

THE INCOME TAX APPELLATE TRIBUNAL
"A" Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Amarjit Singh (JM)

I.T.A. No. 4462/Mum/2018 (Assessment Year 2012-13)

M/s. Abhyankar Developers Rajyog Aprtment Sakharam Keer Marg Shivaji Park, Mahim Mumbai-400 028 PAN : AAJFA8924C (Appellant)	Vs.	ITO-21(1)(1) 103, Piramal Chambers Lalbaug Mumbai-400 012. (Respondent)
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Assessee by	Shri Anil Sathe
Department by	Shri Brajendra Kumar
Date of Hearing	01.06.2021
Date of Pronouncement	10.08.2021

ORDER

Per Shamim Yahya (AM) :-

This appeal by the assessee is directed against the order of learned Commissioner of Income Tax (Appeals) [in short learned CIT(A)] dated 3.4.2018 for A.Y. 2012-13.

2. The grounds of appeal read as under :

1. The learned Commissioner of Income tax(Appeals)33, erred in upholding the disallowance of expenditure incurred on repairs & maintenance of Rs.3,29,800/-, building maintenance of Rs.5,00,000/- and water charges of Rs.40,432/-; which were incurred by the appellant against a project of the appellant by the name of Eknath.
2. The learned Commissioner of Income tax (Appeals), erred in not appreciating that, the municipal taxes of Rs. 12,89,545/- pertained to Eknath Project and not Rukmini Niwas and consequently erred in allowing the said expenditure under the head income from house property as against business income.
3. The learned Commissioner of Income tax (Appeals)-33, Mumbai erred in confirming the action of the assessing officer of taxing Rs. 53,00,000/- being amount received for creation of tenancy right as income from house property as against business income.

The learned Commissioner of Income tax (Appeals)-33, Mumbai erred in upholding the disallowance of Rs.35,68,000/- being compensation paid to old tenants for surrendering their tenancy rights.

5. Without prejudice to Ground No. 4 and strictly in alternative, the learned Commissioner of Income tax (Appeals)-33 erred in not allowing compensation paid to old tenants for termination of tenancy right as cost of the Rukmini IMiwas project.

6. The learned Commissioner of Income tax (Appeals)-33, Mumbai erred in upholding the addition of Rs. 2,75,000/- made by the learned assessing officer as unexplained credit u/s 68 by ignoring the confirmation given by the Sakahram Bhuvad in response to notice under section 133(6).

3. Brief facts of the case are that the assessee is a builder and developer. During the course of assessment proceedings, the AO, vide letter dated 25.03.2015, asked the assessee to explain the nature and source of amount of Rs.53 lakhs received from three people as premium against tenancy rights given for three rooms in Rukmini Niwas, as under:

S.No.	Name of the person	Amount	Premise
1.	Girish S. Godbole	35,00,000/-	Tenement No. 19 on 2 nd floor of Rukmini Niwas.
2.	Suresh Potdar	8,00,000/-	Tenement No.8 on 1 st floor of Rukmini Niwas.
3.	Rahul Kelkar	10,00,000/-	Tenement No.28 on 3 rd floor of Rukmini Niwas.

According to the AO, since the receipts were against tenancy rights, it was in the nature of house property income and would be taxed accordingly. The Assessing Officer noted that the assessee had claimed property tax of Rs. 12,89,545/-. The assessee was asked to provide the proportionate taxes for the premises. Further, the compensation paid to two persons amounting to Rs.35,68,060/- for vacating the tenancy rights was not allowed as deduction against income from house property since purchase of tenancy rights were in the nature of capital expenditure. In response, the assessee filed its reply vide letter dated 27.03.2015, which was considered, but not accepted by the AO. The AO further noticed from the agreement with Shri Girish S. Godbole that the assessee had received tenancy amount of Rs.35 lakhs and monthly rent of

Rs.49.20 per month. The AO was of the opinion that the monthly rent could not be Rs.49.20 per month. The assessee had actually bifurcated the actual rent and charged notional rent of Rs.49:20 per month and taken a lump sum so that the receipt could be adjusted against other expenses. Hence, the entire receipt of Rs.53 lakhs along with actual rent received of Rs.83,089.50 was taken as rent from property. Therefore, the AO proceeded to take the annual value at Rs.53,83,089.50 and after allowing deduction @ 30%, the income from house property was arrived at Rs.37,68,262.65.

4. Further, the assessee had shown loss of Rs. 1,66,904.80 from Business and Profession, which included. Rs.53,83,089.50 which was deducted. Similarly property tax-of Rs. 12,89,545/- debited to the Profit & Loss Account was not verifiable and the same was disallowed and added back to the total income of the assessee. During the course of assessment proceedings, the AO noticed that assessee had shown loss of Rs. 1,66,904.80 from Business and Profession. This included income from house property amounting to Rs.53,83,089.50, which was deducted. It was observed that assessee had debited Rs.35,68,060/- as compensation paid to vacate old tenants from the rooms of Rukmini Niwas, which was not revenue in nature. It was seen that the expenses were incurred for getting the tenancy vacated and for acquiring the tenancy rights of the Rukmini Niwas premises. Thus, the AO proceeded to disallow this amount from the Profit and Loss Account.

5. Upon assessee's appeal learned CIT(A) held as under :

"10.1 While adjudicating ground of appeal no. 3 (b) and (c), it has been held that the receipts from tenancy rights are in the nature of "income from House property". Moreover, no interference is called for in the action of the AO in treating the annual value of the property as Rs. 53,83,089.50/- and after giving a deduction @ 30% amounting to Rs. 16,14,926.85/- u/s 24 (a), the balance amount of Rs. 37,68,162.65/- is correctly taxed under the head "income from House property". Once it has been held so, the claim of expenditure in respect of repairs & maintenance of Rs. 3,29,800/-, building maintenance of Rs. 5,00,000/- & water charges of Rs. 40,432/-, cannot be allowed, since repairs & maintenance, building insurance & water charges are already treated as allowed under deduction @ 30 %. Regarding claim of property tax of Rs. 12,89,545/-, the AO is directed to call for the original of

the payment proofs and allow only those property tax payments which are actually paid during the year under consideration. Hence, the ground of appeal no. 1 is partly allowed.

22. It is on record that during the year under consideration, one tenant Mr. Jayant Joshi of "Rukmini Niwas" surrendered his tenancy right in respect of his premises bearing no. 28 to appellant for total consideration of Rs. 31,00,000/-, which was paid by the appellant. The appellant had also paid Rs. 4,68,000/- to Smt. Sushma Lele for surrender of her tenancy right in respect of her premises bearing no. 22. Thus total consideration of Rs. 35,68,000/- was paid which was debited to the profit & loss account claiming it as compensation to the tenants.

22.2 In this regard, I find that prior to the payments of Rs. 35,68,000/- to the two tenants, the appellant had already become the owner of the entire "Rukmani Niwas" by executing Development agreement. The appellant has also admitted in the statement of facts enclosed with the form no. 35 that "As per clause 16 on page no. 13 of Development agreement, rights and obligations with respect to all the tenants and occupants are to exclusively held by the Appellant". Therefore, in my considered opinion, any further payment made to a tenant for surrender of his/ her tenancy rights will only enhance the cost of acquisition and at most it can be considered as the cost of improvement as held by Hon'ble Bombay High Court in the case of CIT vs. Miss Piroja C. Patel (2000) 242 ITR 582 (Bombay).

22.3 Considering the above, I agree with the AO that the payment of Rs. 35,68,000/- cannot be considered as revenue in nature as cannot be allowed as deductible expenditure from the P & L A/c. Hence, the ground of appeal no. 3 is dismissed.

22.4 It is further observed that through grounds of appeal no. 3(b) & (c), the appellant has requested that the receipts against tenancy rights of Rs.53 lacs from 3 persons with respect to 3 rooms in Rukmini Niwas should not be treated as rent, in this regard, I agree with the AO that the appellant is the owner of the said property, which is not in dispute. Hence, as per section 27 of the I.T. Act any payment in lieu of tenancy has to be in nature of "income from house property". It is also highlighted by the AO that from the agreement of the appellant with Shri Girish S Godbole, it is observed that the appellant has received tenancy amount of Rs. 35 lacs and a rent of Rs.49.20/- per month. The market value of the rent of the said premises cannot be Rs.49.20/- p.m. According to the AO, what the appellant has actually done was to bifurcate the actual rent and charged notional rent of Rs.49.20/- p.m. and taken a lump sum amount so that the receipt could be adjusted against other expenses. Thus the entire receipt of Rs. 53 lacs along with the actual rent received Rs. 83,089.50/- is of the nature of rent from the house property". Since no details of the property tax paid by the appellant is provided, at the time of assessment proceedings, the annual value of the property is taken as Rs. 53,83,089.50/- and a deduction @ 30% amounting to Rs. 16,14,926.85/- u/s 24 (a) is allowed. Accordingly, the balance amount of Rs. 37,68,162.65/- is taxed under the head "income from House property".

I do not find any reason to interfere with the above findings of the AO. Hence, the action of the AO in treating the receipts from tenancy rights as "income from House property" is confirmed. The grounds of appeal no. 3(b) & (c) are accordingly, dismissed."

6. Against the above order assessee is in appeal before us.
7. We have heard both the parties and perused the records. Learned Counsel of the assessee claimed that the authorities below have erred in not appreciating the facts on this issue as arising in Ground No. 1 & 2. He submitted that these expenditures were in terms of project 'Eknath' and not against 'Rukmini Niwas'. Hence, he claimed that learned CIT(A) erred in holding that these are in connection with income from house rent and hence expenditure cannot be allowed.
8. Upon careful consideration, we note that this is a factual issue. Hence, we direct the Assessing Officer to examine whether these expenditures actually relate to Rukmini Niwas which the Assessing Officer and learned CIT(A) have assumed or in fact in relation to the project 'Eknath' which the assessee is claiming. After factual examination the Assessing Officer shall decide as per law.
9. As regards the issue of treatment of Rs. 53,00,000/- received from creation of tenancy right. We note that the Assessing Officer has treated it as 'income from house property' and thereafter he also disallowed the expenditure of Rs. 35,68,000/- as compensation paid to vacate old tenants as not related to income from house property. We find that this is a contradictory approach. In our considered opinion compensation to vacate old tenants has to be adjusted from the receipt of Rs. 53,00,000/- and thereafter resulted amount can be considered by the Assessing Officer as canvassed by the assessee. Further in our considered opinion amount received as premium pursuant to grant of tenancy right cannot be considered as income from house property by treating the rent offered as too low. For examining the veracity of claim of rental receipt the Assessing Officer has to consider the same in light of the

decision of Hon'ble Bombay High Court in the case of Tip Top Typography (Income Tax Appeal No.1213 of 2011 dated 08/08/2014). We direct accordingly.

10. Apropos issue of unexplained credit.

Brief facts It was noticed from the list of unsecured loans, that the assessee had obtained unsecured loans from the following parties :

Sr.No.	Name of the party	Loan amount
1	Darshana Sharma	8,00,000
2	Sakharam G. Bhuvad	2,75,000
3	Shrushti Sharma	50,000
4	Swarnim Sharma	90,000
5	Vasant Malde	4,00,000

During the assessment proceedings, the assessee did not file any confirmation from the above parties. The assessee was asked to submit confirmations along with copy of ITR, bank statement and balance sheet. Since, the assessee failed to produce the details called for, the AO made the addition of Rs.16,15,000/- to the total income of the assessee as unexplained

11. Upon assessee's appeal learned CIT(A) sustained only part as under :

“During the appellate proceedings as well as before AO, in the remand proceedings, the appellant has submitted confirmation letter, copy of return of income and bank statement of Shri Vasant K. Malde. Similarly, copy of return of income and bank-statement of Darshna S. Sharma were filed too to establish the genuineness of the loans from these two persons. In my opinion, with these documents, the identity, capacity and the genuineness of the loans from these two persons to the extent of Rs. 12,00,000/- (Rs. 4,00,000/- + Rs. 8,00,000/-) is established. However, in the case of other two persons, Shrishti S. Sharma Minor and Swarnim S. Sharma, inspite of giving repeated opportunity, no details are submitted. As far as Sakharam Gangaram Bhuvad is concerned, only copy of cheque dated 26.04.2011 is submitted. No other details to establish identity or capacity of the person is submitted. Looking to the above, in my opinion, the appellant has failed to establish genuineness of remaining loan of Rs. 4,15,000/- received from Sakharam Gangaram Bhuvad, Shrishti S. Sharma Minor and Swarnim S. Sharma are not established. Hence, the addition of Rs. 4,15,000/- u/s 68 of the I.T. Act is confirmed. Thus, the appellant gets relief of Rs. 12,00,000/-. Hence, the ground of appeal no. 4 is partly allowed.”

12. Against the above order assessee is in appeal before us.

13. We have heard both the parties and perused the records. We note that on this issue the Assessing Officer had made impugned addition as no details whatsoever was submitted. However, certain details were submitted before learned CIT(A) who has considered the same and granted part relief. Both the parties have agreed that in the interest of justice this issue may be remitted to the file of the Assessing Officer for examining this issue afresh. Accordingly, this issue may be remitted to the file of the Assessing Officer to examine in accordance with the submissions made by the assessee.

14. In the result, this appeal by the assessee stands allowed for statistical purposes.

Pronounced in the open court on 10.8.2021.

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 10/08/2021

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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