

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B" MUMBAI**
**BEFORE SHRI M.BALAGANESH (ACCOUNTANT MEMBER) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)**

**ITA No.4369/MUM/2019
(Assessment Year: 2013-14)**

DCIT, Circle-3(1)(1),
Room No. 628, 6th Floor,
Aayakar Bhavan, M.K.Road,
Mumbai – 400 020

M/s Bengal Shapoorji Housing
Development Pvt. Ltd.,
Vs. S.P. Centre, 41-44,
Minoos Desai Marg,
Mumbai - 400005

PAN No. AACCM1595P

(Revenue)

(Assessee)

Assessee by : Dr. K.Shivaram, Sr. Advocate
Revenue by : Shri Tharian Oommen, D.R

Date of Hearing : 10/03/2021
Date of pronouncement : 23/03/2021

ORDER

PER RAVISH SOOD, J.M:

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-9, Mumbai, dated 12.04.2019 which in turn arises from the order passed by the A.O under Sec. 143(3) of the Income Tax Act, 1961 (for short 'Act'), dated 29.03.2016. The revenue has assailed the impugned order on the following grounds of appeal before us:

- "1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was correct in deleting the addition of Rs.2,44,04,876/- made by the Assessing Officer on account of notional rent u/s 23 even though the decision of the Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd. (2013) 29 taxmann.com 303 wherein it has been held that the assessee is liable to pay income tax on the annual lettable value of finished flats owned by it under the head 'income from House Property', is clearly in favour of Revenue?
2. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was correct in deleting the addition of Rs.2,44,04,876/- made by the Assessing Officer on account of notional rent u/s 23 relying on the decision of the Hon'ble ITAT in the case of C.R. Developments Pvt. Ltd. vs. JCIT (OSD) (ITA No.4277/Mum/2012) and Runwal Constructions vs. ACIT (ITA No.5408/Mum/2016) without appreciating that the decision of the Hon'ble ITAT in the case of C.R. v Developments Pvt. Ltd was not accepted by the Revenue and further appeal was filed before Hon'ble High Court which was later withdrawn following CBDT Instructions applicable at that time due to low tax effect and the decision in the case of Runwal Constructions was not

accepted by the Revenue, but appeal was not filed following CBDT Instructions applicable at that time due to low tax effect?

3. The appellant prays that the order of CIT(A) on the above grounds be set aside and that of Assessing Officer be restored
4. The appellant craves leave to amend, alter, delete or add grounds which may be necessary.”

2. Briefly stated, the assessee company which is engaged in the business of construction and development of real estate properties had filed its return of income for A.Y. 2013-14 on 29.11.2013, declaring a total loss of Rs.(-)10,52,38,092/-. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

3. During the course of the assessment proceedings it was observed by the A.O that the assessee company was holding finished flats as its closing stock valued at Rs.43,58,01,371/-. Being of the view that the annual lettable value of the unsold flats though held by the assessee as its stock-in-trade was liable to be assessed under Sec.22 of the Act, the A.O determined the same @ 8% of Rs.43,58,01,371/- (i.e value of the closing stock), and therein worked out the same at Rs.3,48,64,109/-. After allowing deduction under Sec. 24(a) @ 30% of the ALV, the A.O worked out the income of the assessee under the head ‘house property’ at Rs.2,44,04,876/-. After inter alia making the addition towards ALV of the aforesaid property held by the assessee as stock-in-trade of its business of a real estate developer, the A.O vide his order passed under Sec.143(3) dated 29.03.2016 assessed the loss of the assessee at Rs.(-) 8,08,04,176/-.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). It was observed by the CIT(A) that the A.O had made the addition towards ALV of the flats held by the assessee as its stock-in-trade by relying on the judgment of the **Hon’ble High Court of Delhi** in the case of **CIT Vs. Ansal Housing Finance & Leasing Company Limited Ltd. (2013) 354 ITR 180 (Del)**. On the other hand, it was noticed by the CIT(A) that the assessee had drawn support from the judgment of the **Hon’ble High Court of Gujarat** in the case of **CIT Vs. Neha Builders (P) Ltd. (2008) 296 ITR 661 (Guj)** and also certain orders of the coordinate benches of the Tribunal. After deliberating on the facts of the case, it was observed by the CIT(A) that as per judicial proprietary in a case where there were conflicting decisions of two non-jurisdictional High Court’s, the decision of a jurisdictional Tribunal delivered after considering such contrary decisions was to be followed. Accordingly, the CIT(A) relying on the decision of the ITAT,

Mumbai in the case of **C.R. Development Pvt. Ltd. Vs. JCIT (OSD) (ITA No. 4277/Mum/2012)** and **Runwal Constructions Vs. ACIT (ITA No. 5408/Mum/2016)** therein concluded that the addition made by the A.O could not be sustained and was liable to be vacated.

5. The revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The Id. Departmental Representative (for short 'D.R') relied on the assessment order. Further, the Id. D.R drew support from the judgment of the **Hon'ble High Court of Delhi** in the case of **CIT Vs. Ansal Housing Finance & Leasing Company Limited Ltd. (2013) 354 ITR 180 (Del)** and submitted that the A.O had rightly concluded that the ALV of the flats though held by the assessee as its stock-in-trade was liable to be assessed under Sec.22 of the Act.

6. The Id. Authorized Representative (for short 'A.R') for the assessee Dr. K. Shivaram, Senior Advocate took us through the facts of the case. The Id. A.R assailed the assessing of the ALV of the flats that were held by the assessee firm, a real estate developer, as its stock-in-trade of its business for the year under consideration. It was the claim of the Id. A.R that as the flats in question were held by the assessee firm as stock-in-trade and not as an investment, therefore, the ALV of the same could not have been determined and brought the tax in its hands. It was submitted by the Id. A.R that the issue involved in the present appeal was squarely covered by the order of a coordinate bench of the Tribunal i.e ITAT 'C' bench, Mumbai in the case of **M/s Osho Developers Vs. ACIT-32, Mumbai, ITA Nos. 2372 and 1860/Mum/2019, dated 03.11.2020** (copy placed on record). Accordingly, it was the claim of the Id. A.R that no infirmity did emerge from the order passed by the CIT(A) who had rightly vacated the addition made by the A.O towards the ALV of the property held by the assessee as stock-in-trade of its business as that of a real estate developer during the year in question.

7. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by them in support of their respective contentions. It is a matter of fact borne from the records that the property in question was held by the assessee as stock-in-trade of its business of construction and development of real estate properties. As observed by us hereinabove, the solitary issue involved in the present appeal is as to whether or not the ALV of the properties held by the assessee as stock-in-trade of its

business as that a real estate developer is liable to be brought to tax in its hands under Sec.22 of the Act. As stated by the Id. A.R, and rightly so, the issue herein involved is squarely covered by the order of the ITAT 'C' bench, Mumbai, in the case of M/s Osho Developers Vs. ACIT-32, Mumbai, ITA No. 2372 and 1860/Mum/2019, dated 03.11.2020, for AYs. 2014-15 and 2015-16. After deliberating at length on the issue under consideration the Tribunal had in its aforesaid order observed as under:

“7. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements that have been pressed into service by them for driving home their respective contentions. Admittedly, it is a matter of fact that the flats in question were held by the assessee firm, a real estate developer, as stock-in-trade of its respective projects viz. (i) Ashwin CHS Projects; and (ii) Infinity Project. As observed by us hereinabove, the A.O had determined and therein brought to tax the ALV of the aforesaid flats under the head 'house property' in the hands of the assessee firm. Our indulgence in the present appeal has been sought by the assessee, to adjudicate, the sustainability of the view taken by the lower authorities that the ALV of the flats held by the assessee as stock-in-trade was liable to be determined and therein brought to tax under the head 'house property'. As is discernible from the assessment order, the A.O by relying on the order of the **Hon'ble High Court of Delhi** in the case of **CIT Vs. Ansal Housing Finance and Leasing Company Ltd. (2013) 354 ITR 180 (Del)**, had determined the ALV of the flats which were held by the assessee as part of the stock-in-trade of its business of a builder and developer, and had brought the same to tax under the head 'house property'. On appeal, the CIT(A) had found favour with the view taken by the A.O by drawing support from the order of the **Hon'ble High Court of Bombay** in the case of **CIT Vs. Gundecha Builders (2019) 102 CCH 426 (Bom)**.

8. On a perusal of the order of the Hon'ble Jurisdictional High Court in the case of Gundecha Builders (supra), we find, that the issue before the High Court was that where an assessee, a real estate developer, was in receipt of rental income from a property held as stock-in-trade of its business as that of a real estate developer, then, whether the said receipts were to be brought to tax under the head 'house property' (as claimed by the assessee) or as 'business income' (as claimed by the revenue). The High Court after relying on its earlier order passed in the case of **CIT Vs. Sane & Doshi Enterprises (2015) 377 ITR 165 (Bom)**, had observed, that in a case where a real estate developer is in receipt of rental income in respect of a property held by him as stock-in-trade of its business as that of a real estate developer, the said rental receipts was to be assessed under the head house property. Accordingly, the issue before the High Court in the aforesaid case was as to under which head of income the rental receipts were liable to be assessed. Finding favour with the claim of the assessee, it was observed by the High Court that the rental income received from letting out of the unsold portion of the property constructed by the real estate developer was assessable to tax as its income from house property. Beyond any scope of doubt, the issue before the Hon'ble High Court was as to under which head of income the rental receipts were to be taxed i.e as 'business income' or 'income from house property'. Unlike the facts involved in the case before the High Court, in the case before us, the flats held by the assessee as stock-in-trade of its business of a builder and developer, having not been let out, had thus not yielded any rental income. As the Hon'ble High Court of Bombay in the case of Gundecha Builders (supra) was seized of the issue as to under which head of income the rental income received from the

unsold portion of the property constructed by a real estate developer was to be assessed, which is not the issue involved in the present appeal before us, therefore, the same in our considered view being distinguishable on facts would not assist the case of the revenue before us.

9. We shall now advert to the judgment of the **Hon'ble High Court of Delhi** in the case of **CIT Vs. Ansal Housing Finance and Leasing Company Ltd. (2013) 354 ITR 180 (Del)** by drawing support from which the A.O had determined and therein brought to tax the ALV of the flats held by the assessee as stock-in-trade of its business as that of a builder and developer. In the aforesaid case, it was the claim of the assessee that unlike the other builders as it was not into letting out of properties, the determination of deemed income which had formed the basis for assessment under the ALV method, was not called for in its case. However, the High Court being of the view that *the levy of income tax in the case of an assessee holding house property was premised not on whether the assessee carries on business, as landlord, but on the ownership, thus, turned down the aforesaid claim of the assessee. To sum up, in the backdrop of its conviction that the incidence of charge under the head house property was based on the factum of ownership of property, the High Court was of the view that as the capacity of being an owner was not diminished one whit, because the assessee carried on the business of developing, building and selling flats in housing estates, therefore, the ALV of the flats held as stock-in-trade by the assessee in its business of a builder and developer was liable to be determined and brought to tax under the head 'house property'. But then, we find, that taking a contrary view the Hon'ble High Court of Gujarat had way back in the case of CIT vs. Neha Builders (2008) 296 ITR 661 (Guj), observed, that rental income derived by an assessee from the property which was treated as stock-in-trade is assessable as business income and cannot be assessed under the head "Income from house property". The High Court while concluding as hereinabove, had observed, that admittedly the income derived from property would always be termed as 'income' from the property, but if the property is used as 'stock-in-trade', then the said property would become or partake the character of the stock, and any income derived from the stock would be 'income' from the business and not income from the property. In the backdrop of the conflict between the decisions of the aforesaid non-jurisdictional High Courts, as observed by the **Hon'ble High Court of Bombay** in the case of **K. Subramanian and Anr. Vs. Siemens India Ltd. and Anr (1985) 156 ITR 11 (Bom)**, the view which is in favour of the assessee has to be preferred as against that taken against him. Accordingly, following the judgment of the Hon'ble Jurisdictional High Court in the case of K. Subramanian and Anr. Vs. Siemens India Ltd. and Anr (1985) 156 ITR 11 (Bom), we respectfully follow the view taken by the Hon'ble High Court of Gujarat in the case of CIT vs. Neha Builders (2008) 296 ITR 661 (Guj). In fact, we find that the issue as to whether the ALV of a property held by an assessee as stock-in-trade of its business as that of a real estate developer had earlier came up before a 'SMC' bench of the **ITAT, Mumbai** in the case of **Shri. Rajendra Godshalwar Vs. ITO-21(3)(1), Mumbai [ITA No. 7470/Mum/2017, dated 31.01.2019]**. The Tribunal after considering the judgment of the Hon'ble High Court of Delhi in Ansal Housing Finance & Leasing Co. Ltd. (2013) 354 ITR 180 (Delhi) and that of the Hon'ble High Court of Gujarat in CIT vs. Neha Builders Pvt. Ltd., (2008) 296 ITR 661 (Guj), had concluded, that the ALV of the unsold property held by the assessee as stock-in-trade could not be determined and brought to tax under the head 'house property'. The Tribunal while concluding as hereinabove had also distinguished the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Sane & Doshi Enterprises (2015) 377 ITR 165 (Bom), as was relied upon by the revenue. The Tribunal while concluding as hereinabove had observed as under:*

“6. We have carefully considered the rival submissions. The short point involved in this appeal is the validity of addition sustained by the CIT(A) on account of notional ALV of the unsold flat, which is held by the assessee as stock-in-trade. Factually speaking, it is not in dispute that the flat in question is not yielding any rental income to the assessee, as it has not been let-out. It is also not in dispute that the project in question has been completed during the year under consideration, and the said flat is shown as stock-in-trade at the end of the year. At the time of hearing, the learned representative also pointed out that the flat has been ultimately sold on 06.11.2012. We find that our coordinate Bench in the case of C.R. Developments Pvt. Ltd. (supra) dealt with charging of notional income under the head 'Income from House Property' in respect of unsold shops which were shown by assessee therein as part of 'stock-in-trade'. As per the Tribunal "The three flats which could not be sold at the end of the year was shown as stock-in-trade. Estimating rental income by the AO for these three flats as income from house property was not justified insofar as these flats were neither given on rent nor the assessee has intention to earn rent by Shri Rajendra Godshalwar letting out the flats. The flats not sold was its stock-in-trade and income arising on its sale is liable to be taxed as business income. Accordingly, we do not find any justification in the order of AO for estimating rental income from these vacant flats u/s 23 which is assessee's stock in trade as at the end of the year. Accordingly, the AO is directed to delete the addition made by estimating letting value of the flats u/s 23 of the I.T. Act.”

7. In our view, the aforesaid observation of our coordinate Bench squarely applies to the facts of the present case. In the case of M/s. Runwal Constructions (supra) also, similar issue has been dealt with by our coordinate Bench. In the case of M/s. Runwal Constructions (supra), the Bench noted the judgment of the Hon'ble Gujarat High Court in the case of CIT vs Neha Builders Pvt. Ltd., 296 ITR 661 (Guj.) as also the judgment of the Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd., 354 ITR 180 (Delhi) and finally observed as under :-

"10. In the case on hand before us it is an undisputed fact that both assesseees have treated the unsold flats as stock in trade in the books of account and the flats sold by them were assessed under the head 'income from business'. Thus, respectfully following the above said decisions we hold that the unsold flats which are stock in trade when they were sold they are assessable under the head 'income from business' when they are sold and therefore the AO is not correct in bringing to tax notional annual letting value in respect of those unsold flats under the head 'income from house property'. Thus, we direct the AO to delete the addition made under Section 23 of the Act as income from house property.”

Following the aforesaid precedents, we find merit in the plea of the assessee, which deserves to be upheld.

8. Insofar as the judgment of the Hon'ble Bombay High Court in the case of Sane & Doshi Enterprises (supra) relied by the CIT(A) is concerned, the same, in our view, does not help the case of the Revenue. Quite clearly, the case before the Hon'ble High Court was relating to actual rental income received on letting out of unsold flats. The dispute pertained to the head of income under which such income was to be taxed - whether as 'Business Income' or as 'Income from House Property'. In the present case, the facts are quite different inasmuch as the unsold flat in question has not yielded any rental income as the flat has not been let-out, and is being held by the assessee purely as stock-in-trade; and, what the Assessing Officer has tried to do is to assess only a notional income thereof. Thus, the ratio of the judgment of the Hon'ble Bombay High Court in the case of Sane & Doshi Enterprises (supra) has been rendered in the context of qualitatively different facts, and is not applicable in the present case.”

Accordingly, preferring the view taken by the Hon'ble High Court of Gujarat in CIT vs. Neha Builders Pvt. Ltd. (2008) 296 ITR 661 (Guj), as per which the ALV of the unsold property held by an assessee as stock-in-trade could not be determined and brought to tax under the head 'house property', as against that arrived at by the Hon'ble High Court of Delhi holding to the contrary in CIT Vs. Ansal Housing Finance and Leasing Company Ltd. (2013) 354 ITR 180 (Del); and also following the order of ITAT, Mumbai in Shri. Rajendra Godshalwar Vs. ITO-21(3)(1), Mumbai [ITA No. 7470/Mum/2017, dated 31.01.2019], we herein conclude that the ALV of flats held by the assessee as part of the stock-in-trade of its business as that of a builder and developer could not have been determined and therein brought to tax under the head 'house property'.

10. Before parting, for the sake of clarity, we may herein observe that vide the Finance Act, 2017 w.e.f 01.04.2018 the legislature had inserted Sec. 23(5) of the Act. As per the said statutory provision, where the property consisting of any building or land appurtenant thereto is held as stock-in-trade and the property or any part of the property is not let during the whole or any part of the previous year, the annual value of such property or part of the property, for a period up to "one year" ["two years" vide the Finance Act, 2019 i.e w.e.f 01.04.2020] from the end of the financial year in which the certificate of completion of construction of the property is obtained from the competent authority, shall be taken to be nil. As the said statutory provision i.e Sec. 23(5) is applicable prospectively i.e w.e.f A.Y 2018-19, the same, thus, would have no bearing on the year under consideration in the case of the present assessee before us. Our aforesaid view is fortified by the aforesaid order of the ITAT, Mumbai in the case of Shri. Rajendra Godshalwar Vs. ITO-21(3)(1), Mumbai [ITA No. 7470/Mum/2017, dated 31.01.2019], wherein in context of the said aspect it was observed as under:

"9. Apart therefrom, we find that Sec. 23(5) of the Act has been inserted by the Finance Act, 2017 w.e.f. 01.04.2018. In terms of the said section, it is prescribed that "where the property consisting of any building or land appurtenant thereto is held as stock-in-trade and the property or any part of the property is not let during the whole or any part of the previous year, the annual value of such property or part of the property, for the period up to one year from the end of the financial year in which the certificate of completion of construction of the property is obtained from the competent authority, shall be taken to be nil". Though the said provision is effective from 01.04.2018, yet even if one is to see the present case from the standpoint of Sec. 23(5) of the Act, no addition is permissible in the instant year. It may be relevant to note that the completion certificate is stated to Shri Rajendra Godshalwar have been obtained on 28.11.2011 and going by the provisions of Sec. 23(5) of the Act, no addition is permissible in the instant assessment year. Be that as it may, we are only trying point out that the assessability of notional income in respect of unsold flat, which is taken as stock-in-trade, is not merited in the instant case. Thus, we set-aside the order of CIT(A) and direct the Assessing Officer to delete the addition."

11. We, thus, in the backdrop of our aforesaid deliberations not being able to concur with the view taken by the lower authorities, therein, set aside the order of the CIT(A) and direct the A.O to delete the addition made by him towards the ALV of the flats held by the assessee as stock-in-trade of its business as that of a builder and developer. The **Grounds of appeal Nos. 1 to 4** are allowed in terms of our aforesaid observations.

12. As we have concluded that the assessability of notional income i.e ALV in respect of unsold flats held by the assessee as stock-in-trade of its business as that of a builder and developer is not merited in the instant case, therefore, the grounds of appeal nos. 5 to 7 having been rendered as merely academic are not being adverted to and therein adjudicated upon.

The **Grounds of appeal nos. 5 to 7** are dismissed as not pressed in terms of our aforesaid observations.

13. The appeal of the assessee is allowed in terms of our aforesaid observations.”

As the facts and the issue involved in the appeal before us remains the same as were there before the Tribunal in the aforementioned case thus, finding no reason to take a different view, we herein respectfully follow the same. As such, finding no infirmity in the view taken by the CIT(A) we herein concur with him that the A.O was in error in assessing the notional lettable value of the flats held by the assessee as stock-in-trade of its business as that of a real estate developer.

8. Resultantly, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 23.03.2021

Sd/-
M. Balaganesh
(ACCOUNTANT MEMBER)
Mumbai, Date: 23.03.2021
PS: Rohit

Sd/-
Ravish Sood
(JUDICIAL MEMBER)

Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR “B” Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai