

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION  
INCOME TAX APPEAL NO. 557 OF 2017

Sharan Hospitality Private Limited ... Appellant

Versus

Dy. Commissioner of Income Tax, Circle 9 (3) ... Respondent

Ms.Priyanka Jain i/b. Vaish Associates for the Appellant.  
Mr.A.Sharma for the Respondent.

**CORAM : AKIL KURESHI &  
S.J. KATHAWALLA, JJ.**

**DATE : 1ST JULY, 2019**

**P.C.:**

1. The Appeal is admitted for consideration of the following substantial question of law :

*"Whether in the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that the annual value of the property in question for the relevant previous year can be determined under Section 23 (1) (a) of the Income Tax Act, 1961 ?"*

2. By consent of the parties as issue is small, we have heard the Appeal finally.

Brief facts are as under :

3. The Appeal is filed by the Assessee challenging the Judgment of the Income Tax Appellate Tribunal ('the Tribunal' for short) dated 12th September, 2016. For the assessment year 2009-10, the Assessee had filed the return of income. The

Assessee had purchased a commercial property from one M/s. Prime Property Development Corporation Limited under Conveyance Deed dated 18th December, 2008. The intention of the Assessee was to let out this property for earning rental income. The building in which this property was situated, was not given Occupancy Certificate ('OC' for short). This was issued by the local authority on 21st May, 2009, only thereafter the remaining consideration of Rs.8.75 Crores was made. In the meantime, the Assessee had leased out the property with effect from 1st April, 2009. Lease Agreement was executed in August-2009, which also referred to the Lessee being put in possession of the property on 1st April, 2009.

4. While assessing the return of income of the Assessee for the said assessment year 2009-10, the Assessing Officer was of the opinion that for the period between 1st January, 2009 till 31st March, 2009, the Assessee had to pay tax on the rental income of the property in question on notional basis. The Assessing Officer passed an order of assessment on 22nd December, 2011, in which he levied tax on sum of Rs.1.16 Crores (rounded off). We may notice that the Assessee had in fact declared the said amount as notional rent but claimed vacancy allowance for claiming no tax liability. This was rejected by the Assessing Officer on the ground that the same would be available only when the property or any part of the properties let and or was vacant during the whole year or any part of the previous year, which in the present case was absent.

5. The Assessee carried the matter in Appeal before the Commissioner. The Commissioner rejected the Appeal. Upon which, the Assessee carried out the matter

further in Appeal before the Tribunal. The Tribunal by the impugned Judgment confirmed the view of the Revenue Authority and rejected the Assessee's Appeal. The Tribunal was of the opinion that the interpretation of the Revenue Authorities of Section 23 (1) (c) of the Act was correct. The Tribunal relied upon and referred to the decision of High Court of Andhra Pradesh in case of ***Vivek Jain v. Assistant Commissioner of Income Tax***<sup>1</sup>

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

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<sup>1</sup> 337 ITR 74 (Andhra Pradesh)

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.

7. The Revenue appears to be raising a contention that since the Assessee in any case leased out the property with effect from 1st April, 2008 without waiting for OC, the entire period during which the Assessee could have let this property, tax on notional basis should be charged. In our opinion, this is fallacious contention. In plain terms, between 1st January, 2009 to 31st March, 2009, the property was legally not occupiable and not occupied. Under such circumstances, charging of tax on notional rental basis and the question of interpretation of Section 23 (1) (a) of the Act did not arise at all. The issue perhaps arose because the Assessee computed the notional rental receipts for the said period of three months and claimed the vacancy allowance, which in our opinion was under mistaken belief of law.

8. In the result, the question is answered in favour of the Appellant and against the Respondent. The impugned Judgment of the Tribunal is reversed. Appeal is allowed and disposed off accordingly.

( S.J.KATHAWALLA, J. )

( AKIL KURESHI, J. )