

IN THE INCOME TAX APPELLATE TRIBUNAL  
PUNE BENCH "SMC", PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT

आयकर अपील सं. / ITA No.1914/PUN/2018  
निर्धारण वर्ष / Assessment Year : 2015-16

M/s. Shree Balaji Ventures, Vs. ITO, Ward-7(5),  
5, San Mahu Complex, Pune  
Opp. Poona Club,  
Camp, Pune  
PAN : AADAS8344K

(Appellant)

(Respondent)

Appellant by Shri Krishna V. Gujrathi  
Respondent by Shri Achal Sharma

Date of hearing 18-02-2019  
Date of pronouncement 19-02-2019

आदेश / ORDER

PER R.S.SYAL, VP :

This appeal by the assessee emanates from the order passed by the CIT(A)-5, Pune on 22-08-2018 in relation to the assessment year 2015-16.

2. The only effective ground raised in this appeal is against the confirmation of addition of Rs.34,35,432/- made by the Assessing Officer (AO) by determining the income under the head "Income from house property", being, the annual letting value (ALV) of the unsold units of properties lying as stock in trade.

3. Succinctly, the factual matrix of the case is that the assessee is engaged in the business as a Builder and Developer. The Assessing Officer (AO) observed that the assessee was holding closing stock of one office building and one showroom. Invoking provisions of section 23(4) of the Income-tax Act, 1961 (hereinafter also called 'the Act'), the AO opined that the Annual Letting Value of the property was required to be determined and added to the assessee's total income. The assessee's contention that two units in respect of which "Income from house property" was proposed to be computed, were its stock in trade and hence, no income could be determined thereon under this head, did not find favour. The AO computed deemed rental income u/s.23 of the Act at Rs.34,35,432/- and added it to the assessee's total income. The Id. CIT(A) countenanced the action of the AO, against which the assessee is in appeal before the Tribunal.

4. I have heard the rival submissions and perused the relevant material on record. It is an undisputed fact that the assessee, a Builder and Developer, was holding two properties as its stock in trade, from which the deemed rental income has been computed u/s 23 of the Act and added to its total income. The AO has made out a case that levy of income tax in respect

of properties held by the assessee as an owner, cannot be marred even if the same have been held as stock in trade. The bedrock of the action of the authorities below is certain decisions which, in turn, are based on the judgments of Hon'ble Supreme Court in *East India Housing & Land Development Trust VS. CIT (1961) 42 ITR 49 (SC)* and *S.G. Mercantile Corporation Pvt. Ltd. Vs. CIT (1972) 83 ITR 700 (SC)*. It has been held in the latter decision that where a builder, being, owner lets out property for some time pending sale, the income so derived is to be taxed under the head "Income from house property" and not as "Business income". So the *ratio* is that even if a builder lets out his property, held as stock in trade, income there from will be chargeable under the head 'Income from house property' and not as 'Business income'. It is pertinent to note that such a legal position has undergone some transformation. In *Chennai Properties and Investments Ltd. Vs. CIT (2015) 373 ITR 673 (SC)*, the assessee whose business was to acquire properties, let out certain properties and the rental income as received therefrom was declared as business income. The AO held such income to be chargeable to tax under the head "Income from house property". The Hon'ble Supreme Court held that the deciding

factor for determining as to whether the income is to be charged under the head “Income from house property” is not the ownership of property but the nature of operations in relation to them. Considering the objects of the company, the Hon’ble Supreme Court held that such income was chargeable to tax under the head “Profits and gains from business or profession”. More recently, the Hon’ble Supreme Court in *Rayala Corporation Pvt. Ltd. Vs. ACIT (2016) 386 ITR 500 (SC)* considered a situation in which the assessee was engaged in the business of renting its properties. The assessee claimed such rental income as falling under the head “Profits and gains of business or profession”. The AO denied such a treatment. When the matter finally came up before the Hon’ble Supreme Court, it considered both the judgments, namely, *S.G. Mercantile Corporation (supra)* and *Chennai Properties and Investments Ltd (supra)* and thereafter held that : `the law laid down by this Court in the case of *Chennai Properties (supra)* shows the correct position of law’. That is how, their Lordships held that the income was to be charged to tax under the head “Profits and gains of business or profession”.

5. In view of the foregoing discussion, it is apparent that the view point bolstered by the authorities that Annual Letting Value in respect of unsold properties lying with the assessee as a stock in trade, should be determined u/s. 23 of the Act, cannot be countenanced in the hue of the later judgments of the Hon'ble Summit Court. Once it is held that the income of a Builder in respect of letting out of the properties is chargeable under the head "Profit and gains of business or profession", the provisions enshrined in Chapter IV-D get magnetized and not those under the head "Capital gains". It is no doubt true that section 23 of the Act deems the determination of income from house property, which is not let out, but it is equally trite that a deeming provision cannot be extended beyond its ambit, so as to cover the heads of income or the sections, to which it does not operate. My attention has not been drawn by the Id. DR towards any specific provision under Chapter IV-D of the Act which deems rental income on the properties held as stock in trade, waiting for sale and not actually let out, as chargeable to tax under the head "Profit and gains of business or profession". As the assessee admittedly did not earn any rental income from letting out of these two units, which position has also not been disputed by

the AO, in my considered opinion, taxing any hypothetical income, which is otherwise not sanctioned by any provision under Chapter IV-D, cannot be permitted.

6. Even otherwise, section 5 of the Act clearly stipulates that a person who is a resident can be subjected to tax in respect of income from whatever source which is received or is deemed to be received in India or accrues or arises or deemed to accrue or arise to him in or outside India during such year. As the instant imaginary income charged to tax by the AO is neither a deemed income under the head 'Business income' nor is received or deemed to be received or accruing or arising or deemed to accrue or arise, not falling in any of the categories given in clauses (a) to (c) of section 5(1), I hold that there is no rationale in charging it to tax. I, therefore, overturn the impugned order and direct to delete the addition of Rs.34.35 lakh.

7. In the result, the appeal is allowed.

Order pronounced in the Open Court on 19<sup>th</sup> February, 2019

**Sd/-  
(R.S.SYAL)**

**उपाध्यक्ष/ VICE PRESIDENT**

पुणे Pune; दिनांक Dated : 19<sup>th</sup> February, 2019

सतीश

**आदेश की प्रतिलिपि अग्रेषित / Copy of the Order is forwarded to :**

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) /  
The CIT (Appeals)-5, Pune
4. Pr.CIT-4, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "SMC" /  
DR 'SMC', ITAT, Pune;
6. गार्ड फाईल / Guard file.

**आदेशानुसार/ BY ORDER,**

**// True Copy //**

Senior Private Secretary  
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	18-02-2019	Sr.PS
2.	Draft placed before author	19-02-2019	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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