

**IN THE INCOME TAX APPELLATE TRIBUNAL
“H” Bench, Mumbai
Before Shri G. Manjunatha, Accountant Member
and Shri Ravish Sood, Judicial Member**

**ITA No. 2043/Mum/2017
(Assessment Year: 2012-13)**

Haresh Natvarlal Sanghavi
Nikunj House, Manav Mandir
Ambadi Road, Vasai (W),
Thane.

ACIT, Circle-4, 6th Floor
A-Wing, Room No. 2, Ashar I.T Park,
Vs. Road No. 16-Z, Wagle Industrial Estate,
Thane(W) – 400 604

PAN –AFCPS7828F

**ITA No. 1915/Mum/2017
(Assessment Year: 2012-13)**

ACIT, Circle-4, 6th Floor
A-Wing, Room No. 2, Ashar I.T Park,
Road No. 16-Z, Wagle Industrial Estate,
Thane(W) – 400 604

Haresh Natvarlal Sanghavi
Nikunj House, Manav Mandir
Vs. Ambadi Road, Vasai (W),
Thane.

PAN –AFCPS7828F

Assessee by: S/shri Nirav Vora & Ankita Lunia, A.Rs
Revenue by: Shri R. Bhoopathi, D.R
Date of Hearing: 05.03.2020
Date of Pronouncement: 09.06.2020

ORDER

PER RAVISH SOOD, JM

The present cross-appeals are directed against the order passed by the CIT(Appeals)- 2, Thane, dated 20.12.2016, which in turn arises from the assessment order passed by the A.O under Sec. 143(3) of the Income-tax Act, 1961 [for short ‘Act’], dated 30.03.2015. We shall first advert to the appeal filed by the assessee wherein the impugned order has been assailed on the following grounds of appeal before us:

- “1. The Id. CIT(A) erred in law and in facts by holding that depreciation on motor car of Rs. 15,59,438/- ,professional fees of Rs. 13,84,227/-, Insurance on motor car of Rs. 2,10,760/- and expenses on motor car of Rs. 59,873/-, are not allowable as a deduction u/s 57(iii) of the I.T Act, 1961. He further erred by holding that the aforesaid expense are alternatively not allowable u/s 32 r.w.s 37(1) of the I.T Act 1961.
2. The Id. CIT(A) erred in law and in facts by confirming addition of Rs. 1,20,000/- u/s 23(1)(a) r.w.s 23(4) of the I.T Act, 1961 in respect of flat at Shreenath Tower.
3. The Id. CIT(A) erred in law and in facts by upholding the disallowance of deduction of Rs. 2,25,000/- claimed u/s 24(a) of the I.T Act, 1961 in respect of tower rent.”

2. Briefly stated, the assessee who is engaged in the business of a builder and developer, and during the year under consideration was deriving income from house property, long term capital gain and income from other sources had filed his return of income for A.Y 2012-13 on 30.09.2012, declaring a total income of Rs. 1,64,99,349/-. The return of income was processed as such u/s 143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment u/s 143(2) of the Act.

3. In the course of the assessment proceedings the A.O made the following additions/disallowances :

- (i). Disallowance of expenditure claimed against the income from “other sources” u/s 57(iii) of the Act. : Rs. 32,16,525/-.
- (ii). Addition under the head “Income from house property” towards the notional lettable value of the properties owned by the assessee viz. (a). Shreenath Tower (Rs. 1,80,000/-); (b). Gaurav Palace (Rs. 2,83,920/-);(c). STPP Mathura (Rs. 1,40,000/-); and (d) Veena Souk (Rs. 4,50,36,444/-) : Rs. 4,36,97,743/- [(after 30% deduction u/s 24(a)].
- (iii). Disallowance of deduction claimed by the assessee u/s 24(a) i.e @30% of the rent received from letting out of space for mobile tower : Rs. 2,25,000/-.

After inter alia making the aforesaid additions/disallowances the income of the assessee was assessed by the A.O vide his order passed u/s 143(3), dated 30.03.2015 at Rs.5,18,47,130/-.

4. Aggrieved, the assessee assailed the assessment order before the CIT(A). After deliberating on the contentions advanced by the assessee the CIT(A) partly allowed the appeal as under:

S.No.	Particulars	Amount of addition /disallowance	Before the CIT(A)
1.	Disallowance of expenditure claimed against the income from other sources u/s 57(iii) of the Act, viz. (i), Bank charges : Rs. 2,227/-; (ii), Professional fees : Rs. 13,84,227/-; (iii). Car Expenses : Rs. 59,873/-; (iv). Car Insurance : Rs. 2,10,760/-; and (v). Depreciation on motor car : Rs. 15,59,438/-.	Rs. 32,16,525/-	Disallowance upheld by CIT(A)
2.	Addition made by A.O of notional lettable value of property owned by the assessee viz. Shreenath Tower. (before allowing 30% deduction u/s 24(a) of the Act).	Rs. 1,80,000/-	Addition upheld by CIT(A)
3.	Addition made by A.O of notional lettable value of property owned by the assessee viz. Gaurav Palace. (before allowing 30% deduction u/s 24(a) of the Act).	Rs. 2,83,920/-	Addition vacated by CIT(A)
4.	Addition made by A.O of notional lettable value of property owned by the assessee viz. STTP Mathura. (before allowing 30% deduction u/s 24(a) of the Act).	Rs. 1,40,000/-	Addition upheld by CIT(A)
5.	Addition made by A.O of notional lettable value of property owned by the assessee viz. Veena Souk. (before allowing 30% deduction u/s 24(a) of the Act).	Rs. 4,50,36,444/-	Addition vacated by CIT(A)
6.	Disallowance of assessee's claim for deduction u/s 24(a) i.e @30% in respect of tower rent.	Rs. 2,25,000/-	Disallowance upheld by CIT(A)

5. Both the assessee and the revenue being aggrieved with the order of the CIT(A) have carried the matter in appeal before us. We shall first advert to the claim of the assessee that the CIT(A) was in error in sustaining the disallowance of expenditure of Rs. 32,16,525/-. As observed

by us hereinabove, the aforesaid claim of expenditure that was raised by the assessee in the return of income against his income from ‘other sources’ was comprised of the following expenses:

Sr. No.	Particulars	Amount
1.	Depreciation on motor car	Rs. 15,59,438/-
2.	Professional fees	Rs. 13,84,227/-
3.	Insurance expenses of motor car	Rs. 2,10,760/-
4.	Car Expenses	Rs. 59,873/-
	Total	Rs. 32,16,525/-

On a perusal of the return of income, we find, that the assessee had claimed the aforesaid expenses u/s 57(iii) of the Act, against his income from “other sources”. Observing, that the said expenses did not have any nexus with the income that was reflected by the assessee under the head income from “other sources”, the A.O had called upon him to justify the allowability of the same u/s 57(iii) of the Act. In reply, it was submitted by the assessee that he was engaged in the business of a builder and a developer under the name and style of M/s Sanghavi Associates and during the year was having two ongoing projects viz. (i). Veena Souk ; and (ii). Veena Mall. In the backdrop of the aforesaid facts, it was the claim of the assessee that as he had used the motor car (on which depreciation/expenses were claimed) for travelling for his business purpose, therefore, he was entitled to claim depreciation and other expenses viz. insurance expenses, car expenses pertaining to the said vehicle while computing his taxable income. As regards the claim of professional expenses, it was submitted by the assessee that as the said expenses were incurred in lieu of professional advice for issues relating to litigation, tax appeals, accounting and compliances in the normal course of his business, therefore, the same were allowable u/s 37 of the Act. However, the A.O was not inclined to accept the aforesaid explanation of the assessee primarily for three reasons viz. (i). that as the assessee had claimed the expenditure under the head Income from “other sources”, therefore he was required to justify the allowability of the same with reference to the provisions of Sec. 57(iii) of the Act; (ii). that the assessee had failed to establish any nexus between the aforesaid expenses and the income earned under the head “other sources” as was required per the mandate of Sec. 57(iii) of the Act; and (iii). that as the assessee had shown a meagre business income of Rs. 69,107/-, therefore, the aforesaid expenses could not

be held to have been incurred in the course of such inadequate business activity of the assessee. Accordingly, the A.O not finding favour with the aforesaid claim of expenses raised by the assessee disallowed the same. On appeal, the CIT(A) not finding any infirmity in the view taken by the A.O upheld the said disallowance.

6. We have given a thoughtful consideration to the issue before us in the backdrop of the contentions advanced by the authorised representatives for both the parties and the observations of the lower authorities in context of the issue under consideration. Admittedly, the aforesaid expenses were claimed by the assessee in his return of income against the income which was earned by him from “other sources” viz. interest on FDR’s, interest on infrastructure bonds and other interest income. Insofar the view taken by the lower authorities that the aforesaid expenses claimed by the assessee could not be demonstrated to have been laid out or expended wholly and exclusively for the purpose of making or earning of the income shown under the head “other sources” is concerned, we find ourselves to be in agreement with the same. But then, the assessee had alternatively claimed that as the motor car was used for travelling in the course of his business of a builder and developer of properties, therefore, he was entitled to claim depreciation on the same u/s 32 of the Act. Also, it was submitted by him that his claim for car expenses was eligible for deduction u/s 37 of the Act. We find that a similar claim of car depreciation and car expenses was raised by the assessee in his case for A.Y 2011-12, which however was disallowed by the A.O vide his order passed u/s 143(3), dated 28.03.2014, and thereafter was upheld by the CIT(A). However, on further appeal the Tribunal while disposing off the assessee’s appeal in ITA No. 2201/Mum/2016, dated 03.12.2019 for A.Y 2011-12 had vacated the aforesaid disallowance of car depreciation and car expenses, observing as under:

“22. Upon careful consideration we find considerable cogency in the submission of the assessee. The alternate claim of the assessee that depreciation is to be allowed as it is undisputed that the assessee was engaged in the business, deserves to be allowed on the touchstone of Hon’ble Apex Court in the case of Rajendra Prasad Moody (supra). We direct accordingly that the assessee ground raised for depreciation claim is to be allowed.”

At this stage, we may also observe that the assessee in the course of the proceedings before the CIT(A), had submitted, that the A.O had disallowed 50% of his claim for car depreciation and car expenses while framing the assessment for A.Y 2013-14. Accordingly, by way of an alternative

claim, it was fairly submitted by him before the CIT(A) that to maintain the principle of consistency a part relief as regards the aforesaid expenses may be allowed on similar lines. As is discernible from the assessment order for A.Y 2013-14, the A.O had disallowed 50% of the assessee's claim for car depreciation and car expenses primarily for the reason that he had not furnished any evidence with regard to maintenance of any log book. As the fact situation during the year under consideration in context of the aforesaid issue before us remains the same, therefore, after principally agreeing with the view taken by the Tribunal as regards the entitlement of the assessee towards claim for car depreciation and car expenses, we accept the alternative claim of the assessee and restrict the disallowance of car depreciation, car insurance expenses and car expenses to the extent of 50% of the claim raised by the assessee. Accordingly, the A.O is directed to restrict the disallowance as regards the assessee's claim for car depreciation, car insurance expenses and car expenses to the extent of 50% of the claim that was raised by him.

7. We shall now take up the claim of the assessee that the lower authorities had erred in disallowing his claim for expenditure incurred towards professional fees of Rs. 13,84,227/-. As observed by us hereinabove, the assessee in the return of income for the year under consideration had claimed the aforesaid expense against his income which was earned by him from "other sources" viz. interest on FDR's, interest on infrastructure bonds and other interest income. Once again, we may herein observe that no infirmity emerges from the view taken by the lower authorities that the aforesaid expenses could not be shown by the assessee to have been laid out or expended wholly and exclusively for the purpose of making or earning of the income shown under the head "other sources". But then, it was the claim of the assessee before the lower authorities that as the aforesaid expenses were incurred in lieu of professional advice for issues relating to litigation, tax appeals, accounting and compliances in the course of his business, therefore, the same were allowable u/s 37 of the Act. Apart from that, it was claimed by the assessee before the CIT(A) that a similar claim of professional fees was allowed by the A.O while framing the assessment in his case for the A.Y 2011-12, vide his order passed u/s 143(3), dated 28.03.2014. On a perusal of the records, we find that there is no material available on record which would substantiate the claim of the assessee that the professional fees as claimed by him

was incurred for availing certain professional services in the course of his business. In fact, the assessee except for harping on his claim that the aforesaid expenses were incurred in lieu of professional advice for issues relating to litigation, tax appeals, accounting and compliances in the course of his business, had however failed to fortify the same on the basis of any corroborative material. Be that as it may, we find that the matter in all fairness requires to be restored to the file of the A.O, who is directed to verify the allowability of the aforesaid claim of expense raised by the assessee u/s 37 of the Act. Needless to say, the A.O shall in the course of the 'set aside' proceedings afford a reasonable opportunity of being heard to the assessee who shall remain at a liberty to substantiate his aforesaid claim of expense on the basis of fresh documentary evidence. **Ground of appeal No. 1** is partly allowed in terms of our aforesaid observations.

8. We shall now advert to the claim of the assessee that the CIT(A) had erred in sustaining the addition made by the A.O towards the 'Annual Lettable Value'(for short "ALV") of a property owned by him viz. Flat No. 503, Shreenath Tower, Kandiwali West. We shall deal with the addition made by the A.O as regards the aforesaid property, as under:

(A). Flat No. 503, Shreenath Tower, Kandiwali West :

(i). It was observed by the A.O that the aforesaid property admeasuring 1000 sq. ft was jointly owned by the assessee alongwith his brother Sh. Hitesh Sanghavi. In the return of income for the year under consideration the assessee had shown his ½ share of rental receipt from the aforesaid property at Rs. 60,000/-. Observing, that the assessee had offered his ½ share of rental receipt from the said property for the period relevant to the immediately preceding year i.e A.Y 2011-12 at Rs. 1,80,000/-, the A.O rejected the annual rent shown by the assessee. Also, it was noticed by the A.O that considering the area and location of the aforesaid property the meagre rent @ Rs. 13.30 per sq.ft shown by the assessee was not acceptable. Although, the A.O as per the method adopted by him worked out the "Fair Market Rent" of the aforesaid property at Rs. 78,588/-, however, considering the fact that the assessee had himself offered his ½ share of rental receipt from the said property in the immediately preceding year i.e A.Y 2011-12 at Rs. 1,80,000/-, thus took the

ALV of the property for the year under consideration at the same amount. On appeal, the CIT(A) finding no infirmity in the view taken by the A.O upheld the same.

(ii). On a perusal of the assessment order passed u/s 143(3), dated 28.03.2014 for A.Y 2011-12, we find that the assessee had reflected his share of the ALV of the aforesaid property which was vacant during the year at Rs. 1,80,000/- ($\frac{1}{2}$ share). As per the return of income for the year under consideration viz. A.Y 2012-13, it is claimed that the aforesaid property was let out for a total rental receipt of Rs. 1,20,000/-. On the aforesaid basis the assessee had shown his share of the rental receipt at Rs. 60,000/- ($\frac{1}{2}$ share). As per Sec. 23(1) of the Act, the ALV of the property shall be viz. **(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 part 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 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. Now, in the case before us the property in question was let out during whole of the year under consideration against which assessee had claimed to have received his share of rent of Rs. 60,000/- ($\frac{1}{2}$ share). As observed by us hereinabove, the ALV of the aforesaid property which was vacant in the immediately preceding year i.e A.Y 2011-12 was suo motto shown by the assessee u/s 23(1)(a) at Rs. 1,80,000/- ($\frac{1}{2}$ share of assessee). As per Sec. 23(1), the actual rental receipt as per clause (b) shall be taken as the ALV of a property only where the same is found to be in excess of the notional lettable value contemplated in clause (a). In the case before us, the assessee had failed to explain as to why the notional lettable value of the property of Rs. 1,80,000/- ($\frac{1}{2}$ share) that was adopted by him as the ALV of the property in the immediately preceding year i.e A.Y 2011-12 was not to be adopted for the year under consideration. As such, we are of the considered view that as the rent of Rs. 60,000/- ($\frac{1}{2}$ share) received by the assessee during the year under consideration is less than the notional lettable value of the aforesaid property which during the year under consideration can safely be taken at Rs. 1,80,000/-, therefore, its ALV

has to be taken as per Sec. 23(1)(a) at Rs. 1,80,000/-. We thus finding no infirmity in the view taken by the CIT(A) uphold the same. **Ground of appeal No. 2** is dismissed.

9. We shall now take up the grievance of the assessee that the CIT(A) had erred in upholding the disallowance of deduction of Rs. 2,25,000/- that was claimed by the assessee in respect of tower rent. As per the facts borne from the records, the assessee had let out space on the terrace of a house property owned by him to a mobile company on which the latter had erected a tower. On a perusal of the records, we find that the A.O while framing the assessment had de hors any reasoning disallowed the assessee's claim for deduction of 30% u/s 24(a) as regards the rent received from the cellular company. On appeal, the assessee assailed the aforesaid disallowance on two counts viz. (i). that as the A.O had carried out the disallowance without affording any opportunity of being heard to the assessee, hence, the same being in violation of Sec. 142(3) was liable to be quashed on the said count itself; and (ii). that the assessee's claim for deduction u/s 24(a) of the Act was in order. However, the CIT(A) being of the view that the A.O had disallowed the assessee's claim for deduction u/s 24(a) after taking into consideration his submissions, upheld the disallowance made by the A.O. At this stage, we may herein observe that both of the lower authorities had dismissed the aforesaid claim of deduction raised by the assessee without passing any reasoned order. We are not inclined to subscribe to the manner in which the lower authorities had rejected the assessee's claim for deduction u/s 24(a) insofar the same pertained to the rent received from the cellular company i.e without giving any logical reasoning. In fact, we find that though the CIT(A) had reproduced the exhaustive submissions filed by the assessee in context of the aforesaid issue under consideration at Page 28-29 - Para 4.23 - 4.25 of his order, but had failed to adjudicate the same on the basis of a speaking order. In the backdrop of the aforesaid facts, we herein restore the issue to the file of the A.O who is directed to adjudicate the aforesaid claim of the assessee on the basis of a speaking order. Needless to say, the A.O shall in the course of the 'set aside' proceedings afford a reasonable opportunity of being heard to the assessee who shall remain at a liberty to substantiate his aforesaid claim on the basis of fresh material. **Ground of appeal No. 3** is allowed for statistical purposes.

10. The appeal of the assessee is partly allowed in terms of our aforesaid observations.

ITA No. 1915/Mum/2017
A.Y 2012-13

11. We shall now take up the appeal of the revenue wherein the impugned order has been assailed before us on the following grounds of appeal:

- “1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A)-3, Thane, erred in deleting notional rent u/s 23(4) of the properties at fair market as per the provisions of section 23(1)(a) r.w.s 23(4) of the I.T Act.
2. The appellant prays that the order of the Ld. CIT(A)-3, Thane may be set-aside and that of the A.O be restored.
3. The appellant craves leave to add, alter or amend any or all of the above ground/grounds which may be necessary ”

12. The revenue has assailed before us the deletion by the CIT(A) of the addition that was made by the A.O towards notional lettable value of two properties owned by the assessee viz. (i). Gaurav Palace (Rs. 2,83,920/-); and (ii). Veena Souk (Rs. 4,50,36,444/-). We shall deal with the addition that was made by the A.O as regards the aforesaid properties, as under:

12.1 Flat - Gaurav Palace:

(i). In the course of the assessment proceedings it was observed by the A.O that the assessee had purchased the aforesaid flat vide an agreement dated 23.06.2003 that was registered on 17.07.2009 for a consideration of Rs. 25,35,000/-. Observing, that the assessee had not computed the ALV of the aforesaid property as per Sec. 23(1)(a) r.w. Sec. 23(4) of the Act, the A.O worked out the same at Rs. 2,83,920/- viz. [Annual Return @10% of cost (+) Annual maintenance and repair charges @12% of annual return]. On appeal, it was the claim of the assessee that the aforesaid property was under construction and possession of the same was not delivered to him as on 31.03.2012. As such, it was the claim of the assessee that de hors possession of the property under consideration, its notional lettable value could not have been computed and brought to tax in his hands. In order to support his aforesaid claim the assessee placed on record a letter from the developer viz. M/s Ravi Group Builders & Developers, wherein they had clearly stated that the possession of the said flat would be given to the assessee in December, 2013. Also, it was

observed by the CIT(A) that an identical addition of the notional rental income that was made by the A.O in respect of the property in question in the immediately preceding year i.e A.Y 2011-12, was on appeal deleted by his predecessor. In the backdrop of the aforesaid facts the CIT(A) deleted the addition that was made by the A.O towards ALV of the property under consideration.

(ii). The revenue being aggrieved has carried the matter in appeal before us. We have heard the authorised representatives for both the parties in context of the issue under consideration and have also perused the orders of the lower authorities and the material available on record. Admittedly, the possession of the aforesaid property was not delivered to the assessee till the end of the year under consideration i.e upto 31.03.2012. In fact, as observed by us herein above, the possession of the property in question was to be delivered in December, 2013. In our considered view, in the very absence of the possession of the property in question having been delivered to the assessee by the builder/developer, there could have been no occasion for computing the ALV of the same within the meaning of Sec. 23 of the Act. In fact, we find that an identical addition of the notional rental income that was made by the A.O in respect of the property in question in the immediately preceding year i.e A.Y 2011-12 was on appeal deleted by the CIT(A). Still further, the appeal of the revenue in context of the issue under consideration for A.Y 2011-12 had also been dismissed by the Tribunal in ITA No. 6003/Mum/2016, dated 03.12.2019. The Tribunal while upholding the order of the CIT(A) had observed as under:

“Apropos Rental income of Gaurav Palace :

14. On this issue the Assessing Officer noted that there was contradictory submission by the assessee that the house was completed or not. Hence, he computed rental income for the same. Upon assessee's appeal learned CIT(A) accepted the assessee submission that assessee has not received the possession of the said property hence there was no question of letting out the same. In this regard learned CIT(A) observed as under :-

“The A.O still went ahead with the addition stating that there was contradiction in the appellant's different replies and the appellant had shown this property in his balance sheet. I find that the AO's approach is not in conformity with the principles of natural justice. The assessee had categorically stated that he was not in possession of the impugned flat. The appellant had also filed a letter of the builder of the property to the effect that the possession would be handed over in 2013. The A.O could not have discarded these details and the appellant's contentions without further enquiries and without establishing that the appellant had actually taken possession of the property. It is

only after a property is ready and available for possession that a charge u/s 22 can be thought of. The addition of Rs. 73,867/- is therefore directed to be deleted.”

15. Against this order revenue is in appeal before us. We have heard both the counsel and perused the records. We find that learned CIT(A) has given the finding that the impugned property’s possession was not handed over to the assessee by the builder. Nothing has been submitted before us that this finding is wrong. In this view of the matter in our considered opinion when the assessee has not gotten possession of the said property there was no question of assessee letting out the same and offering rental income. Hence we do not find any infirmity in the order of the learned CIT appeals on this issue.”

We have perused the aforesaid observations of the Tribunal and being persuaded to subscribe to the view therein taken, respectfully follow the same. Resultantly, we uphold the order of the CIT(A) in context of the aforesaid issue under consideration.

12.2 Commercial Complex - Veena Souk:

(i). In the course of the assessment proceedings it was observed by the A.O that the assessee owned a commercial complex (admeasuring 3200 sq. meters) known as “Vena Souk” situated at Mahavir Marg, Kandiwali West. It was noticed by the A.O that the construction of the aforesaid complex was completed in the year 2009 and part completion occupancy certificate was received by the assessee on 07.02.2009. The aforesaid complex comprised of two basements, a ground floor, two upper floors and a terrace above the second floor. It was gathered by the A.O that the assessee had entered into a combined agreement for leave and license as well as sale of the property with M/s Home Care Retail Mart Pvt. Ltd (hereinafter referred to as “HCRMP”) on 17.02.2006, which was duly registered. Also, the assessee had collected an interest free security deposit from the aforesaid party amounting to Rs. 4,02,11,111/-.

(ii). On account of alleged breach of contract on the part of the assessee the aforesaid HCRMP filed an arbitration petition against the assessee before the Hon’ble High Court of Bombay. Subsequently, on 30.01.2012, the Hon’ble Supreme Court passed an order allowing the assessee to lease out the said property for a tenure of five years and further directed that the Court Receiver shall appoint the assessee as his agent. Further, the Hon’ble Apex court granted liberty to the assessee to give the property on leave and licenses basis and receive the rent/license fee as an agent. In the backdrop of the aforesaid facts, the A.O observing that the property in question during

the year was a constructed property in respect of which the O.C was received by the assessee way back on 07.02.2009 i.e in the F.Y 2008-09, and the same was in a condition to be let out as per the directions given by the Hon'ble Supreme Court in its order, therefore, held a conviction that the notional lettable value of the said property was liable to be computed as per the provisions of Sec. 23(1)(a) r.w Sec. 23(4) of the Act. As the assessee despite sufficient opportunity failed to provide the fair market rent of the aforesaid property under consideration, therefore, the A.O worked out the same at Rs. 4,50,36,444/- viz. [Annual Return @10% of cost (+) Annual maintenance and repair charges @12% of annual return].

(iii). On appeal, the CIT(A) concluded that the A.O could not have assessed the notional lettable value of the property in question for certain reasons viz. (a). that as the aforesaid property which was given on leave and license to HCRMP on 17.02.2006 was pursuant to a dispute between the lessee and the assessee subjected to arbitration before the Hon'ble High Court of Bombay, therefore, the notional lettable value of the said property could not be estimated since the beginning of the leave and license agreement till the conclusion of the arbitral proceedings as the same was not free from encumbrance; (b). that pursuant to the arbitration application filed on 14.06.2010 as the court had vide its interim orders i.e order dated 23.07.2010 & 16.08.2011 directed the assessee not to create any third party rights/or part with the possession/or license of the property in question to any third party, therefore, the assessee was divested of his rights to license the said premises to any third party till the conclusion of the arbitral proceedings; (c). that the assessee in the arbitration petition had raised various claims on the lessee/licensee which inter alia included recovering of the license fee/rent from the licensee for the period starting from 01.07.2009 to 31.03.2013. As such, pursuant to the claim of the assessee that the property was let out and the unrealized rent was to be recovered from the lessee/licensee the ALV of the property was to be determined as per Sec. 23(1)(b), as the actual rent claimed by the assessee i.e Rs. 40,21,000/- p.m was more than the notional rent determined by the A.O. Accordingly, as the entire amount of rent was unrealized the annual value of the property was therefore to be determined at nil, subject to the condition that the amount of rent recovered in the subsequent years would be brought to tax in the hands of the assessee u/s 25AA of the Act.; (d). that as pursuant to the

directions of the court a court receiver was appointed as receiver of the property and possession of the same was vested with him and not the assessee, therefore, the notional lettable value of the property could not have been computed u/s 23(1)(a) of the Act and brought to tax in the hands of the assessee u/s 22 of the Act.; and (e) that the amount of interest free security deposit of Rs. 4,01,11,111/- that was received by the assessee from HCRMP was invested by him in fixed deposits, bonds etc from where substantial income was earned and offered for tax under the head income from “other sources”. In the backdrop of his aforesaid observations the CIT(A) deleted the addition that was made by the A.O towards notional lettable income of the property in question.

(iv). Being aggrieved, the revenue has assailed before us the deletion by the CIT(A) of the addition of an amount of Rs. 4,50,36,444/- that was made by the A.O towards notional lettable income of the aforesaid property under consideration. We find that a similar addition of the notional lettable value of the property in question that was made by the A.O while framing the assessment in the assessee’s own case for the immediately preceding year i.e A.Y 2011-12, vide his order passed u/s 143(3), dated 28.03.2014, was on appeal deleted by the CIT(A), vide his order dated 12.07.2016. On further appeal by the revenue, the Tribunal while disposing off the appeal of the revenue vide its order passed in ITA No. 6003/Mum/2016 for A.Y 2011-12, had after deliberating at length on the order of the CIT(A) in context of the issue under consideration had upheld the same by observing as under:

“ Apropos rental income of Veena Souk :

3. Brief facts of this issue are as under:-

In brief the A.O found from the assessee’s books of accounts and the balance sheet etc. that the assessee was in possession of this property but no rent had been disclosed from this property. On enquiry the assessee contended that the property was under construction and was not capable of being rented out because of pending litigation. However the AO found that the relevant local authority had issued the completion certificate of this property on 23/06/2009 and the assessee had entered into an agreement for renting out this property and had also collected security deposit from the agreement holder. The AO therefore held that notional rent from this property had to be included in the assessee’s income notwithstanding the pending litigation between the assessee and the agreement holder for lease of the property. The AO has also referred to the Delhi H.C decision in the case of Ansal Holding Finance & Leasing Co. Ltd. [213 Taxman.com 143].

4. Upon assessee's appeal the learned CIT(A) further summarised the factual aspect as under:

“The appellant had entered into a leave and license agreement with HRMPL in respect of the said property as early as on 17.02.2006. The appellant had even received huge security deposit. However there was a delay in the construction of the property and the occupation certificate could be obtained only in July 2009. The lessee HRMPL contended that the construction was not completed as per the agreement and asked the appellant to complete the construction work before handing over possession. The appellant refused the claim and issued a notice of termination of the agreement on 19/02/2010. The lessee HRMPL thereupon took recourse to legal proceedings and approached the Bombay High Court. The honourable court vide its order dated 23/07/2010 restrained the appellant from giving out the impugned property to any party other than HRMPL or part with the possession of the property or create any rights in the property in favor of a third party till disposal of the arbitration proceedings. The appellant and HRMPL both filed claims and counter claims before the arbitrator. HRMPL claimed for specific performance of the agreement and monetary damages for not handing over the possession of the property in May 2007 as stipulated in the leave and license agreement. The appellant on the other hand claimed for the license fee from 2009 as per the agreement and also compensation for breach of the contract by HRMPL. The arbitration proceedings took a long time. In between the High Court appointed a court receiver to take possession of the property. The applicant finally could get back possession of the property as an agent of the court appointed receiver only after the order of the Supreme Court to this effect on 30/01/2012. It is only after the SC order that the appellant was able to rent out the property to a third party w.e.f 2/7/2012. The arbitration award was finally issued on 31/12/2013.”

5. Thereafter learned CIT(A) granted relief to the assessee on two counts. Firstly he held that the impugned amount can be said to be unrealised rent for this he held as under:

“It may be clarified her that the conditions mentioned in Rule 4 regarding unrealized rent are all fulfilled in the appellant case. The relevant Rule is reproduced below:

“Unrealized rent.

4. For the purposes of the Explanation below sub-section (1) of section 23, the amount of rent which the owner cannot realise shall be equal to the amount of rent payable but not paid by a tenant of the assessee and so proved to be lost and irrecoverable where:-

(a). the tenancy is bonafide;

(b). the defaulting tenant has vacated, or steps have been taken to compel him to vacate the property;

(c). the defaulting tenant is not in occupation of any other property of the assessee;

(d). the assessee has taken all reasonable steps to institute legal proceedings for the recovery of the unpaid rent or satisfies the Assessing Officer that legal proceedings would be useless.

4.11.6 In the appellant case, the agreement dated 17/2/2006 is indisputably a bona fide agreement between two unrelated parties. The dispute between the parties is also not collusive. The prospective tenant did not take possession of the property but got the appellant restrained from letting out the property to any third party. The appellant was earnestly contesting the legal proceedings initiated by the prospective tenant. Thus substantively the conditions in Rule 4 are satisfied.

4.11.7 The Honourable Karnataka High Court had an occasion to decide a somewhat similar issue while deciding the case of Smt. Divya Devi [217 ITR 824]. The honourable court held as under:

“7. It cannot be disputed that the question whether the lease is validly terminated and whether the forfeiture has come into effect are the issues pending adjudication in the suit before the City Civil Court and unless a final determination is made thereon, the question of the assessee becoming the owner of the building does not arise. In the facts and circumstances, the CIT(A) as well as the Tribunal have upheld the assessee's contention on the ground that since the dispute between the assessee and the sub-tenant has arisen out of a contract, which is pending adjudication before a Civil Court, it cannot be held that there is an automatic forfeiture of the lease, and as such, the assessee cannot be held to have become the owner of the building in question. In this context, the Tribunal has also rightly held that the right of an assessee in regard to a matter in dispute in a Court of law would get transformed into real and permanent one only when the Court finally expresses its opinion. Till then, it is an inchoate or uncertain right. It is further clear that in case of forfeiture under s. 111(g) of the Transfer of Property Act, the Court has a discretionary power to intervene and give relief against forfeiture as provided under ss. 114 and 114A of the Transfer of Property Act. Therefore, till the issue is finally decided in the civil proceedings, the right of the assessee is inchoate in nature. We are, therefore, in full agreement with the view taken by the Tribunal in holding that no house property income in the case of the assessee can be added under s. 22.”

