IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE – VIRTUAL COURT

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI S.S.VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.2977/PUN/2017
निर्धारण वर्ष / Assessment Year 2013-14

Kumar Properties and Real Estate Private Limited, Ist Floor, Kumar Capital, East Street, Camp, Pune – 411 001 PAN : AAACK7490H	Vs.	DCIT, Circle-14, Pune
Appellant		Respondent

Assessee by	Shri Rajan Vora & Shri Rajendra Agiwal
Revenue by	Shri Vitthal Bhosale
Date of hearing	27.04.2021
Date of pronouncement	28-04.2021

आदेश / ORDER

PER R.S. SYAL, VP :

This appeal by the assessee is directed against the order passed by the CIT(A)-7, Pune on 01.09.2017 in relation to the assessment year 2013-14.

2. The assessee has assailed confirmation of addition of Rs.1,47,65,688/- towards deemed rental income on stock-in-trade of unsold flats/bungalows held by the assessee, as a first major issue. Succinctly, the factual panorama of the case is that the assessee has been engaged in the business of development of properties with the projects `Kumar Infinia' and `Kumar Picasso'

having certain unsold flats/bungalows for ready possession at the year end. The AO opined that the assessee ought to have offered deemed notional rental income on such vacant flats/bungalows. The assessee submitted that the flats/bungalows were its stock-in-trade, from which no income could be taxed under the head 'Income from house property'. Relying on judgment of the Hon'ble Delhi High Court in *CIT Vs. Ansal Housing Finance and Leasing Company Ltd. (2013) 354 ITR 180 (Del),* the AO computed the annual letting value of the unsold flats u/s.23 of the Income-tax Act, 1961 (hereinafter also called `the Act') at Rs.1,47,65,688/- and made addition for the same. The ld. CIT(A) echoed the addition, against which the assessee has approached the Tribunal.

3. We have heard the rival submissions through Virtual Court and gone through the relevant material on record. Indisputably, the assessee has been engaged in the business of development of properties. Certain flats/bungalows out of the two buildings were unsold as at the year end. The authorities below have canvassed a view that annual letting value of such unsold flats/bungalows lying as stock-in-trade at the end of the year is income chargeable to tax under the head `Income from house property'. Section 22 is the

charging section of Chapter IV-C, `Income from house property', which reads as under:-

> `The annual value of property consisting of any buildings or lands appurtenant thereto of which the assessee is the owner, *other than such portions of such property as he may occupy for the purposes of any business or profession carried on by him the profits of which are chargeable to income-tax,* shall be chargeable to income-tax under the head "Income from house property".'
>
> (emphasis supplied by us)

4. This section states that the annual value of property (buildings or land appurtenant thereto) held by the assessee as an owner shall be chargeable as `Income from house property'. However, an exception has been carved out, which provides that any such property or its part, which is occupied by the assessee for the purposes of any business or profession carried on by him, the profits of which are chargeable to income-tax, shall be excluded. Thus, in order to fall in the exclusion clause, the following conditions must be satisfied:

i. The property or its part should be occupied by the assessee as an owner.
ii. Any business or profession should be carried on by the assessee-owner.
iii. Occupation of the property should be for the purpose of business or profession
iv. Profits of such business or profession should be chargeable to income-tax.

5. Only when the above four conditions are cumulatively satisfied that the property or its part goes outside the ken of section 22, not requiring computation of the annual letting value therefrom. Let us see if the above conditions are satisfied in the instant case *ad seriatim*.

6. The first condition is that the property or its part should be occupied by the assessee as an owner. The assessee is engaged in the business of developing buildings. Admittedly, the assessee is owner of the flats/bungalows lying unsold at the year end. Now the question is whether these flats etc. can be said to be `occupied' by the assessee? The term `occupy' has neither been defined in section 2 (general definitions under the Act) nor section 27 (definitions relating to income from house property). Rather it is defined nowhere in the Act. In such a scenario, we will have to understand its connotation in common parlance. The term `occupation' (in land law) has been defined in the Oxford Dictionary of Law to mean `the physical possession and control of land'. Thus, occupation of a property means having its physical possession coupled with dominion rather than the physical possession coupled with actual use. Once a property is in physical possession and control of a

person, it is said to be in his occupation, even if it is not actually used by him. Adverting to the facts of the extant case, we find it not to be a case of the AO or that of the ld. DR that the unsold flats etc. were not in the physical possession and control of the assessee. In fact, there is no one other than the assessee having physical possession and control over such flats, thereby making the assessee solely in their `occupation'. Thus the first condition is fulfilled as the flats etc. were occupied by the assessee-owner.

7. The second condition is that any business or profession should be carried on by the assessee-owner. Obviously, the assessee is engaged in the business of property development and has returned income from such business.

8. The third condition is that the occupation of the property should be for the purpose of business or profession. Crucial words used in the provision linking occupation of property with are `for the purpose of business'. If the property is occupied for the purpose of business, the condition gets satisfied. The expression `for the purpose of business' is of wide amplitude. To fall within its purport, what is essential is that there should be some nexus with the business. Even remote connection with the business satisfies the test

of `for the purpose of business'. Section 37(1) of the Act, granting other deductions, also uses similar expression - `for the purposes of the business or profession'. This has been interpreted to be wider in its scope *vis-à-vis* the expression `for the purpose of making or earning such income' as used in section 57(iii), providing deduction under the head `Income from other sources'. Reverting to section 22, we find that the legislature has used a wider expression: `for the purpose of business' with occupation of the property rather than any narrower expression indicating that the business must be carried on from such property or something like that as a *sine qua non* for exception. If the intention of the legislature had been to provide exception in a limited manner, it would have used a suitable constrained expression. Coming back to the factual scenario prevailing in the instant case, we find that the purpose of occupation of the flats is to hold them either for readying them for final sale or during the interregnum from the ready stage to sale stage, which satisfies the test of `for the purpose of business'.

9. The last condition is that profits of such business or profession should be chargeable to income-tax. It is indisputable that the

profits of the business of property development by the assessee are chargeable to income-tax.

10. On a bird's-eye view, we find that that flats/bungalows are occupied by the assessee owner; business of property development is carried on by the assessee; the occupation of the flats etc. is for the purpose of business; and profits of such business are chargeable to income-tax. Ergo, all the four conditions for exclusion from section 22 of the Act are cumulatively satisfied in the present case.

11. The authorities below have canvassed a view that the annual letting value of flats/bungalows is income chargeable to tax as `Income from house property' by relying on *Ansal Housing Finance and Leasing Company Ltd. (supra).* There is no doubt that the Hon'ble Delhi High Court in the said case has held that Annual letting value of unsold flats at the year end is chargeable to tax under the head 'Income from house property'. At the same time, we find that the Hon'ble Gujarat High Court in *CIT Vs. Neha Builders (Pvt.) Ltd. (2008) 296 ITR 661(Guj)* has held that income from the properties held as stock in trade can be treated as Income from business and not as `Income from house property. Our attention has been drawn towards certain Tribunal decisions including

Cosmopolis Construction, Pune vs. ITO dated 18.06.2018 (ITA NO. 230 & 231/PUN/2018), wherein, after taking note of both the above judgments and finding none of them from the jurisdictional High Court, a view has been canvassed in favour of the assessee by holding that no income from house property can result in respect of unsold flats held by a builder at the year end. Similar view has been reiterated by the Pune Bench of the Tribunal in *Mahanagar Constructions VS. ITO* (ITA NO.632/PUN/2018) vide its order dated 5.9.2019.

12. At this juncture, it is relevant to mention that the Finance Act, 2017 has inserted sub-section (5) of section 23 w.e.f. 01.04.2018 reading as under:-

> `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.'

13. A close scrutiny of the provision inducted by the Finance Act, 2017, transpires that where a property is held as stock-in-trade which is not let out during the year, its annual value for a period of

one year, which was later enhanced by the Finance Act, 2019 to two years, from the end of the financial year in which the completion certificate is received, shall be taken as Nil. The amendment has been carried out w.e.f. 1.4.2018 and the Memorandum explaining the provisions of the Finance Bill also clearly provides that this amendment will take effect from 01.04.2018 and will, accordingly apply in relation to the assessment year 2018-19 and subsequent years. Obviously, it is a prospective amendment. The effect of this amendment is that stock-in-trade of buildings etc. shall be considered for computation of annual value under the head 'Income from house property' after one/two years from the end of the financial year in which the certificate of completion of construction of the property is obtained on and from the A.Y. 2018-19. Instantly, we are concerned with the assessment year 2013-14. As such, the amendment cannot apply to the year under consideration. In the absence of the applicability of such an amendment, no income can be said to have accrued to the assessee from unsold flats available as stock-in-trade. We, therefore, overturn the impugned order on this score and delete the addition of Rs.1.47 crore sustained in the first appeal.

14. The next issue raised in this appeal is against the confirmation of addition of Rs.77,021/- made by the Assessing Officer (AO) u/s.41(1) of the Act.

15. During the course of assessment proceedings, the AO observed that a company, namely, M/s. JVS Komatsco Industries Pvt. Ltd. (JVSK) had to receive a sum of Rs.77,021/- from the assessee and the said amount was written off by the company as bad debt in its accounts for the year under consideration. Since the liability of the assessee to pay the amount ceased to survive, the AO held that the assessee was liable to tax u/s.41(1) of the Act on this score. The assessee did not raise any objection to the proposed addition before the AO which led to the making of addition. However, the same was challenged before the ld. CIT(A), who upheld the same. Aggrieved thereby, the assessee has come up in appeal before the Tribunal.

16. We have heard the rival submissions and gone through the relevant material on record. The controversy has arisen out of certain purchase transactions of the assessee from JVSK during the course of its business. JVSK wrote off the sum in question its books of account, but the assessee chose not to show the corresponding income. The ld. AR submitted that the amount of Rs.77,021/-

represents the amount which was deducted by it from the invoices raised by JVSK and only the net amount was debited in its accounts. In other words, if invoice was raised by JVSK for Rs.X; the assessee deducted Rs.i; it recorded Rs.X minus i in its books of account as against the seller initially recording full amount of Rs.X at the time of sale and then on deduction of Rs.i by the assessee, wrote off Rs.77,021/-, an equivalent of Rs.i. As Rs.i was not recognized as expenditure in the first instance at the time of recording purchase by Rs.X minus i, the ld. AR submitted that there was no reason for offering any income u/s 41(1) of the Act later on. On a specific query to corroborate the version with the invoice value of JVSK (Rs. X) initially recorded at gross value by the seller and its corresponding recording by the assessee buyer at Rs.X minus Rs.i in the books of account, the ld. AR failed to put on record such evidence. It was submitted that the AO did not give any opportunity to the assessee and made addition straightway. The ld. AR prayed for giving one opportunity to the assessee to place the necessary details on record to prove its case. In the given facts and circumstances, we are of the considered view that it would be in the interest of justice if the impugned order on this score is set aside and the matter is restored to the file of the AO for deciding this issue

afresh after allowing hearing to the assessee. In case the assessee succeeds in proving that it recorded only the net value (after deduction) at the time of incurring expenses but JVSK recorded its gross invoice value only and the sum of Rs.77,021/- is equivalent of the differential amount of Rs.i, then no addition would be called for u/s 41(1) of the Act. In the otherwise scenario, the AO will deal with the issue as per law.

17. The next issue is against the confirmation of disallowance u/s.14A to the tune of Rs.15,21,690/-. The AO observed during the course of assessment proceedings that the assessee company was a partner in M/s Marigold Properties and had invested Rs.35.20 crore, income from which was exempt. The AO required the assessee to state reasons as to why no disallowance was offered u/s 14A on this count. The assessee submitted that no exempt income was earned during the year from such investment because Marigold Properties returned loss. Not convinced, the AO made disallowance at 0.5% of the average value of investment. The ld. CIT(A) confirmed the disallowance by holding that even though Marigold Properties returned a loss but it was a case of negative income and not Nil income.

18. Having heard the rival submissions gone through the relevant material on record, it is found as an admitted position that the assessee, in fact, did not earn any exempt income from the investment made in Marigold Properties during the year under consideration. The Hon'ble Delhi High Court in *Cheminvest Ltd. vs. CIT (2015) 378 ITR 33 (Del)* has held that if there is no exempt income, there can be no question of making any disallowance u/s 14A of the Act. Similar view has been taken by the Hon'ble Delhi High Court in *CIT vs. Holcim India P. Ltd. (2014) 90CCH 081-Del-HC*. More recently the Hon'ble jurisdictional High Court in *Pr. CIT VS. Kohinoor Projects Pvt. Ltd. (2020) 425 ITR 700 (Bom)* has held that in the absence of any exempt income, there cannot be any disallowance of expenses u/s 14A of the Act.

19. The *raison d'etre* given by the ld. first appellate authority for sustaining the disallowance that the computation of income of the firm may result into positive income as well as negative income, i.e. loss and therefore, the provision of section 14A do not prohibit disallowance of expenditure in relation to exempt loss incurred by the assessee, is neither here nor there. The Hon'ble jurisdictional High Court in *Pr. CIT VS. HSBC Invest Direct (India) Ltd. (2020) 421 ITR 125 (Bom)* has held `that disallowance cannot exceed the

exempt income so earned by the assessee during the year under consideration.' If the disallowance is to be restricted to the amount of exempt income, the sequitur is that there can never be any disallowance u/s 14A in the absence of positive exempt income for the year. Insofar as section 14A is concerned, there is no qualitative difference between two situations, first, where the exempt income is Nil and second, where there is negative income for the year joined with a possibility of earning positive income in future. As the assessee in the instant case admittedly did not earn any exempt income during the year, respectfully following the *ratio* of the above decisions, we hold that no disallowance was called for. The impugned order is overturned on this score and the sustenance of the disallowance is deleted.

20. In the result, the appeal is partly allowed.

Order pronounced in the Open Court on 28th April, 2021.

Sd/-	Sd/-
(S.S.VISWANETHRA RAVI)	**(R.S.SYAL)**
JUDICIAL MEMBER	**VICE PRESIDENT**

पुणे Pune; दिनांक Dated : 28th April, 2021
सतीश

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to</u>:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-7, Pune
4. The Pr. CIT-6, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "**A**" / DR 'A', 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	27.04.2021	Sr.PS
2.	Draft placed before author	28.04.2021	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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