

**IN THE INCOME TAX APPELLATE TRIBUNAL
“F” Bench, Mumbai**

**Before Shri Manoj Kumar Aggarwal, Accountant Member
and Shri Ravish Sood, Judicial Member**

**ITA No.4257/Mum/2019
(Assessment Years: 2014-15)**

Vinay Unique Construction Co.
A-8, Om Maheshwar Niketan,
Harsha Park, Chandavarkar
Road, Borivali (West),
Mumbai – 400092

Vs.

Principal Commissioner of
Income Tax -32,
C-11, 2nd Floor, Pratyaksha kar
Bhavan, Bandra Kurla Complex,
Bandra (East),
Mumbai - 400051

PAN – AAFV6659M

(Appellant)

(Respondent)

Appellant by: Shri Subodh Ratnaparkhi, A.R
Respondent by: Shri Narendra Jangpani, CIT, D.R
Date of Hearing: 26.10.2020
Date of Pronouncement: 29.10.2020

ORDER

PER RAVISH SOOD, JM:

The present appeal filed by the assessee is directed against the order passed by the Principal Commissioner of Income Tax-32, Mumbai (hereinafter referred to as Pr.CIT) under Sec. 263 of the Income Tax Act, 1961 (for short 'Act'), dated 19.03.2019 for A.Y. 2014-15. The assessee has assailed the impugned order on the following grounds of appeal before us:

- “1. The Hon. Pr. CIT erred in holding the order framed by the Id. AO u/s 143(3) of the I.T Act, 1961 on 07.12.2016, to be erroneous and prejudicial to the interest of revenue and accordingly the assumption of jurisdiction by the Hon. Pr. CIT u/s 263 of the I.T Act. 1961 was not valid and was unjustified.
2. The Hon. Pr.CIT erred in setting aside to the file of the assessing officer the assessment framed u/s 143(3) of the I. Tax Act, 1961 on 07.12.2016, holding that as the Id. AO had not taken into consideration

the ALV method on the unsold flats held as closing stock by the appellant firm to derive house property income, the order u/s 143(3) on 07.12.2016 was erroneous in so far as it is prejudicial to the interest of revenue.

3. The appellant craves leave to add, alter, amend and/or vary any of the grounds at any time before the decision of the appeal.”

2. Briefly stated, the assessee firm which is engaged in the business of a builder and developer had filed its return of income for A.Y. 2014-15 on 05.11.2014, declaring its total income at Rs.1,06,91,500/-. Original assessment under Sec.143(3) was framed on 07.12.2016, wherein the income of the assessee firm was assessed at its returned income of Rs.1,06,91,500/-. After the culmination of the assessment proceedings the Pr.CIT in exercise of the powers vested with him u/s 263 of the Act called for the assessment records of the assessee. Observing, that the A.O while framing the assessment had failed to take cognizance of the fact that the assessee had not offered for tax under the head 'house property' the Annual lettable Value (for short 'ALV') of the unsold flats which were held by it as closing stock of its business as that of a developer, the Pr.CIT held a conviction that the order passed by the A.O was erroneous and prejudicial to the interest of the revenue in terms of 'Explanation 2' to Sec.263 of the Act. Accordingly, the Pr.CIT issued a 'Show cause' Notice (for short 'SCN'), dated 10.09.2018, therein calling upon the assessee to put forth an explanation as to why the assessment order passed by the A.O under Sec. 143(3), dated 07.12.2016, may therein not be revised under Sec. 263 of the Act. In reply, it was submitted by the assessee that as the unsold flats were held by it as part of its inventory of stock-in-trade and had not been let out, therefore, the question of assessing their deemed lettable value i.e ALV did not arise. However, the Pr.CIT was not persuaded to subscribe to the aforesaid claim of the assessee. Observing, that as long as the assessee continued to be the owner of the aforesaid vacant flats, the Pr.CIT was of the view that the ALV of the same was liable to be assessed within the meaning of Sec.22 of the Act. The Pr.CIT while observing as hereinabove relied on the judgment of the Hon'ble High Court of Delhi in the

case of Ansal Housing Finance & Leasing Company Ltd. Vs. CIT (2012) 354 ITR 1820 (Del). It was observed by the Pr.CIT that as the incidence of charge of ALV was dependent on the factum of ownership, therefore, holding of the aforesaid property as stock-in-trade or otherwise would have no bearing on the said aspect. In the backdrop of his aforesaid observations, the Pr.CIT was of the view that as the A.O while framing the assessment had not taken into consideration the ALV of the unsold flats that were held by the assessee as closing stock of its business as that of a builder and developer, therefore, the assessment order passed by him under Sec. 143(3), dated 29.12.2016 was rendered as erroneous insofar it was prejudicial to the interest of the revenue. Accordingly, the Pr.CIT 'set aside' the assessment, with a direction to the A.O to pass a fresh order after taking into account all the facts of the case and allowing an opportunity of being heard to the assessee.

3. The assessee being aggrieved with the order passed by the Pr.CIT under Sec. 263, dated 19.03.2019 has carried the matter in appeal before us. The Id. Authorized Representative (for short 'A.R') for the assessee at the very outset of the hearing of the appeal submitted that the present appeal involved a delay of 20 days. It was submitted by the Id. A.R that the aforesaid delay had occasioned, for the reason, that the old residential house of one of the partner of the assessee firm where the order of the Pr.CIT under Sec. 263 was stated to have been served, during the relevant period, was locked, as the partner who owned the said house had shifted his residence. As such, it was the claim of the Id. A.R that due to the aforesaid circumstances the impugned order of the Pr.CIT under Sec.263 of the Act was not delivered to the assessee firm and had remained unattended. It was further submitted by the Id. A.R, that it was only when the assessee firm received a notice dated 29.05.2019 from the ACIT, Circle 32(3), Mumbai, with regard to the 'set aside' assessment, that, it was only then that the assessee firm on the basis of inquiries learnt about the order passed by the Pr.CIT under Sec. 263 of the Act. In order to fortify the aforesaid factual position the Id. A.R took us through

the affidavit filed by Shri Ashok Mohanlal Mehta, partner of the assessee firm, wherein the aforesaid factual position was deposed by him. In the backdrop of the aforesaid facts, it was averred by the Id. A.R that the delay of 20 days in filing of the present appeal which had crept in on account of reasons beyond the control of the assessee may therein be condoned.

4. Per contra, the Id. Departmental Representative (for short 'D.R') did not object to the seeking of condonation of the delay in filing of the present appeal by the assessee appellant.

5. We have heard the authorized representatives for both the parties, and also perused the material available on record in context of the reasons leading to the delay in filing of the present appeal before us. In our considered view, there is substance in the claim of the assessee that as the order passed by the Pr.CIT under Sec. 263, dated 19.03.2019 was forwarded by the department at the old residential house of one of the partner of the assessee firm, which premises at the relevant point of time was locked, thus, the assessee firm had remained unaware of the aforesaid order. The aforesaid claim of the assessee had not been controverted by the revenue. In the totality of the facts leading to the delay in filing of the present appeal, we are of a strong conviction that the aforesaid delay of 20 days in filing of the present appeal had crept in on account of bonafide reasons. Accordingly, in all fairness we herein condone the aforesaid delay of 20 days in filing of the present appeal by the assessee firm.

6. As regards the merits of the case, it was submitted by the Id. A.R that the Pr.CIT had erred both in law and the facts of the case in assuming jurisdiction under Sec.263 of the Act, and therein, revising the order passed by the A.O under Sec. 143(3), dated 07.12.2016. It was submitted by the Id. A.R, that the A.O while framing the assessment had called for the details as regards the unsold flats which were held by the assessee as closing stock of its business as that of a builder and developer. In order to buttress his

aforesaid claim the Id. A.R took us through the assessee's paper book (for short 'APB'), Page 11 to 40. Taking us through Page 13 - Serial No.10 of a query letter dated 03.05.2016, the Id. A.R submitted that the issue as regards the unsold flats held by the assessee as its closing stock was duly queried and deliberated upon by the A.O while framing the assessment. Accordingly, it was submitted by the Id. A.R that now when the A.O had after calling for the requisite details formed a possible view that the ALV of the aforesaid property was not liable to be brought to tax under the head 'house property', therefore, the Pr.CIT had exceeded his jurisdiction by revising the assessment order with a purpose to substitute his view as against that arrived at by the A.O. Further, it was submitted by the Id. A.R that the law did not prescribe any method for determination of ALV of property held by an assessee as its closing stock. It was submitted by the Id. A.R that sub-section (5) to Section 23 of the Act, which therein mandates determination of the ALV of a property held by an assessee as stock-in-trade had been made available on the statute vide the Finance Act, 2017, w.e.f 01.04.2018, and was thus not applicable to the year under consideration. Insofar the judgment of the Hon'ble High Court of Delhi in the case of Ansal Housing Finance & Leading Co. Ltd. (supra) as was relied upon by the Pr.CIT, it was submitted by the Id. A.R that the Special Leave Petition (SLP) of the assessee against the said order had been admitted by the Hon'ble Supreme Court. Further, in his attempt to impress upon us that the A.O in the course of the assessment proceedings had called for the requisite details as regards the property that was held by the assessee as its stock-in-trade, and the requisite details as regards the same was filed by the assessee, the Id. A.R took us through a letter dated 12.09.2016 that was filed by the assessee in the course of the assessment proceedings, Page 16 of APB. Further, the Id. A.R in support of his claim that the ALV of the unsold flats held by the assessee as stock-in-trade of its business as that of a buider and developer could not be brought to tax under the head 'house property', therein, drew support from certain orders of the coordinate benches of the Tribunal, as under:

- (i) M/s C.R. Development Pvt. Ltd. Vs. JCIT
(ITA No. 4277/Mum/2012, order dated 13.05.2015)(Mum)
- (ii) M/s Runwal Constructions Vs. ACIT
(ITA No.5408/Mum/2016, order dated 22.02.2018)(Mum)
- (iii) ACIT Vs. Haware Constructions Private Limited
(ITA No.3321/Mum/2016 and 3172/Mum/2016, dated
31.08.2018)(Mum)
- (iv) Progressive Homes Vs. ACIT
(ITA No. 5082/Mum/2016 dated 16.05.2018)(Mum)
- (v) Haware Engineers and Builders Pvt. Ltd. Vs. DCIT
(ITA No. 7155/Mum/2016 dated 10.10.2018)(Mum)”

7. Per contra, the Id. Departmental Representative (for short ‘D.R’) submitted, that the A.O while framing the assessment had not raised any query as regards assessing of the ALV of the unsold flats held by the assessee as closing stock of its business as that of a builder and developer. It was submitted by the Id. D.R that as there was a clear non-application of mind by the A.O in respect of the aforesaid issue under consideration, therefore, the Pr.CIT by drawing support from the judgment of the Hon’ble High Court of Delhi in the case of Ansal Housing Finance & Leasing Co. Ltd. (supra) had rightly revised the order, with a direction to the A.O to pass a fresh order after taking into account all the facts of the case and allowing an opportunity of being heard to the assessee.

8. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements that have been pressed into service by them. Admittedly, the assessee firm which is engaged in the business of a builder and developer was holding unsold flats (valuing Rs.10,05,08,511/-) as part of its inventory of stock-in-trade during the year under consideration. As observed by us hereinabove, the Pr.CIT was of the view that the failure on the part of the A.O in not taking cognizance of the fact that the ALV of the unsold flats held by the assessee as closing stock of its business as that of a builder and developer was not offered by it for tax under the head ‘house property’, had thus, rendered his order erroneous insofar it

was prejudicial to the interest of the revenue in terms of 'Explanation 2' to Sec.263 of the Act. On the basis of his aforesaid observation the Pr. CIT by relying on the judgment of the **Hon'ble High Court of Delhi** in the case of **Ansal Housing Finance & Leasing Co. Ltd. Vs. CIT (2012) 354 ITR 1820 (Del)**, had concluded, that incidence of charge of ALV of a property was backed by the factum of ownership, and the aspect, that as to whether the assessee carried on a business or held the property as a landlord would have no bearing on determination of the ALV. On the other hand, the Id. A.R had tried to support the order of the A.O, on the ground, that the view of the A.O that the ALV of the property held by the assessee as stock-in-trade was not liable to be brought to tax under the head 'house property' was supported by certain orders of the coordinate benches of the Tribunal. Insofar, the claim of the Id. A.R, that the A.O while framing the assessment had deliberated upon the aforesaid aspect and had arrived at a possible view is concerned, we are afraid that the same does not find favour with us. On a perusal of the relevant pages of the assessee's paper book to which our attention was drawn by the Id. A.R in order to support its claim that the aforesaid issue had been looked into by the A.O while framing the assessment, we find is absolutely misconceived. Perusal of the respective queries that were raised by the A.O vide his letter dated 03.05.2016 and the reply filed by the assessee vide his letter dated 12.09.2016, reveals beyond any scope of doubt that the same pertained to the issue as regards the valuation of opening and closing WIP of the assessee's project and determination of the cost of sale of the same. We are unable to comprehend as to on what basis it is canvassed by the Id. A.R that the A.O while framing the assessment, had queried, on the issue as to whether or not the ALV of the unsold flats was to be assessed under the head 'house property'. Neither the aforesaid claim of the Id. A.R is discernible from the query letters issued by the A.O or the reply filed by the assessee in the course of the assessment proceedings, nor the assessment order inspires any confidence as regards the same. In fact, a perusal of the assessment order/records reveals that the A.O had at no stage raised any query on the

aspect of assessing the ALV of the unsold flats held by the assessee as part of its inventory of stock-in-trade, under the head 'house property'. In the backdrop of the aforesaid facts, we are of a strong conviction that as the issue as to whether the ALV of the unsold flats held by the assessee as closing stock of its business as that of a builder and developer was liable to be assessed under the head 'house property', had not been inquired into by the A.O while framing the assessment, the same, thus, would clearly bring the assessment order passed by him u/s 143(3), dated 07.12.2016 within the realm of the 'Explanation 2(a)' to Sub-section (1) of Sec.263 of the Act. Accordingly, in our considered view the Pr.CIT had rightly invoked his jurisdiction under Sec. 263 of the Act and 'set aside' the assessment order with a direction to the A.O to pass a fresh order after considering the aforesaid aspect and allowing of an opportunity of being heard to the assessee. As no infirmity emerges from the aforesaid order passed by the Pr.CIT under Sec. 263 of the Act, we thus, finding no merit in the appeal filed by the assessee dismiss the same.

9. The appeal filed by the assessee is dismissed.

Order pronounced in the open court on 29.10.2020

Sd/-

Manoj Kumar Aggarwal
(ACCOUNTANT MEMBER)

Sd/-

Ravish Sood
(JUDICIAL MEMBER)

Mumbai, Date: 29.10.2020
R. Kumar

Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "G" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai