IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 5 OF 2004

WITH

INCOME TAX APPEAL NO. 62 OF 2004

Tivoli Investment & Trading Co. Pvt. Ltd. ....*Appellant*

: Versus :

The Assistant Commissioner of Income-tax
and another ....*Respondents*

Mr. Nitesh Joshi *i/b Mr. Atul K. Jasani, for the Appellant-Assessee.*

Dr. Dhanalakshmi S. KrishnaIyer *with Mr. P. A. Narayanan, for the Respondent-Revenue.*

CORAM : ALOK ARADHE, CJ. &
SANDEEP V. MARNE, J.

RESERVED ON : 7 AUGUST 2025.

PRONOUNCED ON : 18 AUGUST 2025.

JUDGMENT: *(Per Sandeep V. Marne, J.)*

1) The issue involved in these two Appeals is whether it is permissible for the Assessing Officer to determine annual value of the property for the purposes of taxation under Section 22 of the Income Tax Act, 1960 **(the Act)** higher than the rateable value determined under the Municipal laws. The issue arises in the light of challenge raised by

the Assessee to the order dated 30 June 2003 passed by the Income Tax Appellate Tribunal **(ITAT)** pertaining to the Assessment Years 1990-91 and 1991-92, by which the orders passed by the Commissioner of Income Tax (Appeals) and Assessing Officer are upheld. The Assessing Officer has determined the gross annual letting value of the property under the provisions of Section 23(1)(a) of the Act at Rs.22,00,000/- and has subjected the same to tax under Section 22 of the Act. The Assessee insists that the annual rateable value determined under the municipal laws could at best be treated as the sum for which the property might have reasonably be expected to be let under the provisions of Section 23(1)(a) of the Act.

2) Brief factual background of the case is as under :

The Assessee purchased office premises bearing No.72 admeasuring 3275 sq.ft. on 7th floor of the building 'Sakhar Bhavan' at Nariman Point, Mumbai for consideration of Rs.21,85,664/-, which is the value reflected in the Fixed Asset Schedule in the Assessee's Balance Sheet. On 29 November 1988, the Assessee entered into Leave and License Agreement and other connected agreements with Citi Bank for letting out the office premises for a period of 10 years from 1 April 1989 to 31 March 1999. The agreed license fees were Rs.9,825/- per month. Citi Bank paid interest free security deposit of Rs.1,54,00,000/- to the Assessee. For the year ending 31 March 1990 (Assessment Year 1990-91), the Assessee offered rental income of Rs.1,17,900/- calculated on the basis of license fees of Rs.9,825/- per month to be taxed under the head 'Income from Business'. The Assessing Officer passed Assessment Order dated 30 November 1992 determining the gross annual rateable value of the property under Section 23(1)(b) of the Act at Rs.22,00,000/- treating the same as the amount for which the property might have reasonably be let out from year to year. This was done by taking into consideration

the rent received in respect of the first and ground floor premises in the same building from the same licensee-Citi Bank as well as the factum of Assessee paying 15% interest on overdraft facility secured from Citi Bank.

3) The Assessee challenged the Assessment Order by filing Appeal before the Commissioner of Income-Tax (Appeals) V, Bombay **[CIT(A)]** which has upheld the order of the Assessing Officer by order dated 29 March 1993. The Assessee preferred further Appeal before the ITAT which has not interfered with the order of the Assessing Officer *qua* income from house property by its order 30 June 2003. The Assessee has accordingly filed Income Tax Appeal No.62/2004 challenging the order of the ITAT dated 30 June 2003.

4) In respect of Assessment Year 1991-92, the Assessing Officer adopted similar course of action by determining the gross annual letting value of the property at Rs. 22,00,000/- vide Assessment Order dated 30 March 1993. The assessment *qua* income from the said property was confirmed by the CIT(A) by order dated 4 March 1994 and by ITAT by order dated 30 June 2003. The Assessee has filed Income Tax Appeal No.5/2004 challenging the order passed by the Assessing Officer, CIT(A) and ITAT *qua* Assessment Year 1991-92.

5) Both the Appeals have been admitted by orders dated 2 December 2004 by formulating the following common question of law :-

> Whether on the facts and circumstances of the case and in law the Tribunal was justified in holding that the assessee was assessable to the income of Rs.22,00,000/- as 'income from house property'?

6) Mr. Joshi, the learned counsel appearing for the Assessee would submit that the Revenue has grossly erred in considering the gross annual letting value of the property at Rs.22,00,000/- by resorting to the provisions of Section 23(1)(b) of the Act. That in the present case, provisions of Section 23(1)(a) of the Act are relevant and the enquiry into the sum for which the property might reasonably be expected to be let out has to be determined with reference to the municipal rateable value. That the amount of interest free security deposit received by the Assessee has no relevance for determination of the gross annual letting value either under Clauses (a) or (b) of sub-section (1) of Section 23 of the Act. That the sum for which the property might reasonably be expected to be let from year to year must be determined with reference to the rateable value. That the issue is squarely covered by the judgment of this Court in ***Commissioner of Income-tax-12 Versus. Tip Top Typography***[1] which also holds that the sum to be determined under the provisions of Section 23(1)(a) and cannot exceed the standard rent in respect of the property determinable as per the Rent Control Legislation. That the Income Tax Appellate Tribunal has grossly erred in considering usufruct obtainable from security deposit as rent of the property. The usufruct of deposit is nothing but an addition made under Section 23(1)(b) which is impermissible in law. That in the present case the funds have been invested in income generating assets which have yielded income from the current or latter years. That the Assessing Officer has erred in taking into consideration the rental transaction pertaining to the year 1983 in respect of the first and ground floor premises ignoring the position that the property concerned is located on the seventh floor of the building. That if the rent for ground and first floor of the premises was Rs.43/- per sq.ft., the rent in respect of the seventh floor premises ought to have been lesser whereas the Assessing

1 [2014] 368 ITR 330 (Bombay)

Officer considered Rs.50/- per sq.ft. per month as the rent in respect of the office premises, which is a perverse finding. That considering 15% interest (notional) on security deposit of Rs.1.52 crores is nothing but determination of fair rent by considering notional interest on security deposit which is held to be impermissible in ***Tip Top Typography*** (supra).

7) Mr. Joshi would then take us through the Certificate dated 31 October 1992 issued by the Developer certifying that the monthly rateable value of the office premises as on 1 April 1996 was Rs.10,200/-. That the said value was updated as on 1995 at Rs.67,331/- by the Co-operative Society of Sakhar Bhavan. That at the relevant time, the municipal taxes were payable jointly by the Co-operative Society and there was no concept of raising of individual bills *qua* each units. That therefore since the municipal tax bills were being raised initially on developer and later on the Society, they alone could certify the annual rateable value of the office premises. That the said additional evidence in the form of certificates dated 31 October 1992 and 28 November 1995 was relied upon by the Assessee before the ITAT and the same ought to have been taken into consideration for the purpose of determining the annual value of the property for the purpose of Section 23(1)(a) of the Act. That the statement made by the learned counsel appearing on behalf of the Assessee about ignorance of the said Certificates was made in a spur of moment. He would also invite our attention to the Balance Sheet of the Assessee as on 31 March 1990 in support of the contention that the standard rent in respect of the premises ought to have been determined on the basis of the value of fixed assets reflected in the said Balance Sheet. On the above broad submissions, Mr. Joshi would pray for setting aside the orders passed by the Assessing Officer, CIT(A) and ITAT.

8) The Appeals are opposed by Dr. Krishnaiyer, the learned counsel appearing for the Revenue. She would submit that the Assessee had smartly divided the rental return receivable by fixing a nominal amount towards license fees and hefty security deposit of Rs.1.54 crores. That the license fees indicated in the agreement constituted only the monthly outgoings in respect of the premises and the real return to the Assessee was in the form of security deposit of Rs.1.54 crores. That the Revenue is not bound to accept the municipal rateable value which is the principle recognized by this Court in its judgment in ***Tip Top Typography***. That in the present case, as per the Asesseee's own case, the municipal rateable value was ridiculously low at Rs.10,200/- and that therefore the Assessing Officer was entitled to consider the comparable instances. That in the instant case, the Assessing Officer has considered comparable instance of the same licencee (Citi Bank) paying license fees in respect of the premises in the same building. That the Assessing Officer has made a detailed analysis while determining that the Assessee had failed to produce any cogent material even *qua* the claim of municipal rateable value. That letters from developer and society were sought to be produced directly before the ITAT and the same were never produced before the Assessing Officer and CIT(A). That the counsel for the Assessee himself urged before the ITAT to ignore the said documents.

9) Dr. Krishnaiyer would further submit that the Assessee-Company is formed only with the objective of earning rental return from the office premises. That the company has been set up with capital of only Rs.14,59,500/- and that the only asset that it possesses is the office premises at Sakhar Bhavan. That therefore the income generated through rent is the only source of income for the Assessee-Company. That the assessee had attempted to indulge in tax evasion by

deliberately dividing the rental return into minuscule amount of license fees and hefty amount of security deposit. She would submit that the three orders currently record findings against the Assessee and no case is made out for interference by this Court in exercise of jurisdiction under Section 260A of the Act. She would pray for dismissal of the Appeals.

10) We have considered the submissions canvassed by the learned counsel appearing for rival parties and have gone through the orders passed by the Assessing Officer, CIT(A) and ITAT. We have also perused the records of the case.

11) In the present case, the Assessee is the owner of the office premises at the building 'Sakhar Bhavan' situated at prominent location of Nariman Point in Mumbai City. The office premises are fairly large admeasuring 3275 sq.ft. located on seventh floor of the building. The license in respect of the office premises was granted by the Assessee in favour of Citi Bank vide Leave and License Agreement dated 29 November 1988. The license was for a period of 10 years from 1 April 1989 to 31 March 1999. However, when it came to payment of license fees, the parties agreed on a unique arrangement. Through the license tenure of 10 years, the license fees or compensation was fixed at Rs.9,825/- per month with no provision for annual increment. From para-5 of the Leave & License Agreement, it appears that the municipal taxes, ground rent, cesses, duties and other outgoings in respect of the licensed premises were Rs.9,825/- per month at the relevant time and the Licensor had agreed to bear the same only to the extent of Rs.9,825/- per month. It was agreed that in the event of any increase of such taxes

and income beyond Rs.9,825/-, the same was to be borne by the Licensee. The arrangement therefore creates an impression that the amount of Rs.9,825/- agreed to be paid as license fees by Citi Bank to the Assessee was actually the amount of taxes and municipal outgoings. Citi Bank paid to the Licensor an amount of Rs.1,54,00,000/- towards interest free security deposit which the Assessee was entitled to retain and enjoy during currency of license for 10 years and to refund the same to Citi Bank without any interest. It however appears that the transaction of payment of security deposit of Rs.1.54 crores was recorded by way of separate agreement executed on the same day i.e. 29 November 1988. The case thus involves letting of premises on a nominal amount of license fees while accepting hefty amount of security deposit.

12) In the return of income for the relevant Assessment years, the Assessee offered rental income of only Rs. 1,17,900/- calculated by taking into consideration only the amount of license fees of Rs.9,825/-. In the Assessment Order passed under the provisions of Section 143(3) of the Act, the Assessing Officer refused to accept the amount of Rs.1,17,900/- as the rental income in respect of the office premises. He took into consideration, statement of Shri. Vaidyanathan, Assistant Vice President of Citi Bank who had stated that the interest free security deposit was given to the Assessee as a part of compensation towards occupancy of premises by Citi Bank. The Assessing Officer however did not determine notional interest on the amount of Rs.1.54 crores and instead proceeded to work out the annual value of the property under the provisions of Section 23(1) of the Act. It would be necessary to take into consideration the provisions of Sections 22 and 23 of the Act which provide thus :-

> **22. Income from house property.**
> The annual value of property consisting of any buildings or lands appurtenant thereto of which the assessee is the owner, other than such portions of such property as he may occupy for the purposes of any business or profession carried on by him the profits of which are chargeable to income-tax, shall be chargeable to income-tax under the head "Income from house property".
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> **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; or
> (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:

13) Thus, under Section 22 of the Act, the annual value of the property consisting of building or lands appurtenant thereto becomes chargeable to income tax under the head 'Income from house property'. Thus, whether the property is actually let out or not, the annual value of the property still becomes chargeable to income tax under Section 22 of the Act. Section 23 of the Act deals with the manner in which annual value of the property can be determined for the purposes of Section 22. Under clause-(a) of sub-section (1) of Section 23, the annual value of a property is deemed to be the sum for which the property might reasonably be expected to let from year to year. Thus, under Section 23(1)(a) of the Act, the Assessing Officer needs to conduct an enquiry and determine the annual value for which the property might reasonably be expected to let, whether or not the same is actually let. However, in a case where the property is actually let and the annual rent received or receivable by the owner is in excess of the sum determinable under clause-(a), the actual sum so received/receivable becomes the annual value of the property for the purposes of Section 22 of the Act.

14) In the instant case, the Assessing Officer refused to accept the license fees indicated in the licence agreement as the annual value of the property for taxation under Sections 22 and 23 of the Act. Instead, he embarked upon an enquiry for deciding the annual value of the property. He adopted twin methods for such determination. Firstly, he took into account the comparable instances and secondly, he also took into consideration the interest which the assessee would have paid to the bank if he was to take overdraft facility of Rs, 1.54 crores which it accepted as security deposit. The Assessing Officer thereafter considered the annual value of the property at Rs. 22,00,000/. It would be apposite to exact the findings recorded by the Assessing Officer for facility of reference :-

> 5. I have therefore worked out Annual Letting value of the property given on rent to the Citibank as per the provisions of sec. 23(1) of the I.T.Act, 1961. I have taken the basis of the annual letting value of the said property as under-
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> (a) Aestithetic Builders has given 1st and ground floor of the said building on rent/leave & licence to Citibank as per agreement dated 20.10.1983 as per details filed by them. They have given the premises on leave & licence at Rs. 43/- per sq.ft. per month. Considering this I propose to estimate leave & licence/rent charges receivable by the assessee from Citibank at Rs.50/- per month and hence rent receivable/compensation receivable to the assessee is worked out at R. 19,65,000/-.
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> (b) Citibank has given interest free advance of Rs.1,54,00,000/-to the assessee in lieu of compensation of the said premises. Citibank has charged the interest on overdraft facility given by them to the assessee of Rs.51 lakhs @ 15%, I, therefore, worked out the interest on Rs.1,54,00,000/- 15% which comes to Rs.23, 10,000/-
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> In view of the above facts, I take the gross annual letting value u/s.23(1)(b) at R.22,00,000/- which is the amount for which the property might reasonably be expected to be let out from year to year.

15) This is how the Assessing Officer determined the sum of Rs. 22,00,000/- as the amount for which the property might reasonably be expected to be let out from year to year. However there appears to be an error in quoting the provisions of Section 23(1)(b) of the Act by the Assessing Officer, when in fact what is done by him is determination under Section 23(1)(a).

16) The Assessing Officer thus took into consideration the comparable instance where Citi Bank had taken on rent/license premises in the same building on first and ground floor under the agreement dated 20 October 1983 wherein license fees at the rate of Rs. 43/- per sq.ft was payable. However, since the said license fees were agreed in the year 1983, the Assessing Officer took into consideration slightly higher amount of Rs.50/- per sq.ft per month as rent/compensation receivable by the Assessee and worked out the same at Rs.19,65,000/-. Additionally, the Assessing Officer also took into consideration the fact that interest free security deposit of Rs.1.54 crores was maintained by Citi Bank with the Assessee and the Assessee had contemporaneously availed overdraft facility from Citi Bank for which it was paying to the Citi Bank, interest @ 15% p.a. The Assessing Officer therefore worked out figure of Rs.23,10,000/- as 15% return of security deposit of Rs.1.54 crores. After considering the two figures of Rs.19,65,000/- (*based on comparable instances)* and Rs.23,10,000/- (*based on 15% return on security deposit*), the Assessing Officer arrived at figure of Rs.22,00,000/- by treating the same as gross annual letting value of the property.

17) Mr. Joshi has strongly objected to the course of action adopted by the Assessing Officer by determining 15% notional income as the gross annual letting value of the property. It is submitted that the practice of determining notional interest on security deposit as gross annual letting value of the property has been repeatedly criticized by several Courts. Our attention is invited to the relevant observations made by the Division Bench of this Court in ***Tip Top Typography*** (supra) wherein this Court has dealt with twin issues of (i) permissibility to consider notional interest on security deposit as annual rateable value and (ii) consideration of municipal annual rateable value to be the annual rateable value determinable under the provisions of Section 23(1)(a) of the Act. As of now, we are only considering the findings recorded by the Division Bench *qua* the first issue of consideration of notional interest on security deposit for the purpose of determining the annual value of the property under Section 23(1)(a) of the Act. This Court took note of its *Division Bench judgment in* ***Commissioner of Income-tax Versus. J. K. Investors (Bombay) Ltd.***[2] where the question was about consideration of notional interest on security deposit received by Assessee against letting of property for the purpose of determination of annual rent under Section 23(1)(b) of the Act. In ***J. K. Investors (Bombay) Ltd.*** it appears that the annual rent actually received by the Assessee without taking into account the notional interest was more than the annual rateable value determinable under Section 23(1)(a) of the Act. The Division Bench concluded that the value of notional advantage like notional interest cannot form part of actual rent received as contemplated under Section 23(1)(b). The Division Bench however kept open the question as to whether such notional interest can be a part of 'fair rent' under Section 23(1)(a) of the Act. It however appears that Division Bench of Calcutta High Court in ***Commissioner of Income-***

2 [2000] 112 Taxman 107

tax Versus. Satya Co. Ltd.[3] had disapproved adding notional interest into annual market rent received. The said view of the Calcutta High Court was accepted by the Division Bench of Delhi High Court in ***CIT Versus. Asian Hotels Ltd.***[4] holding that the notional interest on refundable security deposit was neither taxable as profit nor gain from business or profession nor as income from house property under Section 23(1)(a) of the Act. The decision of this Court in ***J. K. Investors (Bombay) Ltd.*** of Calcutta High Court in ***Satya Co. Ltd.*** and of Delhi High Court in ***CIT Versus. Asian Hotels Ltd.*** has been considered by the Full Bench of the Delhi High Court in ***Commissioner of Income-Tax Versus. Moni Kumar Subba***[5] which has concluded as under :-

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

3 [1997] 140 CTR (Cal) 569

4 [2010] 323 ITR 490 (Delhi)

5 [2011] 333 ITR 38

18) The Division Bench of this Court ***Tip Top Typography*** concurred with the above-mentioned decisions particularly with the view expressed by the Full Bench of the Delhi High Court and held in paras-45 and 46 as under :-

> We would like to remark that still the question remains as to how to determine the reasonable/fair rent. It has been indicated by the Supreme Court that extraneous circumstances may inflate/deflate the 'fair rent'. The question would, therefore, be as to what would be circumstances which can be taken into consideration by the Assessing Officer while determining the fair rent. It is not necessary for us to give any opinion in this behalf, as we are not called upon to do so in these appeals. However, we may observe that no particular test can be laid down and it would depend on facts of each case. We would do nothing more than to extract the following passage from the Supreme Court judgment in the case of Motichand Hirachand v. Bombay Municipal Corporation, AIR 1968 SC 441, 442:
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> > '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.'"
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> **46.** We have and after careful reading of the provision in question and the conclusion of the Full Bench of the Delhi High Court concluded that a different view cannot be taken. We respectfully concur with the view taken in this Full Bench decision of the Delhi High Court.

19) Thus, the law appears to be fairly well settled that it is impermissible to take into consideration the notional interest on security deposit received while letting out the property for the purpose of determination of annual value either under Section 23(1)(a) or under Section 23(1)(b) of the Act.

20) However, in the present case, the Assessing Officer has not determined the gross annual rateable value of the property at Rs.22,00,000/- only on the basis of notional interest on security deposit. He has also taken into consideration the comparable instance of letting

out property in the same building to the same licensee (Citi Bank) while making an enquiry under the provisions of Section 23 of the Act. Here, the second issue decided in ***Tip Top Typography*** comes into play as the Assessee contends that the municipal annual ratable value alone can be taken into consideration for the purpose of determining annual value of the property under Section 23(1)(a) of the Act. Strenuous reliance here is placed on judgment of Division Bench in ***Tip Top Typography***. While deciding the first issue of permissibility to consider notional interest on security deposit, we have also made reference to the Full Bench decision of the Delhi High Court in ***CIT Vs. Moni Kumar Subba*** which has also decided the issue of consideration of rateable value determined under municipal law for determining the annual rateable value under Section 23(1)(a) of the Act. Full Bench of the Delhi High Court formulated following question for consideration:-

> The next question would be as to whether the annual letting value fixed by the Municipal Authorities under the Delhi Municipal Corporation Act can be basis of adopting annual letting value for the purposes of section 23 of the Act.

21) After taking into consideration the judgment of Calcutta High Court in ***CIT Versus. Satya Co. Ltd.*** and of Apex Court in ***Mrs. Shiela Kaushish Versus. Commissioner of Income-tax***[6], the Full Bench of Delhi High Court held as under :-

> It is on this basis that in the present case, the Commissioner of Income-tax (Appeals) gave primacy to the rateable value of the property fixed by the Municipal Corporation of Delhi, vide its assessment order dated December 31, 1996, and on this basis, opined that the actual rent was more than the said rateable value and therefore, as per section 23(1)(b), the actual rent would be the income from house property and there could not have been any further additions.
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> Since the provisions of fixation of annual rent under the Delhi Municipal Corporation Act are in pari materia of section 23 of the Act, we are inclined

6 [1981] 131 ITR 435

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

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

Thus, the rateable value, if correctly determined, under the municipal laws can be taken as annual letting value 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 the Patna High Court in the case of Kashi Prasad Kataruka v. CIT (1975) 101 ITR 810 (Patna).

The above discussion leads to the following conclusions:

(i) Annual letting value 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 annual letting value, 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. ..

22) As observed above, the Division Bench in ***Tip Top Typography*** has agreed with the view taken by the Full Bench of Delhi High Court as is apparent in findings recorded in para-46 of the judgment. Additionally, the Division Bench in ***Tip Top Typography*** held in para-52 as under :-

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

23) In our view, both the Full Bench of the Delhi High Court in ***CIT Versus. Moni Kumar Subba*** as well as the Division Bench of this Court in ***Tip Top Typography*** have held that in ordinary circumstances, the only value fixed by the municipal authorities can be a rational yardstick and the rateable value so determined under the Municipal laws can be taken as annual value of the property under Section 23(1)(a) of the Act. However, this principle applies only when the annual value so determined under the municipal laws has 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 the circumstance because of passage of time, for instance where the annual value was fixed by the municipal authorities long back on account of basis of rent then received, such municipal annual value does not provide a safe yardstick for determining annual value of the property under Section 23 of the Act. The Full Bench of the Delhi High Court specifically recognizes the principle of ignorance of municipal valuation for determining annual letting value if the Assessing Officer finds that the same is not based on relevant material for determining the 'fair rent' in the market and that there is sufficient material on record for taking a different valuation. The Full Bench of the Delhi High Court has referred to the judgment of the Apex Court in ***Corporation of Calcutta Versus. Smt. Padma Debi***[7] in which it is held that a bargain between a willing lessor and willing lessee uninfluenced by any extraneous circumstances may afford a guiding test of reasonableness. The Delhi High Court has further held that the municipal rateable value is not binding on the Assessing Officer and if the Assessing Officer can show that rateable value under municipal laws does not represent the correct fair rent, he can determine the same on the basis of material/evidence placed on record. Similar view appears to have been taken by Patna High Court in ***Kashi Prasad Kataruka Versus. Commissioner of Income-Tax***[8].

24) In addition to the observations made by the Full Bench of Delhi High Court as confirmed by this Court in ***Tip Top Typography,*** we have independent reasons to hold that municipal rateable value cannot, in every case, be treated as the real value for which the property might reasonably be expected to be let under Section 23(1)(a) of the Act. The municipal rateable value may not always represent the true and fair market rent which the property actually fetches. No doubt, the

7 AIR 1962 SC 151

8 [1975] 101 ITR 810

Municipal Authorities do conduct a survey of rental returns in each locality while determining the annual rateable value. However, such municipal rateable value is not updated or in some cases, the same does not represent the correct annual rent received *qua* a particular property. In a given case, the rental value of premises in two adjoining buildings in City of Mumbai can be different. Various factors such as condition of building, accessibility, road frontage, interiors, amenities etc. can make a substantial difference between the rental value of same properties located in close proximity to each other. Therefore, the Assessing Officer can make an enquiry under Section 23(1)(a) of the Act to find out the sum which the property is reasonably expected to fetch for the purpose of determining the annual value under Section 22. After the Assessing Officer, on his own enquiry, finds out that the gap between the municipal rateable value and the annual rent of the property is likely to fetch in not too wide, the Assessing Officer can consider the annual value of the property corresponding to the municipal rateable value. However, the moment the Assessing Officer notices that the gap between the two amounts is wide, he cannot be compelled to accept the municipal rateable value for the purpose of Section 23 of the Act. Thus, the principle of accepting municipal rateable value for the purpose of Section 23 of the Act cannot be uniformly applied to every case and there is no bar for the Assessing Officer from making an independent enquiry under Section 23(1)(a) and determine the sum which he believes is likely to be fetched as rent in respect of the property in question.

25) In the present case, the Assessee did not, in the first place, present before the Assessing Officer the municipal rateable value right till the proceedings were decided by the CIT(A). No document was produced by the Assessee to indicate a particular amount being fixed as municipal rateable value. In fact, it was never his case that the amount

fixed towards municipal rateable value be taken as annual value of the property under Section 23 of the Act. The Assessee always claimed that the licence fees indicated in license agreement must be treated as the annual letting value of the property. For the first time before ITAT, the Assessee relied upon two documents being letter dated 31 October 1992 issued by the Developer-Aesthetic Builders Pvt. Ltd. and Certificate dated 28 November 1995 issued by Sakhar Bhavan Premises Co-op. Society Ltd. (Proposed). The developer's letter dated 31 October 1992, read thus :-

> Dated 31st October 1992
>
> M/s Tivoli Investment & Trading Co.P.Ltd.
> 7, Champaklal Udyog Bhuvan,
> Sion (East),
> Bombay 400 022.
> ---
>
> Dear Sirs,
>
> Re: Rateable Value
> Office No.72, Sakhar Bhavan.
> ---
>
> In response to your letter No. TI/10107/92 dated 21.10.1992 we may inform you that the Proposed Rateable Value in respect of Office Premises No.72 in Sakhar Bhavan, Plot No.230, Nariman Point, Bombay -21, owned by you, as notified by the Assessment Department of the Municipal Corporation of Greater Bombay, with effect from 1-4-1986, is as follows:-
>
> | Office No. | Area. | Rateable Value @ Rate |
> |---|---|---|
> | 72 | 255.00 Sq.mtrs. | Rs.10,200/- |
>
> A complaint against the proposed rateable value is still pending finalisation with the Assessor & Collector, Municipal Corporation of Greater Bombay.
>
> Yours faithfully,
> For AESTHETIC BUILDERS PVT. LTD.
>
> Manager(Sales)

26) Thus, in the developer's letter 'proposed rateable value' in respect of the office premises w.e.f. 1 April 1986 was indicated as Rs.10,200/-. The letter further stated that a complaint against proposed rateable value was pending finalization before the Assessor and Collector, MCGM. Thus, the letter dated 31 October 1992 itself made it clear that what was fixed and what had continued to operate even till 31 October 1992 was merely proposed rateable value. Again, the figure of Rs.10,200/- was as on 1 April 1986 and had no relevance to the Assessment Years 1990-91 and 1991-92. Faced with this difficulty, the Assessee relied on Certificate issued by Sakhar Bhavan Co-op. Society Ltd. (Proposed) dated 28 November 1995 which certified that the rateable value fixed by the Municipal Corporation in respect of the office premises was Rs.67,331/- per year. The Certificate is silent about the date of fixation of such rateable value. There is no underlying material to indicate as to how the society had arrived at the said figure.

27) Though the Assessee attempted to rely upon developer's letter and Society's Certificate before the ITAT, its Counsel ultimately conceded that both documents be ignored. In this regard, para-8 of the order of the ITAT reads thus :-

> 8. According to Shri Dastur, the rateable value of the premises, which comprised area of 255 sq.mts, was only Rs. 10,200/-. So, as per section 23(1)(a) of the Act, its value is to be adopted at Rs. 10,200/-. This was on the basis of a letter given by Aesthetic Builders Private Limited, appended at Page 60 of the Paper Book. In the Paper Book at Page 59, one certificate from Sakhar Bhavan Premises Co-operative Society Limited (Proposed) dated 28.11.1995 was appended, wherein the valuation of premises No.702 at Sakhar Bhavan was stated to be Rs.67,331/- per year. In the certificate given along with the Paper Book, it was stated that this evidence was available before the CIT(A). The CIT (A) did pass the order on 29.03.1993. The learned Departmental Representative submitted that the certificate of the assessee is wrong. This evidence was not available before the CIT(A). At this, Shri Dastur submitted that this evidence may be ignored. Similarly, at Page 58 of the Paper Book, the assessee filed a letter from Citibank dated 24.01.1994. In the certificate appended along with the

> Paper Book, it was stated that this evidence was before the CIT(A). This evidence was obtained subsequent upon the order of the CIT(A), which is dated 29.03.1993. As such, the learned DR made objection. On that, Shri Dastur submitted that this evidence may also be ignored. We just ignore these two papers without making any comment on the falsity of the certificate appended along with the Paper Book.

28) Thus, the Assessee itself did not press the developer's letter and Society's Certificate in support of its claim before ITAT and cannot be permitted to rely upon the same before this Court. Mr. Joshi's submission that the Counsel made a statement for ignorance of evidence in a spur of moment cannot be accepted. It was a conscious call taken by the Assessee.

29) Thus, the Assessee did not place any material before the Assessing Officer to demonstrate that any particular sum was fixed as municipal rateable value. Though some material was sought to be produced before the ITAT, the same was not relied upon. Even otherwise, both the documents cannot be treated as cogent evidence for fixation of municipal rateable value in respect of the premises in question.

30) Therefore, the Assessee's contention of fixation of annual value under Section 23 and of municipal rateable value cannot be accepted in the facts of the present case.

31) Another contention raised on behalf of the Assessee is that the standard rent in respect of the premises ought to have been taken into consideration for the purpose of determining annual value under Section 23. Reliance is placed on the findings recorded by the Division Bench of this Court in ***Tip Top Typography*** in para-52, which are as under :-

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

32) In our view, the contention of fixation of annual value of the office premises of the Assessee under Section 23(1)(a) based on standard rent is totally misconceived. The concept of standard rent is referable to rent control legislations. In Maharashtra, Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (**Bombay Rent Act**) was applicable till the year 1999 which had frozen the rent in respect of the premises as on 1st September 1940, which became the standard rent. The Bombay Rent Act has been substituted by the Maharashtra Rent Control Act, 1999 (**MRC Act**), which again freezes the standard rent as on 1 October 1987, subject to annual increment @ only 4%.

33) The concept of standard rent applies only where there is statutory tenant in the premises in question, who enjoys protection from rent escalation and eviction. In respect of the premises which are not governed by the provisions of the Rent Control Legislations, the concept of standard rent becomes wholly inapplicable. The idea behind

fixation of annual value of the property under Section 23 of the Act corresponding to the standard rent is to ensure that the landlord is not made to pay income-tax on actual market rent when he receives a paltry sum towards standard rent. In City of Mumbai, premises which are governed by the Bombay Rent Act and MRC Act fetch paltry sums on account of freezing of rent. Thus, in a given case where landlord receives rent of only Rs.500/- per month cannot be made to pay income-tax on an assumption that the premises are actually worth fetching market rent of Rs.50,000/-. Therefore, the annual value of premises governed by the rent control legislations needs to be computed by taking into consideration the annual standard rent received by the landlord by ignoring the market rent which the premises are capable of fetching. This is the reason why observations are made in paragraph-52 of the judgment in ***Tip Top Typography*** that *'.....the Assessing Officer cannot brush aside the rent control legislation, in the event, it is applicable to the premises in question'*. Those observations are relevant only to premises which are governed by the rent control legislations.

34) It is not the case of the Assessee a tenancy was created in favour of Citi Bank under the provisions of Bombay Rent Act, which was in vogue at the time of execution of the licence agreement dated 29 November 1988. Therefore, the contention that annual value under Section 23 needs to be determined on the basis of standard rent merits outright rejection.

35) Once it is held that the Assessing Officer is not bound to accept the municipal rateable value and that in a given case, he can take into consideration the annual rent the premises are capable of fetching, we do not see any error on the part of the Assessing Officer in conducting enquiry and fixing Rs.22,00,000/- as the annual rental value

of the premises. The Assessing Officer has taken into consideration the license fees paid by Citi Bank in respect of the other premises in the same building in the year 1983 and has marginally increased the rent of Rs.43/- paid by Citi Bank in the year 1983 to Rs.50/- in respect of the year 1989-90. The contention about impermissibility to consider rent of ground floor premises for fixing the annual value of seventh floor premises does not merit consideration. Even if it is assumed that ground floor premises are likely to fetch more rent, there was also a long gap of six to seven years between the instance taken into consideration by the Assessing Officer and the license agreement executed between the Assessee and Citi Bank. If yearly increment in the rent for ground and first floor premises is taken into consideration, which was 10% at the relevant time, the rent would have gone upto Rs. 76/- by the year 1989 and even if the annual increment is considered at 5% the rent would have been Rs. 57/- in 1989. The Assessing Officer has rightly considered the rent at Rs. 50/- considering that the premises are on the seventh floor. In fact, we find that the Assessing Officer's assessment is on a conservative side.

36) So far as return of 15% on security deposit of Rs. 1.54 crores is concerned, we have already held that notional interest receivable on security deposit cannot be the sole factor for deciding the annual value of the property under Section 23(1)(a) of the Act. The Assessing Officer though has taken into consideration 15% return of Rs. 23,10,000/-, the same has not been made the sole basis for determining annual value of the property. He has conducted independent analysis by taking into consideration the twin factors of comparable instance and return on overdraft facility and instead of choosing either of the two figures, he has arrived at independent sum of Rs.22 lakhs as reasonable rent which office premises were likely to fetch at the relevant point of time. We do

not find any element of perversity in the findings recorded by the Assessing Officer.

37) The Assessee has raised a strong objection to invoke the principle of usufruct of the security deposit for justifying the sum determined by the Assessing Officer under Section 23 of the Act. From the findings recorded in para-21 of the order of the ITAT, it appears that the Tribunal has attempted to find out the fruits of exploitation of premises at Sakhar Bhavan and has refused to believe that the amount received towards reimbursement of taxes and outgoings could be taken into consideration for use of the office premises. The Tribunal has rightly justified Assessing Officer's action in finding out the consideration which the Assessee can receive from use of the property, which is also the scheme of Clause-(a) of sub-section (1) of Section 23. The Tribunal has also rejected the contention of the Assessee to consider municipal rateable value of Rs.10,200/- by terming it to be ridiculously low. In addition, the Tribunal has noted the submission of counsel of Assessee for ignoring the said municipal rateable value. It rightly took into consideration that the Assessee did not file any documentary evidence from the Municipal Corporation. The contention that the Municipal Corporation was levying taxes in respect of the entire building on condominium/apartment association/co-operative society does not cut any ice as it was possible for the Assessee to seek information from the tax department of the Municipal Corporation about the exact annual rateable value determined in respect of the office premises. Production of letters from the Developer or Society cannot be treated as sufficient compliance with the requirement of proving municipal rateable value, even if it is momentarily accepted that the said value was of some relevance in the present case. As held above, both the Full Bench of Delhi High Court in ***CIT Versus. Moni Kumar***

Subba as well as the Division Bench of this Court in ***Tip Top Typography*** have held that if the municipal rateable value does not depict the correct annual value of the property, the Assessing Officer is entitled to make his own assessment, which is done in the present case.

38) Considering the overall conspectus of the case, we do not find any valid ground to interfere in the concurrent findings recorded by the Assessing Officer, CIT(A), ITAT. The Assessee entered into a transaction of license by showing the amount of taxes and outgoings as license fees and hefty security deposit of Rs.1.54 crores, with right to utilize the same without payment of any interest for 10 long years. The fact that the Assessee had contemporaneously availed overdraft facility of Rs. 51 lakh shows that it was in need of funds for business purposes. Thus, the security deposit in the present case is the real return for the Assessee and not the amount indicated as license fees. In such circumstances, neither the ridiculously low amount of license fee of Rs.9,825/- per month nor the municipal rateable value of Rs.10,200/- could be taken into consideration as a sum under Section 23(1)(a) of the Act.

39) We find no reason to interfere in the orders passed by the Assessing Officer, CIT(A) and the ITAT, which appear to us as unexceptionable. The question of law is accordingly answered against the Assessee and in favour of the Revenue. Consequently, both the Appeals are **dismissed.**

[SANDEEP V. MARNE, J.] [CHIEF JUSTICE]