आयकर अपीलीय अधिकरण "I" न्यायपीठ मुंबई मे।

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

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री राजेश कुमार लेखा सदस्य के समक्ष।

BEFORE SRI MAHAVIR SINGH, JM AND SRI RAJESH KUMAR, AM

आयकर अपील सं./ ITA No. 3282/Mum/2014

(निर्धारण बर्ष / Assessment Year 2001-02)

आयकर अपील सं./ ITA No. 3283/Mum/2014

(निर्धारण बर्ष / Assessment Year 2002-03)

आयकर अपील सं./ ITA No. 3284/Mum/2014

(निर्धारण बर्ष / Assessment Year 2003-04)

आयकर अपील सं./ ITA No. 3285/Mum/2014

(निर्धारण बर्ष / Assessment Year 2004-05)

आयकर अपील सं./ ITA No. 3286/Mum/2014

(निर्धारण बर्ष / Assessment Year 2005-06)

आयकर अपील सं./ ITA No. 3287/Mum/2014

(निर्धारण बर्ष / Assessment Year 2006-07

Indokem Ltd. 410/411,Khatau House, Mogul Lane, Mahim (West), Mumbai-400 016	Vs.	Commissioner of Income Tax, Circle 6, Aayakar Bhavan, Maharshi Karve Road, Mumbai-400 020
(अपीलार्थी / Appellant)	..	**(प्रत्यर्थी / Respondent)**
स्थायी लेखा सं./PAN No. AAACR0413R		

अपीलार्थी की ओर से / **Appellant by** : Shri Nitesh Joshi, AR

प्रत्यर्थी की ओर से **/ Respondent by** : Shri Jacinta Zimik Vashai, DR

सुनवाई की तारीख **/ Date of hearing:**	11-07-2018
घोषणा की तारीख **/ Date of pronouncement :**	25-07-2018

आदेश / O R D E R

PER MAHAVIR SINGH, JM:

These appeals by the assessee are arising out of the common revision order of Commissioner of Income Tax-6, Mumbai, [in short CIT(A)] in No. CIT(A)-6/263/2013-14/658 dated 11.03.2014 under section 263 of the Income Tax Act, 1961(hereinafter 'the Act'). The Assessments were framed by the Income Tax Officer, Circle 2(3)-1, Mumbai (in short ITO/ AO) for the assessment years 2001-02, 2002-03, 2003-04, 2004-05, 2005-06, 2006-07 vide orders dated 14.11.2008, 31.07.2007, 24.12.2008 under sections 143(3)(ii), 143(3) read with section 147 of the Act.

2. The only common issue in these six appeals of assessee is against the revision orders passed by CIT under section 263 of the Act even though Assessment orders were framed by the AO were neither erroneous nor prejudicial to the interest of the Revenue. For this assessee has raised the identical grounds in all the years. The facts are also identical in all the years. Hence, we will take the facts and grounds from AY 2001-02 in ITA No. 3282/Mum/2014. The relevant grounds read as under: -

> *"1. The learned Commissioner of Income Tax erred in passing the order u/s. 263 even though the assessment orders framed by the AO were neither erroneous or prejudicial to the interest of the revenue, and while doing so he amongst others erred in;*

a. not appreciating that the order giving effect to order of I-1onble ITAT was passed by the A0 after duly considering the directions of Hon'ble ITAT.

b. not appreciating that the AO had accepted the actual rent received as the basis for determining ALV of the property, after considering the ratio laid down in the decision of Moni Kumar Subba 333 ITR 38 (Del)."

3. At the outset, the learned Counsel for the assessee first of all drew our attention to Income Tax Appellate Tribunal, Mumbai 'D' Bench decision in assessee's own case for AY 2001-02 to 2006, wherein Tribunal vide order dated 30-12-2011 has decided this issue and remand the matter back to the file of the AO vide Para 16 to 17 as under: -

"16. We have considered the rival contentions and relevant material on record. For the purpose of taxation of income from house property, section 22 prescribes the annual value of the property consisting of building or land appurtenant thereto of which the assessee is owner. Thus, income from house property is measured as annual value of the property. Section 23 contemplates the manner in which the annual value of the property has to be determined. As per subsection (1) of section 23 the AO has to first determine the sum for which the property might reasonably be expected to fetch the rent from year to year and then if the property is let out compare the same with the annual/actual rent received or receivable. Thus, as per clause (a) of sub-section (1) of section 23 the reasonable rent

expected to be fetched by the property by letting out from year to year has to be determined. Clause (b) of subsection (1) of section 23 deals with the cases where the property is let out. It is pertinent to note that prior to amendment with effect from 1.4.1996 there was no such clause (b) in sub-section(1) of section 23. The provisions was further amended by the Finance Act 2001 w.e.f 1.4.2002 whereby the word "annual rent received or receivable" has been substituted by the word " actual rent received or receivable". Though this change of the term from annual rent to actual rent has not altered any material meaning of the provision except for the first year of letting out or in case the property is not let out for full year. Thus, for determination of the ALV under section 23(1), the Assessing Officer has first to find out the reasonably expected rent which the property might fetch by letting out from year to year and then this reasonably expected rent has to be compared with the annual rent received or receivable by the owner and if annual rent received or receivable as contemplated under section 23(1)(b) is in excess of the reasonable rent expected from letting out the property from year to year as determined u/s 23(1)(a) the amount so received or receivable would the annual value for the purpose of section 22 of the Act.

16.1 From the various judicial pronouncements of the Hon'ble Supreme Court as well as High Courts, it is clear that the standard rent or the municipal value, as case may be, is the one of the various factors to be taken into account by the AO while

determining the fair rent expected to be fetched for letting out the property from year to year u/s 23(1)(a).

16.2 Recently, the Full Bench of the Hon'ble Delhi High Court in the case of Moni Kumar Subba (supra) after considering the decision of the Division Bench of the Hon'ble High Court in the case of CIT V/s Asian Hotels ltd observed and held in paragraph 13 to 22 as under :

> *"13. 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 AO, 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". Provisions of Section 23(1)(a) do not*

mandate this. The Division Bench in Asian Hotels Limited (supra), 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 of Commissioner of Income Tax Vs. J. K. Investors (Bombay) Ltd., [(2001) 248 ITR 723 (Bom.)] categorically rejected the formula of addition of notional interest while determining the „fair rent" in the following manner:

> *…….Before concluding we may point out that under Section (23)(1)(b), the word "receivable" denotes payment of actual annual rent to the assessee. However, if in a given year a portion of the actual annual rent is in arrears, it would still come within Section (23)(1)(b) and it is for this reason that the word "receivable" must be read in the context of the word "received" in Section(23)(1)(b). In the light of the above interpretation, notional interest cannot form part of the actual rent as contemplated by Section (23)(1)(b) of the Act. We once again repeat that whether such notional interest could form part of the fair rent under Section (23)(1)(a) is expressly left open.*

14. 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 Asian Hotels Limited (supra).

15. The next question would be as to whether the annual letting value fixed by the Municipal Authorities under the Delhi Municipal Authority 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 Satya Co. Ltd. (supra) on the ground that the provisions contained in the Delhi Municipal Corporation Act for fixing annual letting value is 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 asst. yrs. 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-cl. (a) of sub-s. (1) of s. 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-cl. (b) of s. 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 s. 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 socalled notional interest on the deposit made by the tenant, since there is no provision to this effect in s. 22 or 23 of the IT Act, 1961.

16. In fact, this is the view taken even by the Supreme Court in the case of Shiela Kaushish Vs. CIT [1981] 131 ITR 435 (SC) on account of similarity of the provisions under the municipal enactments and Section 23 of the Act.

17. It is on this basis that in the present case, the CIT (A) gave primacy to the rateable value of the property fixed by the Municipal Corporation of Delhi vide its assessment order dated 31.12.1996 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.

18. Since the provisions of fixation of annual rent under the Delhi Municipal Corporation Act are 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. (supra) that in such circumstances, the annual value fixed by the Municipal Authorities can be a rationale 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 AO 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 Vs. Smt. Padma Debi, AIR 1962 SC 151:

> *"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." 16. 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 of Kashi Prasad Kataruka v. CIT [1975] 101 ITR 810.

17. 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."

19. We may also add that in place like Delhi, this has now become redundant inasmuch as the very basis of fixing property tax has undergone a total change with amendment of the Municipal Laws by Amendment Act, 2003. Now the property tax is on unit method basis.

20. In the present case, the AO added notional interest on the interest free security for arriving at annual letting value. Since that was not permissible, the effect would be that such assessment was rightly set aside by the CIT (A) and the Tribunal. Therefore, the orders would not call for any interference. These appeals are, thus, dismissed on this ground. Once we hold this, the very basis adopted by the AO to fix annual letting value was wrong and therefore, no further exercise in fact is required by us in these appeals.

21. 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 AO 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 Vs. Bombay Municipal Corporation, AIR 1968 SC 441:

> *"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."

22. We have also taken note of the judgment of the Bombay High Court in the case of J.K. Investors (supra) wherein the Court hinted that various factors may become relevant in determining the „fair rent". The precise observations of the Court in the said judgment are as under:

> *"At the cost of repetition it may be mentioned that under Section (23)(1)(a), the Assessing Officer has to decide the fair rent of the property. While deciding the fair rent, various factors could be taken into account. In such cases various methods like the contractors method could be taken into account. If on comparison of the fair rent with the actual rent received, the Assessing Officer finds that the actual rent received is more than the fair rent determinable as above, then the actual rent shall constitute the annual value under Section (23)(1)(b) of the Act. Now, applying the above test to the facts of this case, we find a categorical finding of fact recorded by the Tribunal that the actual rent received by the assessee was more than the fair rent. Under the above circumstances, in view of the said finding of fact, we do not see any reason to interfere".*

16.3 From the decision of the Hon.Full Bench of the Hon. Delhi High Court, it is clear that for determination of the fair rent, the Assessing Officer has to take into account various factors including standard rent. If the standard rent is not fixed then the procedure provided under the Rent Control Act for fixation of standard rent has to be taken into consideration. We may mention that municipal value or standard rent itself is not sole binding factors on the AO but these are only guiding factor for determining the reasonable expected rent to be fetched by he property as contemplated u/s 23 (1)(a). If in the given case, the AO finds that the Municipal Value is not based on relevant material for determining fair rent in the market and there is a sufficient material on record for taking different valuation then the AO can determine the fair rent by inflating or deflecting the Municipal Value or Standard Rent as the case may be by taking into account the relevant material in this regard. As observed by the Hon. Delhi High Court if the ratable value is correctly determined under the Municipal law the same can be taken as annual letting value u/s 23(1)(a) of the Act. However, the ratable value is not a binding on the AO if the AO can show that the ratable value under Municipal law does not represent the correct fair rent. If the AO finds that the actual rent received is less than the fair market rent/market rent because of

the reason that the assessee has received abnormally high interest free security deposits and because of that reason actual rent received is less than the rent which the property might fetch he can undertake necessary exercise in that behalf.

16.4 However, when the same premises has been let out by the sub tenant and fetch a higher rent, then the same can be taken as determinative factor to arrive at fair market rent. If the Assessing Officer finds that the ratable value under the municipal law does not represent correct fair rent and then he may determine the same on the basis of material/evidence placed on record. The Hon. Full Bench of the Delhi High Court has observed in paragraphs 21 of the decision that to determine the reasonable/fair rent extraneous circumstances may inflect or deflect the fair rent which can be taken into consideration by the AO.

16.5 Hence, the rent received by the sub tenant itself cannot be taken as fair market rent as contemplated in sec. 21(a). However, the said rent can be a relevant determinative factor for determining the fair market rent. We further note that in the case in hand, the Assessing Officer has taken into consideration an agreement dt 10.1.2004 entered into by the sub tenant for further letting out the property in question, which is subsequent to the Assessment Years 2001-

02 and 2002-03. Even otherwise, the rent received by the sub tenant vide agreement dated 2.1.2004 is not for the entire property in question but only for a part that too after carry out the some furnishing work. Therefore, the same cannot be adopted as fair market rent for the entire property. Thus, while computing the ALV the Assessing Officer has to take into account all the facts including any specific portion/part of the property was let out etc.

17. We may observe that the rent against which the property was let out by the sub tenant is one of the very relevant factors for determination of the fair market rent but not the sole and alone. Accordingly, we set side the orders of the lower authorities and remand the issue to the record of the Assessing Officer to determine the fair market rent u/s 23(1)(a) in view of the decision of the Full Bench of the Hon'ble Delhi High Court (supra)."

4. The learned Counsel for the assessee stated that the AO passed an order giving effect to this ITAT order vide order dated 14.02.2012, wherein the AO has accepted the ALV declared by assessee. Subsequently, the AO passed another order giving appeal effect to the order of the Tribunal under section 143(3) read with section 254 of the Act vide order dated 20-12-2012, wherein ALV was determined by the AO at ₹ 24,10,471/-. The learned Counsel for the assessee stated that this order was challenged before CIT(A) and CIT(A), by combined order

dated 23.10.2013 set aside the assessment order giving appeal effect to the order of ITAT by observing in para 7.10 to 7.14 as under: -

> *"7.10 From the above discussion it is evident that the appeal effect orders dated 14.02.2012 passed by the AO were orders which got merged with the assessment orders and the same were assessment orders like the assessment orders passed u/s 143(3) or else u/s 143(3)1147. Hence, the AO had no jurisdiction or authority to pass any subsequent assessment orders The subsequent orders passed u/s 143(3)1254 dated 20.12.2012, thus, cannot be held to be valid and legal assessment orders as there is no specific provision in the Act for passing such an assessment order again. I therefore, hold that the impugned orders dated 20.12.2012 are bad in law and void ab initio. The same therefore deserve to be annulled.*
>
> *7.11 The AO himself, in the remand report has stated that the orders dated 14.02.2012 were appeal effect orders. Hence, such orders are deemed to be assessment orders in view of the judgements cited above. Further logic of the AO that subsequent orders dated 20.12.2012 are also assessment orders, therefore. becomes invalid and self-contradictory. It may also be pointed out here that the AO has no protection u/s 2928 of the Act in respect of the impugned orders dated 20.12.2012 as invalidity of these*

orders is not on account of any mistake, defect or omission. Section 292B reads as under:

> *'No return of income, assessment, notice, summons or other proceedings, furnished or made or issued or taken or purported to have been furnished or made or issued or taken in pursuance of any of the provisions of this Act shall be invalid or shall be deemed to be invalid merely by reason of any mistake, defect or omission in such return of income, assessment, notice, summons or other proceeding if such return of income, assessment, notice, summons or other proceeding is in substance and effect in conformity with or according to the intent and purpose of this Act.*

7.12 According to the aforesaid section, no return of income, assessment, notice, summons or other proceedings shall be invalidated merely by reason of any mistake, defect or omission, provided the subject matter, in substance and effect, is in conformity with the intent and purpose of the Act. Also, in this regard, Circular No. 179, dated September 30, 1975 which provides explanatory notes and legislative intent for introduction of the said section, explains that:

> *This provision has been made to provide against purely technical objections without*

substance coming in the way of the validity of assessment proceedings, etc.

7.13 Section 292B provides relief against mistakes on the grounds of 'mere technicalities' coming in the way of law. Various judicial pronouncements have been made in favor of the Revenue overruling 'pure technical objections' raised by the assessee. However, in the instant case, the AC has passed subsequent assessment orders without jurisdiction, which cannot be treated as a mere technical mistake but a valid case having absolute substance. Hence, the AC cannot take shelter under Section 292B of the Act, as the AO has consciously passed the orders dated 14.02.2012 and subsequent impugned orders dated 20.12.2012. Such a lapse cannot be validated by ' Section 2928 of the Act. Such an error cannot qualify to be a clerical or technical error but turns out to be a question of jurisdiction. Following decisions support this view:

a) Sunrolling Mills P Ltd vs ITO, 160 ITR 412(Cal) and,

b) Pushpa Devi Bhojnagarwala vs ITO (56 ITO 302) (]TAT, Cal).

7.14 It is thus true that the impugned orders have been wrongly passed without jurisdiction.

In the case of Sunrolling Mills P Ltd (supra), the assessment was reopened under section 147(b) by the AO, who later sought to justify the reopening under section 147(a). The Hon'ble high court held that section 292B does not empower the AO to treat a proceeding initiated under section 147(b) as a proceeding under section 147(a). Similarly, Hon'ble Calcutta bench of the ITAT in the case of Pushpa Devi Bhojnagarwala (supra) held that penalty levied under a wrong section cannot be upheld by taking recourse of section 292B. In view of above decisions, the impugned orders cannot be sustained by taking recourse to the provisions of section 292B. Therefore, the impugned orders are legally not valid and the same deserve to be annulled. I order accordingly and the impugned orders dated 20.12.2012 are hereby annulled."

5. The learned Counsel for the assessee also stated that the CIT(A) also discuss the issue on merits of the case but refrained from adjudicating the issue on merits. In view of the above, the learned Counsel stated that the CIT while passing a revision order under section 263 of the Act dated 11.03.2014 referred to the order dated 14.02.2012, giving appeal effect to the order of ITAT in respect of AY 2001-02 to 2006-07 which are not adjudicating by the CIT(A) as the assessee was not aggrieved against these orders. In view of these facts, the learned Counsel for the assessee argued the first proposition that whether loss of revenue to the department is an essential pre-condition for the purpose of treating an order to be prejudicial to the interest of the Revenue. He

stated that in the present case, this test has not been fulfilled as no cause is shown to by the CIT in his order that there is any loss to the Revenue on account of order passed by AO while giving appeal effect to the Tribunal's order dated 14.02.2012. Further, the learned Counsel for the assessee also raised the issue by proposition that, whether the issue relating to determination of annual value under section 23 of the Act, in view of the Tribunals order dated 30-12-2011, was a subject matter of appeal filed by the assessee before the CIT(A), against the order dated 20.12.2012 passed by the AO and hence, the CIT could not have assumed jurisdiction in respect of the same subject matter under section 263 of the Act.

6. On the other hand, the learned CIT DR, Miss Jacinta Zimik Vashai argued with regard to the ground of appeal pertaining to determination of the Annual letting Value (ALV), that the Tribunal gave a finding that the AO has to first determine the sum for which the property might reasonably be expected to fetch the rent from year to year and then compare the same with the annual/actual rent received or receivable. The Bench stated that from the various judicial pronouncements of the Hon'ble Supreme Court as well as High Courts, that standard rent or the municipal value as the case may be is one of the various factors to be taken into account by the AO while determining the fair rent expected to be fetched for letting out the property from year to year u/s. 23(l)(a). She argued that the Bench brought on record the observation of the Full Bench of Hon'ble Delhi High Court in the case of Moni Kumar Subba that if the AO finds the Municipal value is not based on relevant material for determining fair rent in the market and there is sufficient material on record for taking different valuation then the AO can determine the fair rent by inflating or deflecting the municipal value or standard rent as the case may be by taking into account the relevant material in this regard. Further, if the AO 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. The Bench in paras 16.4 & 16.5 of its aforesaid order, remarked that in the instant case when the same premises has been let out by the sub-tenant and fetched a high rent, then the same can be taken as determinative factor to arrive at fair market rent. If the AO finds that the ratable value under the municipal law does not represent correct fair rent and then he may determine the same on the basis of material/ evidence placed on record. Further, the Bench observed that the rent against which the property was let out by the sub-tenant is one of the relevant factors for determination of the fair market rent but not the sole and alone. Accordingly, the Bench set aside the orders of the lower authorities and remanded the issue to the record of the AO to determine the fair market rent u/s.23(1)(a), in view of the decision of the Full Bench of the Hon'ble Delhi High Court in the case of Moni Kumar subba (supra). There is no ambiguity in the above directions to the Bench. The AO is bound to scrupulously follow the directions of the aforesaid Judicial Authority. However, the AO did not delve into the matter as was required to arrive at the annual letting value/fair market rent while giving effect to the aforesaid appellate order of the Tribunal. The essential determinants were not examined to determine the ALV/ Fair rent following the decision of the Full Bench of the Hon'ble Delhi High Court in the case of Moni Kumar Subba (supra) which was to be followed but, AO has not been considered in the consequential order passed on 14.02.2012. The AO has merely gone by the actual rent declared by the assessee in the Return of income filed. The so called order dated 14.02.2012 is a mere mathematical calculation of figures. Hence, the aforesaid consequential order dated 14.02.2012 is factually and in law erroneous which is prejudicial to the interest of the

Revenue. The AO passed a subsequent order dated 20.12.2012 to give effect to the directions of the Tribunal against which the assessee went in appeal before the CIT(A)-6. Mumbai. As per the order of the CIT(A)-6, Mumbai dated 23.10.2013, the subsequent order dated 20.12.2012 is not viable legally in view of the fact that an order giving effect to the aforesaid order of the Tribunal has already been passed on 14.02.2012 by the AO. Therefore, the CIT(A)-6, Mumbai held that the consequential order dated 20.12.2012 is null and void, in view of the aforesaid decision held by the CIT(A)-6, Mumbai, the order dated 14.02.20 12 is the valid consequential order. It is, therefore, amply clear that order dated 14.02.2012 is the only consequential order that existed when the proceedings u/s.263 of the Act, was initiated by the CIT vide show-cause letter dated 20.01.2014.

7. She argued that the assessee has raised one more issue that the order dated 14.02.20 12 has been a subject matter of appeal before the CIT(A)-6, Mumbai and therefore cannot be examined u/s. 263 of the Act in the revision proceedings. However, the said submission is not tenable, as can be seen from the grounds of appeal taken by the assessee before the CIT(A)-6, Mumbai. A perusal of the grounds of appeal shows that the assessee has objected to the AO passing the order dated 20.12.2012 stating that an order dated 14.02.2012 has already been passed giving effect to ITAT's order. In fact, at Ground No.3, it is contended by the assessee that the ITO did not address the issue of fair rent of let out properties as per statute and as per the decision of the Full Bench of the Hon’ble Delhi High Court in the case of Moni Kumar Subba (supra). But she argued that the CIT(A) has stated in para 1.5 at page 10 of his order that the only legal issue to be decided is as to whether the appeal effect order dated 14.02.2012 passed by the AO can be considered to be valid assessment order or not. It is further stated that if such orders passed on 14.02.2012 are valid assessment orders then it automatically follows that any subsequent assessment order could not have been passed for the

same assessment years without any specific provision of law under the Act. Hence, it is a fact that the merits of the order dated 14.02.2012 has not been a subject matter of appeal before the CIT(A)-6, Mumbai.

8. Hence, she argued that going by the appellate order of the CIT(A) since the assessment order passed on 20. 12.2012 is held to be null and void, the order dated 14.02.2012 is the order giving effect to the directions of the Tribunal in its order dated 30.12.2011 is the surviving order. In the order of Moni Kumar Subba (supra), the Hon'ble Delhi High Court remarked that the question as to what could be the circumstances which can be taken into consideration by the AO while determining the fair rent is discussed. The Hon'ble High Court pointed out those extraneous circumstances of security deposit by the tenant may inflate/deflate the fair rent. It is further observed that no particular test can be laid down and it would depend on facts of each case. A perusal of order dated 14.02.2012 clearly demonstrates that the AO has not considered the relevant factors discussed in the aforesaid order of the Hon'ble Delhi High Court in computing the income from house property and has not seen whether the income from house property declared by the assessee and considered in the order dated 14.02.2012 is reasonable/fair rent. Thus, the aforesaid order dated 14.02.2012 of the AO is erroneous and prejudicial to the interest of the Revenue. She argued that Pr.CIT, Mumbai has rightly assumed the revisionary powers by invoking the provisions of Sec.263 of the Act. The order passed by the AO is erroneous in so far as it is prejudicial to the interest of the Revenue. The Pr.CIT after giving the assessee opportunity of being heard and after making necessary inquiries passed the order u/s.263 of the Act Since all the requisite conditions for invoking the provisions of Sec.263 of the Act stand fulfilled, it is humbly submitted that the order passed u/s.263 of the Act is in the interest of the Revenue and prayed

that the order passed u/s.263 of the Act be upheld as valid and sustainable.

9. We have heard the rival contentions and gone through the facts and circumstances of the case. We find from the facts of the case that assessee's assessment was reopened by issuing notice under section 148 of the Act. In the course of these proceedings, the Assessee had inter alia urged that municipal rateable value of the said premises may be taken as its annual value under section 23(1)(a) of the act. The said submission was rejected by the AO as an adjustment to the extent of 10% of the said value would be required for determination of annual value for income tax purposes. Nothing was found by the AO to doubt the correctness of such value. The AO noted that Indokem Limited had further sub-let the said premises to Sumangal Holdings for a monthly rent of ₹ 67,275/- equivalent to ₹ 8,07,300/- per annum. Based on the rent received by Indokem Limited from its tenant, the AO computed the annual value in the assessee's case at ₹ 8,07,300/- under section 23(1)(a) of the Act. This re-assessment was challenged in appeal before the CIT(A) and the CIT(A) by his appellate order granted discount of 20% to the annual value as determined by the AO and determined such value at ₹ 60,548/- per month equivalent to ₹ 7,26,576/- per annum. Aggrieved, assessee preferred the appeal before Tribunal.

10. The Tribunal in its appellate order has followed the decision of Full Bench of the Delhi High Court in the case of Moni Kumar Subba (surpra) & set aside the matter back to the AO for re-determination of the annual value. It directed the AO to re-determine the annual value under section 23(l)(a) of the Act and held that standard rent or municipal rateable value would be factors relevant for determination of annual value under section 23(l)(a) of the Act. According to the Tribunal, municipal rateable value would be safe guide for determination of annual value under section

23(l)(a), unless the AO found that such value was not based on relevant material for determining fair rent in the market and there was sufficient material on record for taking different valuation. It was only then, that it would be open to the AO to determine the fair rent on the basis of relevant evidence and materials. Unless the municipal rateable value was doubted, it was not open to the AO to determine the fair rent or use it as a basis for determination of annual value under section 23(l)(a) of the Act. Lastly, the annual value for the purposes of section 23(l)(a) of the Act, could not exceed the standard rent which was the upper limit. Therefore, the exercise as required to be carried out by the AO as per the Tribunal's order was to adopt the Municipal rateable value as the annual value for the purposes of section 23(l)(a) of the Act unless he found that such value was not based on relevant material for determining fair rent in the market and there was sufficient material on record for taking different valuation. It was only in such circumstances that the AO could determine the fair rent for the purposes of section 23(l)(a) of the Act. Even if such fair rent was determined, the annual value could not exceed the standard rent as that was the upper limit for the purposes of computation of annual value under section 23(1)(a) of the Act.

11. The AO after considering the material as gathered by her in the course of original assessment proceedings and the directions of the Tribunal upheld the annual value, in the present case i.e. at ₹ 3, 16,800 based on the rent actually received by the assessee from Indokem Limited. We find from the facts of the case that information with respect to municipal rateable value was available with her in the course of original assessment proceedings and this position has also been accepted by the CIT in the revision order passed under section 263 of the Act. Since, there was nothing to suggest that the municipal rateable value was not based on relevant material, the AO was justified in taking the said value of ₹ 2,14,495/- as the annual value under section 23(1)(a) of the Act and

₹ 3,16,800/- as such value under section 23(1)(b) of the Act. Hence, she has taken the annual value for the purposes of section 23 of the Act as ₹ 3,16,800/- being the higher of the values arrived at based on clauses (a) or (b). Therefore, there is no error in the Order dated 14.02.2012 passed by the AO and she has given effect to the Tribunal's order after full application of mind. The AO passed second order giving effect to the Tribunal's order, determining the annual value of the said premises at ₹ 24,10,471/- and income from house property after allowing the necessary deductions at ₹ 11,31,664/-. For this purpose, he has determined the annual value based on the' value adopted by Valuer M/s Nadkarni& Co. in its valuation report. Aggrieved by the aforesaid order passed by the AO, the assessee had filed an appeal before the CIT(A). In the said appeal, the assessee had inter-alia urged that the AO was not justified in passing the order dated 20.12.2012 as there cannot be more than one assessment order for the same year and, in the present case, order dated 14.02.2012 passed by the AO should be regarded as the valid order. It was also urged that the AO erred in not assessing the annual value in accordance with the directions of the Tribunal and the decision of the Full Bench of the Delhi High Court in the case of Moni Kumar Subba (supra). The issue as now raised by the CIT in the revision proceedings under section 263 of the Act was a subject matter of appeal in the said appeal. The CIT(A) has held that order dated 14.02.2012 passed by the AO giving effect to the Tribunal's order is the valid order and the second order dated 20.12.2012 passed by him again giving effect to the Tribunal's order was while dealing with the assessee's ground with respect to determination of annual value, which according to it was not in accordance with the directions in the Tribunal's order, he has observed that it was the duty of the AO to determine the standard rent of the said premises as per the Rent Control Legislation. According to him, lower of the standard rent or the fair rent would be regarded as the annual value

for the purposes of section 23 of the Act. Since, the AO had proceeded on the basis of fair rent determined by the Valuer without determination of the standard rent of the said premises, the direction of the Tribunal had not been carried out. In view of these facts, we find that the Revenue issued show-cause notice under section 263 of the Act and referred to certain extracts from the decisions of the Full Bench of the Delhi High Court in the case of Moni Kumar Subba (supra) and alleged that the AO did not consider the factors enumerated in the said decision while passing the order giving effect to the Tribunal's order. He referred to valuation report of M/s Nadkarni & Co. to allege that the fair market rent which could be fetched by the said property was substantially higher than the amount offered for tax by the Assessee. He also observed that the AO did not try to consider what the municipal value of the said premises was and whether the said value represented fair market rent prevailing during the relevant period. He has discarded the application of Rent Control Act as unreasonable and arbitrary. Reference has also been made to the interest free security deposit placed by Indokem Limited with the assessee. According to him, AO also failed to consider the rent as received by Indokem Limited from its tenants or information available on various web-sites. Referring to the above, he alleged that failure on the part of the AO to make relevant and meaningful enquires had made her order dated 14.02.2012 giving effect to the Tribunal's order as erroneous and prejudicial to the interests of the Revenue. Assessee replied to the above referred show cause notice, highlighting the conclusion reached by the Full Bench of the Delhi High Court in the case of Moni Kumar Subba (supra) as inter-alia laying down that standard rent is the upper limit for determination of annual value under section 23 of the Act. Further, municipal rateable value could be considered as a rational yard stick to determine the annual value unless the AO can show that the rateable value under the municipal laws did not represent the correct fair rent. His

attention was drawn to the fact that, the Assessee had let out the said premises to Indokem Limited in the year 1995 in a bare shell form on which substantial expenditure had been incurred by them to make it suitable to be used as an office. It was also highlighted that municipal rateable value for the present year.

12. Eventually, the CIT passed the revision order under section 263 of the Act. According to him, order dated 14.02.2012 was passed by the AO without perusing the said details properly and carrying out the enquiries to the logical end. He has thereafter in paragraph 3 of his order observed that (a) the AO did not consider whether the actual rent received is fair market rent or it is deflated by reasons of extraneous consideration i.e., receipt of interest free security deposit of Rs. 3.50 crore; (b) the AO did not work out the rent which the property might have reasonably fetched if the transaction was at arms length between a willing lessor and willing lessee; (c) the AO did not work out the municipal rateable value and whether this represented the fair market rent and (d) the AO also did not consider whether any standard rent had been fixed by the Rent Controller for the said premises. According to him, the AO did not follow the letter and spirit of the decision of the Delhi High Court in the case of Moni Kumar Subba (supra) while passing her order dated 14.02.2012. This had made the order dated 14.02.20 12 passed by the AO as erroneous in so far as it was prejudicial to the interests of the Revenue.

13. On the above facts, we are of the view that the CIT was not justified in assuming jurisdiction under section 263 of the Act, for the reasons that as per clause (c) of Explanation 1 below section 263(1) of the Act, the Commissioner of Income-tax cannot exercise jurisdiction under the said section with respect to an issue which is the subject matter of an appeal before the CIT(A) and has been considered and decided in such appeal. In the present case, the CIT has exercised his jurisdiction

under section 263 of the Act for the purposes of determination of the annual value of the said premises under section 23(1)(a) of the Act, in view of the Tribunal's Order dated 30.12.2011 and the judgment of Full Bench of the Delhi High Court in Moni Kumar Subba (supra). The said issue was a subject matter of appeal before the CIT(A) against order dated 20.12.2012 passed by the AO giving effect to the Tribunal's order. The CIT(A) has also considered the said issue in his appellate order dated 23. 10.2013 in paragraph 8 at pages 20 to 27 of the Order. In this regard, he has observed that the determination of annual value only based on the fair rent is incorrect without ascertaining the standard rent of the said premises. According to him, standard rent as determined under the rent control legislation is the upper limit and annual value under section 23(1)(a) of the Act has to be lower of the standard rent or the fair rent. A bare perusal of this part of the CIT(A)'s order shows that determination of annual value of the said premises as per the Tribunal's Order was a subject of matter of appeal before the CIT(A) which has been considered and decided by him. Therefore, the CIT could not have assumed jurisdiction under section 263 of the Act in respect of the said issue. The CIT in his revision order dated 11.03.2014 passed under section 263 of the Act, has observed that the order dated 23.10.2013 passed by the CIT(A) and the consideration of the issues therein was restricted to the second Order dated 20.12.2012 passed by the AO giving effect to the Tribunal's Order. According to him, the subject matter of appeal adjudicated by the CIT(A) in the said order would not be hit by the provisions of clause (c) of Explanation-1 below section 263(1) of the Act. According to us, the real test for determination of subject matter of appeal is that, assuming that the CIT(A)'s order dated 23. 10.2013 was appealed by the Revenue before the Tribunal and his finding with respect to the validity of the order dated 20.12.2012 passed by the AO in view of his earlier order dated 14.02.2012 was reversed, whether the conclusion

reached by the CIT(A) with respect to determination of annual value under section 23 of the Act in accordance with the directions of the Tribunal in its order dated 30.12.2011 would stand. Since, the said conclusion reached by the CIT(A) would be binding on the assessee as well as the Revenue, the subject matter of appeal including the consideration and decision of the CIT(A) was on the same subject matter on which the CIT has revised the assessment by invoking his powers under section 263 of the Act. An assessment order may be challenged by an assessee in appeal as beyond jurisdiction as well as on merits. In such appeal, it is open to the appellate authority to decide both the issues i.e., with respect to the jurisdiction as well as on merits. We have gone through the case law of Sreenivasa Pitty & Sons [1988] 173 ITR 306 (AP), wherein it has been held that the Tribunal or any other appellate authority is duty bound to consider all the issues arising in the appeal and not decide the appeal based only on the jurisdictional issue or an alternate claim. Hon'ble High Court held as under:-

> ***"4.*** *Mr. A. Satyanarayana, the learned counsel for the assessee represents to this Court that the matter relates to 1969-70 and nearly two decades have since elapsed, the question regarding the merits remained unresolved causing considerable hardship to the assessee. It was pointed out that although there was a direction by the Tribunal to the AAC to decide the case on merits the matter was not taken up by the learned AAC and in the meantime some complications had set in. We can not over emphasis the need on the part of the appellate authorities to deal with all the contentions urged at the time of disposal of the appeal. The practice of taking up one amongst several contentions and allowing the appeal on that ground would result in piecemeal disposal of the appeal causing considerable*

time lag and the consequent hardship on account of the superior appellate authorities taking contrary views in the matter. In the interests of all concerned appellate authorities like the Assistant Commissioners, the Commissioners and the Tribunal should address themselves to all the contentions raised before them and dispose them of so that there is a decision on all the points urged. When the matter is processed no further time will be lost by the necessity to remand the matter on matters not considered. We hope the learned AAC will take up the matter without further delay and record his views on the question on merits. The reference is answered accordingly. No costs."

14. In the present case also order dated 20.12.2012 passed by the AO giving effect to the Tribunal's order was challenged before the CIT(A) as without jurisdiction as well as on merits but the finding given by the CIT(A) with respect to the order dated 20.12.2012 passed by the AO, as beyond jurisdiction and therefore the merits of the matter becoming academic, he has also rightly adjudicated the merits of the matter. Hence, in our view, the bar on jurisdiction prescribed by clause (c) of Explanation 1 below section 263 applies to this case. The CIT has relied upon certain decisions to justify his exercise of jurisdiction under section 263 of the Act, which according to him, would show that the issue with respect to determination of annual value under section 23 of the Act in view of the directions of the Tribunal was not the subject matter of appeal before the CIT(A). Whether the issue in respect of which the CIT had exercised jurisdiction under section 263 of the Act was the subject matter of appeal before the CIT(A) was a matter of fact. It cannot be justified based on any legal decisions. As stated above, the said issue was not only involved in appeal before the CIT(A), but he has also considered the same. In any

view of the matter, the decisions as relied upon by the CIT in his revision order dated 11.03.2014 have no application to the present case.

15. In view of the above, we are of the view that the revision order passed by CIT under section 263 of the Act is clearly without jurisdiction and hence quashed. Consequently, the facts being similar in other years, the appeals of assessee for all the years are allowed.

16. **In the result, the appeals of assessee are allowed.**

Order pronounced in the open court on 25-07-2018.

Sd/-	Sd/-
(राजेश कुमार /RAJESH KUMAR)	(महावीर सिंह /MAHAVIR SINGH)
(लेखा सदस्य / ACCOUNTANT MEMBER)	(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 25-07-2018

सुदीप सरकार, व.निजी सचिव / *Sudip Sarkar, 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)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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