

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।  
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

BEFORE SHRI ANIL CHATURVEDI, AM AND  
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / ITA Nos. 2261 & 2262/PUN/2017

निर्धारण वर्ष / Assessment Years : 2011-12 & 2013-14

M/s. Parmar Properties Pvt. Ltd.  
Office No.2A, Wing 1, Thacker House,  
2418, East Street,  
Pune-411 001.

PAN : AABCP1016F

.....अपीलार्थी / Appellant

**बनाम / V/s.**

The Deputy Commissioner of Income Tax,  
Circle-4, Pune.

.....प्रत्यर्थी / Respondent

Assessee by : Shri Jatin C. Shah

Revenue by : Shri Pankaj Garg

सुनवाई की तारीख / Date of Hearing : 16.01.2020

घोषणा की तारीख / Date of Pronouncement : 20.01.2020

**आदेश / ORDER**

**PER ANIL CHATURVEDI, AM :**

The captioned appeals preferred by the assessee emanate from separate orders of the Ld. CIT(A)-3, Pune, both dated 30.06.2017, for the assessment years 2011-12 and 2013-14.

2. Before us, at the outset, ld.AR submitted that though the appeals filed by the assessee are for different assessment years but the facts and issues involved in both the appeals are identical except for the assessment year and the amounts involved and therefore the submissions made by him while arguing one appeal would be equally applicable to the other appeal also and therefore, both the appeals can be heard together. The aforesaid submission of the ld.AR has not been objected to by ld. DR. We therefore, for the sake of convenience, proceed to dispose of both the appeals by a consolidated order but however, we proceed with narrating the facts for assessment year 2011-12.

3. The relevant facts as culled out from the material on record are as under:-

The assessee is a private limited company stated to be engaged in the development of land and construction of residential and commercial buildings on such lands. The assessee electronically filed its return of income for A.Y. 2011-12 on 29.09.2011 declaring total income at Rs.1,37,87,875/-. The case was reopened by issuing notice u/s 148 of the Income-tax Act, 1961 (hereinafter referred to as 'the Act'). Thereafter, assessment was framed u/s 143(3) r.w.s. 147 of the Act vide order dated 29.02.2016 and the total income was determined at Rs.2,98,98,260/-. Aggrieved by the order of Assessing Officer, assessee carried the matter before Ld.CIT(A), who vide order dated 30.06.2017 (in appeal No.PN/CIT(A)-3/Cir-4,Pn/106/2016-17) has granted partial relief to the assessee. Aggrieved by the order of Ld.CIT(A), assessee is now in appeal before us and has raised the following grounds:-

- 1. The learned CIT(A)-3 erred in law and on facts in confirming protective addition made by AO on account of notional rent of unsold area of 50,787 Sq Ft as "Income from House Property" to the extent of Annual Reteable Value, disregarding the fact that the same was held as stock-in-trade of the appellant.*

2. *Alternatively and without prejudice to Ground No.1, the learned CIT(A)-3 erred in law and on facts in not confining the protective addition of lease rent only on area for which completion certificate received. Learned AO & CIT(A) ought to have appreciated that 26,495 sq.ft. area out of 50,787 sq.ft. unsold area has not been assessed by PMC till March 2011.*
3. *The learned CIT(A)-3 erred in law and on facts in not appreciating the fact that the learned AO has tax notional income on protective basis in the absence of any additions on substantive basis.*

All the grounds being interconnected are considered together.

4. During the course of assessment proceedings, the Assessing Officer noticed that the assessee has offered rental income of Rs.74,60,559/- under the head "Income from House Property" after claiming deduction u/s 24(a) of the Act. The assessee was requested to explain why notional rental income has not been offered on the unsold units of area 50,787 sq.ft., to which the assessee made the submissions which were not found acceptable to the Assessing Officer. The Assessing Officer thereafter held that the notional rental income should be added to the total income of the assessee and accordingly, added the same to the total income. Aggrieved by the order of Assessing Officer, assessee carried the matter before the CIT(A), who granted partial relief.

5. Aggrieved by the order of CIT(A), the assessee is now in appeal before us.

6. Before us, Ld. LR submitted that the issue is squarely covered by the decision of Co-ordinate Bench of Tribunal in assessee's own case. In support of his contention, he placed a copy of the said order on record.

7. The Ld. DR on the other hand supported the orders of Assessing Officer and CIT(A).

8. We have heard the rival submissions and perused the material on record. The issue in the present appeal is with respect to confirmation of addition made on account of notional rent of unsold area as 'Income from House Property' since the same was held as stock-in-trade by the assessee. We find that the Pune Tribunal in ITA No.2225/PUN/2016, order dated 28.03.2019 for A.Y. 2012-13 in assessee's own case has decided the issue in assessee's favour by observing as under:

*"9. We have perused the case records and considered the judicial pronouncements placed before us. That in ITA No.1914/PUN/2018, the Assessing Officer (AO) observed that the assessee was holding closing stock of one office building and one showroom. Invoking provisions of section 23(4) of the Income-tax Act, 1961 (hereinafter also called 'the Act'), the AO opined that the Annual Letting Value of the property was required to be determined and added to the assessee's total income. The assessee's contention that two units in respect of which "Income from house property" was proposed to be computed, were its stock in trade and hence, no income could be determined thereon under this head, did not find favour with the Revenue Authorities. With regard to these issues, the Co-ordinate Bench of the Pune Tribunal has held as follows:*

*"4. I have heard the rival submissions and perused the relevant material on record. It is an undisputed fact that the assessee, a Builder and Developer, was holding two properties as its stock in trade, from which the deemed rental income has been computed u/s 23 of the Act and added to its total income. The AO has made out a case that levy of income tax in respect of properties held by the assessee as an owner, cannot be marred even if the same have been held as stock in trade. The bedrock of the action of the authorities below is certain decisions which, in turn, are based on the judgments of Hon'ble Supreme Court in East India Housing & Land Development Trust VS. CIT (1961) 42 ITR 49 (SC) and S.G. Mercantile Corporation Pvt. Ltd. Vs. CIT (1972) 83 ITR 700 (SC). It has been held in the latter decision that where a builder, being, owner lets out property for some time pending sale, the income so derived is to be taxed under the head "Income from house property" and not as "Business income". So the ratio is that even if a builder lets out his property, held as stock in trade, income there from will be chargeable under the head 'Income from house property' and not as 'Business income'. It is pertinent to note that such a legal position has undergone some transformation. In Chennai Properties and Investments Ltd. Vs. CIT (2015) 373 ITR 673 (SC), the assessee whose business was to acquire properties, let out certain properties and the rental income as received therefrom was declared as business income. The AO held such income to be chargeable to tax under the head "Income from house property". The Hon'ble Supreme Court held that the deciding factor for determining as to whether the income is to be charged under the head "Income from house property" is not the ownership of property but the nature of operations in relation to them. Considering the objects of the company, the Hon'ble Supreme Court held that such income was chargeable to tax under the head "Profits and gains from business or profession". More recently, the Hon'ble Supreme Court in Rayala Corporation Pvt. Ltd. Vs. ACIT (2016) 386 ITR 500 (SC) considered a situation in which the assessee was engaged in the business of renting its properties. The assessee claimed such rental income as falling under*

*the head "Profits and gains of business or profession". The AO denied such a treatment. When the matter finally came up before the Hon'ble Supreme Court, it considered both the judgments, namely, S.G. Mercantile Corporation (supra) and Chennai Properties and Investments Ltd (supra) and thereafter held that : 'the law laid down by this Court in the case of Chennai Properties (supra) shows the correct position of law'. That is how, their Lordships held that the income was to be charged to tax under the head "Profits and gains of business or profession".*

*5. In view of the foregoing discussion, it is apparent that the view point bolstered by the authorities that Annual Letting Value in respect of unsold properties lying with the assessee as a stock in trade, should be determined u/s. 23 of the Act, cannot be countenanced in the hue of the later judgments of the Hon'ble Summit Court. Once it is held that the income of a Builder in respect of letting out of the properties is chargeable under the head "Profit and gains of business or profession", the provisions enshrined in Chapter IV-D get magnetized and not those under the head "Capital gains". It is no doubt true that section 23 of the Act deems the determination of income from house property, which is not let out, but it is equally trite that a deeming provision cannot be extended beyond its ambit, so as to cover the heads of income or the sections, to which it does not operate. My attention has not been drawn by the ld. DR towards any specific provision under Chapter IV-D of the Act which deems rental income on the properties held as stock in trade, waiting for sale and not actually let out, as chargeable to tax under the head "Profit and gains of business or profession". As the assessee admittedly did not earn any rental income from letting out of these two units which position has also not been disputed by the AO, in my considered opinion, taxing any hypothetical income which is otherwise not sanctioned by any provision under Chapter IV-D, cannot be permitted.*

*6. Even otherwise, section 5 of the Act clearly stipulates that a person who is a resident can be subjected to tax in respect of income from whatever source which is received or is deemed to be received in India or accrues or arises or deemed to accrue or arise to him in or outside India during such year. As the instant imaginary income charged to tax by the AO is neither a deemed income under the head 'Business income' nor is received or deemed to be received or accruing or arising or deemed to accrue or arise, not falling in any of the categories given in clauses (1) to (c) of Section 5(1), I hold that there is no rationale in charging it to tax. I, therefore, overturn the impugned order and direct to delete the addition of Rs.34.35 lakh."*

*The legal sanctity drawn from this decision pertains to the very spirit and soul of the Income Tax Act, 1961. Meaning thereby, Section 5 of the Act stipulates that a person who is a resident can be subjected to tax in respect of income from whatever source which is received or is deemed to be received in India or accrues or arises or deemed to accrue or arise to him in or outside India during such year but there is no provision for charging any imaginary income. Respectfully, following the aforesaid decision, **ground Nos. 1 and 2 raised by the assessee in appeal are allowed.**"*

9. Before us, no distinguishing feature in the facts of the case under consideration and that of A.Y. 2012-13 (supra) was pointed by the Revenue. We further find that the Revenue has not placed any contrary binding decision

in its support nor placed any material on record to demonstrate that the order of the Co-ordinate Bench of the Tribunal in assessee's own case for A.Y. 2012-13 has been set aside / overruled / stayed by Higher Judicial Forum. In view of the aforesaid, the **grounds raised by the assessee are allowed.**

10. Since the facts and issues raised in other appeal i.e. ITA No.2262/PUN/2017 are identical to the facts and issues raised in ITA No.2261/PUN/2017, our decision in ITA No.2261/PUN/2017 shall apply *mutatis mutandis* to ITA No.2262/PUN/2017.

11. In the combined result, **both the appeals of assessee are allowed.**

Order pronounced on 20<sup>th</sup> day of January, 2020.

**Sd/-**  
**(S.S. VISWANETHRA RAVI)**  
न्यायिक सदस्य / JUDICIAL MEMBER

**Sd/-**  
**(ANIL CHATURVEDI)**  
लेखा सदस्य / ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 20<sup>th</sup> January, 2020.

GCVSR

**आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-3, Pune.
4. The Pr. CIT-2, Pune.
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, "बी" बेंच,  
पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

//सत्यापित प्रति// True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune