



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 129 OF 2020

The Pr. Commissioner of Income Tax-27

.. Appellant

V/s.

3NN Corporation

.. Respondent

Mr. Arjun Gupta for Appellant – Revenue.

Mr. Pankaj Toprani (through VC) a/w Mr. C. M. Lokesh i/b PRH Juris for
Respondent.

CORAM : B. P. COLABAWALLA AND
FARHAN P. DUBASH, JJ.

DATE : 30th SEPTEMBER 2026

P.C.:

1. The above appeal has been filed by the Revenue seeking to challenge the order dated 10th April 2019 passed by the Income Tax Appellate Tribunal, Mumbai (“ITAT”) in ITA No. 2637/Mum/2016. This appeal (before the Tribunal) was filed by the Assessee challenging the order passed by the Pr. Commissioner exercising powers under Section 263 of the Income Tax Act, 1961 (“the Act”). The Assessment Year in question is 2013-14.
2. According to the Revenue, the impugned order of the ITAT gives rise to the following substantial question of law:

“On the facts and circumstances of the case and in law, whether the

Hon'ble Tribunal was correct in relying on the decision of the Supreme Court in the case of CIT Vs. Vegetable Product Ltd. (1973) 88 ITR 192 (SC) without considering the fact that the said judgement was reversed by the Hon'ble Supreme Court (5 Member Bench) in the case of M/s Dilip Kumar and Company and others?"

3. Having gone through the impugned order as well as the order passed by the Pr. Commissioner exercising his revisional powers under Section 263, we find that the real issue arising in the present case is whether the Assessee was liable to pay tax on the rental income of the property from 25th October 2012 to 31st March 2013, on a notional basis under Section 23(1)(a) of the Act.
4. The facts of this case reveal that the Assessee is a partnership firm engaged in the business of building and developing immovable properties. The Assessee filed its return for Assessment Year 2013-14, declaring its total income at Rs. 29.86 Lakhs. This assessment was picked up for scrutiny and an Assessment Order was passed under Section 143(3), determining the total income of the Assessee at Rs. 31.11 Lakhs.
5. After this, for Assessment Year 2013-14, on verification of the records, the Pr. Commissioner was of the opinion that the Assessee had one residential project situated in Taluka Bhiwandi, District Thane in which buildings A, B and C were completed on 25th October 2012. The Assessee had offered

income of Rs. 8.06 Crores from the sale of the flats. The Revisional Authority also noticed from the balance sheet and profit and loss account, that the Assessee had shown a closing stock of Rs. 8.13 Crores. The Revisional Authority was of the opinion that the Annual Letting Value of flats/shops built by the Assessee [who is engaged in the construction business] lying unsold, was assessable as 'Income from House Property' and the Assessee was liable to pay income tax on the Annual Letting Value of the unsold flats/shops. In support of the aforesaid contention, the Revisional Authority relied upon a decision of the Delhi High Court in the case of CIT Vs. Ansal Housing Finance & Leasing Co. Ltd. [2012 SCC OnLine Del 5565] and the decision of the Tribunal in the case of M/s. Om Prakash & Co. [87 TTJ 183].

6. Accordingly, the Revisional Authority came to the conclusion that the Gross Annual Value of the rent income came to Rs. 56.97 Lakhs (7% of Rs. 8.13 Crores) and after statutory deductions, the taxable Net Annual Value worked out to Rs. 39.88 Lakhs. As the project was completed on 25th October 2012, the Revisional Authority came to the conclusion that the notional rent for the five months was assessable and therefore an amount of Rs. 16.61 Lakhs remained to be assessed and taxed under the head 'Income from House Property'. It is on this basis that the Revisional Authority held that the Assessment Order passed under Section 143(3) was prejudicial to

the interest of the Revenue, which then gave the power to the Revisional Authority to invoke powers under Section 263.

7. Being aggrieved by this order of the Revisional Authority, the Assessee preferred an appeal before the ITAT, which was allowed by the impugned order.
8. From the record, we find that, though the completion certificate was issued on 25th October 2012, the occupancy certificate was issued only on 25th May 2016. Until the occupancy certificate was issued, the property was not legally occupiable and hence the question of levying any notional rent under the provisions of Section 23(1)(a) could not arise. We find that this very issue has been considered by this Court in the case of ***Sharan Hospitality (P.) Ltd. Vs. Deputy Commissioner of Income-tax, Circle 9(3) [2019] 112 taxmann.com 372 (Bombay)***. Paragraph 6 of this decision reads as under:

“6. We have heard the learned Counsel appearing for the parties and perused the documents on record. It is not necessary to enter into the interpretation of Section 23(1)(c) of the Act, since this issue can be thrashed out on the facts and the first principles emerging from the statutory provisions. As noted, the facts are that though the Assessee acquired the property in question under Conveyance Deed dated 18th December, 2008, the OC for the property in question was obtained by the builder only in May, 2009. Under such circumstances, by operation of law, such property could not have been legally occupied by either the Assessee or any other person under the license given by the Assessee. It is a different matter that the Assessee did execute a lease deed putting the leasee in possession of the property on 1st April, 2009. The Assessee’s explanation is that the same was only for

completing the furniture and fixtures and not for occupation for commercial use. We are not in the present Appeal concerned with the correctness of this explanation. What we are however concerned about is the fact that the Revenue wishes to tax the Assessee for the so-called occupation of the property between 1st January, 2009 to 31st March, 2009. This is the period during which the Assessee had neither occupied the property nor put lessee in possession of the property nor earned any rental income. The property was in fact during the period in question legally not occupiable nor occupied. Under the circumstances, the question of charging tax on notional rental income during such period does not arise.

(emphasis supplied)

9. As can be seen from the aforesaid decision, until an occupancy certificate was obtained, there was no question of charging tax on rental income on a notional basis. Since the issue in the present case is squarely covered by the decision of this Court in ***Sharan Hospitality (P.) Ltd.*** (supra), we find no merit in the above appeal. The appeal is accordingly dismissed. However in the facts and circumstances of the case, there shall be no order as to costs.
10. This order will be digitally signed by the Private Secretary / Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

(FARHAN P. DUBASH, J.)

(B. P. COLABAWALLA, J.)

Shubham Gadhavepatil

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