

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

INCOME TAX APPEAL NO. 2356 OF 2013

The Commissioner of Income Tax-11 .. Appellant.
v/s.
M/s. Goodwill Theatres Pvt. Ltd., .. Respondent.

Mr. P. C. Chhotaray, for the Appellant.
Dr. K. Shivram, Sr. Advocate with Mr. Rahul Hakani i/b. Neelam Jadhav,
for the Respondent.

**CORAM: M.S.SANKLECHA, &
A.K.MENON, JJ.**

DATE : 6th JUNE, 2016.

P.C:-

This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 19th June, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal) for the Assessment Year 2008-09.

2 The Revenue urges the following questions of law for our consideration:

“(a) Whether on the facts and in the circumstance of the case and in law, the Tribunal was correct in holding that mesne profits are capital receipts in the hands of the assessee and not revenue receipts chargeable to tax?”

“(b) Whether on the facts and in the circumstance of the case and in law, the Tribunal was correct in holding that mesne profits, can not be part of book profit u/s. 15JB, as it was held as capital assets?”

S.R.JOSHI

3 The impugned order of the Tribunal has held that the mesne profits received by the Respondent-Assessee for the unauthorized occupation of its premises from Central Bank of India is a receipt of capital nature and thus not taxable. To reach the above conclusion, the impugned order placed reliance upon the decision of Special Bench of the Tribunal in *Narang Overseas Pvt. Ltd., v/s. ACIT 100 ITD (Mum)S.B.* The issue before the Special Bench in *Narang Overseas Pvt. Ltd.* (supra) was whether the mesne profits received by an assessee is revenue or capital in nature. The Special Bench, in its order placed reliance upon the definition of mesne profits in Section 2(12) of the Code of Civil Procedure, 1908 which reads as under:-

“ Mesne profits of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession.”

On the basis of above, it held that any amount received from a person in wrongful possession of its property, would be mesne profits and it is capital in nature.

4 This appeal was on board on 14th January, 2016. At that time, it was pointed out to us that the Revenue had preferred an appeal against the decision of the Special Bench in *Narang Overseas Pvt. Ltd.* (supra) to this Court being Income Tax Appeal (L) No. 1791 of 2008. However, the Appeal of the Revenue was dismissed for non-removal of office objections on 25th June, 2009. In view of the above, at the instance of the Revenue, the appeal was adjourned to enable the Revenue to find out whether the dismissed Income Tax Appeal (L) No.1791 of 2008 filed by the Revenue

S.R.JOSHI

from the order of the Special Bench in Narang Overseas Pvt. Ltd., (supra), has been restored to the file of this Court. Further, the Revenue was directed to put on record the reason why the Revenue seeks to challenge the impugned order in the face of the order of the Special Bench of the Tribunal in Narang Overseas Pvt. Ltd., (supra) which appears to be undisturbed.

5 Today, when the Appeal was called out, Mr. Chhotaray, learned Counsel appearing for the Revenue on instruction states that till date no proceedings had been filed in this Court, seeking to restore its appeal in the case of Narang Overseas Pvt. Ltd., (supra) dismissed on 25th June, 2009. However, he further states that the Revenue is still in the process of ascertaining the reason for non-removal of office objections in Income Tax Appeal (L) No. 1791 of 2008 in Narang Overseas Pvt. Ltd., (supra), leading to dismissal on 25th June, 2009.

6 In spite of our order dated 14th January, 2016, the Revenue has not taken any steps to put on affidavit the reasons why it seeks to press this appeal. This is particularly so in the face of having accepted the order of the Special Bench of the Tribunal in Narang Overseas Pvt. Ltd., (supra).

7 We had in *Director of Income Tax (International Taxation) v/s. Credit Agricole Indosuez ITR 102 -377-* observed as under:-

“(v):-
In matters of tax, justice requires that there must be certainty of law which presupposes equal application of law. Thus, where the issue in controversy stands settled by the decisions of this court or the Tribunal in any other case and the Revenue has accepted that decision then in that event, the Revenue

ought not to agitate the issue further unless there is some cogent justification such as change in law or some later decision of an higher forum, etc., then in such cases appropriately the appeal memo itself must specify the reasons for preferring an appeal failing which at least before admission the officer concerned should file an affidavit pointing out the reasons for filing the appeal. It is only when the court is satisfied with the reasons given, that the merits of the issue need be examined of purposes for admission (please see I.T.A. No.37 of 2013 CIT v. Proctor and Gamble Home Products Ltd., dated January 19,2015 [2015] 377 ITR 66 (Bom); I.T.A. No.269 of 2013 CIT v. SBI dated February 4, 2015 [2015] 375 ITR 20(Bom); I.T.A. No. 330 of 2013 CIT v. Citibank N. A. dated March 11, 2015 – [2015] 377 ITR 69 (Bom).)

Filing of appeal under Section 260A of the Act is serious issue. The parties who seek to file such appeals (which are normally after two tiers of appeal before the authorities under the Act) must do so after due application of mind and not raise frivolous / concluded issues. This is certainly expected of the State..”

8 Thus, on the above ground alone, we see no reason to entertain the present appeal.

9 However, Mr. Chhotaray, learned Counsel appearing for the Revenue, submitted that decision of the Special Bench of the Tribunal in Narang Overseas Pvt. Ltd., (supra) will not apply as the facts in this case are different. Mr. Chhotaray points out that landlord-tenant relationship as arising in the present case was not present in Narang Overseas Pvt. Ltd., (supra). Thus, he submits that this appeal needs to be admitted.

10 We find that the issue before the Special Bench of the Tribunal in Narang Overseas Pvt. Ltd., (supra) was to determine the character of mesne profits being either capital or revenue in nature. The Special Bench of the Tribunal in Narang Overseas Pvt. Ltd., (supra) held that the same is capital in nature. There is no doubt that the issue arising

S.R.JOSHI

herein is also with regard to the character of mesne profits received by the Respondent-Assesse. In this case also, the amounts are received by the Respondent-Assessee from a person in wrongful possession of its property i.e. after the relationship of landlord and tenant has come to an end. Once the Special Bench order of the Tribunal in Narang Overseas Pvt. Ltd., (supra) has taken a view on the character of mesne profits, then unless the Revenue challenges the order of the Special Bench of the Tribunal it would be unfair of the Revenue to pick and choose assesseees where it would follow the decision of the Special Bench of the Tribunal in Narang Overseas Pvt. Ltd., (supra) The least that is expected of the State which prides itself on Rule of Law is that it would equally apply the law to all assesseees's.

11 We make it clear that we have not examined the merits of the question raised for our consideration. We are not entertaining the present appeal on the limited ground that the Revenue must adopt an uniform stand in respect of all assesseees. This is more so as the issue of law is settled by the decision of the Special Bench of the Tribunal in Narang Overseas Pvt. Ltd., (supra). The fact that even after the dismissal of its Appeal (L) No.1791 of 2008 for non-removal of office objections on 25th June, 2009, no steps have been taken by the Revenue to have the appeal restored, is evidence enough of the Revenue having accepted the decision of the Special Bench of the Tribunal in Narang Overseas Pvt. Ltd., (supra). Thus, the question as framed in the present facts does not give rise to any substantial question of law.

12 Accordingly, **Appeal is dismissed.** No order as to costs.

(A.K.MENON,J.)

(M.S.SANKLECHA,J.)

S.R.JOSHI