

IN THE INCOME TAX APPELLATE TRIBUNAL "F" BENCH, MUMBAI
BEFORE SHRI PAWAN SINGH, JM AND SHRI RAJESH KUMAR, AM

ITA No.5550/Mum/2016 Assessment Year 2012-13

Vijay Enterprises Ground Floor, Eesha Kripa, Brahman Sabha Lane, Malad-(W) Mumbai-400 064.	Vs.	DCIT - 30(3), C-13 6 th Floor, Pratyakshakar Bhavan, Bandra Kurla Complex, Bandra (E), Mumbai-400 051.
PAN :AAAFV 2622 D		
(Appellant)	..	(Respondent)
Appellant by	Shri Rajesh Kumar C. Gandhi	
Respondent by	Shri Rajeev Gubgotra & Shri D.G. Pansari Sr DR's	
Date of Hearing	26/04/2019	
Date of Pronouncement	30/04 /2019	

ORDER

Per Pawan Singh , Judicial Member:

1. This appeal by assessee is directed against the order of Id. Commissioner of Income-tax(Appeals)-41, Mumbai [Id. CIT(A)] dated 24/06/2016 for Assessment Year 2012-13, which arises from assessment order passed u/s. 143(3) dated 31/03/2015 . The assessee has raised the following Grounds of appeal :-

1. *The learned CIT (A) erred by treating the Appellant's unsold premises which are held by them as stock in trade, the Appellant being Builders & Developers, by treating such unsold premises as deemed let out and charging the same to tax u/s 23 of the Income Tax Act, 1961.*
2. *Alternatively, without prejudice to Appellant's earlier ground and without admitting, in the event the learned CIT (A) having made applicable the provisions contained under the head Income from House Property for the Appellant's Stock-in-trade, the learned CIT(A) erred by not granting vacancy allowance for such vacant Stock-in-trade under the head Income from House Property.*

3. *Without prejudice to Appellant's earlier ground and without admitting, the Learned CIT(A) erred by not working out deemed rent based on the Municipal Ratable Value/Rent for the unsold flats and thus erred by working out addition on account of deemed rent by taking market rent of other flats/premises.*

4. *Appellant craves leave to add, amend, alter, substitute or delete any one or more of the aforesaid grounds of appeal.*

2. Brief facts of the case are that the assessee is a partnership firm engaged in the business of construction is a builder and developer, filed its return of income for relevant assessment year on 26 September 2012. In the return of income the assessee claimed its income from house property, business, capital gain and other sources. The assessment was completed under section 143(3) on 31.03.2015. The assessing officer while passing the assessment order estimated the annual letting value of unsold flat and brought to tax under the head income from 'house property'. On appeal before Commissioner (Appeals) the action of assessing officer was confirmed. Therefore, further aggrieved by the order of Commissioner (Appeals) the assessee has filed present appeal before us.

3. We have heard the rival submission of the parties and perused the material available on record. We have also deliberated on the various case laws relied by lower authorities. The ld. AR for the assessee further submits that the finding of the assessing officer in para 6.3 are not correct; the assessee has not let out such unsold flat during the relevant period the assessee in the business of Builders and Developers and has shown the unsold units as stock in trade. The ld. AR submits that the

Grounds raised by the assessee are covered by the decision of Hon'ble Gujarat High Court in the case of Neha Builders (P.) Ltd. (296 ITR 661) dated 18th August, 2006 and the decisions of the Mumbai Tribunal in ITO Vs Arihant Estate Pvt Ltd in ITA No.6037/Mum/2016 for A.Y. 2012-13 dated 27/06/2018, Runawal Constructions Vs ITO & Runawal Builder P Ltd Vs ACIT in ITA No(s) 5408 & 5409/Mum/2016 respectively. The ld AR for the assessee also relied on the recent decision of Pune Tribunal in ITO Vs Arihant Estate Pvt Ltd in ITA No. 6037/Mum/2016 dated 27.06.2018.

4. On the other hand the learned DR for the revenue supported the order of authorities below.
5. The ld. AR for the assessee was confronted with the decision of Hon'ble Bombay High Court in Mangla Homes (P) Ltd v. ITO [2009] 182 Taxman 55/[2010] 325 ITR 281.
6. The ld. AR of the assessee submits that the ratio of the decision of jurisdictional High Court in *Mangla Homes (P) Ltd.'s* case (*supra*) is not applicable on the facts of the present case. The facts of the said case are entirely different. The assessee in the said case is not the builder like the assessee in the case in hand. In *Mangla Homes (P) Ltd.'s* case (*supra*) the assessee has not shown the vacant flats as stock in trade, rather they were

engaged in the business of let out of the properties, which was one of their object.

7. We have considered the rival submission of the parties and have gone through the orders of authorities below. We have noted that the assessee has raised three ground of appeal, in alternative to each other. Ground No. 1 relates to treating the unsold flat which is shown as stock in trade, by treating taxable under section 23 of the Act. During the assessment the assessing officer noted that the assessee completed two projects namely “Nazarene” and “Symphony”. The assessee has shown unsold flat in ‘Nazarene’ at Rs. 75,39,218/- and in ‘Symphony’ at Rs.10,00,36,150/-. The assessing officer by referring to the decision of the Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd. (supra) computed the notional annual letting value (ALV) of the unsold flats and brought to tax under [Section 23](#) of the Act as income from house property. The Id CIT(A) confirmed the action of assessing officer holding that the fact of the case are similar to the facts of case law relied by assessing officer in Ansal Housing Finance & Leasing Co. Ltd (supra).
8. There is no dispute of the fact that the assessee is in the business of builders, developers and construction. The assessee has constructed two projects namely “Nazarene” and “Symphony”. The assessee has shown

unsold flat in 'Nazarene' at Rs. 75,39,218/- and in 'Symphony' at Rs.10,00,36,150/- as stock in trade in the books of account. Flats sold by the assessee were offered by assessee under the head 'income from business'. There were certain unsold flats in stock in trade which the AO treated as property assessable under the head 'income from house property' and computed notional annual letting value on such unsold flats placing reliance on the decision in the case of Ansal Housing Finance & Leasing Co. Ltd. (supra). The Id AR for the assessee strongly relied on the decision of Mumbai Tribunal in Runawal Constructions & Runawal Builders Pvt Ltd (supra), wherein the following order was passed;

“7. We have heard the rival submissions and perused the orders of the authorities below and the decisions relied upon. It is an undisputed fact that the assessee's are in the business of builders, developers and construction. Both the assessee's have constructed various projects and the projects were treated as stock in trade in the books of account. Flats sold by the assessee's were assessed under the head 'income from business'. There were certain unsold flats in stock in trade which the AO treated as property assessable under the head 'income from house property' and computed notional annual letting value on such unsold flats placing reliance on the decision in the case of Ansal Housing Finance & Leasing Co. Ltd. (supra). The action of the AO was upheld by the learned CIT(A).

8. The Hon'ble Gujarat High Court in the case of Neha Builders Pvt. Ltd. (supra) considered the question whether the rental income received from any property in the construction business can be claimed under the head 'income from property' even though the said property was included in the closing stock. The Hon'ble Gujarat High Court held that if the business of the assessee is to construct the property and sell it or to construct and let out the same, then that would be the business and the business stocks, which may include movable and immovable, would be taken to be stock in trade and any income derived from such stocks cannot be termed as income from house property. While holding so the Hon'ble High Court observed as under: -

"8. True it is, that income derived from the 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. If the business of the assessee is to construct the property and sell it or to construct and let out the same, then that would be the 'business' and the business stocks, which may include movable and immovable, would be taken to be 'stock-in-trade', and any income derived from such stocks cannot be termed as 'income from property'. Even otherwise, it is to be seen that there was distinction between the 'income from business' and 'income from property' on one side, and 'any income from other sources'. The Tribunal, in our considered opinion, was absolutely unjustified in comparing the rental income with the dividend income on the shares or interest income on the deposits. Even otherwise, this question was not raised before the subordinate Tribunals and, all of sudden, the Tribunal started applying the analogy.

9. From the statement of the assessee, it would clearly appear that it was treating the property as 'stock-in-trade'. Not only this, it will also be clear from the records that, except for the ground floor, which has been let out by the assessee, all other portions of the property constructed have been sold out. If that be so, the property, right from the beginning was a 'stock-in-trade'."

9. Similarly the Coordinate Bench has considered similar issue as to whether the unsold property which is held as stock in trade by the assessee can be assessed under the head 'income from house property' by notionally computing the annual letting value from such property and the Coordinate Bench considering the decision of the Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd. (supra) which the AO relied upon and the decision of the Hon'ble Supreme Court in the case of [Chennai Properties & Investments Ltd. vs. CIT](#) reported in 373 ITR 673, held that unsold flats which are in stock in trade should be assessed under the head 'business income' and there is no justification in estimating rental income from those flats and notionally computing annual letting value under [Section 23](#) of the Act. While holding so the Coordinate Bench observed as under: -

"3. The ld. AR placed the order of Bombay Tribunal in the case of M/s Perfect Scale Company Pvt. Ltd., ITA Nos.3228 to 3234/Mum/2013, order dated 6-9-2013, wherein it was held that in respect of assets Runwal Constructions & Runwal Builders held as business, income from the same is not assessable u/s.23(1) of the [IT Act](#).

4. On the other hand, ld. DR relied on the order of Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd., 354 ITR 180 (Delhi) in support of the proposition that even in respect of unsold flats by the developer is liable to be taxed as income from house property.

5. We have considered rival contentions and perused the record. The issue under consideration has been restored by the CIT(A) to the file of AO to compute the annual value. Recently the Hon'ble Supreme Court in the case of M/s Chennai Properties & Investments Ltd. Vs. CIT, reported in (2015) 42 SCD 651, vide judgment dated 9-4-2015 has held that where assessee company engaged in the activity of letting out properties and the rental income received was shown as business income, the action of AO

treating the rental income as income from house property in place of income from business shown by the assessee was held to be not justified. The Hon'ble Supreme Court held that since the assessee company's main object, is to acquire and held properties and to let out these properties, the income earned by letting out these properties is main objective of the company, therefore, rent received from the letting out of the properties is assessable as income from business. On the very same analogy in the instant case, assessee is engaged in business of construction and development, which is main object of the assessee company. 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 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."

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 Runwal Constructions & Runwal Builders house property'. Thus, we direct the AO to delete the addition made under [Section 23](#) of the Act as income from house property.

9. Further, by following the decision of Runawal Constructions & Runawal Builders (supra), identical relief was granted in Arihant Estate Pvt Ltd (supra). Coming to the facts of the present case, when the flats are not at variance as the assessee has shown the unsold flats as stock in trade.
10. In CIT Vs Ansal Housing Finance Ltd (supra) the Hon'ble Delhi High Court has taken a view that ALV of unsold flat built by the builder is assessable as income from the house property. However, there is contrary view of Hon'ble Gujarat High Court in Neha Builders (supra) that income derived from the 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 income derived from the stock, would be 'income' from the business, and not from the property. If the business of the assessee is to construct the property and to sell it or to construct and let out the same, then would be the 'business' and the business stocks, may included moveable or immoveable, would be taken to be 'stock in trade' and any income from such stock cannot be termed as 'income from property'. There is no direct decision on this issue by Jurisdictional High Court; therefore, the view in favour of the assessee has to be adopted in view of decision of Hon'ble Apex Court in CIT Vs Vegetable product Ltd. (88 ITR 192 SC). Sub-section (5) in section 23 was inserted by finance Act 2017 w.e.f. 01.04.2018; therefore, the same is not applicable for the assessment year under consideration.

11. Therefore, respectfully following the decisions of coordinate bench the and the decisions of Gujarat High Court in Neha Builders (supra) we are of the view that the assessing officer was not justified in bringing the unsold flat to bring it under income from house property.

12. In the result the ground No.1 of the appeal is allowed.

13.Considering our finding on ground No.1, which we have allowed, therefore, the alternative grounds of appeal raised by the assessee has become academic.

14.In the result the appeal of the assessee is allowed.

Order pronounced in the open court on 30.04.2019.

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER
Mumbai; Dated: 30/04/2019

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

SK-PS.

Copy of the Order forwarded to :

- 1.Appellant /अपीलार्थी
2. Respondent /प्रत्यर्थी
- 3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त,
- 4.The concerned CIT /संबद्ध आयकर आयुक्त
- 5.DR "F" Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अ.न्याया.मुंबई
- 6.Guard File/गार्ड फाईल

आदेशानुसार/ **BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई /**ITAT, Mumbai.**