IN THE INCOME TAX APPELLATE TRIBUNAL, MUMBAI BENCH "C", MUMBAI

BEFORE SHRI I.P.BANSAL,JUDICIAL MEMBER &
SHRI P.M.JAGTAP, ACCOUNTANT MEMBER

ITA NO. 8068 TO 8071/MUM/2010
(ASSESSMENT YEARS 2004-05 TO 2007-08)

Pradip Pacheriwala, C/o. Shankarlal Jain & Associates, 12, Engineer Building, 265, Princes Street, Mumbai - 400 002. PAN:AAAPP6766L (Appellant)	Vs.	The DCIT, Cen. Cir.39, Mumbai. (Respondent)

Appellant by	:	Shri S.L.Jain
Respondent by	:	Shri Rajarshi Dwivedy
Date of hearing	:	23/08/2012
Date of pronouncement	:	29/08/2012

ORDER

PER I.P.BANSAL, J.M

All these appeals are filed by the assessee. They are directed against a consolidated order passed by Ld. CIT(A)-41, Mumbai dated 25/10/2010 for assessment years 2004-05, 2005-06, 2006-07 and 2007-08. The grounds of appeal in all these appeals are identical and are reproduced as under:

> "1. Ld. CIT(A) erred in holding that income of the residential flat which remained vacant is assessable u/s. 23(1) (b), without considering the appellant's plea that flat being vacant, it will have 'nil' annual let out value under the provisions of section 23(1)(c).
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> 2. Ld. CIT(A) erred in not considering the fact that in any case such annual let out value of the vacant flat will not exceed annual let out value as fixed by the Municipal Corporation of Greater Mumbai at Rs. 35596/- as appellant has not received any rent during the year."

2. During the course of assessment proceedings it was noticed by AO that assessee owned two flats as follows:

(1) Flat No.42, Maker Tower 'L' Cuffe Parade, Mumbai -21	(2) 704, Phoneix Tower "A" Senapati Bapat Marg, Lower Parale, Mumbai -12.

2.1 The rental income in respect of Flat No.42 at Cuffe Parade was shown. However, no income in respect of flat at Lower Parale was shown. The AO asked the assessee to explain as to why rental income in respect of Lower Parale flat should not be assessed as per the provisions of section 23(4)(b) of the Income Tax Act, 1961(the Act). The assessee as per letter dated 23/12/2007 and 24/12/2009 submitted that the flat at Phoneix had remained vacant and no income is being received. In view of provisions of section 23(1)(c) the ALV should be adopted at nil. On these submissions the AO had recorded a finding that assessee did not submit any proof of flat remained vacant during the period. The assessee also submitted a Municipal Corporation Certificate showing the ratable value of the said flat at Rs. 35,596/-. Noting from the fact that in A.Y 2008-09 the assessee had received rent of Rs.1,80,000/- the AO ignored municipal value and estimated the rent of Rs.12,500/- per month in respect of assessment years 2004-05, 2005-06 & 2006-07 and of Rs. 15,000/- per month for A.Y 2007-08.

2.2 The addition so made was contested in appeal before Ld. CIT(A) against each of the assessment year and those appeals have been disposed of by Ld. CIT(A) by the aforementioned consolidated order . The submissions made by the assessee before AO were reiterated in appeal before Ld. CIT(A). Considering those submissions Ld. CIT(A) referring to the provisions of section 23(4)(b) of the Act has upheld the action of the AO on the ground that nothing has been brought on the record by the assessee against the findings of the AO that no evidence was submitted by the assessee that flat had remained vacant during these years. Keeping in view the rent earlier being enjoyed by the assessee Ld. CIT(A) has held that estimate made by the AO in respect of these years was correct and impugned property was liable to be assessed under the provisions of section 23(4)(b) of the Act.

3. After narrating the facts Ld. A.R submitted that where the property had remained vacant and it was earlier let out then according to the provisions of section 23(1)(c) the ALV of that property should be taken as nil. For this purpose Ld. A.R placed reliance on the decision in the case of Premsudha Exports (P) Ltd. vs. ACIT, 110 ITD 158 (Mum), decision dated 31/5/2007, wherein it has been held that "expression property is let" in clause (c) of section 23(1) does not mean that the property should have been actually let in the relevant previous year or during any time prior to the relevant previous year but means intended to be let out; property in question being intended to be let out and despite efforts made, it remained vacant for the whole of the relevant previous year, its annual value has to be worked out as nil under section 23(1)(c) of the Act.

4. This case was initially heard on 21/8/2012. Ld. D.R requested that the assessee is placing reliance on the old decision of the Tribunal and he wanted time to study the matter to find out any contrary view. However, Ld. A.R submitted that according to his knowledge there is no contrary decision. To enable the department to go through the issue, the matter was adjourned to 23/08/2012. On 23/08/2012,Ld. A.R has fairly submitted before us copy of the decision of Hon'ble Andhra Pradesh High Court in the case of VIvek Jain vs. ACIT,337 ITR 74, in which it has been held that in a case where the property has not been let out at all, during the previous year, there is no question of any vacancy allowance being provided thereto under section 23(1)(c) of the Act. However, Ld. A.R tried to distinguish the same.

5. We have heard both the parties and after hearing both the parties we find that what assessee is contending is squarely covered against the assessee by the aforementioned decision of Hon'ble Andhra Pradesh High Court in the case of

Vivek Jain (supra). Therefore, the contention of the assessee that ALV of the impugned property should be taken as nil under the provisions of section 23(1)(c) is rejected and it is held that the assessee is not entitled to claim the benefit of section 23(1)(c) of the Act as admittedly in all the years under consideration, even according to assessee, the property had remained vacant. It has been the case of the department that assessee did not submit any proof to show that the impugned property had remained vacant through out all these years as assessee has not brought on record any evidence to show that this property had remained vacant during the entirety of the period under consideration. Till today no such evidence has been brought on record by the assessee against these observations of AO and Ld. CIT(A). In this view of the situation Ground No.1 in respect of all the appeals is dismissed.

6. Now coming to second ground, no arguments whatsoever were raised by the Ld. A.R. It has already been mentioned that no evidence has been brought on record by the assessee to prove that the property had remained vacant during the years under consideration. In this view of the situation, it is difficult to accept the contention of the assessee that the ALV of the impugned property should be taken on the basis of municipal value. Municipal value for computation of ALV can be adopted only in a case where property had remained vacant or actual rent received by the assessee is less than ratable value. Therefore, second ground of the assessee in all these appeals is also dismissed.

7. In the result, in view of above discussions, all the appeals field by the assessee are dismissed.

Order pronounced in the open court on the 29th day of August, 2012

Sd/-	Sd/-
(P.M.JAGTAP)	(I.P.BANSAL)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dated 29th August, 2012.

Copy to: 1. The Appellant 2. The Respondent 3. The CIT City –concerned
4. The CIT(A)- concerned 5. The D.R ”C” Bench.

(True copy) By Order

Asst. Registrar, ITAT, Mumbai Benches

MUMBAI.

Vm.

	Details	Date	Initials	Designation
1	Draft dictated on	23/8/2012		Sr.PS/PS
2	Draft Placed before author	23/08/2012		Sr.PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
6.	Kept for pronouncement on			Sr.PS/PS
7.	File sent to the Bench Clerk			Sr.PS/PS
8	Date on which the file goes to the Head clerk			
9	Date of Dispatch of order			