

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA No. 2928/Mum/2022 (A.Y.2015-16)

M/s. Ravi Developments

76, Laxmi Palace, Mathuradas
Road, Kandivali (west)
Mumbai-400 067

PAN: AAAGR2516G

..... Appellant

Vs.

ACIT CC – 2,

Ashar IT Park, 6th floor,
Road No. 16Z, Wagle Industrial
Estate, Thane
Thane- 400 064

..... Respondent

Appellant by : Shri Akshay Jain, Ld. AR
Respondent by : Smt. Mahita Nair, Ld. CIT-DR

Date of hearing : 28/06/2023
Date of pronouncement : 25/08/2023

ORDER

PER GAGAN GOYAL, A.M.:

This appeal by assessee is directed against the order of Ld. CIT (A)- 11, Pune dated 22.09.2022 u/s. 250 of the Income Tax Act, 1961 (in short 'the Act') for A.Y. 2015-16. The assessee has raised the following grounds of appeal:-

1. That on the facts and circumstances of the case and in law, the Ld. CIT (A) erred in confirming the Ld. AO's order in making an addition of Rs. 34,66,134/- under section 43CA and in adding the same to the total income of appellant-assessee

2. That on the facts and circumstances of the case and in law, the Ld. CIT (A) erred in confirming the A.O.'s action by not appreciating the facts that section 43CA is not applicable on agreement to sale entered before 01.04.2013.

3. That on the facts and circumstances of the case and in law, the Ld. CIT (A) erred in confirming the addition u/s. 43CA despite the fact that income with respect to the flats had already been offered for taxation in earlier years.

4. That on the facts and circumstances of the case and in law, the Ld. CIT (A) erred in confirming AO's action in rejecting the valuation of property as adopted by the appellant and in not referring the matter to the valuation officer u/s. 50C, before making the addition under section 43CA.

5. That on the facts and circumstances of the case and in law, Ld. CIT(A) erred in upholding the order of the Ld. A.O., wherein the additions were made without any corroborative evidence.

6. That on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in confirming AO's action in making addition of Rs.24,52,359/- under section 22 r.w.s 23 of the Income Tax Act, 1961 and in adding the same to the total income of appellant.

2. The Brief facts of the case are that assessee is a partner-ship firm, engaged in the business of construction and real estate development. Assessee filed its return of income u/s. 139 of the Act on 31.10.2015 declaring total income at Rs. 7,38,06,330/-. Case of the assessee was selected for scrutiny and relevant notices u/s. 142(1) and 143(2) of the Act were issued and served. Case of the assessee

was assessed u/s. 143(3) of the Act and additions u/s. 43CA and sections 22 r.w.s. 23 was made amounting to Rs. 34,66,134/- and 24,52,359/- respectively. Assessee being aggrieved with this order preferred an appeal before the Ld. CIT (A), who in turn confirmed the order of AO. Assessee being further aggrieved with the order of Ld. CIT (A) passed u/s. 250 of the Act, preferred present appeal before us.

3. We have gone through the order of AO, Order of Ld. CIT (A) and submissions of the assessee along with case laws relied upon. It is observed vide assessment order Page No. 6 vide Para No. 5.4, that AO pointed out as under:

5.4 The submission of the assessee is carefully perused and it is also examined as per provisions of 43CA(3),but in these following cases sale price/agreement price is still lower than the stamp duty value on the date of first payment made by purchaser by any other mode other than cash:-

S.No	Flat No.	Project Name	Market value	Sale price	Difference
1	SAM/A/103	Gaurav Samruddhi	35,40,000	32,15,500	3,24,500
	TOTAL 'A'				3,24,500

In the above case, no proof of the first payment by any other mode other than cash was submitted by the assessee.

S.No	Flat No.	Project Name	Market value at the time of the first payment made other than cash	Sale price	Difference
1	EXC/3/503	Gaurav Excellency	39,76,377	34,94,265	4,82,112
2	EXC/3/1503	Gaurav Excellency	41,65,729	34,94,265	6,71,464
3	EXC/3/1502	Gaurav Excellency	41,65,729	34,94,265	6,71,464
4	EXC/3/204	Gaurav Excellency	37,35,502	34,45,050	2,90,452
5	EXC/3/1504	Gaurav Excellency	41,09,052	34,45,050	6,64,002
6	GSH/A/08	Gaurav Woods	36,42,140	32,80,000	3,62,140
	TOTAL 'B'				31,41,634

TOTAL 'A' + TOTAL 'B' = 34,66,134/-

In view of the above, the addition of Rs. 34,66,134/- hereby is made on account of contravention of section 43CA of I.T. Act, 1961. Penalty proceedings u/s 271(1)(c) is hereby initiated for concealing of income and furnishing of inaccurate particulars of income.

(Addition - Rs. 34,66,134)

4. For better understanding and analysis of the issue we are reproducing herein below the provisions of section 43CA as under:

“[Special provision for full value of consideration for transfer of assets other than capital assets in certain cases.

43CA. (1) *Where the consideration received or accruing as a result of the transfer by an assessee of an asset (other than a capital asset), being land or building or both, is less than the value adopted or assessed or assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall, for the purposes of computing profits and gains from transfer of such asset, be deemed to be the full value of the consideration received or accruing as a result of such transfer:*

[Provided that where the value adopted or assessed or assessable by the authority for the purpose of payment of stamp duty does not exceed one hundred and [ten] per cent of the consideration received or accruing as a result of the transfer, the consideration so received or accruing as a result of the transfer shall, for the purposes of computing profits and gains from transfer of such asset, be deemed to be the full value of the consideration:]

[Provided further that in case of transfer of an asset, being a residential unit, the provisions of this proviso shall have the effect as if for the words "one hundred and ten per cent", the words "one hundred and twenty per cent" had been substituted, if the following conditions are satisfied, namely: —

(i)	<i>the transfer of such residential unit takes place during the period beginning from the 12th day of November, 2020 and ending on the 30th day of June, 2021;</i>
(ii)	<i>such transfer is by way of first-time allotment of the residential unit to any person; and</i>
(iii)	<i>the consideration received or accruing as a result of such transfer does not exceed two crore rupees.]</i>

(2) *The provisions of sub-section (2) and sub-section (3) of section 50C shall, so far as may be, apply in relation to determination of the value adopted or assessed or assessable under sub-section (1).*

(3) *Where the date of agreement fixing the value of consideration for transfer of the asset and the date of registration of such transfer of asset are not the same, the value referred to in sub-section (1) may be taken as the value assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer on the date of the agreement.*

(4) The provisions of sub-section (3) shall apply only in a case where the amount of consideration or a part thereof has been received [by way of an account payee cheque or an account payee bank draft or by use of electronic clearing system through a bank account] [or through such other electronic mode as may be prescribed] on or before the date of agreement for transfer of the asset.]

[Explanation. —For the purposes of this section, "residential unit" means an independent housing unit with separate facilities for living, cooking and sanitary requirement, distinctly separated from other residential units within the building, which is directly accessible from an outer door or through an interior door in a shared hallway and not by walking through the living space of another household.]"

5. Here on first place, AO made the addition of Rs. 3, 24,500/- on account of that agreement price is lower than the stamp duty value on the first date of payment made by purchaser by any other mode other than cash. In this case we would like to rely on [2014] 49 taxmann.com 249 (SC) CIT (Central)-I, New Delhi v. Vatika Township (P.) Ltd. *"where a benefit is conferred by legislation, the rule against a retrospective construction is different. If legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally and where to confer such benefit appears to have been the legislators object, then the presumption would be that such legislation, giving it a purposive construction, would warrant it to be given a retrospective effect". The net effect of this judgment is that if a fresh benefit is provided by the Parliament in an existing provision, then such an amendment should be given retrospective effect."*

6. Keeping in view the ratio laid down in Vatika Township (P.) Ltd. (supra) the benefit granted by 1st proviso to section 43CA (1) is applicable in the case of assessee also, which is again reproduced herein below as under:

*"[Provided that where the value adopted or assessed or assessable by the authority for the purpose of payment of stamp duty does not **exceed one hundred and [ten] per cent of the consideration received** or accruing as a result of the transfer, the consideration so received or accruing as a result of the transfer shall, for the purposes of computing profits*

and gains from transfer of such asset, be deemed to be the full value of the consideration:]”

7. Assessee’s sale price and market value does not exceed in this case more than 10% hence no addition of Rs. 3, 24,500/- against the transaction with Gaurav Samruddhi, Flat No. SAM/A/103 can be made. Same is the situation for Flat No. EXC/3/204, Serial No. 4, Table-2, Project Name “Gaurav Excellency”, No addition of Rs. 2,90,452/- can be made. Our view is being fortified by following judicial pronouncements of coordinate benches/Hon’ble High Courts:-

[2022] 144 taxmann.com 168 (Pune - Trib.) Sai Bhargavanath Infra v. ACIT
[2021] 123 taxmann.com 252 (Mumbai - Trib.) Maria Fernandes Cheryl v. Income Tax Officer, (International Taxation)

8. As far as balance transactions of Table-2 at Page No.6 of the assessment order at serial no. 1, 2, 3, 5, and 6 are concerned we rely upon the ruling of Hon’ble Punjab and Haryana High Court in the case of CIT vs. Chandani Bhuchar [2010] 323 ITR 510/191 Taxman 142 (Punjab & Haryana) for the preposition that *“The valuation done by any State Agency for the purpose of stamp duty would not ipso facto substitute the actual sale consideration as being passed on to the seller by the purchaser in the absence of any admissible evidence. The Assessing Officer is obliged to bring on record positive evidence supporting the price assessed by the State Government for the purpose of stamp duty. From a plain reading of the provision, it emerges that the value adopted or assessed by any authority of a State Government for the purpose of payment of stamp duty in respect of land or building or both, shall for the purpose of Section 48 of the Act be deemed to be the full value of the consideration received or accruing as a result of transfer. It nowhere provides that the valuation done by the State Government for the purpose of stamp duty etc., would ipso facto take place the actual consideration as being passed on to the seller by the purchaser in the absence of any other evidence. The Assessing Officer is required to bring*

positive evidence on record indicating the fact that assessee has paid anything more than the one disclosed in the purchase deed.”

9. The view of the High Court of Punjab & Haryana with respect to the deeming provision of section 50C of the Act is that onus of proof lies on the Department/Revenue to bring on record any evidence to the effect that higher amount of sale consideration had passed on to the seller from the buyer in addition to the amount of sale consideration recorded in the deed. The amount at which valuation has been done by the stamp authorities could not be taken as actual sale consideration and the value shown in the sale deed has to be accepted. The circle rates as stipulated under section 50C of the Act cannot be sole concluding reason to hold that there is an understatement of sale consideration and adopt the valuation done for the purpose of stamp duty.

10. In view of above discussions revenue has failed to discharge its burden of proof that higher amount of sale consideration had passed on to the seller from the buyer in addition to the amount of sale consideration recorded in the deed. On the other hand, it is also found that assessee also did not come forward with relevant documents which can help in establishing the fact that no cash payment element is involved to take the advantage of position as provided in section 43CA (3) r.w.s. 43CA (4) of the Act. In view of this, we store the matter back to the file of Jurisdictional AO for verification of balance transactions of Table-2 at Page No.6, i.e., at serial no. 1, 2, 3, 5, and 6. **In the result, Ground Nos. 1, 2, 3, 4 and 5 are partly allowed for statistical purposes.**

11. As far as Ground No. 6 is concerned, it pertains to taxability of deemed rent u/s. 22 r.w.s. 23 of the Act. AO by deputing an Income Tax Inspector determined

ALV as prescribed in section 23 of the Act for the purposes of section 22 of the Act. As per I.T.I report as mentioned at page no. 10, para no. 7 of the assessment order, value of unsold flats worked out to be Rs. 24,52,359/- and added to the income of the assessee. On this matter assessee relied upon following judicial pronouncements:

Kumar Beharay Rathi vs ITO (2019) (4) TMI 389- ITAT Pune

Pegasus Properties P. Ltd. 135 Taxmann.com 294

Runwal Constructions Runwal & Omkar Esquare 2018 (2) TMI- ITAT Mumbai

Sarovar Developers P. Ltd. 2019 (10) TMI 278-ITAT Ahmadabad

12. During the appellate proceedings, vide submission dated 09/09/2022, the appellant has submitted that sub-section 5 to sec. 23 has been inserted vide Finance Act, 2017. As per this sub-section, any property which has been held as stock in trade and has not been let-out during the year, then the Annual Value of such property shall be taken as Nil up to a period of one year from the end of the financial year in which the certificate of completion of construction is obtained. The appellant has submitted that the said amendment is applicable w.e.f. A.Y. 2018-19 and therefore the income can be charged only from A.Y. 2018-19 onwards.

13. The Ld. CIT (A) and AO relied upon following case laws to substantiate their view on the taxability of deemed rent on unsold stock of flats hold by assessee as under:

1. CIT vs. Ansal Housing Finance & Leasing Co. Ltd. (2013) 354 ITR 180

2. CIT v. Ansal Housing & Construction [2016] 72 taxmann.com 254 (Delhi).

3. *Ansal Housing & Construction Ltd. v. ACIT [2018] 89 taxmann.com 238 (Delhi)*
4. *CIT v. Sane & Doshi Enterprises [2015] 58 taxmann.com 111 (Bombay).*
5. *CIT v. Gundecha Builders [2019] 102 taxmann.com 27 (Bombay)*
6. *Dimple Enterprises v. DCIT [2021] 129 taxmann.com 66 (Mumbai - Trib.)*

14. We have gone through the case laws relied upon by both the parties and facts of the matter. It is observed that this issue with all its contours, dealt with by the Hon'ble Delhi High Court in the case of CIT vs. Ansal Housing Finance & Leasing Co. Ltd. (2013) 354 ITR 180 (Del). In this case the Hon'ble High Court came across the similar situation as in before us. The findings on the issue as observed by the Hon'ble High Court are as under:-

"The assessee is engaged in building activities. It argues that flats are held as part of its inventory of stock-in-trade, and are not let out. The further argument is that unlike in the other instances, where such builders let out flats, here there is no letting out and that deemed income - which is the basis for assessment under the ALV method, should not be attributed. The argument, though attractive cannot be accepted.

The levy of income tax in the case of one holding house property is premised not on whether the assessee carries on business, as landlord, but on the ownership. The incidence of charge is because of the fact of ownership. [Para 13]

Intention of assessee is to be seen

- *In every case, the Court has to discern the intention of the assessee; in this case the intention of the assessee was to hold the properties till they were sold. The capacity of being an owner was not diminished one whit because the assessee carried on business of developing, building and selling flats in housing estates. The argument that income tax is levied not on the actual receipt (which never arose in this case) but on a notional basis, i.e. ALV and that it is therefore not sanctioned by law, is meritless. ALV is a method to arrive at a figure on the basis of which the impost is to be effectuated. The existence of an artificial method itself would not mean that levy is impermissible. Parliament has resorted to several other presumptive methods, for the purpose of calculation of income and collection of tax. Furthermore, application of ALV to determine the tax is regardless of whether actual income is received; it is premised on what constitutes a reasonable letting value, if the property were to be leased out in the marketplace. [Para 13]*

Assessee is not occupier

- *As far as the alternative argument that the assessee itself is occupier, because it holds the property till it is sold, is concerned, there is no merit in this submission. While there can be no quarrel with the proposition that 'occupation' can be synonymous with physical possession, in law, when Parliament intended a property occupied by one who is carrying on business, to be exempted from the levy of income tax was that such property should be used for the purpose of business. The intention of the lawmakers, in other words, was that occupation of one's own property, in the course of business, and for the purpose of business, i.e., an active use of the property, (instead of mere passive possession) qualifies as 'own' occupation for business purpose. This contention is, therefore, rejected. [Para 14]*
- *Thus, the assessee was liable to pay income tax on the annual letting value of unsold flats owned by it under the head 'income from house property'. [Para 14]"*

15. Similar issue has been discussed and dealt in detail by the Coordinate Bench in ITA No. 2220/Mum/2021 in the case of DCIT CC 4(2) vs. M/s Inorbit Malls Pvt. Ltd. dated 11.10.2022 wherein the Coordinate Bench has elaborately discussed the issue under appeal and all the permutations and combinations relating to this issue emerged out of various judicial pronouncements of the Coordinate Benches as well as Hon'ble High Courts and Supreme Court are discussed. With respectfully accept and follow the decision of Coordinate Bench in the case of M/s Inorbit Malls Pvt. Ltd. (supra). In view of above, ground no. 6 raised by the assessee is dismissed.

17. In the result, appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 25th day of August, 2023.

Sd/-

(VIKAS AWASTHY)
JUDICIAL MEMBER

Mumbai, दिनांक/Dated: 25/08/2023

Sr. PS (Dhananjay)

Sd/-

(GAGAN GOYAL)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

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BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai