# Saif Ali Khan Pataudi v. Asstt. CIT

## *IT Appeal No. 5811 (Mum.) of 2016*

## *A.Y. 2012-13*

## *21 August, 2018*

*Appellant by:* K.K. Lalkaka

*Respondent by:* V. Vidhyadhar

## ORDER

### *Shamim Yahya, A.M.*

This appeal by the assessee is directed against the order of the Commissioner (Appeals)-4, Mumbai dated 12-7-2016 and pertains to the assessment year 2012-13.

**2.** The grounds of appeal read as under :--

1. On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) has erred in estimating the value of the property known as "Hicon Property" at Rs. 50,40,000 per annum instead of Rs. 11,86,723 being valuation carried out by approved Valuer M/s. Patwardhan & Associates --

(a) By ignoring the legal disability pointed out by the Executive Engineer, Building Proposal (WS) H Ward Municipal Corporation of Central Mumbai in their letter dated 9-2-2012.

(b) By refusing to believe that because of the defects in the property, the said property could not be let out and not applying the provisions of section 23(1)(c) regarding vacancy allowance.

(c) By dismissing the letters as self serving without any evidence of two real estate agents R. R. Real Estate and Nisha Dusija categorically stating that the property could not be let out as it was defective.

(d) By relying on the letter of Secretary of Hicon Society who is not competent to give opinion that Maharashtra Rent Control Act was not applicable to the Society.

(e) By taking as a base for purpose of arriving at the annual value the flat rented out on the first floor which had different characteristics and did not suffer from various defects vis-a-vis the flat on the terrace.

(f) By not taking into consideration municipal tax which has to be factored in while determining the annual value.

**3.** Brief facts of the case are that the assessee has owned property at 12th & 13th floor of Hicon, Bandra, in addition to his own residential flats. However, the assessee has estimated ratable value on lower side as compared to the ratable value based on size, location of the property. Further, the assessee has reduced the estimated ratable value by Municipal taxes of Rs. 20,000. Therefore, the assessee was asked to explain the basis of taking Annual Ratable Value of Rs. 4 lakhs. The cost of property is of Rs. 11,58,40,022. Further, during the course of assessment proceeding, inquiry was made and it was "explained by the "Hicon's Society" by letter dated 22-11-2013 that Rent Control Act was not applicable to the "Hicon Society". Further, society has

submitted a copy of assessment bill and receipt, of taxes paid on behalf of all members of Society. These facts were confronted with the A.R. of the Appellant on 20-10-2014. The learned Counsel of the assessee was also asked to explain that why fair estimate of Annual Ratable value of this property should not be estimated @ 7% of investment.

**4.** According to the assessing officer, reply of the assessee is not acceptable because the basis given by the assessee for calculation of ratable value is without any certificate of Municipal Authorities. Though the assessee has claimed that Maharashtra Rent Control Act, 1989 is inapplicable to this property, society claims otherwise.

**5.** As per the assessing officer, during the course of assessment proceeding, the assessee was repeatedly asked to give standard rent fixed under Maharashtra Rent Control Act. However, the assessee could not give any valuation of standard rent fixed in his case. Finally, the assessing officer concluded that the assessee had given no basis of showing ALV-of Rs.4 lakhs that the assessee could not discharge his onus of substantiating his estimation, that Hicon Society had given information that Maharashtra Rent Control Act was not applicable to the Society whereas, the assessee has reduced Municipal Tax from estimated ALV, that no supporting evidences of estimation of income is submitted that the assessee has not given working of standard rent fixed, he has only referred to the report of Approved Valuer. That the case laws relied upon are not applicable to the facts of the case. The assessing officer has proceeded to adopt Annual Ratable Value @ 7% of total investment and has therefore, calculated ALV of Rs. 81,08,802. After giving standard deduction, the assessing officer estimated Income from House Property of Rs. 56,76,162 and has assessed accordingly.

**6.** Before the learned Commissioner (Appeals), the assessee submitted copy of valuation report of Patwardhan & Associates in respect of flat situated at "Hicon Residency", copy of assessment order of assessment year 2011-12, copy of letter of one R. R. Real Estate, copy of Nisha Dusija and copy of notice of Maharashtra Regional & Town Planning Department dated 28-12-2011. Finally, the learned Counsel of the assessee has pleaded that income from house property calculated by the assessing officer is not correct because "Hicon Residency" has been constructed unauthorizedly vide letter dated 9-2-2012 of Executive Engineer, Building Proposal (WS), 'H' Ward, Municipal Corporation of Central Mumbai. Thus, it was argued that the ALV shown by the assessee may be accepted and addition made by the assessing officer may be deleted.

**7.** Upon the assessee's appeal, the learned Commissioner (Appeals) held that the computation of rental value done by the assessing officer is not correct. Though he rejected the assessee's plea that there was some unauthorized construction to be removed before the premises could be properly let out, holding that the alteration required was minor. He referred to another let out flat in the premises at Rs.1.75 lacs per month and computed the assessee's rental value at Rs. 50,40,000. The order of the learned Commissioner (Appeals) is as under :--

> 3.5. I have circumspected the facts & circumstances of the case and have carefully considered the finding of the assessing officer, rival submission of the appellant, report of Approved Valuer and various case laws relied upon by the assessing officer as well as learned A.R. The property under reference, i.e., Flat No. 1201 on 12th & 13th Floor I "Hicon Residency" bearing Plot No. 175, TPS-III, 26th Road, Bandra, Mumbai - 400 050 is having, as claimed by the Appellant, 6000 sq.ft. of carpet area. This property is apparently found to be capable for renting out. The Appellant, himself, has shown ratable value of this property of Rs. 4 lakhs as ALV. The assessing officer has rightly I held that considering the size of flats, it's location, investment value of Rs. 11,58,40,022 and its making style, the ALV shown by the Appellant'at style, the ALV shown by the Appellant at Rs. 4 lakhs is significantly lower one. It is also an important fact that "Hicon" Residency Co-op. Hsg. Society has very categorically stated by letter dated 22-11-2013 that Rent Control Act is not applicable to this Society. Further, no standard rent has been fixed by the local authority hence, considering the law under section 23(1)(c) of the Income Tax Act, the fair ratable value of the property has to be estimated. The learned assessing officer has estimated Annual Ratable Value @ 7% of Investment which is not based on any supporting evidence. It is a general estimation which cannot be sustained. The fair estimation should be based on some evidence or reasonable ground. This aspect of the issue under consideration shall be analysed and decided later on.

Before that, it is necessary to "deal with the various arguments and counter representation of the learned A.R. against the estimation of Annual Ratable Value. According to the learned A.R., the said property suffers from legal disability as Developer has carried out unauthorized construction to the extent of 40% beyond the 'Occupation Plan'. This argument is of no avail because property was constructed much earlier and only some minor unauthorized construction has been made by the Developer which was to be removed, hence, so far as construction of Flat under reference is concerned, the 'Occupation Certificate' was issued on 12-3-2009. As per the notice of Executive Engineer, Building Proposals (Western Suburbs), 'H1 Ward, Mumbai, there was an alteration and modification against the O.C.C Plan dated 12-3-2009, hence; same was to be corrected, removed or modified within 1 month from the date of notice No. CE/1893/WS/AH dated 28-12-2011. Thus, the restoration work was to be completed as per the 'Occupation Plan' within 1 month. This notice refers refused area on 8th floor & 12th floor which has been merged with adjoining flats. It means, there was a minor work which could have been completed within 1 month, i.e., in the month of January, 2012. Hence, this property was obviously, free from legal disability. Further, I find no supporting evidence that this property was not rented because of leakage from terrace and these flats were bad in all condition. Further, I find no convincing explanation that property was not rented because of inherent defects in the said property. The learned A.R. has not submitted any such evidence that these flats at 12 & 13 floor was defective one. Obviously, this statement of learned A.R. is found to be unsubstantiated one. Further, it is pertinent to mention that the Appellant after receipt of notice, could not remove the alteration or modification or restored as per O.C.C. Plan. No contrary evidence has been submitted. Hence, such arguments "becomes very general. Further, argument that all the efforts were made to let out the property but did not materialize because of defect in the flat, is not at all convincing one because firstly, learned A.R. has not submitted any such evidence which can demonstrate that flat(s) at 12th floor was defective one and it was not suitable for residence. Such arguments could not be believed that such Flat(s) having cost of Rs. 11,58,40,022 was not worth habitation.

3.6. Further, the above argument of the learned A.R. becomes nullified if, one can refer the relied evidence of the Appellant, i.e., Valuer's Report of M/s. Patwardhan & 22-9-2011. It can be seen that in Approved Plan, valuer has not about defect in House Property. He has only referred that Ratable by 15% by litigation with Municipal Corporation regarding of the flat since they are definite encumbrances and restrictions of the property. It there is any alteration or modification in Approved Plan, after receipt of the notice, the Appellant can remove the same without any delay but as mentioned by Approved Valuer, the appellant was in litigation with Municipal Corporation which means the appellant was claiming the correctness & righteous construction. Obviously, because of litigation, there is no bar of renting out the property to tenant person. Therefore, from this angel also such argument becomes infractuous.

During the course of hearing proceeding, the learned A.R. has submitted a copy of letter of R.R. Real Estate dated 15-3-2013 which is apparently a self-serving document. Similar is the fact in respect of letter of Nisha Dusija. These self-serving documents are of no avail because if there was unauthorized modification in original plan, same would have been removed in January, 2012 and property could have been given on rent and obviously there would have not been any further objection by MRTP. It appears that these 2 letters have been obtained only with a view to justify that efforts were made to let out the property but it could not materialized. Apparently, such strategy has been adopted just with a view to suit the judicial propositions over such issue. The baselessness of the letter of R.R. Real Estate and Nisha Dusija can be established by referring the evidence submitted by the Appellant, i.e., Report of Approved Valuer namely, M/s. Patwardhan & Associates dated 22-9-2014 as this report contains the evidence that 1 Flat in the same Building has been given on rent @ 1,75,000 per month of 3 BHK having area of 2500 sq.ft. It means "Hicon" property was capable of habitation and Flats were being occupied for own residential purposes or were being given on rent.

3.7. As regards valuation done by M/s. Patwardhan & Associates of Rs. 11,86,723, it is pertinent to mention that such Valuation Report is apparently baseless and is full of contradiction. While working of ratable value of the Flat under reference, he has admitted that "Hicon" Apartment has not been assessed by Assessor & Collector Department of MCGM. The assessment is levied only of vacant piece of Land. He has referred Public Interest Litigation in Bombay High Court regarding ratable value but as demonstrated in Para 3 that one Flat of 3 BHK 2500 sq.ft. area has been rented @ Rs. 1,75,000 per month with deposit of

Rs.5 lakhs. He has estimated the rental value of Appellant's Flat of 6000 sq.ft. accordingly at Rs. 50,40,000 per annum. However, he has reduced the rental value by 10% on the ground that area of property is large hence, it is difficult to rent it out. Obviously, this stand of Approved Valuer is not worth approval. In Mumbai, there are so many Flats having carpet area of more than 6000 sq.ft. are rented out and people are capable to take such Flat on rent. There are thousands of Corporate Houses who take such Flats on rent for their Executives & Directors. Further, I find no valid reason to reduce 15% from ratable value because of litigation with Municipal Corporation. Obviously, such reduction is arbitrary and having no foundation for reduction of ratable value. Further, I find no reasonable ground to reduce tenant's taxes @ 8% from the ratable value. Similarly, Approved Valuer has wrongly reduced 10% for statutory deduction for calculating ratable value. Similarly, in Para 7, the Approved Valuer has wrongly reduced an amount of Rs. 26,68,877 as Municipal taxes @ 83.5% of ratable value. Therefore, I find no reason to approve or accept the ratable value of Approved Valuer as his report is based on his own presumption, conjecture and on arbitrary opinion. When there is an admitted evidence that 1 Flat in the same building has been rented out @ Rs. 1,75,000 per month. Thus, it is a best evidence referred to by the Appellant himself, cannot be ignored while calculating the ratable value of such high profile residential house of "Hicon Residency".

3.8 In the light of above discussion, I reached to the conclusion that fair rental value of the property has to be calculated. However, estimation made by the assessing officer @ 7% of investment value of the property at Rs. 81,08,802 is also approvable and similarly, the ratable value estimated by Approved Valuer in report dated 22-9-2014 is also not sustainable. Since there is an evidence admitted by the Appellant that one Flat has been rented out @ Rs. 1,75,000 accordingly, the gross ratable value of the property could not be less than Rs. 50,40,000 per annum. Since reliable and corroborative evidence is there, there is no reason, not to take such evidence for calculating ratable value of the residential Fiat No. 1201 claimed to be on 2 floors. Thus, considering the facts & circumstances of the case and legal propositions, the Annual Ratable Value of the property is found to be at Rs. 50,40,000 per annum which is based on primary evidence, hence, the assessing officer is directed to take the ratable value of "Hicon Residency" at Rs. 50,40,000 and allow the standard deduction under section 24(a) and calculate the "Income from House Property, accordingly.

**8.** Against the above order, the assessee is in appeal before us.

**9.** We have heard both the counsel and perused the records. The learned Counsel of the assessee referred to the provisions of section 23(1)(c). He also referred to the following case law in this regard :--

*Premsudha Exports (P) Ltd. v. ACIT (2008) 110 TTJ 158 (Mum) : 2007 TaxPub(DT) 1270 (Mum-Trib);*

Referring to the above provisions of law and case law, the learned Counsel of the assessee submitted that assessee in the present case was not in a position to let out the property. Hence, he pleaded that assessee should be granted vacancy allowance. The learned Counsel of the assessee submitted that there were some inherent defects in the construction of the property. The deficiency was pointed out by the authorities. And it was necessary to remove the deficiencies in order to bring the property in accordance with the plan. He submitted that since the defects where subsisting there were reasonable cause why the flat would not be let out. Furthermore, the learned Counsel of the assessee submitted that apart from the deficiencies, the flat was too large for being let out. The learned Counsel of the assessee submitted that subsequently the assessee had to incur considerable expenses in bifurcating the property in three flats in order to rent the same. In this connection, the learned Counsel of the assessee proposed to file the additional evidences. The prayer of the learned Counsel of the assessee in this regard reads as under :--

> Your appellant do hereby submits the following additional evidence to establish the genuineness of his claim in respect of income derived from house property as the appellant was prevented by sufficient cause from producing the said evidence before the subordinate authority and since the said additional evidence goes to the root of the matter :--
>
> (1) Copy of Ledger Account for additional expenditure incurred on construction of flats which have been sub-divided.

(2) Floor plan of Flat No. 1201 duly certified by the municipality.

(3) Certificate from Architect certifying the area of Flat No. 1201.

(4) Property Tax Bill from 2010-11 to 2015-16.

(5) Deed of Rectification dated 19-6-2014 made with Hicon Construction dividing the flat into three parts.

(6) Letter dated 13-3-2018 of Patwardhan & Associates explaining the basis on which rateable value has been arrived at.

(7) Proof of non occupancy charges levied with effect from 13-2-2018 when the flats were let out.

Your appellant prays that since the above additional evidence is critical and goes to the root of the matter and is relevant for calculating the real income of the appellant, the same may be admitted. Reliance is placed on the decision of Madhya Pradesh High Court in *Daljeet Kaur v. ITO 212 Taxation 46* and *Pr. CIT v. Daljit Singh Sra Prop. M/s. Sra Construction Co. [ITA No. 98 of 2017, dt. 16-3-2017] : 2017 TaxPub(DT) 1131 (P&H-HC).*

**10.** Further, the learned Counsel of the assessee prayed that in the facts and circumstances of the case it is apparent that there was reasonable cause due to which the flat could not be let out. However, to save the assessee from further litigation, the learned Counsel of the assessee submitted that assessee was agreeable to offer as tax as sum of Rs. 11,83,723 as computed by the assessee's valuer and prayed in the grounds of appeal.

**11.** Per Contra, the learned departmental representative relied upon the order's of the learned Commissioner (Appeals).

**12.** Upon careful consideration we note that assessing the present case is the owner of the property being flat comprising of 6000 sq. ft. The said flat had remained vacant in the concerned assessment year. The assessee has offered Rs.4 lacs as rent. In the grounds of appeal the assessee has offered Rs. 11,83,723 as taxable rent as per its valuer. This has also been accepted by the learned Counsel of the assessee. The assessing officer in this case has held that the sum of Rs. 56,76,172 is taxable as rent but the learned Commissioner (Appeals) has rejected this computation of the assessing officer. He has substituted a sum of Rs. 50,40,000 as reasonable rent for the property. For this he has referred to rate of Rs.1.75 lakh per month fetched by other flat of the same building.

**13.** While coming to the above conclusion, the learned Commissioner (Appeals) has partly rejected the assessee's plea that assessee was under obligation to remove certain unauthorized construction/defects done by the builder in order to bring the construction under appropriate permission and sanction. The learned Commissioner (Appeals) has admitted that certain defects were there but he has found the same to be minor. No details whatsoever has been brought by the learned Commissioner (Appeals) in considering the defects to be dissected between major and minor. Once when it is accepted that the construction was not fully in accordance with the plan and some alteration was required to bring it under proper plan, it has to be accepted that the flat was not in a position to be let out *de horse* removal of the defects. Furthermore, the assessee has brought on record certain letters from the real estate agents who have submitted that flat not readily lettable in the present condition. This has been rejected by the learned Commissioner (Appeals) to be spurious.

**14.** Now we note that the learned Counsel of the assessee has submitted by way of additional evidence certain evidences which showed that the assessee had to incur over Rs.50 lacs in order to make the necessary alterations which ultimately resulted in bifurcating the flat in three parts to further facilitate proper letting out. In the interest of justice we have admitted this additional evidence and we have gone through them.

**15.** 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 Rs.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 learned Counsel of the assessee cannot be said to be spurious, vexatious, mere bluster or frivolous. Hence, in this connection, in our considered opinion, the assessee deserves vacancy allowance under section 23(1)(c). This section reads as under :--

> *23. 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
>
> (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 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 :

**16.** 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. We find that the ITAT in the case of *Premsudha Exports (P) Ltd.* (supra) had the occasion to deliberate on the identical issue. The tribunal had expounded as under :--

> From a reading of the provisions of sub-section (3) of section 23, it appears that the Legislatures in their wisdom have used the words 'house is actually let'. This shows that the words 'property is let' cannot mean actual letting out of the property because had it been so, there was be no need to use the word 'actually' in sub-section (3) of section 23. Regarding the scope of referring to actual letting out in preceding period, there was no force in the contention of the revenue, as the Legislature has used the present tense. Even if it is interpreted so, it may lead to undesirable result because in some cases, if the owner has let out a property for one month or for even one day, that property would acquire the status of 'let out property' for the purpose of clause (c) of section 23(1) for the entire life of the property, even without any intention to let it out in the relevant year. Not only that, even if the property was let out at any point of time even by any previous owner, it could be claimed that the property is let out property because the clause talks about the property and not about the present owner and since the property was let out in past, it is a let out property, although the present owner never intended to let out the same. Therefore, it is not at all relevant as to whether the property was let out in past or not. These words do not talk of actual let out also but talk about the intention to let out. If the property is held by the owner for letting out and efforts are made to let it out, that property is covered by clause (c) and this requirement has to be satisfied in each year that the property was being held to let out but remained vacant for whole or part of the year. Above discussion shows that meaning and interpretation of the words 'property is let' cannot be 'property actually let out'. Thus, if a property is held with an intention to let out in the relevant year coupled with efforts made for letting it out, it could be said that such a property is a let out property and the same would fall within the purview of clause (c) of section 23(1). [Para 16]

**17.** On the touchstone of the above proposition of law and case law, in our considered opinion, the assessee should be granted vacancy allowance. However, as conceded by the learned Counsel of the assessee and also

accepted in the grounds of appeal, the assessee is agreeable to offer a sum of Rs. 11,83,723 for taxation in this regard. We accept this proposal and modify the order of the learned Commissioner (Appeals) accordingly.

**18.** In the result, the assessee's appeal is partly allowed.