

IN THE INCOME-TAX APPELLATE TRIBUNAL "E" BENCH MUMBAI
BEFORE SHRI G.S. PANNU, VICE-PRESIDENT AND
SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 7545/Mum/2013 (Assessment Year 2010-11)

M/s Sigfriede Infotech Pvt. Ltd. (formerly known as Techstar Infotech (India) Pvt. Ltd.) 156, Bhandup Village Road, Next to WMI Cranes Road, Bhandup, West Mumbai-400068. PAN: AABCT7637C	Vs.	ITO-10(3)(3) Aayakar Bhavan, M.K. Road, Mumbai-400020.
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Appellant Respondent
Appellant by : Shri Vijay Mehta &
Anuj Kushandwala-(AR)
Respondent by : Shri Sachchidanand Dube (DR)
Date of Hearing : 30.04.2019
Date of Pronouncement : 22.05.2019

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT
PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by assessee is directed against the order of Ld. Commissioner (Appeals)-22 Mumbai, dated 15th of October 2013 which in turn arises from assessment order passed under section 143(3) on 12th November 2012. The assessee has raised the following grounds of appeal:

- (i) *On the facts and circumstances of the case and in law, learned Commissioner appeal erred in confirming the disputed amounts credited into the accounts by way of ECS holding that this is nothing but rental income received by the appellant and it has been rightly assessed by the assessing officer as income under the head 'income from house property' even when the appellant explained that tenants occupy legitimises illegally.*

2. Brief facts of the case are that during the assessment, the assessing officer from the 26 AS details noted that during the relevant period the assessee-company has received rent income from Mahanagar Telephone Nigam Ltd. (MTNL) of Rs. 35,98,356/-. However, from the computation of income and return of income filed by assessee, the assessing officer find that the assessee has not offered the said rental receipt for taxation. The assessing officer issued show cause notice to the assessee and asked to reconcile the details of 26 AS. The assessee filed its reply dated 17th October 2012 and stated that the assessee had let out the ground floor of building situated at 15 Bhandup Village Road, Ceat Tyre Road, Bhandup (W) Mumbai to MTNL with effect from 17th September 2002 and rent was fixed at the rate of Rs. 1,79,918/- per month. The rent was to be increased after three years subject to maximum 15% increase. The rent agreement was accompanied by service agreement of even date and it was to remain in force so long as main agreement survived. The assessee further stated that leave and licence agreement was not renewed and MTNL has continued to occupy the premises even after the expiry of agreement. The possession of MTNL is illegal in the rented premises. The assessee has filed eviction suit against MTNL for recovery of tenanted premises and compensation for the period of illegal possession. MTNL continued to remit amounts through ECS toward consideration for their continued occupation of the premises. During the relevant period

MTNL remitted Rs. 35,98,356/- through ECS, which was not offered to tax. As there was no prevailing agreement between MTNL and assessee for renting the said premises. The amounts received from MTNL have been accounted as MTNL deposit under other current liabilities. The reply of assessee was not accepted by Assessing Officer and treated the receipt of Rs. 35,98,356/- from MTNL as rental income under the head "Income from House Property". On appeal before the Id. CIT(A), the action of Assessing Officer was confirmed. Before Id. CIT(A), assessee reiterated the similar contention that MTNL failed to comply with the term of leave and licence agreement, the tenancy had ceased to exist and, therefore, the assessee had no right to receive any rent. The assessee also submitted that in the preceding year such receipt was not considered as rental income but shown as deposit under the head "current liability" and as such offer was accepted in order passed under section 143(3). The Id. CIT(A) rejected the contention of assessee holding that treating receipts as 'deposits' in the books of assessee would not make any difference and the law does not differentiate income arising out of 'legal' and 'illegal' receipts. Thus, further aggrieved by the order of Id. CIT(A), the assessee has filed the present appeal before us.

3. We have heard the submission of Id. Authorized Representative (AR) of the assessee and Id. Departmental Representative (DR) for the revenue and perused the material available on record. The Id. AR of the assessee

submits that as per the leave and licence agreement dated 17th September 2002, MTNL was required to serve three month prior notice before the expiry of agreement, and in absence of such notice, the agreement come to an end by efflux of expiry of five years. Whatever amount were transmitted through ECS to the account of assessee for illegal occupation of the premises, by no stretch of imagination, be construed as rent as held by Assessing Officer. The rent is a payment made by the tenant for the occupation of the premises let out by landlord, about which there can be no dispute. Despite services of repeated notice, MTNL failed to vacate and handover the premises, did not yield any result, therefore, the assessee filed suit for eviction of MTNL before Small Causes Court at Bombay for seeking relief for vacant and peaceful possession of suit property/rented premises, claiming mesne profit @ 100 per sq. ft. per month or any such rate which the Court may deem fit and to pay compensation of Rs. 2,10,000/- + additional compensation till the date of payment and cost of the suit. It was submitted that in absence of relationship of licensor and licensee between the assessee and MTNL, the amount received by assessee from MTNL cannot be treated as 'rent'. It is submitted that only right of the assessee is to make a claim and to receive 'mesne profit'. The Small Cause Court at Mumbai in proceeding taken by assessee in suit No.169 /2011 vide order dated 29th of July 2016 have directed the assessee to initiate separate proceeding under Order 20 Rule

12 of Code of Civil Procedure (CPC) for recovery of mesne profit. The copy of order of the Small Cause Court is placed on record. The small cause court has yet to decide the quantum of mesne profit, which the assessee is entitled to recover from the MTNL. The amount received by assessee would ultimately be adjusted against the mesne profit, if any, awarded by small cause court in the separate proceeding. It was canvassed that if mesne profit is determined at the amount lower than the amount already received by the assessee, the licensee is liable to refund the excess amount. Similarly, if the mesne profit determined is more than the amount already received by the assessee, the licensee would be liable to pay differential amount. Thus, the amount received by assessee is only a deposit /liability to be adjusted against the future receipt on account of mesne profit if any.

4. The learned AR for assessee further submits that whether such mesne profit is taxable or not would, in any case, is an issue to be determined in the year in which it is awarded by the learned Small Cause Court, and accepted by the MTNL. Upon happening of such event, the advance received by assessee during the year under consideration would be adjusted against mesne profit awarded. Therefore, whether mesne profit is income or not is an academic issue so far as the year under consideration is concerned.

5. The learned AR further submits that mesne profit, as held by various judicial forum, is capital in nature and not revenue. The assessing officer was, therefore, not justified in bringing to tax the disputed amount as ‘income from house property’, and confirming his order by learned Commissioner (Appeals) was no exception. Therefore, the order of both the lower authorities on the issue deserves to be set-aside. The Id AR made reliance on the order of the Special Bench of Mumbai Tribunal in case of Narang Overseas Private Ltd Versus ACIT [111 ITD 1(SB), wherein question was framed “whether in the light of the decision in 232 ITR 2 it must be held that mess profit received by assessee is revenue income chargeable to tax.” The special bench passed the following order:

48. The above analysis clearly reveals that there is cleavage of opinion between High Courts. The Hon'ble Madras High Court has held that mesne profits are recompense for deprivation of income which the owner would have enjoyed but for the interference of the persons in wrongful possession of the property. Consequently, the same is revenue receipt chargeable to tax. On the other hand the Hon'ble High Courts of Andhra Pradesh, Calcutta, Kerala and Patna have held that mesne profit is in the nature of damages for deprivation for use and occupation of the property and therefore capital receipt not chargeable to tax. There is no judgment of the jurisdictional High Court on this issue. In our view, such conflict can be resolved only by the Hon'ble Supreme Court in some appropriate case. In the absence of the judgment of the highest court of land or of the jurisdictional High Court, the legal position is that where there are two views then the view favourable to the subject should be preferred. Reference can be made to various judgments of the Apex Court : *CIT v. Vegetable*

Product Ltd. [1973] 88 ITR 192, *CIT v. Naga Hills Tea Co. Ltd.* [1973] 89 ITR 236, *CIT v. Madho Prasad Jatia* [1976] 105 ITR 179, *CIT v. J.K. Hosiery Factory* [1986] 159 ITR 85, *Smt. Shashi Gupta v. LIC of India* [1995] 84 Comp. Cas. 436, therefore, following the same, it has to be held that mesne profit received for deprivation of use and occupation of property would be capital receipt not chargeable to tax. We hold accordingly. Consequently, the decision of the Special Bench of the Tribunal in the case of *Sushil Kumar & Co. (supra)*, holding to the extent that mesne profit is taxable as revenue receipt is overruled.

49. In the present case, after the termination of lease, NIHPL was occupying and using the property unauthorisedly and thus the assessee was deprived of the use and occupation of the property and therefore, the mesne profit received by the assessee under the consent decree awarded by the Apex Court at the rate of Rs. 10 lakhs p.m. was on account of damages for deprivation of use and occupation of the profits and therefore, the sum so received was capital in nature not chargeable to tax.

6. The learned AR for assessee fairly brought to our that the appeal filed by the revenue against the above referred decision of Special Bench was dismissed by Hon'ble Bombay High Court, vide ITA No. 1791 of 2008 as the revenue had not been able to furnish the reasons for non-removal of office objection in its appeal. The revenue again raised the similar issue about the taxability of mesne profit in *CIT Vs Goodwill Theatre (P) Ltd* (386 ITR 294 Bom), in which proceeding the earlier order in case of *Narang Overseas Pvt Ltd (supra)* was relied by Mumbai Terminal. The Hon'ble High Court not entertained the appeal of revenue on the ground that subsequent to the dismissal of its appeal in case of *Narang Overseas*

Pvt Ltd (supra) on technical grounds, no steps were taken by the revenue to get the appeal is restored which, according to the judgement, was acceptance of the order of Special Bench. However, on further appeal filed by revenue, this Hon'ble Supreme Court by their judgement and order dated 29 November 2017 set-aside the judgement appealed against and remanded the matter back to the Hon'ble Bombay High Court for deciding the issue on merit vide CIT Versus Goodwill Theatre (P) Ltd (292 CTR 457 SC). Since, the assessee has not come across any further order in case of Goodwill Theatre (P) Ltd, it appears that matter is pending adjudication before Hon'ble Bombay High Court. The learned AR humbly prayed that the reasoned order of Special Bench in Narang Overseas Private Ltd, wherein even cleavage of opinion expressed by different forums were considered, prevails as on date. Therefore, the learned AR of assessee would submit that mesne profit cannot be taxed under the provision of Income tax Act. The learned AR further submits that at the cost of litigation, the issue of taxability or otherwise of mesne profit does not arise during the year under consideration and all the above submissions have been made only to demonstrate that amount received during the year is to be adjusted against the mesne profit which might be awarded by the Hon'ble Small Cause Court in a separate proceedings.

7. On the other hand the learned the DR for the revenue supported the order of lower authorities. The learned DR submits that assessee is receiving periodic payment from licensee for use and occupation charges of house property and the receipt thereof is nothing but the rental income and liable to be taxed under the head 'income from house property'. The learned DR for revenue further submits that the facts of the case in Narang Overseas Private Ltd (supra) were entirely different. In said case the income received from letting out of various shops payment of as well as commission by way of certain percentage of sales proceeds and the assessee that income as 'business income'. On determination of lease/ license the occupant has not made periodical payment rather lump sum compensation on account of mesne profit was awarded.
8. We have considered the rival submission of the landed representative of the parties and have gone through the orders of authorities below. We have also deliberated on various case laws relied by lower authorities. The facts of the case that the tenant/ licensee despite efflux of lease period are occupying the tenanted portion are not in dispute. The tenant is remitting the user charges by way of ECS. The assessee has claimed that the payment made through ECS is not on account of contractual payment of rent and nothing but part of mesne profit. The assessee had treated the said amount as part payment of deposits of mesne profit. The parties have locked their horn on the taxability of receipt, whether it should be taxed as

revenue receipt chargeable to tax or it should be treated as mesne profit being capital receipt and not chargeable to tax. The learned AR of the assessee had strongly relied upon the decision of Special Bench in Narang Overseas Private Ltd (supra) wherein the Special Bench of Mumbai Tribunal held that when the assessee was deprived of the use and occupation of the property and therefore, the mesne profit received by the assessee under the consent decree awarded by the Apex Court at the rate of Rs. 10 lakhs p.m. was on account of damages for deprivation of use and occupation of the profits and therefore, the sum so received was capital in nature not chargeable to tax. In the present case the assessee has filed already obtained a judgement and decree of vacant and peaceful possession of tenanted premises vides order dated 29th July 2016 passed by learned Judge of Small Cause Court Bombay. While passing the judgement in degree the learned Judge of Small Cause Court Bombay directed the assessee to initiate separate proceeding under Order 20 Rule 12 of CPC for inquiry for recovery of mesne profit. The said proceeding for determination of quantum of mesne profit under Order 20 Rule 12 of CPC initiated by assessee is still pending. The main thrust of submission of learned AR of the assessee was that the issue of taxability or otherwise of mesne profit does not arise during the year under consideration and all the submission of made only to the demonstrate the facts that the amount received during the year is to be adjusted against mesne profit which

might be awarded by learned Small Cause Court in a separate proceedings. Therefore, considering the submission of learned AR of the assessee that the decision of learned Small Cause Court on the quantum of mesne profit is awaited, this ground of appeal is restored back to the file of assessing officer to decide the issue afresh after taking in to consideration of decision of Small Cause Court. The assessing officer is directed to consider the decision of Special Bench of in Narang Overseas Private Ltd (supra) and pass the order in accordance with law. Needless to record that assessing officer shall grant fair and proper opportunity before passing order on the issue. In the result the grounds of the appeal raised by the assessee is allowed for statistical purpose.

Order pronounced in the open court on 22/05/2019.

Sd/-
G.S. PANNU
VICE-PRESIDENT

Mumbai, Date: 22.05.2019

Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "E" Bench, ITAT, Mumbai
6. Guard File

Sd/-
PAWAN SINGH
JUDICIAL MEMBER

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai