IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES, 'F', MUMBAI

BEFORE SHRI S V MEHROTRA, ACCOUNTANT MEMBER AND
SHRI VIJAY PAL RAO, JUDICIAL MEMBER

ITA No. 2808 and 2809/Mum/1996
(Assessment years 1992-93 and 1993-94)

Tivoli Investment and Trading Co.,
Private Limited
7, Champaklal Udyog Bhavan,
Sion (E), Bombay-400022,
GIR No.Cir 4(2)/T-4 ..... Appellant

Vs

Asstt.Commissioner of Income Tax
Circle 4(2),
Aayakar Bhavan, M K Road,
Mumbai-400020 ..... Respondent

Appellant by : Shri S E Dastur, Sr. Advocate and
Sh. Nitesh Joshi, Advocate
Respondent by : Smt.Ashima Gupta

O R D E R

PER VIJAY PAL RAO,JM

These appeals by the assessee are directed against two separate orders of the CIT(A) both dated 19.12.1995 for the assessment years 1992-93 and 1993-94.

2. The assessee has raised following common grounds in these appeals :

> *"1. On the facts and in the circumstances of the case, and in law, the learned CIT(A) erred in imputing interest on an interest –free deposits as rent for the purposes of computing the appellant's income;*

2. On the facts and in the circumstances of the case, and in law, the learned CIT(A) erred in taking into consideration other cases of let-out property whilst estimating the income from house property of the appellant;

3. On the facts and in the circumstances of the case, and in law, the learned CIT(A) erred in computing the annual letting value at a figure higher than the standard rent whilst computing the income of the appellant under section 23(1)(a) of the IT Act, 1961;

4. On the facts and in the circumstances of the case, and in law, the learned CIT(A) ought to have made an estimation of the appellant's income from house property;

5. On the facts and in the circumstances of the case, and in law, the learned CIT(A) erred in not taking into consideration the fact that there was no benefit received by the appellant at the time of receiving the interest-free deposits;

6. On the facts and in the circumstances of the case, and in law, the learned CIT(A) ought to have held that the benefit accrued to the appellant only when the funds were deployed and income accrued as a result of such deployment;

7. On the facts and in the circumstances of the case, and in law, the learned CIT(A) erred in not allowing deductions allowable under section 24 of he Income Tax Act, 1961 such as ground rent, maintenance charges, municipal taxes etc"

3. The brief facts emerging from the record are that the assessee entered into an agreement dated 26.6.1982 with Aesthetic Builders Pvt ltd for acquisition of premises office no.72 located at 7th floor, Sakhar Bhavan, Nariman Point, Mumbai hereinafter referred to as the property in question.

The purchase consideration for acquiring the property in question was shown at Rs.21,85,663/-. The assessee stated that till date no lease has been granted as agreed between the parties vide agreement dated 26.6.1982. On 29.11.1988, the assessee entered into three agreement with the CITY Bank in respect of the property in question. The first agreement was agreement for granting Leave and License and thereby the property in question was let out to the CITY Bank. Vide second agreement the assessee received the interest free security deposits of Rs.1,54,00,000/- from the CITY Bank. The third agreement was for availing an overdraft facility upto Rs.51,00,000/- from citi bank. The assesse also executed a Special Power of Attorney in favour of the citi bank and whereby CITI Bank was authorised to give the said property in question on sub-license. In the year 1989 the owners/occupiers of the building form a co-operative society in the name of Sakhar Bhavan Premises Co-operative Society Limited and registered on 5.5.1998.

4. The assessee filed the return of income declaring total income of Rs.6,90,990/- and Rs.7,70,668/- for the assessment years 1992-93 and 1993-94 respectively along with the auditor report u/s 44AB. During the course of assessment proceedings the AO observed that the assessee has given the property in question on Leave and License to the CITY Bank

as per agreement dated 29.11.1998 and received interest free deposits of Rs.1,54,00,000/- from CITI Bank. The AO noted that the CITY bank is paying the actual maintenance charges of Rs.9825/- per month as charged by the Aesthetic Builder from whom the assessee has purchased the property in question. The assessee has shown the rent received i.e. maintenance charges received from CITI bank at Rs.1,17,900/- whereas the assessee has reimbursed the same amount to the builder for the above property in question which shows that the assessee has not received any compensation/leave and license charges/rent from CITI Bank for occupying the premises in question except interest free advances of Rs.1,54,00,000/- and overdraft facility of Rs.51,00,000/-. The AO has further recorded that in this connection the statement on oath of Shri Vaidyanathan, Vice-President of City Bank and Head Service Administrator of City Bank was recorded. In the said statement, Shri Vaidyanathan stated that the Citi Bank has entered into an agreement with the assessee for the premises in question on total area of 3275 sq. ft. He has further stated that the bank has entered into three agreement viz (i) .Leave and license Agreement, (ii) Agreement for interest free advances and Overdraft agreement for overdraft facilities. On a specific question about interest not charged on the deposits of

Rs.1,54,00,000/- Shri Vaidyanathan has stated that interest free security deposit has been given by the bank to the Company as part of compensation towards our occupancy of the premises in question. The AO observed that the statement of Shri Vaidhanathan reveals that the interest free advances of Rs.1,54,00,000/- has been given by the bank to the assessee in lieu of compensation/rent towards occupancy of the premises in question. The AO after considering the contentions and submissions of the assessee has determined Annual Ratable Value of the property in question by adding 15% interest on free deposits of Rs.1,54,00,000/- and made an addition of Rs.23,10,000/-. The assessee filed appeals before the CIT(A) and challenged the assessment order regarding the addition on account of interest on interest free deposits received by the assessee while determining the annual value u/s 23(1) of the Act. The CIT(A) confirmed the action of the AO vide impugned orders.

5. It is pertinent to note that the identical issue came up before this Tribunal in the assessee's own case for the assessment years 1990-91 and 1991-92 and this Tribunal vide order reported in 90 ITD 163 considered and decided the issue against the assessee in paragraph 10 to 25 as under :

"10. Adverting to section 23(1)(a) of the Act, we find that the language of this section provides that for the purposes of section 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, It is pertinent to note that the word used is "might" and not "can" or "is". It is thus a national income to be gathered from what a hypothical tenant would pay which is to be objectively ascertained on a reasonable basis irrespective of the fact whether the property is let out or not.

11. The Municipal valuation and annual valuation is assessed after taking into consideration all relevant factors, e.g. the prevailing rate of rent in the area and what a similar building of same nature would fetch in that locality, etc.

12. In the case of M.V. Sonavala v. CIT, 177 ITR 246 (Bom), it was held that the income from house property has to be computed on the basis of the sum of which the property might reasonably be let from year to year to the annual Municipal rateable value. The word "or" is disjunctive as such it is possible to take the sum for which property might reasonably let from year to year or the Municipal rateable value. It is pertinent to note that while deciding this issue the Hon'ble jurisdictional High court took into consideration the decisions of the Apex Court rendered in the case of Devan Daulat Rai Kapoor Vs. New Delhi Municipal Committee, 122 ITR 700 (SC) and in the case of Sheila Kaushish vs. CIT, 131 ITR 435 (SC).

13. No cogent material was placed before us to indicate that what is the rateable value of the property. The piece of evidence which was placed before the revenue authorities is only certificate from Aesthetic Builders Private Limited who said that the rateable value of the property was Rs. 10,200/-. In out opinion, no credence can be given to this certificate as the valuation from the Assessment Department of the Municipal Corporation was not appended to. Beside, this value is ridiculously low. For determining the Municipal taxes payable, the local authority makes

a periodical survey of all buildings within its area. The surveyor first determines the gross rent receivable from the property. The annual value is determined after considering the prevailing rate of rent in the area and what a similar building of the same nature would fetch in the locality, etc.It was noted by the AO that Aesthetic Builders Private Limited, who has issued certificate for rateable value and which is appended at Page 60, has given first and ground floor of the said building on rent/leave & licence to Citibank as per agreement dated 20.10.1983. The licence fees charged was Rs. 43/- per sq.ft. per month. On the basis, for the assessment year 1990-91, the AO took the licence fees at Rs. 50/- per month and calculated the compensation receivable at Rs. 19,65,000/-. This indicates that the rateable value as shown by the assessee is palpably erroneous and cannot be believed.

14. The Hon'ble jurisdictional High court in the case of M V Sonavala (Supra) has held that the income from house property can also be computed on the basis of the sum for which the property might reasonably be let from year to year under section 23(1)(a) of the Act.

15. As per the scheme of the section, it is imperative on the part of the AO to first compute the value of the property as per section 23(1)(a) of the Act, which prescribes that ALV shall be deemed to be the sum for which the property might reasonably be expected to let from year to to year, because sub-section (b) of section 23(1) stipulates that where the annual rent received or receivable is in excess of the sum refereed to in clause (a), the actual sum is to be taken into consideration, meaning thereby that higher of the two value is to be adopted. As such, even for arriving at the value under clause (b), it is mandatory to make computation under clause (a) to find out the sum for which the property might reasonably be expected to let from year to year.

16. The order of section 23 of the Act is to determine the ALV in respect of the house property. If the income is derived from the exploitation of the property, it is to be charged under the head "Income

from house property". As the assessee did not reflect the rental income, as such the rental income is determined in accordance with the prescription of law. There is no double taxation. Assuming that there was no security, rent from the let out premises was to be computed. Admittedly the property was exploited. Rental income was not offered for taxation. As such, the rental income was determined with reference to the modus prescribed under the law. As such, in our opinion, there is no double taxation.

17. We now come to the question that if in lieu of rent some benefit is given to the owner, whether the value of such benefit could be assessed as rent.

18. There was lot of discussion on this aspect. Various precedents were relied upon. It is true that no addition is possible with reference to notional interest on interest free deposits. When the ALV is determined under sub-clause (a) of section 23(1) of the Act, with reference to the fair rent and then to such value no further addition can be made. The fair rent takes into consideration everything. The notional interest on such deposit is not any actual rent received or receivable. Under sub-clause (b) of section 23(1) of the Act, only the actual rent received or receivable can be taken into consideration and not any notional advantage. The rent is an actual sum of money which is payable by the tenant for use of the premises to the landlord. Any advantage and/or perquisite cannot be treated as rent. Wherever any such perquisite or benefit is sought to be treated as income, specific provisions in that behalf have been made in the Act by including such benefit etc. in the definition of income under section 2(24) of the Act. Specific provisions have also been made under different heads for adding such benefits or perquisites as income while computing the income under those heads, e.g. salary, business. The computation of the income under the head "Income from house property" is on a deemed basis. The tax has to be paid by reason of the ownership of the property. Even if one does not incur any sum
on account of repairs, a statutory deduction there-for is allowed and where on repairs the expenses are incurred in excess of such statutory limit, no deduction for such expenses is allowed. The

deductions for municipal taxes and repairs are not allowed to the extent they are borne by the tenant. However, even such actual reimbursements for Municipal taxes, insurance, repairs or maintenance of common facilities are not considered as part of the rent and added to the annual value. Accordingly there can be no scope or justification whatsoever for making any addition for any notional interest for determining the annual value. This view was taken by the Hon'ble Calcuatta High Court in the case of CIT vs. Satya Co. ltd. (1994) 75 Taxman 193 (Cal).

19. Hon'ble jurisdictional High Court in the case of CIT v. J. K. investors (Bombay) Ltd. (2001) 248 ITR 723(Bom) took the similar view. It was held that the notional interest would not from part of actual rent received or receivable under section 23(1)(b) of the Act.

20. Now the question arises that what the actual rent in the present case? As per the concise Oxford Dictionary the term "actual" connotes existing in fact, real. What is the actual rent or real rent of the property in question? It is not stipulated in the agreement. It transpires from the perusal of different clauses that the amount of Rs. 9,825/- is only reimbursement. The Citibank is required to pay this amount towards the present taxes and outgoings. It is not towards the licence fee. Therefore, the question arises that what the assessee is getting is out of the exploitation of its right in the property. Truly speaking, no licence fee. No amount of compensation or licence fee is separately stipulated in the agreement. What is the consideration for the user of the property? Shri S Vaidyanathan, Assistant Vice President and Head - Services Administration, was examined on 27.08.1992 under section 131 of the Act. Several questions were put to him. We reproduce here the question and reply of Question No. 8.

"Q.8 In answer to Question No. 2 you have stated that you have given interest free deposit of Rs. 1 crore 54 lakhs to M/s. Tivoli Investment and Trading Co. Can you tell me whether the interest is not charged in lieu of leave and licence premise occupied by the Bank ?

Ans. The interest free security deposit of Rs. 1 crore 54 lakhs has been given to the company as a part of compensation towards our occupying the premises as Sakhar Bhavan."

21. It transpires from the reply of Shri S Vaidyanthan that the usufructus of the deposit amount was the consideration for the user of the property. As such, the usufructus can be considered as the licence fee. Now the question arises what is that usufructus? The assessee availed the overdraft facility on an interest of 15% per annum. As such to find out the usufructus of the deposit amount, if we apply the rate of 15%, the usufructus will come to Rs. 23,10,000/-. This usufructus is not additional advantage to the assessee. It is the sum of money for which the property was let out. It was the consideration for the user of the house property. The Hon'ble Apex Court in the case of Bhagwan Dass Jain vs. Union of India (2002-TAXINDIAONLINE-165-SC-IT) (1981) 128 ITR 315 (SC) has held that even in its ordinary economic sense, the expression "income" includes not merely what is received or what comes in by exploiting the use of a property but also what one saves by using it on self. Here we are concerned with the question that what the assessee received by exploiting the user of the property? Obviously a deposit is not the receipt because it is refundable. Deposit is not obtained to secure the payment of rent because there is no stipulation for any rent. What the assessee calls rent is nothing but reimbursement of the actual expenditure. This cannot be the consideration for the user of the property. The assessee is entitled to get the usufructus out of the amount of deposit. The tree of money of course belongs to the Citybank. They have given the tree of money to the assessee in consideration of the user of the assessee's property. The assessee is not the owner of the tree. He has the right to get the fruits of that tree and the fruits of that tree are signified by term "usufructus". That is the consideration for the user for exploiting the premises No. 72 at the Sakhar Bhavan. We find no merit in the contention of the assessee that the amount of reimbursement received by the assessee towards the payment of taxes, etc. is the consideration for the user of the property. While computing the income

under the head "House property", it is incumbent on the AO to find out that what consideration the assessee did receive for the user of the property.

22. In the case of J K Investors (Bombay) Ltd. (supra), it was found that the actual rent received by the assessee was more than the fair rent even without taking into account the notional interest. In the present case the assessee received only the deposit and Rs. 9,825/- per month towards the payment of taxes and outgoings. No separate amount of licence fee of rent is anywhere stipulated in the agreement. This amount cannot be construed to be licence free or rent. As such, the facts of the present case are different. Hon'ble High Court has further observed in this case that the fair rent is fixed even under the Bombay Municipal Corporation ACt and Rent Act by taking into account various principles of valuation, vis. the contractors' method, the rent method, etc. In the present case we find that there is no cogent evidence in regard to the determination of the fair rent under the Bombay Municipal Corporation Act. The certificate from Aesthetic Builders Private Limited, which is bereft of any supporting documents, cannot be relied upon. The rateable annual value for the area 255 sq. mts. at Nariman Point is given at Rs. 10,200/- which is ridiculously low. The other papers filed, to increase that valuation in the Paper Book are not to be relied upon. The learned counsel stated that these are to be ignored.

23. Hon'ble jurisdictional High Court in the case of Saipansaheb WD. Dawoodsaheb Vs. Laxman Venkateshi Naik, LVII BLR 413 (Bom) has held that in fixing the standard rent the correct approach should be, what is the net return which a landlord should be reasonably allowed on his investment. In our opinion, the amount of Rs. 10,200/- cannot be said to be the correct net return. For that purpose, the AO found that the same builder
given the Ground Floor of the building to the Citibank as per agreement dated 20.10.1983 on leave and licence basis. For that rent was charged at RS. 43/- per sq. ft. per month. In 1983 the return was Rs. 43/- per sq. ft. In 1988 the AO took the rent at Rs. 50/- per sq. ft. and accordingly calculated the rent receivable at Rs. 19,65,000/-.

24. Adverting to the rateable valuation, it is pertinent to note that the assessee did not file any documentary evidence from the Municipality. It is well known principal of law canonized in the dictum : - "DE NON APPARENTIBUS ET NON EXISTENTIBUS EADEM EST RATIO", meaning thereby the which does not appeal will not be presumed to exist. The letter from the Builder is the self-serving document. As such, no conclusion can be drawn on the basis of that letter. The conduct of the assessee in furnishing the incorrect certificate concerning the fresh evidence proves beyond the shadow of doubt that the evidence which was furnished originally was incorrect. Besides, as man should not be permitted to blow hot and cold with reference to the same fact or insist, at different times, on the truth of each two conflicting allegations, according to the promptings of his private interest. This in inculcated in the common law dictum :

"ALLEGANS CONTARIA NON EST AUDIENDUS" (he is not to be heard who alleges things contradictory to each other).

25. As the ALV on the basis of rateable value was not correctly mentioned, as such the AO proceeded to determine the value as per the mandate of the decision of the Hon'ble jurisdictional High court rendered in the case of M V Sonavala (Supra), wherein it is laid down that the income from house property has to be computed on the basis of the sum for which the property might reasonably by let from year to year. In determining such value, the AO adopted the rent paid by the same tenant to the landlord. Thereafter he calculated the usufructus and determined the ALV. Various precedents were placed before us. We have considered all the precedent. Examined the text and context. A close similarity between one case and another is not enough. Even a single significant detail may alter the entire aspect. The facts the present case are totally different from the facts of the cases referred. We have made it clear in the preceding Paras that no addition is possible with reference to the notional interest on interest free deposit. But if there is no rent paid and in lieu of that rent excessive deposit is being made, the usufructus of the said deposit may be considered as rent.

Normally the deposits is made as security for the payment of rent and the vacation of premises on the expiry of lease. Here the deposit is accepted in lieu of rent. As such, in our opinion, the revenue authorities were correct in considering the usufrucuts from the security as rent. We find no infirmity in the impugned order. Accordingly we confirm the same on this count. "

6. While hearing the appeals of the assessee for the assessment years under consideration, the Co-ordinate Bench of this Tribunal had expressed its reservation on the conclusion arrived by this Tribunal in assessee's own case for the assessment years 1990-91 and 1991-92 and accordingly, the issue was referred vide recommendation dated 21.10.2005 for consideration of Special Bench consisting of three or more Members to decide the question whether the notional interest on interest free deposits received by the assessee be take into consideration in determining the Annual Letting Value of the property u/s 23(1)(b) of the Act.

7. The Hon. President of this Tribunal constituted the Special Bench of three Members for deciding the issue referred to the Special Bench vide order dated 21.11.2006. Subsequently, the revenue vide its letter dated 20.02.2007 and again vide letter dated 20.4.2009 objected to the constitution of the Special Bench on the issue involved in the assessee's case on the basis that the assessee has already filed the

appeal before the Hon. Jurisdictional High Court against the order of this Tribunal for the assessment year 1990-91 and 1991-92 on identical issue. The Hon. High Court has admitted the appeal vide order dated 29.12.2004. Thus, the revenue has pleaded that the order of constitution of Special Bench be withdrawn. The revenue also referred the precedent in the case of M/s Star Limited Hongkong, where in the similar circumstances the order of Constituting the Special Bench was rectified and withdrawn on the ground that the matter had already been admitted and pending before the High Court. The revenue has also cited the decision of this Tribunal in the case of Harsh Achyut Bhogle V/s ITO reported in 114 TTJ(Mum) 266, where this Tribunal has taken a view that when the matter is already pending before the jurisdictional High Court, the Special Bench of this Tribunal is not to be constituted to consider the issue which has already been decided by the Tribunal in assessee's own case. The Special Bench after hearing both the parties, on the letter of the revenue for withdrawal of the Special Bench, had recommended to the Hon'ble President, ITAT to consider the withdrawal of the reference matter from the Special Bench vide recommendation dated 23.06.2009. Subsequently, due to transfer of one of the Member of the Special Bench and re-nomination of the substituting Member of the Special Bench,

the Special Bench again found it is a fit case to be considered by the Hon. President, ITAT for withdrawal of the Special Bench vide note-sheet dated 6.9.2010. Accordingly, the hon'ble President vide order dated 7.9.2010 withdrawn the reference to the Special Bench in the case of the assessee for the assessment years under consideration. Thus, the appeals have been placed before the regular Division Bench for hearing and disposal in accordance with law.

8. In the backdrop of the above facts and circumstances of the case we have heard the learned Senior Counsel Shri Dastur as well as the learned DR Smt. Ashima Gupta at length. The learned senior counsel submitted that the assessee has given premises to the CITI Bank on leave and license and as per the Clause (4) of the Leave and license agreement dated 29.11.1988, the leave and license fee agreed between the parties is Rs.9825. He has further submitted that the said leave and license fee or compensation payable by the CITI Bank is inclusive off all present taxes and outgoings to the extent of Rs.9,825 per month ;but the license fee agreed between the parties is not being the reimbursement of taxes and maintenance charges payable by the assessee. The terms of license fee clearly state that all the present taxes and outgoings to the extent of

Rs.9825/-, the license fee will remain at Rs.9825, in case, any increase in such taxes and out goings in excess of Rs.9825/- per month the licensee has to pay the same. Thus, the learned Sr.Counsel has submitted that Rs.9825/- is the amount of license fee or compensation and not for reimbursement of taxes, maintenance and outgoings etc. The condition in the agreement is only regarding the increase in the license fee whenever there is a increase in taxes and outgoings. He has further submitted that for determining the income from house property u/s 23(1) the starting point under clause (*a*) is the sum for which the property might reasonably be expected to let from year to year. He has submitted that it has been held in the various decision of this Tribunal as well as in the decisions of the High Courts that such value is the municipal ratable value. In the present case, the Municipal Corporation has determined the ratable value of the property at Rs.78,750/-. He has then referred the provisions of section 154 of the Mumbai Municipal corporation Act, 1888 as well as section 23(1)(a) of the Act and submitted that the language used in both the provisions is similar. He has then referred the decision of the Hon. Supreme Court in the case of Mrs. Sheila Kaushish V CIT reported in 131 ITR 435 (SC) and submitted that the Supreme Court has accepted that the definition of annual value in the Income Tax Act and the

ratable value under Municipal Act are identical. The ld. Sr.Counsel then referred the agreement for interest free deposits and submitted that as per clause 2 of the said agreement the bank agreed to pay the assessee a sum of Rs.1,54,00,000/- as security deposit for due fulfillment and observance of the terms and conditions and covenants of the leave and license agreement. Thus, the ld. Sr. Counsel submitted that the amount of Rs.1,54,00,000/- was refundable deposits as a security by the bank to the assessee for ensuring the fulfillment of the terms and conditions of lease and license agreement for getting back the possession of the premises in question. The ld. Sr. Counsel thus submitted that when it is clear from the terms and conditions of the agreement under which the deposits received by the assessee that the deposit was made only as a security for ensuring the proper fulfillment of the terms and conditions of the leave and license agreement as well as getting back vacant possession of the premises at the end of the term of the leave and license then it cannot be treated as deposit against the occupancy of the premises and part of the income from house property.

9. The learned Sr Counsel has referred various decisions and submitted in the written synopsis as under :

"1.

(a) in case of Mrs. Sheila Kaushish V CIT 131 ITR 435 (SC) the Supreme Court has accepted that the definition of annual value in the Income Tax Act and the ratable value under the Municipal Act are in identical terms.

(b)in case of CIT V/s Prabhabati Bansali 141 ITR 419 (Cal) This case was also concerned with a property covered by the Mumbai Municipal Corporation Act, 1888. After referring to decisions of the Supreme Court in Dewan Daulat Raj Kapoor V/s NDMC 122 ITR 700 and Mrs. Sheila Kaushish V CIT 131 ITR 435 and paragraph 9 of the circular no,. 204 dated 24th July, 1976 explaining the provisions of Taxation Laws (Amendment) Act, 1975 which inserted clause (b) in section 23(1), the Court concluded that "...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 relevant"

(c)in case of M.V.Sonavala V CIT 177 246 where the Bombay high Court has followed the decision of the Calcutta High Court in CIT V/s Prabhabati Bansali 141 ITR 419 and concluded that the municipal value is to be regarded as the sum for which the property might reasonably be expected to let from year to year that it was municipal ratable value which was unequivocally regarded as the sum for which the property might reasonably be expected to let from year to year in so far as section 23(1)(a0 is concerned, i.e. the municipal ratable value is in no way to be adjusted upward or downward.

(d)in case of Smt. Smitaben N Ambani V CWT 323 ITR 104 (Bom) whre Municipal ratable value has been held to be the gross maintainable rent for the purposes of rule 1BB of the Wealth tax Rules.

(e)in case of CIT V/s Shapoorji and co (Rajkot) pvt ltd- (unreported) wherein for the assessment years 1994-95 and 1995-96 the AO had assessed the annual value at Rs.4,62,000 based on two criteria viz (i) return on investment and (ii) rent fetched by similar premises while, the Tribunal and the Bombay High Court has upheld the assessee's contention that such annual value should be the Municipal ratale value which was about Rs.45,000/-. This was despite the fact tht similar premises fetched Rs.60,000/- per month.

(f)also relied upon the decision of Bombay High Court dated 29.8.2009 in Bhansali International pvt ltd V/s ITO in Income Tax Appeal no. 758, 759 and 866 of 2008 u8nreported.

2. Municipal ratable value should be the basis for determining the annual value under section 23(1)(a) of the Act, Standard rent can be adopted as the annual value under the said clause only if it is lower than the municipal ratable value-Park Paper Industries (P) Ltd V/s ITO 25 SOT 406 (Mum) and the other decisions mentioned therein including Prabhabati Bhansali's case mentioned above, which decision has been followed by the Bombay high Court in Sonavala's case. It was pointed out that normally determined at 6% of the investment in the land and 8 2/3% of the building investment or about 7% of the total cost.

3. Municipal ratable value has been accepted as the annual value under section 23(1)(a) of the Act even in case where the landlord had accepted interest free security deposit from the tenant:

(a) ITO V. Cygnus Negri Investment P ltd (unreported) where the assessee was receiving Rs.5 per sq. ft. while another unit in the same building was fetching Rs.225 per sq. ft-Revenue's appeal against the Tribunal's order has been dismissed by the High Court as the actual rent received was more than the municipal ratable value and therefore section 23(1)(a) was applicable . (the municipal ratable value was accordingly less than Rs.5 per sq. ft). It is to be noted that no weightage was given to the fact that a deposit of Rs.1,10,00,000/- was received by

the landlord. The Supreme Court has dismissed the Special Leave petition of the Revenue .
(b) CIT V/s Satya Co.Ltd 75 TM 193(Cal) At page 202 the Court has held that no adjustment is to be made for the notional interest on the interest free deposits of Rs.10,40,000/- received by the owner

c) CIT V.s Hemraj Mahabir Prasad ltd 279 ITR 522 (Cal). Here also no addition was made on account of the interest free deposit of Rs.50 lac.

The aforementioned decisions show that a wide disparity between the municipal ratable value and the actual rent fetched by a property is not unusual.

4. No addition of notional interest can be made for arriving at the annual value under section 23(1)(b) of the Act as held by the High Court at Bombay in CIT V/s J K Investors (Bombay) ltd 248 ITR 723. The Supreme Court has dismissed the SLP filed by the revenue . Indeed the decision in paragraphs 3(a)(b) and (c) above also consider the question of addition under section 23(1)(b) for interest free deposits.

Thus, neither under section n23(1)(a) nor under section 23(1)(b) can be an addition be made for interest free deposits. Indeed in paragraphs 18 and 19 of its order dated 30th June, 2003 for assessment years 1990-91 and 1991-92 the Tribunal itself has accepted this position"

10. It is submitted that the assessee invested the said amount of Rs.1,54,00,000/- in purchasing of the properties and acquired shares and also advancement of the loans, therefore, the income from the investment of the said amount is taxable and the addition of notional interest in the annual value for computation of income from house property amount to double taxation of the same income. The learned senior counsel

has submitted that by making the addition on account of notional interest, the AO has determined the annual ratable value which is more than the cost of acquisition of the property in question which itself shows that even as per the standard rent and annual value is only about 8% of the cost of the property.

11. Thus, the learned senior counsel submitted that the conclusion reached by the Division Bench of this Tribunal in the assessee's case for the assessment years 1990-91 and 1991-92 does not lay down the correct law and is contrary to the law as laid down by the Bombay high Court and the Apex Court for the following reasons;

(a) Firstly, there is an inherent contradiction in the Tribunal's order. In paragraphs 18 and 19 of the order Tribunal has clearly held that no addition can be made in respect of notional interest on interest free security deposits either under section 23(1)(a) or 23(1)(b) and yet ultimately a view adverse to the assessee was taken;

(b) under section 23(1)(a) once it is held that municipal ratable value is to be regarded as the annual value, then, the Tribunal erred in disregarding the same on the ground that in its opinion no credence can be given to the certificate issued

by the builder as assessment of Municipal Corporation was not appended thereto and that the value was ridiculously low. If it was not clear as to what was the municipal ratable value then it is respectfully submitted that the Tribunal ought to have laid down the principle that u/s 23(1)(a) the municipal ratable value ought to be adopted and directed the AO to determine the municipal ratable value. The AO could verify the correctness of the certificate issued by the society at page 66 of the paper book. It has been pointed out about that it is not unusual to have a wide disparity between the municipal ratable value and the actual rent and this is not “ridiculous”

(c) The tribunal has upheld the addition in respect of notional interest on the deposit as “usufructus of the amount of deposit” . This conclusion is reached on the ground that in the assessee’s case there is no rent. The assessee submits that :

i) The Tribunal’s conclusion that there is no rent in the present case is incorrect because the assessee has actually received rent or license fees of Rs.9825/- per month which fact is borne out by the license agreement. Whether a license fee is received or not is to be determined by considering the position and relationship prevailing between the assessee and

Citibank and has nothing to do with what the licensor has to pay out ;

(ii) in this regard the Tribunal has referred to the statement of Mr.S Vaidyanathan from Citibank. The assessee submits that firstly, this was a leading question put by the revenue to Mr.S Vaidyanathan. Further, the earlier Bench of the Tribunal has overlooked his reply to Q.no.2 where he has accepted the license fee to be Rs.9825 pm. In any event, what is the license fee/rent of the premises is to be judged on the basis of the agreement and not the understanding of Mr. Vaidyanathan;

iii) Assuming without admitting that there is no rent received by the assessee the annual value under section 23(1)(b) would be nil and, therefore the annual value will have to be determined only under section 23(1)(a) which as mentioned above is equivalent to the municipal ratable value.

(d) Tribunal's conclusion that usufructus of the amount of deposit is to be regarded as consideration for user of property would appear to suggest that the addition of notional interest is being made under section 23(1)(b) of the Act which is contrary to decision of the jurisdictional High Court in CIT V/s J K Investors (Bombay) ltd 248 ITR 723 as noted by the Tribunal itself in paragraphs 19 of its order.

12. The learned Sr. Counsel submitted that even at the time of hearing of the appeal of the assessee by the Division Bench of this Tribunal has expressed its reservation in fallowing the decision of the Co-ordinate Bench of this Tribunal in assessee's own case for the assessment years 1990-91 to 1991-92. The Tribunal has recommended for constitution of Special Bench of this Tribunal by noting down the decision of this Tribunal reported in assessee's case reported in **93 ITD 426** and the decision of the jurisdictional High Court in the case of J K Investors. Since the reference to the Special Bench has already been withdrawn, this Tribunal now should take an independent view without following the earlier decision of this Tribunal in assessee's own case**.** Since the Tribunal's earlier decision is contrary to the decision of the Hon. Supreme Court and the High Court, therefore, this Tribunal is not bound to follow the earlier decision in assessee's own case. The ld. Sr. counsel has submitted that annual value as per section 23(1)(a) shall be standard rend or Municipal value whichever is low. If the standard rent is more than the municipal value then only municipal value should be considered as per the provisions of section 23(1)(a). The learned senior counsel has referred the certificate from the co-operative society

regarding the ratable value of the property in question. As per the said certificate dated 28.03.2003 the ratable value of the property in question is only Rs.78,750/- for the period from 1.4.1987 to 31.3.1993. The learned sr. counsel has submitted that when the ratable value which is the annual value as per section 23(1)(a) is less than the actual rent received by the assessee then the annual value of the property in question shall be actual rent received by the assessee and there is no question of making any addition on account of notional interest on interest free deposits. The ld. Senior counsel has pointed out that the Municipal taxes in respect of the property in question is Rs.64845/- for the year under consideration and the ground rent payable by the assessee is Rs.17665/-. Therefore, the total outgoing even as per the AO is less than Rs.1,17,900/- which is license fee received by the assessee. The learned senior counsel has submitted that when the assessee is receiving more than outgoing then it cannot be treated or said that the license fee received by the assessee is only reimbursement of the outgoings which comprises municipal taxes, ground rent etc. Even if it is presumed that the same is as reimbursement it would not be treated as other than license fee because even if it is going towards taxes and other charges it has nothing to do with the license fee. The learned Sr. Counsel has further

contended that even if no license fee received by he assessee the assessee is under statutory obligation to pay municipal taxes, therefore, there is no nexus between payment of the taxes and the license fee. The provisions in the agreement is only for enhancement of the license fee whenever there is an increase in the municipal taxes payable. The learned Senior counsel has pointed out the word “actual rent” was not in the section 23(1) at the relevant point of time and the term actual rent has been introduced by the amendment vide Finance Act 2001 w.e.f 1.4.2002. Prior to that only annual rent received or receivable by the owner existed in the provisions. Thus, the learned Sr. Counsel has submitted that there is no scope or question for making any addition on notional basis while determining the annual rent received or receivable. As regards in the statement of of Shri Vaidyanathan recorded by the AO, the learned Sr. Counsel submitted that the statement does not alter the treatment of the agreement between the parties and the nature of the receipt as per the agreement. The ld. Sr.Counsel then referred the Income Tax Bill 1997 wherein there was a proposal to include the notional interest but the proposal was dropped and therefore the intention of the legislature is clear that while computing the income of the property no notional interest can be added.

13. On the other hand, the learned DR has submitted that the issue involved in the appeals of the assessee has been considered and adjudicated upon by this Tribunal in assessee's own case for the assessment year 1990-91 and 1991-92. Therefore, as per Rule of consistency this Tribunal should follow the earlier decision of this Tribunal in assessee's own case and decide the appeals as covered against the assessee. The learned DR has submitted that the leave and license is the same and no change in the facts and circumstances between both the case i.e. case in hand and decided by this Tribunal in assessee's own case. The facts were examined by this Tribunal therefore, it is not a case where any evidence has been dis-regarded by this Tribunal while deciding the earlier case of the assessee. The learned DR submitted that, if there was any error in the order of this Tribunal, then the assessee could have filed Miscellaneous Petition for rectification of the mistake u/s 254(2) of the Act. Since, the assessee has already challenged the decision of this Tribunal before the Jurisdictional High Court for the assessment year 1990-91 and 1991-92 then the order passed by this Tribunal should be followed in the subsequent year. The learned DR has referred the decision of the jurisdictional High Court in the case of H A Shah and Co. V/s CIT reported in 30 ITR 618 and submitted that it is not open to the Tribunal

to come to different conclusion to one arrived by this Tribunal by different Bench. If the first Tribunal took a particular view as to construction of documents, the hon. Jurisdictional High Court has observed that it would not be open to the second Tribunal to disturb the decision given by the first Tribunal, in case of construction of documents is not a matter of computation or matter of reckoning which may alter from year to year or from assessment year to assessment year. The learned DR has further submitted that even though the principle of resjudicata may not apply even thought the there may be estoppels. It is very desirable that there should be finality and certainly in all litigation including the litigation arising out of the Act as observed by the HON. Jurisdictional Hugh Court in the said case.

14. The learned DR has, therefore, referred the third member decision of this Delhi Bench of this Tribunal in the case of NPAR Drugs (P) Ltd V/s DCIT reported in 100 TTJ 38 and submitted that the decision of the co-ordinate bench of this Tribunal should be followed and the subsequent Bench should not proceed on its own taking contrary decision. The learned DR has then referred the decision of Hon. Jurisdictional High Court in the case of Mercedse Benz private limited V/s Union of INDIA and ors in writ petition

no.1614/10 order dated 17.3.2010 and submitted that the Hon. Jurisdictional High Court has observed that if the Tribunal wants to differ with the earlier views taken by this Tribunal in the identical set of facts, the judicial discipline requires reference to the Larger Bench. One co-ordinate BENCH finding fault with another co-ordinate bench is not healthy practice. Judicial discipline and legal propriety demands that the bench which does not agree with the decision of co-ordinate bench should refer the matter to a Larger Bench. The ld. DR has referred the decision of Full Bench of the Hon. Andhdra Pradesh High Court in the case of CIT V/s B R Construction reported in 202 ITR 222 (AP) and submitted that the Hon. AP High Court has discussed the issue of decision giver per- in-curium in detail and held that the Rule per –in-curium has limited application and is applicable only in the rarest of rare cases. The decision of the co-ordinate Bench of this Tribunal is a binding precedent and if the subsequent Bench doubts the correctness of the decision then it would be referred to the proper Bench of the Larger Bench.

15. On merits, the learned DR has submitted that the decision in the case of Mrs. Sheila Kaushish V CIT (Supra) and the decision in the case of Deewan Daulat Rai Kapoor

(122 ITR 700) has been considered by the Hon. Jurisdictional High Court in the decision rendered in the case of M V Sonavala V/s CIT (177 ITR 246 (Bom). Therefore, in the case of Deewan Daulat Rai Kapoor and . Mrs. Sheila Kaushish V CIT, the Hon. Supreme Court held that the standard rent alone can be the basis for the fixation of Municipal ratable value. The ld. DR has submitted that the assessee did not produce any cogent evident regarding the Municipal value of the property in question. The ld. DR has further contended that even in the case of Mrs. Smitaben N Ambani V CWT 323 ITR 104 (Bom) the Hon. Bombay High Court has held that the Municipal Ratable value should adopted for arriving at gross municipal rent. The ld. DR has thus submitted that in this decision the standard rent has not been ruled out for determining the annual value on the basis of which the property might reasonably be let out from year to year as per the provisions of section 23(1)(a) of the Act. Even the decision in the case of Smitaben N. Ambani (supra) is on the point of gross maintainable rent in the case of self occupied property and valuation of house for the purpose of wealth tax. She has relied upon the decision of the Hon. Patna High Court in the case of Kashi Prasad Kataruka V. CIT reported in 101 ITR 810 as well in case of ITO v/s Baker Technical Services Pvt. Ltd., (2010) 125 ITD 1 (Mum.)(TM)and

submitted that the municipal value is only an indication as to be reasonable annual letting value of the property subject to the reduction or enhancement on the basis of other material on records. The standard rent is the more proper and reliable method and it is only guidance on the basis of which the annual letting value can be determined. The ld. DR has then relied upon the decision of this tribunal in the case of ITO V/s Makrupa Chemicals (P) Ltd reported in 108 ITD 95/110 TTJ (MUM)489 and submitted that this Tribunal after considering the decision in the case of J K Investor (supra) , K Prabhabati Bansali and Deewan Daulat Rai Kapoor and Mrs. Sheila Kaushish V CIT has held that the municipal ratable value is not binding on the AO if the AO can show that ratable value under the Municipal Law does not represent the correct fair market value/rent then he can determine the same on the basis of material/evidence placed before him. The ld. DR has then relied upon the reference of the Hon. Delhi High Court for constitution of larger bench in the case of CIT V/s Moni Kumar Subba in ITA No.803 of 2007, ITA No.499 of 2008 and 1113 of 2008 vide order dated 16.8.2010 and submitted that the Division Bench of the Hon. Delhi High Court did not agree with the decision of the Hon. Calcutta High Court in the case of CIT V/s Satya CO Ltd reported in 75 TM 193 (Cal) and the decision of the Delhi High Court in the case of CIT V/s

Asian Hotels ltd reported in 215 ITR 84. The Hon. Delhi High Court observed that the AO might ultimately formed an opinion that there would be reasonable expectation that the property would fetch higher rent than the contractual rent even when the contractual rent is more than the annual value fixed by Delhi Municipal Corporation. Accordingly, the issue has been referred to the Hon. Chief Justice for constitution of Full Bench and to consideration the issue.

16. She has also relied upon the orders of the lower authorities as well as the decision of this Tribunal in assessee's own case for the assessment years 1990-91 and 1991-92.

17. In rebuttal, the learned Sr.Counsel submitted that even the jurisdictional High Court in the case of H A Shah and CO. V. CIT and excess profits tax (supra) observed that if the Tribunal in the earlier decision failed to take into consideration the material facts and if these material facts has been taken into consideration the decision would have been different than the second Tribunal would be in the same position to revise earlier decision as fresh facts has been placed before it. On principle, there is no large difference between fresh facts being placed before the second Tribunal and the Second

Tribunal by taking into consideration certain material facts which the first Tribunal failed to take into consideration. It may be said that even though the first Tribunal may take into consideration all the facts still its decision may be so erroneous as to justify the subsequent Tribunal in not adhering to that decision. The ld. Sr. counsel has pointed out that in view of the various decisions of the Hon. Jurisdictional High Court and the decision of he Calcutta HIGH Court and the decision of the Hon.Supreme Court, apart from the decision of the Tribunal, this Bench needs not to adhere with the earlier decision of this Tribunal in assessee own case. The learned Sr.Counsel has stressed that when the issue is settled by the decision of the Hon. Supreme Court and High Courts in subsequent decisions then the Tribunal has to follow the same instead of following the earlier decision of this Tribunal. He has specifically pointed out that in the case if CIT V/s Shapoorji and Co.(Rajkot) Pvt ltd in ITA No.7051/Mum/98 AY 1994-95 and 1995-96 order dated 29.7.2003 and in the case of Smitaben N. Ambani (323 ITR 104) and Bansali international Private limited the Hon. Jurisdictional High Court has taken the view which is in favour of the assessee and therefore this Tribunal has to take an independent view by following the decisions of the Hon. Jurisdictional High Court. He has further pointed out that it is

not clear from the record that under what provision, the additions was made by the AO whether by determining the reasonable rent expected to be fetched by letting out the property year to year u/s 23(1)(a) or the rent received or receivable under section 23(1) (b). The Learned Sr.Counsel has pointed out that when the rent received by the assessee is more than the municipal value of the property then no addition can be made and the rent received has to be determined as annual value for the purpose of section 22 of the IT Act, 1961.

18. We have considered the rival contentions and relevant record. For the purpose of taxation of income from house property, section 22 prescribes the annual value of the property consisting of building or land appurtenant thereto of which the assessee is owner. Thus, income from house property is measured as annual value of the property. Section 23 contemplates the manner in which the annual value of the property has to be determined. As per subsection (1) of section 23 the AO has to first determine the sum for which the property might reasonably be expected to fetch the rent from year to year and then if the property is let out compare the same with the annual/actual rent received or receivable. Thus, as per clause (a) of sub-section (1) of section 23 the reasonable rent expected to be fetched by he property by

letting out from year to year has to be determined. Clause (b) of subsection (1) of section 23 deals with the cases where the property is let out. It is pertinent to note that prior to amendment with effect from 1.4.1996 there was no such clause (b) in sub-section(1) of section 23. The provisions was further amended by the Finance Act 2001 w.e.f 1.4.2002 whereby the word "annual rent received or receivable" has been substituted by the word " actual rent received or receivable". Though this change of the term from annual rent to actual rent has not altered any material meaning of the provision except for the first year of letting out or the property is not let out for full year. Thus, for determination of the ALV under section 23(1), the AO has first to find out the reasonably expected rent which the property might fetch by letting out from year to year and then this reasonably expected rent has to be compared with the annual rent received or receivable by the owner and if annual rent received or receivable as contemplated under section 23(1)(b) is in excess of the reasonable rent expected from letting out the property from year to year as determined u/s 23(1)(a) the amount so received or receivable would the annual value for the purpose of section 22 of the Act.

19. The Income Tax Act does not define the term reasonable expected rent to be fetched by the property from letting out

from year to year. No method for determination of such reasonable rent u/s 23(1)(a) has been provided either in the Act or in the Rules framed thereunder. Only the judicial pronouncements on the issue have thrown some light as how to determine the sum for which the property may reasonably be expected to let out from year to year u/s 23(1)(a). In the case of Mrs. Sheila Kaushish V CIT (supra), the issue involved was whether the actual rent received by the assessee or standard rent under the Delhi Control Act should be taken to be the annual value of the property within the meaning of section 23 of the Act. The said case pertains to the assessment year 1969-70 and assessment year 1970-71 therefore, the unamended provisions of section 23 were applicable. In the said case, the Hon'ble Supreme Court has observed that this question stands concluded by the decision in the case of Dewan Daulat Rai Kapoor v. New Delhi Municipal Committee, (supra). Accordingly, it has been held that even if the standard rent of the building has not been fixed by the controller u/s 9 of the Rent Control Act the annual value of the building according the definition given in subsection (1) of section 23 must be the standard rent determined under the provisions of Rent Control Act and not actually rent received by the landlord from the tenant. Finally the Hon. Supreme Court has observed as under

"We accordingly answer question No. 1 in favour of the assessee by holding that the standard rent of different portions of the warehouse determinable under the provisions of the Rent Act, as indicated above, and not the actual rent received by the assessee from the American Embassy should be taken to be the annual value of the warehouse within the meaning of sub-section (1) of section 23 of the I.T. Act, 1961. On this view taken by us, the assessee did not press question No. 2 and hence it is not necessary to answer it. We allow the appeals of the assessee to this limited extent and direct that the revenue will pay the costs of the appeals to the assessee"

20. Thus, it is clear from the decision of the Supreme Court in the case Mrs. Sheila Kaushish V CIT (supra), that for determination of Annual value, the standard rent should be the basis and the actual rent received by the land lord is not relevant. In the case of Dewan Daulat Rai Kapoor v. New Delhi Municipal Committee,(supra), the issue was computation of ratable value of the property which though covered under the Rent Control Act, but standard rent was not fixed and the time for application for fixation of the standard rent was also expired. In the said case, the question before the Hon Supreme Court was as to how the annual value of building should be determined for levy of house tax where the building is governed by the provisions of Rent Control Act but the standard rent has not yet been fixed. In the said case the Hon. Supreme Court has held that even if the standard rent of a building has not been fixed by the Controller under section 9

of the Rent Act, the landlord cannot reasonably expect to receive from a hypothetical tenant anything more than the standard rent determinable under the provisions of the Rent Act and this would be so equally whether the building has been let out to a tenant who has lost his right to apply for fixation of the standard rent by reason of expiration of the period of limitation prescribed by section 12 of the Rent Act or the building is self-occupied by the owner. Thus, it was held that in either case, according to the definition of the annual value the standard rent determined under the provisions of Rent Control Act and not actual rent received by the land lord from the tenant would constitute the correct measure of annual value of the building. The hon. Apex Court pointed out that in each case the assessing authority would have arrived at its own figure of standard rent by applying the principle laid down under Rent Control Act for determination of the standard rent and determination of annual value of the building on the basis of such figure of standard rent. In the case of CIT vs. Prabhabati Bansali (141 ITR 419) (Cal) the Hon'ble Calcutta High Court has observed at page 433 -435 as under :

> *"17. Therefore, in a 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 a 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 Hon**. C**alcutta High Court has considered the decision of the Hon. Supreme Court in the case of Dewan Daulat Rai Kapoor v. New Delhi Municipal Committee, and Mrs. Sheila Kaushink(supra) as it was held by the Hon. Supreme Court in the case of Dewan Daulat Rai Kapoor v. New Delhi Municipal Committee, that the annual value of the property for the purpose of municipal taxes should be computed as per the provisions of Rent Control Act for computing the standard rent and therefore, the Municipal value should not be above the standard rent. Accordingly, the hon. High Court in the case of Prabhabati Bansali (supra) has held that the annual value of the 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. This findings of the Hon. Calcutta High Court has to be

understood in the context of decision of the Hon Supreme Court in the case of Dewan Daulat Rai Kapoor v. New Delhi Municipal Committee,(supra) and Mrs. Sheila Kaushish *v.*Commissioner of Income-tax (supra). In the case of M.V. Sonavala vs. CIT (177 ITR 246) (Bom);. the hon. Jurisdictional High Court has considered the decision of the Hon. Supreme Court in the case of Dewan Daulat Raj Kapoor (supra) in the case of Mrs. Sheila Kaushish as well as the decision of the Hon. Calcutta High Court in the case of Prabhabati Bansali (supra). Thus, from all the decisions of the Apex Courts and the Hon. HIGH Courts, it is clear that the standard rent or the municipal value where the property is not governed by the Rent Control Act would be the safest guidelines for computing the sum for which the property might reasonably be expected to let from year to year u/s 23(1)(a). Even in the case of Smt. Smitaben N. Ambani (323 ITR 104) jurisdictional High Court has held as under :

> *"17. The Advocate for the assessee relied upon the judgment of the Calcutta High Court in the case of CIT vs. Smt. Prabhabati Bansali (1982) 29 CTR (Cal) 15 : (1983) 141 ITR 419 (Cal). In that case the Tribunal had directed the ITO to determine the annual value of the property afresh with reference to its rateable value as determined by the municipal corporation. In a reference, the Calcutta High Court held that the Tribunal had (was) justified in giving these directions.*

18. Advocate for the assessee then relied upon a judgment of this Court in the case of M.V. Sonavala vs. CIT (1989) 75 CTR (Bom) 74 : (1989) 177 ITR 246 (Bom), where this Court following the view taken by the Calcutta High Court in the case of CIT vs. Smt. Prabhabati (supra), held that the annual value of different properties should be calculated on the basis of which the property might reasonably be let from year to year or the annual municipal value. The aforesaid decision was given for calculating the annual value within the meaning of s. 23(1)(a) of the IT Act and the reference was one under the IT Act. The question in the case was also framed not in relation to standard rent but in relation to actual compensation received but the ultimate finding of this Court was it could be calculated on the basis of annual municipal value. To that extent, this judgment of our Court is relevant to the issue raised before us.

19. That it may be that in areas which are governed by rent control legislation the reasonable letting value cannot exceed the standard rent but if we consider the statutory definition of the term "standard rent" in rent control legislations and the mode and manner of calculating municipal rateable value, situations can be countenanced where the standard rent of a given premises might be more or different than the sum for which a house might reasonably be expected to be let from year to year as calculated by the local municipal authority for the purpose of arriving at the municipal rateable value. This possibility was noticed by this Court in the case of Nirlon Synthetic Fibres & Chemical vs. Municipal Corporation (2002) 104 (1) Bom. L.R. 762 wherein in para 20 this Court observed as under :

"It is therefore to be held that the authorities, while determining the rateable value under s. 154 of the said Act, have to bear in mind the provisions of the Rent Act and while deciding the rateable value have to take into consideration the provisions of the said Act as well as the Rent Act and considering the facts and materials placed before them have to arrive at the figure pertaining to the rateable value of the premises. While doing so, in cases where the Court under the Rent Act has already fixed the standard rent for any such premises, undoubtedly the same will

have to beconsidered for determining the rateable value of the building. However, in case no such standard rent has been fixed under the Rent Act, the reasonable amount of rent, which can be expected by the owner from a hypothetical tenant, has to be arrived at by taking into consideration the provisions of s. 11 r/w s. 5(10) of the Rent Act as also ss. 154 and 155 of the said Act. Sec. 155 of the said Act empowers the Commr. to call for information and returns from the owner or enter an exigible premises. It should be also borne in mind by the authorities that whatever figure which can be arrived at shall be a reasonable amount of rent which can be expected by the owner from a hypothetical tenant; i.e., the amount so arrived at should not be more than the standard rent which can be calculated in terms of the provisions contained in s. 11 r/w s. 5(10) of the Rent Act". (emphasis, italicized in print, provided)

20. In our view, the basis on which a self-occupied property is valued under r. 1BB of the WT Rules and municipal rateable value is arrived at under municipal law is the same i.e. "a reasonable amount of rent that can be expected by the owner from a hypothetical tenant". That while arriving at such reasonable amount of rent that can be expected by the owner from a hypothetical tenant, the amount of statutory deduction, if any, permissible under the local municipal law must be added to the rateable value. We thus answer question No. 3 as follows :

"That while applying provisions of r. 1BB for valuing the self-occupied property, municipal rateable value with addition of statutory deductions, if any, may be adopted instead of standard rent, for arriving at the gross maintainable rent."

21. In view of the questions as answered, the wealth-tax reference is disposed of with no order as to costs.

22. Thus, it is settled proposition that the assessing officer has to determine the reasonable rent expected to be fetched by the property by letting out from year to year in accordance

with method provided for fixation of standard rent or computation of ratable value. Since nothing has been provided under the provisions of section 23(1) of the Act which suggests that the AO has to adopt either municipal value or standard rent, therefore, the AO has to independently determined the sum for which the property might reasonably expected to be let out from year to year u/s 23(1)(a) in accordance with the provisions of as laid down under the Rent Control Act or Municipal Act. If the property is governed by the Rent Control Act then certainly the provisions of Rent Control Act has to be followed for determination of the sum for the property might reasonably expected to be let out from year to year u/s 23(1)(a). Thus, the AO is not bound to strictly substitute fair and reasonable rent expected to be fetched u/s 23(1)(a) by municipal value or standard rent. The Hon. Jurisdictional High Court in the case of J K Investors 248 ITR 723) has observed as under :

> *"4. In this matter, we are required to consider the scheme of taxation of income from house property. Section 22 says that the measure of income from house property is its annual value. The annual value is to be decided in accordance with Section 23. Sub-section (1) of Section 23, by virtue of the amendment with effect from the assessment year 1976-77, has two limbs, namely, Clauses (a) and (b). Clause (a) states that the annual value is the sum for which the property might reasonably be expected to be let from year to year. Clause (b) covers a case where the property is let and the actual rent is in excess of the sum for which the property might reasonably be*

expected to be let from year to year. In other words, insertion of Clause (b) by the Taxation Laws (Amendment) Act, 1975, covers a case where the rent for a year actually received by the owner is in excess of the lawful rent which is known as the fair rent or standard rent under the rent control legislation. The provisions of Section 23(1)(a) of the Income-tax Act apply both to owner-occupied property as also to property which is let out and the measure of valuation to decide the annual value is the standard rent or the fair rent. However, Section 23(1)(b) only applies to cases where the actual rent received is more than the reasonable rent under Section 23(1)(a) of the Act and it is for this reason that Section 23(1)(b) contemplates that in such cases the annual value should be decided on the basis of the actual rent received. As stated hereinabove, in this case, the Department has invoked Section 23(1)(b) which, as stated hereinabove, proceeds on the basis that the actual rent received by the assessee is more than the reasonable rent under Section 23(1)(a). The Tribunal has also found that the actual rent received by the assessee, even without taking into account the notional interest, was more than the annual value determinable under Section 23(1)(a) of the Act. This finding of fact has not been challenged by the Department in this appeal. On the contrary, the Department has contended that in this case, Section 23(1)(b) was applicable. They have not relied on the provisions of Section 23(1)(a). The question as to whether notional interest could have been taken into account under Section 23(1)(a) does not arise in this appeal and we do not wish to go into that question in this appeal. However, the moot point which needs to be considered in this case, is whether notional interest could form part of the actual rent received by the assessee under Section 23(1)(b) of the Income-tax Act. It is important to note that the property is covered by the provisions of the Bombay Rent Act. The scheme of Section 23(1)(b), in contradistinction to Section 23(1)(a), shows that the fair rent is the basis to determine the annual value of a property. This was the sole basis prior to the assessment year 1975-76. However, after the amendment of Section 23(1) by the Taxation Laws (Amendment) Act, 1975. the Legislature has clearly laid down under Section 23(1)(b) that when the actual annual rent received or

receivable is in excess of the fair rent determinable under Section 23(1)(a), then such higher actual annual rent would constitute the annual value of the property. It is important to ear in mind that under Section 22, the measure of income from house property is its annual value. The annual value is to be decided in accordance with Section 23(1). By virtue of the amend- ment, Clause (a) states that the annual value is the sum for which the property might reasonably be expected to be let from year to year whereas Clause (b) covers a case where the property is let and the actual rent is in excess of the sum for which the property might reasonably be expected to be let from year to year. In our view, this later insertion of Clause (b) by the Taxation Laws (Amendment) Act, 1975, is meant to cover a case where the rent per annum actually received by the owner is in excess of the fair rent or the standard rent under the rent control legislation. Now, in this case, the Department has invoked Section 23(1)(b). Now, in this case, it has been found that the actual rent received by the assessee is more than the fair rent even without taking into account notional interest. Generally, the fair rent is fixed even under the B.M.C. Act and the Rent Act by taking into account various principles of valuation, viz., the contractors' method, the rent method, etc. However, that exercise is undertaken to decide the fair rent of the property. In that connection, the actual rent received by the lessor also provides a piece of evidence to decide the fair rent of the property. However, under the Income-tax Act, the scheme is slightly different. 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. In the circumstances, the value of the notional advantage, like notional interest in this case, will not form part of the actual rent received as contemplated by Section 23(1)(b) of the Act. At the cost of repetition it may be mentioned that under Section 23(1)(a), the Assessing Officer 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 methods like the contractors method could be taken into account. If on comparison of the fair rent with the actual rent received, the Assessing Officer finds that the actual rent received is more than the fair rent determinable as above, then

the actual rent shall constitute the annual value under Section 23(1)(b) of the Act. Now, applying the above test to the facts of this Commissioner Of Income-Tax vs J.K. Investors (Bombay) Ltd. on 5 June, 2000 Indian Kanoon - http://indiankanoon.org/doc/604272/ 2case, we find a categorical finding of fact recorded by the Tribunal that the actual rent received by the assessee was more than the fair rent. Under the above circumstances, in view of the said finding of fact, we do not see any reason to interfere".

23. Thus the Hon. Jurisdictional High Court in the case of J K Investors (supra) has observed that that the scheme of section 23(1)(b), in contradiction of construction to section 23(1)(a) shows that the fair rent is the basis to determine the annual value of the property. This was sole basis prior to assessment year 1975-76. However, after the amendment of section 23(1) by the Amendment Act, 1975, the Legislature has clearly laid down in the section 23(1)(b) that when the real annual rent received or receivable is in excess of fair rent determined u/s 23(1)(a) then such higher actual annual rent would constitute annual value of the property. The Hon. Jurisdictional High Court has further observed that this later insertion of clause (b) by Taxation Law Amendment Act, 1975 is meant to cover the cases where the rent per annum actually received by the owner is in excess of fair rent or standard rent under the Rent Control Act. The AO has to decide the fair rent of the property by taking into consideration various factors. In such cases various method

like contractor method could be taken into account. Since the issue of notional interest forming part of the actual rent as contemplated under section 23(1)(b) was the issue involved in the said case, the Hon. High Court has left upon the issue of notional interest should form part of fair rent u/s 23(1)(a). The Hon. Patna High Court in the case of Kashi Prasad Kataruka vs Commissioner Of Income-Tax has held as under :

> *"10. Taking into consideration the test to be applied in the instant case and even applying the test laid down in the cases which had arisen before the various Rent Control Acts had come into force, suffice it to say that it had always been presumed that municipal valuation afforded an indication as to the reasonable annual letting value of a building which could be rebutted and either reduced or enhanced only on the basis of other materials on record for the purpose of such rebuttal. In the instant case the Rent Controller has fixed the rate of rent on the basis of municipal valuation as in law he was bound to do. A presumption with regard to such a valuation as being reasonable annual letting value for the purposes of Section 23 certainly attached to it and in the absence of any other material on record it was the only safe guide on the basis of which the annual letting value for the purposes of Section 23 could be fixed.*
>
> *11. Thus, taking into consideration the question in all its ramifications, I am constrained to hold that, on the facts and in the circumstances of the case, for determination of the annual value under Section 23, the rent fixed by the Rent Control Act [Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947], could be taken into consideration. I, accordingly, answer the question in the affirmative, in favour of the assessee and against the department. But, in the circumstances of the case, there shall be no order as to costs."*

24. Therefore, it is clear from the various judicial pronouncements that the standard rent or the municipal value, as case may be, is the one of the various factors to be taken into account by the AO while determining the fair rent expected to be fetched for letting out the property from year to year u/s 23(1)(a).

25. In the case of Makrupa Chemicals 108 ITD 95 (Mum), the co-ordinate Bench has taken a similar view after considering all the decisions relied upon by the either parties including, J K Investors, Smt.Prabhabati Bansali, Smt. *Mrs.* Shiela Kaushish (supra, Dewan D Kapoor and Kashiprasad Kataruka etc. In the said cases, this Tribunal has obsrerved in paragraphs 14 to 17 as under :

> *"14. All the decisions mentioned above were rendered in connection with the determination of rateable value under municipal laws. The ratio laid down in the above decisions has been applied by the apex Court for determining the ALV under s. 23 of the Act in the case of Mrs. Shiela Kaushish (supra) on account of similarity in the provisions under the municipal enactments and s. 23 of IT Act, 1961. Thus the rateable 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 rateable value is not binding on the AO. If the AO 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 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, 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 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 the standard rent.

16. Still the question remains 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 into 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. However, we find that Hon'ble Supreme Court had to consider this question in the case of Motichand Hirachand vs. Bombay Municipal Corpn. 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. Investors (Bombay) Ltd. (supra) has held that under s. 23(1)(a) of the Act, the AO can take into 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 methods 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 rent 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."

26. An identical issue had come up before this Tribunal in case of ITO v/s Baker Technical Services Pvt. Ltd., (2010) 125 ITD 1 (Mum.)(TM) and this tribunal held as under:

"17. However, whereas I agree with the learned AM that in this case the fair rental value was to be determined by considering various factors, I do not agree with him about the quantum of the fair rent determined by the AO, which has been approved by the learned AM. It is pertinent to mention that the AO in this case has adopted the rent received by the assessee from non-resident company in the previous year relevant to asst. yr. 2000-01 for a period of four months. Whereas the rent received during any period would be a relevant factor for considering the

fair rental value, yet one has to keep in mind various factors which may deflate or inflate the rental value. The AO as well as the learned AM have overlooked vital fact in this case that the same property has been let out at substantially lower rent to Deutsche Bank AG and subsequently to Bombay Stock Exchange. Admittedly, the assessee, apart from the rent received from Deutsche Bank AG and Bombay Stock Exchange, has received interest-free deposits from the tenants. As per the decision of the Bombay Bench of the Tribunal in the case of J.K. Investors (Bombay) Ltd. (supra), the benefit derived by the assessee from the interest-free deposit could be taken into consideration for determination of fair rental value under s. 23(1)(a) of the Act. In my considered view, the benefit derived by the assessee from the interest-free deposit could not be more than the lending rate at which the deposits were available in the market at the particular point of time. Even if that is taken into account, the fair rental value of the property does not work out to the amount determined by the AO and confirmed by the learned AM. I, therefore, partly agree with the learned AM that the ALV in this case cannot be limited to standard rent but I do not agree with him that the fair rent adopted by the AO is justified. I partly agree with the learned JM that the matter has got to go back to the AO instead of adopting the value determined by the AO. I hold accordingly.

18. Since this case is peculiar insofar as I have partly agreed with learned AM and partly with learned JM, I would like to give the following opinion : That in this case the ALV cannot be limited to the standard rent as workable under the Rent Control Act but the fair rental value shall have to be determined. The fair rental value determined by the AO however is not reasonable. The learned JM had proposed to set aside the order of the AO. To that extent I have agreed with him. So however, I have not agreed with him that the standard rent is to be determined and adopted as ALV under s. 23(1)(a) of the Act. The learned AM has held that the standard rent is not to be adopted. I have agreed with him to this extent. So however, I have not agreed with him that the fair rental value has to be adopted as adopted by the AO. The issue shall be set aside and restored to AO for determination of the fair rent to be adopted as the annual letting value.

19. The majority view can be formed on the basis of the above decision. So however, in case the Division Bench of the Tribunal considers it difficult to form the majority

opinion as per the orders in this case, it is suggested that a reference may be made to the Hon'ble President for making a further reference to a Member or Members for resolving the difference of opinion in accordance with law."

27. Averting to the facts of the present case, it is evident from the record that the AO has not made any inquiry or done any exercise in order to determine the fair rent or sum for which the property might reasonably be expected to let from year to year. For determining the annual letting value of the property, it is incumbent upon the AO to first determine the fair /reasonable rent expected to be fetched by the property under section 23((1)(a) and then it is to be compared with the annual rent received or receivable by the owner / assessee. If the annual rent received or receivable is in excess of fair rent determined u/s 23(1)(a) such higher annual rent would be the annual value of the property. As held by the Hon jurisdictional High Court in the case of J K Investors (supra) as well as in the case of Sheila Kaushik by the Supreme Court that if the property is governed under the Rent Control Act the standard rent is one of the various factors to be taken into account by the AO. To address the issue in the assessment year 1992-93 the A.O. held as under :

"The issue that this income will be assessed as income from house property has been upheld by

CIT(A) in assessee's own case in assessment year 1990-91 and 1991-92, Assessee's contention that standard rent should be considered for determining annual letable value cannot be considered as –

i)CIT(A) has in earlier years accepted value calculated by AO which was other than standard rent;

(ii) Hon. ITAT Bombay in case of ACIT V/s Meca Properties vide ITA No. 9288(Bom)/1990(E) Bench) ha upheld that value u/s 23 is to be determined independent of standard rent or valuation done by Municipal authorities. In fact this judgment has upheld that value of notional interest on interest free deposits has to be taken into account while deciding annual let- able value vide nothing on note-sheet dated 20.1.1995"

28. From the order of the AO is clear that the AO has not even made an attempt to determine the fair rent u/s 23(1)(a). It is also not clear as under what provision, the additions on account of interest on interest free deposits is made. It is pertinent to note that the alleged certificate given by the society for retable value was not available before the authorities below as it was given much later on 20.102003. Thus, in our view, the AO has not followed the proper procedure as provided under the provisions of section 23(1).

As we have discussed in the forgoing paragraphs that the decision of the Hon. Supreme Court in the case of Mrs. Shiela Kaushish (supra), the issue was whether the actual rent received by the land lord is relevant for determination of the annual value as per section 23(1). The Hon. Supreme Court held that the standard rent of different portions of the ware

house determinable under the provisions of Rent Control Act should be taken the annual value of the ware house within the meaning of sub-section (1) of section 23 of the Act an not the actual rent. Thus, the Hon. Supreme Court held that the actual rent received by the assessee from the tenant should not be taken to be the annual value within the meaning of sub-section (1) of Section 23. In the case of J K Investors (supra), the Hon.High Court has observed that while deciding the fair rent various factors should be taken into account. In such case various method like contractor method could be taken into account. As held by the Third Member decision of this Tribunal in the case of ITO v/s Baker Technical Services Pvt. Ltd (supra) that the annual letting value cannot be limited to standard rent but the standard rent is one of the various factors to be taken into account for determination of the fair rent. In the recent decision dated 30.3.2011, Full Bench of the Hon'ble Delhi High Court, in the case of CIT V/s Moni Kumar Subba and ors in ITA No.499 of 2010, ITA No.803 of 2007, ITA No.1113 of 2008, ITA No.388 of 2010, ITA No.516 of 2010, ITA No.1034 of 2010 and ITA No.1240 of 2010, after considering the decision of the Division Bench of the Hon.High Court in the case of CIT V/s Asian Hotels ltd observed and held in paragraph 13 to 22 as under :

"13. We approve the aforesaid view of the Division Bench of this Court and Operative words in Section 23 (1)(a) of the Act are "the sum for which the property might reasonably be expected to let from year to year". These words provide a specific direction to the Revenue for determining the „fair rent". The AO, 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". Provisions of Section 23(1)(a) do not mandate this. The Division Bench in ***Asian Hotels Limited (supra)****, 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* ***Commissioner of Income Tax*** *Vs.* ***J. K. Investors (Bombay) Ltd.****, [(2001) 248 ITR 723 (Bom.)] categorically rejected the formula of addition of notional interest while determining the „fair rent" in the following manner:*

> *".....Before concluding we may point out that under Section (23)(1)(b), the word "receivable" denotes payment of actual annual rent to the assessee. However, if in a given year a portion of the actual annual rent is in arrears, it would still come within Section (23)(1)(b) and it is for this reason that the word "receivable" must be read in the context of the word "received" in Section(23)(1)(b). In the light of the above interpretation,* ***notional interest cannot form part of the actual rent as contemplated by Section (23)(1)(b) of the Act****. We once again repeat that whether such notional interest could form*

part of the fair rent under Section (23)(1)(a) is expressly left open."

14. 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 Limited (supra)****.*

15. The next question would be as to whether the annual letting value fixed by the Municipal Authorities under the Delhi Municipal Authority Act can be the basis of adopting annual letting value for the purposes of Section 23 of the Act. This question was answered in affirmative by the Calcutta High Court in ***Satya Co. Ltd. (supra)*** *on the ground that the provisions contained in the Delhi Municipal Corporation Act for fixing annual letting value is pari materia with Section 23 of the Act. The Court opined that the fair rent fixed under the Municipal laws, which takes into consideration everything, would form the basis of arriving at annual value to be determined under Section 23(1)(a) and to be compared with actual rent and notional advantage in the form of notional interest on interest free security deposit could not be taken into consideration. It is clear from the following discussion therein:*

"6. With regard to question Nos. (5) and (6) which are only for the asst. yrs. 1984-85 and 1985-86 the further issue involved is whether any addition to the annual rental value can be made with reference to any notional interest on the deposit made by the tenant. When the annual value is determined under sub-cl. (a) of sub-s. (1) of s. 23 with reference to the fair rent then to such value no further addition can be made. The fair rent, takes into consideration everything. The notional interest on the deposit is not any actual rent received or receivable. Under sub-cl. (b) of s. 23(1) only the actual rent received or receivable can be taken into consideration and not any notional advantage. The rent is an actual sum of money which is payable by the tenant for

use of the premises to the landlord. Any advantage and/or perquisite cannot be treated as rent. Wherever any such perquisite or benefit is sought to be treated as income, specific provisions in that behalf have been made in the Act by including such benefit, etc., in the definition of the income under s. 2(24) of the Act. Specific provisions have also been made under different heads for adding such benefits or perquisites as income while computing income under those heads, e.g., salary, business. The computation of the income under the head House property is on a deemed basis. The tax has to be paid by reason of the ownership of the property. Even if one does not incur any sum on account of repairs, a statutory deduction therefore is allowed and where on repairs expenses are incurred in excess of such statutory limit, no deduction for such excess is allowed. The deductions for municipal taxes and repairs are not allowed to the extent they are borne by the tenant. However, even such actual reimbursements for municipal taxes, insurance, repairs or maintenance of common facilities are not considered as part of the rent and added to the annual value. Accordingly, there can be no scope or justification whatsoever for making any addition for any notional interest for determining the annual value. Whatever benefit or advantage which is derived from the deposits - whether by way of saving of interest or of earning interest or making profits by investing such deposit - the same would be reflected in computing the income of the assessee under other heads. In our view there is no scope for making any addition on account of so-called notional interest on the deposit made by the tenant, since there is no provision to this effect in s. 22 or 23 of the IT Act, 1961."

16. In fact, this is the view taken even by the Supreme Court in the case of ***Shiela Kaushish Vs. CIT [1981] 131 ITR 435 (SC)*** *on account of similarity of the provisions under the municipal enactments and Section 23 of the Act.*
17. It is on this basis that in the present case, the CIT (A) gave primacy to the rateable value of the property fixed by the Municipal Corporation of Delhi vide its assessment order dated 31.12.1996 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.

18. Since the provisions of fixation of annual rent under the Delhi Municipal Corporation Act are pari materia of Section 23 of the Act, we are inclined to accept the aforesaid view of the Calcutta High Court in ***Satya Co. Ltd. (supra)*** *that in such circumstances, the annual value fixed by the Municipal Authorities can be a rationale 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 incircumstances 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 AO 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 Vs. Smt. Padma Debi, AIR 1962 SC*** *151:*

> *"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." 16. Thus the rateable value, if correctly determined, under the municipal laws can be taken as ALV 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 Patna High Court in the case of ***Kashi Prasad Kataruka v. CIT [1975] 101 ITR 810****.*

17. The above discussion leads to the following conclusions:

(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, 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."

19. We may also add that in place like Delhi, this has now become redundant inasmuch as the very basis of fixing property tax has undergone a total change with amendment of the Municipal Laws by Amendment Act, 2003. Now the property tax is on unit method basis.

20. In the present case, the AO added notional interest on the interest free security for arriving at annual letting value. Since that was not permissible, the effect would be that such assessment was rightly set aside by the CIT (A) and the Tribunal. Therefore, the orders would not call for any interference. These appeals are, thus, dismissed on this ground. Once we hold this, the very basis adopted by the AO to fix annual letting value was wrong and therefore, no further exercise in fact is required by us in these appeals.

21. 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 AO 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 Vs. Bombay Municipal Corporation, AIR 1968 SC 441****:*

> *"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."

22. We have also taken note of the judgment of the Bombay High Court in the case of ***J.K. Investors*** (supra) wherein the Court hinted that various factors may become relevant in determining the „fair rent". The precise observations of the Court in the said judgment are as under:

"At the cost of repetition it may be mentioned that under ***Section (23)(1)(a), the Assessing Officer 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 methods like the contractors method could be taken into account****. If on comparison of the fair rent with the actual rent received, the Assessing Officer finds that the actual rent received is more than the fair rent determinable as above, then the actual rent shall constitute the annual value under Section (23)(1)(b) of the Act. Now, applying the above test to the facts of this case, we find a categorical finding of fact recorded by the Tribunal that the actual rent received by the assessee was more than the fair rent. Under the above circumstances, in view of the said finding of fact, we do not see any reason to interfere".*

29. From the decision of the Hon.Full Bench of the Hon. Delhi High Court, it is clear that for determination of the fair rent, the AO has to take into account various factors including standard rent. If the standard rent is not fixed then the procedure provided under the Rent Control Act for fixation of standard rent has to be taken into consideration. We may

mention that municipal value or standard rent itself is not sole binding factors on the AO but these are only guiding factor for determining the reasonable expected rent to be fetched by he property as contemplated u/s 23 (1)(a). If in the given case, the AO finds that the Municipal Value is not based on relevant material for determining fair rent in the market and there is a sufficient material on record for taking different valuation then the AO can determine the fair rent by inflating or deflecting the Municipal Value or Standard Rent as the case may be by taking into account the relevant material in this regard. As observed by the Hon. Delhi High Court if the ratable value is correctly determined under the Municipal law the same can be taken as annual letting value u/s 23(1)(a) of the Act. However, the ratable value is not a binding on the AO if the AO can show that the ratable value under Municipal law does not represent the correct fair rent. If the AO finds that the actual rent received is less than the fair market rent/market rent because of the reason that the assessee has received abnormally high interest free security deposits and because of that reason actual rent received is less than the rent which the property might fetch he can undertake necessary exercise in that behalf. However, the notional interest on interest free security cannot be taken as determinative factor to arrive at fair rent. If the AO finds that

the ratable value under the municipal law does not represent correct fair rent and then he may determine the same on the basis of material/evidence placed on record. The Hon. Full Bench of the Delhi High Court has observed in paragraphs 21 of the decision that to determine the reasonable/fair rent extraneous circumstances may inflect or deflect the fair rent which can be taken into consideration by the AO. Since, the reasonable rent u/s 23(1)(a) has not been determined. The Municipal Value or Standard Rent was also not before the AO as well as CIT(A). And it is also not clear from the record as under which clause, the AO has made this addition. Accordingly we restore the issue to record of the AO and direct the AO to determine the sum for which the property mighty reasonably expected to let from year to year u/s 23(1)(a) after considering all relevant factors as discussed above and thereafter compared the same with the annual rent received or receivable by the assessee u/s 23(1)(b) and then decide the issue as per law.

30. Grounds of appeal no.1 is allowed for statistical purposes.

ADDITIONAL ISSUE

31. The has also raised an additional ground in this appeal vide letter 20.10.2003. The only issue raised by the assessee in this additional ground is that the lower authorities ought to have held that the income from licensing of premises is assessable as profits and gains of business because the assessee is not the owner of the property in question. .

32. The other grounds raised in the additional grounds are only in clarificatory of the grounds already raised in the appeal memo.

33. The assessee though raised this ground before the CIT(A) but during the course of hearing before the CIT(A), the assessee stated that the assessee do not wish to press. Accordingly, the said grounds were dismissed by the CIT(A) being not pressed.

34. We have heard the learned Senior Counsel Shri Dastoor as well as the learned DR and considered the relevant record. The Learned Senior Counsel has submitted that this is a legal ground and no new facts are required to be examined or verifed, therefore, the same may be admitted for adjudication on merits. He has further submitted that since the property in question was allotted by the Government of Maharashtra to

Maharashtra Rajya Sahakari Sakhar Karkhana Sangh co-operative Society on lease basis and the owner of the said land is wasted with the government. Therefore, the assessee is not the owner of the property in question and accordingly the license fee received by the aseseee cannot be charged to tax under the head income from house property and is liable to be taxed as income from business and profession.

35. On the other hand, the learned DR explained the facts and submitted that the assesse has purchased the constructed area which is the property in question. She has thus submitted that as per the provisions of section 27 of the Act, the assessee is deemed to be a owner of the property in question because the assessee has retain the possession of the building and has been purchased through the agreement to sale dated 26.6.1982. Therefore, the condition prescribed under clause 3(a) of section 27 of section are satisfied..

36. The ld. DR has also vehemently objected to the admission of the additional ground when the assessee did not press the same before the CIT(A) and submitted that the assessee has not explained any reason as to why the assessee did not press this ground before the CIT(A) and now raised the additional ground.

37. We have considered the rival contentions and considered the relevant record. At the outset we note that the assessee acquired office no.72 at 7th floor of the Sakhar Bhavan, building no.230, Backbay Reclamation, Nariman Point, Mumbai-400021 vide agreement dated 26.6.1982. The ownership of the flat/office was acquired by the assessee according to the Ownership Flat Act (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act. Though initially the land was allotted by the Government for 99 years lease to Maharashtra Rajya Sahakari Sakhar Karkhana Sangh, which is a co-operative society, subsequently the said society after taking the permission from the government handed over the land in question to Aesthetic Builders Pvt ltd for its construction and development. The said builder was also allowed to sell the surplus built up area to the outside parties on ownership basis. Accordingly, the assessee acquired the property which is a office at 7th floor of the building through agreement to sale, the assessee paid the entire sale consideration and took possession of the property in question. Thus, it is clear that the assessee acquired the property under the provisions of Maharashtra Ownership Flats Act, 1963 and even otherwise, the assessee falls under the provisions of section 27(iiia) . Further the assessee in

the leave and license agreement, interest free deposits agreement and overdraft facilities agreement all dated 29.11.1988 claimed to be lawful owner in respect of the property in question. These facts clearly establishe that the assessee has presented itself as owner of a property while entering into the leave and license agreement. Moreover, the assessee has acquired only constructed property in question and therefore even if it is not outright sale it amount to conveyance of all material rights in the property in question. Further, the legal position is well settled that even under the common law the assessee may not have a legal titled over the property but in the context of section 22 the owner is the person who is entitled to receive income from the property in his own right. There is no dispute about the right of the assessee to receive the income from the property in question, therefore, in view of the decisions of the Hon. Supreme Court in the case of Podar Cement reported in 226 ITR 626, there is no merit or substance in the additional ground raised by the aseseee. The Hon. Supreme Court in the case of Podar Cement has laid down as under :

> *"From the circumstances narrated above and from the Memorandum explaining the Finance Bill, 1987 (see [1987] 165 ITR (St.) 161), it is crystal clear that the amendment was intended to supply an obvious omission or to clear up doubts as to the meaning of the word "owner" in section 22 of the Act. We*

do not think that in the light of the clear exposition of the position of a declaratory/clarificatory Act, it is necessary to multiply the authorities on this point. We have, therefore, no hesitation to hold that the amendment introduced by the Finance Bill, 1987, was declaratory/clarificatory in nature so far as it relates to section 27(iii), (iii a) and (iii b). Consequently, these provisions are retrospective in operation. If so, the view taken by the High Courts of Patna, Rajasthan, and Calcutta, as noticed above, gets added support and consequently the contrary view taken by the Delhi, Bombay and Andhra Pradesh High Courts is not good law.

We are conscious of the settled position that under the common law, "owner" means a person who has got valid title legally conveyed to him after complying with the requirements of law such as the Transfer of Property Act, Registration Act, etc. But, in the context of section 22 of the Income-tax Act, having regard to the ground realities and further having regard to the object of the Income-tax Act, namely, "to tax the income", we are of the view, "owner" is a person who is entitled to receive income from the property in his own right"

38. The decision in Podar Cement (supra) has been followed by the hon. Supreme Court in the subsequent case of Mysore V/s CIT reported in 239 ITR 775. Accordingly, in the facts and circumstances of the case, as well as in view of the decision of the Hon. Supreme Court(supra) we dismiss the additional ground raised by the assessee in limine.

39. In the result, the appeals of the assessee are partly allowed for statistical purposes.

Order pronounced in the open court on 13th April.2011

Sd sd

(S V MEHROTRA) (VIJAY PAL RAO)
ACCOUNTANT MEMBER JUDICIAL MEMBER

Mumbai, Dated 13 th April, 2011

SRL:24311

copy to:
1. Appellant
2. Respondent
3. CIT Concerned
4. CIT(A) concerned
5. DR concerned Bench

BY ORDER

True copy

ASSTT. REGISTRAR, ITAT, MUMBAI