

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

**BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA No.5183/M/2018
Assessment Year: 2014-15**

M/s. Filmkraft Productions (I) P. Ltd., B/27, Commerce Centre, Off New Link Road, Andheri – West, Mumbai – 400 053 PAN: AAACF3549E	Vs.	ACIT Circle -16(1), Aayakar Bhavan, M.K. Marg, New Marine Lines, Mumbai - 400020
(Appellant)		(Respondent)

Present for:

Assessee by : Shri K. Gopal, A.R.
Smt. Neha Paranjpe,
Shri Sumanta Sen, A.R.

Revenue by : Shri Rajeev Gubgotra, D.R.

Date of Hearing : 27.08.2019

Date of Pronouncement : 30.09.2019

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against the order dated 18.01.2017 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2014-15.

2. The main issue raised by the assessee is against the order of Ld. CIT(A) confirming the addition of Rs.77,75,567/-, upholding the order of AO on assessing the deemed ALV in respect of 16th floor at Lotus Business Park on the basis of

annual rent received in respect of 15th floor of the same property.

3. The facts in brief are that the AO observed that the assessee has not returned any income in respect of 16th floor in Lotus Corporate Bank. Accordingly, a show cause notice was issued as to why the ALV should not be estimated on the basis of rent of 15th floor which was replied by the assessee vide letter dated 18.11.2016. The AO, rejecting the submissions and contentions of the assessee, added a sum of Rs. 77,75,567/- to the income by observing as under:

- A) 7% of the Cost of the Property, as assessed for AY 2013-14, in assessee's own case.
B) Prevailing Market Rent, obtained from information available from Internet or actual instances. The Income from House Property is taking 7% basis is worked out as under:

Particulars	16 th Floor (Amt. in Rs.)
<u>Gross Deemed Annual Value</u>	
Cost as per Balance Sheet	9,15,26,740
"7% of Cost	64,06,872
Less : Municipal Taxes	7,58,806
	56,48,066
Less : 30%	16,94,420

Net Deemed ALV	39,53,646

4.16. The Assessee has pointed out that during this year, it has actually let out 15th Floor in the same building, which is more reliable to compute deemed- rent. Further, actual rent received for 15th floor is higher than the 7% of cost in this case and the same is more reasonable basis for deemed ALV. Hence the rent income which is offered for 15th floor of the same building is considered as 'Deemed ALV.

Therefore, the actual rent received for 15th floor of Rs.77,75,567/- is hereby added to the total income of the assessee as deemed rent for 16th floor of Lotus Park building.”

4. In the appellate proceedings , the Ld. CIT(A) has upheld the order of AO by observing and holding as under:

“6.3 I have carefully considered the facts of the case, oral contentions and written submission of the assessee, discussion of the AO in the assessment order and material available on record. I have also gone through the various case laws referred to by the Ld. A.R. I find that this property of Lotus Business Park is not at all covered under Maharashtra Rent Control Act, 1999 because the Assessee itself has shown actual rent of property on 15th floor of the same Building @Rs.77,75,567/-. When the property situated at 15th floor of Lotus Business Park is rented on higher side hence, it cannot be pleaded that ALV of property situated at 16th floor should be adopted as per the Municipal Rateable Value. The various arguments advanced by the Ld. A.R. in this regard are not applicable. When property was in working condition, it was to be let out. If it was not let out, then Annual Letting Value was to be estimated. When property under reference is not covered under Rent Control Act, fair rent of property has to be taken as annual value which is to be determined on the JI basis of facts or material on record, vide: Woodland Associates (P) Ltd. vs. ITO 5(3)(4) (2013) 29 taxman.com 216 {Mum.}(Trib.}. In the case of CIT-Delhi Central-3 vs. Monikumar Subba (2011) 10 taxmann.com 195 ITAT(Delhi)(Full Bench), it is held that if rateable value under municipal law does not represent correct fair rent then Assessing Officer can determined Annual Letting Value on the basis of material or evidences on record. The commercial property is capable of renting out. The 15th floor has been rented out @Rs.77,75,567/- hence, such estimation of ALV @Rs.77,75,567/- is not at all on higher side or unreasonable. Such finding of Assessing Officer get support from decision of Hon'ble ITAT in case of EMTICI Engineering Ltd. vs. ACIT(1991) 58 TTJ 27 (Ahmedabad)., ITO vs. Chem Mech Pvt. Ltd.(2002) 83 ITD 427 (Mum.)(ITAT) and Shri Bipinbhai Vadilal Family Trust No.1 vs. CIT (1994) 208 ITR 1005(Guj.). It is seen that same issue on same facts was there in the case of appellant for A.Y. 2011-12 & A.Y. 2012-13 which has been decided against the assessee by my Ld. Predecessor. However, in the appellant's case for A.Y. 2013-14 the Ld. CIT(A)-7, Mumbai decided the issue in favour of the appellant observing as under:

"I have considered the appellant's submission. Assessing Officer is directed to compute the annual value of the property on municipal rateable value. Ground of appeal is allowed subject to above computation."

It can be seen that the order of CIT(A)-7, Mumbai in assessee case for A.Y. 2013-14 is cryptic and non-speaking and hence cannot be given precedence over reasoned and speaking orders of CIT(A)-4, Mumbai for A.Y. 2011-12 A.Y. 2012-13. In view of the facts and circumstances of the case and discussions herein above, the contentions and submissions of assessee are not found to be acceptable and are accordingly rejected. Therefore, the estimation of Annual Letting Value of **commercial property** at Rs.77,75,567/- is **sustained.**”

5. The Ld. A.R., at the outset, pointed out that the issue is squarely covered in assessee's own case in ITA No.2882/M/2017 A.Y. 2011-12 and others vide order dated 12.10.2018 wherein the identical issue has been decided by restoring the same to the file of the AO after considering the ratio laid down by the Hon'ble Bombay High Court in case of CIT vs. Tip Top Typography 48 taxman 191 (Bom.). The Ld. A.R., therefore, prayed that the current year may also be decided in the same manner and appeal of the assessee may kindly be allowed.

6. The Ld. D.R., on the other hand, relied on the order of authorities below.

7. After hearing both the parties and perusing the material on record and also the impugned order of ITAT in ITA No.2882/M/2017 in assessee's own case for A.Y. 2011-12 & ors., we observe that identical issue has been decided by the Tribunal in favour of the assessee. The operative part whereof is reproduced as under:

"9. We have considered the rival submission of the parties and have gone through the orders of the authorities below. There is no dispute that the flats in respect of which the Assessing Officer has determined the ALV under section 23(1)(a) remained vacant during the relevant previous year/ assessment years. The Assessing Officer determined the ALV on the basis of cost of the property shown in the balance-sheet of the assessee. during assessment year 2011-12 and 2012-13, the Assessing Officer treated the 7% of the cost of the property (7% of Rs. 9,15,26,740/-) as deemed ALV and after granting standard deduction under section 24(a) @ 30% worked out Income from House Property of Rs. 44,84,81 0/-. The Id. CIT(A) confirmed the action of Assessing Officer.

10. For Assessment Year 2013-14 the Assessing Officer determined the similar ALV. however, the assessee was allowed the deduction of Municipal Taxes of Rs.7,58,806/-. On appeal before the Id. CIT(A), the assessment order was set-aside and the Assessing Officer was directed to adopt the Municipal Rateable Value for computing the income from the said flat/House Property.

11. For appreciation of law, section 23(1) of the Act is reproduced below: — **Annual value how determined.**

23.(1) for the purpose of section 22, the annual value of any property shall be deemed to be –

(a) the sum for which the property might reasonably be expected to let from year to year, or

(b) 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)- the amount so received or receivable; or

(c) where the property or any pan of the property is let and was vacant during the whole or any part of the previous year and owing to such vacancy the actual rent received or receivable by the owner in respect thereof is less than the sum referred to in clause (A), the amount so received or receivable:

Provided that the taxes levied by any local authority in respect of the property shall be deducted (irrespective of the previous year in which the liability to pay such taxes was incurred by the owner according to the method of accounting regularly employed by him) in determining the annual value of the property of that previous year in which such taxes are actually paid by him.

Explanation.- for the purposes of clause (b) or clause (c) of this sub-section, the amount of actual rent received or receivable by the owner shall not include, subject to such rules as may be made in this behalf, the amount of rent which the owner cannot realize.

12. Bare reading of the aforesaid provision reveals that where any part of the property is lei out and was vacant during the whole or any part of the previous year and due to such vacancy rent received/receivable by the owner is less than the ALV determined under section 23(1)(a) in that case the actual rent received or receivable is to be treated as the ALV. In our view the word 'let' and 'vacant' are mutually exclusive. We may appreciate it further, the underlying principle of this provision has to be viewed with regard to the intention together with efforts put by assessee in letting out the property, etc. and then gross annual value is required to be determined. If the assessee intended to let the property and took appropriate efforts in letting the property but ultimately failed to let the same, the actual rent received from it will have to be considered as "nil" being less than the sum referred in section 23(l)(a) of the Act. Similar view was taken by Pune Bench in Vikas Kashav Garud Vs ITO (supra).The Id. AR of the assessee vehemently argued that the assessee made efforts to let out the property, but facts remain the same that assessee could not find suitable tenant. The assessee has placed on record the documentary evidences to show its bonafidies about the letting of flat by filing confirmation of Brokers/Real Estate Consultant (page no. 53 to 55 of PB). In appeals, the question before us is as to whether the ALV determined by Assessing Officer by adopting 7% of cost of acquisition is fair enough or not. 13.The Hon'ble Bombay High Court in case of CIT vs. Tip Top Typography 48 taxmann.com 191 (Bombay) held that in order to determine annual value of property, municipal rateable value may not be binding on Assessing Officer but that is only in cases where he is convinced that interest free security deposit and monthly

compensation do not reflect prevailing rate and, in such a case, Assessing Officer can himself resort to enquire about prevailing rate in locality. Where a premises is covered by Rent Control Act, Assessing Officer must undertake exercise to fix rent himself in terms of said Act or have it determined by Court or Tribunal and until then he is not justified in applying any other formula or method and determine 'fair rent' by abiding with same. The relevant part of the judgment of Hon'ble Bombay High Court is extracted below:

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 1 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.

54. As a result of the above discussion, we are of the opinion that wherever the Assessing Officer has not adhered to the above principles, and his finding and conclusion has been interfered with, by the higher Appellate Authorities, the revenue cannot bring the matter to this Court as no substantial question of law can be arising for determination and consideration of this Court. Then, the findings by the last fact finding Authority namely the Tribunal and against the revenue shall have to be upheld as they are consistent with the facts and circumstances brought

before. If they are not vitiated by any perversity or error of law apparent on the face of the record, the appeals of the revenue cannot be entertained. They have to be accordingly dismissed.

14. Considering the decision of Hon'ble Bombay High Court in case of Tip Top Typography all the appeals are restored back to the file of Assessing Officer to determine the ALV after considering the ratio laid down by Hon'ble High Court. Needless to say that Assessing Officer shall grant fair and proper opportunity before passing the order in accordance with law. In the result, appeal of assessee for Assessment Year 2011-12 & 2012-13 are allowed for statistical purpose."

8. Since the facts are materially same in the present case before us vis-à-vis the facts of the case in the above decision, we ,therefore respectfully following the same, restore the issue back to the file of the AO to decide the ALV of the property after following the ratio laid down by Hon'ble Bombay High Court in the case of CIT vs. Tip Top Typography (supra) after affording a reasonable opportunity of hearing to the assessee.

9. In the result, the appeal is allowed for statistical purposes.

Order pronounced in the open court on 30.09.2019.

**Sd/-
(Mahavir Singh)
JUDICIAL MEMBER**

**Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER**

Mumbai, Dated: 30.09.2019.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.