

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SHRI S. S. VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.684/PUN/2018
निर्धारण वर्ष / Assessment Year: 2014-15

Kumar Properties and Real Estate Pvt. Ltd., 1 st Floor, Kumar Capital, East Street, Camp, Pune-411001. PAN : AAACK7490H	Vs.	DCIT, Circle-14, Pune.
Appellant		Respondent

Assessee by : Shri Rajan R. Vora &
Shri Rajendra Agiwal
Revenue by : Shri Abhinay S. Kumbhar
Date of hearing : 19.07.2022
Date of pronouncement : 25.08.2022

आदेश / ORDER

PER INTURI RAMA RAO, AM:

This is an appeal filed by the assessee directed against the order of Id. Commissioner of Income Tax (Appeals)- 7, Pune [‘the CIT(A)’] dated 23.02.2018 for the assessment year 2014-15.

2. Briefly, the facts of the case are that the appellant is a company incorporated under the provisions of the Companies Act, 1956. It is engaged in the business of promoter and developer of the housing project. The return of income for the assessment year

2014-15 was filed on 05.11.2014 declaring total income of Rs.38,91,11,289/-. Against the said return of income, the assessment was completed by the Dy. Commissioner of Income Tax, Circle-14, Pune ('the Assessing Officer') vide order dated 26.12.2016 passed u/s 143(3) of the Income Tax Act, 1961 at a total income of Rs.51,82,45,910/-. While doing so, the Assessing Officer made (i) addition of Rs.18,69,491/- u/s 14A, (ii) addition on account of notional rent on unsold flats of Rs.89,68,680/- and (iii) addition by disallowance of provision of Rs.11,38,26,228/-. The factual background of the above disallowances is as under :-

During the course of assessment proceedings, the Assessing Officer observed that the appellant company made investments in partnership firm, namely, M/s Marigold Properties and income from which is exempt from tax in the hands of the appellant company. The appellant also made investments with partnership firm and in equity shares, income from which is also exempt. On noticing that the appellant had not offered any *suo moto* disallowance u/s 14A, the appellant was called upon to explain as to why disallowance u/s 14A cannot be made. In response to the same, the appellant filed letter dated 28.11.2016 stating that it had not incurred any expenditure for earning the exempt income. Therefore, the question

of disallowance u/s 14A does not arise. Rejecting the above contention, the Assessing Officer had proceeded with making of disallowance under the provisions of Rule 8D(2)(iii) of the Income Tax Rules, 1962 ('the Rules') at Rs.18,69,491/-.

3. As regards, the addition on account of notional rent of unsold flats, the Assessing Officer, during the course of assessment proceedings, noticed that the appellant company completed two projects, namely, "Kumar Infinia" and "Kumar Picasso" as on 31.03.2012. The Assessing Officer also found that there are unsold flats and the appellant had not offered any notional rental income on unsold flats, when the appellant was show-caused as to why the notional rental value of unsold flats cannot be brought to tax. In response to which, it is submitted that the unsold flats lying in the stock-in-trade, therefore, notional rental value of unsold flats cannot be computed u/s 22 of the Act placing reliance on the certain decision of the Tribunal in the case of C.R. Development Pvt. Ltd. vs. Jt. CIT 2015 (8) TMI 317 (Mumbai-ITAT). However, rejecting the above contentions, the Assessing Officer brought to tax notional rental value of unsold flats of Rs.89,68,680/-.

4. As regards the disallowance of Rs.11,38,26,228/-, during the course of assessment proceedings for the year under consideration,

the Assessing Officer found that the appellant had made a provision for expense of Rs.11,38,26,228/- formed an opinion that the provision made towards the expense had been not crystallized at all. Rejecting the contention of the appellant that the expenses have been claimed on matching principle, in the subsequent year based on the matching principle that these expenses have been provided the income in respect of flats which have been sold, offered to tax during the year under consideration.

