

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC", MUMBAI**

**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER**

**ITA NO. 387, 388 & 390/MUM/2018 : A.Ys : 2009-10, 2010-11
& 2012-13**

M/s. Europa Chemicals Pvt. Ltd.,
3rd floor, Cambatta Building,
South West Wing, Churchgate,
Mumbai (Appellant)

Vs. ITO-5(1)(4),
Mumbai (Respondent)

PAN : AABCE3346D

Appellant by : Shri Prakash K. Jotwani

Respondent by : Ms. N. Hemalatha

Date of Hearing : 12/04/2018

Date of Pronouncement : 15/06/2018

ORDER

PER G.S. PANNU, AM :

The captioned are three appeals by the assessee which involve common issues and, therefore, they have been clubbed and heard together and a consolidated order is being passed for the sake of convenience and brevity.

2. At the outset, it was noted that the captioned appeals have been filed belatedly after a delay of 25 days. The assessee has sought

condonation of delay, and in support, a duly sworn Affidavit dated 17.01.2018 has been placed before the Bench.

3. On the basis of the Affidavit, it is canvassed by the learned representative that the delay was unintentional and for *bona fide* reasons and, therefore, same be condoned and appeal admitted for adjudication on merits. The Id. DR appearing for the Revenue has not doubted the *bona fides* of reasons canvassed by assessee for delay, but has merely opposed the application.

4. In our considered opinion, in the absence of any material to doubt the *bona fide* of the reasons canvassed, the delay ought to be condoned. We hold so. The aforesaid aspect was announced at the time of hearing and accordingly, the rival parties were heard with respect to the merits of the dispute.

5. In order to appreciate the controversy, the appeal for Assessment Year 2009-10 is taken as the lead case. This appeal by the assessee is directed against the order of CIT(A)-10, Mumbai dated 18.08.2017 pertaining to the Assessment Year 2009-10, which in turn has arisen from the order passed by the Assessing Officer dated 30.01.2016 under section 143(3) r.w.s. 147 of the Income Tax Act, 1961 (in short 'the Act').

"1. The learned CIT(A) erred in confirming reassessment made u/s 147 when there was no escapement of income nor was there any tangible, material with AO to reopen the case for this year.

2.a) *The Learned CIT(A) erred in confirming addition of Rs.8,09,810/- under the head income from House Property when it was a case of sub-letting and not house property.*

b) *The Learned CIT(A) erred in confirming the estimate made by the AO under the head income from house property when the only basis was a magazine report published by ICICI and the Inspector report which also relied on hearsay reports.*

c) *The Learned CIT(A) erred in not considering that the rent disclosed by the appellant was in excess of rateable value.*

d) *The Learned CIT(A) erred in not considering the appellant had also received a substantial deposit which was not considered by the AO in considering Annual Rateable value as reasonable and fair.”*

6. Insofar as the first Ground relating to initiation of reassessment proceedings under Sections 147/148 of the Act is concerned, the same has not been pressed at the time of hearing and is accordingly dismissed.

7. The substantive dispute in Ground of appeal no. 2 is with regard to the addition of Rs.8,09,810/- made by the Assessing Officer under the head 'Income from House Property'. On this aspect, the relevant facts are that the appellant is a private limited company incorporated under the provisions of the Companies Act, 1956 and it has been explained that it's only activity is by way of investments. Apart therefrom, in the return of income, assessee had declared rental income of Rs.7,000/- per month amounting to Rs.90,000/- as 'Business income'. Notably, the relevant facts are that the assessee-company had acquired tenancy rights of approximately 1634 square feet carpet area on the third floor of Cambatta building, Churchgate, Mumbai for a sum of Rs.45 lacs. By way of a Memorandum of Understanding with its sister concern, M/s. Polson Ltd., it gave a portion of

the said premises, i.e. 817 square feet on rent w.e.f. 01.10.2007 for a monthly rent of Rs.7,500/-. Assessee also received a rent deposit of Rs.2,85,00,000/- from M/s. Polson Ltd. This rental income was disclosed as 'Business income' and the rent paid for the property as well as expenses required for running of the company was claimed as a deduction. In the impugned assessment finalised u/s 143(3) r.w.s. 147 of the Act, the Assessing Officer differed with the assessee on the taxation of such rental income on two grounds; firstly, the Assessing Officer held that such income was liable to be taxed under the head 'Income from House Property' as assessee was to be treated as owner of the house property in view of Sec. 27(iib) of the Act, secondly, the Assessing Officer also differed with the assessee to treat the actual rent received as the annual value of the property for the purposes of Sec. 23 of the Act. As per the Assessing Officer, the fair rent of the property was higher than the stated rental. The Assessing Officer noted that in the same building one M/s. Galaxy Aviation was paying a rent of Rs.5,50,000/month for a space of 3000 square feet and secondly, Bank of India was paying a rent of Rs.1,27,449/- per month for an area of 3120 square feet. The Assessing Officer has also referred to a publication of ICICI Property Services (a Division of ICICI Home Finance Co. Ltd.), wherein the rentals prevailing in the vicinity of assessee's building was around Rs. 150/- to 300/- per square feet. Considering all these, the Assessing Officer adopted the fair rent of Rs.150/- per square feet for assessee's property in Assessment Year 2012-13 and, after making a backward calculation @ 8% for the assessment year under consideration, he arrived at the fair rent of Rs.118/- per square feet for the Assessment Year 2009-10. On this basis, he determined the fair rent of Rs.96,406/- per month as against Rs.7,500/- declared by the assessee and in this manner, the annual value of the

property was determined at Rs.11,56,872/- and after allowing the statutory allowances u/s 24(a) of the Act, the income of Rs.8,09,810/- was assessed under the head 'Income from House Property'. This action of the Assessing Officer has been affirmed by the CIT(A), and accordingly assessee is in further appeal before us.

8. So far as the grievance of the assessee against the action of the Assessing Officer in treating the rental income as assessable under the head 'Income from House Property' as against 'Business income' declared in the return is concerned, no arguments have been raised and, therefore, the action of the income-tax authorities in this regard is affirmed.

9. The only point raised by the appellant before us is with regard to the estimation of the annual value of the property made by the lower authorities, which is much higher than the actual rent declared by the assessee. At the time of hearing, the learned representative for the assessee pointed out that there was no ground for the Assessing Officer to find fault with the actual rent derived by the assessee, which was much more than the ratable value arrived at by the Municipal Corporation. It was pointed out that the Municipal valuation could not be straightaway disregarded to arrive at the fair rental value of the property unless it can be shown that there was suspicion or *mala fide* in the actual rent declared by the assessee. In this context, it has been pointed out that assessee has given part of the property on rent to its subsidiary concern and it would make no difference if it would have been given it for use without any charge. It was pointed out that since assessee and the user of the property, M/s. Polson Ltd. were sister concerns, the actual rent derived by the assessee could not be said to be suspicious.

With regard to the instances relied upon by the Assessing Officer, the learned representative pointed out that so far as the rent arrangement of M/s. Galaxy Aviation Pvt. Ltd. is concerned, the same is made in the year 2012 which is on a much later date than assessee's arrangement, which is from 01.10.2007. Even with regard to the rent payment by Bank of India, the learned representative pointed out that the figures reported by the Assessing Officer itself do not show that the bank was paying anything close to Rs.150/- per square feet estimated by the Assessing Officer inasmuch as the bank was paying Rs.40/- per square feet. That too, is canvassed to be incomparable in the absence of an agreement showing the specific terms and conditions vis-a-vis the rental arrangement entered by the assessee with its sister concern. Furthermore, it has been pointed out that in the following decisions – (i) Anudeep Enterprises Pvt. Ltd., ITA No. 1215/Mum/2012 dated 03.03.2017; and, (ii) Laxmi Satyapal Jain, ITA Nos. 4726 & 4831/Mum/2014 dated 04.02.2016, it has been held that where the actual rent disclosed is in excess of the Municipal ratable value, the annual value of the property can be assessed on the basis of the actual rent. In this context, reliance has also been placed on the judgment of Hon'ble Bombay High Court in the case of *CIT vs. Tip Top Typography, 368 ITR 330 (Bom.)* to point out that the Municipal ratable value is to be accepted as a good indicator of the fair rent unless the Assessing Officer is able to establish on the basis of material that the actual rent charged was suspicious. According to the learned representative there is no such case made out by the Assessing Officer and, therefore, the determination of annual value of the property be restricted to the actual rent declared by the assessee.

10. On the other hand, the Id. DR appearing for the Revenue relied upon the orders of the authorities below and pointed out that, in the present case, the Assessing Officer has referred to certain instances in the vicinity of assessee's property to show that the actual rent declared by the assessee was lower than the prevailing market rent.

11. We have carefully considered the rival submissions. As our aforesaid discussion shows, the short-point for our consideration is as to whether the Assessing Officer was justified in rejecting the value declared by the assessee and instead, determining the annual value of the property for the purposes of Sec. 23 of the Act based on estimation arrived at by him, having regard to the two instances noted in the vicinity of assessee's property ?

12. Sec. 23 of the Act prescribes the manner in which the annual value of any property is to be arrived at for the purpose of assessment under the head 'Income from House Property'. Sec. 23(1)(a) of the Act relates to the determination of annual value of a property for a sum for which the property might reasonably be let from year to year. Thus, what is envisaged in Sec. 23(1)(a) of the Act is the probable rent which the property is expected to earn. Sec. 23(1)(b) of the Act deals with a case where the property or any part of the property is let and the actual rent received or receivable by the owner in respect thereof is in excess of the sum referred to in clause (a) to Sec. 23(1), then the amount so received or receivable shall be treated as the annual value of the property. In the present case, the actual rent declared by the assessee is Rs.7,500/- per month, whereas the Municipal valuation is stated to be Rs.225.38 per month. In this factual background, the claim of the assessee is that the actual rent be taken as the

annual value of the property as it exceeds the Municipal ratable value. The Assessing Officer does not accept Rs.7,500/- per month as the value for which the property might reasonably be expected to be let. In such a situation, as held by the Hon'ble Bombay High Court in the case of *Tip Top Typography (supra)*, the Assessing Officer is required to carry out necessary investigations and inquiries. It is further prescribed that the Assessing Officer shall have cogent and satisfactory material in his possession "*which indicate that the parties have concealed the real position*". It has been further explained that there must be "*definite and positive material to indicate that the parties have suppressed the prevailing rate*". If we were to examine the case made out by the Assessing Officer in the instant in the background of the above reasoning laid down by the Hon'ble Bombay High Court, it is found that there is no allegation, much less any positive material with the Assessing Officer, to say that the assessee has suppressed the real position by declaring rent from the sister concern @ Rs.7,500/- per month. On the contrary, what we find is that without arriving at such satisfaction, the Assessing Officer has proceeded to ascertain the going rate of the rentals in the vicinity of assessee's property. The said approach, in our view, is contrary to the judgment of the Hon'ble Bombay High Court in the case of *Tip Top Typography (supra)*, wherein the following discussion would indicate that ascertaining of the going rate in the market is not the basis to reject the actual rent declared, but rather there has to be a definite and positive material to indicate that the parties have suppressed the prevailing rate and the exercise of ascertaining the going rate would follow his satisfaction of disagreeing with the stated rent on the basis of definite and positive material :-

“47.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.....”

Therefore, on the aforesaid reasoning, the action of the Assessing Officer is liable to be set-aside. Apart therefrom, we find that the Assessing Officer has straightaway based his estimation on the rates found on his inquiry without establishing the similarity of the arrangement. As pointed out by the learned representative with regard to the rental arrangement of Galaxy

Aviation, the same is incomparable with assessee's arrangement because of the timing difference. The arrangement of Galaxy Aviation is of the year 2012 whereas assessee's arrangement is of 2007. Even with regard to the rental arrangement of Bank of India, there are no details brought out by the Assessing Officer to show as to how the same are comparable to the assessee's arrangement. Therefore, on this ground also, the estimation made by the Assessing Officer cannot be straightaway accepted.

13. Therefore, considering the entirety of facts and circumstances of the case, we do not find any justification for the action of the Assessing Officer in disregarding the actual rent declared by the assessee for the purpose of arriving at the annual value of the property to be taxed u/s 22 of the Act. As a consequence, we set-aside the order of CIT(A) and restore the matter back to the file of the Assessing Officer who shall recompute the income assessable under the head 'Income from House Property' in terms of our aforesaid directions. Thus, on this aspect, assessee succeeds.

14. The only other issue is on account of Additional Ground of appeal raised by the assessee, which reads as under :-

"1. The Learned CIT(A) erred in confirming disallowance of expenses of Rs.99,139/- by holding that no arguments were advanced while the appellant in its submission had submitted that the AO did not give reason to make the disallowance and on a cursory glance of expenses claimed the same were regular expenses & were allowable as per law."

15. On this aspect, the learned representative pointed out that once the income declared from rental income has been assessed under the head 'Income from House Property', the income under the head 'Income from

Business' has to be separately assessed. While assessing the income from business, the entire expenditure claimed have been disallowed, an aspect which was sustained by the CIT(A) also. It is pointed out that though assessee does not have an active business activity, but expenses which are necessary for existence of the company as such are required to be allowed. The said Ground was omitted to be raised at the time of filing of appeal and is now being raised as an Additional Ground of appeal.

16. The said Ground is emerging from the material on record itself and we find no reasons to deny its admission following the ratio of the judgment of the Hon'ble Supreme Court in the case *National Thermal Power Co. Ltd. vs CIT, 229 ITR 383 (SC)*.

17. On the issue of Additional Ground, we deem it fit and proper to direct the Assessing Officer to consider the same on merits and allow such expenses as are permissible and required for maintenance of a corporate entity as such. Thus, on this aspect, assessee succeeds for statistical purposes.

18. In the result, appeal of assessee for Assessment Year 2009-10 is allowed, as above.

19. Insofar as the appeals for Assessment Years 2010-11 & 2012-13 are concerned, the issues are similar to those considered by us in the earlier paras in relation to Assessment Year 2009-10 and, therefore, our decision in Assessment Year 2009-10 will apply *mutatis mutandis* in these appeals also

and accordingly, the appeals for Assessment Years 2010-11 & 2012-13 are allowed, as above.

20. Resultantly, all the appeals of the assessee are allowed, as above.

Order pronounced in the open court on 15th June, 2018.

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Sd/-
(G.S. PANNU)
ACCOUNTANT MEMBER

Mumbai, Date : 15th June, 2018

SSL

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "SMC" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai