IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.699 OF 2002 (
Assessment Year 1988-89)

T.V. Patel Pvt. Ltd.
'Kanchanjunga', 72, Peddar Road,
Mumbai – 400 026 .. Appellant v/s.
The Dy. Commissioner of Income Tax
Special Range-14, Mumbai .. Respondent

WITH

INCOME TAX APPEAL NO.638 OF 2002 (
Assessment Year 1986-87)

Tulsidas V. Patel Pvt. Ltd.
'Kanchanjunga', 72, Peddar Road,
Mumbai – 400 026 .. Appellant v/s.
The Dy. Commissioner of Income Tax
Special Range-14, Mumbai .. Respondent

WITH

INCOME TAX APPEAL NO.639 OF 2002 (
Assessment Year 1987-88)

T.V. Patel Pvt. Ltd.
'Kanchanjunga', 72, Peddar Road,
Mumbai – 400 026 .. Appellant v/s.
The Dy. Commissioner of Income Tax
Special Range-14, Mumbai .. Respondent

WITH

INCOME TAX APPEAL NO.720 OF 2002
(Assessment Year 1989-90)

T.V. Patel Pvt. Ltd.
'Kanchanjunga', 72, Peddar Road,
Mumbai – 400 026 .. Appellant v/s.
The Dy. Commissioner of Income Tax Special Range-14, Mumbai .. Respondent

WITH
INCOME TAX APPEAL NO.675 OF 2002 (
Assessment Year 1990-91)

T.V. Patel Pvt. Ltd.
'Kanchanjunga', 72, Peddar Road,
Mumbai – 400 026 .. Appellant v/s.
The Income Tax Officer, Circle 2(1), Mumbai .. Respondent

WITH
INCOME TAX APPEAL NO.676 OF 2002 (
Assessment Year 1991-92)

T.V. Patel Pvt. Ltd.
'Kanchanjunga', 72, Peddar Road,
Mumbai – 400 026 .. Appellant v/s.
The Income Tax Officer, Circle 2(1), Mumbai .. Respondent

WITH
INCOME TAX APPEAL NO.640 OF 2003 (
Assessment Year 1993-94)

Tulsidas V. Patel Pvt. Ltd.
'Kanchanjunga', 72, Peddar Road,
Mumbai – 400 026 .. Appellant v/s.
The Dy. C.I.T., Special Range 26,
Aaykar Bhavan, M.K. Road, Mumbai .. Respondent ….
Ms. Shobha Jagtiani, a/w. Ms. Sneha Agicha, i/by D.M. Haresh & Co., for the Appellant.

Mr. Akhileshwar Sharma, a/w. Ms. Shilpa Goel, for the Respondent.

….

CORAM : G.S. KULKARNI &
JITENDRA JAIN, JJ.

DATED : 4th DECEMBER 2023.

Judgment (Per Jitendra Jain, J.) :-

. The present appeals relate to the assessment years 1986-87, 1987-88, 1988-89, 1989-90, 1990-91, 1991-92 and 1993-94. The appeal for assessment year 1986-87 being first year is taken as lead matter for the purpose of deciding the question of law. The appeal for

A. Y. 1986-87 was admitted by an order of this Court dated 3rd

September 2004 on the following question of law:-

"1.Whether the Tribunal had erred in law in holding that the Assessing Officer was justified in reopening the assessment u/s. 148 of the Income Tax Act ?

2. Whether the Tribunal erred in not appreciating the fact that the collection of rent from I.D.B.I. was a unilateral act by the Assessing Officer and the appellant had no connection with the same. Furthermore, the appellant had objected to the collection of this rent which the Assessing Officer had not acceded?"

2. At the stage of final hearing of the above appeal for assessment year 1986-87, the Appellant did not press for adjudication of question no.1 which relates to validity of proceedings under section 147 of the Income Tax Act, 1961. In all the other assessment years, including assessment year 1986-87, therefore, only following common question of law arises for consideration of this Court:-

"Whether the Tribunal erred in not appreciating the fact that the collection of rent from I.D.B.I. was a unilateral act by the Assessing

Officer and the appellant had no connection with the same. Furthermore, the appellant had objected to the collection of this rent which the Assessing Officer had not acceded ?"

A. Relevant facts :

3. On 1st October 1978, the Appellant, the lessees of M/s. Neville Wadia Pvt. Ltd. entered into an Agreement with Bombay Builders to construct a building at Cumballa Hill and sell 30 flats to the Appellant at an agreed price. On 22nd April 1980, by a Tripartite Agreement, Bombay Builders as confirming party was substituted with the IDBI as sub-lessee and the Appellant sub-leased the said property at Cumballa Hill in Mumbai on annual lease rent of Rs.3,42,720/- to IDBI. The Appellant received the aforesaid rent and offered Rs.3,42,720/- being lease rent in its return of income for the assessment year 1981-82. The said income was offered for tax under the head "Income from Other Sources."

4. In the previous year 1980-81, dispute arose between the Appellant and the IDBI for various breaches alleged to have been committed by the IDBI. This led to the Appellant terminating the sub-lease agreement on 14th September 1981, and, thereafter, the Appellant refused to accept the rent from IDBI post-termination. In the year 1981, IDBI filed a Declaratory Suit No.4560 of 1981 in the Small Cause Court and on 13th October 1981 obtained injunction against the Appellant from terminating the sub-lease agreement. On 19th March 1984, the Revenue issued a garnishee notice to IDBI under Section 226(3) of the Income Tax Act (for short "the Act") with respect to outstanding tax arrears of the Appellant directing IDBI to pay the rent to the Income-tax department. The Appellant informed the Revenue by letter dated 16th July 1984, that since the sub-lease agreement has been terminated, there was no rent due and payable by IDBI to the Appellant and, consequently, the garnishee proceedings are illegal. The copy of this letter was also sent to IDBI under a cover of letter dated 31st July 1984. Also the Appellant by its letter dated 9th October 1985 and 14th July 1986 addressed to the IDBI reiterated about the termination recording that IDBI should not make payment to the Income tax department pursuant to the garnishee notice. However, IDBI deposited the amount as per the sub-lease agreement with

the Income Tax Department in spite of the Appellant terminating the agreement. In the year 1984, the Appellant filed a suit for eviction against the IDBI and claimed various reliefs, including compensation for wrongful use and occupation of the flats.

5. The prayers in the eviction suit filed by the Appellant are as under:-

"a) that it may be declared that the Sub-Lease dated 22nd April, 1980 is lawfully terminated and forfeited by the Plaintiffs as stated in the Plaint.

b) that it may be declared that :

(i) the plaintiffs are the lawful owners of Rear Tower Building which includes part construction made by the Plaintiffs, further part construction made by the 2nd Defendants and further part construction made by the 1st Defendants after 22nd April 1980 on the plot of land sub-demised to the 1st Defendants under the Sub-Lease dated 22nd April 1980.

(ii) the Defendants have no right, title or interest whatsoever therein.

(c) that the Defendants be ordered and decreed to hand over vacant and peaceful possession of Rear Tower Building including part construction made by the Plaintiffs, further part construction made by the 2nd Defendants and further part construction made by the 1st and 2nd Defendants after 22nd April 1980 together with the land sub-leased to the 1st Defendant.

(d) that the 1st Defendants be ordered and decreed to pay to the Plaintiffs arrears of rent or compensation for wrongful use and occupation of the property in suit, a sum of Rs.1,12,50,000/- at the rate of Rs.4,50,000/- per month from 1st December 1981 to the date of suit.

(e) that the Defendants, their servants and agents should be restrained by a mandatory order and injunction of this Honourable Court from in any manner using the access from Peddar Road (Dr. G. Deshmukh Marg) for going to the Rear Tower Building on the land sub-demised to the 1st Defendant.

(f) that pending the hearing and final disposal of the suit, a Receiver or some fit or proper person should be appointed for the said Rear Tower Building with land thereunder admeasuring 3000 sq. mtrs., or thereabouts situated at Bomanji Petit Road, Bombay more particularly described in the Schedule being Ex.'H' hereto with all powers under Order 40 Rule 1 of the Code of Civil Procedure with power to take possession thereof and also to construct and complete construction thereon.

(g)that pending the hearing and final disposal of the above suit, the Defendants, their servants and agents should be restrained by an order and injunction of this Honourable Court from in any manner dealing with or disposing off or selling or alienating or encumbering or parting with possession thereof or inducting any third party in the said Rear Tower building or any portion thereof or from entering into any agreements for any of the purposes as aforesaid.

(h)that pending the hearing and final disposal of the above suit the Defendants, their servants, and agents should be restrained by an order and injunction of this Honourable Court from in any manner using the access from Peddar Road (Dr. G. Deshmukh Marg) for entering into the said Rear Tower Building or the land under the said Sub-Lease.

(i) that the Defendants should be ordered and decreed to pay to the Plaintiffs a sum of Rs.6,18,750/- per month as compensation for wrongful use and occupation and enjoyment of the Plaintiffs property being the Rear Tower Building and the land sub-demised from the date of the suit till vacant and peaceful possession thereof is handed over to the Plaintiffs from the date of the suit till the recovery of the suit premises.

(j) Ad-interim reliefs in terms of prayers (e), (f), (g), (h) and (i).

(k)Defendants may be ordered and decreed to pay to the Plaintiffs interest at the rate of 18% per annum on the amounts claimed in the prayers (d) and (i) mentioned hereinabove from the date of suit till payment or realisation.

(l) That the Defendants be ordered to pay to the Plaintiffs the cost of the suit.

(m)For such further and other directions and reliefs as this Honourable Court may deem fit and proper."

(emphasis supplied)

6. On 3rd May 1999, on an application made by the IDBI (plaintiff) following order came to be passed by the Small Causes Court in the Declaratory suit filed by the IDBI :-

"O R D E R"

The application is made absolute with no order as to cost.

The plaintiffs are hereby allowed to deposit the lease rent in court as detailed in prayer clauses (a), (b) and (c) of the application within four weeks from the date of order and to go on depositing the same till the rights of the parties are decided. The order of deposit of the rent is without prejudice to the rights and contentions of the parties.

The Defendants are at liberty to withdraw the amount deposited in the court.

(emphasis supplied) However, the Appellant has not withdrawn any amount.

7. We are informed that both the suits, namely, the suit filed by the IDBI and the suit filed by the Appellant are pending as on today.

8. On 20th February 1985, an assessment order for assessment year 1981-82 came to be passed wherein the lease rent of Rs.3,42,720/- as offered under the head "income from other sources" was assessed. In the said assessment order, the Assessing Officer has noted the aforesaid dispute between the Appellant and the IDBI.

9. The Appellant did not offer the aforesaid lease rent as its income in the return of income filed for the assessment years 1982-83 to 1985-86 in view of the termination of the sub-

lease by the Appellant. The proceedings with respect to the said assessment year have become final and no addition was made on account of the subject sub-lease rent by the Revenue.

10. The Appellant did not offer aforesaid rent for tax in its return of income for assessment year 1986-87. Thereafter, the case of the Appellant for the assessment year 1986-87 was reopened under Section 148 of the Act for assessing the subject sub-lease rent, which the Appellant had not offered for tax in its return of income for the said assessment year.

11. On 20th March 1989, an assessment order under section 143 read with section 148 of the Act for the assessment year 1986-87 came to be passed and the rent on account of sub-lease agreement of the Appellant with IDBI amounting to Rs.3,42,720/- was added as income of the Appellant. In the assessment order, the Assessing Officer records submissions of the Appellant that since the sub lease agreement with the IDBI has been terminated and a suit is filed against it, no amount is due from IDBI as lease rent and, therefore, question of taxing the same does not arise. The Assessing Officer, however, rejected the said contention on the ground that sub lease agreement exists for the relevant assessment year 1986-87 on the ground that the Appellant itself has admitted that it had filed a suit against the IDBI for termination of sub-lease agreement and, therefore, the matter was subjudice.

12. The aforesaid assessment order was challenged in appeal before the Commissioner of Income-tax (Appeals). The Commissioner of Income-tax (Appeals), vide cryptic order dated 11th March 1992, confirmed the order of the Assessing Officer. The order of the Commissioner (Appeals) was challenged before the Tribunal and the Tribunal, vide its order dated 19th December 2001, in ITA No.4873/Bom/1992, confirmed the

addition and the relevant para of the Tribunal giving its reasoning for confirming the addition reads as under :-

> "11. It is abundantly clear from the records that the assessee did not waive his right to receive the rent. The claim for the arrears rent and compensation was pending before the Court. The consideration, as agreed and stipulated in the agreement, was paid by IDBI. The assessee was demanding rent and compensation over and above that amount. Therefore, right to receive the amount as stipulated on the agreement was intact. The dispute was for the additional rent and compensation. Therefore, there is no doubt that in the year under consideration income did accrue to the assessee. It was being utilised towards the payment of tax arrears. There was absolutely no possibility of refunding this amount to the IDBI."
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> (emphasis supplied)

13. It was on this background that the present appeal under Section 260A of the Act came to be filed before this Court and the same was admitted by an order dated 3rd September 2004. B. Submissions of the Appellant/Assessee :

14. The learned Counsel for the Appellant would contend that since the Appellant had terminated the sub-lease agreement with the IDBI in 1981 itself and it had filed a suit for eviction before the Small Cause Court and the IDBI has also filed a suit to restrain the Appellant from terminating the agreement and from dispossessing IDBI and both these cross-suits are still pending adjudication by the Small Causes Court as of today, there was no accrual of income of Rs.3,42,720/- arising under the sub-lease agreement between the Appellant and the IDBI. The learned Counsel for the Appellant has contended that the Revenue cannot tax the amount in the year under consideration on fortuitous circumstances by speculating what the Small

Causes Court would ultimately decree in the suit. The Counsel further contended that since cross suits are pending before Small Causes Court, the Revenue cannot pre-empt the decision of the Civil Court to tax rent. The Appellant relied upon the following decisions in support of the above contentions :-

(i) Commissioner of Income Tax Vs. Vimla D. Sonwane & Ors., (1995) 212 ITR 489 (Bom);

(ii) Pal Properties (I) Pvt. Ltd. Vs. Commissioner of Income Tax, (2002) 254 ITR 687 (Delhi);

(iii) P. Mariappa Gounder (Dead) by LRs. Vs. Commissioner of Income Tax, Madras, (1998) 3 SCC 552;

(iv) Godhra Electricity Co. Ltd. Vs. Commissioner of Income Tax, 225 ITR 746 (SC);

(v) Commissioner of Income Tax, West Bengal-II, Calcutta Vs. Hindustan Housing and Land Development Trust Ltd., (1986) 161 ITR 524 (SC).

C. Submissions of the Respondent/Revenue :

15. Per contra, learned Counsel for the Respondent supported the order passed by the Assessing Authority and confirmed by the Appellate Authorities to contend that revenue would be justified in making an addition of Rs.3,42,720/-. The Respondent contended that whether the suit pending before the Small Causes Court is allowed in favour of the Appellant or dismissed against the Appellant, in either case the Small Causes Court would atleast order IDBI to pay Rs.3,42,720/- p.a. towards the use and occupation of the property of the Appellant since the property is in possession of the IDBI. Therefore, it is contended that sum of Rs.3,42,720/- is chargeable to tax under the Act for the year under consideration i.e. assessment year 1986-87 . It is further submitted that sum of Rs.3,42,720/- is an ascertained sum and, therefore, same accrues to the Appellant moreso because IDBI has not accepted termination and is willing to pay the rent but the Appellant is not accepting the same. The Respondent further contended that the letter of termination dated

14th September 1981 only indicates intention of the Appellant to terminate and there is no actual termination of the sub-lease agreement and, therefore, agreement exists as on today and therefore rent is taxable on accrual basis. The Counsel for the Respondent distinguished the case laws relied upon by the Appellant on the ground that those cases dealt with enhanced compensation which was the subject matter of litigation and the sum was not ascertained whereas in the present case Rs.3,42,720/is an ascertained sum under the sub-lease agreement. An apprehension is expressed that if and when in future the Civil Court decrees certain amounts to be paid to the Appellant by the IDBI for use and occupation of the property from the date of filing the suit, the Appellant Assessee would contend in the year of the said decree, that the amount cannot be taxed because it pertains to assessment year 1986-87 and, in such a scenario, the Revenue would not have any recourse to tax the said amount in assessment year 1986-87 on account of limitation. Therefore, it is contended by the Respondent that the Revenue is justified in taxing the said amount in the assessment year 1986-87.

16. We have heard the learned counsel for the Appellant and the Respondent and we have with the assistance of the parties also perused the case records.

D. Analysis :

17. We now propose to analyse whether sum of Rs.3,42,720/can be said to have accrued to the Appellant in the assessment year 1986-87 ?

18. Section 56 of the Act which deals with 'Income from other sources' provides for charging to income tax, income of every kind which is not chargeable for income tax under any of the heads specified in Section 14, items A to E. The Appellant is a company governed by the Indian Companies Act, 1956 (now Companies Act, 2013) and maintains its books of accounts on mercantile basis. Section 5(1)(b) of the

Act provides for scope of total income to include all income which "accrues" or "arises" or "is deemed to accrue or arise" in India during such year.

19. The words 'accrue' or 'arise' have different meanings attributed to them while the former connotes the idea of a growth or accumulation, the latter connotes the idea of crystallization of the former into a definite sum that can be demanded as a matter of right. For determining the point of time of accrual, two factors are relevant. The first is a qualitative factor and second is a quantitative factor. The qualitative factor is relatable to the terms of the agreement or conduct of the parties for determining when the legal right to receive income emerges. The quantitative factor is relatable to the exact sum in respect of which the qualitative factor of legal right to receive is applied. These two factors have no order of priority between them. When both converge, there is a legal right to receive a certain sum of money as income. Such convergence determines a point of time of accrual. In order that income may be said to have accrued at a particular point of time, it must have ripened into a debt at that time, that is to say, the Assessee, should have acquired a right to receive payment at that moment, though the receipt itself may take place later. There must be a debt owed to the Assessee by somebody at that moment or, as is otherwise expressed, "debitum in praesenti solvendum in futuro". Until it is created in favour of the Assessee, the debt due by somebody, it cannot be said that he has acquired a right to receive to any income accrued to him. There is also a difference between "accrue or arise" or "earned" Earning the same is not the same as accrual of income but it is a stage anterior to accrual of income. A person does not have a legal right to receive the income by merely earning of income. Although, earning of income is a necessary pre-requisite for accrual of income, mere earning of income without right to receive the same

does not suffice. A person may be said to have "earned" his income in the sense that he has contributed to its production by rendering service and the parenthood of the income can be traced to him but in order that the income that may be said to have "accrued" to him an additional element is necessary that he must have created a debt in his favour. The phrase "accrue or arise" has been the subject matter of judicial debate from inception which we now propose to deal with some of them.

20. The Supreme Court, in the case of E D Sassoon & Co. Ltd. vs. CIT [1], observed thus:

> "'Accruing' is synonymous with 'arising' in the sense of springing as a natural growth or result. …, strictly speaking 'accrues' should not be taken as synonymous with 'arises' but in the distinct sense of growing up by way of addition or increase or as an accession or advantage; while the word 'arises' means comes into existence or notice or presents itself. The former connotes the idea of a growth or accumulation and the latter of the growth or accumulation with a tangible shape so as to be receivable. It is difficult to say that this distinction has been throughout maintained in the Act and perhaps the two words seem to denote the same idea or ideas very similar, and the difference only lies in this that one is more appropriate than the other when applied to particular cases." The Supreme Court in the above case has recognised that there is a difference between these two terms but hastened to add that it is difficult to say that this distinction has been throughout maintained in the Act. For the purpose of section 5 the aforesaid difference between the words 'accrue' and 'arise' is not relevant as both are considered to convey the same meaning. In the Act, the two words are used synonymously with each other to denote the same idea or ideas very similar, and the difference lies only in this that one is more appropriate than the other, when applied, to a particular case."

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[1] (1954) 26 ITR 27(SC)

21. The Calcutta High Court, in the case of CIT vs. Bharat Petroleum Corporation Ltd.[2], observed that the amount can accrue or arise to the Assessee if the Assessee acquires a legal right to receive the amount or, conversely, the said amount has become legally due to the Assessee from the Assessee's debtor. The mere raising of claim or bill does not create any legally enforceable right to receive the same.

22. In CIT, Gujarat vs. Ashokbhai Chimanbhai[3], the Supreme Court observed that when the right to receive the income becomes vested in the Assessee, it can be said to have accrued or arise.

23. In the case of CIT vs. Vimla D. Sonwane & Ors.[4], the Assessee, co-owner of a plot, gave on lease one plot at Rs.9 lakhs per year to M/s. Poonam Hotels Pvt. Ltd. and other plot to M/s. Punjab Co-operative Housing Society at Rs. 6 lakhs per year. Both the lessees filed proceedings for fixing of standard rent in the Small Causes Court at Bombay. The Assessee there did not follow the mercantile system of accounting but income was offered on receipt basis. The Revenue sought to add the lease money in the total income of the Assessee on accrual basis on the basis of agreed rent. The matter reached this Court and the Court in para 5 observed as under:

> "The right to receive the agreed lease money was in jeopardy because of pendency of proceedings for fixing of standard rent in a Court of law. There was neither factual accrual nor deemed accrual."

In this case, although the Assessee was following the cash system of accounting, but the High Court observed that since the dispute between the Assessee and the lessee was pending in a court of

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[2] 1993 202 ITR 492 (Cal)

3 1965 AIR 1343
4 1995 212 ITR 489 (Bom)

law, there was no factual accrual or deemed accrual.

24. In Pal Proprieties (I) Pvt. Ltd. vs. CIT[3], following questions were raised before the Delhi High Court:

> "(i) Whether the Tribunal was right in law in holding that the damages or any part thereof for illegal occupation of the premises accrued to the appellant though the claim was yet to be adjudicated finally and was pending disposal before the High Court ?
>
> (ii) Whether the Tribunal is right in law in holding that the amount received by the appellant under interim order of the High Court dated January 6 1993, relevant to the assessment year 1993-94 is taxable on month to month basis in the assessment years 1990-91 and 1991-92 as relatable thereto ?"

In this case, the Assessee entered into a lease agreement in 1979 , which was renewed from time to time and, ultimately, on June 15 , 1989, the sub-lease expired. Since the lessee failed to pay the rent to the Assessee, the tenancy agreement was terminated with effect from 31st January 1989, on the ground of non-payment of rent. The Assessee received a letter from the lessee along with the cheque representing the rent for the month July to October 1988 but the Assessee returned the cheque clarifying that tenancy was terminated. The Assessee has filed a legal suit against the lessee for vacating the premises. Hence, the right to receive rent was in dispute. It was, hence, submitted that rent could not be brought to tax. The Assessing Officer did not accept the contention of the Assessee and the matter travelled to Delhi High Court. The Delhi High Court, in para 6 proceeded on the basis that the Assessee has been following the mercantile system of accounting. In para 9, the Delhi High Court observed that upon termination of tenancy, the tenant no longer

3 (2002) 254 ITR 687 (Del)

remains a tenant but becomes a trespasser and for the purpose of the eviction the Assessee had filed a suit and claimed a decree for rent and mesne profit. In the suit, the Assessee claimed Rs.70,000/- per month by way of damages, which was higher than the actual rent payable at Rs.24,000/- and the said sum has become payable to the landlord. The Delhi High Court observed that the mesne profits are a composite sum payable by the lessee, who becomes the trespasser upon the termination of the lease and mesne profits are unascertained amounts of money. They do not constitute a debt. The High Court further observed that lis between the parties is pending adjudication, the fate thereof is unknown. It is further observed that there cannot be said that only because the claim of the Assessee by way of mesne profit denotes a higher amount of the rent, same can be divided into two parts, as has been sought to be done by the Tribunal. The Delhi High Court applied the ratio of CIT vs. Hindustan Housing and Land Development Trust[4] and P. Mariappa Gounder (dead) by LRs vs.

CIT-Madras[5], Godhra Electricity Ltd. vs. CIT[6] and observed in para

24 that the mesne profits, which are yet to be determined, do not come within the purview of an accrued income for the purposes of Section 4 and 5 of the Income Tax Act till the judgment in regard to civil dispute was rendered in this regard. The Delhi High Court answered the two questions raised in favour of the Assessee and against the Revenue.

25. The Supreme Court, in the case of P. Mariappa Gounder vs. CIT[7], had an occasion to consider the time of accrual of mesne profit in the suit for specific performance of agreement for sale of factory. The Supreme Court in the civil suit held the plaintiffappellant therein to be entitled to mesne profit. Pursuant to the Supreme Court's direction, trial court quantified the amount of mesne profit in accounting year

[4] (1986) 161 ITR 524 (SC)
[5] (1998) 3 SCC 552
[6] (1997) 225 ITR 746
[7] (1998) 3 SCC 552

relevant to assessment year 1963-64 and the Assessee receiving the same in accounting year relevant to assessment year 1964-65. The issue arose whether the said mesne profit accrued to the Assessee in the assessment year 1963-64 when the trial court quantified the same or in the year 1964-65 when the Assessee received the amount. The Assessee in this case was following mercantile system of accounting. The Supreme Court held that the decree passed by them only created inchoate right in favour of the Assessee. It is only when the trial court determined the amount of mesne profit, the right to receive the same is accrued in his favour and the liability became ascertained only on the date of the trial court determining mesne profit, that is to say, on 22nd December 1962 and not earlier and since the Assessee was following mercantile system of accounting, the mesne profit accrued was rightly taxed in Assessment year 1963-64 and it was only irrelevant when the amount awarded was, in fact, realized by the Assessee.

26. In Godhra Electricity Co. Ltd. vs. CIT[8], the Supreme Court held that even though the Assessee Company was following mercantile system of accounting and had made entries in the books regarding enhancement charges, no real income accrued to the Assessee company in respect of those enhanced charges on account of various suits filed and pending on the right of the Assessee company to enhance the charges.

27. In CIT vs. Hindustan Housing and Land Development

[8] (1997) 225 ITR 746 (SC)

Trust[9], following question arose before the Supreme Court:

> "Whether on the facts and in the circumstances of the case, the extra amount of compensation amounting to Rs.7,24,914 was income arising or accruing to the assessee during the previous year relevant to the assessment year 1956-57."

In this case, the Assessee's land was acquired by the State Government and the Land Acquisition officer awarded a sum of Rs.24,97,295/- as the compensation payable to the Assessee. The Assessee was not satisfied with the amount of compensation preferred an appeal before the Arbitrator. The Arbitrator made an award dated 29th July 1955 fixing the amount of compensation at Rs.30,16,787/on account of the permanent acquisition of the land. Thus, in addition to the original amount of compensation further compensation was awarded amounting to Rs.5,13,624/- and on which he directed interest at the rate of 5% per annum from January 8, 1953, the date of acquisition upto the date of payment. The State Government filed an appeal against the said award to the High Court. During the pendency of the appeal, the State Government deposited Rs.736691/-, which the Assessee was permitted to withdraw on 9th of May 1956 on furnishing security. On receipt of the amount, the Assessee credited it in its suspense account on the same date. The issue arose when the sum of Rs.736631/- can be said to have accrued during the relevant assessment year 1956-57 for the previous year ending 31st March 1956 . The Supreme Court reiterating the principle laid down in the case of E.D. Sassoon & Co. Ltd. observed that there was no absolute right to receive the amount at the time of withdrawing the sum because if the appeal of the State Government was allowed in its entirety, the right to payment of the enhanced compensation would fall altogether. The Supreme Court referred to the observation of the Andhra Pradesh High Court in the case of Khan Bahadur Ahmed Alladin & Sons vs. Commissioner of Income-tax[10] as under:

> "Income-tax is not levied on a mere right to receive compensation; there must be something tangible, something in the nature of debt, something

[9] (1986) 161 ITR 524 (SC)
[10] (1969) 74 ITR 651

> in the nature of an obligation to pay an ascertained amount. Till such time, no income can be said to have accrued."

The Supreme Court held that it was on the final determination of the amount of compensation that the right to such income would arise or accrue and, till then, there was no liability in presenti in respect of the additional amount of compensation claimed by the owner of the land. The Supreme Court made a distinction between cases where the right to receive payment is in dispute and it is not a question of merely quantifying the amount to be received and cases where the right to receive payment is admitted and the quantification of the amount received is left to be payable in amount of settled principles. Since the right to receive itself was in dispute, no income accrued to the Assessee in that case.

28. To the same effect that in case of civil disputes pending before the Court, no income accrues till the dispute is finally adjudicated, we may also refer to the following decisions:-

(i) DSL Enterprises Pvt. Ltd. vs. ITO [11]
(ii) PCIT vs. Rajdarbar[12]
(iii) CIT vs. Sarbatain Road Runner Pvt. Ltd.[13]
(iv) FGP Ltd. vs. CIT[14]
(v) CIT vs. Sushil Thomas Abraham[15]

29. The principle of law as laid down in the aforesaid decisions is to the effect that if the matter is pending before the judicial forum and pending adjudication if certain amount is deposited in the said judicial forum or the amount is allowed to be withdrawn by the party, the consistent view

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[11] 2013 355 ITR 209 Bom.
[12] 2022 135 Taxmann 438
[13] 2008 3018 ITR 443
[14] 2010 326 ITR 444
[15] 2018 93 Taxmann. Com 64

in such a scenario taken by the Courts is that till the case is decided finally by the judicial forum, it cannot be said that the Assessee has acquired a right to receive the income for the purposes of Section 5 of the Income Tax Act, 1961.

30. The common thread running through all the above judicial pronouncements is that the time of accrual for taxing income gets postponed till the dispute is adjudicated by the Civil Court.

31. Considering the principles as discussed in the decisions referred hereinabove, we need to examine whether sub-lease rent of Rs.3,42,720/- sought to be taxed accrues or arises to the Appellant in the assessment year 1986-87. It is not disputed by the Revenue that the cross-suits filed by the Appellant and the IDBI against each other are pending as of today before the Small Causes Court. It is also not disputed that the Appellant has not accepted the rent from IDBI post termination of the sub-lease agreement in the year 1981. The Appellant, in its suit for eviction, has prayed for a declaration that sublease dated 22nd April 1980 is lawfully terminated and forfeited by the Appellant in addition to various other prayers, including a prayer that IDBI be ordered and decreed to pay arrears of rent or compensation for wrongful use and occupation of the property in a suit at the rate of Rs.4,50,000/- per month as against Rs.3,42,720/- per annum as per the sub-lease agreement. The Appellant has also prayed for compensation for wrongful use of the Appellant's property, being Rear Tower building, which consists of 30 flats, which, according to the original agreement, was to come to the Appellant. IDBI, in turn, in its suit, has sought a prayer for restraining the Appellant from terminating the sub-lease agreement and from dispossessing them. The Small Causes Court has permitted IDBI to deposit the lease rent in the Court till the rights of the parties are decided and the order of deposit of the rent is without prejudice to the rights and contentions of the parties. In the light of these facts, whether the sub-lease agreement between the IDBI and the Appellant subsists post 1981 termination by the Appellant, is itself a subject matter of dispute between the Appellant and IDBI which is pending adjudication.

32. In the light of these facts, it cannot be said that the Appellant is entitled to receive a sum of Rs.3,42,720/- under the sublease agreement with IDBI or a right is vested in the Appellant to that sum. The Appellant has refused to accept the rent post termination. Rent of Rs.3,42,720/- was agreed upon between the Appellant and IDBI under a sub-lease agreement dated 1980. The said agreement is sought to be terminated by the Appellant and which termination is not accepted by the IDBI. Insofar as the Appellant is concerned, they have terminated the agreement and, therefore, the Appellant has contended that there cannot be a sub-lease agreement post termination between themselves and IDBI. The right to receive Rs.3,42,720/under the sub-lease agreement is not a subsisting right in favour of the Appellant post the termination and which too is a subject matter of civil dispute. Hence, the Revenue is not correct in contending that irrespective of the fate of the civil suits, the Small Causes Court would never order less than Rs.3,42,720/- to the Appellant and, therefore, the said ascertained sum is accrued to the Appellant. In our view, this would amount to pre-empting the decision to be rendered by the Small Causes Court in the cross-suits filed by the Appellant and IDBI.

33. In our view, one cannot tax the amount having not accrued to the Assessee and not received by an Assessee on an assumption and presumption that in future the Small Causes Court will at least order the said sum in favour of the Appellant. The determination of the amount payable by the IDBI to the Appellant as prayed for by the Appellant in its suit is to be determined by the Small Causes Court and it is as and when the Court passes a final decree that one can say that right to receive the sum decreed by the Small Causes Court as having accrued to the Appellant. Till then, the right to receive any sum by the Appellant is in jeopardy and subjudice before the Small Causes Court.

34. The Appellant has fairly made a statement before this Court, that in the year when the Small Causes Court would decree the amount, the issue of taxability of the sum received, as per the decree would be examined in the year of decree and they would not contend that same is income of

assessment year 1986-87 for which the present appeals are filed and same would be offered to tax as per law.

35. The Respondent has sought to distinguish the judgments relied upon by the Appellant on the ground that those are cases where enhanced compensation was in dispute before the Civil Court and either the same was not ascertained or the lease had expired and, therefore, unascertained sum cannot be taxed whereas, in the instant case, the sum is already ascertained and the IDBI is willing to offer the said amount but the Appellant is not accepting the same and, therefore, merely because the Appellant is not accepting the rent offered by the IDBI, it cannot be said that no income accrues. It is on these facts that the decision relied upon by the Appellant, according to the Respondent, are not applicable to the facts of the present case. In our view, this is not a correct contention on the part of the Revenue. The ratio of the decisions in the case of Hindustan Housing and Land Development Trust (supra), P. Mariappa Gounder (supra) and other cases relied upon by the Appellant and further cases quoted by us above is that if the dispute is pending before the Civil Court, no income can be said to have accrued or arise to an Assessee pending adjudication of the said dispute for the purpose of Section 5 of the Income Tax Act, 1961. It is the ratio of these judgments, which requires to be applied to the present case before us.

36. The Respondent Revenue has sought to distinguish the decision of Delhi High Court, in the case of Pal Properties (supra) on the ground that the lease in that case had expired. In our view, that is not the correct reading of the facts of the case. The Respondent cannot pick-up one line from facts of the case and contend that ratio of that case is not applicable. Although the lease had expired, but the Assessee therein terminated the lease agreement for non-payment of rent and the issue before the Court was post termination of the lease and the matter being subjudice before the civil court, the Court held no income accrues post termination. It was on these facts that the Delhi High Court came to a conclusion that till the matter is decided by the Civil Court, there cannot be any accrual of

income in favour of the Assessee. The facts of the Appellant Assessee before us are similar to that before the Delhi High Court and same supports the Appellant Assessee.

37. The test of convergence laid down by us in earlier part of the present judgment fails in assessment year 1986-87 so as to result into accrual of income, since there is neither any ascertainment of rent nor there exists any right in present on account of termination of agreement and the disputes pending before the Small Causes Court.

38. The Tribunal has misconstrued the prayers made by the Appellant before the Small Causes Court and had wrongly come to a conclusion that the Appellant has not waived his right to receive the rent. The prayer made by the Appellant in the suit before the Small Causes Court are to be treated as claim (pending adjudication) made by the Appellant for adjudication before the Small Causes Court and not waiver of right. In our view, any such observation of the Tribunal would amount to involving upon the adjudication of the civil dispute between the Appellant and the IDBI by the Income Tax Appellate Tribunal, which is not permissible and beyond the jurisdiction of the Income Tax Appellate Tribunal. Secondly, the Tribunal has observed that the consideration was paid by the IDBI. This is not correct. The Appellant had returned the cheques, which were given by IDBI, since the Appellant had terminated the sub-lease agreement. The deposit order made by the Small Causes Court in 1999 is subject to and without prejudice to the rights and contentions of the parties. The Tribunal is also not correct in observing that because in garnishee proceedings IDBI has paid the rent towards the tax arrears of the Appellant, income accrues for the year under consideration. The Appellant had informed the Revenue and the IDBI that the garnishee proceedings are illegal because post-termination no rent is due and payable by IDBI to the Appellant. This fact has been missed out by the Tribunal in coming to its conclusion. Even otherwise, merely because a party to a civil dispute to protect its rights makes a payment to the Income Tax Department pursuant to garnishee proceedings, it would not amount to subsistence or existence of the sub-lease agreement between the Appellant and the IDBI for bringing to tax Rs.3,42,720/- per

annum as income for the assessment year under considerations. In our view, the Tribunal has not correctly appreciated the facts of the Appellant's case and the effect of the civil dispute pending between the Appellant and the IDBI on the income tax proceedings.

E. Conclusion :-

39. For the aforesaid reasons, the Revenue is not justified in bringing to tax sum of Rs.3,42,720/- as accrued income for the assessment year 1986-87 and for the other years, which are subject matter of appeal before this Court in appeal, that is to say, assessment years 1988-89 1989-90, 1990-91, 1991-92 and 1993-94. The question raised, therefore, is decided in favour of the Appellant/Assessee and against the Respondent/Revenue.

40. Before parting, we may observe that any finding given by us in this order and/or observation made by us is restricted only to the disposal of the appeals under the Income Tax Act for determining the issue of accrual of income. None of our observations or finding herein should be construed as expressing any view on any of the issues, which are subject matter of the cross-suits filed by the Appellant and the IDBI before the Small Causes Court.

(JITENDRA JAIN, J.) (G.S. KULKARNI, J.)