

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'D' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI M.BALAGANESH, ACCOUNTANT MEMBER**

**ITA No.1174/Mum/2022
(Assessment Year :2017-18)**

Shri Rajesh Dharamvir Gulati Office No.1204, 1205 & 1206, Maithili Signet Sector-30A, Navi Mumbai- 400 705	Vs.	Pr. Commissioner of Income Tax-27 Room No.401, 4 th Floor Tower No.06, Vashi Railway Station Commercial Complex Vashi, Navi Mumbai- 400 703
PAN/GIR No.ACAPG8999G		
(Appellant)	..	(Respondent)

Assessee by	Ms. Rutuja Pawar
Revenue by	Shri T. Shankar
Date of Hearing	18/08/2022
Date of Pronouncement	18/08/2022

आदेश / ORDER

PER M. BALAGANESH (A.M.):

This appeal in ITA No.1174/Mum/2022 for A.Y.2017-18 arises out of the order by the Id. Commissioner of Income Tax (Appeals)-27, Mumbai in appeal No.PCIT, Mumbai-27/Revision-263/100000321659/2022 dated 15/03/2022 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 09/05/2019 by the Id. Asst. Commissioner of Income Tax, Circle 28(2), Mumbai (hereinafter referred to as Id. AO).

2. The only issue to be decided in this appeal is as to whether the Id. PCIT was justified in invoking revisionary jurisdiction u/s.263 of the Act in the facts and circumstances of the instant case. The interconnected issue involved therein is as to whether the Id. PCIT was justified in directing the Id. AO to make a fresh assessment by taxing the notional rent arising from property held as 'stock in trade' under the head 'income from house property' in the facts and circumstances of the case.

3. We have heard rival submissions and perused the materials available on record. The assessee is an individual engaged in real estate business having income from house property, income from business and income from other sources. The return of income for the A.Y.2017-18 was filed by the assessee on 01/11/2017 declaring total income of Rs.2,42,79,270/-. This return was selected for scrutiny under CASS. During the course of scrutiny assessment proceedings, notice u/s.142(1) of the Act was sent to the assessee calling for various details. In response to the same, the assessee submitted all the replies in the online portal of Income Tax department. The Id. AO on going through the said replies completed the assessment u/s.143(3) of the Act dated 09/05/2019 by accepting the returned income. This assessment was sought to be treated as erroneous in as much as it is prejudicial to the interest of the Revenue by the Id. PCIT and accordingly, first show-cause notice u/s.263 of the Act was issued to the assessee on 02/03/2022 on the ground that assessee being a builder has shown closing stock as on 31/03/2017 as 'stock in trade' and had not offered rental income from the unsold stock of flats in terms of Section 23(5) of the Act. The said show-cause notice is reproduced in pages 1 & 2 of the order of the Id. PCIT u/s 263 of the Act. The Id. PCIT observed that 8% of value of closing stock of property held

as 'stock in trade' should be subjected to tax as deemed rental income u/s.23(5) of the Act and from which, statutory deduction of 30% would be eligible to assessee and remaining sum is to be brought to tax under the head income from house property. The assessee was directed to furnish reply on 07/03/2022 on which date the assessee did not file any reply. However, the assessee furnished the reply on 11/03/2022 which fact is also acknowledged by the Id. PCIT in page 2 of his order. The submissions made by the assessee in letter dated 11/03/2022 is reproduced by the Id. PCIT from pages 2 to 5 of his order. In the said reply, the assessee specifically drew the attention of the Id. PCIT that provisions of Section 23(5) of the Act were introduced only from 01/04/2018 and would be applicable only from A.Y.2018-19 onwards. Accordingly, it was pleaded that the said provision cannot be made applicable for the year under consideration. On merits of the issue of taxability of deemed notional rent on unsold stock of flats, the assessee placed reliance on the decision of Hon'ble Gujarat High Court in the case of CIT vs. Neha Builders Pvt Ltd., reported in 296 ITR 661 wherein it was held that in the case of a builder, the annual value of the property held as 'stock in trade' cannot be brought to tax under the head 'income from house property' and even if any rent has been realized, the same would be taxable only as 'business income'. Apart from this, the assessee also submitted that, even assuming, if section 23(5) of the Act would be applicable in the present case, still no income would be liable to be offered to tax under 'Income from House Property' for the A.Y. 2017-18 due to the fact that as per the provisions of section 23(5) of the Act, the Annual value for a period of one year from the end of the financial year in which the certificate of completion of construction of the property was obtained from the competent authority, shall be taken to be Nil. It was specifically pointed out that the closing stock of flats of Rs 22.82 crores

shown in the balance sheet comprises mostly of project for which completion certificate was either awaited or was received in the same financial year for which one year had not been completed from the end of the financial year in which completion certificate is received. The assessee also gave the details of each project, its closing stock and date of receipt of completion certificate for each project together with the supporting evidences before the Id. PCIT in the form of separate annexures. All these facts are part of written submissions of the assessee which are reproduced in the order of Id. PCIT.

3.1. From the perusal of the aforesaid narration of facts and arguments of the Id. AR and perusal of relevant papers in the appeal folder to which our attention was drawn by the Id. AR, we find that the Id. PCIT is only directing to invoke the provisions of Section 23(5) of the Act for taxing the rental income on notional basis under the head 'income from house property' in respect of unsold flats lying as 'closing stock'. We find that the provisions of Section 23(5) of the Act has been introduced in the statute only from A.Y.2018-19 and the same cannot be made applicable to assessment years prior to that. Hence, the same cannot be made applicable for the year under consideration. In respect of deemed rental income on unsold stock of flats held as stock in trade, the Hon'ble Gujarat High Court in the case of Neha Builders reported in 296 ITR 661 had categorically held that the said rental income, if any, could be brought to tax only under the head 'income from business' and not under the head 'income from house property'. On perusal of the said decision of the Hon'ble Gujarat High Court, we find that the decision of the Hon'ble Delhi High Court in the case of Ansal Housing Finance and Leasing Co. Ltd., which has been heavily relied upon by the Id. PCIT has also been considered and distinguished. We find that the co-ordinate bench of this

Tribunal in the case of DCIT vs Bengal Shapoorji Housing Development Pvt Ltd in ITA No. 4369/Mum/2019 dated 23/03/2021 for A.Y 2013-14 had deleted the addition made on account of annual lettable value of flats held by the assessee as stock in trade. Moreover, this Tribunal in the case of Tata Housing Development Company Limited vs PCIT in ITA Nos. 3492 & 3493/Mum/2019 dated 28/09/2020 for Asst Years 2015-16 & 2014-15 respectively had categorically held that the provisions of section 23(5) of the Act has been introduced from 01/04/2018 and since the said amendment is substantive in nature , the same would have only prospective application from A.Y. 2018-19 onwards. Hence, even on merits, no rental income could be brought to tax in the instant case, even if provisions of Section 23(5) of the Act is applied.

3.2. We hold that the order of the Id. PCIT suffers from legal infirmity in not considering the replies of the assessee, wherein the assessee had stated that the provisions of section 23(5) of the Act cannot be brought into operation at all for the year under consideration. We hold that no finding has been given by the Id. PCIT on the submissions made by the assessee together with its relevant legal provisions of the Act. Hence we have no hesitation to hold that the revision order passed by the Id. PCIT u/s 263 of the Act deserves to be quashed on merits.

3.3. From the perusal of the order of the Id. AO and from perusal of the replies filed by the assessee before the Id. PCIT, we find that no evidences were placed on record by the assessee as to whether any enquiries were carried out by the Id. AO in the instant case with regard to the taxability of deemed rental income on unsold stock of flats. To this extent, prima facie, the assumption of jurisdiction u/s 263 of the Act by the Id. PCIT would be correct. But however, from the aforesaid

observations on merits, it is found that the Id. PCIT had proceeded to assume his revision jurisdiction by incorrect application of law i.e trying to apply provisions of section 23(5) of the Act, which is not applicable for the year under consideration. Hence on this ground, the assumption of revision jurisdiction u/s 263 of the Act by the Id. PCIT deserves to be quashed. Accordingly, the grounds raised by the assessee are allowed.

4. In the result, appeal of the assessee is allowed.

Order pronounced on 18/ 08/2022 by way of proper mentioning in the notice board.

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 18/08/2022
KARUNA, sr.ps

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Sr. Private Secretary / Asstt. Registrar)
ITAT, Mumbai