

(1978) 07 CAL CK 0017
In the Calcutta High Court

Case No : Income-tax Reference No. 52 of 1974

Commissioner of Income Tax

APPELLANT

Vs

Purnendu Mullick

RESPONDENT

Date of Decision : 14-07-1978

Acts Referred:

Citation : (1979) 116 ITR 591

Hon'ble Judges : Dipak Kumar Sen, J;C.K. Banerji, J

Bench : Division Bench

Advocate : Suhas Sen and Samar Banerjee, for the Appellant;Sitaram Bhattacharjee, for the Respondent

Judgement

Sen, J.—Purnendu Mullick, the assessee, was assessed to Income Tax in the assessment year 1964-65, the relevant previous year being 1370 B.S. In the relevant assessment year the assessee had executed a deed of lease on the 11th December, 1963, in respect of premises Nos. 14 and 15, Old Court House Street, Calcutta, in favour of one Octavious Steel Co. Ltd. In consideration of the said lease the assessee had received a lump sum of Rs. 50,000. The valuer's report submitted by the assessee recorded that the total area of the premises leased out was 9,825 sq. ft. Under Clause 2 of the deed the rent of the premises was fixed at Rs. 1,500 per month for the first two years and, thereafter, at an increased rate of Rs. 100 per month after every nine years till the expiry of the lease, i.e., after 99 years.

2. The ITO rejected the assessee's claim that the said sum of Rs. 50,000 received as premium or salami constituted capital receipt and was not taxable as income.

3. The ITO found that the property was situated in a predominantly business area where the market rent was quite high varying between 75 p. to Re. 1 per square foot. The stipulated rent was lower than the prevailing market rent. The ITO also noted that the lump sum payment was in consideration of location of

the premises and, therefore, constituted the difference between market rent and the actual rent payable. He held that the said sum of Rs. 50,000 was rent paid in advance and, therefore, taxable. The sum was added to the income of the assessee.

4. Being aggrieved by the order of assessment the assessee preferred an appeal to the AAC. It was, *inter alia*, contended before the AAC that the old structure in the premises being very old had to be demolished as otherwise no one would take a lease of the said premises for such a long period and that the rent fixed was more than that fixed under the immediately previous lease and which was stipulated to be enhanced to Rs. 2,500 per month in the last lap of the lease. The AAC found that even if payment of salami was influenced by the location of the property and the period of lease it did not necessarily constitute an advance payment of rent. He held that in any event the difference between the fair market rent and the stipulated rent would not in fact be covered by payment of Rs. 50,000. The building leased out was old and required thorough overhauling and it was doubtful if any one would have taken the building on a long-term lease at a rent higher than that fixed in the lease. He also noted the clause in the lease whereby the lessee was required to put up a new and modern construction spending not less than Rs. 8,00,000 and also to pay to the lessor Rs. 40,000 as compensation if the present building had to be demolished. For the above reasons the AAC accepted the contentions of the assessee and allowed his appeal.

5. From the order of the AAC the revenue preferred a further appeal to the Tribunal. The Tribunal found that the said sum of Rs. 50,000 had been paid by way of salami or premium and had been so recorded in the deed. The Tribunal also found that the other provisions in the deed justified the low rate of rent.

6. The Tribunal concluded that the said sum of Rs. 50,000 received by the assessee as salami was a capital receipt and not liable to tax.

7. At the hearing learned counsel for the revenue did not advance any contention except what had been stated by the ITO. The learned counsel for the assessee, on the other hand, cited a decision of the Supreme Court in *Durga Das Khanna Vs. The Commissioner of Income Tax, Calcutta*, . The facts in that case were that the assessee had taken on lease certain premises for a term of 99 years with the right to assign the lease and alter the structure of the premises so as to convert it into a cinema house. After spending Rs. 35,000 on some alterations, the assessee executed a sub-lease by which the building was demised to the sub-lessees for 30 years. The sub-lessees agreed to pay to the assessee Rs. 55,200 towards the cost of erecting the cinema house and rent was agreed at Rs. 2,100 per month. On these facts, the Tribunal held that the said sum of Rs. 55,200 was received as advance payment of rent. The High Court confirmed the order of the Tribunal.

8. On further appeal, the Supreme Court held that the Tribunal and the High Court were both in error in treating the said sum of Rs. 55,200 as advance

payment of rent for the following reasons:

(a) Prima facie, premium or salami was not income and it would be for the Income Tax authorities to show that the facts existed which would make it a revenue receipt.

(b) The sub-lease did not contain any condition or stipulation from which it could be inferred that the aforesaid amount was paid by way of advance rent.

(c) It was clearly stated in the lease that the money was being paid for completion of the building required for running as a cinema house.

(d) The payment of the rent under the lease was to commence not from the date of the sub-lease which was February 23, 1946, but with effect from June 1, 1946.

(e) The sub-lessees would enter into possession after the cinema house was said to be completed.

(f) The payment of the lump sum was of a non-recurring nature.

9. On the basis of the aforesaid reasons the Supreme Court held that the said sum of Rs. 55,200 was a capital receipt and not income.

10. It appears to us that the facts of the present case are very similar to the facts which were considered by the Supreme Court in the above decision and that the present reference is covered by the said decision.

11. In the instant case the lease is for a long period with provision for escalation of rent. The rent fixed is higher than the previous rent. The lease provides for demolition of the old structures and construction of a new building after substantial expenditure. The lump sum paid is described as salami or premium and not rent. There is no clause for repayment of the lump sum paid or adjustment of the said lump sum against rent. There is nothing on record to show that the premium or salami paid had any characteristic of rent.

12. For the reasons stated above we answer the question referred in the affirmative and in favour of the assessee. There will be no order as to costs.

C.K. Banerji, J.

I agree.