(b) of the Act. For this purpose, we first discuss the validity of approach taken by the AO, viz., whether it is permissible to add notional interest of interest free security deposit and add the same to the actual rent received for arriving at annual letting value. Even the Division Bench while making reference did not countenance the aforesaid formula adopted by the AO as is clear from Para 12 of the reference order wherein it is observed as under:

"12. In this backdrop, the important question which arises for determination is: what is the fair rent of the properties, which were let out in the instant case? The mistake committed by the AO was that he did not address this issue and straightway proceeded to add notional interest on the interest free security deposit.

The aforesaid conclusion is correct. We may record that permissibility of adding notional interest into actual market rent received was not approved by the Calcutta High Court in the case ofCIT v. Satya Co. Ltd. [1997] 140 CTR (Cal) 569] and categorically rejected in the following words:

"There is no mandate of law whereby the AO could convert the depression in the rate of rent into money value by assuming the market rate of interest on the deposit as the further rent received by way of benefit of interest-free deposit. But section 23, as already noted, does not permit such calculation of the value of the benefit of interest-free deposit as part of the rent. This situation is, however, foreseen by Schedule III to the WT Act and it authorises computation of presumptive interest at the rate of 15 per cent as an integral part of rent to be added to the ostensible rent. No such provision, however, exists in the Act. That being so, the act of the AO in presuming such notional interest as integral part of the rent is ultra vires the provision of section 23(1) and is, therefore, unauthorised. Though what has been urged on behalf of the Revenue is not to be brushed aside as irrational, yet the contention is not acceptable as the law itself comes short of tackling such fact-situation."

This view of the Calcutta High Court has been accepted by a Division Bench of this Court as well in the case of CIT v. Asian Hotels Ltd. [2008] 215 CTR (Delhi) 84 holding that the notional interest on refundable security, if deposited, was neither taxable as profit or gain from business or profession under Section 28(iv) of the Act or income from house

property under Section 23(1)(a) of the Act. Rationale given in this behalf was as under (page 493):

"A plain reading of the provisions indicates that the question of any notional interest on an interest free deposit being added to the income of an assessed on the basis that it may have been earned by the Assessee if placed as a fixed deposit, does not arise. Section 28(iv) is concerned with business income and is distinct and different from income from house property. It talks of the value of any benefit on perquisite, "whether convertible into money or not" arising from "the business or the exercise of a profession." It has been explained by this Court in Ravinder Singh that Section 28(iv) can be invoked only where the benefit or perquisite is other than cash and that the term "benefit or amenity or perquisite" cannot relate to cash payments.

In the instant case, the AO has determined the monetary value of the benefit stated to have accrued to the assessed by adding a sum that constituted 18% simple interest on the deposit. On the strength of Ravinder Singh, it must be held that this rules out the application of Section 28(iv) of the Act.

Section 23(1)(a) is relevant for determining the income from house property and concerns determination of the annual letting value of such property. That provision talks of "the sum for which the property might reasonably be expected to let from year to year." This contemplates the possible rent that the property might fetch and not certainly the interest in fixed deposit that may be placed by the tenant with the landlord in connection with the letting out of such property. It must be remembered that in a taxing statute it would be unsafe for the Court to go beyond the letter of the law and try to read into the provision more than what is already provided for. The attempt by learned counsel for the Revenue to draw an analogy from the Wealth-tax Act, 1957 is also to no avail. It is

an admitted position that there is a specific provision in the Wealth-tax Act which provides for considering of a notional interest whereas Section 23(1)(a) contains no such specific provision."

We approve the aforesaid view of the Division Bench of this Court and Operative words in Section 23 (1)(a) of the Act are "the sum for which the property might reasonably be expected to let from year to year". These words provide a specific direction to the Revenue for determining the "fair rent". The Assessing Officer, having regard to the aforesaid provision is expected to make an inquiry as to what would be the possible rent that the property might fetch. Thus, if he finds that the actual rent received is less than the "fair/market rent" because of the reason that the assessee has received abnormally high interest free security deposit and because of that reason, the actual rent received is less than the rent which the property might fetch, he can undertake necessary exercise in that behalf. However, by no stretch of imagination, the notional interest on the interest free security can be taken as determinative factor to arrive at a "fair rent". The Provisions of section 23(1)(a) do not mandate this. The Division Bench in CIT v. Asian Hotels Ltd. [2010] 323 ITR 490 (Delhi), thus, rightly observed that in a taxing statute it would be unsafe for the Court to go beyond the letter of the law and try to read into the provision more than what is already provided for. We may also record that even the Bombay High Court in the case ofCIT v. J.K. Investors (Bombay) Ltd. [2001] 248 ITR 723 categorically rejected the formula of addition of notional interest while determining the "fair rent".

It is, thus, manifest that various Courts have held a consistent view that notional interest cannot form part of actual rent. Hence, there is no justification to take a different view that what has been stated in CIT v. Asian Hotels Limited [2010] 323 ITR 490/[2008] 168 Taxman 59 (Delhi).

The next question would be as to whether the annual letting value fixed by the Municipal Authorities under the Delhi Municipal Corporation Act can be the basis of adopting annual letting value for the purposes of section 23 of the Act. This question was answered in affirmative by the Calcutta High Court in CIT v. Satya Co. Ltd. [1997] 140 CTR (Cal.) 569 on the ground that the provisions contained in the Delhi Municipal Corporation Act for fixing annual letting value is in pari materia with section 23 of the Act. The Court opined that the fair rent fixed under the Municipal laws, which takes into consideration everything, would form the basis of arriving at annual value to be determined under Section 23(1)(a) and to be compared with actual rent and notional advantage in the form of notional interest on interest free security deposit could not be taken into consideration. It is clear from the following discussion therein:

"6. With regard to question Nos. (5) and (6) which are only for the assessment years 1984-85 and 1985-86 the further issue involved is whether any addition to the annual rental value can be made with reference to any notional interest on the deposit made by the tenant. When the annual value is determined under sub-clause (a) of sub-section (1) of section 23 with reference to the fair rent then to such value no further addition can be made. The fair rent, takes into consideration everything. The notional interest on the deposit is not any actual rent received or receivable. Under sub-clause (b) of section 23(1) only the actual rent received or receivable can be taken into consideration and not any notional advantage. The rent is an actual sum of money which is payable by the tenant for use of the premises to the landlord. Any advantage and/or perquisite cannot be treated as rent. Wherever any such perquisite or benefit is sought to be treated as income, specific provisions in that behalf have been made in the Act by including such benefit, etc., in the definition of the income under section 2(24) of the Act.

Specific provisions have also been made under different heads for adding such benefits or perquisites as income while computing income under those heads, e.g., salary, business. The computation of the income under the head 'House property' is on a deemed basis. The tax has to be paid by reason of the ownership of the property. Even if one does not incur any sum on account of repairs, a statutory deduction therefore is allowed and where on repairs expenses are incurred in excess of such statutory limit, no deduction for such excess is allowed. The deductions for municipal taxes and repairs are not allowed to the extent they are borne by the tenant. However, even such actual reimbursements for municipal taxes, insurance, repairs or maintenance of common facilities are not considered as part of the rent and added to the annual value. Accordingly, there can be no scope or justification whatsoever for making any addition for any notional interest for determining the annual value.

Whatever benefit or advantage which is derived from the deposits - whether by way of saving of interest or of earning interest or making profits by investing such deposit - the same would be reflected in computing the income of the assessee under other heads.

In our view there is no scope for making any addition on account of so-called notional interest on the deposit made by the tenant, since there is no provision to this effect in section 22 or 23 of the IT Act, 1961."

In fact, this is the view taken even by the Supreme Court in the case of Mrs. Shiela Kaushish v. CIT [1981] 131 ITR 435 on account of similarity of the provisions under the municipal enactments and section 23 of the Act.

It is on this basis that in the present case, the Commissioner of Income Tax (Appeals) gave primacy to the rateable value of the property fixed by the Municipal Corporation of Delhi vide its assessment order dated

December 31, 1996 and on this basis, opined that the actual rent was more than the said rateable value and therefore, as per Section 23(1)(b), the actual rent would be the income from house property and there could not have been any further additions.

Since the provisions of fixation of annual rent under the Delhi Municipal Corporation Act are in pari materia of section 23 of the Act, we are inclined to accept the aforesaid view of the Calcutta High Court in Satya Co. Ltd. [1997] 140 CTR (Cal.) 569 that in such circumstances, the annual value fixed by the Municipal Authorities can be a rational yardstick. However, it would be subject to the condition that the annual value fixed bears a close proximity with the assessment year in question in respect of which the assessment is to be made under the Income-tax laws. If there is a change in circumstances because of passage of time, viz., the annual value was fixed by the Municipal Authorities much earlier in point of time on the basis of rent than received, this may not provide a safe yardstick if in the Assessment Year in question when assessment is to be made under Income-tax Act. The property is let-out at a much higher rent. Thus, the Assessing Officer in a given case can ignore the municipal valuation for determining annual letting value if he finds that the same is not based on relevant material for determining the "fair rent" in the market and there is sufficient material on record for taking a different valuation. We may profitably reproduce the following observations of the Supreme Court in the case of Corporation of Calcutta v. Smt. Padma Debi, AIR 1962 SC 151, 153.

"A bargain between a willing lessor and a willing lessee uninfluenced by any extraneous circumstances may afford a guiding test of reasonableness. An inflated or deflated rate of rent based upon fraud, emergency, relationship and such other considerations may take it out of the bounds of reasonableness."

Thus the rateable value, if correctly determined, under the municipal laws can be taken as ALV under Section 23(1)(a) of the Act. To that extent we agree with the contention of the learned Counsel of the assessee. However, we make it clear that rateable value is not binding on the Assessing Officer. If the Assessing Officer can show that rateable value under municipal laws does not represent the correct fair rent, then he may determine the same on the basis of material/evidence placed on record. This view is fortified by the decision of Patna High Court in the case ofKashi Prasad Kataruka v. CIT [1975] 101 ITR 810.

The above discussion leads to the following conclusions:

(i) *ALV would be the sum at which the property may be reasonably let out by a willing lessor to a willing lessee uninfluenced by any extraneous circumstances.*

(ii) *An inflated or deflated rent based on extraneous consideration may take it out of the bounds of reasonableness.*

(iii) *Actual rent received, in normal circumstances, would be a reliable evidence unless the rent is inflated/deflated by reason of extraneous consideration.*

(iv) *Such ALV, however, cannot exceed the standard rent as per the Rent Control Legislation applicable to the property.*

(v) *If standard rent has not been fixed by the Rent Controller, then it is the duty of the Assessing Officer to determine the standard rent as per the provisions of rent control enactment.*

(vi) *The standard rent is the upper limit, if the fair rent is less than the standard rent, then it is the fair rent which shall be taken as ALV and not the standard rent.*

We would like to remark that still the question remains as to how to determine the reasonable/fair rent. It has been indicated by the Supreme Court that extraneous circumstances may inflate/deflate the "fair rent". The question would, therefore, be as to what would be circumstances which can be taken into consideration by the Assessing Officer while determining the fair rent. It is not necessary for us to give any opinion in this behalf, as we are not called upon to do so in these appeals. However, we may observe that no particular test can be laid down and it would depend on facts of each case. We would do nothing more than to extract the following passage from the Supreme Court judgment in the case of Motichand Hirachand v. Bombay Municipal Corporation, AIR 1968 SC 441, 442 :

"It is well-recognized principle in rating that both gross value and net annual value are estimated by reference to the rent at which the property might reasonably be expected to let from year to year. Various methods of valuation are applied in order to arrive at such hypothetical rent, for instance, by reference to the actual rent paid for the property or for others comparable to it or where there are no rents by reference to the assessments of comparable properties or to the profits carried from the property or to the cost of construction.'

46. *We have and after careful reading of the provision in question and the conclusion of the Full Bench of the Delhi High Court councluded that a different view cannot be taken. We respectfully concur with the view taken in this Full Bench decision of the Delhi High Court.*

47. *We are of the view that where Rent Control Legislation is applicable and as is now urged the trend in the real estate market so also in the commercial field is that considering the difficulties faced in either retrieving back immovable properties in metro cities and towns, so also the time spent in litigation, it is expedient to execute a leave and license*

agreements. These are usually for fixed periods and renewable. In such cases as well, the conceded position is that the Annual Letting Value will have to be determined on the same basis as noted above. In the event and as urged before us, the security deposit collected and refundable interest free and the monthly compensation shows a total mismatch or does not reflect the prevailing rate or the attempt is to deflate or inflate the rent by such methods, then, as held by the Delhi High Court, the Assessing Officer is not prevented from carrying out the necessary investigation and enquiry. He must have cogent and satisfactory material in his possession and which will indicate that the parties have concealed the real position. He must not make a guess work or act on conjectures and surmises. There must be definite and positive material to indicate that the parties have suppressed the prevailing rate. Then, the enquiries that the Assessing Officer can make, would be for ascertaining the going rate. He can make a comparative study and make a analysis. In that regard, transactions of identical or similar nature can be ascertained by obtaining the requisite details. However, there also the Assessing Officer must safeguard against adopting the rate stated therein straightway. He must find out as to whether the property which has been let out or given on leave and license basis is of a similar nature, namely, commercial or residential. He should also satisfy himself as to whether the rate obtained by him from the deals and transactions and documents in relation thereto can be applied or whether a departure therefrom can be made, for example, because of the area, the measurement, the location, the use to which the property has been put, the access thereto and the special advantages or benefits. It is possible that in a high rise building because of special advantages and benefits an office or a block on the upper floor may fetch higher returns or vice versa. Therefore, there is no magic formula and everything depends upon the facts and circumstances in each case. However, we emphasize that before the Assessing Officer

determines the rate by the above exercise or similar permissible process he is bound to disclose the material in his possession to the parties. He must not proceed to rely upon the material in his possession and disbelieve the parties. The satisfaction of the Assessing Officer that the bargain reveals an inflated or deflated rate based on fraud, emergency, relationship and other considerations makes it unreasonable must precede the undertaking of the above exercise. After the above ascertainment is done by the Officer he must, then, comply with the principles of fairness and justice and make the disclosure to the Assessee so as to obtain his view.

48. *We are not in agreement with Shri Chhotaray that the municipal rateable value cannot be accepted as a bona fide rental value of the property and it must be discarded straightway in all cases. There cannot be a blanket rejection of the same. If that is taken to be a safe guide, then, to discard it there must be cogent and reliable material.*

49. *We are of the opinion that market rate in the locality is an approved method for determining the fair rental value but it is only when the Assessing Officer is convinced that the case before him is suspicious, determination by the parties is doubtful that he can resort to enquire about the prevailing rate in the locality. We are of the view that municipal rateable value may not be binding on the Assessing Officer but that is only in cases of afore-referred nature. It is definitely a safe guide.*

50. *We have broadly agreed with the view taken by the Full Bench of the Delhi High Court. Hence, the issue of determination of the "fair rental value" in respect of properties not covered by or covered by the Rent Control Act is to be undertaken in terms of the law laid down in the Full Bench decision of the Delhi High Court.*

51. *We quite see the force in the arguments of Ms. Vissanjee that ordinarily the license fee agreed between the willing licensor or a willing licensee uninfluenced by any extraneous circumstances would afford reliable evidence of what the landlord might reasonably be expect to get from a hypothetical tenant. She has in making this submission, answered the issue and summed up the conclusion as well. Then, it is but natural and logical that in the event, the transaction is influenced by any extraneous circumstances or vitiated by fraud, or the like that the Assessing Officer can adopt a "fair rent" based on the opinion obtained from reliable sources. There as well, we do not see as to how we can uphold the submissions of Mr. Chhotaray that the notional rent on the security deposit can be taken into account and consideration for the determination. If the transaction itself does not reflect any of the afore stated aspects, then, merely because a security deposit which is refundable and interest free has been obtained, the Assessing Officer should not presume that this sum or the interest derived therefrom at Bank rate is the income of the assessee till the determination or conclusion of the transaction. The Assessing Officer ought to be aware of several aspects and matters involved in such transactions. It is not necessary that if the license is for three years that it will operative and continuing till the end. There are terms and conditions on which the leave and license agreement is executed by parties. These terms and conditions are willingly accepted. They enable the license to be determined even before the stated period expires. Equally, the licensee can opt out of the deal. A leave and license does not create any interest in the property. Therefore, it is not as if the security deposit being made, it will be necessarily refundable after the third year and not otherwise. Everything depends upon the facts and circumstances in each case and the nature of the deal or transaction. These are not matters which abide by any fixed formula and which can be universally applied. Today, it*

may be commercially unviable to enter into a lease and, therefore, this mode of inducting a 'third party' in the premises is adopted. This may not be the trend tomorrow, therefore, we do not wish to conclude the matter by evolving any rigid test.

52. *We have also noted the submissions of Shri Ahuja. We are of the opinion that even in the cases and matters brought by him to our notice, it is evident that the Assessing Officer cannot brush aside the rent control legislation, in the event, it is applicable to the premises in question. Then, the Assessing Officer has to undertake the exercise contemplated by the rent control legislation for fixation of standard rent. The attempt by the Assessing Officer to override the rent control legislation and when it balances the rights between the parties has rightly been interfered with in the given case by the Appellate authority. The Assessing Officer either must undertake the exercise to fix the standard rent himself and in terms of the Maharashtra Rent Control Act, 1999 if the same is applicable or leave the parties to have it determined by the Court or Tribunal under that Act. Until, then, he may not be justified in applying any other formula or method and determine the "fair rent" by abiding with the same. If he desires to undertake the determination himself, he will have to go by the Maharashtra Rent Control Act, 1999. Merely because the rent has not been fixed under that Act does not mean that any other determination and contrary thereto can be made by the Assessing Officer. Once again having respectfully concurred with the judgment of the Full Bench of the Delhi High Court, we need not say anything more on this issue.*

53. *Thus, apart from the three aspects namely of a municipal valuation, of obtaining interest free security deposit and the properties being covered by the Maharashtra Rent Control Act but no standard rent thereunder is fixed, our attention has not been invited to any other case.*

Suffice it to hold that in those cases and to which our attention is not invited the principles laid down in the decisions of the Hon'ble Supreme Court and referred to by the Full Bench of the Delhi High Court would govern the enquiry.

54. *As a result of the above discussion, we are of the opinion that wherever the Assessing Officer has not adhered to the above principles, and his finding and conclusion has been interfered with, by the higher Appellate Authorities, the revenue cannot bring the matter to this Court as no substantial question of law can be arising for determination and consideration of this Court. Then, the findings by the last fact finding Authority, namely the Tribunal and against the revenue shall have to be upheld as they are consistent with the facts and circumstances brought before it. If they are not vitiated by any perversity or error of law apparent on the face of the record, the appeals of the revenue cannot be entertained. They would have to be accordingly dismissed."*

We have also observed that the A.O. has not made any enquiry with respect to the computation of the income from house property with respect to the respective properties in accordance with section 22 and 23 of the Act and the principles laid down by the Hon'ble Bombay High Court in the case of Tip Top Typography (supra) to determine the prevailing market rent of these properties and rather computed ALV based on notional rent based on cost of properties. During the hearing , the ld. Counsel of the assessee also contended that the assessee has produced additional evidences before the authorities below which has not been considered by the authorities and principles of natural justice are vitiated. In view of the above, we are of the considered view that the matter with respect to ground no 1 and 2 raised by the assessee in memo of appeal needs to be set aside to the file of the A.O. for re-determination of the income from house properties in accordance with the

provisions of section 22 and 23 of the Act and the principles laid down by the Hon'ble Bombay High Court in the case of Tip Top Typography (supra) after considering the additional evidences filed by the assessee in his defense. Accordingly we set aside the order of CIT(A) and restore back the issue to the file of A.O. with the above directions and to decide the issue de-novo as per law. The A.O. shall also afford sufficient opportunity of being heard to the assessee in accordance with principles of natural justice. Ground No. 1 & 2 are accordingly treated as allowed for statistical purposes.

8. Ground No. 3 relates to the addition of Rs. 22,57,000/- made by the A.O. on the ground that in case of professional income, the assessee is liable to follow mercantile method of accounting in respect of income which has already been considered as income in the subsequent assessment year based on cash basis of accounting consistently followed by the assesee. During the assessment proceedings u/s 143(3) read with Section 143(2) of the Act, the A.O. observed that the assesse is following cash system of accounting for individual transactions and mercantile system of accounting for transactions in his proprietorship concern M/s Pushpa Krishna Creations. As per section 145 of the Act, method of accounting should be either cash or mercantile to be followed by the assessee and since the assessee is following mercantile system of accounting in view of the compulsory requirements of Rule 9A & 9B of the Income Tax Rules, 1962 , it was show caused to the assessee by the A.O. that why mercantile system of accounting should not be followed by the assessee with respect to his other individual transactions. The A.O. asked for the agreement pursuant to which the receipts are credited in the P&L account. The assessee in reply submitted that the assessee is an individual and allowed to follow cash method of accounting for his various business or professions as per section 145 of the Act. However, for the purpose of film production business, method of accounting as prescribed in Rule 9A and 9B is followed. Thus, the assessee submitted before the AO that the assessee

has followed the provisions of the Income Tax Act in both the cases. The assessee also submitted that with respect to his professional receipt , there are no written agreements as all the contracts are oral. The A.O. asked the assessee to submit the details of professional receipts party wise for the financial year 2007-08 and 2008-09 against which the assessee submitted the details for financial year 2007-08 from whom he has received the professional income as under:-

Sl No.	Name	TDS	Gross Amount
1	Real Good Films	41,475	7.83,000
2	Shabbo Arts	-	6,00,000
3	Himesh Reshammiya Movie Culture	44,598	8,74,000

Since the assessee did not provided the written agreements with respect to professional income , the A.O. added the above stated receipt of Rs. 22,57,000/- received by the assessee in the financial year 2007-08 , as accrued income of the assessee in the financial year 2006-07 itself which in the opinion of A.O. was done to arrive at the correct total income of the assessee without rejecting the books of account of the assessee.

9.Aggrieved by the orders of the AO, the assessee carried the matter before the CIT(A) in appeal and submitted that income from production of films have been accounted for on accrual basis since according to the nature of business , in the opinion, it was the most appropriate method of accounting. The assessee submitted that the assessee computed the income separately for both the business based on different methods of accounting and no mistake has been pointed by the A.O. and there was no intention of the assessee of showing incorrect income. The assessee submitted that the choice of following method of accounting lies with the assessee and not with the Revenue in accordance with the provisions of section 145 of the Act. The

assessee submitted that as per rule 9A of the Act which govern the amortization of cost of production of the film business, the assessee can only follow mercantile system of accounting. The assessee submitted that if the AO wanted to follow mercantile system of accounting for his other professional income, the AO cannot do it on piecemeal basis and the AO should compute the income afresh by recasting the total income and expenditure. The assessee relied upon the case of ACIT v. Nana G Patekar, 27 SOT 8 (Mum) wherein it was held that rejection of books of account u/s 145 while accepting books as correct and complete was invalid. The assessee submitted that this professional income of Rs. 22.57 lakhs has already been offered to tax and due taxes have been paid to the Revenue in the assessment year 2008-09 and the same income cannot be taxed twice and if it be so added then equivalent credit of income should be given in the assessment year 2008-09 . However, the CIT(A) rejected the contentions of the assessee and held that as per section 145(1) of the Act , the income chargeable to profits and gains of business or profession shall subject to provisions of section 145(1) be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee. The CIT(A) held that the assessee falls under the class of choreographer, film producers and hence the assessee falls under the specific class of assessee for which Rule 9A and 9B has been made applicable and the assessee would be required to follow the mercantile system of accounting for his profession. He held that the A.O. was correct in applying the mercantile system of accounting for his professional income as Section 145 of the Act was amended to prohibit use of hybrid system of accounting. The CIT(A) held that the assessee also did not produced the agreement entered into with Real Goods, Shaboo Art and Himesh Reshamiya Movie Culture before the AO and even during the appellate proceedings before the CIT(A) , therefore, it is difficult to ascertain as to what method the assessee has actually employed and accordingly the action of the A.O. was upheld. With respect to the inclusion of the said

income by the assessee in the income of the assessee in the assessment year 2008-08 leading to taxing the same income twice, the CIT(A) held that this is not the subject matter of appeal and the assessee is free to approach the AO during assessment proceedings for the assessment year 2008-09 for appropriate relief .

10.Aggrieved by the orders of the CIT(A), the assessee is in further appeal before the Tribunal.

11. The ld. Counsel for the assessee submitted that the assessee is a choreographer which falls under the definition of 'film artist' as professional defined in Rule 6F of Income Tax Rules, 1962 , whereby the assessee is allowed to follow cash system of accounting which has been consistently and regularly followed by the assessee and allowed by the Revenue in the earlier years. The ld. Counsel submitted that it produced films under the banner of his proprietary concern Pushpa Krishna Creation and for the film production business the assessee followed prescribed Rule 9A & 9B of the income Tax Rules, 1962 and for this business of film production the mercantile method of accounting is adopted . Thus, in nut-shell, the income from profession of choreography was accounted for on cash basis consistently and regularly for several years which was accepted by the Revenue and for the film production business, Rule 9A & 9B was mandatory and was followed by assessee whereby mercantile method of accounting was followed . The ld. Counel submitted that the A.O. has directed the assessee to follow accrual basis of accounting for choreography business also because as per the AO, the assessee by following both cash and mercantile basis of accounting for different sources of income is following hybrid system of accounting which is not permitted by law as per the amended provisions of Section 145 of the Act. The assessee relied upon the judgment in the case of Abdulgafar A Nadiadwala v. ACIT (2004)267 ITR 488 (Bom. HC). The assessee submitted

that as per section 28 of the Act, the assessee has followed Rule 9A & 9B of Income Tax Rules,1962 to compute the income chargeable under the head "profits and gains from business or profession" in accordance with section 28. The assessee submitted that the A.O. has brought to tax in the impugned assessment year, the income of Rs. 22,57,000/- which was earned in the financial year 2007-08 and already subjected to tax in assessment year 2008-09 and due taxes have been paid to the Revenue and no prejudice is caused to Revenue while bringing to tax the same in the impugned assessment year, the assessee is prejudiced as the same income is taxed twice once in the assessment year 2007-08 by action of AO and secondly in assessment year 2008-09 by assessee's own action of voluntarily offering the same to tax in the return of income filed u/s 139 of the Act.

13. On the other hand, the ld. D.R. submitted that the assessee is following hybrid system of accounting whereby the assessee following cash basis of accounting for choreography business and mercantile system of accounting for film production business which method of accounting is not allowable as per the Act as per Section 145 of the Act. The ld. D.R. submitted that the A.O. may be directed to verify the system of accounting consistently followed by the assessee with respect to choreography business whereby cash system of accounting is followed following Rule 6F of Income Tax Rules,1962 while for film production mercantile system of followed as per Rule 9A and 9B of Income Tax Rules, 1962 is concerned.

14. We have considered the rival submissions and perused the material available on record. We have observed that the assessee is following cash basis of accounting for income arising from his profession . On the other hand, the assessee is following mercantile system of accounting by following Rule 9A & 9B of Income Tax Rules ,1962 for income arising from film production business under the proprietary concern 'Pushpa Krishna Creation'

which in the opinion of the AO is mandatory. The above facts are admitted by the AO in his assessment orders u/s 143(3) of the Act dated 07-12-2009 . The CIT(A) has observed that the choreographer, film producer has to follow rule 9A and 9B of Income Tax Rules, 1962 which in our humble opinion is not correct as the Rule 6F of the Income Tax Rules, 1962 provides that film artist include dance director and are professionals vide explanation (c) to sub-rule 2 to Rule 6F of Income Tax Rules,1962 while Rule 9A and 9B of the Income Tax Rules , 1962 deals with film production and distribution rights of feature film, thus the finding of the CIT(A) that choreographer i.e. dance directors have to compulsorily follow Rule 9A and 9B of Income Tax Rules, 1962 is humbly rejected. The whole controversy revolves around the action of the AO whereby the AO held that the assessee cannot follow cash basis of accounting for income arising from his profession and at the same time follow mercantile system of accounting for film production business, which in the opinion of AO is not permissible in view of the amendment in Section 145 of the Act by Finance Act , 1995 as it leads to following hybrid system of accounting because the assessee with respect to both the sources of income is the same being an individual i.e. Mr. Vishwanath Acharya. The AO has taken a view that income from profession has to be computed in accordance with mercantile system of accounting instead of cash system of accounting followed by the assessee because for the film production business carried on by the assessee , Rule 9A and 9B of Income Tax Rules, 1962 is mandatory and has to be compulsorily followed and hence income from profession also need to be computed following mercantile system of accounting so that mandate of amended Section 145 of the Act is complied with which do not permit the assessee to follow hybrid system of accounting. We have observed that the A.O. has added Rs. 22,57,000/- to the income of the assessee from the profession for the impugned previous year by following mercantile system of accounting although the assessee was consistently and regularly following cash system of accounting for the said profession , by assuming that the

income of Rs.22,57,000/- which was received in the next financial year 2007-08 has actually accrued in the impugned previous year i.e. 2006-07 merely on the pretext that the assessee has not produced the agreements with the three parties namely Real Goods, Shaboo Art and Himesh Reshamiya Movie Culture from whom the income of Rs.22,57,000/- was received in the next financial year 2007-08 without bringing on record cogent material or evidence to justify that this income of Rs. 22,57,000/- has actually accrued in the previous year 2006-07 to fasten liability of tax on the assessee while on the other hand the assessee contended that the agreement with these parties were oral and the said professional income of Rs.22,57,000/- has already suffered taxation on receipt basis as income for the assessment year 2008-09 and due taxes paid to the Revenue , rather the whole premise of the Revenue treating the income of Rs.22,57,000/- to have accrued in the impugned previous year 2006-07 is based on conjectures, surmises and assumptions not backed with any cogent material or evidence which is not permissible under the Act to bring it within the ambit of taxability to fasten liability on the assessee and more so the said amount of Rs.22,57,000/- has already suffered tax in the immediately succeeding assessment year 2008-09 and due taxes paid to Revenue.

The contention of the AO is that the assessee in the instant case by following cash system of accounting for income from profession and by following mercantile system of accounting for film production business , has in-fact followed hybrid system of accounting which is not permitted by Section 145 of the Act after amendment by Finance Act, 1995 which in our considered view is again devoid of merits . It is important to refer to amended Section 145 of the Act which was amended by Finance Act,1995 as applicable to relevant assessment year which reads as under:

*" [**Method of accounting.***

> ***145.*** *(1) Income chargeable under the head "Profits and gains of business or profession" or "Income from other sources" shall, subject to the provisions of sub-section (2), be computed* ***in accordance with either cash or mercantile system of accounting regularly employed by the assessee.***
>
> *(2) The Central Government may notify in the Official Gazette from time to time accounting standards to be followed by any class of assessees or in respect of any class of income.*
>
> *(3) Where the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee, or where the method of accounting provided in sub-section (1) or accounting standards as notified under sub-section (2), have not been regularly followed by the assessee, the Assessing Officer may make an assessment in the manner provided in section 144.]"*

The Section 145 of the Act , inter-alia, stipulate that the income chargeable to tax under the head 'Profits and gains of business' or 'Income from other sources' shall be computed in accordance with cash or mercantile system of accounting regularly employed by the assessee and where the above method of accounting is not regularly followed by the assessee, the AO may make an assessment in the manner provided in Section 144 of the Act. Prior to amendment , Section 145 of the Act did not restrict method of accounting to only cash or mercantile system of accounting and the assessee's were also allowed to follow hybrid system of accounting which was leading to distortion of income whereby correct income chargeable to tax was not reflected in hybrid system of accounting . The rationale of introduction of amendment of Section 145 of the Act by Finance Act,1995 as stipulated therein was as under:

"Methods of accounting and accounting standards for computing income

44.1 *Section 145(1) of the Income-tax Act prior to its amendment by the Finance Act, 1995, provided for computation of income from business or profession or income from other sources in accordance with the method of accounting regularly employed by the assessee. Income is generally computed by following one of the three methods of accounting, namely, (*i*) cash or receipts basis, (*ii*) accrual or mercantile basis, and (*iii*) mixed or hybrid method which has elements of both the aforesaid methods. It was noticed that many assessees are following the hybrid method in a manner that does not reflect the correct income. The Finance Act, 1995, has amended section 145 of the Income-tax Act to provide that income chargeable under the head 'Profits and gains of business or profession' or 'Income from other sources' shall be computed only in accordance with either the cash or the mercantile system of accounting, regularly employed by an assessee. The first proviso to sub-section (1) of section 145 has been deleted."*

The Hon'ble Rajasthan High Court in the case of (2008) 215 CTR 51(Raj) CIT v. VTC Leasing and Finance Limited has held as under:

"5. *So far as the first question is concerned, of course, it has come that the assessee was maintaining books of accounts by both manners viz., by receipt basis, and on mercantile basis as well, inasmuch as, with respect to accrual of lease income, mercantile system was adopted. However, for lease and hire income, the receipt basis was adopted. True it also is that by virtue of section 145, as amended, the income chargeable under the head "Profits and gains of business or profession" or "Income from other sources" is, subject to provisions of sub-section (2),*

to be computed in accordance with either cash or mercantile system of accounting, regularly employed by the assessee. Earlier the provision was that such income was to be computed in accordance with the method of accounting regularly employed by the assessee. In the present case, the learned Tribunal has found that this is undisputed and settled principle of fiscal law, that only the real income is to be taxed, and that the same income cannot be taxed twice. It was also taken to be settled principle of law, that realities of life have to be considered while arriving at the taxable income. It was noticed that amendment in section 145 has been carried out with the sole aim of checking the escapement of income, which occurred due to heterogeneous system of accounting followed by the assessee."

The mandate of Income Tax Act, 1961 is to collect correct taxes at the correct applicable tax rates from the correct assessee for the correct assessment year on the correct income to be computed in accordance with the Provisions of the Act . Thus, the method of accounting regularly employed by the assessee should enable the Revenue to compute correct /real income of the assessee as per provisions of the Act. Prior to amendment in Section 145 of the Act by Finance Act,1995, the Income was generally computed by following one of the three methods of accounting, namely, (*i*) cash or receipts basis, (*ii*) accrual or mercantile basis, and (*iii*) mixed or hybrid method which has elements of both the aforesaid methods. It was noticed by the Revenue that many assessees are following the hybrid method of accounting in a manner that does not reflect the correct income. Post amendment to Section 145 of the Act by Finance Act 1995, the income chargeable under the head 'Profits and gains of business or profession' or 'Income from other sources' shall be computed only in accordance with either the cash or the mercantile system of accounting, regularly employed by an assessee.Thus, in nutshell the objective of not allowing Hybrid or Mixed

method of accounting which had element of both the methods of accounting viz. cash and mercantile method of accounting , was that many assessees were following the hybrid method or mixed method of accounting in a manner that was not reflecting the correct income as per the Act and hence the mandate of the Act was defeated and to correct the situation so that correct income could be computed and correct taxes can be collected , the Parliament in its wisdom permitted ,by making amendment to Section 145 of the Act by Finance Act,1995 either of two methods of accounting viz. cash basis of accounting or mercantile basis of accounting regularly employed by the assessee to compute the correct taxes as per provisions of the Act. At this stage it is important to understand cash method of accounting, mercantile method of accounting and hybrid or mixed method of accounting to proceed further :

1. Cash Method of Accounting (Cash Basis of Accounting):

Under this method, all incomes are considered to be earned only when they are actually received in cash. Similarly, expenses are deemed to be incurred only when they are actually paid in cash.

2. Accrual Basis of Accounting (Mercantile Basis of Accounting):

Under this method, all Incomes are recorded or credited to the period in which they are earned irrespective of the fact that whether the same has actually been received or not. Similarly, expenses are charged to the period in which they relate irrespective of the fact that they have actually been paid or not.

Thus, as could be seen the major difference between the cash method of accounting and accrual basis of accounting is the timing difference in the recognition of expenses and income.

3. Hybrid or Mixed Method of Accounting:

Under this method, both cash basis and accrual basis are followed. Incomes are recorded on cash basis whereas expenses are taken on accrual basis. The net income is ascertained by matching expenses on accrual basis with income on cash basis.

This is the most conservative basis of ascertaining income because all possible expenses relating to the period whether actually paid or not are considered whereas income only received in cash is taken into consideration

As we have seen above Hybrid or Mixed method of accounting postulate combining of both the cash and accrual method of accounting whereby income are recorded on receipt basis while expenses are booked on accrual basis which was leading to distortion of computation of correct income for bringing to charge to tax as per the provisions of the Act and the Finance Act,1995 amended the Section 145 of the Act whereby the Hybrid or Mixed method of accounting was not permitted to be allowed for computing income under the Act. However, the lawmakers still left the choice of regularly employing either of the two methods viz. Cash method of accounting or mercantile method of accounting for computing income chargeable to tax as per the provisions of the Act. Thus, as we have seen above the major

difference between the cash method of accounting and accrual basis of accounting is the timing difference in the recognition of expenses and income. In the instant case, the assessee has two sources of income within the head 'Profit and Gains of business' viz. income from profession and secondly income from film production. The assessee is employing cash basis of accounting regularly and consistently for his one source (under the head 'Income from Business or Profession) i.e. income from profession which was accepted by the Revenue in the earlier years while for the second source (again under the head 'Income from Business or Profession) i.e. income from film production, the assessee is employing mercantile method of accounting and both the methods are allowed by Section 145 of the Act to enable revenue to compute correct income chargeable to tax as per provisions of the Act. The assessee has not employed hybrid or mixed method of accounting as envisaged by lawmakers at the time of amending Section 145 of the Act vide Finance Act, 1995 , which was leading to distortion in computation of correct income chargeable to tax . The law has given freedom to the assessee to regularly employ either cash basis of accounting or mercantile basis of accounting to compute correct income chargeable to tax and the plain , simple and natural language and words used in the Section 145 of the Act does not , in our humble opinion, cast any bar on the assessee to follow regularly either cash basis or mercantile basis of accounting by the assessee having more than one source of income with in the head of income from 'Profit and gains of business or profession' or 'income from other sources' as in the instant case the assessee has two stream and sources of income under the head of income from 'Profit and gains of business or profession' viz. his professional income and also income from production of films because by

following either of the two method of accounting regularly , there is not likely to be distortion in computation of correct income as per the provisions of the Act and it will be only timing difference which we have seen above due to following the above methods of accounting and no prejudice will be caused to the Revenue . The said income of Rs.22,57,000/- from the profession is also stated to have been offered for tax by the assessee in the year of receipt i.e. immediately succeeding financial year 2007-08 by following consistently and regularly cash basis of accounting for his source of income from profession . Thus, we hold that the assessee is not following hybrid or mixed method of accounting and the assessee is following cash system of accounting for his income from profession and mercantile system of accounting for his income from film production which are permitted by Section 145 of the Act. Based on our discussions and reasoning given here-inabove , we order deletion of the addition of Rs.22,57,000/- made to the income of the assessee by the AO by setting aside the orders of the CIT(A) and deleting the addition of Rs.22,57,000/- made to the income of the assessee by the AO. We order accordingly.

15. Ground No. 4 relates to addition of unexplained cash credit of Rs. 10 lacs u/s 68 of the Act. The AO observed that the assessee received Rs. 15 lakhs as advance against MHADA properties as reflected in the balance sheet of the assessee under the head 'Current Liabilities'. The assessee was asked to submit the agreement against which the said advance was received by the assessee. However, no reply was submitted by the assessee before the A.O. and addition of Rs. 15 lakhs was made to the income of the assessee as unexplained cash credit u/s 68 of the Act under the head "Income from other sources".

16.Aggrieved by the orders of the AO, the assessee carried the matter before the CIT(A) in appeal. The CIT(A) asked for the remand report from A.O. and in the remand report dated 8th August, 2011 the A.O. submitted that the document produced during remand report proceedings are new documents which were not produced during the assessment proceedings. The assessee made submission vide letter dated 7-3-2011 claiming that the assessee, his mother and sister has sold adjoining accommodation located at Lovely CHS, Versova, Andheri (W), Mumbai for a total consideration of Rs. 15 lakhs, i.e. Rs. 5 lakhs each for each accommodation bearing No. C-18, C-19 and C-20. The registered sale deed of flat no. C-18 & C20 is in the name of mother and sister while the flat no C-19 is owned by the assessee for which no registered sale deed was produced before the CIT(A) . The assessee submitted before the CIT(A) that with respect to the two properties i.e. accommodation no. C-18 and C-20, assessee's mother and sister are registered owners but it was essentially assessee's funds utilized for purchase of all the three properties. It was also submitted by the assessee that in the block assessment order passed in the case of the assessee, the funds utilized for purchase of aforesaid properties were assessed as undisclosed income of the assessee. It is the assessee only in whose income the capital gain/loss arising from transfer of the aforesaid properties should be included. The assesssee submitted that these accomodations were purchased in September 1994 in above three names and the purchase of the same has been duly dealt with in the order of the A.O. passing the block assessment order in the case of assessee. Accordingly the assessee submitted that the A.O. be directed to assess capital gains in the hands of the assessee and delete the addition made u/s 68 of the Act. The CIT(A) after considering the facts, gave relief to the assessee with respect to the accommodation no. C-19 as the same was owned by the assessee while the addition with respect to accommodation C-18 and C-20 of Rs.10 lacs being advance receipt in respect of mother and sister of the

assessee is confirmed in the hands of the assessee as the Mhada properties stood in the name of mother and sister of the assessee.The CIT(A) also held that the NOC from sale of the above properties were given by society on 2/10/2007 which means that the property was not sold during the year under consideration and hence the amount was shown as advance.

17.Aggrieved by the orders of the CIT(A), the assessee is in further appeal before the Tribunal.

18. The ld. Counsel for the assessee submitted that the purchases with respect to three accommodations C-18, C-19 & C20 has already assessed to tax in the hands of the assessee as undisclosed income vide the block assessment order framed by the Revenue,. The ld. Counsel submitted that when these assets have already been assessed to tax in the assessee's hands by the Revenue in the block assessment order framed against the assessee then the income arising from the sale of these accommodations being capital gain should be taxed in the hands of the assessee only as the revenue has accepted that these accommodations are purchases out of undisclosed income of the assessee. The block assessment order dated 30th July 2001 was placed before the ld. CIT(A) and is also placed in paper book page No. 187 to 194 before us. The assessee submitted that the undisclosed income w.r.t. these accommodations were also been part of proceedings before settlement commission which are also placed in the paper book filed before us page 195-218 . The ld counsel submitted that all due taxes were paid to the Revenue while offering undisclosed income utilized for purchase of these accommodations in the name of mother and sister of the assessee being close family members.

19. The ld. D.R., on the other hand, relied on the orders of authorities below.

20. We have considered the rival submission and also perused the material on record. It is stated by the assessee that the accommodations are acquired out of undisclosed income of the assessee which has been brought to tax as undisclosed income in the hands of the assessee vide block assessment order dated. 31st July, 2001 and orders of the settlement commission framed against the assessee with dues taxes paid to the Revenue. It is stated by the assessee that these accommodations have been sold (C-18 & C20) with respect to which addition of Rs. 10 lakhs have been made. In our considered opinion, once the income is stated to be assessed in the hands of the assessee and the said accommodations C-18 and C-20 have been stated to be acquired out of undisclosed income and treated as own property by the assessee , which has been brought to tax in the hands of the assessee and due taxes paid to Revenue , then the capital gains arising on sale of these accommodations C-18 and C-20 owned by the assessee and held by the assessee in the name of close family members being sister and mother shall be chargeable to tax in the hands of the assessee although the accommodations are technically held in the name of close family members i.e. mother and sister of the assessee and hence we order deletion of addition of Rs.10 lacs being advance on sale of these accommodations as made by the AO and as confirmed by the CIT(A) with the direction to the AO to compute capital gains arising out of these two accommodations as per Act which shall be brought to tax in the hands of the assessee in accordance with law after duly verifying and authenticating the claim of the assessee with respect to acquisition and ownership of the above accommodations C-18 and C-20 out of undisclosed income of the assessee which has been brought to tax and due taxes paid to Revenue as asserted by the assessee and the assessee is directed to appear before the A.O. and file the necessary evidences before the AO to support its claim and assertions for verification and authentication by the AO . Needless to say that proper and adequate opportunity as per law

shall be given by the AO to the assessee in accordance with the principles of natural justice . We order accordingly.

21. Ground No. 5 relates to confirming the action of A.O. in adding a sum of Rs. 14,19,000/- as cash deposit u/s 68 of the Act. From the ITS details, the A.O. observed that cash deposit of Rs. 14.19 lakhs was made by the assessee in the bank account during the financial year 2006-07. The assessee was asked to substantiate the same but no reply was filed by the assessee and cash deposit of Rs. 14.19 lakhs was added to the income of the assessee u/s 68 of the Act. A remand report was called by the CIT(A) during the first appellate proceedings and in the remand report dated 8-8-2011 the A.O. stated that the document produced are new and the same were not produced during the assessment proceedings despite sufficient opportunity been provided to the assessee and the explanation now provided during appellate proceedings is an afterthought. The assessee submitted before the CIT(A) that assessee has income from production of film under the name of Pushpa Krishna Creation, Ganesh Acharya Dance Academy business of conducting dance and choreography direction in films in the name of Vishwanath Acharya. The cash receipt of Rs. 25.81 lakhs including opening cash balance of above three concerns and further the assessee withdrew cash of Rs. 28 lakhs from bank. Thus , there was inflow of cash of Rs. 53.81 lakhs out of which the cash of Rs. 14.91 lakhs was not required for business purpose which was deposited in the bank. The assessee also filed the copy of cash book and bank statement of all the concerned entities. The CIT(A), however, rejected the contentions of the assessee and held that the sufficient opportunities was given by the AO during assessment proceedings and even in remand report proceedings and assessee is now not entitled to submit the additional evidences which was not admitted by the CIT(A). The CIT(A) held that the cash book etc. were not produced before the A.O. and the assessee has not reconciled as to how the amount reflected in cash book and how is

accounted for in the various concerns as these so called cash books were not produced before the AO.

22.Aggrieved by the orders of the CIT(A), the assessee is in further appeal before the Tribunal.

23. The ld. Counsel of the assessee submitted that the assessee has submitted additional evidences before the CIT(A) which are not admitted by the CIT(A) . The assessee has also submitted in his written submissions filed before the authorities below that the assessee originally hailed from very lower strata of society. With lot of hard work, difficulty and moral support from the family , the assessee has come so far in his profession of choreography. Due to lack of financial support, the assessee could not even complete his basic education and as such he is not well versed with the terms of accountancy, tax and other laws and regulations. The assessee has once again hit as he had incurred huge losses in the film business. The assessee's accountant also left the job without even handing over the charge of the books of account. The assessee was not having the proper information about the books of account and assessee was traveling while assessment proceedings are going on which was the main reason the assessee could not produce the evidence before the A.O. and hence there was sufficient cause for not producing the evidence during the assessment proceedings and accordingly prayed before the CIT(A) for admitting the additional evidence which the CIT(A) declined to admit the same. We find that there was sufficient cause shown by the assessee which prevented the assessee from producing the additional evidence during the assessment proceedings, hence, we direct the admission of the additional evidences by the AO . In our considered opinion, the interest of justice will be best served, if the orders of authorities below are set aside and the matter is restored back to the file of A.O. with a direction to admit and examine the additional evidence filed by

the assessee and decide the issue afresh on merits after giving sufficient opportunity of being heard to the assessee. Ground No. 5 is also treated as allowed for statistical purpose.

10. In the result, the appeal filed by the assessee company is partly allowed for statistical purpose.

Order pronounced in the open court on 16th December, 2015.

आदेश की घोषणा खुले न्यायालय में दिनांकः 16-12-2015 को की गई ।

Sd/-	sd/-
(JOGINDER SINGH)	(RAMIT KOCHAR)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 16-12-2015

I

व.नि.स./ R.K., Ex. Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai H Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**