

THE INCOME TAX APPELLATE TRIBUNAL
"A" Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Pavan Kumar Gadale (JM)

I.T.A. No's. 2660 & 2180/Mum/2019
(Assessment Years 2011-12 & 2015-16)

Amit Balkrishna Jalan 601, Serenity, Indranarayan Road Santacruz(West) Mumbai-400 054 PAN : AAJPJ5896N	Vs.	ACIT-22(1) Room No.322, 3 rd Floor Piramal Chambers, Lalbaug, Parel Mumbai-400 012
(Appellant)		(Respondent)

Assessee by	Shri Prakash Jotwani
Department by	Shri Brajendra Kumar
Date of Hearing	08.07.2021
Date of Pronouncement	12. 07.2021

O R D E R

Per Shamim Yahya (AM) :-

These appeals by the Assessee are directed against the order of learned CIT(A)-34 dated 01.02.2019 and pertains to Assessment Years 2011-12 & 2015-16 respectively.

2. Since the issues are common and connected and the appeals were together, these are consolidated disposed off together by this common order.
3. The grounds of appeal for assessment year 2011-12 read as under :
 1. The Learned CIT (Appeals) erred in confirming the reopening of the assessment order u/s 148 as valid, inspite of all the facts disclosed and submission made by Appellant.
 2. The Learned CIT (Appeals) erred in computing the ALV @ 8% of cost on the flat at Navi Mumbai. Whereas, it has failed to consider that the Appellant had no ownership right and the flat was under construction i.e no possession was held by Appellant and

proof for the same was filed before both the lower authorities Therefore, there is no question of any notional income when the flat was not in the possession of Appellant.

3. The Learned CIT (Appeals) erred in confirming the ALV of Yashodeep flat at Municipal rateable value when there was material filed to demonstrate that the flat was not fit for occupation and certificates from authorities were filed to evidence the same.
 4. The Appellant craves leave to add alter or amend the ground of appeal at or before the hearing of the appellant.
4. The grounds of appeal for assessment year 2015-16 read as under :
1. The Learned CIT (Appeals) erred in confirming the Annual Letting Value (ALV) of pune flats at 6% of cost of flats i.e. Rs 283905/ in place of ALV to be restricted to Municipal rateable value which in this case was the value determined by Gram Panchayat as held by Bombay High Court and erred in assessing ALV of Yashodeep flats at Municipal rateable value when there was material filed to demonstrate that the flat was not fit for occupation
 2. The Ld. CIT erred in not granting the benefit of vacancy allowance U/s 23 (1) (c) since the flats were lying vacant for the whole year
 3. The Appellant craves leave to add alter or amend the ground s of appeal at or before the hearing of the appellant
5. We have heard both the parties and perused the record. One of the issues in the appeal related to estimation of notional rent for the flat at Navi Mumbai. The Assessing Officer on the issue has rejected the assessee's plea that assessee was not in possession of the said flat as the agreement was cancelled. This was duly submitted also before the Ld.CIT(A), who chose to confirm the order of AO on the ground that the documentary evidence has not been produced by the assessee.
6. The order of the Ld.CIT(A) in this regard is as under:-
- It was contended by the AR of the appellant that the appellant had entered into an assignment agreement for purchase of flat at Navi Mumbai. Since the owner of the said flat was unable to give the possession of the said flat, the

deal was cancelled in May, 2011. AO did not accept the above contention of the appellant and held that deemed rental income was assessable in appellant's hands and adopted the ALV at 8% of the cost of property. During the appellate proceedings, the appellant has not furnished any documentary evidence which could prove that the agreement entered into by the appellant for purchase of Navi Mumbai flat was cancelled. In view of the above, the addition made by the AO in respect of Navi Mumbai flat stands confirmed.

7. Contesting the above, Ld. Counsel of the assessee Shri Prakash Jotwani referred to paper book page No.6 and submitted that this fact was very much brought to the notice of the AO.

8. We note that the paper book page No.6 referred by the Ld. Counsel of the assessee is a letter dated 10.08.2017 to the AO, which inter alia read as under:-

- a. For flat at Navi Mumbai I would like to state that I have entered into an Assignment Agreement for purchase of Flat at Navi Mumbai. The owner of the said flat was unable to give the possession of the said flat and finally the deal was cancelled in May, 2011. Copy of cancellation deed attached herewith for your kind perusal Annexure-B.

9. From the above, it is amply clear that assessee has duly informed the fact that agreement entered into the by the assessee for the purchase of said flat was cancelled hence, there was no question of assessing any deemed notional rent for the flat, which was not at all in the possession of the assessee. Hence, we set aside the orders of authorities below and direct that addition in this regard should be deleted.

10. Another issue raised relates to confirmation of annual letting value of yashodeep flat at a municipal ratable value, when there was material filed to demonstrate that the flat was not fit for occupation and certificates from authorities were filed for evidence of the same.

