IN THE INCOME TAX APPELLATE TRIBUNAL, 'D' BENCH MUMBAI

BEFORE: SHRI MAHAVIR SINGH, VICE PRESIDENT
&

SHRI M.BALAGANESH, ACCOUNTANT MEMBER

ITA No.7615/Mum/2016
(**Assessment Year :2010-11**)

M/s. Rational Art & Press Pvt. Ltd., 21, Nirmal, Nariman Point Mumbai – 400 021	Vs.	DCIT Cen Cir 44 R. No.656, Aayakar Bhavan Mumbai- 400 020
PAN/GIR No.AAACR7185E		
(Appellant)	..	**(Respondent**)

Assessee by	Ms. Ritu
Revenue by	Shri Gaurav Bathom
Date of Hearing	**19/07/2021**
Date of Pronouncement	**24/08/2021**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

This appeal in ITA No.7615/Mum/2016 for A.Y.2010-11 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-50, Mumbai in appeal No.CIT(A)-50/IT-479/2013-14 dated 19/09/2016 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 26/03/2013 by the ld. Dy. Commissioner of Income Tax, Central Circle – 44, Mumbai (hereinafter referred to as ld. AO).

2. At the outset, we find that this appeal was already disposed by this tribunal vide its order dated 28.2.2019. Later this order was recalled in Miscellaneous Application proceedings in MA No. 449/Mum/2019 dated 26.3.2021 only to the extent of adjudication of Ground No. 2 by considering the judgements of Hon'ble Jurisdictional High Court in the case of CIT vs Akshay Textile Trading & Agencies Pvt Ltd reported in 304 ITR 401 (Bom). Accordingly, we are adjudicating the Ground No. 2 raised by the assessee in the original grounds of appeal in the aforementioned perspective.

3. The Ground No. 2 raised by the assessee is as under:-

> *"The learned Assessing Officer erred in including the sub-lease income of Fazlani Exports Pvt. Ltd., in respect of sub-lease of Rational House property to M/s. Goldman Sachs on the ground that Fazlani Exports Pvt. Ltd sub-leased aforesaid property at higher rent and treating as Sham Transaction."*

4. We have heard the rival submissions and perused the materials available on record. We find that the assessee company is a Hi-tech capital intensive agro company and had filed its return of income for the Asst Year 2010-11 on 15.10.2010 declaring total income of Rs 8,11,38,570/- which included income from house property of Rs 5,89,39,788/- after claiming statutory deduction of 30% towards repairs.

4.1. The assessee company owned a property at Prabhadevi, Mumbai viz. 'Rational House' that was converted into a business centre. The aforesaid property for the past several years was leased by the assessee to its sister concern viz. M/s Fazlani Exports Pvt Ltd (FEPL in short) . During the year under consideration, the assessee had leased the property to FEPL for the first seven months i.e from April 2009 to October 2009 for a rent of Rs 3,15,00,000/- (i.eat Rs 45 lacs per month) which in turn had

sub-leased the same to M/s Goldman Sachs (India) Securities Pvt ltd for the aforesaid period for a rent of Rs 11,02,50,000/- (i.e at Rs 1,57,50,000/-). In so far as the remaining period of five months for the year under consideration i.e November 2009 to March 2010, the assessee had directly leased the property to M/s Goldman Sachs (India) Securities Pvt Ltd for a total rent of Rs 5,31,60,000/-. Hence the assessee company had received a total rent of Rs 8,46,60,000/- (3,15,00,000+5,31,60,000) from leasing the property under consideration during the year, which was offered to tax as income from house property by the asesssee in the return of income. During the course of assessment proceedings, the ld AO noticed that the assessee had leased the property under consideration to FEPL (sister concern) at substantially lower rent , thereby enabling the sister concern to derive more rent for the same period out of sub-leasing activity. In other words, the ld AO observed that the market rent of the property was substantially more than that received by the assessee from FEPL. Accordingly, the ld AO showcaused the assessee as to why the transaction of giving the property on lease to FEPL may not be treated as sham and full "Annual Lettable Value" (ALV) of the property may not be brought to tax in its hands. The reply filed by the assessee did not find favour with the ld AO and he adopted ALV of the property at Rs 19,49,10,000/- and reworked the income of the assessee under the head 'income from house property'.

4.2. On first appeal, the ld CITA in principle approved the action of the ld AO, however, observed that the ld AO had erred in computing the ALV of the property for the entire year at Rs 19,49,10,000/- (11,02,50,000 for 7 months + 8,46,60,000 for 5 months). The ld CITA noticed that as the actual rent received by the assessee for the last 5 months was Rs 5,31,60,000/- , therefore, as per the method applied by the ld AO , the

ALV of the property was worked out at Rs 16,34,10,000/- (11,02,50,000 for 7 months + Rs 5,31,60,000 for 5 months). Aggrieved, by the upholding of the determination of ALV of the property for first seven months at Rs 11,02,50,000/-, the assessee is in appeal before us.

4.3. The facts stated hereinabove remain undisputed and hence the same are not reiterated for the sake of brevity. The ld AR placed on record the decision of the co-ordinate bench of this tribunal in the first round of proceedings before the tribunal itself, on the decision of Mumbai Tribunal in the case of Fazlani Exports Pvt Ltd vs DCIT in ITA No. 4090/Mum/2019 dated 4.5.2018 for the Asst Year 2010-11, wherein the sub-leasing receipts of Rs 11,02,50,000/- were liable to be assessed as 'income from other sources'. It was then submitted by the ld AR that when the sub-leasing receipts of Rs 11,02,50,000/- had been held to be income of FEPL, therefore, the same could not be assessed as income of the assessee. It was also then pointed out by the ld AR that the issue in dispute in the case of FEPL before the tribunal was whether the sub-leasing receipts would be taxable in the hands of FEPL under the head 'income from business' or 'income from other sources'. The taxability of sub-leasing receipts per se in the hands of FEPL was never in dispute before the tribunal. Accordingly, the tribunal in the hands of FEPL had held that the sub-leasing receipts were to be taxed as 'income from other sources'. It was pointed out by the ld AR as statement made from the Bar, that this tribunal decision in the hands of FEPL had been accepted by the revenue by not preferring further appeal to Hon'ble High Court. Hence the entire transaction of assessee leasing out the property to its sister concern at a rent lesser than the market rent, cannot be construed as a sham transaction. However, in this recalled proceedings, we have to adjudicate the applicability of the decision of Hon'ble Jurisdictional High Court in the

case of CIT vs Akshay Textile Trading & Agencies Pvt Ltd reported in 304 ITR 401 (Bom)which was admittedly relied upon by the ld AR. The brief facts before the Hon'ble Bombay High Court are as under:-

> *The assessee-company let out three properties to the three companies and those tenants further sub-let the same property to 'RIL' for higher consideration. The assessee filed the return showing rent received from three companies. The Assessing Officer, however, held that for the purpose of section 23, the annual value of the property should not be one entered into by the assessee with its tenants, but the amount received by the tenants from RIL. On appeal, the Commissioner allowed the assessee's claim. On revenue's appeal, the Tribunal upheld the order of the Commissioner (Appeals).*

4.4. We find that the Hon'ble Jurisdictional High Court held as under:-

> ***6.*** *We have given our anxious consideration to the matter. Considerable time was spent as to whether there has been a departure from the ratio decedendi in McDowell & Co. Ltd. v. CTO [1985] 154 ITR 148 (SC) in the case of Union of India v.AzadiBachaoAndolan[2003] 263 ITR 706 (SC). We may address ourselves to that issue. The judgment in McDowell & Co.'s case (supra) was of a Constitution Bench. The majority judgment insofar as the issue of colourable exercise and tax planning observed as under:—*
>
> > *"Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges.*
> >
> > *On this aspect, one of us, Chinnappa Reddy J., has proposed a separate and detailed opinion with which we agree." (p.171)*
>
> *Chinnappa Reddy J., while answering the issue of colourable devices referred to various authorities and then observed that time has come for us to depart from the Westminster principle as emphatically as the British Courts have done. After so saying the ratio on the issue of colourable devices has been explained as under :—*
>
> > *"In our view, the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it." [Emphasis supplied].*
>
> *In our opinion this would be the ratio of that judgment.*

In AzadiBachaoAndolan's case (supra) the issue arose out of Taxation Treaty between India and Mauritius. A learned Bench considered some observations made by Chinnappa Reddy specially on the applicability of principles set out in Westminster, but after having so said, the Court addressed itself as to what was the ratio in McDowell & Co. Ltd. (supra) and was pleased to observe as under :-

> *"The Court nowhere said that every action or inaction on the part of the tax-payer which results in reduction of tax liability to which he may be subjected in future, is to be viewed with suspicion and be treated as a device for avoidance of tax irrespective of legitimacy or genuineness of the act; and inference which unfortunately, in our opinion, the Tribunal apparently appears to have drawn from the enunciation made in McDowell's case (1958) 154 ITR 148 (SC). The ratio of any decision has to be understood in the context it has been made. The facts and circumstances which lead to McDowell's decision leave us in no doubt that the principle enunciated in the above case has not affected the freedom of the citizen to act in a manner according to his requirements, his wishes in the manner of doing any trade, activity or planning his affairs with circumspection, within the framework of law, unless the same fall in the category of colourable device which may properly be called a device or a dubious method or a subterfuge clothed with apparent dignity." [Emphasis supplied].*

The Supreme Court has thus explained as to how it is understood the law laid down in McDowell & Co. Ltd. (supra). There is, therefore, no departure from the law laid down in McDowell & Co. Ltd.'s case (supra), in AzadiBachaoAndolan's case (supra). In our opinion, therefore, the ratio of McDowell's case (supra) as understood by the Supreme Court in AzadiBachoAndolan'scase (supra) is the law, considering that that is how the Supreme Court understood the ratio decidendi of the Judgment in McDowell & Co. Ltd.'s case (supra). In our opinion, therefore, it is not possible to contend that there is departure on the principles laid down in McDowell & Co. Ltd.'s case (supra).

7. *That bring us to the facts of the case. It is no doubt true that the Assessing Officer had recorded a finding in para 5.4 that the shareholding of the assessee-company as well as the intermediary company is held by another set of group companies and the shareholders of these group companies are once again another set of group companies of RIL. It is further observed that there is a cross-holding of shares of each other by large number of group companies of RIL. All these companies had activities in dealing in shares of RIL or holding the shares of RIL as investment. Under these circumstances it was held that it is not possible to hold that the transaction between the assessee-company and its tenants is an independent business transaction. Similarly it was held that it was not possible to accept that the transaction between the tenant companies and RIL is an independent transaction between two independent companies. Under these circumstances it held that the rent paid by RIL to the tenant should be considered as annual value.*

8. *The assessee aggrieved preferred an appeal before the Commissioner (Appeals). The ground of recomputation of annual letting value was in issue. The Commissioner (Appeals) noted that in the case of the appellant for the assessment year 1997-98 the addition made on account of enhanced annual letting value is deleted. That decision was followed. In other words, the finding of fact of the tenant*

company being the alter ego of Reliance was not accepted. The finding recorded by the Assessing Officer was thus set aside by the Commissioner (Appeals).

An appeal was preferred before ITAT. In the grounds of appeal no contention was taken that the Agreement between Reliance as intermediary tenant is a sham and/or that it was a colourable device which may properly be called a device or a dubious method or a subterfuge clothed with apparent dignity.

9. *From the order of the Tribunal also it does not appear that the issue of colourable exercise and/or sham contract was argued or raised. The Tribunal dismissed the appeal preferred by the revenue. Once the issue of sham and bogus contract had not been raised before the Tribunal the finding of fact recorded by the Commissioner (Appeals) stood confirmed. From the judgment of the Tribunal the issue which is sought to be now contended or canvassed of sham contract or a colourable device on the ground that the intermediary is an alter ego of RIL was not in issue. It is not the case of the revenue that the intermediary was another face of the assessee and consequently the Agreement entered into with the tenant by the assessee was a colourable device. In these circumstances considering section 23, what is assessable to tax is the income received from the tenant falling either under sub-section (a) or (b) of section 23(1). The compensation received by the tenant would be taxable in the hands of the tenant. Appeal would lie on substantial question of law from the order of the Tribunal in respect of the matters which were taken up before it and/or on a pure question of law based on undisputed material on record. That is not the case over here.*

10. *We may also note that section 23 before its amendment by Finance Act, 2001 with effect from 1-4-2001 read as under :-*

> *"23. Annual value how determined - (1) For the purposes of section 22, the annual value of any property shall be deemed to be-*
>
> *(a) the sum for which the property might reasonably be expected to let from year to year;*
>
> *(b) where the property is let and the annual rent received or receivable by the owner in respect thereof is in excess of the sum referred to in clause (a), the amount so received or receivable."*

This was necessitated on account of the Supreme Court interpreting section 23(1) as it then stood and to bring within its ambit those cases where higher rent had been received, than the annual letting value. In other words were the annual rent receivable was more than the annual letting value.

On behalf of the revenue considering the expression 'receivable' in section 23(1)(b), learned counsel seeks to contend that what has to be considered is the rent which is receivable as rent from the premises. It is, therefore, submitted that the rent which the tenant was receiving from Reliance would be the rent receivable. On the other hand on behalf of the assessee learned counsel explains that the expression 'receivable' is in the context of the rent reserved in terms of the agreement. As an illustration, it is submitted that if the rent received per annum is Rs. 12,000 even though Rs. 6,000 is paid for the purpose of tax incidence what has to be considered is Rs. 12,000 as that is the rent receivable.

We have given our anxious consideration to the rival contentions. Section 23(1)(a) uses the expression 'the sum for which the property might reasonably be expected to be let from year to year'. This has to be considered in the context of the applicable rent laws. The Courts have construed the rent receivable in such circumstances to be either the standard rent or the rateable value as fixed by the local authority. Though the rateable value may also on occasions has to consider the standard rent in cases where the rent law may be applicable. Before the amendment brought about to section 23 by the Finance Act, 2001 with effect from 1-4-2002 even if an assesses had received higher rent then the standard rent the additional amount would not be the subject of tax. To overcome this omission the section was substituted to cover also those cases where rent received was higher than the standard rent or rent based on municipal rateable value. If the argument of the assessee is to be considered then expression 'reasonable' would have to be given different meaning. In our opinion it is not possible to give a meaning wider amplitude than what is contained in section 23(1)(a). The Legislature has substituted the provision and brought in section 23(1)(b) to cover the part of the annual value which otherwise would not fall with the tax ambit before its amendment. In that context the expression 'receivable' would mean that though the annual value is fixed in terms of the Agreement even though it is not received in the relevant year, yet the same would be assessable to tax in terms of the illustration given on behalf of the assessee. The contention, therefore, as urged on behalf of the revenue on the construction or expression 'receivable' will have to be rejected.

11. *The issue whether the contract between Reliance and the intermediary tenant is a sham cannot be gone into as the question would not arise in the absence of it being in issue raised before the Tribunal. That question as framed does not, therefore, arise. Further as noted earlier it is not the contention of revenue that the contract between the assessee and the tenant is sham. The annual value would and be the value in terms of that contract. Therefore, the annual value is the annual value received or receivable by the owner from the tenant irrespective whether tenant on such letting has received higher rent from RIL.*

12. *Considering the above, in our opinion the question of law at 'A' as framed would not arise. Question B has to be answered in the affirmative and against the revenue. Consequently appeal stands dismissed.*

4.5. Respectfully following the aforesaid decision, we decide the Ground No. 2 of original grounds of appeal in favour of the assessee.

5. All other grounds already adjudicated by this tribunal vide its order dated 28.2.2019 shall remain unchanged.

6. This order shall be read together with the old tribunal order dated 28.2.2019 and MA order dated 26.3.2021.

7. In the result, the appeal of the assessee is partly allowed.

Order pronounced on 24/08/2021 by way of proper mentioning in the notice board.

Sd/-	**Sd/-**
(MAHAVIR SINGH)	**(M.BALAGANESH)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Mumbai; Dated 24/08/2021
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai