

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A" : HYDERABAD
(THROUGH VIDEO CONFERENCE)**

**BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

I.T.A. No. 397/HYD/2017

Assessment Year: 2012-13

M/s.Optrex Finexim Private Limited, HYDERABAD [PAN: AAACO5544J]	Vs	Income Tax Officer, Ward-16(1), HYDERABAD
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(Appellant)

(Respondent)

For Assessee : Shri A.V.Raghuram, AR
For Revenue : Shri Sunil Kumar Pandey, DR

Date of Hearing : 23-02-2021
Date of Pronouncement : 28-04-2021

ORDER

PER S.S.GODARA, J.M. :

This assessee's appeal for AY.2012-13 arises from the CIT(A)-4, Hyderabad's order dated 18-01-2017 passed in case No. 0206/ITO,W-16(1)/15-16/CIT(A)-4/Hyd/2016-17, in proceedings u/s.143(3) of the Income Tax Act, 1961 [in short, 'the Act'].

Heard both the parties. Case file perused.

2. The assessee has raised the following substantive grounds in the instant appeal:

“1.The order of the learned CIT(A) confirming the order of the AO making additions is not only erroneous both on facts and in law but is perverse having been passed without application of mind to the facts.

2.The learned CIT(A) erred in confirming the addition of Rs.14,40,000 under the head property without dealing with the submissions of the assessee in a cryptic manner.

3.The learned CIT(A) failed to appreciate that the provisions of Sec.23 does not permit in a case of property that was let earlier and not occupied later, to estimate notional income and thereby erred in confirming the addition of Rs.14,40,000.

4.The learned CIT (A) erred in directing the AO to enhance the income by treating the loss claimed of Rs.15,85,613 being claim of business loss as against the ground of the assessee to allow entire loss as against the loss determined by the AO of Rs.4,844.

5.The learned CIT(A) failed to appreciate that there is no provision in the Income-tax Act for treating the claim of expenditure as income except proviso to Sec.69C which relate to expenditure not recorded in the books and thereby erred in directing to treat the claim of loss under the head business as income without support of any legal provisions.

6.The learned CIT(A) failed to appreciate that the assessee is eligible for depreciation in respect of the value of building used by it for business and also for deduction of municipal taxes to the extent of the building used by it and thereby erred in not considering the ground of the assessee for directing to allow the loss claimed under the head business.

7.The learned CIT(A) erred in confirming the addition of Rs.2,96,51,889 made u/s.68 in spite of noting the fact that the same was not received during the previous year but it was only through a journal entry the balances in Share application money is transferred to unsecured loans and failing to appreciate the legal position that Sec.68 could be applied only if there is a direct credit in the previous year and further that such credit which appeared in earlier years was never questioned and added.

8. Any other ground that may be urged at the time of hearing”.

3. We advert to the first issue of income from house property addition of Rs.14,40,000/- discussed in the CIT(A)'s order as under:

“5.The Ground No.2 is with regard to determining notional income on the portion of building occupied by the appellant for business purposes at Rs.14,40,000/-.

5.1 With regard to above ground, during the course of assessment proceedings, the Assessing Officer observed as under:

As seen from the submissions of the assessee, the property is of three floors and a portion of second floor is given on rent and the balance is occupied by the assessee company. The total constructed area of the premises is 18,000 sft. This infers that each floor is 6,000 sft. As the assessee occupied the portion of the second floor and also as no details area of the let out portion is submitted by the assessee, it is assumed that the portion let out is half of the second floor i.e., 3000 sft.

In respect of balance portion, the Annual value cannot be taken at Nil in view of the provisions of Sec.23 (1)(c) of the I.T.Act and on application of the ratio laid out by the Hon'ble AP High Court in the case of Vivek Jain Vs. ACIT reported in 337 ITR 74. In view of the above, the Annual value of the property is arrived u/s.23(1)(a) of the I.T.Act.

Total area of the premises	: 18000 sft.
50% of the area of 2nd Floor (Taken as occupied by assessee)	: 3000 sft.
Area on which Annual value is to be determined	: 15000 sft.
50% of the area of 2nd floor (Taken as let out as declared by assessee)	: 3000 sft.

Annual let out value of 3000 sft as declared by assessee:

Rs.3,60,000

Annual let out value of 12000 sft which is not declared

By the assessee (36000013000X12000)= Rs. 14,40,000

Accordingly, the Annual value of the remaining two floors is taken as Rs.14,40,000/- and the same is added under the head 'Income from House property'.

Further, the assessee debited an amount of Rs. 6,93,195/- towards Municipal taxes. However, the expenses towards Municipal taxes is allowable only from the income derived from the house property and as part of 2nd floor i.e., 3000 sft, is occupied by the assessee on which this expenses if not allowable, the allowable expenditure towards Municipal tax on area of 15000 sft, works out to Rs. 5,77,662/-.

As per 26AS, the assessee derived total receipts of Rs. 3,90,000/- from the tenant, Cyberpark Development & Construction Limited and the tax deduction is Rs. 39,000/-. The assessee claimed the entire amount of TDS in the return of income. Accordingly, the rental income from the tenant is adopted at Rs.3,90,000/- as against Rs.3,60,000/- declared by the assessee.

5.2 During the course of appeal proceedings, the AR of the appellant with regard to above ground submitted as under:

The AO made this addition on the ground that the appellant has not admitted income on the vacant portion, by relying on a decision of the A.P. High Court in the case of Vivek Jain Vs. ACIT. It is unfortunate the AO is unaware that the said decision relate to the A. Y. 2002-03 when there was provisions for claiming vacancy allowance as income was estimated on notional basis even on self occupied property. As per the present provisions of Section 23, there is no provision allowing any vacancy allowance. On the other hand the clause (c) is very clear to the effect that the rent received or receivable. It also refers to clause (a) which proposes to estimate the ALV stating that it should be as per clause (c) i.e., received or receivable thereby meaning '0' if it '0'. The appellant submit that the premises is in fact occupied for its business purpose only and it was let out in the earlier years whose details are submitted and are enclosed. The kind attention of the Hon'ble CIT(A) is drawn to the annexure where in the details of letting out is given. It would be seen that during the F.Y.2010-11 itself there was no tenant and occupied by the appellant. In 2011-12 financial year only a portion of ground floor is let out to a real estate company and part of ground floor and terrace is let out for erecting antenna to another Telecom infrastructure company. The appellant therefore submit that the action of the AO in estimating rent on the basis of a decision which is not in accordance with the provisions for the relevant assessment year may be directed to be deleted.

5.3. After carefully considering the assessment order and submissions of the appellant, the submissions of the appellant are not accepted and income to be taxed under House property. Therefore, the addition made under House property confirmed”.

4. We have heard rival contentions against and in support of the correctness of the impugned rental income addition of Rs.14,40,000/-. It emerges from a perusal of a case file that there is no clarity even about the area let-out at the assessee's

behest on the specified portion of the second floor since both the learned lower authorities have adopted total constructed area as 18,000 sq. ft. having three floors admeasuring 6,000 sq. ft., of each floor. The assessee has also not filed the break-up of the constructed area as per the sanctioned municipal plan as well the rented portion in other words. We therefore are of the opinion that the instant issue requires afresh adjudication at the CIT(A)'s level. We order accordingly. The assessee is directed to place on record the exact measurement of the rented property viz-a-viz the entire constructed area as per the sanctioned building plan from the municipal authority; if any to be subjected to further factual verification as per law within three effective opportunities of hearing. We further grant liberty to the assessee to raise all factual/legal arguments in consequential proceedings.

5. Next is the second issue involving loss of Rs.15,85,613/- discussed in the CIT(A)'s order as under:

"6.3 I have carefully considered the assessment order and submissions of the appellant. As per the assessment order at para 8, it was observed by the AO that there is no business profits of the appellant and no income was derived from the business and so the depreciation calculated not to be allowed but finally this aspect was ignored by the Assessing Officer. In computation of total income by the appellant, the appellant ha-s shown income from House property loss at Rs.3,33,195/- and business income loss at Rs.12,52,418/-. This includes Profit and Loss account loss of Rs.21,99,838/- for which Municipal tax and depreciation was added and reduced depreciation as per I.T.Act and rent included of Rs.3,60,000/- and net effect arrived at total loss of Rs.15,85,613/-. Therefore, the depreciation claimed at Rs.17,44,761/- not to be allowed and added back to the total income. While doing the computation of income, the Assessing Officer taken house property income and added income from lease, income from interest and unexplained credit u/s 68 and after giving credit for loss and deduction u/s 80G and assessed the

total income at Rs.3,05,41,409/-. But actually when once the House property income is calculated, when there is no business income, the loss returned of Rs.15,85,613/- also not to be allowed and added back to the total income, which the Assessing Officer ignored. Therefore, even though in the assessment order, the Assessing Officer has discussed about depreciation but finally the total loss was not added back by the Assessing Officer. Therefore, since there is no business income, hence the business loss arrived at by the appellant at Rs.15,85,613/- to be treated as income. Hence, the total income is enhanced to the extent of Rs.15,85,613/-”.

6. It *prima-facie* emerges from a perusal of a case file that the Assessing Officer's assessment order dt.31-03-2015 had disallowed the assessee's loss to the tune of Rs.4,844/- only as against the CIT(A)'s findings *prima-facie* enhancing it to Rs.15,85,613/-. There is further no material in the case file suggest that the assessee had been ever issued any show cause notice to this effect in the lower appellate proceedings. We therefore are of the opinion that the instant second issue also requires CIT(A)'s afresh adjudication as per law in the very terms as regards in the first and foremost issue decided in preceding paragraphs. We order accordingly.

7. Lastly comes Section 68 un-explained cash credits issue of Rs.2,96,51,889/-. The assessee's only case is that the same does not pertain to the relevant previous year which could trigger Section 68 as per hon'ble Bombay high court (Goa Bench)'s recent decision in Ivansingh Vs. ACIT, dt.14-02-2020 holding that the clinching statutory expression '*previous year*' implies the previous year issue only than any other year.

7.1. Learned departmental representative fails to dispute that this clinching issue has nowhere been considered in the

CIT(A)'s detailed discussion. And also that the impugned addition has been treated as 'un-secured loans' as well.

7.2. We thus follow the very course of action *qua* the instant last issue as well. We direct the CIT(A) to decide the present issue afresh in the very terms.

8. This assessee's appeal is treated as allowed for statistical purposes in above terms.

Order pronounced in the open court on 28th April, 2021

Sd/-
(LAXMI PRASAD SAHU)
ACCOUNTANT MEMBER

Sd/-
(S.S.GODARA)
JUDICIAL MEMBER

Hyderabad,
Dated: 28-04-2021

Copy to :

1.M/s.Optrex Finexim Private Limited, C/o. K.Vasant Kumar, A.V.Raghu Ram, P.Vinod & M.Neelima Devi, Advocates, 610, Babukhan Estate, Basheerbagh, Hyderabad.

2.The Income Tax Officer, Ward-16(1), Hyderabad.

3.CIT(Appeals)-4, Hyderabad.

4.Pr.CIT-4, Hyderabad.

5.D.R. ITAT, Hyderabad.

6.Guard File.