

**IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI
BEFORE SRI MAHAVIR SINGH, JM AND SRI RAJESH KUMAR, AM**

ITA No. 5248/Mum/2016

(A.Y. 2012-13)

Palm Grove Beach Hotels Pvt. Ltd. Construction House 'B', 2 nd Floor, 623, Linking Road, Khar (W), Mumbai-400 052	Vs.	The Deputy Commissioner of Income Tax, CC-4(1), 19 th Floor, Air India Bldg, Nariman Point, Mumbai-400 021
Appellant	..	Respondent
PAN No. AAACP2735J		

ITA No. 5249/Mum/2016

(A.Y. 2012-13)

Makewaves Sea Resort Pvt. Ltd. Construction House 'B', 2 nd Floor, 623, Linking Road, Khar (W), Mumbai-400 052	Vs.	The Deputy Commissioner of Income Tax Central Circle 4(1), 19 th Floor, Air India Bldg., Nariman Point, Mumbai-400 021
Appellant	..	Respondent
PAN No. AAACM0673J		

Assessee by : Sanjay Swami, AR

Revenue by : Saurabhkumar Rai, DR

Date of hearing: 07-02-2018 **Date of pronouncement :** 21-03-2018

ORDER

PER MAHAVIR SINGH, JM:

These appeals by two different Assessee are arising out of the different orders of Commissioner of Income Tax (Appeals)-52, Mumbai, [in short CIT(A)] in appeal No. CIT(A)-52/IT/AC-CC-4(1)/26 & 30 /2015-16 dated 29.06.2016 & 22-06-2016. The Assessments were framed by the Asst. Commissioner of Income Tax, Circle 23, Mumbai (in short ACIT) for



the assessment year 2012-13 vide order dated 09-03-2015 & 11-03-2015 under section 143(3) of the Income Tax Act, 1961 (hereinafter 'the Act').

2. The only common issue in these two appeals of different assessee is against the order of CIT(A) confirming the action of AO in charging deemed income by taking Annual Letting Value(ALV) of unsold flat, which is closing stock of the assessee. Exactly identical grounds are raised by both the assessee and we will take up the issue from ITA No. 5248/Mum/2016 and the assessee has raised the following two grounds:

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"1. On the facts and in the circumstances of othe case and in law, the learned CIT(A) has erred in confirming the action of AO in charging notional income considering Annual Letting Value of unsold flats which is closing stock of the appellant treated as Income from House Property and made addition of Rs 38,24,814/- under the head Income from House Property

2. On the facts and in the circumstances of the case and in law the learned CIT(A) has erred in not following the jurisdictional Income-tax Appellate Tribunal decision in the case of MIs C R Developments Pvt Ltd. v/s JCIT-8(1)(OSD). Mumbai (ITA No 4277/ Mum/2012) decided on 13th May, 2015."

3. Briefly stated facts are that the AO considered the ALV of unsold stock of flats which was claimed by assessee as closing stock but the AO treated the ALV of the unsold flat which is kept by assessee as closing stock, as deemed rental income and assessed under the head income from House property by making the addition of ₹ 38,24,814/-. The AO as well as CIT(A) relying on the decision of Hon'ble Delhi High Court in the



case of CIT vs. Ansal Housing Finance & Leasing Co. Ltd. (2013) 354 ITR 180 (Del), wherein it is held that the annual letting value of the unsold stock i.e. closing stock is assessable as deemed rent in the hands of the assessee, assessed the same as deemed income. The CIT(A) confirming the action of the AO by observing in Para 19 and 20 as under -

“19. It would be seen from the above that the Hon'ble Supreme Court has held that for deciding the issue whether income from a property is to be assessed as business income or income from house property, the deciding factor is the nature of the activity of the assessee and the nature of the operations in relation to the property. In the case of East India Housing and Land Development Trust Ltd., the assessee-company was incorporated with the object of buying and developing landed properties and promoting and developing markets. Accordingly, the rental income from some shops and stalls developed and rented out by the assessee was held to be assessable as income from house property. While holding so, the Hon'ble Court took note of the fact that letting out of the property was not the object of the assessee. Similarly, in the case of Karanpura Development Co. Ltd. v. CIT, the assessee was engaged in the activity of acquiring coal mining leases over large areas, developing them as coal fields and then sub-letting them to collieries and other companies. Therefore, the Hon'ble Court held that the income received from letting out of the mining leases should be treated as income from business. Further, in the case of Chennai Properties & Investments Ltd. also, it was held that rental income received from letting out of properties should be treated as business



income, observing that letting out of the properties was the business of the assessee. Thus, it is clear from the judgments of the Hon'ble Supreme Court discussed above that income earned from letting out of property will be assessed as income from business, only if the assessee is engaged in the business of letting out of properties. In the present case, the appellant has never taken a stand that it is engaged in the business of letting out of properties. As stated above, it is clear from the statement of facts tiled along with Form No.35 and written submissions filed by the appellant during assessment proceedings and appellate proceedings that it is engaged in the business of construction of properties and sale thereof. In fact, in the submissions, the appellant has also admitted that it was never its intention to earn income by letting out the premises. Therefore, the ratio of the decision of Hon'ble Supreme Court in the case of East India Housing and Land Development Trust Ltd. is squarely applicable to the facts of the present case. Further, the facts in the present case are identical to the facts in the case of Ansal Housing Finance & Leasing Co. Ltd. decided by the Hon'ble Delhi High Court, and, therefore, the said decision is also squarely applicable to the present case.

20. In view of the discussion in the foregoing paragraphs, I hold that the AO has rightly assessed deemed income from We unsold units in the hands of the appellant as per the provisions of Sec.22 and 23 of the Act. It may be mentioned here that before me, the appellant has not objected to the AO's working of annual letting value and computation of



income from the house property. Accordingly, the addition of Rs.38,24,814/- made by the AO is upheld on the grounds of appeal taken by the appellant are rejected.”

Aggrieved, now assessee is in second appeal before Tribunal.

4. We have heard rival contentions and gone through facts and circumstances of the case. We find from the facts of the case that the issue in appeal before us is covered by the decision of Hon'ble Delhi High court in the case of Ansal Housing Finance & Leasing Co. Ltd.(supra), wherein it is held as under: -

13. In the present case, the assessee is engaged in building activities. It argues that flats are held as part of its inventory of stock in trade, and are not let out. The further argument is that unlike in the other instances, where such builders let out flats, here there is no letting out and that deemed income - which is the basis for assessment under the ALV method, should not be attributed. This Court is of the opinion that the argument, though attractive, cannot be accepted. As repeatedly held, in East India, Sultan, and Karanpura, the levy of income tax in the case of one holding house property is premised not on whether the assessee carries on business, as landlord, but on the ownership. The incidence of charge is because of the fact of ownership. Undoubtedly, the decision in Vikram Cotton indicates that in ITA 18/99, 56,57,105, 107,109,114,177/01, 88/02 111, 321,498/03,227,336,529,690/04,212/05 Page 11 every case, the Court has to discern the intention of the assessee; in this case the intention of the



assessee was to hold the properties till they were sold. The capacity of being an owner was not diminished one whit, because the assessee carried on business of developing, building and selling flats in housing estates. The argument that income tax is levied not on the actual receipt (which never arose in this case) but on a notional basis, i.e. ALV and that it is therefore not sanctioned by law, in the opinion of the Court is meritless. ALV is a method to arrive at a figure on the basis of which the impost is to be effectuated. The existence of an artificial method itself would not mean that levy is impermissible. Parliament has resorted to several other presumptive methods, for the purpose of calculation of income and collection of tax. Furthermore, application of ALV to determine the tax is regardless of whether actual income is received; it is premised on what constitutes a reasonable letting value, if the property were to be leased out in the marketplace. If the assessee's contention were to be accepted, the levy of income tax on unoccupied houses and flats would be impermissible - which is clearly not the case.

14. As far as the alternative argument that the assessee itself is occupier, because it holds the property till it is sold, is concerned, the Court does not find any merit in this submission. While there can be no quarrel with the proposition that "occupation" can be synonymous with physical possession, in law, when Parliament intended a property occupied by one who is carrying on business, to be exempted from the levy of income tax was that such property should be used for the



purpose of business. The intention of the lawmakers, in other words, was that occupation of one's own property, in the course of business, and for the purpose of business, i.e. an active use of the property, (instead of mere passive possession) qualifies as "own" occupation for business purpose. This contention is, therefore, ITA 18/99, 56,57,105, 107,109,114,177/01, 88/02 111, 321,498/03,227,336,529,690/04,212/05 Page 12 rejected. Thus, this question is answered in favour of the revenue, and against the assessee.

15. The next question which arises, is deduction under Section 32 AB on interest income. This arises for consideration in ITA Nos. 18/1999, 56/2001 and 114/2001. In all the concerned years the assessee had claimed benefit under Section 32 AB (1)(b) contending that it had utilized amounts during the previous year for purchase of new machinery or plant. The Appellate Commissioner had allowed its claim, and in some instances, the Tribunal did so. The revenue urges that the assessee was not entitled to claim the benefit, since it did not carry on eligible business at the relevant time. The assessee, on the other hand, counters by contending that the eligibility for the benefit was never in issue, or questioned by the tax authorities, and what was in fact considered as well as decided was the correct method of computation.

16. This court is of the opinion that the question is no longer res integra, and is covered by the decision of the Supreme Court in Apollo Tyres Ltd v CIT 255 ITR 273. It was held, in that decision that if a



business qualifies for the benefit granted under Section 32AB, if an assessee carries on business covered by that provision, and "has utilized any amount during the previous year for the purchase of new plant or machinery then it is entitled to a set off of a sum equal to 20 per cent of the profit of such eligible business as computed in the accounts of the assessee which account has been audited in accordance with sub-section (5) of Section 32AB"

17. In the present case, the approach of the tax authorities, as well as the Tribunal, was to compute the benefit of set off, in the manner described, and approved in Apollo Tyres. The Court also notices that the eligibility or entitlement of the assessee to claim the benefit, was never questioned in the proceedings before the lower authorities. Accordingly, the question is answered in favour of the assessee, and against the revenue."

5. Since the assessee relied on ITAT Mumbai decision in the case of CR Development Pvt. Ltd vs. JCIT in ITA No. 4277/Mum/2012 order dated 13-05-2015, the same cannot be followed, because now the issue is covered by Hon'ble Delhi High Court decision. Accordingly, the issue of assessee's appeal is dismissed.

6. In the Result, both the appeals of assessee's are dismissed.

Order pronounced in the open court on 21-03-2018.

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER



ITA No.5248&5249/Mum/2016

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT (A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.
//True Copy//

BY ORDER,

Assistant Registrar
ITAT, MUMBAI