

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

**BEFORE SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER AND**  
**SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

**ITA no.495/Mum./2018**  
(Assessment Year : 2014-15)

Mohd. Saleem Mohd. Nazir Shaikh  
Flat no.1501, 15<sup>th</sup> Floor  
Libra Tower, Hill Road  
Bandra (West), Mumbai 400 050  
PAN – AMBPS4606D

..... Appellant

v/s

Dy. Commissioner of Income Tax  
Circle-5(1), Mumbai

.....Respondent

Assessee by : Shri K. Gopal  
Revenue by : Shri Purnesh Gururani

Date of Hearing – 10/10/2022

Date of Order – 03/01/2023

**ORDER**

**PER SANDEEP SINGH KARHAIL, J.M.**

The present appeal has been filed by the assessee challenging the impugned order dated 15/12/2017 passed under section 250 of the Income Tax Act, 1961 (*the Act*) by the learned Commissioner of Income Tax (Appeals)-53, Mumbai [*learned CIT(A)*], for the assessment year 2014-15.

2. The present appeal has been listed for hearing before us pursuant to the order dated 22/08/2022, passed by the Co-ordinate Bench of the Tribunal in Saleem Mohd. Nazir Shaikh vs DCIT, M.A. no. 12/Mum./2019 (in ITA no.

495/Mum./2018, for the assessment year 2014-15), whereby, the earlier order dated 25/09/2018, passed under section 254(1) of the Act was recalled and appeal was directed to be re-fixed for hearing.

3. In this appeal, the assessee has raised the following grounds:

*"Being aggrieved by the Order of the Learned Commissioner of Income Tax, (Appeals)53 Mumbai, the appellant prefers this appeal on the following amongst other grounds of appeal.*

*1. On the facts and in the circumstances of the case and in law, the Learned CIT (A) has erred in upholding the addition made by the Learned AO on account of notional income on property [flat which was vacant, calculated @8.5% of the cost price of the flat, without considering:*

*a) the condition of the building and the flat and the rent which could have been received in respect of the said flat;*

*b) that the premises in Mumbai are subject to rent control legislation and the maximum yield of residential properties in Mumbai is 3.5 to 4%.*

*c) ignoring the certificate of the society's secretary which clearly stated that the rental which could be possibly received in respect of the said flat would be in the range of Rs 30,000/- to Rs. 50,000/-.*

*2. Hence, the notional income in respect of the vacant flat be reduced by adopting the average rent @Rs. 40,000/- per month for the entire flat and allowing a deduction of 30% there from in accordance with the provisions of section 24(a) of the Income tax Act, 1961, as against the assessed notional income of Rs. 21,18,152/-.*

*The appellant craves leave to add to or amend the above grounds of appeal as the occasion may demand or circumstances require."*

4. The brief facts of the case are: The assessee is an individual. For the year under consideration, the assessee filed his return of income on 03/01/2015, declaring a total income of Rs. 9,68,229. The assessee has earned income under the head of salary, house property, and income from other sources. The return filed by the assessee was initially processed under section 143(1) of the Act and thereafter was selected for scrutiny assessment

through 'compulsory' category. During the assessment proceedings, it was observed that the assessee owns more than one house property. However, no deemed income from house property has been offered to tax. It was further observed that the property in a Capri Tower has been treated as self-occupied property by the assessee. Further, the value of flat at Bandra Breeze as appearing in the balance sheet is Rs. 2,49,19,440. The Assessing Officer ('AO') vide order dated 31/08/2016 passed under section 143(3) of the Act, following the decision of the learned CIT(A), determined deemed rent in respect of this flat @8.5% of the cost. Accordingly, the AO calculated income from the house property at Rs. 14,82,007, after allowing deduction under section 24(a) of the Act and added the same to the total income of the assessee.

5. In its appeal before the learned CIT(A), the assessee submitted that the flat at Bandra Breeze is owned 65% by the assessee and 35% by another individual. The value of 65% of the share is Rs. 2,49,19,440. It was further submitted that the premise is an old building, comprising of ground and three stories. The rent was claimed to be not more than Rs. 30,000 to Rs. 50,000 per month based on the letter of the Secretary of the building, Bandra Owner's Court Co-operative Housing Society Ltd. The learned CIT(A) following its decision rendered in case of assessee for the assessment year 2012-13, wherein deemed rent was calculated at 8.5% of total investment, dismissed the appeal filed by the assessee and upheld the findings of the AO. Being aggrieved, the assessee is in appeal before us.

6. During the hearing, the learned Authorised Representative ('learned AR') submitted that no appeal was filed by the assessee against the order of

learned CIT(A) for the assessment year 2012–13. The learned AR further submitted that lower authorities have not carried out the exercise of determining the rent as per the rent control legislation applicable to the property. Further, the premises in Mumbai are subjected to rent control legislation and the maximum yield of residential properties in Mumbai is 3.5 to 4%. Learned AR further submitted that the annual letting value of the property be determined in light of the decision of the Hon'ble Jurisdictional High Court in *CIT vs Tip Top Typography*, (2014) 368 ITR 330 (Bom.).

7. On the contrary, the learned Departmental Representative by vehemently relying upon the orders passed by the lower authorities submitted that the learned CIT(A) followed its order rendered in assessee's own case for the assessment year 2012–13, which has been accepted by the assessee and therefore, the impugned order be upheld.

8. We have considered the rival submissions and perused the material available on record. As the assessee owned a flat at Bandra Breeze in addition to its self-occupied property in Capri Tower, the AO computed the deemed rent from the 2<sup>nd</sup> property by considering 8.5% of the value of the flat as appearing in the balance sheet. The learned CIT(A) following its order rendered in assessee's own case for the assessment year 2012–13 dismissed the appeal filed by the assessee. It is pertinent to note that in its earlier decision, the learned CIT(A) considered the fact that the standard rent under the Bombay Rent Control Act is to be fixed at 8.5% on the total investment. We find that in *Tip Top Typography* (supra) following substantial questions of law came up for consideration before the Hon'ble Jurisdictional High Court:

*"(i) Whether on the facts and circumstances of the case and in law, Tribunal was right in holding that the fair rental value specified in section 23(1)(a) is the municipal value or actual rent received whichever is higher and not the annual letting value on the basis of comparable instances as adopted by the Assessing Officer, though the property under consideration was not covered by Rent Control Act?*

*(ii) Whether on the facts and circumstances of the case and in law, Tribunal was right in remitting the matter back to the file of the Assessing Officer with a direction to verify the rateable value fixed by the Municipal Authorities and if the same is less than the actual rent received, then the actual rent received should be taxed?"*

9. The Hon'ble Jurisdictional High Court decided the appeal by observing as under:

*"47] We are of the view that where Rent Control Legislation is applicable and as is now urged the trend in the real estate market so also in the commercial field is that considering the difficulties faced in either retrieving back immovable properties in metro cities and towns, so also the time spent in litigation, it is expedient to execute a leave and license agreements. These are usually for fixed periods and renewable. In such cases as well, the conceded position is that the Annual Letting Value will have to be determined on the same basis as noted above. In the event and as urged before us, the security deposit collected and refundable interest free and the monthly compensation shows a total mismatch or does not reflect the prevailing rate or the attempt is to deflate or inflate the rent by such methods, then, as held by the Delhi High Court, the Assessing Officer is not prevented from carrying out the necessary investigation and enquiry. He must have cogent and satisfactory material in his possession and which will indicate that the parties have concealed the real position. He must not make a guess work or act on conjectures and surmises. There must be definite and positive material to indicate that the parties have suppressed the prevailing rate. Then, the enquiries that the Assessing Officer can make, would be for ascertaining the going rate. He can make a comparative study and make a analysis. In that regard, transactions of identical or similar nature can be ascertained by obtaining the requisite details. However, there also the Assessing Officer must safeguard against adopting the rate stated therein straightway. He must find out as to whether the property which has been let out or given on leave and license basis is of a similar nature, namely, commercial or residential. He should also satisfy himself as to whether the rate obtained by him from the deals and transactions and documents in relation thereto can be applied or whether a departure therefrom can be made, for example, because of the area, the measurement, the location, the use to which the property has been put, the access thereto and the special advantages or benefits. It is possible that in a high rise building because of special advantages and benefits an office or a block on the upper floor may fetch higher returns or vice versa. Therefore, there is no magic formula and everything depends upon the facts and circumstances in each case. However, we emphasize that before the Assessing Officer determines the rate by the above exercise or similar permissible process he is bound to disclose the material in his possession to the parties. He must not proceed to rely upon the material in his possession and disbelieve the parties. The satisfaction of the Assessing Officer that the bargain reveals an inflated or deflated rate based on fraud, emergency, relationship and other considerations makes it unreasonable must precede the undertaking of the above exercise. After the above ascertainment is done by the Officer he must, then, comply with the principles of fairness and justice and make the disclosure to the Assessee so as to obtain his view.*

48] We are not in agreement with Shri Chhotaray that the municipal rateable value cannot be accepted as a bonafide rental value of the property and it must be discarded straightway in all cases. There cannot be a blanket rejection of the same. If that is taken to be a safe guide, then, to discard it there must be cogent and reliable material.

49] We are of the opinion that market rate in the locality is an approved method for determining the fair rental value but it is only when the Assessing Officer is convinced that the case before him is suspicious, determination by the parties is doubtful that he can resort to enquire about the prevailing rate in the locality. We are of the view that municipal rateable value may not be binding on the Assessing Officer but that is only in cases of aforesaid nature. It is definitely a safe guide.

50] We have broadly agreed with the view taken by the Full Bench of the Delhi High Court. Hence, the issue of determination of the "fair rental value" in respect of properties not covered by or covered by the Rent Control Act is to be undertaken in terms of the law laid down in the Full Bench decision of the Delhi High Court.

51] We quite see the force in the arguments of Ms. Vissanjee that ordinarily the license fee agreed between the willing licensor or a willing licensee uninfluenced by any extraneous circumstances would afford reliable evidence of what the landlord might reasonably be expected to get from a hypothetical tenant. She has in making this submission, answered the issue and summed up the conclusion as well. Then, it is but natural and logical that in the event, the transaction is influenced by any extraneous circumstances or vitiated by fraud, or the like that the Assessing Officer can adopt a "fair rent" based on the opinion obtained from reliable sources. There as well, we do not see as to how we can uphold the submissions of Mr. Chhotaray that the notional rent on the security deposit can be taken into account and consideration for the determination. If the transaction itself does not reflect any of the aforesaid aspects, then, merely because a security deposit which is refundable and interest free has been obtained, the Assessing Officer should not presume that this sum or the interest derived therefrom at Bank rate is the income of the assessee till the determination or conclusion of the transaction. The Assessing Officer ought to be aware of several aspects and matters involved in such transactions. It is not necessary that if the license is for three years that it will be operative and continuing till the end. There are terms and conditions on which the leave and license agreement is executed by parties. These terms and conditions are willingly accepted. They enable the license to be determined even before the stated period expires. Equally, the licensee can opt out of the deal. A leave and license does not create any interest in the property. Therefore, it is not as if the security deposit being made, it will be necessarily refundable after the third year and not otherwise. Everything depends upon the facts and circumstances in each case and the nature of the deal or transaction. These are not matters which abide by any fixed formula and which can be universally applied. Today, it may be commercially unviable to enter into a lease and, therefore, this mode of inducting a 'third party' in the premises is adopted. This may not be the trend tomorrow, therefore, we do not wish to conclude the matter by evolving any rigid test.

52] We have also noted the submissions of Shri Ahuja. We are of the opinion that even in the cases and matters brought by him to our notice, it is evident that the Assessing Officer cannot brush aside the rent control legislation, in the event, it is applicable to the premises in question. Then, the Assessing Officer has to undertake the exercise contemplated by the rent control legislation for fixation of standard rent. The attempt by the Assessing Officer to override the rent control legislation and when it balances the rights between the parties has rightly been interfered with in the given case by the Appellate authority. The Assessing Officer either must undertake the exercise to fix the standard rent himself and in terms of the Maharashtra Rent Control Act, 1999 if the same is applicable or leave the parties to have it determined by the Court or Tribunal under that Act. Until, then, he may not be justified in applying any other formula or method and determine the "fair rent" by abiding with the same. If he desires to undertake the determination himself, he will have to go by the Maharashtra Rent

*Control Act, 1999. Merely because the rent has not been fixed under that Act does not mean that any other determination and contrary thereto can be made by the Assessing Officer. Once again having respectfully concurred with the judgment of the Full Bench of the Delhi High Court, we need not say anything more on this issue."*

10. In another decision, the Hon'ble Jurisdictional High Court in Smt. Kokilaben D. Ambani v/s CIT: [2014] 226 Taxman 208 (Bombay), following the aforesaid decision in Tip Top Typography (supra), observed as under:

*"8. In our view, in the judgment in Tip Top Typography case (supra) after concurring with the conclusion of the Delhi High Court, we have held that the assessing officer in the cases of properties, which are subject to Rent Control Legislation cannot ignore the same. If the standard rent has not been fixed under the Rent Control Legislation by the competent authority, it is the duty of the assessing officer to determine the same in terms of the Rent Control Legislation. The law has been crystallized in terms of the decision of the Hon'ble Supreme Court as also the Full Bench of the Delhi High Court. In these circumstances, we do not find any basis for an apprehension that the Tribunal would ignore the Rent Control Legislation and prefer some other mode in determining the fair rent or annual letting value of the property under section 23(1)(a). We have also stated that the principle cannot be any different for self occupied properties and in relation to which the exercise must be carried out in terms of the relevant section 23(1) of the I.T. Act. The reference is answered accordingly and disposed of."*

11. In the present case, it is evident that the lower authorities have determined the annual letting value by considering 8.5% of the value of the flat as appearing in the balance sheet. Further, the learned CIT(A) also upheld the findings of the AO on the basis that standard rent under the Bombay Rent Control Act is to be fixed @8.5% of the total investment. As noted above, the Hon'ble Jurisdictional High Court in Tip Top Typography (supra) held that the AO either must undertake the exercise to fix the standard rent himself and in terms of rent control legislation, if the same is applicable or leave the parties to have it determined by the court or tribunal under the said legislation. Further, it was held that until then the AO may not be justified in applying any other formula or method and determine the 'fair rent'. In the present case, it is evident that the AO did not follow the applicable rent control legislation while

determining the deemed rent of the property @8.5% of the value of the flat. Further, nothing has been brought on record to support that the findings of the learned CIT(A) were reached after undertaking the exercise to fix the standard rent in terms of applicable rent control legislation. Thus, in view of the above findings, we deem it appropriate to remand this issue to the file of the AO for determination of annual letting value in terms of the applicable rent control legislation in light of aforesaid decisions of the Hon'ble Jurisdictional High Court. Accordingly, grounds raised in assessee's appeal are allowed for statistical purposes.

12. In the result, the appeal by the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 03/01/2023

**Sd/-**  
**GAGAN GOYAL**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SANDEEP SINGH KARHAIL**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 03/01/2023**

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury  
Sr. Private Secretary

True Copy  
By Order

Assistant Registrar  
ITAT, Mumbai