

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "F", MUMBAI

Before Shri Rajesh Kumar, Accountant Member
& Shri Ram Lal Negi, Judicial Member

ITA Nos.2811 & 2812/Mum/2018
Assessment Years : 2013-14 & 2014-15

Unique Estates Development Co. Ltd. Construction House B- 2 nd Floor, 623 Linking Road, Khar (W), Mumbai 400 052. PAN AAACU0699N	Vs.	DCIT CC 4(1), Mumbai.
(Appellant)		(Respondent)

Appellant By : Shri Sanjay Sawant
Respondent By : Shri Rajeev Gubgotra

Date of Hearing :07.08.2019	Date of Pronouncement : 22.08.2019
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ORDER

Per Rajesh Kumar, Accountant Member

The captioned appeals filed by the assessee pertaining to A.Y. 2013-14 and 2014-15 are directed against two separate orders, both dated 12.03.2018 passed by the CIT(A)-52, Mumbai, which in turn arise out of orders passed by the Assessing Officer under Section 143(3) of the Income Tax Act, 1961 (hereinafter "the Act").

2. The only issue raised in appeal for A.Y. 2013-14 is against the order of the CIT(A) confirming the disallowance of Rs 6.52,243/- as made by the AO by

estimating the Annual Letting Value (ALV) of unsold flats forming part of closing stock in trade and assessing the same as 'Income from house property.'

3. During the course of assessment proceedings, the AO observed that the assessee is holding some unsold flats in various projects constructed by the assessee as stock-in-trade. According to the AO said flats constitute property in the hands of the assessee and liable to be assessed under the head 'Income from house property' and, thus, estimated the ALV at Rs 9,31,776/-. Further, the AO after allowing deduction of 30% towards statutory allowance of Rs 2,79,533/- added an amount of Rs 6,52,243/- to the net taxable income of the assessee under the head 'Income from house property.' The learned AR submitted before the Bench that the issue is squarely covered in favour of the assessee by the decision of the co-ordinate Bench, vide order dated 20.03.2019, in the case of assessee's sister concern Makewaves Sea Resort Pvt. Ltd. in ITA Nos. 36 & 37/Mum/2018 for A.Y. 2013-14 and 2014-15. It is submitted that similar addition made by the estimating the notional rent in respect of unsold flats was deleted by the Tribunal. The learned AR prayed before the Bench that the addition as made by the AO estimating the ALV of unsold flats be deleted by following the aforementioned order of the Tribunal.

4. The learned DR strongly objected to the arguments of AR by submitting that the AO has rightly treated the unsold flats as property liable to be assessed as 'Income from house property. He placed reliance on the decision of Hon'ble Bombay High Court in the case of CIT vs. Gundecha Builders [2019] 102

taxmann.com 27 (Bom). The learned AR submitted that in the said case the assessee has received rental income from unsold property constructed by it, which was held by the AO to be assessed as 'Income from house property' as against business income treated by the assessee. The Hon'ble High Court upheld the order of the Tribunal wherein income was held to be assessed as 'Income from house property'.

5. After hearing both the parties and perusal of material available on record, we observe that the issue of estimation of notional rent in respect of unsold plots has been decided in the case of assessee's sister concern Makewaves Sea Resort Pvt. Ltd (supra), wherein it has been held as under:

"8. We have heard the rival submissions of the parties and also perused the material on record including the decision relied upon by the assessee. As pointed out by the Ld. counsel the coordinate Bench has decided the identical issue in favour of the assessee in the case of Ferani Hotels Ltd. vs. ACIT (supra). The findings of the coordinate Bench are as under:-

"6. Under this issue the assessee has challenged the confirmation of the addition of Rs.13,22,90,044/- under the head of income from house property on account of deemed income from unsold unit/ flat which was closing stock of the appellant as per provisions of Sections 22 and 23 of the Act. At the very outset, the Ld. Representative of the assessee has argued that the assessee is deriving its income from hotel business and construction. The assessee was also deriving income from dividend, share of profit and sale of flats and due to the recession, the assessee failed to sold out all the flats, therefore, some flats remain vacant which was being treated as stock in trade. The AO has wrongly assessed the notional rent and assessed the rent in view of the provision u/s 24 of the Act wrongly which can only be treated

under the head of income from business, therefore, the finding of the CIT(A) is wrong against law and facts and is liable to be set aside. It is also argued that the case of the assessee is fully covered by the case of Runwal Construction Vs. ACIT in ITA. No. 5408/M/2016 & C.R. Developments Vs. JCIT in ITA. No. 4277/M/2012 dated 13.05.2015. However, on the other hand, the Ld. Representative of the Department has refuted the said contention. On appraisal of the facts of the case and relevant record on the file, we noticed that the object of the assessee is deriving of income from Hotel Business and Construction. The assessee company is running a five star hotel in the name and style of The Carlton at Kodaikannal, Tamil Nadu, having rooms and other facilities. The assessee also derived income from dividend, share of profit from partnership firm and profit from sale of flats. The assessee failed to sold the flat which was being treated by him as stock in trade. The AO assessed the notional income and brought to tax as income as house property which has no doubt confirmed by CIT(A). It is to be seen whether the income of the assessee is liable to be treated as house property or business income. It is necessary to discuss the finding in the case of M/s. Runwal Constructions Vs. ACIT in ITA. No.5409/M/2016 dated 22.02.2018 which has been given in para no. 7 to 10 and are hereby reproduced as under.: -

"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 assesseees are in the business of builders, developers and construction. Both the assesseees have constructed various projects and the projects were treated as stock in trade in the books of account. Flats sold by the assesseees 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 Id. 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 held as business, income from the same is not assessable u/s.23(1) of the IT Act.

4. On the other hand, Id. 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 house property'. Thus, we direct the AO to delete the addition made under Section 23 of the Act as income from house property.

7. In the case of titled as M/s. C.R. Developments P. Ltd. Vs. JCIT. The relevant para in 5 is hereby reproduced as under.: -

"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."

8. In the factual position of the present case is quite similar to the facts of the case mentioned above. In view of the law relied upon the law representative of the assessee i.e. M/s. Runwal Constructions Vs. ACIT and M/s. C.R. Developments P. Ltd. Vs. JCIT (supra), we are of the view that the finding of the CIT(A) on this issue is wrong against law and facts whereas the case of the assessee has duly been covered by the law mentioned above, therefore, by honoring the orders mentioned above. We deleted the addition raised by assessee on account of notional income of vacant flats. Accordingly, this issue is decided in favour of the assessee against the revenue."

9. The facts and the issue involved in the present case are similar to the facts of the case and the issue involved in the case of Ferani Hotels Pvt. Ltd. (supra). In the said case, the coordinate Bench has deleted the addition confirmed by the CIT (A) on account of notional rent determined by the AO by holding that the ALV of the unsold unit of assessee project is assessable under the head 'income from house property'. Since, the findings of the Ld.CIT (A) is not in accordance with the decision of the coordinate Bench rendered in the case of Ferani Hotels Pvt. Ltd. (supra), we respectfully following the decision of the coordinate Bench set aside the order of the Ld. CIT (A) and allow the appeal of the assessee and direct the AO to delete the addition made under the head 'income from house property'.

On perusal of the said order, we find that the issue is squarely covered in favour of the assessee and, hence, the order of the CIT(A) upholding the addition made by AO estimating the ALV in respect of unsold flats cannot be sustained. The decision relied upon by the learned DR in the case of CIT vs. Gundecha

Builders (supra), is distinguishable on facts as in that case the unsold portion of the property constructed by the builder was given on rent and rental income was treated as business income. Whereas, in the present case, the assessee has not let out any flats and all were lying unsold as stock in trade. Accordingly, we are inclined to set aside the order of the CIT(A) and direct the AO to delete the addition on account of estimation of ALV in respect of unsold flats for A.Y. 2013-14.

The appeal of the assessee is allowed.

6. The issue involved in the appeal for A.Y. 2014-15 is identical to that involved for A.Y. 2013-14, wherein we have set aside the order of the CIT(A) and deleted the addition as made by the AO on this issue. Therefore our finding on this ground would mutatis mutandis apply to this appeal also.

7. In the result, assessee's appeals are allowed.

Order pronounced in the open court on this day of 22nd August, 2019.

Sd/-
(Ram Lal Negi)
Judicial Member

Sd/-
(Rajesh Kumar)
Accountant Member

Mumbai, Dated: 22nd August, 2019

SA

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT(A), Mumbai.
4. The CIT
5. The DR, 'F' Bench, ITAT, Mumbai

//True Copy//

BY ORDER,

(Assistant Registrar)
Income Tax Appellate Tribunal, Mumbai