5. Being aggrieved by the above disallowances, an appeal was filed before the ld. CIT(A), the ld. CIT(A) following his decision for the assessment year 2013-14 upheld the disallowance of Rs.18,69,491/- u/s 14A as well as addition on account of notional rental value of unsold flats of Rs.89,68,680/-.

As regards, the addition on account of provision for expense of Rs.11,38,26,228/-, the ld. CIT(A) considering the details of provision made and the submission of the appellant that out of the total sum of Rs.11,38,26,228/-, an amount of Rs.8,70,76,854/- was directly included as part of the closing work-in-progress, directed the Assessing Officer to delete the addition. However, the ld. CIT(A) confirmed the addition to the extent of Rs.2,35,60,537/- which has been debited to the Profit & Loss Account rejecting the

contention of the appellant that the provision for expense was made in respect of flats sold on the matching principle, the expenses should be allowed as deduction.

6. Being aggrieved by the order of the ld. CIT(A), the appellant is in appeal before us in the present appeal.

7. Ground of appeal no.1 is general in nature does not require any adjudication.

8. Ground of appeal no.2 to 4 challenges the order of the ld. CIT(A) in confirming the disallowance of Rs.18,69,491/- u/s 14A of the Act read with Rule 8D(2)(iii) of the Rules. It is contended before us that before embarking upon the disallowance under the provisions of section 14A, it is incumbent upon the Assessing Officer to record a satisfaction as to the correctness of the claim of the assessee that no expenditure was incurred to earn exempt income. Taking us through the submission made before the ld. CIT(A), he submits that the appellant took stand that no expenditure was incurred for the purpose of earning the exempt income and the question of disallowance does not arise. The Assessing Officer as well as the ld. CIT(A) had proceeded with making a disallowance u/s 14A of the Act. He further submits that no disallowance can be made u/s 14A without recording a satisfaction as to the correctness

of the claim made by the assessee company. Without prejudice to the above, it is submitted that the amount of disallowance u/s 14A r.w. Rule 8D(2)(iii) should be computed by considering the value of those investments which yielded the exempt income for the purpose of computing the average value of investments.

9. On the other hand, ld. CIT-DR placing reliance on the orders of the lower authorities submits that no satisfaction is required to be recorded.

10. We heard the rival submissions and perused the material on record. The issue in the present ground of appeal relates to the disallowance u/s 14A of the Act. It is undisputed position that the appellant company made investments in partnership firm and in equity shares, income from which is exempt from tax. It is contention of the appellant that no expenditure was incurred to earn the exempt income and, therefore, the question of disallowance u/s 14A does not arise. The provisions of section 14A provides that resort to disallowance u/s 14A can be made only if the Assessing Officer is not satisfied with the correctness of the claim of the assessee that no expenditure was incurred to earn the exempt income. Therefore, it is mandatory on the part of the Assessing Officer to record a satisfaction as to the correctness or otherwise of

claim of the assessee regarding the expenditure incurred to exempt income. In the absence of recording of such satisfaction by the Assessing Officer, resort to the provisions of section 14A cannot be made as held by the Hon'ble Bombay High Court in the case of PCIT vs. Reliance Capital Asset Management Limited, 400 ITR 217, Hon'ble Delhi High Court in the cases of CIT vs. Taikisha Engineering India Ltd, 229 Taxman 143 and CIT vs. I P Support Services India P. Ltd, 378 ITR 240. Even the Hon'ble Supreme Court in the case of Maxopp Investment Ltd vs. CIT, (2018) 402 ITR 640 (SC) upheld as follows :-

“41. Having regard to the language of section 14A(2) of the Act, read with rule 8D of the Rules, we also make it clear that before applying the theory of apportionment, the Assessing Officer needs to record satisfaction that having regard to the kind of the assessee, suo motu disallowance under section 14A was not correct. It will be in those cases where the assessee in his return has himself apportioned but the Assessing Officer was not accepting the said apportionment. In that eventuality, it will have to record its satisfaction to this effect. Further, while recording such a satisfaction, the nature of the loan taken by the assessee for purchasing the shares/ making the investment in shares is to be examined by the Assessing Officer”

11. The Hon'ble Supreme in the case of Godrej & Boyce Manufacturing Company Ltd. vs. DCIT, 394 ITR 449 (SC) held as follows :-

“37. We do not see how in the aforesaid fact situation a different view could have been taken for the Assessment Year 2002-2003. Sub-sections (2) and (3) of Section 14A of the Act read with Rule 8D of the Rules merely prescribe a formula for determination of expenditure incurred in relation to income which does not form part of the total

income under the Act in a situation where the Assessing Officer is not satisfied with the claim of the assessee. Whether such determination is to be made on application of the formula prescribed under Rule 8D or in the best judgment of the Assessing Officer, what the law postulates is the requirement of a satisfaction in the Assessing Officer that having regard to the accounts of the assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. It is only thereafter that the provisions of Section 14A(2) and (3) read with Rule 8D of the Rules or a best judgment determination, as earlier prevailing, would become applicable.”

12. Thus, the law is settled to the extent that without recording the satisfaction as to correctness or otherwise, the claim of the assessee that no expenditure was incurred to exempt income, the Assessing Officer cannot resort to the provisions of section 14A of the Act. In the present case, from the perusal of the assessment order as well as the order of the Id. CIT(A), it would clearly reveal that the appellant had asserted that no expenditure was incurred. The Assessing Officer had not recorded any finding on the submissions made by the appellant company. Even the Id. CIT(A) had not also rendered any finding on the submissions made by the appellant company. Therefore, we remit the issue to the file of the Id. CIT(A) to adjudicate the contention of the appellant company that in the absence of recording of satisfaction, no disallowance u/s 14A can be made in accordance with law. Accordingly, these grounds of appeal no.2 and 4 stands partly allowed.

13. Grounds of appeal no.5 to 10 challenges the correctness of the decision of the ld. CIT(A) upholding the addition on account of notional rental value of unsold flats lying in stock-in-trade. This issue is decided in favour of the appellant company by this Tribunal in the case of (i) Kumar Properties and Real Estate Pvt. Ltd. vs. DCIT (ITA No.2977/PUN/2017 dated 28 April 2021), (ii) Pegasus Properties Pvt. Ltd. vs. DCIT (ITA No.3081/PUN/2017 and ITA No.646/PUN/2018 dated 7 November 2019) and (iii) Kumar Constructions and Properties Pvt. Ltd. vs. DCIT (ITA No.568/PUN/2018 dated 7 September 2021) to which both of us held as follows :-

“4. Heard both the parties and perused the material available on record. During the course of assessment proceedings, we note that the assessee is holding stock of 6 flats which are completed and the details of which are reflected in Para No. 5 of the assessment order. The AO asked the assessee to explain as to why deemed rent in respect of said 6 flats should not be charged to tax under the provisions of section 22 of the Act. The assessee explained vide its submissions dated 09-03-2016, we note that the main contention of ld. AR is that the unsold flats forms part of stock in trade and there is no intention for the assessee to let out the said unsold flats but only to sell in the market. The AO rejected the contention raised by the assessee and calculated the deemed rental income regarding the above said unsold flats by deputing the Inspector for field enquiry ascertaining the monthly fair market rent. The CIT(A) in the impugned order agreed with the view taken by the AO. A similar issue came up before this Tribunal in assessee’s sister concern in the case of Kumar Properties and Real Estate Private Limited in ITA No. 2977/PUN/2017 for A.Y. 2013-14. The Co-ordinate Bench of Tribunal vide order dated 28-04- 2021 discussed the issue in detail from Para Nos. 3 to 13 of the said order and held that an exception has been carried out in section 22 of the Act that any such property or its part, which is occupied by the assessee for the purposes of any business or profession carried, the profits of which are chargeable to income-tax, shall be excluded on satisfying the conditions therein. The Co-ordinate

Bench, further discussed the said 4 conditions in Para Nos. 6, 7, 8 and 9. The first condition being that the property or its part should be occupied by the assessee as an owner. There is no material evidence to show before us that the assessee is not occupied the said unsold 6 flats. The second condition is that any business or profession should be carried on by the assessee. We note that the assessee filed return showing income from such business and also engaged in the business of property development. The third condition is that the occupation of the property should be for the purpose of business or profession wherein the assessee before us shown the said 6 unsold flats as stock in trade. The last condition is that profits of such business or profession should be chargeable to income-tax. In the present case that there is no dispute that the profits of the business of construction by the assessee are chargeable to income-tax. Therefore, in our view that the unsold 6 flats are occupied by the assessee as owner; business of construction is carried on by the assessee; the occupation of the flats is for the purpose of business; and profits of such business are chargeable to Income-tax. Thus, in our opinion, all the four conditions provided in exclusion clause in section 22 of the Act are to be excluded, therefore, we hold that no addition on account of deemed rent on unsold 6 flats can be made in the hands of the assessee. Thus, the order of CIT(A) is not justified and it is set aside. Thus, the grounds raised by the assessee are allowed.”

14. Accordingly, these grounds of appeal no.5 to 10 stands allowed in favour of the appellant company.

15. Grounds of appeal no.11 to 16 challenges the decision of the ld. CIT(A) confirming the addition on account of provision for expenses of Rs.2,03,08,768/- which has been made in respect of properties which are completed and the expenses had to be incurred. It is submitted that the proportionate of expenditure in respect of the area of sold flats, is debited to the Profit & Loss Account, the balance provision for expenses was carried forward as part of the closing work-in-progress and, therefore, on the principle of

matching concept, the provision for expenses which are attributable to sales should be allowed as deduction. It is also submitted that in order to claim the deduction as business expenses, it is not necessary that the amount has only been paid and it is sufficient if the liability for payment incurred and liability had accrued during the relevant accounting year. It is further submitted that when the corresponding sales have been offered to tax, disallowance of corresponding expenditure results in the distortion of true picture of the taxable income.

16. On the other hand, Id. CIT-DR submitted that the expenses were incurred in respect of area of sold flats and balance was formed part of the closing work-in-progress requires verification and this contention was not raised before the Assessing Officer.

17. We heard the rival submissions and perused the material on record. The issue in the present ground of appeal relates to the allowability of the provisions for expenses of Rs.2,03,08,768/-. It is settled position of law that if liability for expenditure had crystallized during the previous year relevant to the assessment year under consideration, then the deduction should be allowed, although the liability is discharged at future date. Reliance in this regard can be placed on the decision of the Hon'ble Apex Court in the case of

Bharat Earth Movers vs. CIT, 245 ITR 428 (SC). On going through the orders of the ld. CIT(A) as well as the Assessing Officer, we find that without examining the crystallization of liability for the expenditure, the Assessing Officer had made disallowance. This approach of the Assessing Officer cannot be upheld. Accordingly, we remit this matter back to the file of the Assessing Officer to examine the allowability of this claim for provision for expenses on being satisfied that the liability for this expenditure had been crystallized during the previous year relevant to the assessment year under consideration and these expenses are incurred in respect of flat already sold and the balance of the expenditure is carried to the closing work-in-progress. Thus, these grounds of appeal no.11 to 16 stands partly allowed for statistical purposes.

18. In the result, the appeal filed by the assessee stands partly allowed for statistical purposes.

Order pronounced on this 25th day of August, 2022.

Sd/-
(S. S. VISWANETHRA RAVI)
JUDICIAL MEMBER

Sd/-
(INTURI RAMA RAO)
ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 25th August, 2022.
Sujeet

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A) -7, Pune.
4. The Pr. CIT-6, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "A" बेंच,
पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

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Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.