11. On this issue, the assessee's plea that the said flat was not habitable and was in a ruinous condition was very much before the Ld.CIT(A). Ld.CIT(A) noted the plea that when the concerned house property was not in a position to be let out there cannot be any deemed notional rent for the same. For this proposition, he noted the reference by the assessee to several ITAT decisions. However, Ld.CIT(A) chose to display scant regard for judicial discipline. He did not at all refer whatsoever to the ratio emanating from the ITAT decisions. But, simply referred to the provision of the concerned section and Hon'ble Bombay High Court decision in case of Tiptop typography. He did not refer at all as to how the Hon'ble Bombay High Court decision empowers him to impose notional rent on a flat, which is inhabitable and in a ruinous condition. We may gainfully referred to this order of Ld.CIT(A) as under:-

Flat nos.9 & 11 in building called Yashodeep situated at Carter Road Bandra was valued at Rs.8,70,000/- and Rs.2,62,63,090/- respectively. During the assessment proceedings, appellant had produced certificate from Municipal Corporation alongwith photographs of the flat to show that the flat was in a ruinous condition and dangerous for occupation. Thus, it was contended by the AR of the appellant that since the flat could not be given on rent, the annual value of the said flat cannot be estimated at 8% of its cost value. In this regard, appellant had placed reliance the decision in the case of Sachin Tendulkar. During the appellate proceedings also the A.R of the appellant had furnished the above evidences which were furnished before the AO. In addition to the above, AR of the appellant had furnished letter received from Structural Engineer. The relevant portion of the letter is reproduced below:

"On the basis of above, it is our opinion that the existing structure is in severely hazardous condition, which can pose danger to its occupants. Due care has to be taken to vacate the premises immediately. Arrangement should be made for early and safe demolition of the building"

On perusal of the documents furnished by the appellant, it is found that _the contention the appellant is found to be genuine,—Further, .reliance is placed on the decision of the Hon'ble ITAT "G" Bench in the case of Saif All Khan Pataudi vs. ACIT-16(1), Mumbai bearing IT No.5811/Mum/2016 for A. Y.2012-13 wherein the facts and circumstances of the case are applicable to the appellant's case. The relevant portion of the order is reproduced below:

"Now examining the present case, on the touchstone of above said facts, we come to the following conclusion:

There were certain defects in the construction of the flat under the sanctioned plan, the removal of which was necessary. Letting out a house which is not constructed as

per an approved plan cannot be forced upon the assessee. Furthermore, subsequently the assessee had to incur over Ks.50 lacs for alteration of the flat which resulted in the bifurcation of the flat into three parts. This oxygenates the assessee's claim that the premises required alteration in order to properly let out Hence, the plea by the Id. Counsel of the assessee cannot be said to be spurious, vexatious, mere bluster or Saif Ali Khan Pataudi frivolous. Hence, in this connection, in our considered opinion, the assessee deserves vacancy allowance u/s. 23(1)(c). This section reads as under-Annual value how determined. "

. (1) For the purposes of section 22, the annual value of any property shall be deemed to be-

(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

© 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 rent 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 :

From the above provision of law, it can be construed that in case the property or part thereof was vacant during the period, the proportion deduction should be allowed from the sum on which the property might reasonably be let out from year to year. We find that it is the plea of the assessee that due to inherent defects, the flat could not be let out. Hence, the flat remained vacant. Hence, the assessee has claimed benefit of section 23(1)(c) which duly permits deduction in this regard. "

Further and without prejudice, the appellant submitted that even if ALV is estimated, since the flat was vacant for the whole period of ownership, vacancy allowance u/s 23(1)(c) should be allowed and hence even on this count no addition of ALV is justifiable .

Further the appellant also relied on the decision of Bombay High Court in the case of Tip Top Typography 368 1TR 330 where it was held that ALV of flat should be restricted to municipal rateable value. This view was also followed by the Bombay Tribunal in the following cases.

- 1) Owasi Hussain
- 2) Pankaj Wadhwa
- 3} Europa Chemicals Pvt. Ltd.

During the course of appellate proceedings, the appellant without prejudice to the above further submitted that the ALV of this flat should be restricted to the municipal

rateable value only. In this regard copy of the BMC Certificate was enclosed in the paper book. In view of the above, AO is directed to restrict the ALV in respect of Yashodeep flat to the municipal rateable value.

12. From the above, it is amply clear that the order of Ld.CIT(A) is without any application of mind. There is no discussion whatsoever as to where the act mandates that if a flat is inhabitable and in a ruinous condition notional rent should be computed thereon and imposed upon the assessee. The ITAT decisions referred by the assessee despite being noted has been ignored by the CIT(A). For all the above reasoning including the lack of application of mind by the CIT(A) and the scant regard to the judicial discipline the order of Ld.CIT(A) is set aside and the notional rent addition in this regard is directed to be deleted.

13. Another issue in AY 2015-16 relates to the confirming by the CIT(A), the annual letting value of the flats at 6% of the flats that is Rs.283905/- a place of ALV to restricted to municipal rateable value.

14. We note that the solitary plea of the assessee in this regard is that the notional rent should be restricted to the municipal rateable value. The AO has levied 8% of the cost as notional rent and CIT(A) has restricted the same to 6%. This, the Ld.CIT(A) did despite noting the Hon'ble Bombay High Court decision in the case of Tiptop topography and following which in case of another flat, he had directed that municipal rateable value should be adopted.

15. Considering the above, issue and going through the order of Ld.CIT(A) referred, we fail to understand as to why the Ld.CIT(A) has chosen again to exhibit his scant regard to the judicial discipline and not follow the Hon'ble Bombay High Court decision in the case of Tiptop topography. In the said decision Hon'ble Bombay High Court has expounded that municipal rateable value in an accepted norm for

considering the rental value unless the AO shows by some material that the rent offered by the assessee is a manipulated figure. We are again anguished and wonder why the Ld.CIT(A) chose to ignore the Hon'ble Bombay High Court decision. Be as it may, we direct that following the precedent from Hon'ble Bombay High Court as above the rental value should be limited to the municipal ratable value in this regard. We direct accordingly.

16. In the result, appeals by the assessee stand partly allowed as above.

Pronounced in the open court on 12.07.2021

Sd/-

(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Sd/-

(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 12 /07/2021

Sr.PS. Thirumalesh

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