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

INCOME TAX APPEAL NO.1361 OF 2013

The Commissioner of Income Tax-14 .. Appellant.
V/s.
M/s. Kewal Silk Mills .. Respondent.

Mr. Charanjeet Chanderpal, for the Appellant.
Mr. Percy Pardiwalla, Sr. Advocate i/b. Mr. A. K. Jasani, for the Respondent.

CORAM: M.S.SANKLECHA, &
N.M.JAMDAR, JJ.
DATE : 15th JUNE, 2015.

P.C:-

This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 12th October, 2012 passed by the Income Tax Appellate Tribunal (the Tribunal) for the Assessment Year 2009-10.

2 In support of its submission that this appeal requires admission, the Appellant-Revenue urges that the following questions of law arise in this appeal:-

> *"(a) Whether the Tribunal was justified in law as well as on facts, in holding that the assessee has received compensation for surrender the tenancy right, and ignoring the fact that the assessee has not termed as tenant as per the Maharashtra rent control act?*
>
> *(b) Whether in the fact and circumstances of the case and in law, the tribunal was justified in holding that amount received by assessee on account of transfer of capital assets occupied by assessee within the meaning of "capital gain" even otherwise the*

deed of surrender of tenancy stated that it is a compensation in connection with loss of business, profit and convenience and hardship due to shifting elsewhere?"

3 Briefly the facts leading to this appeal is that Respondent-Assessee had entered into an agreement dated 13th June, 1972 with one M/s. Modern Textiles and Silk Mills Private Limited (Modern) for use of looms and machinery in the subject premises and also took occupation of the subject premises. M/s. Modern was itself tenant of the subject premises. The above agreement inter alia, provided that the Respondent was granted use of the subject premises only as a licensee, incidental to its use of the looms. It also provided that the agreement dated 13th June, 1972 cannot in any manner be construed as a sub-lease of the subject premises. In the subject Assessment Year, the Respondent-Assessee under Agreement dated 7th October, 2008 surrendered its occupation of the subject premises to Pravin and Rajesh Makwana (Makwana) on receipt of consideration. The Respondent offered the consideration received on the surrender of its occupation of the subject premises as long term capital gain, claiming exemption under Section 54EC of the Act. The Assessing Officer did not accept the Respondent-Assessee's contention that surrender of occupation of the subject premises was transfer of capital asset and held that the amount received on account of surrender of tenancy rights would be chargeable to tax under the head '*Income from other sources*' and not as '*Capital gains.*'

4 On appeal, the Commissioner of Income Tax (Appeals) [CIT(A)] upheld the order of the Assessing Officer. On further appeal, the Tribunal while allowing the appeal, placed reliance upon the definition of the tenant under Sections 5(11) and 15A of the Bombay Rent, Hotel &13

Lodging and House Rates Control Act, 1947 (the Rent Control Act), providing for deemed tenancy of premises in occupation of any person as on 1st February, 1973. On the above basis, the Tribunal concluded that surrender of occupation was surrender of tenancy i.e. capital asset and the amounts received was taxable under the head '*Capital gains*' and not under the head '*Income from other sources*'. Section 15A of the Rent Control Act provides that a person in occupation of the premises shall be deemed to be a tenant in respect of premises in its occupation.

5 For proper appreciation of the impugned order and the grievance of the Appellant-Revenue, it would be useful to reproduce Sections 5(11) and 15A of the Rent Control Act which reads as under:-

> ***Section 5 (1) to (10):-***
> *"(11) 'tenant' means any person by whom or on whose account rent is payable for any premises and includes--*
>
> *(a) such sub-tenants and other persons as have derived title under a tenant [before the 1st day of February 1973;]*
> *[(aa) any person to whom interest in premises has been assigned or transferred as permitted or deemed to be permitted, under section 15;]*
>
> *(b) any person remaining, after the determination of the lease, in possession, with or without the assent of the landlord, of the premises leased to such person or his predecessor who has derived title [before the first day of February 1973];*
>
> *[(bb) such licensees as are deemed, to be tenants for the purposes of this Act by section 15A;]*
>
> *[(bba) the State Government, or as the case may be, the Government allottee, referred to in sub-clause (b) of clause (1A), deemed to be a tenant, for the purposes of this Act by section 15B]*

115A – Certain licensees in occupation on 1st February 1973 to become tenants – (1) Notwithstanding anything contained elsewhere in this Act or anything contrary in any other law for the time being in force, or in any contract, where any person is on the 1st day of February 1973 in occupation of any premises, or any part thereof which is not less than a room, as a licensee, he shall on that date be deemed to have become; for the purposes of this Act, the tenant of the landlord, in respect of the premises or part thereof, in his occupation.

(2) The provisions of sub-section (1) shall not affect in any manner the operation of sub-section (1) of section 15 after the date aforesaid."

6 The grievance of the Appellant-Revenue is that the Respondent-Assessee cannot be considered to be a tenant of the subject premises, thus the giving up of occupation by it was not a surrender of capital assets. This on the basis that the Agreement dated 13th June, 1972 entered into by the Respondent-Assessee clearly provided that it had rights only to the looms and machinery and use of the subject premises was only incidental. The Agreement dated 13th June, 1972 in terms also provided that license to use the premises will not be construed as sub-lease in any form. Therefore, it is submitted that Sections 5(11) and 15A of the Rent Control Act would not be of any avail to Respondent-Assessee. Consequently, the amounts received on surrender of occupation of the subject premises has to be classified as '*Income from other sources*' and not as '*Capital gains*'. In the alternative, it was submitted that in any event, tenancy by itself is not a capital asset under Section 2(14) of the Act and, therefore, surrender of it will not result in capital gains. Thus, it is submitted that the appeal does raise substantial question of law and requires consideration.

7 It is an undisputed position that the Respondent-Assessee is in occupation of the subject premises consequent to Agreement dated 13th June, 1972 i.e. prior to 1st February, 1973. The impugned order on the basis of the clear provisions found in Section 2(11) and 15A of the Rent Control Act concludes that the Respondent-Assessee is a deemed tenant of the subject premises. In fact, Section 15A of the Rent Control Act, inter alia, provides that notwithstanding anything to the contrary in any contract, where a person is in occupation of the premises on 1st February, 1973, he shall be deemed to have become the tenant of the landlord in respect of the premises or part thereof, in his occupation. Thus, it follows that if the owner of the subject premises were to seek eviction of the Respondent-Assessee on the basis of the contract, it would fail in view of the clear position in to Section 15A of the Rent Control Act. Thus, the Respondent-Assessee is a deemed tenant of the subject premises. Consequently, such tenancy being property would be a capital asset and amounts received on surrender of it would be capital receipts chargeable to tax under the head '*Capital gains.*' The issue of tenancy being a capital asset is no longer res integra as the Apex Court in ***CIT v/s. D. P. Sandu Bros. Chembur 273 ITR 1*** has upheld the view of this Court in ***Union of India v/s. Cadell Weaving Mill Co. 249 ITR 265*** wherein it has been held that tenancy right was a capital asset and surrender of the same was a transfer of a capital asset.

8 In view of the self-evident and settled position in law, this appeal does not raise any substantial question of law, to be entertained.

9 Accordingly, **appeal dismissed**. No order as to costs.

(N.M.JAMDAR,J.) **(M.S.SANKLECHA,J.)**