

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'E' BENCH  
MUMBAI**

**BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER  
&  
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No.1072/Mum/2022  
(Assessment Year :2017-18)**

Shri Manoj Lalman Awasthi 20, Nirman Vyapar Kendra Sector – 17, Vashi Navi Mumbai-400 703	Vs.	Principal Commissioner of Income Tax PCIT, Room No.401, 4 <sup>th</sup> Floor, Tower No.6 Vashi Railway Station, Commercial Complex Vashi, Navi Mumbai-400 703
<b>PAN/GIR No.AADPA3502G</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Assessee by	Ms. Hiral D Sejpal
Revenue by	Shri Manoj Kumar
<b>Date of Hearing</b>	<b>08/08/2022</b>
<b>Date of Pronouncement</b>	<b>23/08/2022</b>

**आदेश / O R D E R**

**PER M. BALAGANESH (A.M):**

This appeal in ITA No.1072/Mum/2022 for A.Y.2017-18 preferred by the order against the revision order of the Id. Principal Commissioner of Income Tax-27, Mumbai u/s.263 of the Act dated 17/03/2022 for the A.Y.2017-18.

2. The only issue to be decided in this appeal is as to whether the Id. PCIT was justified in invoking revisionary jurisdiction u/s.263 of the Act in

the facts and circumstances of the instant case. The interconnected issue involved therein is as to whether the Id. PCIT was justified in directing the Id. AO to make a fresh assessment by taxing the notional rent arising from property held as 'stock in trade' under the head 'income from house property' in the facts and circumstances of the case.

3. We have heard rival submissions and perused the materials available on record. The assessee is an individual in real estate business having income from house property, income from business and income from other sources. The return of income for the A.Y.2017-18 was filed by the assessee on 30/10/2017 declaring total income of Rs.28,67,170/-. This return was selected for scrutiny under CASS. During the course of scrutiny assessment proceedings, notice u/s.142(1) of the Act was sent to the assessee calling for various details. In response to the same, the assessee submitted all the replies in the online portal of Income Tax department. The Id. AO on going through the said replies completed the assessment u/s.143(3) of the Act dated 14/12/2019 by accepting the returned income. This assessment was sought to be treated as erroneous in as much as it is prejudicial to the interest of the Revenue by the Id. PCIT and accordingly, first show-cause notice u/s.263 of the Act was issued to the assessee on 02/03/2022 on the ground that assessee being a builder has shown closing stock of Rs.9,12,74,048/- as on 31/03/2017 as 'stock in trade' and had not offered rental income from the unsold stock of flats in terms of Section 23(5) of the Act. The said show-cause notice is enclosed in pages 2 & 3 of the paper book filed by the assessee. The Id. PCIT observed that 8% of value of closing stock of property held as 'stock in trade' should be subjected to tax as deemed rental income u/s.23(5) of the Act. The Id. PCIT placed reliance on the decision of the Hon'ble Delhi High Court in the case of CIT vs. Ansal Housing Finance and

Leasing Co. Ltd., reported in 354 ITR 180 in support of his contentions. The assessee was directed to furnish reply on 07/03/2022 on which date the assessee did not file any reply. We find that subsequently yet another notice was issued to the assessee on 10/03/2022 fixing the hearing on 14/03/2022. The assessee did not comply on 14/03/2022 by filing the requisite details and explanations, however, the replies were filed on 15/03/2022 before the Id. PCIT in the online portal of Income Tax department as is evident from page 7 of the paper book containing online acknowledgement given to the assessee thereon. Ultimately, the order was passed by the Id. PCIT treating the order of the Id. AO as erroneous and prejudicial to the interest of the Revenue by invoking revision jurisdiction u/s.263 of the Act on 17/03/2022. Hence, before passing the order on 17/03/2022, the reply filed by the assessee on 15/03/2022 was very much available before the Id. PCIT and despite that he grossly erred in stating in para 4 that no reply was filed by the assessee in response to the show-cause notice.

3.1. The reply filed by the assessee vide letter dated 14/03/2022 filed on 15/03/2022 are enclosed in pages 8-12 of the paper book filed before us. In the said reply, the assessee specifically drew the attention of the Id. PCIT that provisions of Section 23(5) of the Act was introduced only from 01/04/2018 and would be applicable only from A.Y.2018-19 onwards. Accordingly, it was pleaded that the said provision cannot be made applicable for the year under consideration. The assessee also placed reliance on the decision of the Hon'ble Supreme Court in the case of CIT vs. Max India reported in 166 Taxman 188 wherein it was held that amendments in a section although retrospective, do not attract the provisions of Section 263 of the Act and position of law as it stood on the date of Assessing Officer passing the order need to be taken into

consideration. The assessee also distinguished the case law relied upon by the Id. PCIT and in support of the contentions of the assessee, reliance was placed on the decision of the Gujarat High Court in the case of CIT vs. Neha Builders Pvt Ltd., reported in 296 ITR 661 wherein it was held that in the case of a builder, the annual value of the property held as 'stock in trade' cannot be brought to tax under the head 'income from house property' and even if any rent has been realized, the same would be taxable only as 'business income'. Apart from this, the Id. AR also drew our attention to the enquiries made by the Id. AO during the course of assessment proceedings vide issue of notice u/s.142(1) of the Act dated 16/11/2019 wherein specific query was raised with regard to the ongoing projects and stock in trade of the assessee. In response thereto, the assessee filed a reply vide letter dated 29/11/2019 submitting all the requisite details including the address, assets of the building, copy of occupancy certificate, copy of commencement certificate and calculations for valuation of closing stock of flats. Hence, it was pleaded that all the necessary enquiries were indeed carried out by the Id. AO in the course of original assessment proceedings itself and assessee had duly furnished entire details that were called for by the Id. AO and the Id. AO had taken a possible view on the matter. Hence, it was pleaded that the order passed by the Id. AO cannot be termed as erroneous warranting revision u/s.263 of the Act. The assessee had also addressed the provisions of Explanation-2 to Section 263 of the Act before the Id. PCIT in the reply dated 14/03/2022.

3.2. From the perusal of the aforesaid narration of facts and arguments of the Id. AR and perusal of relevant papers in the paper book to which our attention was drawn by the Id. AR, we hold that the adequate enquiries with regard to the valuation of closing stock of the property and

its consequential assessability of rental income, was indeed carried out by the Id. AO in the course of original assessment proceedings. Hence, it could be safely concluded that the Id. AO had taken a possible view on the matter. Accordingly, by placing reliance on the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Nirav Modi reported in 390 ITR 292, the order of the Id. AO cannot be treated as erroneous, when a possible view has already taken by him in the assessment. Moreover, we find that the Id. PCIT is only directing to invoke the provisions of Section 23(5) of the Act for taxing the rental income on notional basis under the head 'income from house property' in respect of unsold flats lying as 'closing stock'. We find that the provisions of Section 23(5) of the Act has been introduced in the statute only from A.Y.2018-19 and the same cannot be made applicable to assessment years prior to that. Hence, the same cannot be made applicable for the year under consideration. In respect of deemed rental income on unsold stock of flats held as stock in trade, the Hon'ble Gujarat High Court in the case of Neha Builders reported in 296 ITR 661 had categorically held that the said rental income, if any, could be brought to tax only under the head 'income from business' and not under the head 'income from house property'. On perusal of the said decision of the Hon'ble Gujarat High Court, we find that the decision of the Hon'ble Delhi High Court in the case of Ansal Housing Finance and Leasing Co. Ltd., which has been heavily relied upon by the Id. PCIT has also been considered and distinguished. Hence, even on merits, no rental income could be brought to tax in the instant case, even if provisions of Section 23(5) of the Act is not applied. Hence, we have no hesitation to hold that the order of the Id. PCIT suffers from all legal infirmities and the revision order to be quashed for the purpose of invalid assumption of jurisdiction u/s.263 of the Act. We hold that assessee also deserves to succeed on merits in view of the aforesaid

observations. Accordingly, the ground No. 1 & 2 raised by the assessee are allowed.

**4. In the result, appeal of the assessee is allowed.**

Order pronounced on 23/08/2022 by way of proper mentioning in the notice board.

**Sd/-**  
**(RAHUL CHAUDHARY)**  
JUDICIAL MEMBER

**Sd/-**  
**(M.BALAGANESH)**  
ACCOUNTANT MEMBER

Mumbai; Dated 23/08/2022  
KARUNA, *sr.ps*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Sr. Private Secretary / Asstt. Registrar)  
ITAT, Mumbai