IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" Bench, Mumbai
Before Shri Shamim Yahya, Accountant Member

I.T.A. No. 552/Mum/2021
(Assessment Year 2013-14)

Satyam Realtors Pvt.Ltd. Room No.04, 3rd Floor Capri,Op. HDIL Towers Anant Kanekar Marg, Bandra(E) Mumbai-400 051 PAN : AACCS7290P	Vs.	DCIT,CC-5(4) Room No.1927, 19th Floor Air India Building Nariman Point Mumbai-400 021
(Appellant)		(Respondent)

Assessee by	None
Department by	Shri T.Sankar, Sr.AR
Date of Hearing	13.01.2022
Date of Pronouncement	25.03.2022

O R D E R

Per Shri Shamim Yahya (AM) :-

This appeal by the assessee is directed against the order of learned Commissioner of Income Tax (Appeals)-53 dated 06.08.2019 and pertains to assessment year 2013-14.

2. Grounds of appeal read as under:-

1) The Learned CIT (A) has erred in law & on facts in upholding the Learned AO's action of in issuing notice issued u/s. 148 and erred in initiating the reassessment proceedings. The notice issued u/s. 148 is bad in law. The conditions stipulated u/s.147 is not satisfied. The reassessment order passed by the learned AO may be treated as invalid. The appellant prays that reassessment order passed by the learned AO may be cancelled.

2) The Learned CIT (A) has erred in law & on facts in upholding the Learned AO's action of making addition / disallowance of deemed income of Rs. 24,45,924/- being 8% of closing stock.

3) The Learned CIT (A) has erred in law & on facts in upholding the Learned AO's action of imposing interest under Section 234B of the Income Tax Act, 1961.
4) The Appellant craves leave to add to and/ or amend and/ or delete and/ or modify and/ or alter the aforesaid grounds of appeal as and when the occasion demands.

3. I have heard the ld. DR and perused the records. At the outset, it is noted that there is a delay of 517 days in filing this appeal. In the reason for condonation of delay, it has been submitted that appeal ought to have be filed on or before 12.11.2019, but due to serious financial crisis & non availability of funds, the assessee was unable to make payment of the appeal fees. Subsequently, worldwide lock down due to Covid-2019 happened and thereby, appeal could not be filed on time.

4. I note that despite notice, none has appeared, but it is seen that as per Hon'ble Apex Court decision, the period of lockdown due to Covid pandemic is to be excluded from the limitation period. The remaining period is very small. In this view of the matter on the facts and circumstances of the case, the delay is condoned.

5. As regards, the issue of reopening. The challenge of reopening has been disposed-off by Ld.CIT(A) by following observations:-

" I have considered the facts on record and submissions carefully. Reasons were recorded and notice u/s 148 was issued after taking approval of the prescribed authority. The reasons recorded for re-opening were supplied to the appellant on 28.9.2018. Objections were not filed within reasonable time and filed only on 3.12.2018 when the assessment was getting barred by limitation on 31.12.2018. Yet the objections filed by the appellant were duly disposed by the assessing officer in writing. Thus the procedural requirements have been met by the assessing officer.

It is trite law that for reopening the assessment the A.O has to merely form reason to believe that income has escaped assessment. The reassessment proceedings allows the appellant to rebut the reasons for reopening of the assessment. The only question to be seen is whether there is relevant material on which a reasonable person could have formed requisite belief. Whether those facts stated in material are true or not, is not the concern at this stage. This is so because the formation of belief by the Assessing Officer is within his subjective satisfaction -refer Supreme Court's decision in the cases of /TO vs. Select Dohirband Coal Company Put. Ltd. (1996) 217ITR

597, 599 (SC) and Central Province Manganese Ore Company Ltd. vs. ITO (1991) ITR 662, 666 (SC). In the case of Peass Industrial Engineers (P) Ltd. v CIT (2016) 289 CTR (Guj) 139 information was received from investigation wing regarding bogus entry operators and the assesse being one such beneficiary. It was held that whether assessee is a beneficiary or not is not to be finally adjudicated at the stage of reopening. Reopening was held to be valid. Distinction between validity of an addition and validity of reasons to believe was explained in the case of Pr CIT v Laxmiraj Distributors P. Ltd. (2019) 302 CTR (Guj) 676.

The action u/s.147 is possible despite complete disclosure of material facts if there is any escapement of income in assessment proceedings-refer PrafulChunilcd Patel, Vasant Chunilal Patel vs. ACIT (1999) 236 ITR 832, 840 (Guj), Stock Exchange vs. ACIT (1997) 227 JTR 906 (Guj) and JTO vs. LabjmaniMewal Das (1976) 103 ITR 437 (SC).

In the present case, though there is previous order of assessment, the assessing officer can form reasons to believe that income has escaped assessment by examining the very return/documents accompanying the return. Refer Indulata Rangwala vs DCIT (2016) 286 CTR (Del) 474, CIT vs Rajesh Jhaveri Stock Brokers P. Ltd. (2007) 291 ITR 500(SC), DCIT vs Zuari Estate Development 6s Investment Co. Ltd. (2015) 373 ITR 661(SC).

The assessing officer noted that in the original assessment order, the assessing officer did not notice that "Malad Property" was shown as stock-in-trade at Rs 4,36,77,204/- but no income was offered under "Income from House property". Even when an income liable to tax has escaped assessment in the original assessment proceedings due to oversight and inadvertence or a mistake committed by the original Assessing Officer, subsequently, while verifying the records Assessing Officer can start reassessment proceedings for escapement of income. Further, there is a legal proposition accepted by various Courts that reassessment proceeding is permissible even if the information is obtained after proper investigation from the materials on record or from any enquiry or research into facts or law. There is a plethora of judgements that such information need not be from external source-refer CIT and anr. vs. Rinku Chakraborty 56 DTR 227 (Kar) and Kalyanji Mavji and Company vs. CIT 102 ITR 287 (SC). It is also pertinent to mention that for reopening of completed assessment u/s.148, tangible material need not be from outside the return of income. It can be obtained from the return of income or evidences on record itself. The reference may be had of ACIT vs. Kanga & Company (2010) - TIOL 464 ITAT Mumbai. It is also relevant to mention that information obtained in assessment proceedings of subsequent year, can also be utilized for reopening of the completing assessment -refer Raymond Woolens Mills Ltd. vs. ITO and Other 236 ITR 34 (SC) and Revathy C.P. Equipment Ltd. vs. DCIT AND ors. 241 ITR 856 (Mad).

It is further noted that the reasons recorded were furnished to the appellant on 28.09.2018 no objection was filed against the reopening till after the assessing officer issued final show cause notice dated 24-11-2018 when assessment was getting barred

by limitation on 31.12.2018. In the light of these facts and discussions earlier, I do not find merits in the contention of the appellant."

6. Upon perusing the aforesaid order of ld.CIT(A) and hearing the ld. DR. I note that ld.CIT(A) is giving contradictory finding, whether objections filed by the assessee to the reopening notice has been disposed off or not. I note that from the appraisal of the assessment order and ld.CIT(A)'s order, it is not getting clear, as to when the assessee objected to reopening and when AO disposed off the same and whether the procedure laid down by the Hon'ble Jurisdictional High court in this regard have been complied with or not. Be as it may, I note that reopening in this case has been done without referring to any tangible material coming to the possession of the AO. Ld.CIT(A) has observed that even when an income liable to tax has escaped assessment in the original assessment proceedings due to oversight and inadvertence or a mistake committed by the original AO, subsequently, while verifying the records AO can start reassessment proceedings for escapement of income. I find that this observation by the ld. CIT(A) is totally contrary to the law in this regard and mistake oversight or inadvertence by the AO in passing the order can be subject matter of 263 proceedings by the ld.CIT. The AO cannot review his own order. In this view of the mater, this part of the observation of the ld.CIT(A) is set aside and held to be not tenable in law. Hence, I hold that reopening y the AO by change of opinion in this case is not sustainable in law.

7. As regards the merits of the case, it is seen that AO has attributed 8% to the closing stock of flats with the assessee, which has been sustained by ld.CIT(A). In this regard, I note that identical issue was adjudicated by this ITAT in the case of Dimple Enterprises vs DCIT in ITA 5269/Mum/2019 for AY 2015-16, dated 21.05.2021. The Tribunal had held as under:-

"9. We have heard both the parties and perused the records. We have carefully considered the submissions and perused the records. The only issue for our consideration is the levy of deemed rent on the unsold real estate property of the assessee who is a real estate developer. It is not the case of the assessee that its object include letting out of the property. In fact before the assessing officer it was submitted that assessee has never contemplated leasing or renting the property.

10. On this issue of deemed rent on unsold stock of real estate the only High Court order available is that of the honourable Delhi High Court in the case of Ansal Properties (Supra). It has been mistakenly referred that honourable Gujarat High Court decision in the case of CIT versus Neha builders (266 ITR 661) is in favour of the assessee. The question decided by honourable Gujarat High Court in the above said case was as under :-

"Whether on the facts and in the circumstances of the case, the rental income from any property in the construction business can be claimed under the head of "Income from Property' even though the said property was included in the closing stock and expenses on maintenance were debited to the P&L a/c?"

11. The honourable High Court had adjudicated the issue 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-intrade'."

12. Thus honourable High Court had never expounded on the issue before us nor it was seized with the issue of deemed rent on unsold stock of flats. Moreover we also note that honourable jurisdictional High Court in the case of CIT versus Gundecha builders by the order dated 31 July 2018 has held that if the assessee is a builder but

is not engaged in the business of letting of property, the lease rent from unsold flats is assessable to tax under the head income from house property.

13. Thus on the touchstone of above said jurisdictional High Court decision which is binding upon us the exposition that emanates is that if the business of the assessee is not letting of the property, then the rent from the unsold stock is to be assessed as income from house property. This is another reason why no help is drawn to be assessee by referring the decision of Neha Builders (supra).
14. We note that honourable Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd. (supra) had expounded as under :-

"13. In the present case, the assessee is engaged in building activities. It argues that flats are held as part of its inventory of stock in trade, and are not let out. The further argument is that unlike in the other instances, where such builders let out flats, here there is no letting out and that deemed income - which is the basis for assessment under the ALV method, should not be attributed. This Court is of the opinion that the argument, though attractive, cannot be accepted. As repeatedly held, in East India, Sultan, and Karanpura, the levy of income tax in the case of one holding house property is premised not on whether the assessee carries on business, as landlord, but on the ownership. The incidence of charge is because of the fact of ownership. Undoubtedly, the decision in Vikram Cotton indicates that in every case, the Court has to discern the intention of the assessee; in this case the intention of the assesse was to hold the properties till they were sold. The capacity of being an owner was not diminished one whit, because the assessee carried on business of developing, building and selling flats in housing estates. The argument that income tax is levied not on the actual receipt (which never arose in this case) but on a notional basis, i.e. ALV and that it is therefore not sanctioned by law, in the opinion of the Court is meritless. ALV is a method to arrive at a figure on the basis of which the impost is to be effectuated. The existence of an artificial method itself would not mean that levy is impermissible. Parliament has resorted to several other presumptive methods, for the purpose of calculation of income and collection of tax. Furthermore, application of ALV to determine the tax is regardless of whether actual income is received; it is premised on what constitutes a reasonable letting value, if the property were to be leased out in the marketplace. If the assessee's contention were to be accepted, the levy of income tax on unoccupied houses and flats would be impermissible - which is clearly not the case.

14. As far as the alternative argument that the assessee itself is occupier, because it holds the property till it is sold, is concerned, the Court does not find any merit in this submission. While there can be no quarrel with the proposition that "occupation" can be synonymous with physical possession, in law, when Parliament intended a property occupied by one who is carrying on business, to be exempted from the levy of income tax was that such property should be used for the purpose of business. The intention of the lawmakers, in other words, was that occupation of one's own property, in the course of business, and for the purpose of business, i.e. an active use of the property, (instead of mere passive possession) qualifies as "own" occupation

for business purpose. This contention is, therefore rejected. Thus, this question is answered in favour of the revenue, and against the assessee."

15. From the above it is amply clear that deemed rent on the unsold stock is exigible to tax under the head income from house property. The assessee has contended that the provisions of section 23(5) are prospective and hence not applicable in the present assessment year. We may gainfully referred to the provision of section 23(5) :-

"23(5) Where the property consisting of 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 be nil."

16. The finance bill included the following explanatory note in this regard :-
"No notional income for house property held as stock-in-trade
Section 23 of the Act provides for the manner of determination of annual value of house property.
Considering the business exigencies in case of real estate developers, it is proposed to amend the said section so as to provide that where the house property consisting of any building and 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 upto 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 be nil This amendment will take effect from 1st April, 2018 and will, accordingly apply in relation to assessment year 2018-19 and subsequent years."

17. From the above it is amply clear that the said section was inserted to provide relief to the builders and developers from the ambit of deemed rent on unsold stock already present in the sanguine provisions of section 23, for a period of one year with effect from 1.4.2018. Hence the assessee is mistaken in its plea that deemed rent has been levied under the provisions of section 23(5) which as per the claim of the assessee is prospective. As we have noted that it is nobody's case that deemed rent is to be levied under the provisions of section 23(5). Hence this plea of the assessee that deemed rent was not leviable as section 23(5) was not in existence in the statute books for the impugned assessment year is totally unsustainable

18. Thus from the decision and precedence from Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd.(supra) read alongwith Hon'ble Jurisdictional High Court decision in CIT Vs. Gundecha Builders (supra), it is amply clear that deemed rent from the unsold stock is duly leviable on the assessee on the facts of present case. Hence principally we do not find any infirmity in the proposition that deemed rent is leviable upon the assessee.

19. Now the question is of the rental value. The assessing officer has not levied the deemed rent on municipal ratable value or any nearly similar instance. The reliability of municipal ratable value has been duly upheld in several decisions. The Assessing Officer cannot make any adhoc computation of deemed rent. Hounourable Bombay High Court decision in the case of CIT Vs. Tip Top Typography (368 ITR 330) duly supports this proposition. Thus assessing officer has made an ad hoc estimate of 8.5% of investment on the plea that assessee has not been able to provide the municipal ratable value. This is not sustainable on the touchstone of Hon'ble Bombay High Court decision in the case of Tip Top Typography (supra). In our considered opinion nothing stops the assessing officer from obtaining the municipal ratable value from Departmental or government machinery. Hence we direct the assessing officer to compute the valuation of deemed rent in accordance with our observation as above and take into account the Hon'ble Jurisdictional High Court decision as above. Since we have decided the issue by duly taking note of Hon'ble Jurisdictional High Court decision and have also applied Hon'ble Delhi High Court decision, the reference to other decision in this case is not considered relevant to adjudication in this case.

8. I follow the aforesaid precedent and set aside the issue to the file of AO with the same direction.

9. In the result, appeal by the assessee stands partly allowed.

Pronounced in the open court on 25. 03.2022

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 25.03.2022
Thirumalesh, Sr.PS

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//

(Assistant Registrar)
ITAT, Mumbai