

**IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA 'SMC' BENCH, KOLKATA  
[Virtual Court Hearing]**

**(Before Shri P.M. Jagtap, Hon'ble Vice President, Kz)**

**ITA No. 2131/Kol/2019  
Assessment Years: 2012-13**

**Sun Biotechnology Ltd.....Appellant**  
**21A, Shakespeare Sarani**  
**Kolkata - 700 017**  
**[PAN : AAECs 8587 R]**

**Vs.**

**Deputy Commissioner of Income Tax, Circle-7(2) Kolkata.....Respondent**

**Appearances by:**

*Shri Subash Agarwal, A/R, appeared on behalf of the assessee.*

*Shri Jayanta Khanra, JCIT Sr. D/R, appearing on behalf of the Revenue.*

Date of concluding the hearing : June 2<sup>nd</sup>, 2020

Date of pronouncing the order : June 2<sup>nd</sup>, 2020

**ORDER**

**Per P.M. Jagtap, VP, Kz:-**

This appeal filed by the assessee is directed against the order of the Learned Commissioner of Income Tax (Appeals) - 18, Kolkata, (hereinafter the "Id.CIT(A)"), dt. 27/08/2019 and the solitary issue involved therein relates to the addition of Rs.24,00,000/- made by the Assessing Officer and confirmed by the Id. CIT(A) by treating the same as lease rent received by the assessee which is chargeable to tax.

2. The assessee in the present case is a company which is engaged in the business of supply of raw jute. The return of income for the year under consideration was filed by it on 31/03/2014, declaring its total income at NIL. During the course of assessment proceedings, it was noticed by the Assessing Officer from the relevant Form No. 26AS that, lease rent of Rs.24,00,000/- was received by the assessee during the year under consideration and even though tax at source was deducted from the said amount, the income from lease rent was not offered to tax by the assessee company in its return of income. In this regard, the following explanation was offered by the assessee:-

*"(1) the company has given the Jute Mill at Katihar on lease to Sunbio Manufacturing Pvt. Ltd. on term of Agreement dt. 20/02/2004 for a period of 5 years w.e.f. 01/04/2004, (2) the said lease has not vacated the Mill even after extension of 8 months from the expiry of lease on 31/03/2009, (3) thus, since 1<sup>st</sup> Oct, 2009 said company is in possession of Mill as trespasser, (4) Company has filed a suit for possession of the property before*

*High Court at Patna which is pending and (5) Company is neither claiming any lease rent or conversion charges from said company nor recognising the same as income pending the suit before Patna High Court.”*

2.1. On the basis of the above explanation, it was claimed by the assessee that the amount of Rs.24,00,000/-, in question was not chargeable to tax in its hands for the year under consideration. The Assessing Officer did not find merit in this claim of the assessee and proceeded to make an addition of Rs.24,00,000/- to the total income of the assessee in the assessment completed u/s 143(3) of the Act vide order dt. 03/03/2015.

3. Against the order passed by the Assessing Officer u/s 143(3) of the Act, an appeal was preferred before the Id. CIT(A) challenging the addition of Rs.24,00,000/- made by the Assessing Officer. During the course of appellate proceedings before the Id. CIT(A), the following submissions were made on behalf of the assessee company, in support of its case that the amount of Rs.24,00,000/- in question was not chargeable to tax in its hands for the year under consideration:-

*“1) Appellant Company owns a Jute Mill at Katihar (Bihar), which was leased to m/s. Sunbio Manufacturing Pvt. Ltd. as per agreement dt. 20/02/2004 for a period of 5 years w.e.f. 01/04/2004.*

*2) The said lessee has not vacated the Mill even after extension of 6 months from the expiry of lease on 31.03.2009.*

*3) Thus, since 1<sup>st</sup> Oct, 2009, said company is in possession of Mill as trespasser.*

*4) Company has filed a suit for possession of the property before High Court at Patna which was pending as on 31.03.2012.*

*5) Company treating the said lessee as Trespasser has neither claimed any lease rent or conversion charges from said lessee company nor recognized the same as income pending the suit before Patna High Court.*

*6) This fact was given in Note 21 of the audited accounts for the year :-*

*“2.1 Subject to approval from the Concerned Authorities, company had re-entered into lease agreement dated 20th February, 2004 valid for 5 years w. e. f 1st April, 2004 whereby the Mill at Katihar was given on lease and accordingly the lessee is liable for payment of interest on Term Loan, statutory and other liabilities arising on day to day running of the Mill. Consequent to the expiry of the Lease Agreement w.e.f. 1<sup>st</sup> April, 2009 a temporary extension for six months upto 30<sup>th</sup> September, 2009 was given to the lessee whereafter the lessee was to surrender the possession of the Jute Mill w. e. j. 1st October, 2009 to the lessor. In spite of the written Agreement the lessee has so far not surrendered the possession of the Jute Mill and continued to run the Jute Mill without any valid document. The matter is currently sub judice and pending in the Patna High Court. In this regard the company has also come to learn that the lessee also*

*deposited TDS amounting to Rs.2.40 Lacs with the Income Tax authorities. Since no amount was received by the company from the lessee, it has not provided any lease rent during the year."*

7) *As a matter of fact, the leasee by obtaining fraudulent signature of Sri Ramawatar Ashopa as Director of the appellant, made a renewal of lease agreement on dated 07/02/2009.*

8) *Appellant filed suit before Patna High Court being Civil Writ Jurisdiction Case No. 11486 of 2011 making leasee as well as other group of Kali Charori Sharma as party to the suit.*

9) a) *The leasee to mislead the proceeding deducted TDS of Rs.2,40,000/- on purported lease rent of Rs.2,40,000/- in terms of said fraudulent lease agreement dated 07/02/2009. Such TDS was reflected in Form No. 26AS of the appellant.*

*However appellant has not recognized the renewal agreement, treated the leasee as trespasser and required the possession of the Jute Mill.*

b) *Assessee company has not received such sum at all. We are submitting the ledger of lease Rent for the period from F. Y. 2009-10 to F. Y. 2012-13.*

10) **Hon'ble Patna High Court vide order dated 05/02/2013 disposed off the writ as under :-**

11)

*"The writ application was filed for quashing the order dated 29.04.2011 passed by the Scientist "F" & Head, Bureau of Indian Standards, Patna and for consequential orders.*

*This is the second round of litigation before this Court. On the earlier occasion the respondent no. 6 had approached this Court by filing CWJC No. 931/2011 which was disposed of by order dated 01.03.2011 with a direction to the Director & Head of Bureau of Indian Standards, Patna Branch Office to take up the matter afresh and decide as to whether Ramawtar Ashopa was the Director of M/s. Sun Bio Technology Limited on the relevant date and had signed the lease agreement and also to consider and decide the matter of renewal of licence of the petitioner of that case (respondent no. 8 in this case).*

*From the facts stated in the pleadings of the parties there appears to be a dispute between two factions in the petitioner company one represented through its Director, Saurav Banerjee who has filed the writ application on behalf of the Company and the other through another Director, Kali Charan Sharma, who has been allowed to represent the Company which has also been added as respondent no. 8 to the Company which has also been added as respondent no. 8 to the present writ application. The same position was also noted in the earlier order dated 01.03.2011.*

*While passing the impugned order dated 29.04.2011, the Scientist, "F" & Head, Bureau of Indian Standards, Patna, could not arrive at any specific conclusion as to whether the lease agreement had actually been executed by Mr. Ashopa since Mr. Ashopa appearing before him denied the said execution but relying only upon the fact that lease rent of Rs. 25 lacs was duly paid to the lessor and the same was also accepted and encashed by the lessor and necessary income tax was also deducted from the said payment, came to the conclusion that by accepting the payment of lease rent, it seems that the Lease Agreement has been acted upon. However, it was held that it is a complicated question of law and the issue can only be decided by a competent Court of Law.*

*In my view, the said issue can only be properly resolved after taking appropriate evidence by authorities under the Companies Act, in this case, the Company Law Board. It is apparent that issues of management control of the company in such circumstances*

could have been brought to the notice of the Company Law Board and its decision sought under Section 398 (1)(b) of the Companies Act and had that been done, the matter would have been resolved by now. However, considering the fact that complicated issues of fact ad to who is in actual control and management of the company has arisen and repeated by both the factions are approaching this Court as being the true representative of the company, it would be in the interest of the company as also the parties who claim like respondent no. 6 to have taken lease of company's plant and machinery and factory. Let the said issue be resolved by the Company Law Board efficaciously.

The writ application is, accordingly disposed of with a direction to the Company Law Board to decide the issue as to which of the factions is in control and management of the Board of Directors of the Company including as to which of the Directors are entitled to remain on the Board of the Company taking into account the fact that several resolutions are in existence stating that some of the Directors have been removed by the Board of Directors. Let all these issues be considered and decided by the Company Law Board after giving opportunity to both the parties to be heard in the matter within a period of three months from the date of appearance of the parties before it.

It is made clear that the order dated 29.04.2011 shall not be acted upon until it is resolved as to whether the lease agreement dated 07.02.2009 as also the lease agreement dated 29.08.2011 were entered into with a Director of the Company who was legally authorized by the company on that date to sign the lease agreement) which issue shall also be decided by the Company Law Board while deciding main issue."

12) Legal Portion in this regards is as under

a) Section 108 of the Transfer of Property Act provides that, upon determination of a lease, the erstwhile lessee is obligated to put the lessor in possession of the property, even if there is no express covenant in the contract.

b) In **M/s. Raptakos Brett & Co. Ltd. v. Ganesh Property**, the **Supreme Court** held that, when a lease comes to an end by efflux of time, or by notice of termination, or if there be a breach and the lessee's rights are forfeited, the lessee becomes a tenant at sufferance, and it becomes the duty of the lessee under Section 108 of the Transfer of Property Act to restore possession to the lessor forthwith.

13) Appellant company is not recognizing the renewal of lease agreement dated 07/02/2009 and lease agreement dated 29/08/2011 fraudulently executed by other group.

14) In the aforesaid such a situation, company's claim shall be :-

a) Vacate and peaceful possession and

b) Mesne Profit for unauthorized use of the Jute Mill w. e. f 01.10.2009 till the handing over of the possession to the appellant.

15) In view of the peculiar litigations, company has not recognized the lease rent in its books when it is fighting against the lessee to be termed as not validly in possession of Mill and shall be subsequently entitled to Mesne Profit from lease.

16) Appellant shall recognize said lease rent, mesne profit and TDS as income on resolving of the dispute finally and under the order of the court to accept such rent, otherwise company has several legal claims including mesne profits etc.

17) Deposit of TDS on the Lease Rent was just to strengthen the fraud case by the lessee having remained in possession on the basis of fraudulent agreement of renewal of lease.

18) We draw your kind attention to **Delhi High Court Judgment dated 21-12-2001** in the case of **Pal Properties (India) Pvt. Ltd. v.CIT 254 ITR 687 (Delhi)** wherein it was held:

"Head Note

After termination of lease, lessee occupied premises even after expiry of lease term. However, after a lapse of 2 ½ Years lessee sent cheques for the period for which rent was not paid by lessee - Assessee returned cheques and filed suit which is pending before High Court - Assessing Officer while framing assessment under section 143(3) called upon assessee to explain as to why rent termination of lease was not offered for taxation - it was explained on behalf of assessee that tenancy was not valid after termination of lease term assessee was not entitled to receive rent - it was explained that assessee had not filed legal suit against lease for vacation of premises - As right to receive rent was in dispute, it was submitted on behalf of assessee that same could not be brought to tax - Assessing Officer rejected assessee's claim and brought rent for taxation - Commissioner (Appeals) confirmed order of assessing officer - Not justified - Mesne profit which is yet to be determined by High Court, does not come within purview of an accrued income for the purpose of sections 4 and 5.

**Ratio: Mesne profit which is yet to be determined by High Court does not come within purview of accrued income for purpose of section 4 and 5."**

19) Under these circumstance, fastening the said income as income of the appellant is not correct.

20) Therefore, Ld. A. o. was wrong in taking said Rs. 24,00,000/- as income which is neither accrued to the appellant nor received by it.

21) We are attaching the Form 26AS from Asst year 2014-15 to 2018-19, wherein your honour shall find that no such fraudulent TDS was deducted by opposite group and trespassers.

22) We therefore, request your honour to kindly delete the addition of Rs. 24,00,000/- and oblige."

3.1. The Id. CIT(A) did not find merit in the submissions made on behalf of the assessee as above and proceeded to confirm the addition of Rs.24,00,000/- made by the Assessing Officer for the following reasons given in paragraph no. 5.2. of his impugned order, which is reproduced below:-

"5.2 The above contention of the appellant is considered. The question to be answered is whether the lease rental income which is not recognized by the appellant in view of the litigation could be considered as its income or not. As per the Income Tax Act, once the TDS is deducted by the deductor the corresponding income becomes taxable in the hands of deductee. As per the section 198 "all sums deducted in accordance with the foregoing provisions of this chapter (that means from Sec lion 192 to 196) shall for the purpose of computing the income of an assessee be deemed to be income received. In this case, as

*per 26AS the TDS has been deducted by the lesser which means the corresponding income, of Rs. 24,00,000/- should have been recognized as income of the appellant. In this regard, it is relevant to mention that the appellant submitted that it has not recognized the renewal of lease agreement dated 07.02.2009 and lease agreement dated 29.08.2011 which, as per the appellant fraudulently executed by the lessee and hence will not recognize the lease rent till the issue is resolved by the Hon'ble Patna High Court. However, for Income Tax 'purposes the income deducted and which is duly reflected in Form 26AS shall be deemed to be the income of the appellant. The Tax deducted by the lessee, as per the Section 199 is considered as payment or Tax on behalf of the appellant and hence the appellant shall consider the corresponding income as income received during the year. The appellant should have recognized the income with stipulation or rider in the accounts that the said income is in dispute and the income is offered only for the purpose of Taxation. The issue is in subjudice and the fact that the lease agreement is forged not established. However, the tenant or lessee has deducted the TDS on rent and credited to the government account and it is duly reflected in the form 26AS. Hence in this case, the amount of rent is determined to an extent and the appellant should have admitted it as its income for the year under consideration. Even the Hon'ble court determines the mense profits the rent payment would not be less than this amount. Therefore, the facts of the case relied upon by the appellant are distinguishable and not applicable to the case of the appellant."*

4. Aggrieved by the order of the Id. CIT(A), the assessee has preferred this appeal before the Tribunal.

5. I have heard the arguments of both the sides and also perused the relevant material available on record. The Id. Counsel of the assessee has submitted that the addition of Rs.24,00,000/- in question made by the Assessing Officer was confirmed by the Id. CIT(A) by relying on the provision of Section 198 of the Act, which are not applicable to the facts of the present case. He has contended that the nature of the amount in question received by the assessee itself is in dispute and unless and until such nature is determined, the chargeability of the same to tax cannot be decided. He has contended that this issue is pending before the Company Law Board as a result of the order dt. 05/02/2013 passed by the Hon'ble Patna High Court and this vital aspect was completely overlooked by the Id. CIT(A). By relying on the decision of Mumbai Special Bench of the ITAT in the case of *Narang Overseas (P) Ltd. vs. ACIT (2008) 100 ITD (Mum) S.B*, he has contended that *mense* profits received by the assessee for wrongful deprivation of use and occupation of property constitutes capital receipt and hence not chargeable to tax under the provisions of the Income Tax Act, 1961 ('Act'). He has urged that this issue, therefore, is required to be sent back to the Assessing Officer for deciding the same afresh after taking into

consideration the decision to be rendered by the Company Law Board, determining the exact nature of the amount in question received by the assessee.

6. The Id. D/R has not raised any objection for sending the matter back to the Assessing Officer keeping in view all the facts and circumstances of the case as explained by the Id. Counsel for the assessee before the Id. CIT(A) as well as before the Tribunal. He, however, has contended that specific directions may be given to the Assessing Officer while sending the matter back to him for reconsideration.

7. After taking into consideration the submissions made by the learned representatives of both the sides in the light of the facts and circumstances of the case, I consider it just and proper to set aside the impugned order of the Id. CIT(A) confirming the addition of Rs.24,00,000/- made by the Assessing Officer and restore the matter to the file of the Assessing Officer for deciding the same afresh after taking into consideration the decision of Company Law Board determining the exact nature of amount in question received by the assessee during the year under consideration. Keeping in view the nature of the said amount, as finally decided by the Company Law Board, the Assessing Officer shall decide the chargeability or otherwise of the said amount to tax in the hands of the assessee for the year under consideration.

8. In the result, appeal of the assessee is treated as allowed for statistical purposes.

*Order pronounced in the open court on the 2<sup>nd</sup> day of June, 2020.*

**Sd/-**  
**[P.M. Jagtap]**  
Vice President

Dated : 02.06.2020  
{SC SPS}

*Copy of the order forwarded to:*

**1. Sun Biotechnology Ltd  
21A, Shakespeare Sarani  
Kolkata – 700 017**

**2. Deputy Commissioner of Income Tax, Circle-7(2) Kolkata**

3. CIT(A)-

4. CIT- ,

5. CIT(DR), Kolkata Benches, Kolkata.

True copy  
By order

Assistant Registrar  
ITAT, Kolkata Benches