

**THE INCOME TAX APPELLATE TRIBUNAL
“F” BENCH MUMBAI**

**SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
&
MS. KAVITHA RAJAGOPAL, JUDICIAL MEMBER**

**ITA NO.1616/MUM/2021
(A.Y.2017-18)**

Jaydeep Realty 7/8, Patidar Complex, Kannamwar Nagar-II, Vikhroli West, Mumbai-400 604 PAN No.AAHFJ2889H	v/s	Assistant Commissioner of Income Tax, Circle 26 (1) Room No.302, 3 rd Flr, Kautilya Bahavan, C-41 to C-43, “G” Block, BKC, Bandra (East) Mumbai-400 051
Appellant		Respondent

Assessee by	None
Department by	Ms. Vranda U Matkari Sr. AR
Date of Hearing	25-07-2022
Date of Pronouncement	21-10-2022

ORDER

PER KAVITHA RAJAGOPAL :-

This appeal has been filed by the assessee as against the order of the learned Commissioner of Income Tax (Appeals)-40, Mumbai [hereinafter referred to as “CIT(A)”] under section 250 of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) pertaining to



assessment year 2017-18. The solitary issue involved in this appeal is the addition of Rs.4,94,813/- made by the Assessing Officer (AO) and confirmed by the CIT(A) under section 22 and 23 being notional income of unsold flats. There was no representation for the assessee and we have decided to hear this appeal on the basis of the learned DR's submission and on perusal of the materials available on record.

2. The brief facts are that the assessee is a firm engaged in the business of builders and developers having two projects one in Thane and other in Dharavi, Mumbai. The assessee submitted that the Dharavi project is under SRA and due to litigation not even 10% of the work was completed and that the Thane project was completed in FY 2014-15 and 3 units admeasuring about 1527 sq.ft were left unsold. Assessee filed its return of income for the impugned year dated 31.10.2017 declaring total loss of Rs.72,29,225/-.The assessee's case was selected for scrutiny. The AO observed that the value of stock as on 31.03.2017 was Rs.88,35,974/- while opening value as on 1.04.2016 was Rs.23,892,098/- which implies that the assessee has sold two properties during the relevant financial year



2016-17. The AO considered the sale proceeds and the P&L account of the assessee from the project during the impugned year. The assessee has submitted that the project has been completed in FY 2014-15 and that the occupancy certificate was obtained in 08.10.2014 and that the assessee has not offered any rental income from the finished units of residential property as per provision of section 22 of the Act. The AO stated that the assessee has failed to offer any rental income from the said property during the impugned year and therefore, the ALV of the residential units for calculating income from house property is being calculated on the basis of 8% of closing stock value. The AO calculated the income from house property for the two properties which are made as closing stock proportionately for the impugned year after the date of occupancy certificate till the time of sale of these properties or the end of FY 2016-17 as unsold stock in trade of the assessee for FY 2016-17 itself. The AO computed notional income from house property for full year at the rate of 8% of the closing value to be Rs.7,06,877/- after making deduction under section 24 and the same was worked out to Rs.4,94,813/- which was added to the total income of the assessee. Aggrieved



by this assessee is in appeal before the learned in CIT(A) who dismissed the appeal filed by the assessee on the ground that the Hon'ble Delhi High Court in **Ansal Housing and Constructions ltd. Vs. ACIT (2018) 89 taxmann.com 238**, upheld the taxability of notional income computed u/s 23 (1) of the Act under Income from House Property on vacant house properties which was held by the builder as stock in trade.

3. The assessee in appeal before us as against the order of the learned CIT(A). As there was no representation from the assessee's side we proceeded to hear the learned Departmental Representative (DR). The learned DR contended that the Tribunal's decisions in **Ansal Housing and Construction Ltd.** was reversed by the Hon'ble Delhi High Court and that the learned CIT(A) has rightly applied his mind in deciding the issue. The learned DR relied on the decisions of the lower authorities.

4. Having heard the submissions of the learned DR and perused the materials on record, it is observed that the assessee was possessed with two unsold flats which were neither sold nor let out for which the AO calculated



notional income at the rate of 8% of the ALV and taxed it under Income from House Property after making deduction u/s 24 of the Act. The assessee relied on the decision of **Rajendra Godshalwar Vs. ITO (ITA No. 7470/MUM/2017)** and **Haware Engineers & Builders Vs. DCIT (ITA No. 7155/MUM/2016)**. The assessee further contended that sub-section 5 to section 23 was inserted with effect from 1.04.2018 (AY. 2018-19) and the said amendment is prospective in nature and does not apply to AY 2017-18 ie that is in assessee's case. The assessee further submits that as per the provision of section 23 notional income is to be taken as "NIL" for 1 year from the end of the financial year in which the certificate of completion of construction is obtained, in assessee's case on 08.10.2014. The assessee stated that the addition on account of notional rent is not in accordance with law. The Revenue on the other hand, placed its reliance on the decision of Hon'ble Delhi High Court in **Ansal Housing and Constructions Ltd. (supra)** which held that assessee is liable to pay tax on ALV of flats which were held as stock in trade and which has not been let out for in any previous years. The relevant



extract of the said decision is cited here under for ease of reference:

9. Furthermore there is no dispute that the effect of the amendment, inserting Section 23 (1) (c), would not be to change the incidence of taxability of the properties held as stock in trade. Therefore, this Court's finding that such properties were to be assessed as income from house property and not income from "business or profession", in its judgment dated 31 10 2012, would be good law, even in view insertion of Section 23 (1) (a), since, in view of the decision in Vivek Jain (supra), the assessee cannot claim the benefit of Section 23 (1) (c) having actually let out the properties held as stock in trade.

11. Therefore, it is clear that in the assessee's factual situation, sub-section (5) would be squarely applicable, but for the fact that sub-section (5) has been inserted w.e.f 1 April 2018. Moreover, sub-section (5) does not use language which would indicate that it has been as a clarification (which would make clear that it was always the legal position) or by way of abundant caution. The amendment therefore clearly applies prospectively and since a separate sub-section was inserted in Section 23, it is clear that the legislative intent is that the peculiar situation in sub-section (5) was not already covered by sub-section (3). That being the case, for the relevant assessment years, the properties



held as stock in trade would be taxable on the basis of notional annual letting value under section 23.

From the above observations, it is evident that the assessee's case is squarely covered by the said decision and the assessee does not have anything to controvert the same. By respectfully following the said decision, we find no infirmity in the order the learned CIT(A) in upholding the action of the learned AO in taxing the notional rent under Income from House Property for the unsold flats of the assessee. But, now the question arises that whether that 'annual value' of property can be determined on adhoc basis as done by learned AO ie being 8% of closing value of house property. We find that provisions of section 23 of the Act mandates that it should be 'sum for which property might reasonably be expected to let from year to year.' We find that there is no basis for finding of learned AO that 8% of the closing value of the property is same as sum for which the property might reasonably be expected to let. Therefore, to determine annual value of the property in terms of section 23 of the Act, we restore the matter, to that extent, back to the file of learned AO. Accordingly, for



this limited purpose, ground raised by the assessee is partly allowed with above direction.

5. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 21.10.2022.

Sd/-

(PRASHANT MAHARISHI)
ACCOUNTNANT MEMBER

Sd/-

(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Mumbai:

Dated: 21/10/2022

MAHESH SONAVANE (P.S)

Copy of the Order forwarded to :

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



BY ORDER,

//True COPY//

(Assistant Registrar)

ITAT, Mumbai