IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "D", MUMBAI

Before Shri Pramod Kumar, A.M. and Shri V. D. Rao, J.M.

I.T.A. No.: 2193 to 2196/Mum/2010
Assessment Years : 2000-01, 2001-02, 2002-03 & 2003-04

M/s. ICICI Realty Ltd. (Now known as M/s. Reclamation Realty (I) P. Ltd.) Ms. Sangeeta Mhatre, ICICI Bank Limited, ICICI Bank Towers, 9th Floor South East Wing, Bandra Kurla Complex, Bandra (E),Mumbai-400 051 **PAN NO: AAACI 5643 Q**	Vs.	DCIT 10(1) Ayakar Bhavan, 4th Floor, R.No.461, Mumbai-400 020
(Appellant)		(Respondent)

Appellant by	:	Smt. Aarti Vissanji
Respondent by	:	Shri C. G. K. Nair

<u>O R D E R</u>

<u>Per Bench :</u>

These four appeals pertain to the same assessee, involve common issues arising out of same facts and were heard together. As a matter of convenience, therefore, all the four appeals are being disposed of by way of this consolidated order. The assessment years involved are 2000-01, 2001-02, 2002-03 & 2003-04 and the impugned assessments have been framed under section 143(3) read with section 147 of the Income Tax Act, 1961.

2. Grievance of the asssessee is two fold - first, that the Ld. CIT(A) erred in upholding the reassessment proceedings, and, second, that the Ld. CIT(A) erred in upholding Assessing Officer's action of adopting annual value/fair rent of Rs.2,62,25,960, determined in the case of associate concern, as against Rs.1,12,64,400 actually received by the assessee.

3. To adjudicate on the above grievances, only a few material facts need to be taken note of. These assessments impugned in appeal before us are cases of reopened assessments. These cases were reopened by the Assessing Officer in the background that during the course of assessment proceedings in the case of Reclamation Real Estate Company (India) Pvt. Ltd, which is an associate company of the assessee, it was noticed that the said company is the owner of 9th floor at Mafatlal Centre, admeasuring 15,645 sq. ft. and six parking spaces, and the said company had let out the property to J. P. Morgan and received annual rent of Rs.2,62,25,960, whereas the assessee company owning the premises situated at 10th floor on the same building, with the same area and same parking spaces, has let out the property for Rs.51,62,850 to ICICI Bank Ltd. On these facts, the Assessing Officer took note of section 23 which provides that annual property shall be deemed to be (a) the sum for which the property might reasonably be expected to let out year to year, or (b) the rent received or receivable if the same is in excess of the sum mentioned at (a). Accordingly, the Assessing Officer was of the view that "in the case of ICICI Properties Ltd. (i.e. the assessee), the fair rent of property should be taken at Rs.2,62,25,960 instead of the actual rent received amounting to Rs.51,62,850." It was on this basis that Assessing Officer formed the belief that income has escaped assessment, and initiated the reassessment proceedings. Aggrieved, the assesssee disputed the validity of reassessment proceedings before the Ld. CIT(A) but without success. The Ld. CIT(A) upheld the validity of reassessment proceedings and observed, *inter alia*, that "when the associate concern derived a high rental income, the

appellant's property was also reasonably expected to let for the same account". Not satisfied the assessee is in further appeal before us.

4. We have heard the rival contentions, perused the material on record and duly considered the factual matter of the case as also the applicable legal position.

5. We have noted that, as noted by the Assessing Officer in reasons recorded for reopening the assessments, the actual rent received by the assesses is to be substituted for the rent received for a similar property by an associate concern. We are unable to see any legal support for this approach of the Assessing Officer. Just because a similar property is let out for a higher rent, the Assessing Officer cannot determine annual value on the basis of such higher rent, and disregard the actual rent received. No doubt a higher rent being received by a sister concern for a similar property may prima facie indicate that "the sum for which the property might reasonably be expected to let out from year to year" could be higher than actual rent received, but that does not *per se* justify such a higher rent being adopted as the annual value of Rs.2,62,25,960 which is what Assessing Officer has done in the reasons recorded by the Assessing Officer. It is also important to bear in mind that, as held by Hon'ble Bombay High Court in the case of Hindustan Lever Ltd. vs. R. B. Wadkar (268 ITR 332), "……. It is needless to mention that the reasons are required to be read as they were recorded by the AO. No substitution or deletion is permissible. No additions can be made to these reasons". Similarly, in the case of Prashant S. Joshi Vs. ITO (324 ITR 154), Hon'ble Bombay High Court has observed that "the reasons which are recorded by the AO are the only reasons which can be considered when formation of belief is impugned." Viewed in this perspective, when we examine reasons recorded for reopening the assessment, we find that these reasons proceed on the fallacious assumptions that when a higher rent is received for same

property by a person other than the assessee, the rent so received can be substituted for the rent actually received by the assessee. We are unable to see any legal support for this assumption. It was not even the case of the Assessing Officer that the sum for which subject property might reasonable be expected to let out is to be ascertained by making further enquiries. That apart, Hon'ble Bombay High Court, in the case of Smt. Smitaben N Ambani V CWT (323 ITR 104) and while dealing with the scope of expression “the sum for which the property might be reasonably expected to let from year to year”, has observed that rateable value, as determined by the Municipal Corporation, shall be the yardstick. In view of these discussions, in our considered view, the reasons for reopening the assessment cannot be sustained in law, and are contrary to the plain provisions of statute and law as laid down by Hon'ble Jurisdictional High Court.

6. For the reasons set out above, we uphold the grievance of the assessee and hold that the Ld. CIT(A) indeed erred in upholding the impugned reassessment proceedings. We quash the reassessments itself.

7. As regards, the second issue, i.e. whether or not the impugned additions can be sustained on merits, we find that the issue is now covered in favour of the assessee, by Tribunal’s decisions in the case of Reclamation Realty India Pvt. Ltd. Vs. DCIT (ITA No.1734/Mum/2007, A.Y. 2004-05 order dated 26.11.2010), wherein the Tribunal has observed as follows:-

> *“30. The Assessee is a company. It is engaged in the business of undertaking in one or more activities involving purchase, sale, letting out, investment and dealing in land, preparation of building sites for construction etc. This Assessee is a group company of M/S. Reclamation Real Estate Company India Pvt. Ltd., the Assessee in ITA No.1413/Mum/2007, which we have decided in the earlier paragraphs.*

31. The facts as far as this Assessee is concerned are that the Assessee owned the entire 10th floor of the premises, Maftalal Centre Nariman Point, admeasuring about 15645 Sq.ft. together with 6 car parking space (hereinafter referred to as "the property"). It had let out the property to ICICI Ltd., on an annual rent of Rs.1,12,64,400/-. It is not in dispute that income from letting out of the property has to be assessed under the head "Income from House Property". The annual value (also referred to as municipal valuation) adopted by the municipal authorities in respect of the property was Rs.27,50,835/-. The Assessee determined "Income from House Property" by adopting the annual value at Rs.1,12,64,400/- which is the actual rent received which is higher than the Municipal valuation. The Assessee had claimed that the annual value has to be determined in accordance with Sec.23(1)(b).

32. The AO after making a reference to the fact that the property owned by this Assessee was located in the same building and is of the same size as that of the Assessee M/S. Reclamation Real Estate Company India Pvt.Ltd.,(the Assessee in ITA No.1413/Mum/2007, which we have decided in the earlier paragraphs) which was a group of this Assessee, was of the view that the annual value determined in the case of M/S. Reclamation Real Estate company India (P) Ltd. would be the "the sum for which the property might reasonably be expected to let from year to year", viz., Rs.3,42,23,856/-. He therefore adopted the annual value at the said figure applying the provisions of Sec.23(1)(a) of the Act. On appeal by the Assessee, the CIT(A) following the decision in the case of M/S. Reclamation Real Estate company India (P) Ltd., held that Municipal valuation alone will be relevant while determining annual value u/s.23(1)(a) of the Act. He however was of the view that the rent received by this Assessee should be atleast equal to the rent declared as received by M/S.Reclamation Real Estate company India (P) Ltd., from J.P. Morgan Chase Bank. He therefore substituted the actual rent received by this Assessee by the rent actually received by M/S.Reclamation Real Estate company India (P) Ltd., from J.P. Morgan Chase Bank, at Rs.2,87,87,600/- as against actual rent received by this Assessee of Rs.1,12,64,400/-. Aggrieved by the relief granted to the Assessee the revenue is in appeal before the Tribunal. Aggrieved by the action of CIT(A) in substituting the actual rent received by it by the rent received by M/S.Reclamation Real Estate company India (P) Ltd., from J.P. Morgan Chase Bank, the Assessee is in appeal before the Tribunal.

33. We have heard the rival submissions, which are the same as was put forth in the case of M/S. Reclamation Real Estate Company India Pvt.Ltd.,(the Assessee in ITA No.1413/Mum/2007. For the details reasons given in that case, we hold that the annual the annual value (also referred to as municipal valuation/ rateable value) adopted by the municipal authorities in respect of the property at Rs.27,50,835 should be the determining factor for applying the provisions of Sec.23(1)(a) of the Act. Since the rent received by the Assessee was more than the sum for which the property might reasonably be expected to let from year to year, the actual rent received should be the annual value of the property u/s.23(1)(b) of the Act. Notional interest on interest free security deposit/rent received in advance should not be added to the same in view of the decision of the Hon'ble Bombay High Court in the case of J.K.Investors (Bombay) Ltd. (supra). The revenues appeal is therefore dismissed.

34. As far as Assessee's appeal is concerned, the question is whether the revenue authorities are justified in substituting the actual rent received by this Assessee by the rent actually received by M/S.Reclamation Real Estate company India (P) Ltd., from J.P. Morgan Chase Bank, at Rs.2,87,87,600/- as against actual rent received by this Assessee of Rs.1,12,64,400/-. The argument of the learned D.R. was that since the property is located in the same building and the area leased out are also identical, there was no reason for this Assessee to receive a lesser rent. The learned counsel for the Assessee besides reiterating the arguments as were made in the earlier case for adding notional interest on interest free security deposit further relied on the decision of the Hon'ble Bombay High Court in the case of Akshay Textiles (supra). It was also submitted that the quantum of rent is purely decided on the basis of mutual agreement between the parties. When the annual value is determined u/s.23(1)(b) of the Act, the actual rent received alone should be considered.

35. We have considered the rival submissions. In the case of Akshay Textiles (supra), the facts before the Hon'ble Bombay High Court was that A owner of the property let out the same to B. B sub-let the property to C. While determining the annual value of the property in the case of A, the AO substituted the rent paid by C to B because the rent paid by B to A was less compared to the rent paid by C to B. The Hon'ble Bombay high Court held that annual value is the actual rent received or

> *receivable by the owner from the tenant irrespective whether tenant on such letting has received higher rent. We are also of the view that the expression used in Sec. 23(1)(b) is the rent received or receivable. The expression receivable cannot mean anything more than what is actually received. The CIT(A) in our view has overlooked this aspect in substituting the actual rent received by this Assessee by the rent actually received by M/S.Reclamation Real Estate company India (P) Ltd., from J.P. Morgan Chase Bank. We therefore hold that the annual value has to be adopted at the annual rent actually received by the Assessee from ICICI Ltd., viz., Rs.1,12,64,400/-."*

8. The Learned Departmental Representative fairly accepts that the issue is covered, as such, in favour of the assessee though he vehemently relied upon the orders of the authorities below and justifies the same.

9. We see no reasons to take any other view of the matter than the view so taken by the co-ordinate bench.

10. For the reasons set out, we uphold the grievance of the assessee on merit as well. The impugned additions cannot thus be sustained on the merits either. This grievance is also upheld.

11. In the result, the appeals are allowed.

Order pronounced on this 30th day of June, 2011.

Sd/-	Sd/-
(V. D. RAO) JUDICIAL MEMBER	(PRAMOD KUMAR) ACCOUNTANT MEMBER

MUMBAI, Dt: 30/06/2011

Copy forwarded to :

1. The Appellant,
2. The Respondent,
3. The C.I.T.
4. CIT (A)
5. The DR, D - Bench, ITAT, Mumbai

//True Copy//

BY ORDER

ASSISTANT REGISTRAR
ITAT, Mumbai Benches, Mumbai

Roshani