

Durga Das Khanna

Vs

The Commissioner of Income Tax, Calcutta

Civil Appeal No. 873 of 1966

(J.C. Shah, V. Ramaswami - I, A.N. Grover JJ)

30.01.1969

JUDGMENT

GROVER, J. -

1. This is an appeal by special leave from the judgment of the Calcutta High Court in an Income-tax Reference in which the question that had to be answered by the High Court was "whether on the facts and circumstances of the case the sum of Rs. 55,200/- was a revenue receipt being rent received in advance thus liable to be taxed ?"

2. On July 19, 1945, the assessee took on lease premises No. 157 Upper Circular Road, Calcutta, for a term of 99 years on a monthly rental of Rs. 750/-. It was stipulated inter alia that the lessee could assign the lease with the consent of the lessor. He could alter the structures on the premises so as to convert it into a cinema if necessary. After expending Rs. 35,000/- on some alterations to the premises the assessee felt the necessity of having some more money in order to convert the building into a cinema. He entered into a lease on February 23, 1946, with three persons, namely, Nani Gopal Dutt, Makhan Lal Dutt and Shiv Kumar Khanna. By this lease, the building which was called 'Khanna Cinema house' at 157, Upper Circular Road, Calcutta, was demised to the lessees for a period of 30 years. The lessees agreed to pay under the indenture of lease Rs. 55,200/- to the lessor towards the cost of erecting the said cinema. The rent which was agreed to be paid was Rs. 2,100/- per month. It was payable with effect from June 1, 1946. It is necessary to set out the relevant portion of the lease :

"And whereas the lessor obtained sanction from the Corporation of Calcutta and other necessary authorities and commenced the erection of a cinema house the estimated total cost of which is about Rs. 1,00,000/- (rupees one lakh). And whereas the lessees agreed to pay to the lessor a sum of Rs. 55,200/- (rupees fifty-five thousand and two hundred) towards the cost of the erection of the said cinema house according to their suggestion and other charges and expenses incurred therefor by the lessor. And whereas the construction of the said cinema house is almost complete and is expected to be completed by the end of March, one thousand nine hundred and forty-six and whereas the lessee have called upon the lessor to grant to them a lease of the said cinema house which the lessor has agreed to do upon payment by the lessees of the said agreed sum of Rs. 55,200/- (rupees fifty-five thousand and two hundred), towards the cost of building the said cinema house and whereas the lessees have paid to the lessor the sum of Rs. 55,200/- (rupees fifty-five thousand and two hundred) for which separate receipt has been granted by the lessor."

After the cinema house had been completed the lessees entered into possession and started

exhibiting shows there.

3. For the assessment year 1947-48 the corresponding accounting year being the financial year ending March 31, 1947, the Income-tax Officer sought to treat the sum of Rs. 55,200/- received by the assessee as his income. The contention of the assessee was that the aforesaid amount should be treated as capital receipt. Alternatively if it was to be treated as salami (premium) and was to be taxed as a revenue receipt it should be distributed evenly over the entire term of the lease, i.e. 30 years. The Income-tax Officer did not accept either of the contentions of the assessee. It was held by him that the lease was not permanent but was temporary and that the salami had been fixed as an advanced payment of rent and not as payment for transfer of the lease-hold interest. According to him the system of accountancy for this source of income being on cash basis the whole of the receipt of salami was liable to be taxed as one year's income in the year of the receipt. The assessee appealed to the Appellate Assistant Commissioner who agreed with the Income-tax Officer. In his view the lessees were under no legal obligation to contribute towards the cost of construction of the cinema house and the sum of Rs. 55,200/- constituted payment of advance rent. The assessee appealed to the Tribunal which held that the receipt of the aforesaid amount was in the nature of advance payment of rent since the assessee was short of funds at the time the lease was entered into and that the lease was for a short-term and that the amount in question represented consolidated rent for thirty years paid in advance. The High Court answered the question which was referred in the affirmative and against the assessee. According to the High Court the only object of the payment of the sum of Rs. 55,200/- could be to advance the cost of construction or to meet the existing liabilities of the assessee for completing the cinema house. It was observed :

"Further it should be noted that the period of lease is only for 30 years and the assessee's investment on the cinema is about Rs. 60,000/- Rs. 35,000/- being the cost of construction and Rs. 25,000/- being costs of machinery with a liability to pay Rs. 750/- rent to the owner of the plot. As a result of this lease he has got a rent of Rs. 2,100/- for a term of 30 years. Thus there is no question of payment of any salami as no further inducement for grant of the lease was necessary. It is obvious that if the cost of construction of the cinema house would have been met in its entirety by the assessee and thereafter if the assessee would have granted the lease to the lessee, the rent would certainly have been much higher. Thus, the said sum of Rs. 55,200/- in the absence of a different recital can only be deemed to have been paid as an advance rent in respect of the said cinema house."

4. On behalf of the appellant-assessee it has been urged that the sum of Rs. 55,200/- was paid to the lessor in lump for completing the cinema house without which the lessee could not have used the building for the purpose of exhibiting cinematograph films. According to the recitals in the deed which must be given due effect the lessees agreed to give this amount towards the cost of erection of the cinema house according to their suggestion and for defraying other charges and expenses. The payment of rent was expressly stipulated at the rate of Rs. 2,100/- per month and there was no indication whatsoever that any different or higher rate of rent was agreed to. It is further submitted that there was no material or evidence on which it could be found that the cinema would have fetched any higher rent, the admitted cost of construction being about Rs. 1,00,000/-. Alternatively the sum of Rs. 55,200/- could be regarded only as payment of salami (premium) and could not be treated as revenue receipt, the payment being of a non-recurring nature.

5. It seems to us that the departmental authorities as well as the High Court were in error in treating the amount of Rs. 55,200/- as advance payment of rent. The lease by which the cinema house was demised did not contain any condition or stipulation from which it could be inferred that the

aforesaid amount had been paid by way of advance rent. The transaction embodied in the indenture of lease was clearly business-like. The lessees wanted the building for running it as a cinema house and the lessor agreed to give it to them but apparently represented that he did not have enough money to complete it in accordance with the suggestion and requirement of the lessees. The lessees agreed to pay him the aforesaid amount by way of a lump sum without making any provision for its adjustment towards the rent or repayment by the lessor. The essential question, however, is whether on the terms of the lease and in the absence of any other material or evidence could it be held that the sum of Rs. 55,200/- was paid by way of advance rental. The view which has been expressed by the Tribunal as also the High Court that the lease was for a comparatively short period of thirty years and that the aforesaid amount had to be spread over that period by way of rent in addition to a rental of Rs. 2,100/- per month cannot be sustained as no foundation was laid for it by any cogent evidence. The departmental authorities can well be said to have based their decision on mere conjectures as there was nothing whatsoever to substantiate the suggestion that the real rental value of the cinema house was in the region of Rs. 2,250/- per month and not Rs. 2,100/- which was the agreed rent.

6. It can equally well be said that the payment of the amount in question to the appellant was in the nature of a premium (salami). In the words of Lord Greene, M. R., in *Henriksen v. Grafton Hotel Ltd.* (24 ITC 453), "A payment of this character appears to me to fall into the same class as the payment of a premium of a lease, which is admittedly not deductible. In the case of such a premium it is nothing to the point to say that the parties if they had chosen, might have suppressed the premium and made a corresponding increase in the rent. No doubt they might have done so, but they did not do so in fact". Fazl Ali, J. (as he then was), in *Commissioner of Income-tax Bihar and Orissa v. Viswashwar Singh* ((1939) 7 ITR 536), referred to the distinction between a single payment made at the time of the settlement of the demised property and recurring payments made during the period of its enjoyment by the lessee. This distinction, according to the learned Judge, is clearly recognised in Section 105 of the Transfer of Property Act which defines both premium and rent. This is what was observed at page 545 :

"It is obvious that if the premium represents the whole or part of the price of the land it cannot be income. As pointed out by Sir George Lowndes in the *Commissioner of Income-tax, Bengal v. Messrs. Shaw Wallace and Company*, income in the Indian Income-tax Act connotes a periodical monetary return, coming in with sort of regularity or expected regularity from definite sources. The premium of salami which is paid once for all and is not recurring payment, hardly satisfies this test. I concede that in some cases where the rent is ridiculously low and the premium abnormally high, it may be possible to argue that the premium includes advance rent"

It has not been even remotely suggested in the present case that the rent of Rs. 2,100/- per month was ridiculously low as compared with the amount of Rs. 55,200/- paid in lump sum. It is true that the question whether premium is a capital or a revenue receipt cannot be decided as a pure question of law. Its decision necessarily depends upon the facts and circumstances of each case. It would not, however, be wrong to say that prima facie premium or salami is not income and it would be for the income-tax authorities to show that facts exist which would make it a revenue receipt. There is another factor which is of substantial importance in the present case. According to the terms of the lease the payment of rent was to commence not from the date of the lease which was February 23, 1946, but with effect from June 1, 1946. It is also not disputed that the lessees entered into possession after the cinema house had been completed which was subsequent to the date of the lease. These facts coupled with the payment of a lump sum which was of a non-recurring nature

showed that the amount in question had all the characteristics of a capital payment and was not revenue. This would be in accord with the principles laid down by this court in Member for the Board of Agricultural Income-tax v. Sindhurani Chaudhurani and others ((1957) 32 ITR 169), which was a case of settlement of agricultural land but in which the principles governing the payment of premium or salami have been fully discussed.

7. For the reasons given above we hold that the question which was referred to the High Court ought to have been answered in the negative and in favour of the assessee. The appeal is accordingly allowed with costs in this Court and the High Court and the answer returned by the High Court is hereby discharged.

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