

IN THE INCOME TAX ASSESSEEE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM
आयकर अपील सं./ITA No.241/SRT/2022
(निर्धारणवर्ष / Assessment Years: (2018-19)
(Physical Court Hearing)

Shah and Sanghavi Developers LLP, 801, SNS Business Park, Opp. Reliance School, Udhna Magdalla Road, Vesu, Surat	Vs.	Assistant Commissioner of Income-tax, Central Circle-2, Surat-395001
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: ABZFS 2921 E		
(अपीलार्थी /Appellant)		(प्रत्यर्थी /Respondent)

निर्धारिती की ओर से /Assessee by : Shri Kiran K. Shah, CA

राजस्व की ओर से/Revenue by : Shri Vinod Kumar, Sr- DR

सुनवाई की तारीख/ **Date of Hearing** : **17/03/2023**

घोषणा की तारीख/**Date of Pronouncement** : **30/03/2023**

आदेश / O R D E R

PER DR. A. L. SAINI, ACCOUNTANT MEMBER:

Captioned appeal filed by the assessee, pertaining to Assessment Year (AY) 2018-19, is directed against the order passed by the Learned Commissioner of Income-tax (Appeals)-4, Surat [Ld. CIT(A) for short] dated 21.07.2022, which in turn arises out of an assessment order passed by Assessing Officer under section 143(3) of the Income Tax Act, 1961 [hereinafter referred to as the "Act"] dated 06.05.2021.

2. Grounds of appeal raised by the assessee are as follows:

"1) The learned CIT(A) grossly erred in confirming addition up to Rs.18,56,870/- on account of dispute u/s 23(5) of the Act and also not appreciating the curative nature of amended section of 23(5) of the Act.

2) The learned CIT(A) grossly erred in not appreciating the provisions of section 23(3) of the Act.

3) The appellant reverses the right to add, alter and withdraw any ground(s) of appeal."

3. Succinct facts *qua* the issue are that assessee before us is a firm and engaged in the business of construction and development of project and adopted project

completion method year after year. The assessee-firm has filed its return of income u/s 139 of the Act for the assessment year under consideration 2018-19, declaring total income of Rs.95,30,710/-. Subsequently, the case of assessee was selected for scrutiny. During the year under consideration, the assessee-firm undertook several projects viz. SNS Platina, SNS Axis, SNS Splendid & SNS Atria. During the course of assessment proceedings, assessee was asked to furnish the complete details regarding the BUCs received project-wise and building-wise. On perusal of details, it was noticed that BUC has been received by assessee-firm for the following projects in F.Y 2015-16 which is summarized as under:

<i>Sr.No.</i>	<i>Name of the project</i>	<i>BUC received on</i>	<i>Closing stock as on 31.03.2018</i>
1	SNS Platina	27.03.2015	11 units
2	SNS Arsta	09.07.2015	23 units

Even though BUC is received in the financial year 2015-16, relevant to assessment year 2016-17, the assessee in the computation of income has not offered any deemed rent on vacant flats in its possession for assessment year 2018-19. In this case, the assessee is liable to offer the deemed rent u/s 23(5) of the Act on the vacant flats for which BUC already received in assessment year 2016-17.

4. Therefore, assessing officer issued a show cause notice dated 15.04.2021 wherein the assessee was asked to reply on 19.04.2021, the relevant portion of the same is reproduced as under:

“2. On perusal of the submission/reply filed by the firm, the following observations are made:

(i) *On perusal of the details furnished by the firm, it is noticed that various projects are taken by the firm. On perusal of the closing stock and other details furnished including copies of the BUC, it is noticed that various projects are also shown in closing stock in which BUCs are received in F.Y 2015-16 and earlier which is summarized as under:*

(ii)

<i>Sr.No.</i>	<i>Name of the project</i>	<i>BUC received on</i>	<i>Closing stock as on 31.03.2018</i>
1	SNS Platina	27.03.2015	11
2	SNS Arista	09.07.2015	23 units

The firm is hereby asked to furnish the complete details, project-wise and building-wise of the flats/shops shown as closing stock as on 31.03.2018 with supporting evidences. Further, on perusal of the computation / return of income 2018-19, the firm had not shown any deemed rent u/s 23(5) of the Act. The firm is hereby asked to show cause as to why provisions of sec.23(5) of the Act should not be invoked as per the Act and deemed rent

should not be calculated as per the prevailing rates. If you fail to furnish any reply, it shall be assumed that the firm has nothing to offer in this regard, the deemed rent shall be charged by invoking provisions of sec.23(5) of the Act as per the prevailing rates.

Further, it may be noted that the on-compliance to this notice would also compel the undersigned to decide the issues on merits on the basis of the material available with this office as the proceedings in this case are time barring”

5. In response to the notice issued by the Assessing Officer, the assessee submitted his reply, which is produced below:

“6. In response to the show cause notice, the assessee vide its letter uploaded in ITBA on furnished reply which is reproduced as under:

“Under the instruction of my abovesaid client, I beg to state that your goodself has invoked section 23(5) of the Act in respect of unsold offices for the project called SNS Platina and SNS Arista. It is submitted that, the same may not be estimated for following reasons:

- 1) Amendment brought later on is clarificatory – Firstly, there is amendment u/s 23(5) of the Act w.e.f. 01.04.2020 whereby no notional rent maybe estimated if the two years from end of the year in which BUC was received has not expired. It is submitted that the said amendment is of clarificatory nature and it would be applicable to all pending assessments. It is therefore, submitted that no notional rent may be estimated as the period of two years has not expired from the end of the year in which BUC was received.
- 2) No rent to be assumed as per section 23(3) if it is vacant either for part of full of the year – without prejudice to the above and in alternative, it is submitted could not let out the property as no proper tenant was available. It is submitted that, as per provisions of section 23(3) of the Act, the provision of sec.23(2) are not applicable in case the property is not let out for the whole of the year.
- 3) Without prejudice to the above and in alternative, it is submitted that the average rent per sq. ft. was for Rs.10 in the area of Vesu as estimated recently in one of my client case namely Hitech Residency (AAFFH5459R) taking into account the website of 99 acres.com. In the present case, the unsold stock are awkwardly situated and sometimes, not as per the vatu or the wind direction etc., hence, I request your goodself to assume average Rs.8/- per sq.ft. in that case, the notional rent may be as under:

SNS Platina	11057 sq.ft. * 8.12 months	= 10,61,472
SNS Arista	16575 sq.ft. *8.12 months	= <u>15,91,200</u>
		26,52,672
Less: 30% standard deduction		<u>7,95,802</u>
		18,56,870

6. However, assessing officer rejected the contention of the assessee and observed that in the SNS Platina project, the closing stock of the area is 11057 sq. ft. and in SNS Arista project, the closing stock of the area is 16575 sq. ft. The total

closing stock of the projects in which BUCs received is 27632 sq. ft. (11057 + 16575), therefore assessing officer worked out the income from house property as follows:

<i>Deemed rent</i>	$27632 \times 12 \times \text{Rs}10 = \text{Rs.}33,15,840/-$
<i>Less: 30% statutory deduction</i>	$30\% \text{ of Rs.}33,15,840/- \text{ Rs. } 9,94,752/-$
<i>Net deemed rent</i>	$\text{Rs.}23,21,088/-$

This way, the deemed rent u/s 23(5) of the Act with respect to the vacant commercial units for which BUCs received in F.Y 2015-16 or earlier was worked out by AO at Rs.23,21,088/- and added to the total income of the assessee.

7. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the Learned CIT(A) who has partly deleted the addition made by the Assessing Officer observing as follows:

“.....6.3 Thus, in principle the deemed rent brought to tax applying the provisions of section 23(5) of the Act by the AO is upheld. As regards, the estimation of the rent done by the AO, which is at the rate of Rs.10/- per sq.ft., on the basis of the report of the Inspector, which was submitted on the basis of the prevailing rent of adjacent shops and not the offices in the buildings constructed by the appellant. The offices have a lower rent as compared to the shops and further the customers are reluctant to take out rent the new properties in the initial stages as the facilities are not fully operational. Considering these aspects, an average rent of Rs.8/- per sq.ft. per month if estimated, it would meet the ends of justice. Accordingly, the addition to the tune of Rs.18,56,870/- is confirmed and the appellant gets relief of Rs.4,64,218/-. Ground No1 and 2 are partly allowed.”

8. Aggrieved by the order of the Id. CIT(A), the assessee is in further appeal before us.

9. Learned Counsel for the assessee submitted that section 23(5) of the Act was subsequently amended w.e.f 1.04.2020 wherein the period of one year from the end of the year in which the completion certificate was received was increased to two years and hence, it was submitted that the said amendment should be treated as clarificatory in nature and be applied to the impugned assessment year. The Ld. Counsel relied on the ratio of decision in the case of Calasani Naga Ratna Kumari vs. ITO 2017 Taxpub (DT) 75 (Vishaka Tribunal), wherein identical view was taken in respect of amendment to section 50(C) of the Act.

10. On merits, Id Counsel submitted that the assessee had kept the units ready for let out but there were no takers during the impugned assessment year and therefore the annual lettable value of the property should be taken as nil. All the flats were vacant during the year and assessee has not received any rent hence nothing is taxable in the assessee`s case.

11. On the other hand, Ld.Sr-DR for the Revenue has argued that amendment which was brought w.e.f. 01.04.2020 to section 23(5) of the Act is prospective in nature and not retrospective and hence, it cannot be applied to the impugned assessment year 2018-19.

12. On merits, Id DR stated that the units were ready for let out therefore as per the provision of section 23(5) of the Act, the assessee should pay the tax on deemed rent.

13. We have heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the Id CIT(A) and other materials brought on record. Since the issue relates to sub-section-5 of Section-23 of the Act, therefore it is appropriate to go through the provision of the said Section, which is reproduced below:

“Section 23: Annual value how determined.

(1) For the purposes of section 22, the annual value of any property shall be deemed to be-

(a)

(b)

(c)

(2)..

[(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, of the period up to [two years] 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.]”

14. We note that provisions of sub- section 5 of section 23 was inserted by the Finance Act 2017, with effect from 01.04.2018 wherein the period was 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’ was mentioned. However, the said period was increased by the Finance Act 2019, with effect from 01.04.2019, up to ‘two years’.

15. We note that amendment in section 23(5) of the Act is curative in nature. A declaratory or explanatory amendment is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous law; if a statute is merely declaratory or curative, retrospective operation is generally intended,(CIT V Venkateswara Hatcheries 237 ITR 174 (SC)).A statutory amendment that is not expressly made retrospective, but is of an explanatory, declaratory, curative or clarificatory nature, should be judicially construed as retrospective.(Allied Motors v CIT 224 ITR 677 (SC) (proviso inserted to remedy unintended consequences must be treated as retrospective); CIT v Podar Cement 226 ITR 625 (SC); UOI v Muthyam 240 ITR 341 (SC). The Hon`ble Supreme Court in Goslino Mario [(2000) 10 SCC 165 : (2000) 241 ITR 312] held that a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also Reliance Jute and Industries Ltd. v. CIT [(1980) 1 SCC 139: 1980 SCC (Tax) 67]. An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section [See Sonia Bhatia v. State of U.P., (1981) 2 SCC 585, 598 : AIR 1981 SC 1274, 1282 para 24] If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force [See Shyam Sunder v. Ram Kumar, (2001) 8 SCC 24 (para 44); Brij Mohan Das Laxman Das v. CIT, (1997) 1 SCC 352, 354; CIT v. Podar Cement (P) Ltd., (1997) 5 SCC 482, 506]

16. Therefore, based on the principles laid down in the above cited judgments of Hon`ble Supreme Court, we are of the view that amendment in section 23(5) which was brought with effect from 01.04.2020 (from assessment year 2020-21) whereby

“period up to [two years] from the end of the financial year in which the certificate of completion of construction of the property is obtained from the competent authority” is curative in nature, as its main purpose is to remove the intended hardship. Since we hold that amendment in section 23(5) of the Act is curative in nature, therefore if the amended law is applicable in the assessee’s case, which is of curative nature, no addition is justified in the year under consideration. Hence, we delete the addition.

17. Since we have deleted the addition made by the assessing officer holding that amendment in section 23(5) of the Act is curative in nature, and applicable retrospectively, therefore all other arguments of Id Counsel on merits of the additions, in the impugned assessment proceedings, are rendered academic and infructuous.

18. In the result, the appeal is allowed in the terms indicated above.

Order is pronounced on 30/03/2023 by placing result on notice board.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(Dr. A.L. SAINI)
ACCOUNTANT MEMBER

सूरत /Surat / दिनांक/ Date: 30/03/2023

Dkp Outsourcing Sr.P.S.

Copy of the Order forwarded to:

1. The Assessee
2. The Respondent
3. The CIT(A)
4. Pr.CIT
5. DR/AR, ITAT, Surat
6. Guard File

By Order

// True Copy //

Sr. Private Secretary/Private Secretary/
Assistant Registrar, ITAT, Surat