

THE INCOME TAX APPELLATE TRIBUNAL  
"A" Bench, Mumbai  
Before Shri R.C. Sharma (AM) & Shri Pawan Singh (JM)

I.T.A. No. 666/Mum/2019 (Assessment Year 2014-15)

M/s. Akshar Commercial Complex Private Limited (Now M/s. Akshar Commercial Complex LLP) 203, Big Splash, Plot No. 78 & 79, Sector 17, Vashi Navi Mumbai-400 703.  PAN : AAGCA6075L (Appellant)	Vs.	DCIT Circle-15(1)(1) Room No.470 4 <sup>th</sup> Floor Aayakar Bhavan M.K. Road Mumbai-400 020.  (Respondent)
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Assessee by	Ms. Ritika Agarwal
Department by	Shri Michael Jerald
Date of Hearing	28.1.2020
Date of Pronouncement	28.1.2020

ORDER

Per Shri Pawan Singh (AM) :-

This appeal by the assessee is directed against the order of learned CIT(A)-24, Mumbai dated 7.12.2018 which arises from the assessment order passed u/s. 153(3) dated 28.12.2016 for A.Y. 2014-15.

2. The assessee has raised following grounds of appeal:-

- (1) *Because the ld CIT(A) has erred in law and facts confirming the additions of Rs. 58,81,176/- on account of notional rental income on unsold stock u/s 23(a) made by the AO by following the decision of Hon'ble Delhi High Court in the case of Ansal Housing Finance & leasing Ltd 354 ITR 180 (Delhi)*
- (2) *Because the ld CIT(A) has failed to appreciate that calculation of notional rental income on commercial property is outside the scope of section 23(1)(a).*

3. Brief facts of the case are that the assessee is engaged in the business of construction of building, development and selling of immovable property etc., filed its return of income for relevant to the assessment year on 8.12.2014 declaring taxable income at Rs. 1,22,79,970/-. The case was selected for scrutiny. During the assessment the Assessing Officer noted that the assessee

constructed a commercial building namely 'Proxima' on leasehold plot owned by Arunachal Pradesh Industrial Development and Financial Corporation Limited (APIDC). Project was undertaken by the assessee vide assignment cum development agreement dated 29.10.2007 along with M/s. U.S. Roof Limited out of total development area of 6,500 square feet was given to APIDC original lessor. Remaining area was to be shared between the assessee and M/s. U.S. Roof Ltd. in the ratio of 40:60. The assessee vide lease agreement dated 6.3.2013 let out 8170 square feet to M/s. Kalyan Jewellers India Pvt. Limited. The Assessing Officer issued show-cause notice as to why remaining unoccupied commercial area should not be considered for deemed annual letting value u/s. 23(1)(a) of the Act in accordance with the decision of Hon'ble Delhi High Court in the case of CIT Vs. Ansal House Finance & Leasing Ltd. (354 ITR 180). The assessee vide its reply dated 24.12.2016 stated that against the decision of Hon'ble Delhi High Court SLP has been admitted in the Supreme Court and it is not fair to determine deemed letting value against the assessee. Contention of the assessee was not accepted. The Assessing Officer worked out deemed annual letting value at the same rate at which portion of property was let out to Kalyan Jewellers India P. Ltd. and worked annual letting value at Rs. 84,01,680/- and after allowing 30% deduction made out addition of Rs. 58,81,176/- to the total income of the assessee.

4. On an appeal before learned CIT(A) action of the Assessing Officer was upheld. Thus further aggrieved the assessee has filed this appeal before us.

5. We have heard the submission of the learned AR of the assessee and learned Departmental Representative of the Revenue and perused the material available on record. Learned AR submits that the assessee constructed commercial building in Vashi after taking development rights from U.S. Roof Limited, who in turn obtained contract for development from APIDC. The assessee after obtaining development rights developed a plot allotted to APIDC. The assessee let out some part of developed property at ground floor to M/s.

Kalyan Jewellers India Pvt. Limited. The rent of said portion/premises was offered to tax.

6. The Plot of land on which the development was carried out by assessee, was allotted by City and Industrial Development Corporation (CIDCO) to APIDC. The CIDCO issued show-cause notice dated 25.08.2013 to APIDC for cancellation of lease and for reoccupation of plot as the development of the plot was not in consonance of terms of lease. The APIDC filed reply dated 01.12.2014 to the show-cause of cancellation of lease. After considering the reply of APIDC, CIDCO finally cancelled the lease of the plot on the ground that APIDC violated basic object of the allotment vide order dated 31.12.2015. Thus due to legal embargo and notice of cancellation of lease of the plot the assessee was not in a position to let out the balance commercial are in its possession due to impossibility.

7. In the alternative submission learned AR submits that provisions of section 23(1) are applicable on residential unit. The provisions of subsection(2) of section 23 prescribed that (a) where the property consists of a house or part of a house which is in the occupation of the owner for the purposes of his own residence or (b) cannot actually be occupied by the owner by reason of the fact that owing to his employment, business or profession carried on at any other place, he has to reside at that other place in a building not belonging to him, the annual value of such house or part of house shall be taken to be nil. Further subsection (3) of section 23 prescribed that the provisions of subsection (2) shall not apply if (a) the house or part of the house is actually let during the whole or any part of the previous year or (b) any other benefit therefrom is derived by the owner. Thus section 23 deals with residential property/house and not in respect of commercial property.

8. The Learned AR further submits that after cancellation of lease by the super lessor i.e. CIDCO the assessee could not have legally occupy the property nor could use for commercial exploitation there was legal impediment in letting out of the property. In support of his submission learned AR relied

upon the decision of Hon'ble Bombay High Court in the case of Sharan Hospitality Pvt Ltd vs The Deputy Commissioner Of Income (Income Tax Appeal No. 557 of 2017).

9. On the other hand learned Departmental Representative for the Revenue supported the order of the Assessing Officer as well as learned CIT(A).

10. We have considered the rival submissions of the parties and have gone through the orders of the authorities below. There is no dispute that the assessee has undertaken development/construction of commercial building namely 'Proxima' at plot No. 19, sector 30A, Vashi. Project was undertaken by the assessee on 'assignment cum development' agreement dated 29.10.2007 with M/s. U.S. Roof Limited. Under the agreement the assessee was entitled to retain an area of 19,840 square feet of developed area. There is no dispute that the assessee let out 8170 square feet to M/s. Kalyan Jewellers India Pvt. Ltd. in the same developed complex. During the assessment the Assessing Officer asked the assessee as to why remaining unoccupied commercial area should not be considered for deeming let out purposes u/s. 23(1)(a) of the Act. On the basis of decision of Hon'ble Delhi High Court in the case of CIT Vs. Ansal Housing Finance & Leasing Co. Ltd. (supra). The assessee in its reply dated 24.12.2016 has stated that the SLP had been admitted by Hon'ble Apex Court against the decision of Hon'ble Delhi High Court. The Assessing Officer not accepted the contention of the assessee and worked out deemed letting out value of unoccupied area and worked out the gross rental income and after allowing 30% deduction made addition of Rs. 5,81,176/-to the total income of the assessee under the head 'income from house property'.

11. Before learned CIT(A) the assessee urged that the property/vacant portion is stock-in-trade, the same would partake character of stock in trade and any income derived therefrom would be income from business and not income from house property. It was also urged that the business of the assessee was to construct property and sale it and not to let out. Submission

of the assessee was not accepted by learned CIT(A) as the assessee had leased out part of unsold property on commercial to M/s. Kalyan Jewellers India Pvt. Ltd., and learned CIT(A) affirmed the action of the Assessing Officer.

12. Before us learned AR of the assessee vehemently argued that lease of the plot on which assessee developed project for APIDC has been cancelled by lessor CIDCO vide order dated 31.12.2015. Before cancellation lease deed show-cause notice dated 25.8.2013 was issued to APIDC as to why lease should not be cancelled as the development of leased plot was not in accordance with condition of lease. Learned AR of the assessee has strongly relied upon the decision of Hon'ble Jurisdictional High Court in the case of Sharan Hospitality Pvt Ltd. (supra) wherein Hon'ble Court while considering the question of law "whether on the facts and circumstances of the case Income Tax Appellate Tribunal was right in law in holding the annual letting value of the property is question for relevant previous year can be determined u/s. 23(1)(a)". Hon'ble Court after considering the contention of the party held that the assessee let out property w.e.f. 1.4.2018 without waiting for occupation certificate, entire property during which the assessee could have let this property, tax on notional basis should be charged. It was further held that between 1.1.2009 up to 31.3.2009 property was legally not occupyable and not occupied. Under such circumstances charging of tax on notional rental basis and the question of interpretation of section 23(1)(a) did not arise at all.

13. In the case in hand a show-cause notice for cancellation of lease was issued on 25.8.2013 and ultimately lease of plot was cancelled vide order dated 31.12.2015, therefore, we find force in the submission of learned AR of the assessee that after issuance of show-cause notice for cancellation of lease on which building was developed, the assessee was not entitled to let out occupied/constructed portion. Therefore, we find force in the submission of the learned AR that after issuance of show-cause notice the assessee was not entitled to let out the property. Hence, taxing notional income of unoccupied

portion of building on the basis of deemed annual letting value is not justified by the Assessing Officer. Hence, we direct the Assessing Officer to delete the disallowance. Considering the fact that we have accepted the contention of learned AR that the assessee was legally not entitled to let out the property. Therefore adjudication on other submissions of learned AR has become academic.

14. In the result, appeal of the assessee is allowed.

Order has been pronounced in the Court on 28.01.2020.

Sd/-  
(R.C. SHARMA)  
JUDICIAL MEMBER

Sd/-  
(PAWAN SINGH)  
ACCOUNTANT MEMBER

Mumbai; Dated : 28/01/2020

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)  
ITAT, Mumbai

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