IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E', NEW DELHI

BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER

ITA No.4038/Del/2013
Assessment Year: 2006-07

DCIT, Central Circle-4, New Delhi	**Vs.**	Sh. Moni Kumar Subba, Subba Farm House, 118, Village Sultanpur, Mehrauli, Gurgaon Road, Delhi
		PAN :AASPS1484J
(Appellant)		**(Respondent)**

And

ITA No.3982/Del/2013
Assessment Year: 2006-07

Shri. Moni Kumar Subba, Subba Farm House, 118, Village Sultanpur, Mehrauli, Gurgaon Road, Delhi	**Vs.**	ACIT, Central Circle-4, E-2, ARA Centre, Jhandewalan Extn., New Delhi
PAN :AASPS1484J		
(Appellant)		**(Respondent)**

Assessee by	Sh. R.S. Singhvi, Adv. & Sh. Satyajeet Goel, CA
Department by	Ms. Shefali Swaroop, CIT(DR)

Date of hearing	20.08.2018
Date of pronouncement	12.10.2018

ORDER

PER O.P. KANT, A.M.:

These cross appeals by the Revenue and assessee are directed against order dated 07/03/2013 passed by the Ld.

Commissioner of Income-tax (Appeals)-XXXIII, New Delhi [in short 'the Ld. CIT(A)'] for assessment year 2006-07 raising grounds in respective appeals.

2. The grounds of appeal raised by the Revenue in ITA No. 4038/Del/2013 are reproduced as under:

1. *On the facts and in the circumstances of the case, the CIT (A) has erred in deleting the addition made by the Assessing Officer to the Annual Letting Value on account of notional interest of Rs. 97,02,000/- on interest free security received by the assessee.*

2. *On the facts and in the circumstances of the case, the CIT (A) has erred in holding that notional interest on interest free security deposit received by the assessee could not be added to the actual rent received / receivable by the assessee while computing annual value under section 23(1) (b) of the Income tax Act, 1961.*

3. *On the facts and in the circumstances of the case, the CIT (A) has erred in not considering the fact that whether any benefit accrued to the assessee on account of interest free security deposit could be added to the annual value under section 23 of the Income tax Act, 1961.*

4. *On the facts and in the circumstances of the case, the CIT (A) has erred in not considering the fact that the MCD authorities have not taken into consideration the interest free security deposit of Rs. 10.78 crores obtained by the assessee during the year under consideration because the assessee did not inform the MCD authorities about the said interest free deposit.*

5. *On the facts and in the circumstances of the case, the CIT (A) has erred in deleting the addition made by the AO of long term capital gain of Rs. 78,81,841/- and short term capital gain of Rs. 13,67,67,379/- arising from transfer of land at Siliguri after considering the non interest bearing*

security of Rs. 15 crore as full value of consideration as per the Stamp Duty Valuation made by the Stamp Valuation Authority.

6. *On the facts and in the circumstances of the case, the CIT (A) has erred in deleting the addition made by the AO of short term capital gain of Rs. 18,60,33,515/- arising from transfer of land at Darjeeling after considering the non interest bearing security of Rs.20 crore as full value of consideration as per Stamp Duty Valuation made by the Stamp Valuation Authority.*

7. *On the facts and in the circumstances of the case, the CIT (A) has erred in deleting the addition of Rs. 2,51,00,871/- made by the AO under section 2(22)(e) of the Income tax Act, 1961.*

8. *On the facts and in the circumstances of the case, the CIT (A) has erred in holding that the interest free deposit was advanced during the course of the business, hence, section 2(22)(e) of the Income Tax Act, 1961.*

9. *The order of the CIT (A) is erroneous and is not tenable on facts and in law.*

10. *The appellant craves leave to add, alter or amend any/ all of the grounds of appeal before or during the course of the hearing of the appeal.*

2.1 The grounds of appeal raised by the assessee in ITA No. 3982/Del/2013 are reproduced as under:

1. *That on facts and circumstances of the case, Ld. CIT(A) has erred in holding that lease agreement entered by the appellant as lessor with M/s. Subba Microsystems Ltd. as lessee is in the nature of transfer in terms of provisions of section 2(47) of the Income Tax Act, 1961 by treating the prevailing market value of the property as consideration liable to capital gain tax.*

2. *That the appellant has not sold the property to M/s. Subba Microsystems Ltd. and lease period was for a limited period of use of property during lease period and after expirty of lease period, land is to be restored back to the appellant and security deposit is refundable and as such there is no case of any transfer in terms of provisions of section 2(47) of the Income Tax Act, 1961.*
3. *That orders of the lower authorities are not justified on facts and the same are bad in law.*

3. The briefly stated facts of the case are that the assessee, an individual, filed return of income for the year under consideration on 26/03/2007. The case was selected for scrutiny and the scrutiny assessment under section 143(3) of the Income-tax Act, 1961 (in short 'the Act') was completed on 31/12/2008 after making certain additions. On further appeal, the Ld. CIT(A) allowed the appeal partly and, hence, both the Revenue and assessee are in appeal before the Tribunal, raising their respective grounds of appeal as reproduced above.

4. The grounds No. 1 to 4 of the appeal of the Revenue relates to deletion of addition of Rs.97,02,000/-under the head 'income from house property'. The facts qua the issue in dispute are that in the year 2000-01, the assessee leased its two properties, located at 267, Masjid Moth, Udai Park, New Delhi and 87, Adhichini, New Delhi, to M/s. Subba Microsystems Ltd. (i.e. a related concern, in which substantial investment was made by the assessee and his family members) against monthly rent of Rs.1,80,000/- and receipt of security money of Rs. 8.58 crores and Rs. 2.20 crore respectively.

4.1 According to the Assessing Officer, in normal course of letting out of properties, advance rent/security deposit varies

from six-month to 3 years but in the instant case security deposit of Rs.10.78 crore received by the assessee was much more than the amount of security deposit equivalent to 3 years rent, i.e. 64.80 lakhs. The Ld. Assessing Officer referred to by-laws of the Municipal Corporation of the Delhi and submitted that where the value of interest-free security deposit or advance is in excess of six-month rent, an amount equal to 12.5% of the amount, depending on prevailing bank rate shall be added to the amount of rent received by the landlord to determine the lettable value of the premises. The Assessing Officer, thereafter referred to past history of the issue in dispute and following decision of his predecessor in assessment year 2003-04, observed that the Assessing Officer has a mandate to assess fair rent under section 23 of the Act in the light of the decisions in the case of M/s Sheila Kaushik Vs. CIT 131 ITR 435 (SC) and CIT Vs. Satya Co. Ltd. 75 Taxman 193 (Kolkatta). The Assessing Officer observed that the Municipal Authorities were required to take into consideration the interest-free deposit while working out the standard rent, however, in the case of the assessee, same was not brought to the knowledge of the Municipal Authorities and accordingly effect of the interest-free security deposit was not considered while working out the standard rent. The Assessing Officer, therefore, added interest at the rate of 9% (as per prevailing market rate) on security deposit of Rs.10.78 crore, which amounted to Rs.97,02,000/-, to the rent received by the assessee, for determining the fair rent under the provisions of section 23(1)(a) of the Act. The Ld. CIT(A) deleted addition by observing as under:

"4.3 I have considered the assessment order and written submission of Ld. AR. The addition has been made on GALV (Gross Annual Lateable Value) for 97,02.000/- on notional interest on refundable interest free deposit.

The said notional interest was considered as part of ALV in the context of interest free refundable security deposit. It was observed that this very issue has been subject matter of dispute in the preceeding years since 2001-2002 and reference to this effect was made by Assessing Officer himself in para 11.6 of the assessment order. There has been no dispute that the addition of notional income in respect of interest fee security is being made since assessment year 2001-02 and the facts are identical as in the year under reference. It was further observed that addition in respect of notional interest has always been deleted by CIT(A) and ITAT since assessment year 2001-02. Further, it was pointed out that this very issue has again been decided in favour of the appellant in assessment year 2007-08 by Hon'ble ITAT and copy of order of ITAT was placed on record. The Assessing Officer has made addition on same basis as in the past on the ground that appeal u/s 260A has been filed before hon'ble Delhi High Court in respect of assessment year 2001-02. It is further noted that even hon'ble Delhi High Court has dismissed the appeal of revenue, vide order dt. 30/3/1011, 333 ITR 38 (Del.).

In view of relevant facts as brought out above, the issue is fully and squarely covered in favour of the appellant and accordingly addition of Rs. 97,02,000/- is not sustainable and same is hereby deleted."

4.2 Before us, the Ld. DR submitted that the Assessing Officer has worked out the fair rent in the case of the assessee following the by-laws of municipal Corporation and added interest at the rate of 9% on security deposit (which was given interest-free to the assessee) for determination of fair rent, which is in accordance with the provisions of section 23(1)(a) of the Act.

4.3 The Ld. counsel of the assessee, on the other hand, submitted that issue in dispute involved is covered by the decision of the Hon'ble Delhi High Court in the assessee's own case for assessment year 2001-02 to 2003-04, which is reported

in 333 ITR 38. The Ld. counsel submitted that issue of rental income from the very same properties and the same security deposits was before the Hon'ble Delhi High Court and the Hon'ble High Court confirmed the finding of the Tribunal setting aside the addition of notional interest on interest-free security deposit for arriving at Annual Letting Value (ALV). He also submitted that the Tribunal in ITA No. 2107/Del/2014 for assessment year 2009-10, following the decision of the Hon'ble Delhi High Court deleted addition of notional interest on interest-free security deposit for determining Annual Lettable Value of the properties.

4.4 We have heard the rival submissions and perused the relevant material on record. We find that Hon'ble Delhi High Court in the assessee's own case (supra) for assessment year 2001-02 to 2003-04 has reproduced the facts of the case and according to those facts the issue of Annual Lettable Value of the very same properties and notional interest on the same amount of interest-free security deposit was before the Hon'ble Delhi High Court. The Hon'ble High Court after considering the decisions in the case of Mrs. Shila Kaushish (supra) and Satya Co. Ltd. (supra) upheld the finding of the Tribunal in setting aside the Annual lettable Value determined by the Assessing Officer and laid guidelines for determining Annual Lettable Value as under:

> *"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 ITA No.499 of 2008 with ITA No.803 of 2007, ITA No.1113 of 2008, ITA No.388 of 2010, 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."

4.5 The Hon'ble Delhi High Court further laid down as 'how to determine a reasonable/fair rent for the purpose of income from house property' as under:

"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 ITA No.499 of 2008 with ITA No.803 of 2007, ITA No.1113 of 2008, ITA No.388 of 2010, 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."*

4.6 We also find that the Tribunal in ITA No. 2107/Del/2014 for assessment year 2009-10 in the case of the assessee, has deleted the addition of notional interest on interest-free security deposit for determining Annual Lettable Value (ALV) observing as under:

> *"7. We have carefully considered the rival contentions and we have also perused the order of the Hon'ble Delhi High Court - full bench reported at 333 ITR 38(Del.) dealing with the identical issue with respect to the same properties where issues have been decided by the Hon'ble High court in favour of the assessee. Therefore, respectfully following the decision of the Hon'ble High Court we decide ground no. 1 in favour of the assessee reversing the order of the lower authorities deleting addition of Rs.52.33 Lacs been made in respect of rented properties. Therefore, ground No. 1 of the appeal is allowed."*

4.7 Since the very same dispute was present in assessment year 2003-04 and in the assessment year consideration, the Assessing Officer has followed finding of his predecessor in assessment year 2003-04. The issue in dispute in assessment year 2003-04 has been decided by the Hon'ble Delhi High Court in favour of the assessee. In view of the above, respectfully following the judgment of the Hon'ble Delhi High Court and the decision of the Tribunal (supra) in the case of the assessee, we uphold the finding of the Ld. CIT(A) on the issue in dispute. Accordingly, the grounds No. 1 to 4 of the appeal of the Revenue are dismissed.

5. The Grounds No. 5 and 6 of the appeal of the Revenue and grounds No. 1 and 2 of the appeal of the assessee relates to addition of long-term capital gain and short-term capital gain arising from transfer of leasing rights of the land located at Silliguri and Darjeeling. The Ld. CIT(A) held the leasing of the land as in the nature of 'transfer' in terms of provisions of section 2(47) of the Act and treated the prevailing market value of the property (deemed consideration under section 50C of the Act) as 'consideration' liable to capital gain tax. The Revenue is aggrieved

by the value of consideration determined by the Ld. CIT(A) at value for stamp duty purpose as against the entire amount of security deposit received by the assessee. The assessee is aggrieved against treating the transaction as 'transfer' and the value of the deemed consideration for the purpose of stamp duty valuation.

5.1 The facts qua the issue in dispute are that the assessee was owning land measuring 6.25 'kathas' (unit of measurement) in Silliguri, which was valued at Rs. 4.25 lakhs in the balance sheet on 31/03/2006. During the financial year under consideration, the assessee purchased 103.75 'kathas' of land in Siliguri for a sum of Rs. 47.09 lakhs. The assessee also purchased land and building in Darjeeling valued at Rs. 1.39 crores during the year under consideration.

5.2 The assessee entered into two separate lease agreements for lease amount of Rs.10,000/- per month in respect of the land at Siliguri and Darjeeling with M/s Subba Microsystems Limited (SML) i.e. a company in which the assessee was holding 17% shares along with 50% shares held by other family members of the assessee and 33% shares were held by other shareholders, mostly foreigners. In subsequent years, the shareholding of the assessee and family was further increased.

5.3 Under the terms of the lease agreement in respect of land at Siliguri, the assessee received Rs.15 crore as interest-free refundable security for leasing the said land for 30 years, which at the option of the 'lessee' could be further renewed for another 10 years and further extension of the lease was also possible on

the basis of mutual agreement of the two parties. Under the lease agreement, the SML was given rights to construct and commercially operate hotel on the said land. The 'lessee' was permitted to mortgage, charge, transfer, assign the demised lease including the additional building and construction in the superstructure as may be erected or made by the lessee over and above the structure, if any, in favour of financial institution/corporations and banks as security for loan and other financial assistance that may be granted by them or any of them to the lessee. The SML was also given right to allow the financial institution to realise their dues from the demised leased land.

5.4 A Memorandum of Understanding (MOU) was entered with SML in respect of Darjeeling land for construction and operation of the hotel on the said land and similar rights were given however the lease in case of Darjeeling land was irrevocable without any interference from the lessor during the period of the lease. The assessee was given interest-free refundable security of Rs.20 crore for handing over actual and vacant possession of the said land.

5.5 According to the Assessing Officer, the 'transaction' of the lease was not a lease simpliciter and it was in reality a transfer of immovable property or rights therein. The Ld. Assessing Officer was of the view that leasehold rights in the property amounted to capital asset within the meaning of section 2(14) of the Act and the transaction between the assessee and M/s. SML amounted to sale of legal rights giving rise to capital gain on account of such transfer. The Assessing Officer also observed that the transaction

would amount to transfer within the inclusive definition of transfer given in section 2(47) of the Act, wherein the word "extinguishment" of any right therein would include every possible transaction result in destruction, annihilation, extinction, termination, cessation or cancellation by satisfaction or otherwise of all or any of the bundle of rights which the assessee has in a capital asset. Regarding the transfer of rights, the Assessing Officer observed as under:

> *"8.14 What is the true character of the transaction in this case? M/s. Subba Microsystem Ltd. has pledged this property of Darjling to a consortium of banks led by SBI for taking loan of Rs.29.52 Crores for construction of a hotel (refer reply of the assessee at Annexure 2 (page 4). Further, the cost of the hotel excluding this security amount is likely to be around Rs.47 Crores as per the submission of the assessee and till 31.03.2008 has spent Rs.30,78,29,894/- as per its balance sheet. So, substantial rights have already been transferred to M/s Subba Microsystem Ltd. by the assessee in these properties.*
> *8.15. Now, when the other party has constructed a hotel, can the property be repossessed by the assessee like any other lease deed as and when he wants? The answer is no. Property stands mortgaged with the bank against which long term loan has been taken against one property and for other property also such rights are transferred as per the agreement. Can the hotel be removed to give back the possession. Answer is no. Clause 8 of the agreement states that "On expiry of the term or extended term of the agreement" the fixed asset of the hotel property would get transferred to the lessor at the written down value of the same in the books of the company as on 31st March of the last year, unless the parties to the agreement decide to- continue with the agreement. So, agreement cannot be revoked at least before 30 years. After that also it is at the sweet will of the assessee and the company. The question is who is the company? The assessee along with his family members owns 67% shares as on 31-03-2006. After this date, assessee has further increased his share-holding by investing this Rs. 30 Crores in the shares of this company. So, he remains the effective decision maker in both the cases."*

5.6 On the issue of consideration against claim of the said transfer, the Assessing Officer held the entire amount of Rs.31.5

crores received as interest-free security deposit as 'consideration' received against respective lands observing as under:

> *"9.7 In view of the above discussion and facts of the case it is clear that a bundle of rights like enjoyment of property, construction of building thereon, right to mortgage and right to transfer the property have been sought to be transferred for a hefty consideration that has been disguised as interest free security. Considering that in both the cases i.e. for self and for M/s Subba Micro Systems, the assessee Sh. Moni Kumar Subba is the controlling person, he has the ability and the flexibility to design the transaction as per his sweet wishes to avoid payment of legitimate taxes. It is quite clear that the transaction is safely covered under the provisions of Section 2(47) of the Income tax Act, 1961 and therefore the same is held to be a transfer of Capital asset by the assessee. The assessee has only made an attempt to give it a colour of genuineness in the garb of lease agreements whereas the same should have been offered for tax under the head 'Capital gains'.. The decision of Hon'ble Apex' Court in the case Mcdowell and Co. Ltd. Vs Commercial Tax Office (154 ITR148) is worth mentioning here. In this case, the Apex Court has held as under:*
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> *"Tax planning may be legitimate provided it is within the framework of law.. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges", (emphasis supplied)*
>
> *9.8. So, it conclusively proves that this amount of Rs. 31.5 Crores is not interest free security deposit for transferring lease right but the actual consideration received by the assessee for transfer of rights in the land to M/s Subba Microsystem Ltd. within the meaning of section 2(47). As this represents the amount for transfer of capital asset, it is taxable as capital gain u/s 45 of the IT Act. Therefore, keeping in view the facts and circumstances of the case it is held that the above transaction are transfer and the assessee is liable to capital gain tax on account of the same.*
>
> *9.9 As the records suggest, that both of the above sites were purchased by theassessee during the year under consideration itself except 6.25 kathas of total 110 Kathas of Siliguri Site. As per assessment records these 6.25 Kathas of land were purchased on 25.08.1998 i.e. in the Financial year 1998-99. Therefore Long term Capital Gain as well as Short Term Capital Gain would arise in respect of siliguri land and Short Term Capital Gain would arise in respect of Darjiling Land.*

Long Sale Consideration of 6.25 Kathas of land	*150000000 X 6.25 / 110*	*=Rs.85,22,727/-*
Cost of Acquisition (after Allowing indexation	*4,52,618 X 497 / 351*	*=Rs. 6,40,886/-*
Long term Capital Gain		***=Rs.78,818441/-***

Short Term Capital Gain

In respect of Siliguri Land

Deemed sale consideration of 103.75 Kathas (Rs.15,00,00,000 - Rs.85,22,757)	*Rs.14,14,77,273*	
Cost of Acquisition	*Rs. 47,09,894*	
		Rs.13,67,67,379/-

In respect of Siliguri land

Deemed Sale Consideration	*Rs.20,00,00,000*	
Cost of Acquisition	*Rs. 1,39,66,485*	
		Rs. 18,60,33,515/-
Total Short Term Capital Gain		***Rs.32,28,00,894/-"***

5.7 The Ld. CIT(A) after considering the submissions and argument of the learned Authorised Representative, upheld the transaction as 'transfer' liable to capital gain, however, as far as consideration for transfer of the right is concerned was held to be equal to stamp duty valuation of the properties. The relevant finding of the Ld. CIT(A) is reproduced as under:

*"**5.3 Findings**:-*

I have considered the assessment order, written submissions with paper book and arguments of Ld. AR. The appellant has leased the land to its associate concern M/s Subba Microsystem Ltd. for 30 years extendable with mutual consent of lessor and lessee. The appellant has received refundable deposit of Rs. 35 crores from

lessee. The appellant has surrendered following right of the land to the lessee:-

1. *Possession*
2. *Use of land by constructing building for hotel.*
3. *To mortgage the land to the lenders.*
4. *To authorize the lender to sale the property in case of default of payment of loan.*

First two right i.e. possession and use of land by the lessee is common feature of a lease agreement. In my view last two right i.e. mortgaging the property to lenders and authorizing the lender to sale the property in case of default of payment by the lessee is some thing more than normal lease, though entire ownership is not transferred. Once, through the lease agreement, the lender is fully empowered to recover the dues by even selling the property the ownership in the said property is in a way transferred. This view is strengthened as the lease is irrevocable in nature. Therefore, the terms of lease agreement goes beyond the enjoyment of the property for certain time. If the property is sold by the lender, then ownership will not return to the appellant.

The appellant's case is not covered by the case of CIT Vs Lake Palace Hotel and Motels Ltd. 321 ITR 165 (Rajasthan) as in that case though the period was for 72 years and more than the period in present case i.e. 30 years in that case. Apart from other variation such as charging of interest on refundable deposit, the main variation is that apparently the land was not expressely hypothecated to the lender on the terms that the same can be sold in case of default. This is basic difference between appellant's case and the case of Lake view Hotel and Motels Ltd.

Considering the above, rights transferred by virtue of above referred lease agreement is more than normal lease agreement. Accordingly, in my view the transfer of rights through the said lease agreement would amount to 'extinguishment of rights' as per definition of transfer ' under section 2(47) of I.T.Act. Therefore, in my view, the transfer of right through the lease deed in question is covered under sub clause (ii) of definition of transfer in relation to capital assets, contained in clause (47) of section 2 of I.T.Act. In my opinion, this view gets strength from the decision of hon'ble Patna High Court in the case of Traders & Miners Ltd. Vs CIT (1955) 27 ITR 341, though the said decision was, in respect of, mining lease. As in the present case, the exploitation of the right property in question is to the extent which is more than only leasing as discussed supra. I agree with various judicial pronouncement relied upon by the Assessing Officer in support of transfer of assets. Accordingly, I confirm the decision to tax the transfer under section 45 as capital gain.

Now coming to the consideration for such transfer, I do not agree to the Assessing Officer to take refundable deposit of Rs. 35 crores as consideration. As per the terms of lease agreement, this deposit is refundable in clear terms.

The lease agreement has been executed into-to. I do not approve the findings of the assessing officer that the agreement is shame and reliance placed on various judicial pronouncement, namely, Macdowell & Co. Ltd Vs. Commercial Tax Officer or Union of India Vs Azadi Bachchao Andolan and other judicial pronouncements is misplaced on facts. This kind of long lease does not make the transaction sham as similar lease of 72 years in the case of Lake Hotels & Motels Ltd. with security deposit has not been held as sham.

In view of the above position of facts, the market value of the property is an indicator for determining the consideration for the transfer of bundle of rights under section 2(47) of I.T.Act. Guideline value of the land is set by the Government for registration purpose, the same may be considered as market value of the land in respect of which right is transferred.

Majority of the land was purchased by the appellant during the year under consideration for Rs. 2 crores. Apparently, the appellant has purchased the land at lesser rate than the guideline value as evident from registered deed.

Section 50C of I.T.Act. prescribes the method valuation of property for quantifying the f full value of consideration as valuation determined by stamp valuation Authority for that property. In present case, the apparent consideration for transferring the right over and above normal leasing is nil. Therefore, sec 50C is squarely applicable in the present case. Ld. AR has submitted the working of capital gain on the basis of stamp valuation as under:-

Income from Capital Gain

a) *statement of capital sain and land at silisuri, West Bengal Lons Term Capital Gain*

Sale consideration (as per Registry Value)

(sold in F/Y 2005-06) 562,500.00

Less-Indexed cost of acquisition

-cost of purchased (in F/y 1998099)Rs. 4,52,618/-

Indexed cost of purchased (4,52,618/-*497/351) 640,886.00 (78,386)

Short Term Capital Gain

Sale consideration (as per Registry Value) 11,362,500.00

Less.-Purchase Value 4,709,894.00 6,652,606.00

Net Capital gain on Siliguri Land ***6,574,220.00***

b) ***Statement of capital sain on sale of land at Darjeelins, West Bensal***

Short Term Capital Gain

Sale consideration(as per Registry Value) 16,055,000.00

Less:-Purchase Value 13.966.485.00

Net capital gain on Darjeeling land ***2,088,515.00***

G.T. ***8,662,735.00"***

The Assessing Officer is directed to verify the valuation as per the Stamp Valuation Authority on the date of transfer and take the same as full value of consideration for the purpose of computing long and short term capital gain u/s 45 of I.T. Act. Accordingly, this ground of appeal is partly allowed."

5.8 Before us, the assessee has challenged holding of transaction as "transfer" and without prejudice, also challenged the amount of consideration taken at value as per stamp duty valuation.

5.9 The Ld. counsel relied on the submission filed before the Ld. CIT(A) and submitted that assessee has received only refundable security against least of land for a period of 30 years in addition to the lease rent received by the assessee from month-to-month

basis. The Ld. counsel referred to page – 20 of the order of Ld. CIT(A), wherein the terms of lease have been reproduced. The Ld. counsel referred that in clause 5 it has been specifically mentioned that the security deposit would be refundable by the lessor to the lessee at the time of handing over of the actual physical vacant possession of the demised premises by the lessee to the lessor. According to the Ld. counsel, the right to mortgage was allowed to the lessee for facilitating in obtaining loan for construction of the hotel on the said land and the mortgage allowed cannot be a ground for holding the transaction as 'transfer' under section 2(47) of the Act. The Ld. counsel in support of the contention that the transaction amounts to lease only and not transfer, relied on the decision of the Hon'ble Rajasthan High Court in the case of CIT Vs. Lake Palace Hotels and Motels 321 ITR 165 (Rajasthan).

5.10 The Ld. counsel also relied on the decision of the Hon'ble Supreme Court in the case of CIT Vs. Balbir Singh Maini reported in 398 ITR 531, wherein it is held that that in order to qualify as a 'transfer' of a capital asset under section 2(47)(v), there must be a contract, which can be enforced in law under section 53A of the Transfer of Property Act. According to the Ld. counsel, there was no such contract in the instant case and, therefore, the transaction would not qualify for 'transfer' under the Act.

5.11 The Ld. counsel also relied on the decision of the Hon'ble Supreme Court in the case of CIT Vs. Infosys Technologies Ltd., 297 ITR 167 (SC), wherein it is held that unless the benefit is made taxable, it cannot be regarded as income.

5.12 To support the contention that the Ld. CIT(A) was not justified in taking the value as per stamp duty valuation, the Ld. counsel relied on the decision of the Hon'ble Calcutta High Court in the case of Sunil Kumar Agarwal Vs CIT, (2015) 372 ITR 83 (Cal.) and submitted that the Ld. CIT(A) should have directed the Assessing Officer for reference of the matter to the departmental valuation officer for valuation of the property rather than adopting provision of section 50C by the Ld. CIT(A).

5.13 On the contrary, Ld. DR submitted that section 50C has no role in this case. According to her, full rights including rights to mortgage the property and right to sell the property in case of default of mortgage to the financial institution, were given to the lessee and therefore the Ld. CIT(A) was justified in holding the transaction as 'transfer' under section 2(47) of the Act. She submitted that the so-called security deposits of Rs.35 crore, which is disproportionately high *vis-a-vis* lease rent and considerably more than stamp duty valuation of the land. According to her, in fact lease premium was given the colour of security deposit. She further relied on the various decisions relied upon by the Assessing Officer and also the decision of the Hon'ble Supreme Court in the case of R.K. Palshikar (HUF) reported in 172 ITR 311 and the decision of the Hon'ble Kerala High Court in the case of International housing complex reported in 56 DTR 255, wherein the security deposit which was reflected as lease premium, was taken as sale consideration for the purpose of computation of capital gains.

5.14 In the rejoinder, the Ld. counsel distinguished the decision of the RK Palshikar (supra) and submitted that in the said case lease was for 99 years.

5.15 We have heard the rival submissions and perused the relevant material on record. The main issue in dispute is in respect of the land at Drajeeling and Suiliguri leased for a period of 30 years, to the company in which assessee is having substantial interest. The company has been given right to mortgage these properties to financial institution for availing loans and those financial institutions have been given right to take over the properties in case of default by the company in repayment of the loans. In background of the facts narrated in aforesaid paras in respect of the transaction of lease of the properties, according to the Revenue the transaction is in the nature of transfer of rights in property through lease agreement. The assessee in support of his contention stated that said transaction is merely lease and not transfer of the property has relied on the decision of the Hon'ble Rajasthan High Court in the case of **Lake Palace Hotels and Motels** (supra). In the said case the assessee had leased out Land to one East India Hotels Ltd. for a period of 72 years at a gradually increasing rent and also a security of Rs.2.5 crores bearing interest rate of 9%. The assessment was reopened on the ground that during the accounting year 1992-93, the market rate of interest was 18% to 24% and thus the benefit by way of concessional rate of interest to the assessee company on the deposit made by the lessee must be computed and taxed as capital gain. The addition made in the

assessment was deleted by the Ld. CIT(A) and the Tribunal. Before the Hon'ble High Court the substantial question of law was raised as follows:

> *"Whether capital value of such deemed interest to the extent it has been charged lesser than the market rate can be considered as consideration for grant of lease in respect of which the capital gains has to be computed?"*

5.16 This question was answered against the Revenue and in favour of the assessee observing as under:

> *"11. To be very specific, what is significant to note is that even a combined reading of the two sections, nowhere provides for any deemed profit or deemed gain or any hypothetical benefit deemed to have been received or to be deemed to be accruing to the transferor as a result of the transfer of the capital asset. We may refer to a judgment of the hon' ble court in CIT v. Infosys Technologies Ltd. reported in [2008] 297 ITR 167 (SC), which has been relied upon by the learned counsel for the assessee wherein it has been held that unless the benefit is made taxable it cannot be regarded as income. In that case, during the relevant assessment years, there was no provision of law which made the benefit of allotment of shares with lock-in period as taxable income apart from the fact that the benefit was prospective and it was found that unless the benefit is in the nature of income or specifically included by the Legislature as part of income the same is not taxable. Thus, since sections 45 and 48 unlike the provisions of wealth-tax, do not make provision, providing for any deemed profit or gain to be taxable as a capital gain the mere fact that the Assessing Officer was of the view that the prevalent market interest rate was 18 per cent, or was at any amount above 9 per cent, could not render the assessee liable for being taxed on the difference amount as capital gain."*

5.17 The Ld. CIT(A) has distinguished the above decision relied upon by the assessee. It has been pointed out by the Ld. CIT(A) that in said case the security deposit was bearing interest and land was expressly not hypothecated to the lender on the terms

that same can be sold in case of default. Moreover we find that the issue whether transfer of rights in property in the entire process of leasing of land has not been came up for discussion before the Hon'ble High Court. In view of the above, we concur with the Ld. CIT(A) that ratio of the said decision of the Hon'ble High Court is not applicable over the facts of the instant case.

5.18 In the case of **Balweer Singh Maini (supra) relied upon** by the counsel of the assessee, Joint Development Agreement (JDA) fell through for want of permissions and, thus, it was held that there would be no profit or gain, which would arose from transfer of the capital asset. Thus, the ratio of the above decision is also not applicable over the fact of the instant case. The Hon'ble Supreme Court's observed in para 22 of the judgment as under:

> *"22. The object of Section 2(47)(vi) appears to be to bring within the tax net a de facto transfer of any immovable property. The expression "enabling the enjoyment of" takes colour from the earlier expression "transferring", so that it is clear that any transaction which enables the enjoyment of immovable property must be enjoyment as a purported owner thereof the idea is to bring within the tax net, transactions, where, through title may not be transferred in law, there is, in substance, a transfer of title in fact.*

5.19 In the instant case also, the title has not been transferred in law but in substance entire rights of enjoyment of the property even to be acquired by the Financial Institutions, have been transferred. In the case of **Infosys Technologies Ltd. (supra)** the issue was whether the difference between the market value and the price paid by the employees for exercise of the stock option was a perquisite and liable to tax under the Act. The Hon'ble

Supreme Court held *that unless a benefit/receipt was made taxable, it could not be regarded as income and thus in absence of legislative mandate a potential benefit could not be considered as income of the employees chargeable under the head salaries.* As far as ratio of the decision is concerned it is a law, but it is not applicable over the fact of the instant case where the transaction of the assessee falls within the definition of transfer provided under section 2(47) of the Act.

5.20 In the case of R.K. Palshikar (supra), the assessee HUF was the owner of the land in which tenants were growing crops. The assessee obtained permission for converting the land into a housing colony. The assessee leased out the building sites to various parties for a period of 99 years and received "salami" or premium. In background of the above facts, the Hon'ble Supreme Court's observed that the assessee parted an asset of enduring nature, namely, the right to possession and enjoyment of the property leased for a period of 99 years subject to certain conditions on which respective leases could be terminated. The Hon'ble Supreme Court's held that in such circumstances the grant of the lease in question amounted to transfer off capital asset as contemplated under section 12B of the Income Tax Act, 1922. In the instant case, though the initial period of lease has been mentioned for 30 years but same is further extendable. The company to whom, the properties have been leased, has borrowed funds from financial institutions and has constructed hotel buildings. The financial institutions have been given right to sale the land in case of default in payment by the company. In such

circumstances, it can safely be said that the assessee has transferred all his rights of enjoyment in property to the company.

5.21 In view of the aforesaid discussion, we do not find any infirmity in the finding of the Ld. CIT(A) of holding the transaction as transfer liable for capital gains under section 45 of the Act.

5.22 The next question, which arises in the case, is the amount of sale consideration liable for capital gains. According to Assessing Officer, the amount of security deposit received of Rs. 35 crore is sale consideration received and he apportioned the sale consideration for computation of short-term capital gain and long-term capital gain. In case of Siliguri land, the Assessing Officer computed long-term capital gain of Rs.78,81,841/- and short-term capital gains of Rs.13,67,67,379/-. In case of Darjiling land, the short-term capital gain of Rs.18,60,30,515/- was computed by the Assessing Officer.

5.23 The Ld. CIT(A), however, observed that majority of the land was purchased by the assessee during the year under consideration for Rs.2 crores. According to the Ld. CIT(A) the land was purchased at lesser rate than the guideline value is evident from register deed. According to the Ld. CIT(A), the apparent consideration for transferring the right over and above the normal lease was nil and, therefore, he invoked provisions of section 50C of the Act and held that value as per the stamp duty valuation should be the sale consideration for transfer of properties by the assessee. In case of Siliguri Land, The Ld. CIT(A) computed long-term capital loss of Rs.78,386/- and short-term capital gain of

Rs.66,52,606/-. Similarly, in case of Darjeeling land, the Ld. CIT(A) computed short-term capital gain of Rs.20,88,515/-.

5.24 The Revenue, is aggrieved with the sale consideration adopted by the Ld. CIT(A) on the basis of section 50C of the Act, whereas the learned counsel of assessee without prejudice to his arguments that the transaction does not amount to transfer, submitted that matter of valuation should have been referred to the valuation authorities. He submitted that for this purpose, the issue in dispute might be restored to the file of the Assessing Officer.

5.25 We find that during the relevant period, section 50C of the Act could be invoked only, if the property was registered before the Stamp Duty Authorities and in that case amount adopted by the Stamp Valuation Authority could be treated as full value consideration received. The amendment to include assessable value as full value consideration was inserted w.e.f. 01/10/2009 and, thus, the value assessable as per stamp value authority cannot be applied for taking full value consideration of the property. Once, we have held that provisions of section 50C are not applicable in the instant case, the question of referring the matter to the Valuation Officer in terms of section 50C(2) also does not arise.

5.23 In the instant case, the assessee has received so-called security deposits as interest-free amount for the properties leased. This is the amount, which is actually received by the assessee for transfer of rights in the property. In our opinion, in the given circumstances of the case, for the purpose of

computation of the capital gain as laid down in section 48 of the Act, the security deposit received has been rightly treated by the Assessing Officer as full value consideration received as a result of transfer of the capital asset. We, accordingly, set aside the capital gain worked out by the Ld. CIT(A) and restore that of the Assessing Officer. The ground no. 5 and 6 of appeal of the Revenue are accordingly allowed and the grounds No. 1 & 2 of the appeal of the assessee are dismissed.

6. The grounds No. 7 & 8 of the appeal of the Revenue relates to addition of Rs.2,51,00,871/- made by the Assessing Officer under section 2(22)(e) of the Act.

6.1 The addition in question was proposed by the Assessing Officer alternatively. According to the Assessing Officer, the assessee held 17.6% shares of M/s. Suba Microsystem Limited and, thus, the payment received to the extent of accumulated profit of Rs.2,51,00, 871/- was liable to be taxed as deemed dividend in terms of section 2(22)(e) of the Act. But no separate addition was made in the final computation of the order on this account as amount of advance received by way of security deposit was already taxed under the head 'capital gain'. The Ld. CIT(A) deleted the addition holding that interest-free deposit was advanced during the course of the business and thus it was not liable for deemed dividend u/s 2(22)(e) of the Act.

6.2 Before us, the Ld. DR relied on the order of the Assessing Officer, whereas the learned counsel relied on the order of the Tribunal in ITA No. 2107/Del/2014 for assessment year 2009-10

wherein, the identical issue has been decided in favour of the assessee.

6.3 We have heard the rival submission and perused relevant material on record. The Tribunal in assessment year 2009-10 has decided the issue in dispute as under:

> *"10. We have carefully considered the rival contentions and also perused the decisions of lower authorities. According to the facts recorded by the lower authorities the assessee has received a sum of Rs. 11.23 Lacs from the company in which his minor son holds 67.14% shareholding. According to the provisions of section 2 (22) (e) of the income tax act dividend includes any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) made after the 31st day of May, 1987, by way of advance or loan to a shareholder, being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent, of the voting power. Therefore according to the provisions of the law the assessee must be the beneficial owner of the shares of 10% or more. In this case ld AO has not established whether the assessee is holding shares as the beneficial shareholder of 10% or more. We do not find any such finding in the assessment order. Merely because the shares are held by the minor son of the assessee and the loan is received by the assessee it cannot be established that assessee is the beneficial shareholder of 10% or more and therefore such loan amount is not chargeable to tax in the hands of the assessee. Furthermore the submission of the assessee before the lower authorities that it is in the nature of advance rent as whenever the rent is payable by the company to the assessee same is deductible from this amount therefore it partakes the character of advance rent. The Ld. AO has also not categorically stated that this amount is not advance rent and not adjusted subsequently against the rent payable by the company to the assessee. According to us if it is an advance rent then it becomes a business transaction and the provisions of deemed dividend cannot apply to such transactions. In view of this we reverse the finding of lower authorities in confirming an addition of Rs. 11.23 Lacs on account of advance rent received by the assessee from the Suba Microsystems private limited. In the result ground No. 2 of the appeal of the assessee is allowed."*

6.4 However, in the instant case, the deposits received by the assessee has already been held by us as sale consideration received on transfer of rights in the property and, thus, in our opinion, it is not in the nature of advance or deposits, which could be held as liable for deemed dividend in terms of section 2(22)(e) of the Act. Accordingly, the ground of the Revenue is dismissed.

7. In the result, the appeal of the Revenue is partly allowed whereas appeal of the assessee is dismissed.

Order is pronounced in the open court on 12th October, 2018.

Sd/-	**Sd/-**
DIVA SINGH	**O.P. KANT**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 12th October, 2018.
RK/-(D.T.D.)
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi