

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G" MUMBAI**

**BEFORE SHRI MAHAVIR SINGH (VICE PRESIDENT) AND
SHRI S. RIFAUR RAHMAN (ACCOUNTANT MEMBER)**

**ITA No. 3987/MUM/2019
Assessment Year: 2013-14
&
ITA No. 3988/MUM/2019
Assessment Year: 2014-15**

Sudheer Omprakash Bahl,
41-B, Jolly Maker Apartment,
Cuffe Parade, Colaba,
Mumbai-400 005.

PAN No. AAMPB 8549 F

Appellant

Income Tax Officer-1(2)(2),
Vs. Aayakar Bhavan, Room No. 527
Mumbai-400020

Respondent

Assessee by : None
Revenue by : Mr. T.S. Khalsa, DR

Date of Hearing : 29/04/2021
Date of pronouncement : 21/06/2021

ORDER

PER S. RIFAUR RAHMAN, A.M.

The captioned appeals filed by the assessee are directed against the order of the Ld. Commissioner of Income Tax (Appeals)-2, Mumbai and arise out of the order passed u/s 143(3) of the Income Tax Act 1961 (the 'Act'). As common issues are involved, we are proceeding to dispose them off by this consolidated order for the sake of convenience. Facts being identical, we begin with the AY 2013-14.

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2. The brief facts of the case are, the assessee filed his return of income on 23.09.2013 declaring total income of Rs.17,83,640/-. The return was processed u/s 143(1) of the Income Tax Act, 1961 (in short 'Act'). Subsequently, the case was selected for scrutiny and notices u/s 143(2) and 142(1) and served on the assessee. In response, the AR of the assessee attended and filed the relevant information as called for.

The assessee engaged in the business of catering and food processing restaurants, pubs and banquet halls and proprietor of M/s Khyber Restaurant. The relevant facts relating to the grounds of appeal raised by the assessee are, assessee is the owner of flat No. 91-B, Maker Tower A&B Co-op Housing Society Ltd. Cuffe Parade, Colaba. The area of flat is 3000 sq. ft. The assessee let out the above said flat on leave and license agreement dated 13.10.2010 from 01.11.2010 to 31.07.2013 along with one reserved covered car parking in the compound to Indsind Bank Ltd. on a monthly rent of Rs.18,150/- and interest free security deposit of Rs.6,95,75,000/-. The assessee has disclosed annual rental value of the above said flat u/s 23 of the Act at Rs.1,52,460/-. The Assessing Officer observed that on the issue of applicability of u/s 23(a) of the Act, there has been additions during the preceding assessment year including AYs 2010-11 & 2012-13 after taking into various factors i.e. location of the building, quality of construction of building, area of the flat and prevailing rent of the property in the locality. The Assessing Officer has held that the rent on which assessee let out the property does not represent a fair market rent and after making necessary enquiries came to the conclusion that the rent offered by

the assessee was meagre and deposit was exorbitantly high. Accordingly, the present Assessing Officer proceeded to make the assessment in the above said line. When the assessee was asked why rental income should not be taken as per market rent as per u/s 23(1)(a) of the Act. In response the assessee filed the following reply read as under:

“The records show that the said amount i.e. the security deposit has been used to replace the borrowing from the bank which was taken for business purposes. The result has been that the huge interest that was paid and allowed as a business expense to the assessee has been reduced and as a consequence the income of the assessee has gone up substantially. The interest saved as an expense by this use of the security deposit has led to your assessee having had to pay substantially higher taxes than he would have paid had the said deposit been kept in a fixed deposit only. It is respectfully submitted that this aspect was duly examined thoroughly in the past and the department has duly accepted the fact that the increase in income shown by the assessee due to reduction in bank interest outgo has resulted in proper taxation of the Income from security deposit. Accordingly, no addition on any deemed basis of interest on security deposit was called for. Accordingly, the Hon. CIT(A) had deleted the addition on this account, and which order has been upheld by the Hon. ITAT in the departmental appeal. We therefore request you to kindly accept the same. (Copy of CIT Order for Asstt. Year 1999-2000, 2000-2001, 2001-02 & 2002-03 dated 30/04/2007 is enclosed).

A regards additions to house property income in the past are concerned, a detailed explanation is already filed and on record. You will readily appreciate that all additions have been deleted by the Hon'ble ITAT, Mumbai in the case of your assessee, as per orders on record. Further, the department appeal against the deletion of the additions made has been dismissed by the Bombay High Court. The copy of the order of the Hon. Mumbai High Court is already filed and is on record. In view of the above, no addition whatsoever is called for as regards the house property income duly disclosed, fully and truly by the assessee in his return.”

After considering the submissions of the assessee the Assessing Officer observed that the submissions of the assessee was considered carefully and it was found that the Hon'ble Bombay High Court has dismissed the order of the Revenue vide order dated 22.08.2014 for AYs. 1999-2000 to 2005-06. The AO however observed that with due respect it was submitted that the Revenue is in

process of filing review petition on the order of the Hon'ble Bombay High Court in assessee's own case for assessment year 2009-10, the Revenue has filed miscellaneous application before the ITAT, Mumbai on the same issue. To keep the issue alive, he proceeded to reject the annual value of Rs.1,52,460/- disclosed by the assessee for letting of his Flat and observed that it does not represent the reasonable expected rent as providing u/s 23(1)(a) of the Act. By following the previous assessment year i.e. 2012-13 order he proceeded to estimate the rental income at Rs.73,01,440/- (by considering 10% inflation on the sum of Rs.66,37,673/- i.e. rent determined for AY 2012-13).

3. Aggrieved with the above order, assessee preferred appeal before CIT(A). After Considering the detailed submissions of the assessee and he partly allowed the appeal of the assessee with the following observation :

“5.1 I find that the appellant has disclosed the actual rent received of Rs.217,800/- during the year u/s. 23(1)(b). The AO has treated that the appellant's case is to be considered u/s 23(1)(a) and has estimated the sum for which the property is expected to let, at Rs.73,01,440/-. This has been done by that the actual rent received at Rs.217,800/- is much less than the sum for which the said property might reasonably be expected to be let from year to year since the appellant has been deriving additional benefit out of the security deposit of Rs.695,75,000/- received on account of the rented property find similar property in the same building, where huge deposits was taken had earned higher rental value.

5.2. The appellant has submitted that nominal addition of 5% per annum over the actual rent received was sustained from A.Y. 1999-2000 to 2010-11, except for A.Y. 2010-11 and A.Y. 2012-13 in which the return income was accepted. In this regard, I find that the addition for A.Ys. 1999-2000 to 2002-03 was made by the AO by taking fair rent of appellant's property at Rs.250,000/- per month by taking into consideration mainly the notional interest on interest free deposit. This was not found to be correct by the ITAT in their order dated 18.11.2011 in the appellant's case for A.Y. 1999-2000 to 2002-03 and 2005-06, in view of decision of the Hon'ble High court of Delhi in the case of Moni Kumar Subba 333 ITR 38, Further, it has been observed by the ITAT that the fair rent was determined by the CIT(A) at Rs.28,000/- per month for A.Y. 1999-2000 to 2002-03 on the basis of the comparable instances

gathered by the AO and the same has been upheld. Further, the fair rent has been estimated for A.Y. 2005-06 at Rs.28,000/- per month as against the different stand taken by the CIT(A) directing the AO to determine the ALV of the appellant's property on the basis of rent of Rs.15,000/- per month actually received. I find that in the order dated 22.08.2014 in the appellant's case the Hon'ble Bombay High Court have observed that 'In fact in some of the appeals, the Tribunal has determined the letting value at a rate more than the municipal valuation. In such circumstances, the quantum of rent determined can be safely termed as fair.

5.3 I find that in the appellant's case for A.Y 2012-13, the CIT(A)-2, Mumbai, vide order dated 30.12.2016, has deleted the addition made by the AO on this issue and accepted the rent actually received by the appellant as the correct ALV. However, this appears to be contrary to the finding of the ITAT Mumbai for A.Y. 2005-06 in the appellant's case wherein the fair rent has been estimated for A.Y. 2005-06 at Rs.28,000/- per month as against the stand taken by the CIT(A) directing the AO to determine the ALV of the appellant's property on the basis of rent of Rs.15,000/- per month actually received. Further. I find the in AY 2011-12, the CIT(A), vide order dated 01.10.2014, has determined the ALV at Rs.36,960/- per month by enhancing it by 10% on the monthly rent of Rs.33,600/- for A Y. 2009-10.

5.3.1 In view of above discussion, I am inclined to determine the fair rental of the said property at Rs.40,660/- after enhancing the rent determined for A.Y. 2011-12 by 10%. The AO is directed to adopt the annual value of the said property at Rs.487,920/-, re-compute the income from house property and allow appropriate relief to the appellant. Ground No. 1 is partly allowed, ground No. 2 is dismissed and ground no. 3, which is without prejudice ground is dismissed."

4. Aggrieved with the above order, assessee preferred an appeal before us raising following ground of appeal :

1. The Ld. CIT(A) has erred in view of the facts, circumstances and law, in not accepting the actual rent received of Rs.2,17,800/- as truly declared, and which is in any case, more than the municipal rateable value and estimating the rental income on a pure guesswork basis of Rs.4,87,920/-.

5. Considered the submissions of the learned Departmental Representative and perused the material on record. We noticed that in assessee's own case in the AY 2011-12, the Co-ordinate Bench decided the issue in favour of the assessee and against the revenue by following the decisions of earlier AYs viz.

AY 1999-2000 to 2002-03 and AY 2005-06. Further, Co-ordinate Bench relied on the Hon'ble High Court decision in assessee's own case. Therefore, the present issue is decided in favour of assessee by the Co-ordinate Benches and Hon'ble High Court. We have also inclined to follow the settled issue in favour of the assessee. For the sake of clarity, the decision of Co-ordinate Bench in AY 2011-12 is reproduced below :

"5. We have heard the rival submissions and perused the relevant materials on record. We find that the grounds of appeal raised by the Revenue in the impugned assessment year were same as the grounds raised before the Tribunal for assessment year 2009-10 in ITA No. 1839/Mum/2013. The Tribunal held as under:

"4. We have considered rival contentions and carefully gone through the order of the authorities below and found that similar issue has been decided by the Tribunal in assessee's own case for the assessment year 1999-2000 to 2002-03 and the assessment year 2005-06 vide order dated 18.11.2011. As the facts and circumstances of the case are same, the CIT(A) had taken the monthly rent of Rs.28,000/- as taken by the Tribunal in the AY 2005-06 and thereafter increased it by 20% and thus computed ALV at Rs.33,6000/- per month. Respectfully following the order of the Tribunal, we do not find any infirmity in the order of CIT(A).

5. In the result, appeal of the Revenue is dismissed."

5.1 On similar facts, the Hon'ble Bombay High Court in the case of *Shri Sudhir Behl* (supra) in ITA No. 515, 517, 518, 519, 520, 1080 and 1107 of 2012 has dismissed the appeal filed by the Revenue."

Respectfully following the same, we direct the AO to follow the above direction and accordingly ground raised by assessee is allowed.

6. In AY 2014-15, the facts are exactly similar, we decided the issue in favour of the assessee and direct the AO to follow the direction as per para 5 above.

7. In the result, appeal filed by the assessee for both the AYs are allowed.

Order pronounced in the open Court on 21/06/2021.

Sd/-
(MAHAVIR SINGH)
VICE PRESIDENT

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 21/06/2021

Rahul Sharma, Sr. P.S.

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,

(Dy./Assistant Registrar)
ITAT, Mumbai