

आयकर अपीलीय अधिकरण न्यायपीठ रायपुर में।
IN THE INCOME TAX APPELLATE TRIBUNAL,
RAIPUR BENCH, RAIPUR

BEFORE SHRI RAVISH SOOD, JUDICIAL MEMBER
AND
SHRI ARUN KHODPIA, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No.116/RPR/2019

निर्धारण वर्ष / Assessment Year : 2013-14

Shri Nilesh Kumar Agrawal,
Prop. M/s. Friends Construction,
House No.107-108, Opp. Ravi Shankar,
University Gate, Amanaka,
Raipur (C.G.)-492 010
PAN : AFCPA2198G

.....अपीलार्थी / Appellant

बनाम / V/s.

The Income Tax Officer-4(5),
Raipur (C.G.)

.....प्रत्यर्थी / Respondent

Assessee by : Shri R.B Doshi, AR
Revenue by : Shri G. N Singh, DR

सुनवाई की तारीख / Date of Hearing : 21.07.2022

घोषणा की तारीख / Date of Pronouncement : 25.07.2022

आदेश / ORDER**PER RAVISH SOOD, JM:**

The present appeal filed by the assessee is directed against the order passed by the CIT(Appeals)-II, Raipur, dated 11.02.2019, which in turn arises from the order passed by the A.O under Sec 143(3) of the Income-tax Act, 1961 (in short 'the Act') dated 31.03.2016 for assessment year 2013-14. Before us the assessee has assailed the impugned order on the following grounds of appeal:

“1) That Assessing Officer has passed assessment order without issuing notice u/s.143(2), therefore, assessment proceedings conducted by the AO are illegal and contrary to the provisions of the law. Consequent assessment order passed by the AO is illegal, ab-initio-void and not sustainable.

2) That learned CIT(A) erred in not adjudicating on the ground regarding illegality of assessment order due to non-issuance of notice u/s 143(2) by the AO, who has passed the assessment order.

3) That learned CIT(A) erred in confirming the addition of Rs.1,91,406/- made by the Assessing Officer under the head "Income from House Property" for alleged notional rent u/s. 23(1)(a) on unsold flats and shops shown as "Stock-in-trade" in the balance sheet as on 31.03.2013 without considering the facts and circumstances of the case properly and judicially and without properly and completely appreciating the written submission furnished before him.

4) That learned CIT(A) erred in confirming action of the Assessing Officer in not allowing deduction under Chapter VI-A to the extent of Rs.11,512/- by stating that "as income has been assessed under the head "House Property", therefore, the deduction u/s. 80C is not allowable" without referring any provision of the Act or judicial pronouncement in this regard.

5) The appellant reserves the right to add, amend, or alter any ground or grounds of appeal at the time of hearing.”

2. Succinctly stated, the assessee who is engaged in the business of builder and developer, had e-filed his return of income for the assessment year 2013-14 on 28.10.2013, declaring an income of Rs. Nil. Subsequently, the case of the assessee was selected for scrutiny assessment u/s.143(2) of the Act.

3. During the course of assessment proceedings it was observed by the A.O that the assessee who was engaged in the business of construction of residential house/flats was holding 7 flats as stock-in-trade of his business, as under:

S. No.	Particulars	Flat No./Shop No.	Floor	Area (in. Sq.ft)
1	Row House	E-1	Ground floor	477
2		E-1	First floor	477
3	Flats (Old Block)	ML-9	First floor	340
4		C-101	First floor	388
5		C-102	First floor	388
6		C-201	Second floor	388
7		C-202	Second floor	388
8	Flats (Multi Block)	RS-101	First floor	1065
9		RS-102	First floor	1035
10		LS-104	First floor	774
11		LS-105	First floor	863
12		RS-201	Second floor	1035
13		RS-202	Second floor	1050
14		RS-203	Second floor	743
15		RS-204	Second floor	1060
16		RS-205	Second floor	1035
17		RS-301	Third floor	1035
18		RS-302	Third floor	1050
19		RS-304	Third floor	1050
20		RS-305	Third floor	1035
21		LS-301	Third floor	735
22		LS-304A	Third floor	665

23	Multi shops Ground Floor	RS-2	Ground Floor	164
24		RS-3	Ground Floor	137
25		RS-4	Ground Floor	148
26		RS-5	Ground Floor	143
27		RS-6	Ground Floor	173
28		RS-7	Ground Floor	164
29		RS-8	Ground Floor	162

Observing, that Annual Lettable Value (ALV) of the aforesaid flats were liable to be brought to tax u/s.22 of the Act, the A.O called upon the assessee to put forth an explanation as to why ALV of the property in question i.e. 7 flats forming part of his stock-in-trade may not be brought to tax under the head “Income from house property”. As the reply filed by the assessee did not find favour with the A.O, therefore, he determined the ALV of the flats in question at an amount of Rs.2,73,437/- u/s.22 of the Act, as under:

S. No.	Particulars	Flat No./Shop No.	Floor	Area (in. Sq.ft)	Rate of Nagar Nigam, Raipur for per Sq.ft per year (In Rs.)	Annual Rental Value as per section 23(1)9a) of the Income Tax Act, 1961 (in Rs.)
1	Row House	E-1	Ground floor	477	Rs.18 per sq.ft	8,586.00
2		E-1	First floor	477	Rs.15.30 per Sq.ft (85% of Rs.18)	7,298.00
3	Flats (Old Block)	ML-9	First floor	340	Rs.15.30 per Sq.ft (85% of Rs.18)	5202.00
4		C-101	First floor	388	Rs.15.30 per Sq.ft (85% of Rs.18)	5936.00
5		C-102	First floor	388	Rs.15.30 per Sq.ft (85% of Rs.18)	5936.00
6		C-201	Second floor	388	Rs.14.40 per Sq.ft (80% of Rs.18)	5587.00
7		C-202	Second floor	388	Rs.14.40 per Sq.ft (80% of Rs.18)	5587.00
8		RS-101	First floor	1065	Rs.15.30 per Sq.ft (85% of Rs.18)	16,295.00

9	Flats (Multi Block)	RS-102	First floor	1035	Rs.15.30 per Sq.ft (85% of Rs.18)	15,836.00	
10		LS-104	First floor	774	Rs.15.30 per Sq.ft (85% of Rs.18)	11,842.00	
11		LS-105	First floor	863	Rs.15.30 per Sq.ft (85% of Rs.18)	13,294.00	
12		RS-201	Second floor	1035	Rs.14.40 per Sq.ft (80% of Rs.18)	11,994.00	
13		RS-202	Second floor	1050	Rs.14.40 per Sq.ft (80% of Rs.18)	15120.00	
14		RS-203	Second floor	743	Rs.14.40 per Sq.ft (80% of Rs.18)	10,699.00	
15		RS-204	Second floor	1060	Rs.14.40 per Sq.ft (80% of Rs.18)	15,120.00	
16		RS-205	Second floor	1035	Rs.14.40 per Sq.ft (80% of Rs.18)	14,904.00	
17		RS-301	Third floor	1035	Rs.13.50 per Sq.ft (75% of Rs.18)	13,973.00	
18		RS-302	Third floor	1050	Rs.13.50 per Sq.ft (75% of Rs.18)	14,475.00	
19		RS-304	Third floor	1050	Rs.13.50 per Sq.ft (75% of Rs.18)	14,475.00	
20		RS-305	Third floor	1035	Rs.13.50 per Sq.ft (75% of Rs.18)	13,973.00	
21		LS-301	Third floor	735	Rs.13.50 per Sq.ft (75% of Rs.18)	9923.00	
22		LS-304A	Third floor	665	Rs.13.50 per Sq.ft (75% of Rs.18)	8978.00	
23		Multi shops Ground Floor	RS-2	Ground Floor	164	Rs.24 per sq.ft	3936.00
24			RS-3	Ground Floor	137	Rs.24 per sq.ft	3288.00

Accordingly, the A.O after allowing statutory deduction of 30% u/s.24(a) of the Act determined the income of the assessee under the head “Income from house property” at Rs.1,91,406/-.

4. Aggrieved, the assessee carried the matter in appeal before the CIT (Appeals) but without any success.

5. The assessee being aggrieved with the order of the CIT(Appeals) has carried the matter in appeal before us.

6. Controversy involved in the present appeal hinges around the solitary issue, i.e., as to whether or not ALV of the unsold flats held by the assessee as stock-in-trade of his business as that of a builder/developer is liable to be assessed u/s.22 of the Act? We find that the aforesaid issue is squarely covered by the order of the ITAT, Mumbai, "C" Bench in the case of Osho Developers Vs. ACIT (2020) 208 TTJ 802 (Mum.) (to which one of us, the JM was a party), after exhaustive deliberations qua the issue in hand a/w. a reference to the amendment made available on the statute u/s. 23(5) of the Act had vide Finance Act, 2017 w.e.f. 01.04.2018 held, as under:

"7. 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 for driving home their respective contentions. Admittedly, it is a matter of fact that the flats in question were held by the assessee firm, a real estate developer, as stock-in-trade of its respective projects viz. (i) Ashwin CHS Projects; and (ii) Infinity Project. As observed by us hereinabove, the A.O had determined and therein brought to tax the ALV of the aforesaid flats under the head "house property" in the hands of the assessee firm. Our indulgence in the present appeal has been sought by the assessee, to adjudicate, the sustainability of the view taken by the lower authorities that the ALV of the flats held by the assessee as stock-in-trade was liable to be determined and therein brought to tax under the head "house property". As is discernible from the assessment order, the A.O by relying on the order of the Hon'ble High Court of Delhi in the case of CIT Vs. Ansal Housing Finance and Leasing Company Ltd. (2013) 354 ITR 180 (Del), had determined the ALV of the flats which were held by the

assessee as part of the stock-in-trade of its business of a builder and developer, and had brought the same to tax under the head "house property". On appeal, the CIT(A) had found favour with the view taken by the A.O by drawing support from the order of the Hon'ble High Court of Bombay in the case of CIT Vs. Gundecha Builders (2019) 102 CCH 426 (Bom).

8. On a perusal of the order of the Hon'ble Jurisdictional High Court in the case of Gundecha Builders (supra), we find, that the issue before the High Court was that where an assessee, a real estate developer, was in receipt of rental income from a property held as stock-in-trade of its business as that of a real estate developer, then, whether the said receipts were to be brought to tax under the head "house property" (as claimed by the assessee) or as "business income" (as claimed by the revenue). The High Court after relying on its earlier order passed in the case of CIT Vs. Sane & Doshi Enterprises (2015) 377 ITR 165 (Bom), had observed, that in a case where a real estate developer is in receipt of rental income in respect of a property held by him as stock-in-trade of its business as that of a real estate developer, the said rental receipts was to be assessed under the head house property. Accordingly, the issue before the High Court in the aforesaid case was as to under which head of income the rental receipts were liable to be assessed. Finding favour with the claim of the assessee, it was observed by the High Court that the rental income received from letting out of the unsold portion of the property constructed by the real estate developer was assessable to tax as its income from house property. Beyond any scope of doubt, the issue before the Hon'ble High Court was as to under which head of income the rental receipts were to be taxed i.e as "business income" or "income from house property". Unlike the facts involved in the case before the High Court, in the case before us, the flats held by the assessee as stock-in-trade of its business of a builder and developer, having not been let out, had thus not yielded any rental income. As the Hon'ble High Court of Bombay in the case of Gundecha Builders (supra) was seized of the issue as to under which head of income the rental income received from the unsold portion of the property constructed by a real estate developer was to be assessed, which is not the issue involved in the present appeal before us, therefore, the same in our considered view being distinguishable on facts would not assist the case of the revenue before us.

9. We shall now advert to the judgment of the Hon'ble High Court of Delhi in the case of CIT Vs. Ansal Housing Finance and Leasing Company Ltd. (2013) 354 ITR 180 (Del) by drawing support from which the A.O had determined and therein brought to tax the ALV of the flats held by the assessee as stock-in-trade of its business as

that of a builder and developer. In the aforesaid case, it was the claim of the assessee that unlike the other builders as it was not into letting out of properties, the determination of deemed income which had formed the basis for assessment under the ALV method, was not called for in its case. However, the High Court being of the view that the levy of income tax in the case of an assessee holding house property was premised not on whether the assessee carries on business, as landlord, but on the ownership, thus, turned down the aforesaid claim of the assessee. To sum up, in the backdrop of its conviction that the incidence of charge under the head house property was based on the factum of ownership of property, the High Court was of the view that as the capacity of being an owner was not diminished one whit, because the assessee carried on the business of developing, building and selling flats in housing estates, therefore, the ALV of the flats held as stock-in-trade by the assessee in its business of a builder and developer was liable to be determined and brought to tax under the head "house property". But then, we find, that taking a contrary view the Hon'ble High Court of Gujarat had way back in the case of CIT vs. Neha Builders (2008) 296 ITR 661 (Guj), observed, that rental income derived by an assessee from the property which was treated as stock-in-trade is assessable as business income and cannot be assessed under the head "Income from house property". The High Court while concluding as hereinabove, had observed, that admittedly the income derived from 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. In the backdrop of the conflict between the decisions of the aforesaid non-jurisdictional High Courts, as observed by the Hon'ble High Court of Bombay in the case of K. Subramanian and Anr. Vs. Siemens India Ltd. and Anr (1985) 156 ITR 11 (Bom), the view which is in favour of the assessee has to be preferred as against that taken against him. Accordingly, following the judgment of the Hon'ble Jurisdictional High Court in the case of K. Subramanian and Anr. Vs. Siemens India Ltd. and Anr (1985) 156 ITR 11 (Bom), we respectfully follow the view taken by the Hon'ble High Court of Gujarat in the case of CIT vs. Neha Builders (2008) 296 ITR 661 (Guj). In fact, we find that the issue as to whether the ALV of a property held by an assessee as stock-in-trade of its business as that of a real estate developer had earlier came up before a "SMC" bench of the ITAT, Mumbai in the case of Shri. Rajendra Godshalwar Vs. ITO-21(3)(1), Mumbai [ITA No. 7470/Mum/2017, dated 31.01.2019]. The Tribunal after considering the judgment of the Hon'ble High Court of Delhi in Ansal Housing Finance & Leasing Co. Ltd. (2013) 354 ITR 180 (Delhi) and that of the Hon'ble High

Court of Gujarat in CIT vs. Neha Builders Pvt. Ltd., (2008) 296 ITR 661 (Guj), had concluded, that the ALV of the unsold property held by the assessee as stock-in-trade could not be determined and brought to tax under the head 'house property'. The Tribunal while concluding as hereinabove had also distinguished the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Sane & Doshi Enterprises (2015) 377 ITR 165 (Bom), as was relied upon by the revenue. The Tribunal while concluding as hereinabove had observed as under:

"6. We have carefully considered the rival submissions. The short point involved in this appeal is the validity of addition sustained by the CIT(A) on account of notional ALV of the unsold flat, which is held by the assessee as stock-in-trade. Factually speaking, it is not in dispute that the flat in question is not yielding any rental income to the assessee, as it has not been let-out. It is also not in dispute that the project in question has been completed during the year under consideration, and the said flat is shown as stock-in-trade at the end of the year. At the time of hearing, the learned representative also pointed out that the flat has been ultimately sold on 06.11.2012. We find that our coordinate Bench in the case of C.R. Developments Pvt. Ltd. (supra) dealt with charging of notional income under the head 'Income from House Property' in respect of unsold shops which were shown by assessee therein as part of 'stock-in-trade'. As per the Tribunal "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 Shri Rajendra Godshalwar 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."

7. In our view, the aforesaid observation of our coordinate Bench squarely applies to the facts of the present case. In the case of M/s. Runwal Constructions (supra) also, similar issue has been dealt with by our coordinate Bench. In the case of M/s. Runwal Constructions (supra), the Bench noted the judgment of the Hon'ble Gujarat High Court in the case of CIT vs Neha Builders Pvt. Ltd., 296 ITR 661 (Guj.) as also the judgment of the Hon'ble Delhi High

Court in the case of Ansal Housing Finance & Leasing Co. Ltd., 354 ITR 180 (Delhi) and finally observed as under :-

"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."

Following the aforesaid precedents, we find merit in the plea of the assessee, which deserves to be upheld.

8. Insofar as the judgment of the Hon'ble Bombay High Court in the case of Sane & Doshi Enterprises (supra) relied by the CIT(A) is concerned, the same, in our view, does not help the case of the Revenue. Quite clearly, the case before the Hon'ble High Court was relating to actual rental income received on letting out of unsold flats. The dispute pertained to the head of income under which such income was to be taxed - whether as 'Business Income' or as 'Income from House Property'.

In the present case, the facts are quite different inasmuch as the unsold flat in question has not yielded any rental income as the flat has not been let-out, and is being held by the assessee purely as stock-in-trade; and, what the Assessing Officer has tried to do is to assess only a notional income thereof. Thus, the ratio of the judgment of the Hon'ble Bombay High Court in the case of Sane & Doshi Enterprises (supra) has been rendered in the context of qualitatively different facts, and is not applicable in the present case."

Accordingly, preferring the view taken by the Hon'ble High Court of Gujarat in CIT vs. Neha Builders Pvt. Ltd. (2008) 296 ITR 661 (Guj), as per which the ALV of the unsold property held by an assessee as stock-in-trade could not be determined and brought to tax under the head "house property", as against that arrived at by the Hon'ble High Court of Delhi holding to the contrary in CIT Vs. Ansal Housing Finance and Leasing Company Ltd. (2013) 354 ITR 180 (Del); and also following the order of ITAT, Mumbai in Shri. Rajendra Godshalwar Vs. ITO-21(3)(1), Mumbai [ITA No. 7470/Mum/2017, dated 31.01.2019], we herein conclude that the ALV of flats held by the assessee as part of the stock-in-trade of its business as that of a

builder and developer could not have been determined and therein brought to tax under the head „house property“.

10. Before parting, for the sake of clarity, we may herein observe that vide the Finance Act, 2017 w.e.f 01.04.2018 the legislature had inserted Sec. 23(5) of the Act. As per the said statutory provision, 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 a period up to "one year" ["two years" vide the Finance Act, 2019 i.e w.e.f 01.04.2020] 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. As the said statutory provision i.e Sec. 23(5) is applicable prospectively i.e w.e.f A.Y 2018-19, the same, thus, would have no bearing on the year under consideration in the case of the present assessee before us. Our aforesaid view is fortified by the aforesaid order of the ITAT, Mumbai in the case of Shri. Rajendra Godshalwar Vs. ITO-21(3)(1), [ITA No. 7470/Mum/2017, dated 31.01.2019], wherein in context of the said aspect it was observed as under:

"9. Apart therefrom, we find that Sec. 23(5) of the Act has been inserted by the Finance Act, 2017 w.e.f. 01.04.2018. In terms of the said section, it is prescribed that "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". Though the said provision is effective from 01.04.2018, yet even if one is to see the present case from the standpoint of Sec. 23(5) of the Act, no addition is permissible in the instant year. It may be relevant to note that the completion certificate is stated to Shri Rajendra Godshalwar have been obtained on 28.11.2011 and going by the provisions of Sec. 23(5) of the Act, no addition is permissible in the instant assessment year. Be that as it may, we are only trying point out that the assessability of notional income in respect of unsold flat, which is taken as stock-in-trade, is not merited in the instant case. Thus, we set- aside the order of CIT(A) and direct the Assessing Officer to delete the addition."

11. We, thus, in the backdrop of our aforesaid deliberations not being able to concur with the view taken by the lower authorities, therein, set aside the order of the CIT(A) and direct the A.O to delete

the addition made by him towards the ALV of the flats held by the assessee as stock-in-trade of its business as that of a builder and developer. The Grounds of appeal Nos. 1 to 4 are allowed in terms of our aforesaid observations.”

As the facts and the issue involved in the aforesaid order of the Tribunal in the case of Osho Developers Vs. ACIT (supra) remains the same as are there before us in the case of the present assessee, therefore, we respectfully follow the same. We, thus, herein conclude that the ALV of the unsold 7 flats held by the assessee as stock-in-trade of his business could not have been assessed u/s.22 of the Act. Accordingly, we herein vacate the addition of Rs.1,91,406/- made by the A.O. Thus, the **Grounds of appeal No.(s) 1 to 3** raised by the assessee are allowed in terms of our aforesaid observations.

7. As we have vacated the addition made by the A.O, therefore, **Ground of appeal No.4** raised by the assessee qua declining of his claim of deduction u/s.80C of the Act having been rendered as merely academic in nature is dismissed. Thus, **Ground of appeal No.4** is dismissed as having been rendered as infructuous.

8. **Ground of appeal No.5** being general in nature is dismissed accordingly.

9. In the result, appeal of the assessee is allowed in terms of our aforesaid observations.

Order pronounced in open court on 25th day of July, 2022.

Sd/-
ARUN KHODPIA
(ACCOUNTANT MEMBER)

Sd/-
RAVISH SOOD
(JUDICIAL MEMBER)

रायपुर/ RAIPUR ; दिनांक / Dated : 25th July, 2022
SB

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-II, Raipur (C.G)
4. The Pr. CIT-II, Raipur (C.G)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, रायपुर बेंच,
रायपुर / DR, ITAT, Raipur Bench, Raipur.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, रायपुर / ITAT, Raipur.

		Date	
1	Draft dictated on	21.07.2022	Sr.PS/PS
2	Draft placed before author	22.07.2022	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on		Sr.PS/PS
7	Date of uploading of order		Sr.PS/PS
8	File sent to Bench Clerk		Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		