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

BEFORE SHRI N.V.VASUDEVAN(J.M) & SHRI PRAMOD KUMAR(A.M)

ITA NO.1411/MUM/07(A.Y.2004-05)

The DCIT 10(1), Room No.455, Aaykar Bhavan, MK Road, Mumbai – 20. (Appellant)	Vs.	Reclamation Realty India Pvt. Ltd., ICICI Bank Tower, Bandra Kurla Complex, Bandra (E), Mumbai – 51. PAN: AACI 5643Q (Respondent)

ITA NO.1412/MUM/07 (A.Y. 2004-05)

The DCIT 10(1), Room No.455, Aaykar Bhavan, MK Road, Mumbai – 20. (Appellant)	Vs.	Reclamation Properties India Pvt. Ltd., ICICI Bank Tower, Bandra Kurla Complex, Bandra (E), Mumbai – 51. PAN: AAACI 5644K (Respondent)

ITA NO.1413/MUM/07(A.Y. 2004-05)

The DCIT 10(1), Room No.455, Aaykar Bhavan, MK Road, Mumbai – 20. (Appellant)	Vs.	Reclamation Real Estate Co. India Pvt. Ltd., ICICI Bank Tower, Bandra Kurla Complex, Bandra (E), Mumbai – 51. PAN: AAACI 4974N (Respondent)

ITA NO.1733/MUM/2007(A.Y. 2004-05)

Reclamation Properties India Pvt. Ltd., ICICI Bank Tower, Bandra Kurla Complex, Bandra (E), Mumbai – 51. PAN: AAACI 5644K (Appellant)	Vs.	The ACIT 10(1), Aaykar Bhavan, 4th Floor, Mumbai 20 (Respondent)

ITA NO.1734/MUM/2007(A.Y.2004-05)

Reclamation Realty India Pvt. Ltd., ICICI Bank Tower, Bandra Kurla Complex, Bandra (E), Mumbai – 51. PAN: AACI 5643Q (Appellant)	Vs.	The ACIT 10(1), Aaykar Bhavan, 4th Floor, Mumbai 20 (Respondent)

Assessee by : Smt. Aarati Vissanji
Revenue by by : Shri Jitendra Yadav

ORDER

PER BENCH

ITA 1413/Mum/07: This is an appeal by the revenue against the order dated 5.12.2006 of CIT(A)-X, Mumbai, relating to A.Y.04-05.

2. The grounds of appeal of the Revenue reads as follows:

> "1. On the facts and in the circumstances of the case as well as in law, the learned CIT(A) has erred in directing the Assessing Officer to exclude the notional interest on advance rent received and security deposit while computing the annual value of the let out property by ignoring the fact that the Assessing Officer has correctly determined the annual value of the property u/s. 23(1)(a) of the Income Tax Act, 1961 by adding notional interest on advance rent received and interest on security deposit, that being essential component for arriving at such annual value.
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> 2. On the facts and in the circumstances of the case as well as in law, the Learned CIT(A) has erred in directing the Assessing Officer not to calculate notional interest on advance rent received and security deposit while determining the annual value of the let out property by ignoring the fact that the decision given by the ld. CIT(A) has not been accepted in assessee's own case for the earlier year and further appeal to Hon'ble ITAT has been filed.
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> 3. On the facts and in the circumstances of the case as well as in law, the Learned CIT(A) has erred in directing the Assessing Officer not to calculate notional interest on advance rent received and security deposit while determining annual value of the let out property by ignoring the fact that the appeal filed on the same issue in the assessee's own case for earlier year is still pending before the Hon'ble ITAT. Thus the issue has not yet reached to its finality."

3. The Assessee is a company. It is engaged in the business of undertaking in one or more activities involving purchase, sale, letting out, investment and dealing in land, preparation of building sites for construction etc.

4. The Assessee owned the entire 9th floor of the premises, Maftalal Centre Nariman Point, admeasuring about 15645 Sq.ft. together with 6 car parking space (hereinafter referred to as "the property"). It had let out the property to J.P.Morgan Chase Bank on an annual rent of Rs.2,87,87,660/-. It is not in dispute that income from letting out of the property has to be assessed under the head "Income from House Property". Originally the lease commenced from 17.12.1998 for a period of 152 weeks upto November, 2001. It was thereafter renewed in April, 2002 for a further period of 156 weeks from Nov. 2001. The lease was to expire in November, 2004. When the lease was renewed in April, 2002, the entire rent for the period of lease i.e., for 156 weeks, was paid by the tenant. This was a sum of Rs.8,58,91,050. Apart from the above, the tenant also paid a refundable interest free security deposit of Rs.2,60,00,000/-.

5. The rate of rent at Rs.2,87,87,660 (being the rent for the previous year comprising of 12 months from 1st April, 2003 to 31st March, 2004) in terms of rate per sq.ft. worked out to Rs.152.50 Ps. Per month.

6. Under Sec.22 of the Income Tax Act, 1961 ('Act'), the charge to tax under the head 'income from house property' is on the annual value of the property. Sec.22 reads as follows:

> **"Income from house property.**
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> **22.** 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"."

7. Section 23 of the Act lays down as to how the annual value has to be determined. The relevant portion of section 23 is as follows :-

> **23.** (1) For the purposes of section 22, the annual value of any property shall be deemed to be—
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> (*a*) the sum for which the property might reasonably be expected to let from year to year; or
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> (*b*) where the property or any part of the property is let and the actual 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; or
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> (*c*) where the property or any part of the property is let and was vacant during the whole or any part of the previous year and owing to such vacancy the actual rent received or receivable by the owner in respect thereof is less than the sum referred to in clause (*a*), the amount so received or receivable :
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> **Provided** that the taxes levied by any local authority in respect of the property shall be deducted (irrespective of the previous year in which the liability to pay such taxes was incurred by the owner according to the method of accounting regularly employed by him) in determining the annual value of the property of that previous year in which such taxes are actually paid by him.

Explanation.—For the purposes of clause (*b*) or clause (*c*) of this sub-section, the amount of actual rent received or receivable by the owner shall not include, subject to such rules as may be made in this behalf, the amount of rent which the owner cannot realise.

(2) Where the property consists of a house or part of a house which—

(*a*) is in the occupation of the owner for the purposes of his own residence; or

(*b*) cannot actually be occupied by the owner by reason of the fact that owing to his employment, business or profession carried on at any other place, he has to reside at that other place in a building not belonging to him, the annual value of such house or part of the house shall be taken to be *nil*.

(3) The provisions of sub-section (2) shall not apply if—

(*a*) the house or part of the house is actually let during the whole or any part of the previous year; or

(*b*) any other benefit therefrom is derived by the owner.

(4) Where the property referred to in sub-section (2) consists of more than one house—

(*a*) the provisions of that sub-section shall apply only in respect of one of such houses, which the assessee may, at his option, specify in this behalf;

(*b*) the annual value of the house or houses, other than the house in respect of which the assessee has exercised an option under clause (*a*), shall be determined under sub-section (1) as if such house or

8. For the present appeal, what is relevant are the provisions of Sec.23(1)(a) and 23(1)(b) of the Act. The greater of the sums referred to Sec.23(1)(a) and 23(1)(b) has to be adopted as the annual value.

9. According to the Assessee, the rent received was Rs.2,87,87,660/-. The annual value (also referred to as municipal valuation) adopted by the municipal authorities in respect of the property was Rs.27,50,835. According to the Assessee, the annual value (also referred to as municipal valuation or rateable value) adopted by the municipal authorities in respect of the property, reflects the sum for which the property might reasonably be expected to let from year to year. Since the rent received was more than the sum for which the property might reasonably be expected to let from year to year, the Assessee adopted the actual rent received as the annual value of the property.

10. The AO however did not accept the annual value as shown by the Assessee. According to the AO, the Municipal valuation as adopted by the Municipal authorities did not reflect the true sum for which the property might reasonably be expected to let from year to year. The AO was of the view that the property was located in a posh commercial area and the rent of Rs.152.50 Sq.ft. was too low. He was of the view that such reduced rate of rent was due to the fact that the entire rent for the period of lease was paid in advance and the tenant had also given an interest free security deposit. He therefore resorted to an estimate of the annual value by allocating notional interest on rent received in advance and interest free security

deposit and arrived at an annual value of Rs.3,42,23,856/-. The AO called upon the Assessee to show cause as to why the annual value should not be adopted at Rs.3,42,23,856/-. In reply the Assessee submitted that notional interest cannot be added to the interest free security deposit to arrive at the annual value and in this regard referred to the decision of the Hon'ble Calcutta High Court in the case of CIT Vs. Satya & Co. Ltd. 75 Taxman 193(Cal) and the decision of the ITAT Mumbai in the case of Gagan Trading Co. Ltd. Vs. ACIT 93 ITD 426 (mum). Without prejudice to the above, it was also submitted that it had earned an interest income of Rs.30,69,314 as interest income on the security deposit and advance rent received from the tenant and the same has been offered to tax as income from other sources and in the event of the annual value is increased as proposed by the AO, then the interest income should not be taxed.

11. The AO however held that he was not adding notional interest on security deposit and rent received in advance to the actual rent received for determining the annual value u/s.23(1)(b) of the Act, but was treating the same as the sum for which the property might be expected to let from year to year u/s.23(1)(a) of the Act. The Hon'ble Bombay High Court in the case of CIT Vs. J.K. Investors (Bombay) Ltd. 248 ITR 723 (Bom) has taken the view that while computing annual value u/s.23(1)(b) notional interest on interest free security deposit should not be added to actual rent received. The AO referred to the above decision and was of the view that the Hon'ble Bombay High Court in the said decision has observed that the question whether notional interest should be added while determining annual value u/s.23(1)(a) was left open. According to the AO, he was adopting the annual value of the property u/s.23(1)(a) of the Act and therefore the decision of the Hon'ble Bombay High Court in the case of J.K.Investors (supra), would not apply. The AO also held that the plea of the Assessee that interest earned on investment of interest free security deposit and rent received in advance of Rs.30,69,314/- should be excluded, cannot be accepted because the said interest income was an independent income and there was no provision for set off as claimed by the Assessee. For the above reasons, the AO, adopted the annual value of the property at Rs.3,42,23,856 for the purpose of arriving at the income that has to be charged under the head "Income from House Property".

12. Before CIT(A), the Assessee submitted that the Annual Value of property which is the subject of charge was originally defined in Sec.23(1) corresponding to Sec.23(1)(a) as "the sum for which the property might reasonably be expected to let from year to year". This expression is aking to the language used in Sec.154 of the Bombay Municipal Corporation Act (BMC Act) and corresponding legislation in various states and is the basis for determination of rateable value of the property for the purpose of levy of municipal taxes. Attention was drawn to the provisions of Sec.154 of the BMC in this regard. It was submitted that under the BMC Act and Sec.23(1)(a) of the Act, the basis is the hypothetical rent which a owner can reasonably expect to receive. It was also submitted that fair rent fixed under the rent control laws would be reasonably expected rent provided it is less than the one fixed for the purpose of rateable valuation under the municipal law for levy of property tax. The Assessee further relied on the decisions of the Hon'ble Calcutta High Court in the caseof CIT Vs. Smt.Prabhavati Bansali 141 ITR 419(Cal) & CIT Vs.Satya & Co. 75 Taxman 193 (Cal), the Hon'ble Bombay High Court in the case of M.V.Sonalawala Vs. CIT 177 ITR 246 (Bom), the Hon'ble Madras High Court in the case of CIT Vs. M.R.Alagappan 164 ITR 690 (Mad),

the Hon'ble Supreme Court in the case of Dewan Daulat Rai Vs. NDMC 122 ITR 700 (SC) and Sheila Kaushish Vs. CIT 131 ITR 435 (SC). The Assessee reiterated its submission that the rent received was Rs.2,87,87,660/- and the annual value/Municipal Value adopted by the municipal authorities in respect of the property was Rs.27,50,835. The rent received by the Assessee being greater of the two should be adopted as the basis for arriving at the annual value in accordance with Sec.23(1)(b) of the Act. The provisions of Sec.23(1)(a) were therefore not applicable to the case of the Assessee. The Assessee further submitted that notion interest on interest free security deposit cannot be added to the actual rent received as laid down by the Hon'ble Bombay High Court in the case of J.K.Investors (Bombay) Ltd. (Supra).

13. The CIT(A) held as follows:

> "I have carefully considered the finding of the AO and submissions of the appellant. After considering the entire facts, I am of the view that AO was not justified in considering notional interest on advance rent as well as deposits for calculating ALV of the premises in question. The contention of appellant is supported by the decision of Mumbai High Court in the case of CIT vs. J.K. Investors Ltd., 248 ITR 723. In this case, the jurisdictional High Court has held that notional interest on interest free deposits received from lessee would not form part of actual rent u/s. 23(1)(b) of I.T. Act, 1961. The Hon'ble High Court has also observed that where the actual rent received by the assessee was more than the fair rent even without taking into account notional interest, generally fair rent is fixed even under the Bombay Municipal Corporation Act and the Rent Act by taking into account various principles of valuation viz. Contractor's method, the rent method. Under the Income-Tax Act, section 23(1)(b) provides that where the actual rent is more than the fair rent, the actual rent would be the annual value of the property. Therefore, the notional interest would not form part of actual rent received or receivable u/s. 23(1)(b). While deciding this issue, the Hon'ble Bombay High Court has also referred the decision of Calcutta High Court in the case of CIT vs. Satya Co. Ltd. 75 Taxman 193(Cal). In the aforesaid decision, the Hon'ble Calcutta High Court has held that notional interest on interest free deposit by the tenant cannot be added to the annual value u/s. 23(1). The same analogy will apply to advance rent received by the appellant and no notional interest can be added to annual value on advance rent also. In addition to the aforesaid decisions, the appellant has also relied on several case laws including the decision of Bombay ITAT in the case of DCIT Vs. Shripal S. Morakhia. In the present case, the actual rent received by the appellant is Rs.2,87,87,660/- as against the municipal valuation of the premises at Rs.27,50,835/- which is lower than the actual rent received. Therefore, in view of aforesaid decisions, notional interest cannot be calculated on advance rent and interest free deposit and the same cannot be added to the ALV of the property in question. Therefore, this ground of appeal is decided in favour of the appellant."

14. Aggrieved by the order of CIT(A), the revenue is in appeal before the Tribunal.

15. The learned D.R. submitted that the CIT(A) was not correct in following the decision of the Hon'ble Bombay High Court in the case of J.K.Investors (Bombay) Ltd. (supra) because that decision related to determination of annual value u/s.23(1)(b) of the Act. He drew our attention to the penultimate paragraph of the said decision and submitted that the Hon'ble Court has observed therein as follows:

> " We once again repeat that whether such notional interest could form part of the fair rent under S.23(1)(a), is expressly left open."

He further drew our attention to a third member decision of the ITAT Mumbai in the case of ITO Vs. Baker Technical Services (P) Ltd. 126 TTJ (Mumbai)(T M) 455 wherein it was held that annual value determined by the Municipal authorities is not binding on the AO while determining the annual value under Sec.23(1)(a), if it can be shown that the rateable value under the municipal laws does not represent the correct fair rent. It was submitted by him that the Rent Control laws are not applicable in the case of the Assessee because the tenant was a Bank with a share capital exceeding a particular limit. In such circumstances according to him the yardstick of standard rent under the rent control laws cannot also be adopted. It was therefore contended by him that the annual value has to be determined in the case of the Assessee by taking into consideration various factors and the method done by the AO by adjusting the actual rent received by adding thereto notional interest on interest free security deposit/advance rent received was a reasonable basis and that represents "the sum for which the property might be expected to let from year to year". The ITAT Mumbai Bench in the case of Baker Technical Services (P) Ltd. (supra) have in turn relied on a decision of the ITAT Mumbai bench in the case of ITO Vs. Makrupa Chemicals (P) Ltd. 108 ITD 95 (Mumbai). He further relied on the decision of the ITAT Delhi Bench in the case of Fizz Drinks Ltd. Vs. DCIT 95 TTJ (Del) 249, wherein it was held annual value can be determined by taking notional interest on security deposit. It was further held in this decision that the fact that the interest received by the Assessee on investment of the interest free security deposit was offered to tax would not be relevant. Finally reference was made to the decision of the ITAT Mumbai Bench in the case of Tivoli Investment & Trading Co. (P) Ltd. Vs. ACIT 90 ITD 163(Mum). It was thus submitted by the learned D.R. that the estimation of annual value as done by the AO is correct and has to be accepted.

16. The learned counsel for the Assessee reiterated the plea as was put forth by the Assessee before the CIT(A). She relied on the decision of the Hon'ble Bombay High Court in the case of CIT Vs. Akshay Textiles Trading and Agencies Pvt. Ltd. 304 ITR 401(Bom)., wherein it was held that the expression "receivable" as appearing in Sec.23(1)(b) cannot be given a wider meaning. The Hon'ble Court after noticing the amendment to Sec.23(1), whereby it was laid down that if rent received is more than the municipal rateable value then the actual rent received will be the yardstick for determining the annual value, held that the expression "receivable" means what is actual received and an extended meaning cannot be given to that expression. It was her submission that the amount actually received as rent cannot therefore be substituted by adding any notional interest on interest free security deposit/advance rent received. Reliance was placed on the decision of the Hon'ble Bombay High Court in the case of Smitaben N. Ambani Vs. CWT 323 ITR 104 (Bom) wherein the Hon'ble Bombay High Court in the context of Rule 1BB to the Wealth Tax Rules, which uses

the same expression "the sum for which the property might be reasonably expected to let from year to year" as is found in Sec.23(1)(a) of the Act, held that rateable value as determined by the Municipal authorities shall be the yardstick. In coming to the above conclusion, the Hon'ble Court followed its own decision in the case of M.V.Sonavala (supra) a decision rendered in the context of Sec.23 of the Act. A reference was made to the CBDT circular No.204 dated 24/7/1976 wherein it was explained that "the sum for which the property might be reasonably expected to let from year to year" as is found in Sec.23(1) of the Act refers to the rateable value as determined by the Municipal authorities. The learned Counsel for the Assessee also distinguished the case laws relied upon by the learned D.R. It was submitted that the decision in the case of Baker Technical Services (P) Ltd., was a case where the facts were that in the first four months of the previous year, the month rent was Rs.1,12,500/- and thereafter the monthly rent became Rs.10,000/- and a substantial interest free security deposit was taken. This was a very vital factor which weighed in the mind of the Tribunal while deciding the aforesaid case. Similarly in the case of Fizz Drinks Ltd.(supra), the facts were that the agreed rent was Re.1/- per month and interest free security deposit of Rs.1,62,36,000/- was taken by the owner. It was again this factor which weighed in the mind of the Tribunal as is evident from the observations in para-8 of its order where they have held that any fair judicial administration would not allow such things to happen. The decision in the case of Tivoli Investment & Trading Co. (P) Ltd. (supra) was again distinguished by pointing out that it was a case where there was no rent and only a huge interest free security deposit was taken by the owner. It was finally submitted that the decisions of the Hon'ble Bombay High Court on the issue still hold good and they have to be followed. It was submitted that the actual rent received was Rs.2,87,87,660/-. The annual value (also referred to as municipal valuation) adopted by the municipal authorities in respect of the property was Rs.27,50,835 and that should be the determining factor for applying the provisions of Sec.23(1)(a) of the Act. Since the rent received was more than the sum for which the property might reasonably be expected to let from year to year, the actual rent received should be the annual value of the property u/s.23(1)(b) of the Act. Notional interest on interest free security deposit/rent received in advance should not be added to the same in view of the decision of the Hon'ble Bombay High Court in the case of J.K.Investors (Bombay) Ltd. (supra).

17. We have considered the rival submissions. Originally provisions of section 23 of the Act provided for determination of annual value of house property only on the basis of sum for which, the property might reasonably be expected to be let from year to year. The actual receipt of rent was irrelevant. By the Taxation Laws (Amendment) Act, 1975 w.e.f. 1.4.1976, Section 23(1)(b) was introduced, whereby it was provided that if the actual rent received by an assessee is in excess of the sum for which, the property might reasonably be expected to let from year to year, annual value will be the rent received. While explaining the aforesaid amendment, CBDT in Circular 204 dated 24.7.1976 in paragraph 9 has stated as follows :-

> "Hitherto, the annual value of house property, chargeable to income tax under the head 'income from house property was deemed to be the sum for which the property might reasonably be expected to let from year to year. In many cases, however, the actual rent received or receivable in a year exceeds **the municipal valuation of the property**. Sub section (1) of section 23 has been amended to provide that the where any property is in occupation of a tenant and the annual rent received or receivable by

the owner is in excess of the sum for which the property might reasonably be expected to let from year to year, the annual rent received or receivable shall be taken as the annual value of the property".

18. From the aforesaid Circular, it is clear that the law prior to introduction of section 23(1)(b) was that annual value was equal to Municipal Valuation of the property. The above circular gives an indication as to how the expression "the sum for which, the property might reasonably be expected to let from year to year" used in section 23(1)(a) hast to be interpreted.

19. In the case of Diwan Daulat Kappor Vs. New Delhi Municipal Committee, 122 ITR 700 (SC), the question before the Hon'ble Supreme Court was as to what should be the basis of determining the annual value for the purpose of levy of property tax. The expression "Annual Value" as defined in the Delhi Municipal Corporation Act, 1957 and Punjab Municipal Act, 1911 was "Gross annual rent at which such house of building may reasonably be expected to let from year to year". The Hon'ble Supreme Court held that the annual value is always rent realizable by landlord and that actual rent is only an indicator what the landlord might reasonably expect to get from a hypothetical tenant. The Honourable Court further held that where tenancy is subject to rent control legislatation, Standard rent would be a proper measure and in any event, annual value cannot exceed such standard rent. In the case of Mrs. Sheila Kaushish Vs. CIT, 131 ITR 435 (Sc), the question arose in the context of provisions of section 23 of the I.T. Act. The Hon'ble Supreme Court applying the decision of Hon'ble Supreme Court in the case of Dewan Daulat Rai Kapoor (supra) observed as follows :-

"Now this was a definition given on the interpretation of the definition of "Annual value" in the Delhi Municipal Corporation Act, 1957, and the Punjab Municipal Act, 1911, for the purpose of levy of house tax, but it would be eqully applicable in interpreting the definition of 'annual value' in sub-section (1) of section 23 of the I.T. Act, 1961, because these definitions are in identical terms and it was impossible to distinguish the definition of 'annual value' in sub-section (1) of section 23 of the I.T. Act, 1961, from the definition of that term in the Delhi Municipal Corporation Act, 1957 and the Punjab Municipal Act, 1911. We must, therefore, hold on an identical line of reasoning, that even if the standard rent of a building has not been fixed by the Controller under section 9 of the Rent Act and the period of limitation prescribed by section 12 of the Rent Act for making an application for fixation of the standard rent having expired, it is no longer competent to the tenant to have the standard rent of the building fixed, the annual value of the building according to the definition given in sub-section (1) of section 23 of the I.T. Act, 1961, must be held to be the standard rent determinable under the provisions of the Rent Act and not the actual rent received by the landlord from the tenant. This interpretation which we are placing on the language of sub-section (1) of Sec.23 of the IT Act,1961, may be regarded as having received legislative approval, for, we find that Sec.6 of the Taxation Laws (Amendment) Act, 1975 sub-section (1) has been amended and it has now been made clear by the introduction of clause(b) in that sub-section that where the property is let and the annual rent received or receivable by the owner in respect thereof is in excess of the sum for which the property might reasonably be expected to let from year to year, the

amount so received or receivable shall be deemed to the annual value of the property. The newly added cl.(b) clearly postulates that the sum for which a building might reasonably be expected to let from year to year may be less than the actual amount received or receivable by the landlord from the tenant".

20. Hon'ble Calcutta High Court in the case of CIT Vs. Prabhabati Bansali, 141 ITR 419 had to deal with a case of a property in Mumbai, where the dispute was with regard to determination of its annual value u/s. 23 of the Act. Hon'ble Calcutta High Court after making reference the decision of Hon'ble Supreme Court in the case of Dewan Daulat Rai Kapoor (supra) and Mrs. Sheila Kaushish (supra) held as follows :-

"Therefore, in case where the actual rent received is higher than that for which the property might reasonably be expected to let from year to year in respect of an income accruing subsequent to the amendment different considerations might arise. But, we are not concerned with such situation in the instant case. Therefore, in view of that position and the municipal law and in view of the decision of the Supreme Court, it appears to us that the income from house property must be computed on the basis of the sum which might reasonably be expected to let from year to year and with the annual municipal value provided such a value is not above the standard rent receivable and that would be the safest guide for this purpose and the rent actually received would not be of any relevance".

21. The Court in the aforesaid decision also relied on the provisions of section 154 of the Bombay Municipal Corporation Act, wherein the manner of determination of rateable value has been laid down. The said provisions also speak of "annual rent for which, the property might reasonably be expected to let from year to year". Thus, the Court concluded that the Municipal valuation and the annual value u/s. 23(1)(a) are one of the same. The decision of Hon'ble Calcutta High Court has been followed by Hon'ble Bombay High Court in the case of M.V. Sonavala Vs. CIT, 177 ITR 246 (Bom); wherein Hon'ble Bombay High Court has observed as follows :-

"However, the questions posed to us are not whether the annual value of the property for the purpose of section 23(1)(a) should be taken at the actual compensation received or on the basis of standard rent. The question is whether the annual value should be taken at the amount which is actual compensation received or at the amount fixed as municipal rateable value. Obviously, Municipal rateable value cannot be equated to standard rent.

In this context, it may be desirable to refer to the Calcutta High Court's decision in the case of CIT Vs. Prabhabati Bansali, (1983) 141 ITR 419. One of the questions involved in that case was whether the Tribunal was justified in directing the Income Tax Officer to re-determine the annual value of the property under section 23(1) afresh with reference to its rateable value as determined by the Municipal Corporation. The question was answered in the affirmative and the court held that the income from house property had to be computed on the basis of the sum for which the property might reasonably be let from year to year and the annual municipal value.

Following the Calcutta High Court decision (1983) 141 ITR 419, which we think, has taken the right view, we answer the questions in the negative and against the department with a direction that the annual value of different properties will now be determined by the Tribunal in accordance with the directions set out above. No order as to costs".

22. The Hon'ble Bombay High Court in the case of Smitaben N. Ambani Vs. CWT 323 ITR 104 (Bom) in the context of Rule 1BB to the Wealth Tax Rules, which uses the same expression "the sum for which the property might be reasonably expected to let from year to year" as is found in Sec.23(1)(a) of the Act, held that rateable value as determined by the Municipal authorities shall be the yardstick. The Learned counsel for the assessee relied on several other judicial pronouncements in support of his contention that the Municipal value should be the basis of determining the annual value. We are not making reference to those decisions, since, in our opinion the aforesaid pronouncement of Hon'ble Bombay High Court considers the decisions of Hon'ble Calcutta High Court which in turn has considered the law laid down by the Hon'ble Apex Court on the issue. It is clear from the aforesaid exposition of law that charge u/s. 22 is not on the market rent; but is on the annual value and in the case of property which is not let out, municipal value would be a proper yardstick for determining the annual value. If the property is subject to rent control laws and the fair rent determined in accordance with such law is less than the municipal valuation then only that can be substituted by the municipal value. The decision in the case of Mrs. Sheila Kaushish (supra) mentions standard rent under the Rent Control Act as one of the yardsticks. We also find from the decision of Hon'ble Calcutta High Court in the case of Smt. Prabhabati Bansali (supra) that standard rent, if it does not exceed the municipal valuation alone can be adopted in place of municipal valuation.

23. As far as decisions relied upon by the learned D.R. in the case of Baker Technical Services (P) Ltd. (supra), we find that the same is based on the decision of the ITAT Mumbai bench in the case of ITO Vs. Makrupa Chemicals (P) Ltd. 108 ITD 95 (Mumbai). In the case of Makrupa Chemicals, in para-14 of the decision it has been clearly held that rateable value, if correctly determined under the municipal laws can be taken as ALV u/s.23(1)(a) of the Act and in this regard the decision of the Hon'ble Supreme Court in the case of Sheila Kaushish(supra) has been followed. It has further been observed that the rateable value is not binding on the AO, if the AO can show that rateable value under the municipal law does not represent the correct fair rent. In coming to the above conclusion, the Bench has followed the decision of the Patna High Court in the case of Kashi Prasad Katarvka vs. CIT 101 ITR 810 (Patna). We find that the Bombay High Court which is the jurisdictional High Court has held that the rateable value under the municipal law has to be adopted as annual value u/s.23(1)(a) of the Act and therefore the decision in the case of Makrupa Chemicals (supra) to the contrary cannot be followed. Further In para-13 of its decision in the case of Makrupa Chemicals, the Tribunal has very categorically held that if ratable value is less than the standard rent (where the property is subject to rent control laws) then only standard rent has to be taken. In coming to the above conclusion the Tribunal has followed the decision of the Hon'ble Supreme Court in the case of Dewan Daulat Rai kapoor (supra). Thus the decision in the case of Baker

Technical Services (P) Ltd. (supra) being contrary to the decision of the Hon'ble Bombay High court in our view cannot be followed.

24. The decision relied upon by the learned D.R. in the case of Fizz Drinks Ltd.(supra), are distinguishable on facts. The facts in that case were that the agreed rent was Re.1/- per month and interest free security deposit of Rs.1,62,36,000/- was taken by the owner. It was this factor which weighed in the mind of the Tribunal as is evident from the observations in para-8 of its order where they have held that any fair judicial administration would not allow such things to happen. The decision in the case of Tivoli Investment & Trading Co. (P) Ltd. (supra) is again distinguishable because it was a case where there was no rent and only a huge interest free security deposit was taken by the owner.

25. For the reasons given above, we hold that the annual value (also referred to as municipal valuation/ rateable value) adopted by the municipal authorities in respect of the property at Rs.27,50,835 should be the determining factor for applying the provisions of Sec.23(1)(a) of the Act. Since the rent received by the Assessee was more than the sum for which the property might reasonably be expected to let from year to year, the actual rent received should be the annual value of the property u/s.23(1)(b) of the Act. Notional interest on interest free security deposit/rent received in advance should not be added to the same in view of the decision of the Hon'ble Bombay High Court in the case of J.K.Investors (Bombay) Ltd. (supra). We hold accordingly. The appeal of the revenue is dismissed.

26. ITA No.1733/Mum/07 & ITA 1412/Mum/07:

27. ITA No.1733/Mum/07 is an appeal by the Assessee and ITA No.1412/Mum/07 is an appeal by the Revenue. Both these appeals are directed against the order dated 5.12.2006 of CIT(A)-X, Mumbai, relating to A.Y.04-05.

28. The grounds of appeal of the Assessee reads as follows:

> "1. Being aggrieved by the order bearing No.CIT(A) X/IT/318/2005-06 dated December 5,2006 issued by the Commissioner of Income-tax (Appeals) X, Mumbai [hereinafter called the CIT(A)] issued under section 250 of the Income-tax Act, 1961 [hereinafter called The Act] and communicated to the Appellant on December 28, 2006 the Appellant appeals against and on the following amongst other grounds which are without prejudice to each other.
>
> (A) Re: Erroneously enhancing the annual value by adopting the rent received by associate company – Rs. 1,75,23,260/-[Pages 1 to 3 of the CIT(A) order.]
>
> 2. On the facts and circumstances of the case and in law, the CIT(A) erred in confirming the annual value/fair rent of Rs.2,87,87,660/- determined in the case of the associate company as against Rs. 1,12,64,400 actually received by the appellant.

3. The CIT(A) ought to have appreciated that it is rent as per the agreement that can be reasonably be expected to be received by the appellant from letting out the property from year to year.

(B) Re: Charging interest under section 234B and 234D.

4. The assessing officer erred on facts and in the circumstances of the case and in law in levying interest under section 234B and 234D of the Act."

29. The grounds of appeal of the Revenue reads as follows:

"1. On the facts and in the circumstances of the case as well as in law, the learned CIT(A) has erred in directing the Assessing Officer to exclude the notional interest on advance rent received and security deposit while computing the annual value of the let out property by ignoring the fact that the Assessing Officer has correctly determined the annual value of the property u/s. 23(1)(a) of the Income Tax Act, 1961 by adding notional interest on advance rent received and interest on security deposit, that being essential component for arriving at such annual value.

2. On the facts and in the circumstances of the case as well as in law, the Learned CIT(A) has erred in directing the Assessing Officer not to calculate notional interest on advance rent received and security deposit while determining the annual value of the let out property by ignoring the fact that the decision given by the ld. CIT(A)on the same issue in the case of Reclamation Real Estate India Pvt. Ltd. has not been accepted by the department and further appeal has been filed to the Hon'ble ITAT."

30. The Assessee is a company. It is engaged in the business of undertaking in one or more activities involving purchase, sale, letting out, investment and dealing in land, preparation of building sites for construction etc. This Assessee is a group company of M/S. Reclamation Real Estate Company India Pvt. Ltd., the Assessee in ITA No.1413/Mum/2007, which we have decided in the earlier paragraphs.

31. The facts as far as this Assessee is concerned are that the Assessee owned the entire 10^{th} floor of the premises, Maftalal Centre Nariman Point, admeasuring about 15645 Sq.ft. together with 6 car parking space (hereinafter referred to as "the property"). It had let out the property to ICICI Ltd., on an annual rent of Rs.1,12,64,400/-. It is not in dispute that income from letting out of the property has to be assessed under the head "Income from House Property". The annual value (also referred to as municipal valuation) adopted by the municipal authorities in respect of the property was Rs.27,50,835/-. The Assessee determined "Income from House Property" by adopting the annual value at Rs.1,12,64,400/- which is the actual rent received which is higher than the Municipal valuation. The Assessee had claimed that the annual value has to be determined in accordance with Sec.23(1)(b).

32. The AO after making a reference to the fact that the property owned by this Assessee was located in the same building and is of the same size as that of the Assessee M/S. Reclamation Real Estate Company India Pvt.Ltd.,(the Assessee in ITA No.1413/Mum/2007,

which we have decided in the earlier paragraphs) which was a group of this Assessee, was of the view that the annual value determined in the case of M/S. Reclamation Real Estate company India (P) Ltd. would be the "the sum for which the property might reasonably be expected to let from year to year", viz., Rs.3,42,23,856/- He therefore adopted the annual value at the said figure applying the provisions of Sec.23(1)(a) of the Act. On appeal by the Assessee, the CIT(A) following the decision in the case of M/S. Reclamation Real Estate company India (P) Ltd., held that Municipal valuation alone will be relevant while determining annual value u/s.23(1)(a) of the Act. He however was of the view that the rent received by this Assessee should be atleast equal to the rent declared as received by M/S.Reclamation Real Estate company India (P) Ltd., from J.P. Morgan Chase Bank. He therefore substituted the actual rent received by this Assessee by the rent actually received by M/S.Reclamation Real Estate company India (P) Ltd., from J.P. Morgan Chase Bank, at Rs.2,87,87,600/- as against actual rent received by this Assessee of Rs.1,12,64,400/-. Aggrieved by the relief granted to the Assessee the revenue is in appeal before the Tribunal. Aggrieved by the action of CIT(A) in substituting the actual rent received by it by the rent received by M/S.Reclamation Real Estate company India (P) Ltd., from J.P. Morgan Chase Bank, the Assessee is in appeal before the Tribunal.

33. We have heard the rival submissions, which are the same as was put forth in the case of M/S. Reclamation Real Estate Company India Pvt.Ltd.,(the Assessee in ITA No.1413/Mum/2007. For the details reasons given in that case, we hold that the annual the annual value (also referred to as municipal valuation/ rateable value) adopted by the municipal authorities in respect of the property at Rs.27,50,835 should be the determining factor for applying the provisions of Sec.23(1)(a) of the Act. Since the rent received by the Assessee was more than the sum for which the property might reasonably be expected to let from year to year, the actual rent received should be the annual value of the property u/s.23(1)(b) of the Act. Notional interest on interest free security deposit/rent received in advance should not be added to the same in view of the decision of the Hon'ble Bombay High Court in the case of J.K.Investors (Bombay) Ltd. (supra). The revenues appeal is therefore dismissed.

34. As far as Assessee's appeal is concerned, the question is whether the revenue authorities are justified in substituting the actual rent received by this Assessee by the rent actually received by M/S.Reclamation Real Estate company India (P) Ltd., from J.P. Morgan Chase Bank, at Rs.2,87,87,600/- as against actual rent received by this Assessee of Rs.1,12,64,400/-. The argument of the learned D.R. was that since the property is located in the same building and the area leased out are also identical, there was no reason for this Assessee to receive a lesser rent. The learned counsel for the Assessee besides reiterating the arguments as were made in the earlier case for adding notional interest on interest free security deposit further relied on the decision of the Hon'ble Bombay High Court in the case of Akshay Textiles (supra). It was also submitted that the quantum of rent is purely decided on the basis of mutual agreement between the parties. When the annual value is determined u/s.23(1)(b) of the Act, the actual rent received alone should be considered.

35. We have considered the rival submissions. In the case of Akshay Textiles (supra), the facts before the Hon'ble Bombay High Court was that A owner of the property let out the

same to B. B sub-let the property to C. While determining the annual value of the property in the case of A, the AO substituted the rent paid by C to B because the rent paid by B to A was less compared to the rent paid by C to B. The Hon'ble Bombay high Court held that annual value is the actual rent received or receivable by the owner from the tenant irrespective whether tenant on such letting has received higher rent. We are also of the view that the expression used in Sec. 23(1)(b) is the rent received or receivable. The expression receivable cannot mean anything more than what is actually received. The CIT(A) in our view has overlooked this aspect in substituting the actual rent received by this Assessee by the rent actually received by M/S.Reclamation Real Estate company India (P) Ltd., from J.P. Morgan Chase Bank. We therefore hold that the annual value has to be adopted at the annual rent actually received by the Assessee from ICICI Ltd., viz., Rs.1,12,64,400-.

36. In the result, appeal by the Assessee is allowed while the appeal by the revenue is dismissed.

37. ITA No.1734/Mum/07 & ITA 1411/Mum/07:

38. ITA No.1734/Mum/07 is an appeal by the Assessee and ITA No.1411/Mum/07 is an appeal by the Revenue. Both these appeals are directed against the order dated 5.12.2006 of CIT(A)-X, Mumbai, relating to A.Y.04-05.

39. The grounds of appeal of the Assessee read as follows:

> "1. Being aggrieved by the order bearing No.CIT(A) X/IT/318/2005-06 dated December 5,2006 issued by the Commissioner of Income-tax (Appeals) X, Mumbai [hereinafter called the CIT(A)] issued under section 250 of the Income-tax Act, 1961 [hereinafter called The Act] and communicated to the Appellant on December 28, 2006 the Appellant appeals against and on the following amongst other grounds which are without prejudice to each other.
>
> (A) Re: Erroneously enhancing the annual value by adopting the rent received by associate company – Rs. 1,75,23,260/-[Pages 1 to 3 of the CIT(A) order.]
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> 2. On the facts and circumstances of the case and in law, the CIT(A) erred in confirming the annual value/fair rent of Rs.2,87,87,660/- determined in the case of the associate company as against Rs. 1,12,64,400 actually received by the appellant.
>
> 3. The CIT(A) ought to have appreciated that it is rent as per the agreement that can be reasonably be expected to be received by the appellant from letting out the property from year to year.
>
> (B) Re: Charging interest under section 234B and 234D.
>
> 4. The assessing officer erred on facts and in the circumstances of the case and in law in levying interest under section 234B and 234D of the Act."

40. The grounds of appeal of the Revenue read as follows:

> "1. On the facts and in the circumstances of the case as well as in law, the learned CIT(A) has erred in directing the Assessing Officer to exclude the notional interest on advance rent received and security deposit while computing the annual value of the let out property by ignoring the fact that the Assessing Officer has correctly determined the annual value of the property u/s. 23(1)(a) of the Income Tax Act, 1961 by adding notional interest on advance rent received and interest on security deposit, that being essential component for arriving at such annual value.
>
> 2. On the facts and in the circumstances of the case as well as in law, the Learned CIT(A) has erred in directing the Assessing Officer not to calculate notional interest on advance rent received and security deposit while determining the annual value of the let out property by ignoring the fact that the decision given by the ld. CIT(A)on the same issue in the case of Reclamation Real Estate India Pvt. Ltd. has not been accepted by the department and further appeal has been filed to the Hon'ble ITAT."

41. The Assessee is a company. It is engaged in the business of undertaking in one or more activities involving purchase, sale, letting out, investment and dealing in land, preparation of building sites for construction etc. This Assessee is a group company of M/S. Reclamation Real Estate Company India Pvt.Ltd., the Assessee in ITA No.1413/Mum/2007, which we have decided in the earlier paragraphs.

42. The facts as far as this Assessee is concerned are that the Assessee owned the entire 11th floor of the premises, Maftalal Centre Nariman Point, admeasuring about 15645 Sq.ft. together with 6 car parking space (hereinafter referred to as "the property"). It had let out the property to ICICI Ltd., on an annual rent of Rs.1,12,64,400/-. It is not in dispute that income from letting out of the property has to be assessed under the head "Income from House Property". The annual value (also referred to as municipal valuation) adopted by the municipal authorities in respect of the property was Rs.27,50,835/-. The Assessee determined "Income from House Property" by adopting the annual value at Rs.1,12,64,400/- which is the actual rent received which is higher than the Municipal valuation. The Assessee had claimed that the annual value has to be determined in accordance with Sec.23(1)(b).

43. The AO after making a reference to the fact that the property owned by this Assessee was located in the same building and is of the same size as that of the Assessee M/S. Reclamation Real Estate Company India Pvt.Ltd.,(the Assessee in ITA No.1413/Mum/2007, which we have decided in the earlier paragraphs) which was a group of this Assessee, was of the view that the annual value determined in the case of M/S.Reclamation Real Estate company India (P) Ltd. would be the "the sum for which the property might reasonably be expected to let from year to year", viz., Rs.3,42,23,856/-. He therefore adopted the annual value at the said figure applying the provisions of Sec.23(1)(a) of the Act. On appeal by the Assessee, the CIT(A) following the decision in the case of M/S.Reclamation Real Estate company India (P) Ltd., held that Municipal valuation alone will be relevant while determining annual value u/s.23(1)(a) of the Act. He however was of the view that the rent received by this Assessee should be atleast equal to the rent declared as received by

M/S.Reclamation Real Estate company India (P) Ltd., from J.P. Morgan Chase Bank. He therefore substituted the actual rent received by this Assessee by the rent actually received by M/S.Reclamation Real Estate company India (P) Ltd., from J.P. Morgan Chase Bank, at Rs.2,87,87,600/- as against actual rent received by this Assessee of Rs.1,12,64,400/-. Aggrieved by the relief granted to the Assessee the revenue is in appeal before the Tribunal. Aggrieved by the action of CIT(A) in substituting the actual rent received by it by the rent received by M/S.Reclamation Real Estate company India (P) Ltd., from J.P. Morgan Chase Bank, the Assessee is in appeal before the Tribunal.

44. We have heard the rival submissions, which are the same as was put forth in the case of M/S. Reclamation Real Estate Company India Pvt.Ltd.,(the Assessee in ITA No.1413/Mum/2007. For the details reasons given in that case, we hold that the annual the annual value (also referred to as municipal valuation/ rateable value) adopted by the municipal authorities in respect of the property at Rs.27,50,835 should be the determining factor for applying the provisions of Sec.23(1)(a) of the Act. Since the rent received by the Assessee was more than the sum for which the property might reasonably be expected to let from year to year, the actual rent received should be the annual value of the property u/s.23(1)(b) of the Act. Notional interest on interest free security deposit/rent received in advance should not be added to the same in view of the decision of the Hon'ble Bombay High Court in the case of J.K.Investors (Bombay) Ltd. (supra). The revenues appeal is therefore dismissed.

45. As far as Assessee's appeal is concerned, the question is whether the revenue authorities are justified in substituting the actual rent received by this Assessee by the rent actually received by M/S.Reclamation Real Estate company India (P) Ltd., from J.P. Morgan Chase Bank, at Rs.2,87,87,600/- as against actual rent received by this Assessee of Rs.1,12,64,400/-. The argument of the learned D.R. was that since the property is located in the same building and the area leased out are also identical, there was no reason for this Assessee to receive a lesser rent. The learned counsel for the Assessee besides reiterating the arguments as were made in the earlier case for adding notional interest on interest free security deposit further relied on the decision of the Hon'ble Bombay High Court in the case of Akshay Textiles (supra). It was also submitted that the quantum of rent is purely decided on the basis of mutual agreement between the parties. When the annual value is determined u/s.23(1)(b) of the Act, the actual rent received alone should be considered.

46. We have considered the rival submissions. In the case of Akshay Textiles (supra), the facts before the Hon'ble Bombay High Court was that A owner of the property let out the same to B. B sub-let the property to C. While determining the annual value of the property in the case of A, the AO substituted the rent paid by C to B because the rent paid by B to A was less compared to the rent paid by C to B. The Hon'ble Bombay high Court held that annual value is the actual rent received or receivable by the owner from the tenant irrespective whether tenant on such letting has received higher rent. We are also of the view that the expression used in Sec. 23(1)(b) is the rent received or receivable. The expression receivable cannot mean anything more than what is actually received. The CIT(A) in our view has overlooked this aspect in substituting the actual rent received by this Assessee by the rent actually received by M/S.Reclamation Real Estate company India (P) Ltd., from J.P. Morgan

Chase Bank. We therefore hold that the annual value has to be adopted at the annual rent actually received by the Assessee from ICICI Ltd., viz., Rs.1,12,64,400-.

47. In the result, appeal by the Assessee is allowed while the appeal by the revenue is dismissed.

Order pronounced in the open court on the 26th day of Nov .2010

Sd/-	Sd/-
(PRAMOD KUMAR)	(N.V.VASUDEVAN)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dated. 26th Nov.2010

Copy to: 1. The Appellant 2. The Respondent 3. The CIT City –concerned
4. The CIT(A)- concerned 5. The D.R"D" Bench.

(True copy) By Order

Asst. Registrar, ITAT, Mumbai Benches
MUMBAI.

Vm.