

IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH, MUMBAI

BEFORE MS. KAVITHA RAJAGOPAL, JM  
AND  
SHRI. GIRISH AGARWAL, AM

ITA No. 1220/Mum/2024  
(Assessment Year: 2015-16)

<b>Ramesh Dungarshi Shah</b> 108, Shreedhar Apartment, Maulana Azad Road, Dombivali, East, Thane – 421201.	Vs.	<b>Deputy Commissioner of Income Tax, Circle – 3, Kalyan</b> 2 <sup>nd</sup> Floor, Rani Mansion, Murbad Road, Kalyan West – 421301.
<b>PAN/GIR No. AAVPS0931K</b>		
(Assessee)	:	(Respondent)

<b>Assessee by</b>	:	Shri. Devendra Jain, Adv. (Virtually)
<b>Respondent by</b>	:	Shri. Asif Karmali (Sr. DR)

<b>Date of Hearing</b>	:	14.02.2025
<b>Date of Pronouncement</b>	:	14.05.2025

**ORDER**

**Per Kavitha Rajagopal, J M:**

This appeal has been filed by the assessee, challenging the order of the learned Commissioner of Income Tax (Appeals), Delhi ('Id. CIT(A)' for short), National Faceless Appeal Centre ('NFAC' for short) passed u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2015-16.

2. It is observed that the assessee has filed this present appeal with a delay of 47 days beyond the period of limitation for which the assessee has filed an application for condoning the delay along with the reasons specified for the delay. After hearing the rival contentions, we deem it fit to condone the delay in filing the appeal for the reason that there was 'sufficient cause' and bonafide reasons for the delay. Delay condoned.

3. The solitary ground of appeal is on the addition of Rs. 3,82,200/- made under the head 'Income from house property', where the ld. AO has taken the notional rent of unsold shops/flats at Rs. 5,46,000/- as per the provision of Section 23(1)(a) r.w.s. 23(4) of the Act.
4. Briefly stated that the assessee is an individual and engaged in the business of Civil Construction and Builders and Developers and had filed his return of income dated 30.10.2015, declaring total income at Rs. 3,84,95,290/- from sale of flats amounting to Rs. 18,58,75,250/- and other income of Rs. 36,07,952/- after debiting various expenses and claiming deduction under Chapter VIA of the Act amounting to Rs. 1,74,997/- and the same was processed u/s. 143(1) of the Act. The assessee's case was selected for limited scrutiny under CASS, for the reason that the assessee has not declared income from house property for unsold shops/flats which remained vacant during the year under consideration. The learned Assessing Officer ('ld. AO' for short) then passed the assessment order u/s. 143(3) of the Act dated 21.12.2017, thereby determining total income at Rs. 3,88,77,490/- after making an addition of Rs. 3,82,200/- u/s. 23(4)(b) of the Act r.w.s. 23(1) of the Act on the annual rental value of Rs. 5,46,000/- after the standard deduction @ 30% amounting to Rs. 1,63,800/-.
5. Aggrieved the assessee was in appeal before the first appellate authority, who vide order dated 29.11.2023 upheld the addition made by the ld. AO by relying on the decision of the jurisdictional coordinate bench in the case of ***Dimple Enterprises vs. DCIT (2023) 154 taxmann.com 653.***
6. The assessee is in appeal before us, challenging the impugned order of ld. CIT(A).

7. We have heard the rival submissions and perused the materials available on record. The issues that require adjudication is whether addition could be made on the notional income from unsold units held as stock-in-trade for the year under consideration and if so, whether the same has to be determined as per the Municipal Rentable Value. Also, whether the amendment brought to the provisions of Section 23(5) would be applicable for impugned year or prospectively from A.Y. 2018-19 onwards. It is observed that the assessee being proprietor of Advance Home Makers Group which is into the business of construction had shown closing stock of Rs. 7,30,66,564/- in a completed project, where the details of area in sq. ft., fair market rent and municipal valuation for the same was sought for by the ld. AO during the assessment proceedings. The ld. AO made an addition on deemed rental income on the vacant flats which was shown in the balance sheet and P & L Account of the assessee as closing stock of the unsold flats as per Section 23(4)(b) of the Act r.w.s. 23(1) of the Act. The ld. CIT(A) upheld the said addition by relying on the decision of the coordinate bench in the case of ***Dimple Enterprises (supra)*** which has infact considered the decision of the Hon'ble Gujrat High Court in the case of ***CIT vs. Neha Builders Private Limited (2008) 296 ITR 0661***, and the coordinate bench decision in the case of ***DCIT vs. Inorbit Malls Pvt. Ltd., ITA No. 2220/Mum/2021, order dated 11.10.2022***. The ld. AR on the other hand has relied on a catena of decisions which are cited herein under, where addition on account of deemed rental income pertaining to unsold stock of flats which are held as stock-in-trade were deleted.

a. *Pegasus Properties (P.) Ltd. v. DCIT [2022] [135 taxmann.com 294] [Mumbai ITAT].*

- b. *K. D. Construction Unit v. ITO [2022] [138 taxmann.com 382] [Pune ITAT].*
  - c. *Kumar Properties and Real Estate (P.) Ltd. Vs. DCIT [2021] [128 taxmann.com 364] [Pune ITAT].*
  - d. *Shivsagar Builders (P.) Ltd. vs. ACIT [2020] [118 taxmann.com 349] [Delhi ITAT]*
  - e. *Runwal Constructions v. ACIT [2018] [ITA 5408/Mum/2016] [Mumbai ITAT]*
  - f. *ACIT, Mumbai vs. Haware Construction (P.) Ltd. [2019] [101 taxmann.com 168] [Mumbai ITAT].*
  - g. *Haware Engineers and Builders Pvt. Ltd. Vs. DCIT [2018] [ITA 7155/Mum/2016] [ITAT Mumbai].*
  - h. *C. R. Development (P.) Ltd. [2016] [ITA 4277/Mum/2022] [Mumbai ITAT]*
  - i. *Progressive Homes vs. ACIT [2018] [ITA 5082/Mum/2016] [Mumbai ITAT]*
  - j. *Giridharilal K. Lulla vs. DCIT [2017] [ITA 1604/Mum/2016] [Mumbai ITAT].*
8. The ld. AR contended that even otherwise, in case of notional rent to be added to the income of the assessee, the same has to be as per the Municipal Rentable Value and that the same is to be determined not for assessment years prior to 2018-19 onwards as per Section 23(5) of the Act. Though the assessee has raised only one effective ground of appeal challenging the addition made, the reliance placed by counsels for the assessee and the revenue on various decisions put us in a position to discuss multiple aspects revolving the issue in hand.
9. One of the question that ought to be decided in light of the insertion of the provision of Section 23(5) by way of Finance Act, 2017 which is w.e.f. 01.04.2018 is that since it

applies retrospectively can there be an addition in the case of notional rent on unsold flats held as stock-in-trade?

10. The assessee has relied on a plethora of decisions of the Tribunal which has held that no addition could be made to assessment year prior to A.Y. 2018-19 on such notional rent. It is pertinent to note that even before the said amendment, the department has been making addition on notional rent on unsold flats and the same has been held to be valid as per the decision of the Hon'ble Delhi High Court in the case of *CIT vs. M/s. Ansal Housing Finance and Leasing Co. Ltd., ITA No. 18/1999, order dated 31.10.2012*, wherein the Hon'ble High Court held that house properties, constituting stock-in-trade are to be assessed under the head 'Income from house property' on notional rent irrespective of the fact that the same was lying vacant during the year under consideration. In the subsequent decision of the *Ansal Housing Finance and Leasing Co. Ltd., (supra)* again when this issue came up before the Hon'ble High Court for A.Y. 2005-06 and 2006-07, the same view was reiterated, though the issue pertaining to the said appeal was with regard to the vacancy allowance u/s. 23(1)(c) of the Act. It further observed that for the properties which were held as stock-in-trade and not let during the year under consideration, the notional annual letting value u/s. 23 is to be determined even when the insertion of the clause (5) of Section 23 was w.e.f. 01.04.2018 applicable prospectively, it held that the said insertion of Sub Section 5 of Section 23 is not clarifactory or was for abundant caution but it was to emphasize that it was always the legal position and held that for the relevant assessment year i.e., 2005-06 and 2006-07, the properties held as stock-in-trade would be taxable on the basis of

notional annual letting value u/s. 23 of the Act. The relevant extract of the said decision is cited herein 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 judgement dated 31.10.2012, would be good law, even in view of the insertion of Section 23(1)(c). That being the position, in the assessee's case, the properties held as stock in trade will be taxable under the notional annual letting value method prescribed under 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 never actually let out the properties held as stock in trade.*

*10. Finally, this Court notices that the Finance Act, 2017 has amended Section 23 of the Act to insert sub-section (5), which provides:*

*"(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, for the period 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, shall be taken to be nil."*

*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 inserted 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."*

11. It is pertinent to point out that even in the case of the Hon'ble Gujrat High Court in *Neha Builders* (supra) the issue of house income derived from properties shown as stock-in-trade shall be treated arose, where the Hon'ble High Court held that that same to be 'business income' and not 'income from house property'. The subsequent decision of the Hon'ble Delhi High Court in the case of *Ansal Housing Finance and Leasing Co. Ltd.*, (supra) gave a decision contrary to the same and treated the said income as 'Income from house property'. Before us, the issue is not whether the same is to be treated as 'business income'/'Income from house property', but whether notional rent

could be charged on vacant flats held as stock-in-trade. It is evident that the charging section for the Section 22 for 'Income from house property' and how the same has to be determined is specified in Section 23 of the Act which also gives exemption when the property is in occupation of the owner for his own residents or his employment, business or profession as per clause (2) of the Section 23 of the act. Further, Section 23(4)(b) of the Act provided for the deemed rent, where the annual value is to be determined as if such house/houses had been let from this it is inferred that even before the insertion of Section 23(5) deemed rent has been determined as per Section 23(4)(b) of the Act and as held by Hon'ble Delhi High Court in ***Ansal Housing Finance and Leasing Co. Ltd., (supra)***, it was the legal position even before the said amendment. Though the issue of determining the rental income received from unsold flats held as stock-in-trade has been held to be income from house property by Hon'ble Jurisdictional High Court into case of ***CIT vs. Sane and Doshi Enterprises (2015) 377 ITR 165/ 232 taxmann.com 452 Bombay*** and in the case of ***CIT vs. Gundecha Builders (2019) 102 taxmann.com 27 (Bombay)***, the deemed rental on flats lying vacant would also be covered by the Provisions of Section 23(4)(b) of the Act and the subsequent Amendment by way of insertion of Clause (5) was only to give relief to the assessee that when it was not let out for whole or any part of the previous year then the annual value would be NIL for two years (earlier one year as per Finance Act, 2019) from the end of the FY in which certificate of completion of construction was obtained.

12. The assessee has placed reliance on the Tribunal decision in the case of the ***Inorbit Malls Pvt. Ltd. (supra)*** stating that the Tribunal has held that Section 23(5) is applicable only for A.Y. 2018-19 onwards, we are of the considered view that though at para 19 it

has stated that the provision would apply prospectively, at para 20 of the said decision, it has held the same against the assessee by placing reliance on the decision of the Hon'ble Delhi High Court in the case of ***Ansal Housing Finance and Leasing Co. Ltd., (supra)***. The relevant extract of the said Tribunal decision is cited herein under for ease of reference:

*“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.”*

13. The subsequent decision of the Tribunal in ***Dimple Enterprises (supra)*** has also followed the same and has held that the ALV of unsold flats which is held as stock-in-trade should be determined as per the Municipal Rentable Value and added the same as 'Income from house property'. As it is now a settled proposition of law post the decision of the ***Ansal Housing Finance and Leasing Co. Ltd., (supra)*** that notional rent has to be determined on vacant unsold flats held as stock-in-trade as 'Income from house property', the issue now remains for adjudication is what should be the rental value that the Id. AO will have to apply for determination of the notional rent. For this, we place reliance on the decision of the Hon'ble Jurisdictional High Court in the case of ***CIT vs.***

**Tip Top Typography [2014] 48 taxmann.com 191/[2015] 228 Taxman 244 (Mag.)/[2014] 368 ITR 330**, which has relied on the full bench decision of the Hon'ble Delhi High Court in the case of **CIT vs. Moni Kumar Subba, [2011] 333 ITR 38**, where it has been reiterated that for determination of ALV u/s. 23(1)(a) of the Act, the same has to be in accordance with the municipal laws after duly considering the inflated or deflated rent based on extraneous circumstances, if any, which in any case cannot exceed the standard rent as per the Rent Control Legislation applicable to the said property. It has also specified various methods of valuation for arriving at the hypothetical rent. The coordinate bench in the case of **Inorbit Malls (supra)** has also relied on the decision of the Hon'ble Jurisdictional High Court in the case of **Tip Top Typography (supra)** for determining the ALV for computing the notional rent. By respectfully following the proposition laid down by the Hon'ble Jurisdictional High Court in the case of **Tip Top Typography (supra)**, we direct the ld. AO to determine the notional rent in accordance with the principles emphasized in the said decision.

14. In the result, the appeal filed by the assessee is partly allowed.

*Order pronounced in the open court on 14.05.2025*

Sd/-  
(GIRISH AGARWAL)  
ACCOUNTANT MEMBER

Sd/-  
(KAVITHA RAJAGOPAL)  
JUDICIAL MEMBER

Mumbai; Dated: 14.05.2025  
Karishma J. Pawar (Stenographer)

**Copy of the Order forwarded to:**

1. The Appellant
2. The Respondent
3. CIT- concerned

4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt.Registrar)  
ITAT, Mumbai