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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.110 of 2009

The Commissioner of Income Tax..Appellant

Vs.

M/s.Delite Enterprises ...Respondent

Mr.Vimal Gupta with Mr. P.S. Sahadevan, for the appellant.

Mr.J.P. Mistri with Mr. Raj Darak for the Respondent

CORAM: F.I. REBELLO &
R.S.MOHITE, JJ.
DATED: 26th February, 2009

P.C.:

. Revenue is in appeal on the following questions:-

"Whether on the facts and in the circumstance of the case and in law the Hon'ble Tribunal was right in deleting the disallowance made by the Assessing Officer of interest paid by the Assessee Company on borrowed funds amounting to Rs.241.10 lakhs overlooking the fact that the borrowed funds were used by the Assessee Company to invest in the Capital of another Partnership Firm and since profits derived by the Assessee Company from a Partnership firm were exempt from tax u/s.10(2A) of the Income-tax Act, the interest expense related to such tax free profits is to be disallowed u/s.14A of the Income Tax Act?

(B) Whether on the facts and in the circumstance of the case and in law the Hon'ble Tribunal was right in holding that the Assessing Officer cannot consider notional interest on deposit received by the Assessee Company while arriving at the fair market value u/s.23(1)(a) of the Income-tax Act?"

2. In so far as Question (A) is concerned, on facts we find that there is no profit for the relevant assessment year. Hence the question as framed would not arise.

3. In so far as Question (B) is concerned, the Tribunal followed the judgment of this Court in **J.K. Investors (Bom) Ltd. 248 ITR 723 (Bom.).** Nothing has been brought to our notice that the ratio of this judgment would not be applicable. In the light of that the said question would not arise. Consequently Appeal dismissed.

(R.S.MOHITE, J.) **(F.I.REBELLO,J.)**

ITAT, MUMBAI 'I' BENCH J

DELITE ENTERPRISES (P) LTD. vs. INCOME TAX OFFICER

Sudhakar Reddy, A.M. & V. Durga Rao, J.M.
ITA Nos. 433, 2983-4887 & 5708/Mum/2005;
Asst. yrs. 2001-02 & 2002-03 26th February, 2008

ORDER J. Sudhakar Reddy, A.M. : These are cross-appeals filed for the asst. yrs. 2001-02 and 2002-03. As the issues arising in all these appeals are common, for the same of convenience, they were heard together and are disposed of by this consolidated order. Revenue's appeals

2. First we take up the Revenue's appeals. Both the appeals relate to the claim of the assessee for deduction for interest paid on borrowed funds under s. 36(1)(iii).

3. Facts in brief: The assessee alongwith M/s Radian Tex Fab (P) Ltd. has formed a partnership firm under the name and Style "M/s Shreenath Enterprises". The partnership deed dt. 24th July, 2000 was executed between the parties. Clause 3 of the partnership deed sets out the objects of the partnership firm as that of dealing in commodities and the business of dealing in shares and securities or holding them by way of business investment, or business of providing finance whether by way of making loans or advances or otherwise for any activity or any other business or businesses as may be mutually agreed upon between the parties from time to time. The profits and losses of this partnership were to be shared, equally between the partners. Clauses 7 and 8 of the partnership deed are also relevant and are extracted for ready reference :

"7. Capital—The Capital of the Partnership shall be contributed by the partners from time to time as and when considered necessary or expedient for the purpose of carrying on the partnership business in such proportion as the parties hereto may from time to time agree upon. The present capital of the partnership firm is nil. 8. Interest—The partners may introduce capital and/or give loan to the firm, which shall carry interest at the rate of 12 per cent per annum or such other rates as may be mutually agreed upon between the partners from time to time. Provided however, the interest on capital and/or loans so payable shall not exceed the aggregate amount of profit earned by the firm in a year and in such even the interest amount payable to each partner shall be in the proportion of the gross interest amount calculated."

3.1 During the year the assessee had borrowed certain funds from M/s Reliance Capital Ltd. and had invested the same in the partnership firm M/s Shreenath Enterprises. The interest payable to M/s Reliance Capital Ltd. was claimed as a deduction under s. 36(1)(iii). The AO disallowed the same under s. 14A by holding that the income to be derived from the partnership firm would be exempt under s. 10(2A) of the Act and thus the expenditure relatable to the earning of income is to be disallowed in terms of s. 14A. On appeal, the first appellate authority considered the clauses of the partnership deed and held that the interest income earned by the assessee in terms of cl. 8 of the partnership

deed is taxable in the hands of the assessee under s. 28(v) of the Act. He also referred to the judgment of the Hon'ble Supreme Court in the case of CIT vs. Rajendra Prasad Moody 1978 CTR (SC) 141 : (1978) 115 ITR 519 (SC) and held that once the expenditure is incurred for earning of an income, non-receipt of income cannot be a justifiable ground of disallowing such expenditure. Thus he allowed the claim of the assessee. At this juncture it should be observed that for the asst. yr. 2001-02 the assessee had not received any interest from the firm M/s Sreenath Enterprises. For the asst. yr. 2002-03 the assessee received an interest of Rs. 99,01,000 from M/s Shreenath Enterprises. The assessee submitted that in the asst. yr. 2001-02, the partnership firm had incurred losses and thus as per the terms of agreement no interest was earned by the assessee. The CIT(A) also held that the interest income in question was assessable under the head "Income from business or profession" and not under the head "Income from other sources" as determined by the AO. The Revenue is also aggrieved by this finding. Thus these appeals for both the assessment years have been filed by the Revenue.

4. We have heard Shri Pritam Singh and Shri Bharat Bhushan, learned Departmental Representatives and Shri J.D. Mistry the learned counsel for the assessee. The main contention of Shri Pritam Singh is that the assessee has made an investment in the partnership, by borrowing monies from M/s Reliance Capital Ltd. He took this Bench through the paper book, specifically to the statement of accounts of the assessee and as well as that of M/s Shreenath Enterprises to demonstrate that the amount in question was in fact an investment made by the assessee company. He took this Bench to s. 14A and submitted that the CIT(A) has not correctly appreciated this section. His case is that the return of investment made in the partnership firm is exempt under s. 10(2A) of the Act and thus does not form part of total income and hence he submits that any expenditure incurred in relation to earning of non-taxable income is not allowable in terms of s. 14A. His case is that the CIT(A) has wrongly interpreted cl. 8 of the partnership deed. For the asst. yr. 2001-02 he submits that the assessee has not earned any income whatsoever during the year from the partnership concern and thus no expenditure is allowable. On the reliance being placed by the CIT(A) on the judgment of the Hon'ble Supreme Court in the case of Rajendra Prasad Moody (supra), the learned Departmental Representative submits that in that case the Hon'ble apex Court was considering the allowability of expenditure under s. 57(iii) and not under s. 36(1)(iii). Coming to the appeal for the asst. yr. 2002-03 the learned Departmental Representative submits that only an amount of Rs. 99,01,000 was received by the assessee and the CIT(A) has determined that the same is assessable as income from business. Thus he submits that the allowability of interest should be restricted to this amount.

5. On the other hand, Shri J.D. Mistry submits that the fact whether the assessee has earned certain income during the year or a in a particular year is immaterial and cannot be a ground for disallowing expenditure incurred He relied on the order of the first appellate authority and submitted that the learned CIT(A) has rightly relied on the judgment of the Hon'ble Supreme Court in the case of Rajendra Prasad Moody (supra). He submitted that the ratio laid down for applicability of s. 57(iii) is also applicable for expenditure deductible under s. 36(1)(iii) or under s. 37(1) and that the Courts have repeatedly reiterated the same. He relied on the recent judgment of the Madras High Court in the

case of CIT vs. M. Ethurajan (2004) 192 CTR (Mad) 378 : (2005) 142 Taxman 708 (Mad). He took this Bench through the arguments made by the assessee before the first appellate authority wherein a number of judgments have been relied upon and submitted that the first appellate authority was right in holding that the assessee is entitled to claim for deduction under s. 36(1)(iii) as the income in question was taxable under s. 28(v) of the Act. He also took this Bench to the relevant clauses of the IT Act.

6. While arguing for the asst. yr. 2002-03 he submits that the assessee in this year has received interest and this was assessed as "income from other sources" by the AO and that the CIT(A) has rightly assessed it under the head "Income from business or profession" The proof, as per Mr. Mistry, that the income earned in terms of cl. 8 of the partnership deed is taxable under s. 28(v) of the Act lies in the assessment order for the asst. yr. 2002-03. On the question of proportionate disallowance canvassed by the learned Departmental Representative, Shri Mistry submits that no such disallowance can be made unless certain expenditure can be relatable to exempt income. He pointed out that during the year there is no exempt income earned by the assessee. The entire expenditure in question was relatable to the earning of Rs. 99,01,000 and thus the same should be allowed.

7. After hearing rival contentions and considering the papers on record the orders of the authorities below we are of the considered opinion that the order of the first appellate authority calls for no interference for the following reasons :

7.1 The assessee in this case, in pursuance of the objects of carrying on of business of dealing in commodities and business of dealing in shares and securities, etc. has investment in the partnership firm. Clause 8 of the partnership firm clearly states that the assessee shall be entitled to interest at the rate of 12 per cent on the capital introduced. The earning of interest is capped at the maximum amount of profit earned. In other words, the interest on capital/loans, should not exceed the aggregate amount of profit earned by the firm in the year. Sec. 28(v) of the Act merely states that the interest earned on a partnership firm is taxable. For the asst. yr. 2001-02 the assessee had in fact earned interest of Rs. 99,01,000 and the AO has brought it to tax. The first appellate authority has rightly held that this receipt is taxable under the head "Profits and gains of business or profession" under s. 28(v) of the Act. There is no exemption claimed under s. 10(2A) of the Act by the assessee. Sec. 10(14) clearly states that expenditure incurred by the assessee in relation to income which does not form part of total income under the Act will not be allowed. In this case, for both the assessment years, there is no income earned by the assessee which does not form part of the total income under the Act. Under these circumstances we do not see any reason why the claim of the assessee is not allowable under s. 36(1)(iii). Coming to the argument of the learned Departmental Representative that the judgment of the Hon'ble apex Court in the case of Rajendra Prasad Moody (supra) is not applicable to this case, we find that the Hon'ble Madras High Court in the case of M. Ethurajan (supra) has held that the propositions laid down in Rajendra Prasad Moody's case (supra) for allowability under s. 57(iii), are equally applicable for deductions claimed under s. 36(1)(iii) or s. 37. Thus this argument of the Revenue is without any merit.

7.2 In view of the above discussion we are of the considered opinion that the first appellate authority at para 4.3 p. 15 of the order for the asst. yr. 2001-02 has rightly come to a conclusion that the claim of the assessee for the deduction under s. 36(1)(iii) has to be allowed.

8. Coming to the ground of the Revenue for the asst. yr. 2002-03 in view of the above we hold that the first appellate authority was right in holding that the income in question is taxable under the head "Income from business or profession" and not under the head "Income from other sources". In fact it is taxed under s. 28(iv) of the Act.

9. In the result, we uphold the order of the first appellate authority on these issues for both the assessment years and dismiss the appeals of the Revenue.

10. This brings us to the appeals filed by the assessee. The sole issue in these cross-appeals is as to whether the first appellate authority has erred in confirming the action of the AO in taking the annual value of the let out property at Rs. 14,40,000 as against actual rent received by the assessee at Rs. 60,000.

11. Facts in brief: The assessee owns a property at plot No. 25, D-16, Vasant Vihar, New Delhi. The assessee had let out the said property to M/s Reliance Industries Ltd. vide agreement dt. 8th Oct., 1998 for an annual rent of Rs. 60,000 and a security deposit of Rs. 3,70,60,000. The assessee had computed the annual letting value of the said property under s. 23(1)(b) of the Act by taking the rent received at Rs. 60,000 and offered the same to tax in its returns of income. During the course of assessment proceedings the assessee submitted that the municipal rateable value (MRV) as per Delhi Municipal Authority is Rs. 22,230 only. Thus he submits that this MRV being less than the rent received, the higher of the two has to be taken into consideration while computing the annual letting value under s. 23(1)(b) of the Act. The AO disagreed with the assessee and computed the annual letting value by considering the annual rent at Rs. 14,40,000, i.e. municipal rent of Rs. 1,20,000. On appeal, the first appellate authority upheld the order of the AO. Further aggrieved, the assessee is before us.

12. Mr. Mistry, the learned counsel for the assessee submitted that the AO was wrong in determining the value by invoking provisions of s. 23(1)(b) of the Act. His case is that the jurisdictional High Court in the case of CIT vs. J.K. Investors (Bombay) Ltd. (2001) 168 CTR (Bom) 189 : (2001) 248 ITR 723 (Bom) has clearly held that notional interest on deposit cannot be considered while determining the annual letting value. He further submits that the first appellate authority was confused and while holding that the provisions of s. 23(1)(b) of the Act cannot be invoked in this case, has wrongly upheld the decision. He further took this Bench to the order of the AO and submitted that there is no basis for the AO to come to a conclusion that the annual letting value of the property is as determined by him. He pointed out that the AO in this case has simply stated that local enquiries were conducted by him and the value has been determined. He vehemently contended that nothing is stated as to what were the local enquiries made, what was the material gathered, and what was the report of ‘Times’ he is referring to, etc.

and submitted that such a finding cannot be upheld. A simple observation of the AO that on enquiry it has been gathered that the prevailing market rate of a similar house would have a rental value in the range of Rs. 50,000 per month on the strength of Times Property–Reality Views', is no basis for making the estimate, specifically when none of the material is put to the assessee. He further submitted that the first appellate authority was wrong in observing that Rent Control Act is not applicable to this property. He submitted that the property is located in Delhi and that the rent is being paid for more than 10 years and that it is wrong to invoke s. 23(1)(b). Even in the case of s. 23(1)(a) he submitted that the AO, has to determine the standard rent and the fair market value in any case cannot exceed the standard rent. He drew the attention of the Bench to the findings of the first appellate authority that the standard rent in this case is Rs. 22,230 which is based on MRV. Thus on the facts and circumstances he submits that the addition in question should be deleted.

13. The learned Departmental Representative, on the other hand, vehemently contends that there is an interest-free security deposit of Rs. 3,70,60,000 in this case and the interest has to be considered while arriving at the fair market value of the property. He specifically submitted that s. 23(1)(b) is not applicable to the facts of the case and only s. 23(1)(a) has to be considered. He placed reliance on the judgment on the order of 'I' Bench of the Tribunal in the case of ITO vs. Makrupa Chemicals (P) Ltd. (2007) 110 TTJ (Mumbai) 489 : (2007) 108 ITD 95 (Mumbai) and submitted that in this case the judgments of the Hon'ble Supreme Court in the cases of Shiela Kaushish vs. CIT (1981) 24 CTR (SC) 351 : (1981) 131 ITR 435 (SC), Dewan Daulat Rai Kapoor vs. New Delhi Municipal Committee (1980) 122 ITR 700 (SC) and the judgment in the case of Dr. Balbir Singh vs. Municipal Corporation of Delhi (1985) 46 CTR (SC) 208 : (1985) 152 ITR 388 (SC) have been considered and it was held that the fair rental value should be decided by taking into account various factors and what rent the property would fetch on a bargain between a willing lessor and lessee uninfluenced by any extraneous circumstances may afford guiding test of reasonableness. The supported the order of the first appellate authority as well as the AO and submitted that the AO has relied on report in Times Property-Really News and on the basis of the statistics given therein has arrived at their fair market value. Thus he submits that the order of the first appellate authority on this issue has to be upheld.

14. Joining the issue, Shri Mistry took this Bench to the judgment of the Hon'ble Supreme Court in the case of Dewan Daulat Rai Kapoor (supra) and read out the operative part of the judgment to drive home his point that the standard rent is the upper limit and that the fair rent cannot exist the standard rent. He also submitted that the Revenue authorities as well as the learned Departmental Representative were under the wrong impression that the property in question is situated in Maharashtra. He pointed out that the property in question is situated in Delhi and the Rent Control Act is very much applicable and thus the judgment of the Hon'ble apex Court in the case of Shiela Kaushish (supra), Dewan Daulat Rai Kapoor's case (supra) and Dr. Balbir Singh's case (supra) are applicable with all force to the facts of the case and that on applicability of s. 23(1)(b), the judgment of the Hon'ble Calcutta High Court in the case of CIT vs. Satya

Co. Ltd. (1997) 140 CTR (Cal) 569 : (1994) 75 Taxman 193 (Cal) are applicable to the facts of the case.

15. We have heard the rival contentions. On a careful consideration of the facts of the case we hold as follows :

15.1 The AO cannot consider notional interest on deposit while arriving at the fair market value under s. 23(1)(b) of the Act. The judgment of the jurisdictional High Court in the case of J.K. Investors (Bombay) Ltd. (supra) has been approved by the Supreme Court. Thus this issue has to be decided in favour of the assessee. 15.2 Coming to determination of annual letting value under s. 23(1)(a) the learned Departmental representative relied heavily on the judgment of this Bench of the Tribunal in the case of Makrupa Chemicals (P) Ltd. (supra). In this order, the Tribunal has at para 15 drew the following conclusions:

"10. Rival submissions of the parties have been considered carefully in the light of the material placed before us and the case law referred to. In our opinion, neither the AO nor the learned CIT (A) adjudicated the matter in the right prospective. The AO distinguished the judgment of the Hon'ble Bombay High Court in the case of J.K. Investors (Bombay) Ltd. (supra) by observing that the Hon'ble Court had not expressed any opinion as to whether the notional interest could be considered as part of ALV under s. 23(1)(a) of the Act. Having held so, he did not proceed to determine the ALV under s. 23(1)(a). On the contrary, he proceeded to determine the ALV under s. 23(1)(b) by taking into consideration the actual rent received and the notional interest on interestfree deposit by observing at p. 2 of his order 'the interest on deposit received by the assessee also partakes the character of the rent tough not expressly called rent'. Such approach is not supported by any case law. On the contrary, the Hon'ble Calcutta High Court judgment in the case of Satya & Co. (supra) clearly holds that notional interest cannot be added to the amount received. This judgment has been usefully referred and impliedly approved by the Hon'ble Bombay High Court in the case of J.K. Investors (Bombay) Ltd. (supra). Therefore, the decision of the AO in determining the ALV after taking into consideration the notional interest was contrary to the binding judgment of the High Court. He also failed to consider the effect of various judgments of the Hon'ble Supreme Court to the effect that all under s. 23(1)(a) cannot exceed the standard rent where the property is governed by the Rent Control legislation applicable to such property. [Shiela Kaushish (supra) and Dewan Daulat Rai Kapoor vs. New Delhi Municipal Committee (1980) 122 ITR 700 (SC)]. On the other hand, the learned CIT(A) allowed the appeal of the assessee merely by following the High Court decisions in the case of J.K. Investors (Bombay) Ltd. (supra) and Satya & Co. (supra) which are relevant when ALV is to be determined under s. 23(1)(b) of the Act. The ALV under s. 23(1)(b) cannot be computed unless the ALV under s. 23(1)(a) has been computed by tax authorities, as is clear from the said provisions. If the actual rent is more than the ALV determined under s. 23(1)(a), then only the actual rent has to be considered as the ALV of that property. That means ALV under s. 23(1)(a) or the actual rent received whichever is higher is to be considered for the purpose of taxation under the head 'Income from house property'. Accordingly, the learned CIT (A), having held that notional interest could not be taken into consideration, should have either proceeded himself to determine the ALV under s. 23(1)(a) or should

have directed the AO to determine the same. No such direction has been issued by the learned CIT(A).

11. Let us now examine and analyse the legal position as laid down by the Hon'ble High Courts as well as the Tribunal. It would be appropriate at this stage to reproduce the relevant provisions s. 23(1), as originally enacted, read as under:

Section 23(1).—For the purposes of s. 22, the annual value of any property shall be deemed to be the sum for which the property might reasonably be expected to let from year to year.' The aforesaid provisions were amended by the Parliament effective from 1st April, 1976. The relevant portion of the amended provisions reads as under : 'Annual value how determined.—(1) For the purpose of s. 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 cl. (a), the amount so received or receivable.'

12. The expression 'the gross annual rent at which such house or building... May reasonably be expected to let from year to year' as contained in s. 127(a) of the Calcutta Municipal Act, 1923 which is analogous to the expression in s. 23 of the Act was considered by the Hon'ble Supreme Court in the case of Corporation of Calcutta vs. Smt. Padma Devi AIR 1962 SC 151. Their Lordships at p. 153 observed as under :

'A bargain between a willing lessor and 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.' On the same page, it was further observed as under:

'A combined reading of the said provisions leaves no room for doubt that a contract for a rent at a rate higher than the standard rent is not only not enforceable but also that the landlord would be committing an offence if he collected a rent above the rate of the standard rent. One may legitimately say under those circumstances that a landlord cannot reasonably be expected to let a building for a rent higher than the standard rent. A law of the land with its penal consequences cannot be ignored in ascertaining the reasonable expectations of a landlord in the matter of rent. In this view, the law of the land must necessarily be taken as one of the circumstances obtaining in the open market placing an upper limit on the rate of rent for which a building can reasonably be expected to let.' From the above observations, it is clear that the Municipal Committee could not determine the annual value over and above the standard rent. Similar view was taken in the subsequent judgment in the case of Corporation of Calcutta vs. Life Insurance Corporation AIR 1970 SC 1417. However, this principle was further extended by the Hon'ble Supreme Court in the case of Guntoor Municipal Council vs. Guntoor Town Rate Payers Association AIR 1971 SC 353, by holding that where the standard rent is not fixed by the rent controller, then, the assessing authority under the Municipal enactment should determine the standard rent in accordance with the rent control legislation. This is apparent from the following observations of their Lordships at p. 355:

‘It is perfectly clear that the landlord cannot lawfully expect to get more rent than the fair rent which is payable in accordance with the principles laid down in the Act. The assessment of valuation must take into account the measure of fair rent as determinable under the Act. It may be that where the controller has not fixed the fair rent the municipal authorities will have to arrive at their own figure of fair rent but that can be done without any difficulty by keeping in view the principles laid down in s. 4 of the Act for determination of fair rent.’

13. The above decisions were considered and followed by the apex Court in the case of Dewan Daulat Rai Kapoor vs. New Delhi Municipal Committee (1980) 122 ITR 700 (SC). The discussion on this subject would not be complete without referring to the judgment of the apex Court in the case of Dr. Balbir Singh vs. Municipal Corporation of Delhi (1985) 46 CTR (SC) 208 : (1985) 152 ITR 388 (SC) wherein it was held that in a given case the ratable value determined by the municipal authority may be less than the standard rent having regard to various attendant circumstances and consideration. In such cases the Court opined that it is the ratable value so determined which shall be taken for tax purposes and not the standard rent. It was held that the standard rent was the upper limit which can’t be exceeded in any case.

14. All the decisions mentioned above were rendered in connection with the determination of ratable value under municipal laws. The ratio laid down in the above decisions has been applied by the apex Court for determining the annual letting value under s. 23 of the Act in the case of Shiela Kaushish vs. CIT (1981) 24 CTR (SC) 351 : (1981) 131 ITR 435 (SC) on account of similarity in the provisions under the municipal enactments and s. 23 of IT Act, 1961. Thus the ratable value, if correctly determined, under the municipal laws can be taken as ALV under s. 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 ratable value is not binding on the AO. If the AO can show that ratable value under municipal laws does not represent the correct fair rent, then he may determine the same on "the basis of material/ evidence placed on record. This view is fortified by the decision of Patna High Court in the case of Kashi Prasad Kataruka vs. CIT 1976 CTR (Pat) 95 : (1975) 101 ITR 810 (Pat).

15. The above discussion leads to the conclusions that—(i) ALV would be the sum at which the property may be reasonably let out by a willing lessor to a willing lessee uninfluenced by any extraneous circumstances (ii) an inflated, or deflated rent based on extraneous consideration may take it out of the bounds of reasonableness (iii) actual rent received, in normal circumstances, would be a reliable evidence unless the rent is inflated/deflated by reason of extraneous consideration (iv) such ALV, however, can’t 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 AO 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 he standard rent. (Emphasis supplied)

16. Still the question remain to be decided is how to determine the reasonable/ fair rent. The apex Court has indicated in the above judgments that extraneous circumstances may inflate/deflate the fair rent. So the question arises as to what may the circumstances which may be taken in to consideration while determining the fair rent. In our opinion, no particular test can be laid down since it would depend on the facts of each case. (emphasis supplied). However, we find that Hon'ble Supreme Court had to consider this question in the case of Motichand Hirachand vs. Bombay Municipal Corporation AIR 1968 SC 441 wherein it was observed as under : '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.' Even the Hon'ble Bombay High Court in the case of J.K. Investor (supra) has held that under s. 23 (1) of the Act, the AO can take in to consideration various factors like contractor's method as is apparent from the following observations : 'At the cost of repetition, it may be mentioned that under s. 23(1)(a), the AO has to decide the fair rent of the property. While deciding the fair rent, various factors could be taken into account. In such cases, various method like contractors' method could be taken into account.'

17. The circumstances mentioned above are only illustrative and not exhaustive. Therefore, in our opinion, the AO can take into consideration any circumstance which may inflate/deflate the fair rent under s. 23(1)(a) of the Act. If such rent is less than the standard rent, then the same shall be taken as fair rent otherwise the standard rent shall be considered as fair and under s. 23(1)(a) of the Act. Once the fair rent is so determined, then the applicability of s. 23(1)(b) would have to be considered. If the actual rent received/receivable is higher than the fair rent, then the actual rent would be treated as ALV, otherwise the fair rent so determined shall be taken as ALV." (Emphasis ours)

16. A reading of the above shows that the standard rent is the upper limit. The property is situated in Delhi and is undisputably covered under the Rent Control Act. Hence the standard rent had to be arrived at fair market value should be based on the facts and circumstances of the case.

17. Coming to the facts of the case the AO has relied on some undisclosed material and enquiries to arrive at the rental value of Rs. 1,50,000. It is not known what are the facts that are culled out from Time Property-Realty News. No material has been gathered by the AO and brought on record for supporting his conclusion let alone putting the same to the assessee. Even if the AO had certain material the same has not been put to the assessee and this is violation of principles of natural justice has held by the Bench in the case of Makrupa Chemicals (P) Ltd. (supra) at para 19. On that ground, the issue had been remanded back to the AO, in that case. In the case before us we do not feel the necessity to do so. The CIT(A) at para 3 on p. 2 of his order, has recorded that the Municipal Rateable Value as per the Delhi Municipal Authority at Rs. 22,230. This is less than the actual rent received at Rs. 60,000. The AO has not made any attempt

whatsoever to decide the standard rent and under these circumstances, the municipal rateable value assumes significance. As the actual rent received is more than the municipal rateable value and in view of the decision of the Hon'ble Supreme Court in the case of Shiela Kaushish (supra), we hold that the actual rent received should be taken as municipal rateable value. We also find that the facts and circumstances of this case, warrants taking into consideration the huge deposit while determining the fair market value. Wherever deposits are high, the rent is bound to be low. In any event as Rent Control Act applies to this property only standard rent can be taken as the annual letting value. In the absence of standard rent, municipal rateable value is to be taken. As municipal rateable value is less than the actual rent, the actual rent shall be the fair market value. In the result, we uphold the contentions of Shri Mistry and allow both the appeals filed by the assessee.

18. In the result, the appeals filed by the assessee are allowed and the appeals filed by the Revenue are dismissed.