

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI**

BEFORE SHRI ABY T VARKEY, HON'BLE JUDICIAL MEMBER

AND

SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER

ITA NO. 2954/MUM/2023 (A.Y: 2016-17)

La Kozy Builders LLP 1301, 13 th Floor Peninsula Business Park Tower B, Senapati Bapat Marg Lower Parel (W), Mumbai – 400 013 PAN: AAFFL2620L	v.	ACIT – Circle – 21(2) Room No. 232, 2 nd Floor Piramal Chambers, Lalbaug Parel, Mumbai – 400 012
(Appellant)		(Respondent)

Assessee Represented by	:	Shri Nitesh Joshi
Department Represented by	:	Shri Manoj Kumar Sinha
Date of conclusion of Hearing	:	01.04.2024
Date of Pronouncement	:	03.04.2024

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of the Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [hereinafter in short "Ld. CIT(A)"] dated 20.07.2023 for the A.Y.2016-17.

2. Brief facts of the case are, assessee filed its original return of income on 17.10.2016 declaring a total income of ₹.87,30,170/-. The return was processed under section 143(1) of Income-tax Act, 1961 (in short "Act") on 06.01.2017. The case was selected for complete scrutiny and notices under section 143(2) and 142(1) of the Act were issued and served on the assessee along with questionnaire. Ld. AR submitted the relevant information as called for.

3. The assessee is engaged in the business of development of land & construction of a building. The assessee derives income from business and profession. One of the reasons for selecting the assessee's case was "Real Estate business with High Closing Stock". The Assessing Officer observed that on verification of the submissions of the assessee that assessee has vacant flats at the end of the relevant assessment year. Accordingly, assessee was show caused with letter dated 17.12.2018 as why the annual value of the vacant flats shown in the closing stock for the projects for which the occupancy certificate is received be not included in the head "income from house property".

4. In response, assessee submitted that the assessee holding the inventories as stock in trade and not as capital assets. The assessee is

not in the business of renting out of the flats and thus notional rent is not justifiable. The Assessing Officer rejected the same by relying on the decision of the Hon'ble Delhi High Court in the case of CIT v. M/s. Ansal Housing Finance dated 31.10.2012 and amendment in Section 23 i.e., insertion of sub-section 5 in section 23 of the Act. Accordingly, he collected the information from the market that average flats trends are about ₹.6,000/- from the websites "Makhan.com" and "Magicbricks.com". Accordingly, he determined the gross annual value of 34 flats held as stock in trade with the assessee at the end of the year and after giving standard deduction of 30% on gross annual value, Assessing Officer determined the total net annual value of the 34 flats was at ₹.17,13,600/- and added to the income of the assessee under the head "income from house property".

5. Aggrieved, assessee preferred an appeal before the Ld. CIT(A) and filed detailed submissions. After considering the submissions of the assessee, Ld. CIT(A) dismissed the grounds raised by the assessee.

6. Aggrieved, assessee is in appeal before us raising following grounds in its appeal: -

"1) Whether on the facts and circumstances of the case and in law, The Learned Commissioner of Income Tax (Appeals), Income Tax Department, National Faceless Appeal Centre, Delhi (hereinafter referred to as "The CIT(A)") was correct in confirming the addition of Rs.17,13,600/- made by the Assessing Officer toward Notional rent u/s.23 under the head Income from House Property on account of unsold inventories of flats held as stock in trade, relying on the decision of the Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd. (2013) 29 taxmann.com 303 without appreciating that Hon'ble jurisdictional ITAT Mumbai in the case of DCIT, Circle-3(1)(1), Mumbai v. M/s. Bengal Shapoorji Housing Development Pvt. Ltd. on ITA No. 4369/Mum/2019 pronounced on 23.03.2021 after deliberating and distinguishing the judgment of the Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd., held that when the inventory of flats held as stock in trade, the notional annual letting value cannot be computed on such flats.

2) Whether on the facts and circumstances of the case and in law, The Learned CIT(A) was correct in confirming the addition of Rs.17,13,600/- made by the Assessing Officer relying on section 23(5) of the Act without appreciating the fact that said statutory provision i.e. Sec. 23(5) is applicable prospectively i.e. w.e.f. A.Y. 2018-19, the same, thus, would have no bearing on the year under consideration as upheld by Hon'ble jurisdictional ITAT Mumbai in the case of DCIT, Circle-3(1)(1), Mumbai v. M/s. Bengal Shapoorji Housing Development Pvt. Ltd. on ITA No. 4369/Mum/2019 pronounced on 23.03.2021.

3) The appellant prays that the order of CIT(A) on the above grounds be set aside and direct the A.O to delete the addition made by him towards the ALV of the flats held by the appellant as stock-in-trade of its business as that of a builder and developer.

4) The appellant craves leave to amend, alter, delete or add grounds which may be necessary and advised from time to time."

7. At the time of hearing, Ld.AR of the assessee submitted that the facts in the present appeal are exactly similar to the facts in the case of DCIT v. M/s. Inorbit Malls Pvt., Ltd., in ITA No. 2220/MUM/2021 dated 11.10.2022. He submitted that the relevant findings of the Hon'ble ITAT in the above said case are that: -

- a. The units on which assessee has received any advance during this year or in the earlier years but assessee has not delivered or given possession of the said flat to the buyer, then no notional rent can be charged as it tantamount to sale.
- b. It was held that ALV should be determined based on the municipal ratable value for computing notional rent.

8. In line with the above decision, the assessee has filed additional evidences with the application to admit the same under Rule 29 of I.T. Rules 1963 dated 27.03.2024. Ld.AR of the assessee prayed that the above additional evidences may be accepted on record and if required this issue may be remitted back to the file of the Assessing Officer for verification.

9. On the other hand, Ld. DR objected to the admission of the additional evidences at this stage and these are all facts available on record which should have been submitted before Assessing Officer, the

issues like the flats which were already sold by the assessee considering the fact that the actual assessment was completed only in the year 2018.

10. Considered the rival submissions and after considering the additional evidences on record we observe that this issue needs proper verification and there is direct link to the issue raised by the assessee and which is relevant for the purpose of overall justice. Accordingly, the above additional evidences are accepted on record.

11. At the time of hearing, Ld.AR of the assessee brought to our notice Page No. 1 of the additional evidences wherein he has classified the status of the 34 flats which is shown as closing stock in the end of the year. The Flat No. OC502 was already sold by the assessee on 05.10.2013 and another batch of 10 flats for which assessee has already received advances from the flat buyers. Therefore, the ownership of the above said flats are already passed on to the new buyers. Third batch of 23 flats, which assessee has kept as stock in trade for that purpose, assessee has submitted municipal ratable value for the 23 flats which comes to ₹.98,965/- and assessee has grossed up the ratable value to arrive at the gross rateable value at ₹.1,09,964/-. He submitted that the above data are submitted by the assessee relying on the decision of

DCIT v. M/s. Inorbit Malls Pvt., (supra) and he prayed that the data submitted by the assessee may be remitted back to the file of the Assessing Officer for verification.

12. On the other hand, Ld. DR submitted that this issue was not arisen before the lower authorities. However, as per the facts on record the assessee's case are similar to the facts in the case of DCIT v. M/s. Inorbit Malls Pvt., (supra), therefore, he accepted that the issue may be remitted back to the file of the Assessing Officer for proper verification. As far as the issue on record is concerned, he relied on the findings of the lower authorities.

13. Considered the rival submissions and material placed on record, we observe that the facts in the present case is exactly similar to the facts in the case of DCIT v. M/s. Inorbit Malls Pvt., (supra) and the relevant findings of the Coordinate Bench are reproduced below: -

"15. Now, coming to the decision of Hon'ble Delhi High Court in the case of CIT Vs. Ansal Housing Finance & Leasing Company Ltd (Supra), one of the question of law referred before the Hon'ble High Court was as under:

"Whether 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"?

15.1. There the facts relevant to the issue raised relate to the addition on account of annual letting value (ALV) of flats, added on

notional basis are that the assessee-company engages itself in the business of development of mini-townships, construction of house property, commercial and shop complexes etc. In the assessment completed for the year under consideration, the AO assessed the ALV of flats which the assessee had constructed, but were lying unsold under the head "Income from house property". The assessee however, contended that the said flats were its stock-in trade and therefore the ALV of the flats could not be brought to tax under the head "Income from house property". The AO however did not accept the stand of the assessee and therefore, added the notional value of unsold flats to the total income of the assessee. On appeal by the assessee, the CIT(A) however set aside the addition made by the AO. The revenue's appeal to the Tribunal was unsuccessful.

16. *Hon'ble Delhi High Court after referring to various judgments of Hon'ble Supreme Court, finally observed as held in under:*

"In the present case, the assessee is engaged in building activities. It argues that flats are held as part of its inventory of stock-intrade, 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. This Court is of the opinion that the argument, though attractive cannot be accepted. As repeatedly held, in East India, Housing & Land Development Trust's case (supra) Sultan Bros's case (supra) and Karan Pura Development Co. Ltd.'s case (supra) 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. Undoubtedly, the decision in Vikram Cotton Mills Ltd. case (supra) indicates that 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, in the opinion of the Court 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. If the Assessee's contention were to be accepted, the levy of income tax on unoccupied houses and flats would be impermissible which clearly not the case is”.

17. *Though, the judgment which has been referred by the Hon'ble Delhi High Court in the case in "East India Housing & Land Development Trust (Supra)", "Sultan Bros" and "Karan Pura Development Company Ltd". (Supra) wherein, in all the cases the issue whether the rental income received from the property is to be assessed as business income or income of house property. No where, the Hon'ble Supreme Court in any of the cases which has been referred by the Hon'ble Delhi High Court dealt with issue of notional rental income when the property held as stock-in-trade or closing stock which has not been actually let out, is liable to be taxed as income from house property. However, be that as maybe, there is no contrary decision of any other High Court and therefore, this decision Hon'ble Delhi High Court will have both binding and persuasive value. No direct contrary decision has been brought to our knowledge of any other High Court and we have already noted above that the decision of Hon'ble Gujarat High Court in the case of Neha Builder (supra) was not on the issue on notional rent from unsold stock. Therefore, it cannot be held that on this issue the judgment of Hon'ble Gujarat High Court is in favor of the Assessee and therefore, the judgment of Delhi High Court in the case of Ansal Housing Finance Leasing Company Ltd (Supra) should not be followed. Thus, in our opinion this Tribunal in the case of Dimple Enterprises vs. DCIT (Supra) as cited and relied upon by the Ld. DR has correctly appreciated this distinction.*

18. *One very important development took place post these judgments, that an amendment has been brought in the statute in section 23(5) which is applicable from AY 2018-2019 which reads as under,*

"Where the property consisting of any building or land appurtenant there to is held as stock-in trade and the property of 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, for the period up to one year form 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."

It is trite that the said amendment has to be given effect prospectively from 01.04.2018 as mentioned in the Explanatory Notes to the provisions of the Finance Act, 2017. It is a cardinal principle of the interpretation that the normal presumption which respect to an amendment is that is applicable prospectively unless and until specifically stated otherwise. The logic behind such as interpretation is that the law should govern current activities; i.e. to say "lex prospicit non respicit", which means that "The Law looks forward and not backward."

19. *Now, that specific provision has been brought in the statute which provides that, if building or land held as stock in trade and the property has not been let out during the whole or any part of the previous year, then annual value of such property after the period of one year (which was increased 2 years), shall be computed as income from house property and up to period of one year/two years income shall be taken to be „nil“. Thus, when specific provision has been brought with the effect from 01.04.2018 which cannot be applied retrospectively, then in our humble opinion it cannot be imputed that ALV of the flats held as stock in trade should be taxed on notional basis prior to AY 2018-19. Without any legislative intent or specific provision under the Act, such notional or deeming income should not be taxed as cardinal principle, because assessee is not aware that any hypothetical income is to be shown when he has not received any real or actual income. In our view of Hon'ble Delhi High Court is too harsh an interpretation.*

20. *Since, even prior to the amendment, there is one High Court judgment of Hon'ble Delhi High Court which is directly on this issue and against the Assessee, therefore same needs to be followed. Accordingly, we hold that Assessing Officer is correct in computing ALV on notional rent on unsold stock, but with following riders and directions to the AO as discussed herein after.*

21. *Firstly, the flats or units on which assessee has received any advance in this year or in the earlier years but has not delivered or given final possession of the said flat/unit to the buyer, then no notional rent can be charged as it tantamount to sale. Secondly, if unit of flat is shown as work-in-progress in the books then also no notional rent can be computed. And Lastly, Ld. Assessing Officer is not justified in making estimate of 8.5% of investment as ALV which is unsustainable in view of the decision of Hon'ble Bombay High Court in the case CIT Vs. Tip top Typography reported in 368 ITR 330, wherein, it has been held that rent should be computed at Municipal ratable value. We accordingly direct the AO to ascertain the Municipal ratable value for computing the notional rent. This is*

also been held by ITAT Mumbai Bench in the case of Dimple Enterprise Vs. DCIT (Supra), in the following manner:-

"Now the question is of the rental value. The assessing officer has not levied the deemed rent on municipal ratable value or any nearly similar instance. The reliability of municipal ratable value has been duly upheld in several decisions. The Assessing Officer cannot make any ad hoc computation of deemed rent. Honorable Bombay High Court decision in the case of CIT vs. Tip Top Typography [2014] 48 taxmann.com 191/[2015] 228 Taxman 244 (Mag.)/[2014] 368 ITR 330 duly supports this proposition. Thus assessing officer has made an ad hoc estimate of 8.5% of investment on the plea that assessee has not been able to provide the municipal ratable value. This is not sustainable on the touchstone of Hon'ble Bombay High Court decision in the case of Tip Top Typography (supra). In our considered opinion nothing stops the assessing officer from obtaining the municipal ratable value from Departmental or government machinery. Hence we direct the assessing officer to compute the valuation of deemed rent in accordance with our observation as above and take into account the Hon'ble Jurisdictional High Court decision as above. Since we have decided the issue by duly taking note of Hon'ble Jurisdictional High Court decision and have also applied Hon'ble High Court decision, the reference to other decision in this case is not considered relevant to adjudication in this case."

22. Thus, AO is directed to compute accordingly as per direction given above. Accordingly, ground No.1 of the revenue is partly allowed for statistical purposes."

14. Respectfully following the above decision, we are inclined to allow the claim made by the assessee by filing the additional evidences before us wherein the assessee has submitted the status of the closing stock of flats held by the assessee as stock-in-trade. Since the submissions of the assessee needs verification at the lower level, we are inclined to remit this issue back to the file of the Assessing Officer to verify the same and allow the claim made by the assessee i.e. Flat No. OC502 which is already sold

by the assessee, therefore, this flat should be eliminated from the workings. With regard to 10 flats for which assessee has already received advances from the buyers, therefore, these flats also should be eliminated from the stock held by the assessee as stock-in-trade. With regard to 23 flats which assessee has accepted that these flats are held as stock-in-trade for which the municipal rateable value has to be adopted for the purpose of determining the income under the head "income from house property". Accordingly, we direct the Assessing Officer to determine the income under the head "income from house property" based on the above direction and it is needless to say that proper opportunity of being heard to the assessee is granted. Accordingly, grounds raised by the assessee are allowed for statistical purpose.

15. In the result, appeal filed by the assessee is allowed for statistical purpose.

Order pronounced in the open court on 03rd April, 2024.

Sd/-
(ABY T VARKEY)
JUDICIAL MEMBER
Mumbai / Dated 03.04.2024
Giridhar, Sr.PS

Sd/-
(S. RIFAUH RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum