

आयकर अपीलीय अधिकरण “SMC” न्यायपीठ मुंबई मे ।

IN THE INCOME TAX APPELLATE TRIBUNAL “SMC” BENCH, MUMBAI  
BEFORE SRI MAHAVIR SINGH, JUDICIAL MEMBER

आयकर अपील सं./ ITA No. 5354/Mum/2017

(निर्धारण वर्ष / Assessment Year 2012-13)

Hightech Realities Pvt. Ltd. 1 <sup>st</sup> Floor, Ruchi House, Plot No. 169, Aarey Colony, Goregaon (E), Mumbai-400 056	Vs.	The Income Tax Officer, 12(2)(4), Room No. 262, 2 <sup>nd</sup> Floor, Aayakar Bhavan
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
PAN NO. AACCH0026J		

Assessee by : Bhupendra Shah, AR

Revenue by : PR Chauhan, DR

Date of hearing: 16-05-2018 Date of pronouncement : 31-05-2018

आदेश / ORDER

PER MAHAVIR SINGH, JM:

This appeal by the Assessee is arising out of the order of Commissioner of Income Tax (Appeals)-20, Mumbai [in short CIT(A)], in appeal No. CIT(A)/ITO-12(2)(4)/IT-70616/2016-17 dated 29.06.2017. The Assessment was framed by the Income Tax Officer, Mumbai Ward 12(2)(4) Mumbai (in short 'ITO') for the A.Y. 2012-13 vide order dated 09.03.2015 under section 143(3) of the Income Tax Act, 1961 (hereinafter 'the Act').



2. The only issue in this appeal of assessee is against the order of CIT(A) confirming the action of the AO in assessing the deemed rent under the head of income from House property. For this assessee has raised the following ground:-

*“1. In the facts and circumstances of the case and in law, the learned AO erred in adding ₹ 2,60,000/- under the head “Income from House Property” and the commissioner of Income Tax(A) erred in confirming the addition of ₹ 6,30,000/- overlooking the submissions made by the Appellant and various case laws quoted therein.”*

3. Briefly stated facts are that the assessee has a Flat at 41, Sealand Co-operative Housing Society Ltd, Caffe Parade, Claba, Mumbai-05 admeasuring 2850 Sq. Ft. area. The assessee has declared rent from this flat at the rate of 50,000/- per month and declared the same under the head of income from housing property for the relevant AY 2012-13 at ₹ 6 lacs. The AO during the course of assessment proceedings noticed that the rental income shown by the assessee is very low and hence, he required the assessee as to why rental income should not be determined at fair market value in term of section 23 (1)(a) of the Act. The AO gathered information through net sites and noted that the property of this size is available at a rent of ₹ 2 to 3 lacs in the same area and in the same locality. Accordingly, he estimated the deemed rent at the rate of 2 lacs per month. Accordingly, the AO computed the income chargeable to tax under head income from house property at ₹ 24 lacs as fair market rent under section 23(1)(a) of the Act and after allowing deduction, computed income from house property at ₹ 16.80 lacs as against income



declared by assessee from this property at ₹ 4.20 lacs. Aggrieved, assessee preferred the appeal before CIT(A).

4. The CIT(A) after considering the submissions of the assessee, assessment order and case laws stated by the learned Counsel for the assessee, confirmed the action of the AO by observing in Para 4.4 as under: -

*“4.4 I have considered the assessment order vis a vis the submissions made by the Appellant. I find substantial force in the argument of the Appellant that even after the changes made by the amendments, stand. J rent is still is an important factor for determination ci annual value u/s 23(1)(a) as in the case of a hypothetical tenancy, when the rent control legislation of relevant state is applicable to property, the owner cannot be expected to derive higher rental Income than the standard rent fixed under the relevant rent control legislation. The above judgments make it clear that if a property is covered under the Rent Control Act, its reasonable expected rent cannot exceed the standard rent, fixed or determinable under the Rent Control Act. In view of the above, I find that ALV of the property is more than the rateable value of BMC. Having regard to the facts of the case it would be fair and reasonable if the as ALV under section 23(1)(c) of the Act is taken at Rent declared of Rs. 6,00,000/- @ Rs. 50,000/- p.m. plus additional*



*income of Rs. 9,00,000/- and the total ALV will be Rs. 15,00,000/-. The assessee would be entitled for standard deduction @ 30% of this amount which comes to Rs.4,50,000/-. The income from House property of the assessee would thus be worked out at Rs.10,50,000/- (Rs. 15,00,000 - Rs. 4,50,000) as against the value of Rs.16,80,000/- worked out by the AO. The AO is so directed. Accordingly, this ground of appeal is party allowed.”*

Aggrieved, now assessee is in second appeal before Tribunal.

5. I have heard the rival contentions and gone through the facts and circumstances of the case. The learned Counsel for the assessee Shri Bhupendra Shah argued on behalf of the assessee and on the other hand, the learned Sr. Departmental Representative, Shri P R Chauhan argued on behalf of Revenue. The learned Counsel for the assessee stated that the ALV computed by the AO under section 23(1)(a) of the Act and therefore confirmed by CIT(A) under section 23(1)(c) is without any basis and he stated that both the authorities below agreed that the property is covered under rent control Act as the Bombay is governed by rent Control Act and CIT(A) also agreed that the ALV of the property is more than the rateable value as determined by BMC. The learned Counsel for the assessee in view of this argued that once the property value is determined by Rent Control Act and ALV declared by assessee is in excess of market rateable value of BMC, no further fair market value of the property for the purpose of deemed rent under section 23(1)(a) or 23(1)(c) can be estimated. The learned Counsel for the assessee relied on the decision of Hon'ble Bombay High Court in the case of CIT vs. Tip Top Typography [2014] 368 ITR 330 (Bombay), wherein held as under:-



*“46. We have and after careful reading of the provision in question and the conclusion of the Full Bench of the Delhi High Court concluded that a different view cannot be taken. We respectfully concur with the view taken in this Full Bench decision of the Delhi High Court.*

*47. We are of the view that where Rent Control Legislation is applicable and as is now urged the trend in the real estate market so also in the commercial field is that considering the difficulties faced in either retrieving back immovable properties in metro cities and towns, so also the time spent in litigation, it is expedient to execute a leave and license agreements. These are usually for fixed periods and renewable. In such cases as well, the conceded position is that the Annual Letting Value will have to be determined on the same basis as noted above. In the event and as urged before us, the security deposit collected and refundable interest free and the monthly compensation shows a total mismatch or does not reflect the prevailing rate or the attempt is to deflate or inflate the rent by such methods, then, as held by the Delhi High Court, the Assessing Officer is not prevented from carrying out the necessary investigation and enquiry. He must have cogent and satisfactory material in his possession and which will indicate that the parties have*



*concealed the real position. He must not make a guess work or act on conjectures and surmises. There must be definite and positive material to indicate that the parties have suppressed the prevailing rate. Then, the enquiries that the Assessing Officer can make, would be for ascertaining the going rate. He can make a comparative study and make a analysis. In that regard, transactions of identical or similar nature can be ascertained by obtaining the requisite details. However, there also the Assessing Officer must safeguard against adopting the rate stated therein straightway. He must find out as to whether the property which has been let out or given on leave and license basis is of a similar nature, namely, commercial or residential. He should also satisfy himself as to whether the rate obtained by him from the deals and transactions and documents in relation thereto can be applied or whether a departure therefrom can be made, for example, because of the area, the measurement, the location, the use to which the property has been put, the access thereto and the special advantages or benefits. It is possible that in a high rise building because of special advantages and benefits an office or a block on the upper floor may fetch higher returns or vice versa. Therefore, there is no magic formula and everything depends upon the facts and circumstances in each case.*



*However, we emphasize that before the Assessing Officer determines the rate by the above exercise or similar permissible process he is bound to disclose the material in his possession to the parties. He must not proceed to rely upon the material in his possession and disbelieve the parties. The satisfaction of the Assessing Officer that the bargain reveals an inflated or deflated rate based on fraud, emergency, relationship and other considerations makes it unreasonable must precede the undertaking of the above exercise. After the above ascertainment is done by the Officer he must, then, comply with the principles of fairness and justice and make the disclosure to the Assessee so as to obtain his view.*

*48. We are not in agreement with Shri Chhotaray that the municipal rateable value cannot be accepted as a bona fide rental value of the property and it must be discarded straightway in all cases. There cannot be a blanket rejection of the same. If that is taken to be a safe guide, then, to discard it there must be cogent and reliable material.*

*49. We are of the opinion that market rate in the locality is an approved method for determining the fair rental value but it is only when the Assessing Officer is convinced that the case before him is suspicious, determination by the*



*parties is doubtful that he can resort to enquire about the prevailing rate in the locality. We are of the view that municipal rateable value may not be binding on the Assessing Officer but that is only in cases of afore-referred nature. It is definitely a safe guide.*

*50. We have broadly agreed with the view taken by the Full Bench of the Delhi High Court. Hence, the issue of determination of the "fair rental value" in respect of properties not covered by or covered by the Rent Control Act is to be undertaken in terms of the law laid down in the Full Bench decision of the Delhi High Court.*

*51. We quite see the force in the arguments of Ms. Vissanjee that ordinarily the license fee agreed between the willing licensor or a willing licensee uninfluenced by any extraneous circumstances would afford reliable evidence of what the landlord might reasonably be expect to get from a hypothetical tenant. She has in making this submission, answered the issue and summed up the conclusion as well. Then, it is but natural and logical that in the event, the transaction is influenced by any extraneous circumstances or vitiated by fraud, or the like that the Assessing Officer can adopt a "fair rent" based on the opinion obtained from reliable sources. There as well, we do not see as to how we can uphold the submissions of Mr.*



*Chhotaray that the notional rent on the security deposit can be taken into account and consideration for the determination. If the transaction itself does not reflect any of the afore stated aspects, then, merely because a security deposit which is refundable and interest free has been obtained, the Assessing Officer should not presume that this sum or the interest derived therefrom at Bank rate is the income of the assessee till the determination or conclusion of the transaction. The Assessing Officer ought to be aware of several aspects and matters involved in such transactions. It is not necessary that if the license is for three years that it will operative and continuing till the end. There are terms and conditions on which the leave and license agreement is executed by parties. These terms and conditions are willingly accepted. They enable the license to be determined even before the stated period expires. Equally, the licensee can opt out of the deal. A leave and license does not create any interest in the property. Therefore, it is not as if the security deposit being made, it will be necessarily refundable after the third year and not otherwise. Everything depends upon the facts and circumstances in each case and the nature of the deal or transaction. These are not matters which abide by any fixed formula and which can be universally applied. Today, it may be*



*commercially unviable to enter into a lease and, therefore, this mode of inducting a 'third party' in the premises is adopted. This may not be the trend tomorrow, therefore, we do not wish to conclude the matter by evolving any rigid test.*

*52. We have also noted the submissions of Shri Ahuja. We are of the opinion that even in the cases and matters brought by him to our notice, it is evident that the Assessing Officer cannot brush aside the rent control legislation, in the event, it is applicable to the premises in question. Then, the Assessing Officer has to undertake the exercise contemplated by the rent control legislation for fixation of standard rent. The attempt by the Assessing Officer to override the rent control legislation and when it balances the rights between the parties has rightly been interfered with in the given case by the Appellate authority. The Assessing Officer either must undertake the exercise to fix the standard rent himself and in terms of the Maharashtra Rent Control Act, 1999 if the same is applicable or leave the parties to have it determined by the Court or Tribunal under that Act. Until, then, he may not be justified in applying any other formula or method and determine the "fair rent" by abiding with the same. If he desires to undertake the determination himself, he will have to go by the Maharashtra Rent Control Act,*



*1999. Merely because the rent has not been fixed under that Act does not mean that any other determination and contrary thereto can be made by the Assessing Officer. Once again having respectfully concurred with the judgment of the Full Bench of the Delhi High Court, we need not say anything more on this issue.*

*53. Thus, apart from the three aspects namely of a municipal valuation, of obtaining interest free security deposit and the properties being covered by the Maharashtra Rent Control Act but no standard rent thereunder is fixed, our attention has not been invited to any other case. Suffice it to hold that in those cases and to which our attention is not invited the principles laid down in the decisions of the Hon'ble Supreme Court and referred to by the Full Bench of the Delhi High Court would govern the enquiry.*

6. Even the same issue has been decided by Hon'ble Delhi High Court in the case of CIT vs. Moni Kumar Subba [2011] 333 ITR 38 (Delhi) (FB) that even ALV cannot be determined by adding notional interest on the interest free deposit and according to Hon'ble High Court that it is not permissible. Hon'ble Delhi High Court and Hon'ble Bombay High Court, both are in consonance that only value fixed by Municipal Authorities can be a rational yardstick for computing deemed rent under section 23(1)(a) of the Act. As the issue is squarely covered by the decision of Hon'ble Bombay High Court in the case of Tip Top Typography (supra),



respectfully, following the same I delete the addition made by AO and allow the appeal of assessee.

**7. In the result, the appeal of assessee is allowed.**

Order pronounced in the open court on 31-05-2018.

आदेश की घोषणा खुले मे दिनांक 31-05-2018 को की गई ।

Sd/-  
(MAHAVIR SINGH)  
JUDICIAL MEMBER

Mumbai, Dated: 31-05-2018  
*Sudip Sarkar /Sr.PS*

**Copy of the Order forwarded to:**

1. The Appellant
2. The Respondent.
3. The CIT (A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.  
//True Copy//

BY ORDER,

Assistant Registrar  
**ITAT, MUMBAI**