4.11.8 Thus if we assume that the property Veena Souk was in fact leased out to HRMPL, but no rent could be realised by the appellant due to pending litigation, the annual value of the property would be Nil during the previous year.”

6. Secondly he held that the said property could not be let out during the period. He observed that the A.O has however proceeded on the premise that the property was not let out during the year and hence annual value has to be determined under section 23(1)(a). He observed that assuming the A.O to be correct in holding that the property was not let out during the year, one may examine what will be the annual value of the property as per section 23(1)(a). That this has to be the ‘sum for which the property might reasonably be expected let from year to year’. So one has to determine the reasonable sum which a property under litigation and subject matter of an injunction order would reasonably bring in as rent ‘if let out’. He held that the AO has ignored the fact that to start with the impugned property could not have been let out to any one as per the court order. Thus the ‘reasonable sum’ would remain zero.

7. Learned CIT(A) further observed that the assessee has rightly relied on the decision of the jurisdictional High Court in the case of Shri Nirmal Commercial Ltd. 9193 ITR 694) to espouse his claim that a charge u/s 22 is not attracted if the property is inherently incapable of being let out. He reproduced the relevant para as under :

“The learned counsel for the Revenue strenuously urged that, irrespective of the factual background of the case, we must hold that the compensation amount received from the shareholders must be taxed in the hands of the assessee-company as income from property exigible to tax under s. 22 of the IT Act, 1961. He contends that once there is any property consisting of buildings and/or land appurtenant thereto, of which the assessee is the owner, irrespective of whether he uses it himself, keeps it locked or lets it out, he is chargeable to tax under s. 22 of the IT Act, 1961, with regard to the annual value of the property as determined under s. 23 of the Act. In the present case, the assessee had not fully parted with the ownership rights

and, therefore, continued to be the owner of the property, i.e., the building known as "Nirmal". Hence, he contends, the assessee is liable to tax under s. 22 on the annual value of the property as determined in accordance with s. 23, irrespective of what the assessee collects from its shareholders (who, according to learned counsel, are nothing but tenants) and irrespective of the label attached to such receipts.

14. The contention raised by Dr. Balasubramanian appears attractive at first blush but, on closer examination, falls to the ground. Even assuming that after the shareholders were allotted the floor space area and the right of occupancy thereof was completely transferred to the shareholders, the assessee still retained some residuary or vestigial rights of ownership, there are two difficulties in the way of the contention being accepted. First, the Revenue had made no attempt to identify, quantify or evaluate such residuary rights of ownership. The second and more formidable difficulty is that the Revenue is not able to show that the residuary or vestigial rights of ownership were of such nature as could be let out. In our view, unless the property owned by the assessee is of such nature as could be let out, the charge under s. 22 of the Act cannot be attracted. In our view, if the property is of such nature that it is inherently incapable of being let out and the assessee is the owner thereof, then the charge under s. 22 of the Act cannot arise. What is necessary for the charge under s. 22 of the Act to arise is that the property be inherently capable of being let out.

15. In this connection, we may refer to the judgment of the Supreme Court in CIT vs. Official Liquidator, Palai Central Bank Ltd. (1984) 43 CTR (SC) 164 : (1984) 150 ITR 539 (SC), to which our attention was invited by Mr. Dastur, learned counsel for the assessee. The Supreme Court, in Palai Central Bank's case (supra), cited with approval its earlier judgment in CIT vs. B. C. Srinivasa Setty (1981) 21 CTR (SC) 138 : (1981) 128 ITR 294 (SC), and held that, under the scheme of the IT Act, 1961, charge of tax will not get attracted unless the case or transaction falls under the governance of the relevant computation provisions. The Supreme Court observed:

"...character of the computation provisions in each case bears a relationship to the nature of the charge. Thus, the charging section and the computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section."(p. 299). Placing reliance on this judgment of the Supreme Court, Mr. Dastur submitted, in our view rightly, that, since the residuary ownership rights of the assessee were inherently incapable of being let out, no computation of the tax could be made under s. 23 and, therefore, the charge under s. 22 fails."

8. Learned CIT(A) further held that similarly the honourable Gujarat High Court has also held in the case of Gaekwad & Co. 277 ITR 553 (Guj) as under:

"The Tribunal has, therefore, applied the law laid down by apex Court in case of R.B. Jodha Mal Kuthiala vs. CIT (1971) 82 ITR 570 (SC), which has been explained and applied in the aforesaid decision in case of Podar Cement (P) Ltd. (supra). The ratio of the decision is that, having regard to the object of the Act to tax the income, "owner" is a person who is entitled to receive income from the property in his own right. Applying the aforesaid ratio to the facts recorded by the Tribunal, it is apparent that there is no infirmity in the view taken by the Tribunal which requires this Court to interfere. The Tribunal was justified in law in deleting the income from property known as "Jadhav Bungalow" considering the fact that the assessee herein is not in a position to exercise his right as an owner, at least for the years under consideration."

9. Referring to the above learned CIT(A) concluded that in the present case also the court had passed an injunction on 23/07/2010 restraining the assessee from creating any charge on the property or parting with the possession of the property. It was only on 11/11/2011 that the court permitted the receiver to let out the property. Thus during the previous year the property could not have been let out, and hence charge u/s 22 would not be attracted in the case. Hence, he concluded that the AO was apparently wrong in ignoring the material facts and bringing to tax the notional rent of the property.

10. Learned CIT(A) further noted that the assessee has also claimed and furnished copies of the asst. Orders of the subsequent years to show that the assessee's claim that the property Veena Souk could not have been let out due to pending litigation and its annual value therefore would be nil, was accepted by the Assessing Officer in A.Y 2013-14 etc. That principle of consistency requires that same position is accepted in this year as well.

11. Learned CIT(A) held that in view of the above discussion it is held that the annual value of the property Veena Souk would be Nil during the previous year and hence the addition made by the AO deserves to be deleted.

12. Against this order Revenue has filed appeal.

13. We have heard both the counsel and perused the records. We find that learned CIT(A) has taken a well reasoned and correct view of the matter. Facts narrate above clearly indicate that the said property was under dispute and a court judgment was operative in the impugned period and the property could not be let out. Revenue itself has subsequently accepted that annual value of this property was to be taken as nil. Hence, we do not find any infirmity in the order of learned CIT(A) and uphold the same."

13. We have perused the aforesaid observations drawn by the Tribunal while disposing off the appeal of the revenue in DCIT, CC-2, Thane Vs. Shri Harish Natvarlal Sanghavi, ITA No. 6003/Mum/2016, dated 03.12.2019, and finding ourselves to be in agreement with the view therein taken respectfully follow the same. As observed by us hereinabove, as the property in question during the period relevant to the year under consideration was under dispute and a court proceeding was operative, therefore, the same could not have been let out. As a matter of fact, the assessee got back the possession of the property as an agent of the court appointed receiver only after the order of the Hon'ble Supreme Court to the said effect on 30/01/2012. As such, it was only after the order of the Hon'ble Apex Court that the assessee was able to rent out the property to a third party w.e.f 02/07/2012. At the same time, we may herein observe that as it has been the claim of the assessee that the property in question during the year under consideration was let out and the unrealized rent was to be recovered from the lessee/licensee viz. HCRMP, therefore, such amount of unrealized rent would be brought to tax in the hands of the assessee u/s 25AA of the Act

in the year of receipt. Accordingly, in terms of our aforesaid observations we uphold the view taken by the CIT(A) that as the property in question was inherently incapable of being let out during the year under consideration because of the legal constraint imposed by the High Court, therefore, the reasonable rent for which it might be let-out could not be computed. As a consequence, since the computation provisions u/s 23 failed the charging provisions u/s 22 would also fail. As such, the deletion by the CIT(A) of the addition of Rs. 4,50,36,444/- is upheld by us. **Ground of appeal No. 1 & 2** are dismissed in terms of our aforesaid observations.

14. **Ground of appeal No. 3** being general is dismissed as not pressed.

15. The appeal of the revenue is dismissed.

16. Before parting, we may herein deal with a procedural issue that though the hearing of the captioned appeal was concluded on 05/03/2020, however, this order is being pronounced after the expiry of 90 days from the date of conclusion of hearing. We find that Rule 34(5) of the Income-tax Appellate Tribunal Rules, 1962, which envisages the procedure for pronouncement of orders, provides as follows: (5) The pronouncement may be in any of the following manners:— (a) The Bench may pronounce the order immediately upon the conclusion of the hearing. (b) In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date for pronouncement. In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not ordinarily be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board. As such, “ordinarily” the order on an appeal should be pronounced by the bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression “ordinarily” has been used in the said rule itself. This rule was inserted as a result of directions of Hon’ble High Court in the case of Shivsagar Veg Restaurant Vs ACIT [(2009) 317 ITR 433 (Bom)] wherein it was inter alia, observed as under:

“We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the Apex Court in the case of Anil Rai (supra) and to issue appropriate administrative directions to all the benches of the Tribunal in that behalf. We hope and trust that suitable guidelines shall be framed and issued by the President of the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal. In the meanwhile (emphasis, by underlining, supplied by us now), all the revisional and appellate authorities under the Income-tax Act are directed to decide matters heard by them within a period of three months from the date case is closed for judgment”.

In the rule so framed, as a result of these directions, the expression “ordinarily” has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether or not the passing of this order, beyond a period of ninety days in the case before us was necessitated by any “extraordinary” circumstances.

17. We find that the aforesaid issue after exhaustive deliberations had been answered by a coordinate bench of the Tribunal viz. ITAT, Mumbai ‘F’ Bench in DCIT, Central Circle-3(2), Mumbai Vs. JSW Limited & Ors. [ITA No. 6264/Mum/18; dated 14/05/2020, wherein it was observed as under:

“Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon’ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. The epidemic situation being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial work all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon’ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that “In case the limitation expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown”. Hon’ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, “It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly”, and also observed that “arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020”. It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the coronavirus “should be considered a case of natural calamity and FMC (i.e. force majeure clause) maybe invoked, wherever considered appropriate, following the due procedure...”. The term ‘force majeure’ has been defined in Black’s Law Dictionary, as ‘an event or effect that can be neither anticipated nor controlled’ When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an “ordinary” period.

10. In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact

that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to be interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of *Otters Club Vs DIT [(2017) 392 ITR 244 (Bom)]*, Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed "while calculating the time for disposal of matters made time bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly". The extraordinary steps taken suo motu by the Hon'ble High Court and Hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view, even without the words "ordinarily", in the light of the above analysis of the legal position, the period during which lockout was in force is to be excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case."

We have given a thoughtful consideration to the aforesaid observations of the tribunal and finding ourselves to be in agreement with the same, therein respectfully follow the same. As such, we are of the considered view that the period during which the lockout was in force shall stand excluded for the purpose of working out the time limit for pronouncement of orders, as envisaged in Rule 34(5) of the Appellate Tribunal Rules, 1963.

18. Resultantly, the appeal filed by the assessee is partly allowed while for the appeal of the revenue is dismissed.

Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.

Sd/-

(G. Manjunatha)

ACCOUNTANT MEMBER

Sd/-

(Ravish Sood)

JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 09.06.2020

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai