IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G" MUMBAI

BEFORE SHRI C.N. PRASAD (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 5082/MUM/2016
Assessment Year: 2012-13

Progressive Homes 707, Devavrata Sector 17, Vashi, Navi Mumbi-400703	Vs.	ACIT, Circle-4(4) CGO Building M.K. Road, Mumbai-400020.
PAN No. AAHFM5228J **Appellant**		**Respondent**

Assessee by : Mr. Rajiv Waglay, AR
Revenue by : Mr. V. Vidhyadhar, DR

Date of Hearing : 04/04/2018
Date of pronouncement : 16/05/2018

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2012-13. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-52, Mumbai [in short the 'CIT(A)'] and arises out of the assessment completed u/s 143(3) of the Income Tax Act 1961, (the 'Act').

2. The 1st ground raised by the assessee is against the order of the Ld. CIT(A) confirming the addition of Rs.55,69,200/- (out of Rs.64,26,000/-) on account of notional income under the head 'Income from House Property' made by the AO in respect of unsold flats shown as stock-in-trade.

3. Briefly stated, the facts of the case are that the assessee, a builder and developer, filed its return of income for the assessment year (AY) 2012-13 on 28.09.2012 declaring total income of Rs.5,46,61,400/-. During the course of assessment proceedings, the Assessing Officer (AO) observed from the books of accounts that the assessee had an inventory of 47 unsold flats in Highness Project and 4 unsold flats in Sea Loung Project. In response to a query raised by the AO to explain why deemed house property income be not charged on completed flats in possession of the assessee in view of the decision in *CIT v. Ansal Housing Construction Ltd.* 241 Taxman 418 (Del), the assessee filed a reply submitting that it is only into building and construction activity and not into leasing or renting the flats.

The AO vide order sheet noting dated 27.02.2015 asked the assessee to explain as to why the Annual Letting Value (ALV) be not determined at fair market value in respect of 51 flats. In reply, the assessee stated that in absence of non-acceptance of Municipal Rateable Value, the ALV be determined at Rs.91,80,000/- (Rs.15,000/- per month). The assessee filed a copy of the Leave and License agreement. Thus the AO determined the ALV at Rs.15,000/- for flat aggregating to Rs.91,50,000/- and added the same to the total income of the assessee.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) at para 17 of his order dated 01.06.2016 held:

> "17. It is gathered that during the course of assessment proceedings, the appellant had itself mentioned in the submissions made before the AO that

the fair market rent of the properties in question in the FY 2014-15, on the basis of lease deeds, etc. was Rs.15,000/- per month per flat. It is on this basis that the AO had adopted the fair market rent of unsold flats at Rs.15,000/- per month per flat. However, the AO committed a mistake by adopting the fair market rent mentioned by the appellant for the AY.2014-15 as fair market rent for the year under consideration, i.e. A.Y. 2012-13. The appellant in its submissions has mentioned that there would be appreciation by 10% every year in the rent rates, and, accordingly, the fair market rent for the year under consideration (F.Y. 2011-12) may be considered at Rs.11,300/- per month per flat. In my view, the yearly appreciation in rent rates is not likely to be as high as 10%, as contended by the appellant, and it may be in the range of 5% - 7%. Therefore, considering the overall facts of the case, it will be appropriate to adopt the fair market rent for the unsold flats in question at Rs.13,000/- per month per flat. Consequently, the annual letting value of the 51 unsold flats may be worked out at Rs.79,56,000/-. After allowing deduction of Rs.23,86,800/- u/s.24(a) of the Act, the deemed income from house property assessable in the hands of the appellant works out to Rs.55,69,200/- as against Rs.64,26,000/- worked out by the AO. Accordingly, the addition of Rs.64,26,000/- made by the AO is restricted to Rs.55,69,200/-, and the appellant gets a relief of Rs.8,56,800/- in this regard. The grounds taken by the appellant in this regard are, accordingly, partly allowed."

5. Before us, the Ld. counsel of the assessee submits that in terms of section 23(5) of the Act inserted by the Finance Act 2017 w.e.f. 01.04.2018, in the case of building or land held as stock-in-trade which is not let during the year, the annual value of the same up to one year from the end of the financial year in which certificate of completion of construction of property is obtained from the competent authority, shall be taken as Nil and as can be seen, the said section will apply w.e.f. AY 2018-19. The above section inserted w.e.f. AY 2018-19 shows the

intention of the legislature in not taxing the same for the previous period.

The Ld. counsel also relies on the order dated 13.05.2015 of ITAT 'C' Bench, Mumbai in *C.R. Development Pvt. Ltd. v. JCIT* (ITA No. 4277/Mum/2012) for AY 2009-10 and the order dated 22.02.2018 of the ITAT 'G' Bench Mumbai in *M/s Runwal Constructions v. ACIT* (ITA No. 5408/Mum/2016) for AY 2012-13.

6. On the other hand, the Ld. DR relies on the decision *Ansal Housing Construction Ltd.* (supra) and supports the order passed by the Ld. CIT(A).

7. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

The following sub-section (5) has been inserted after sub-section (4) of section 23 by the Finance Act, 2017, w.e.f. 01.04.2018:

> "(5) Where the property consisting 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 nil."

Thus, in order to give relief to Real Estate Developers, section 23 has been amended w.e.f. AY 2018-19 (FY 2017-18). By this amendment, it is provided that if the assessee is holding any house property as his stock-in-trade which is not let out for the whole or part of the year, the

annual value of such property will be considered as Nil for a period up to one year from the end of the financial year in which a completion certificate is obtained from the competent authority.

In view of the above amendment to section 23, we are not adverting to the case laws relied on by the Ld. counsel and Ld. DR.

In the instant case, the assessee is a builder and developer. The issue of taxability is with regard to 51 unsold flats. The AY is 2012-13. In view of the insertion of sub-section (5) in section 23 by the Finance Act, 2017, w.e.f. 01.04.2018 narrated hereinbefore, we set aside the order of the Ld. CIT(A) and allow the 1st ground of appeal.

8. The 2nd ground raised by the assessee in this appeal is against the order of the Ld. CIT(A) confirming the disallowance of Rs.1,76,676/- made by the AO u/s 14A.

9. The assessee has received exempt dividend income of Rs.2,21,881/- during the year under consideration. The AO vide notice u/s 142(1) dated 23.01.2015 asked the assessee to furnish the reasons as to why disallowance u/s 14A r.w Rule 8D should not be made. In response to it, the assessee replied that provisions of section 14A are not applicable in its case. However, the AO was not convinced with the reply and made a disallowance Rs.1,76,676/- u/s 14A r.w. Rule 8D. [Rs.12,000/- under Rule 8D(2)(i); Rs.1,38,951/- under Rule 8D(2)(ii) and Rs.25,725/- under Rule 8D(2)(iii)].

10. In appeal, the Ld. CIT(A) agreed with the computation made by the AO u/s 14A r.w. Rule 8D and confirmed the said disallowance of Rs.1,76,676/-.

11. Before us, the Ld. counsel of the assessee submits that the partners' capital account as on 31.03.2012 showed a credit balance of Rs.19,28,71,467/- which was more than enough to cover the investment in mutual funds to the tune of Rs.51,45,000/- and therefore, interest expenditure cannot be attributed to tax-free income either in whole or in part.

12. On the other hand, the Ld. DR relies on the order of the Ld. CIT(A).

13. We have heard the rival submissions and perused the relevant materials on record. As per the balance sheet as at 31.03.2012, the partner's capital account having a credit balance of Rs.19,28,71,467/- is more than the investment in mutual funds to the tune of Rs.51,45,000/-

In *HDFC Bank Ltd. v. DCIT* [2016] 67 taxmann.com 42 (Bom), the Hon'ble Bombay High Court referring to the decision in CIT v. HDFC Bank Ltd. [2014] 366 ITR 505 (Bom) and CIT v. Reliance Utilities & Power Ltd. [2009] 313 ITR 340 (Bom) held as under :

> "15. It is clear that for the first time in the case of HDFC Bank Ltd. (supra) that this Court took a view that the presumption which has been laid down in Reliance Utilities & Power Ltd. (supra) with regard to investment in tax free securities coming out of assessee's own funds in case the same are in excess of the investments made in the securities (notwithstanding the fact that the assessee concerned may also have taken some funds on interest) applies, when applying Section 14A of the Act. Thus, the decision of this Court in

HDFC Bank Ltd. (supra) for the first time on 23rd July, 2014 has settled the issue by holding that the test of presumption as held by this Court in Reliance Utilities and Power Ltd. (supra) while considering Section 36(1)(iii) of the Act would apply while considering the application of Section 14A of the Act. The aforesaid decision of this Court in HDFC Bank Ltd. (supra) on the above issue has also been accepted by the Revenue in as much as even though they have filed an appeal to the Supreme Court against that order on the other issue therein viz. broken period interest, no appeal has been preferred by the Revenue on the issue of invoking the principles laid down in Reliance Utilities & Power Ltd. (supra) in its application to Section 14A of the Act."

In view of the above position of law, we delete the disallowance of Rs.1,38,951/- made by the AO under Rule 8D(2)(ii).

13.1 In *Godrej & Boyce Mfg. Co. Ltd. v. Dy. CIT* (2010) 194 Taxman 203 (Bom.) the Hon'ble Bombay High Court has explained Rule 8D as under :

"As regard Rule 8D(2)(iii), it had been submitted that some mechanism or formula had to be adopted for attributing part of the administrative / managerial expenses to tax-exempt investment income. The administrative expenses attributable to tax-free investment income have a fixed component and a variable component. A view was taken that the disallowance should also be linked to the value of the investment rather than the amount of exempt income. Under Portfolio Management Schemes (PMS), the fee charged ranges between 2 and 2.5 per cent of the portfolio value which would be inclusive of a profit element for the portfolio manager.

While the fixed administrative expenses were excluded on the ground that in the case of a large corporate taxpayer they would be spread over a large number of voluminous activities, the variable expenses were computed at one-half per cent of the value of the investment."

Thus, the disallowance of Rs.25,725/- made by the AO under Rule 8D(2)(iii) is confirmed. Also the expenditure of Rs.12,000/- directly related to income which does not form part of total income, disallowed by the AO under Rule 8D(2)(i) is confirmed.

14. In the result, the appeal is partly allowed.

Order pronounced in the open Court on 16/05/2018.

Sd/-	Sd/-
(C.N. PRASAD)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 16/05/2018
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai