

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A' NEW DELHI**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No. 6008/Del/2014
AY: 1988-89**

**ITA No. 6010/Del/2014 to ITA No. 6015/Del/2014
AYs: 1990-91, 1991-92, 92-93,93-94, 94-95, 95-96**

**DCIT,
Circle 1(1),
New Delhi-110002**

(Appellant)

**vs Ansal properties & Infrastructure Ltd.,
115, Ansal Bhawan, 16, K. G. Marg,
New Delhi-110001
(PAN: AAACA0006D)**

(Respondent)

Appellant by: Shri R.C. Dande, Sr. DR
Assessee by: Shri Satyen Sethi, Ms Gargi Sethi, Advocates

**Date of hearing: 31.08.2017
Date of pronouncement: 29.09.2017**

ORDER

PER BENCH

All these seven appeals have been preferred by the department against the order of the CIT(A)-XXXI, New Delhi dated 30.06.2014 and pertain to Assessment Years 1988-89, 1990-91 to 1995-96.

1.1 All the appeals have identical issues and therefore these were heard together and are being disposed of through this common order.

2. Brief facts of the case are that the assessee is a builder and promoter who had several simultaneous residential/commercial projects undertaken at different places. As on any date the assessee had few unsold flats/commercial space/open area etc. in different projects. There were also certain flats/commercial spaces, open area in respect of which occupation certificate was yet to be obtained even though the projects had been completed. This was so because the assessee had treated the projects as being completed on completion of 90% of the project and had offered the same for taxation. However, the Assessing Officer was of the view that unsold properties also qualified for inclusion in income from house property on notional basis although the same was part of stock in trade of the assessee company. Assessments were completed for assessment years 1988-89 to 1995-96 by the AO by bringing to tax Annual Letting Value (ALV) of properties as held as stock in trade as income from house property. On appeals before the first appellate authority, it was the assessee's plea that ALV of flats/spaces lying unsold cannot be assessed as income from house property. The alternate ground of the

assessee was that the rates adopted to assess the ALV of the respective flats/spaces was arbitrary and excessive or the property itself was not capable of being let out. The Id. CITA) as well as the ITAT deleted the addition on the legal plea that the notional ALV of flats/spaces lying unsold could not be assessed as income from house property. Since Id. CIT(A) had granted relief to the assessee on the basis of this legal plea, the alternate grounds were not adjudicated upon. However, on 31.10.2012, the Hon'ble Delhi High Court in CIT vs Ansal Housing Finance & leasing Co. Ltd. reported in 354 ITR 180, reversed the orders of the ITAT deleting the addition based on the above legal submissions. The AO vide orders dated 7.5.13 and 27.5.13 made additions of identical amounts as were made in the original assessments while giving effect to the judgment of the Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd. (supra). The assessee again preferred appeals before the Id. CIT(A) against the assessment orders dated 7.5.2013 and 27.5.13 and submitted that since the alternate grounds had not been adjudicated upon in the earlier round, to the extent of

grounds remaining undisposed, the appeals of the assessee were pending. The assessee submitted before the ld. CIT(A) that ld. CIT(A) while deleting the additions made by the AO on account of notional ALV on stock in trade in the first round, had only decided the legal ground on the said issue and had not considered it necessary to give his findings on the ground relating to quantum of ALV and on the question as to whether the ALV of property was assessable at all for the relevant assessment year being not ready for occupation. The ld. CIT(A) noted that for want of decision by the CIT(A) on certain grounds raised in the appeal memo, the appellant cannot be put to unnecessary hardship. Thereafter, the ld. CIT(A) adjudicated the issue partly in favour of the assessee. The quantum of relief allowed by the ld. CIT(A) has been summarized in para 7.6.7 of the impugned order and now, the department has approached the ITAT and has challenged the deletion made by the ld. CIT(A) for all the seven years. The grounds raised are identical in all the seven years and are not being reproduced for the sake of brevity.

4. Ld. DR submitted that the department was agitating broadly the deletion of addition on account of notional ALV in respect of car parking spaces. It was submitted that car parking space in Ansal Bhavan was not for the exclusive use of the assessee and it occupied only a part of the building. It was further submitted that the other ground agitated by the department pertained to the deletion of addition on account of notional ALV in respect of basement area in the Akashdeep building by ignoring the fact that the assessee itself had shown a space under stock in trade. Ld. DR further submitted that the other point of contention between the department and the assessee was the deletion of addition of notional ALV in respect of Dilkhush Bagh Industrial Area which was deleted in spite of the fact that the assessee itself had shown the space under stock in trade. It was further submitted that the department was also agitating the deletion of addition on account of notional ALV in respect of unsold spaces in Ambadeep Building for periods prior to the receipt of the occupancy certificate. It was submitted that the ld. CIT(A) had erred in ignoring that the legal right to use the property was not

relevant while considering the chargeability of notional income u/s 23(1) of the Income Tax Act, 1961. It was further submitted that on similar reasoning, the department was also contesting the deletion of addition of notional ALV in respect of unsold spaces in Palam Vyapar Kendra, unsold spaces in 38, Nehru Place, unsold spaces in Jyoti Shikhar building, and unsold spaces in Antriksh Bhawan. It was further submitted that the department was also contesting deletion of addition of notional ALV on unsold spaces in 6, Aurangzeb Road prior to the receipt of occupancy certificate and that the ld. CIT(A) had erred in ignoring the fact that the legal right to use the property was not relevant while considering the chargeability of notional value u/s 23(1) of the Income Tax Act.

4.1 Ld. DR also submitted that the department was further contesting deletion of addition on account of notional ALV in respect of car parking spaces in Surya Kiran Building in spite of the fact that this space also had been shown as stock in trade by the assessee. Ld. DR argued that additions had been deleted on the ground that occupancy certificate had not been issued to the

assessee which was incorrect because occupation certificate is not a criteria for determining whether the building can be habituated or not. He submitted that only structural reliability certificate is required. He also submitted that the ld. CIT(A), while partly allowing the assessee's appeals, had ignored the order of the Hon'ble Delhi High Court and therefore, the additions deleted were so deleted in misappreciation of law as well as facts. It was also submitted that whether or not the assessee itself had shown unsold spaces as stock in trade and had not capitalised the same, ALV has to be attributed and has been rightly done so by the AO. It was submitted that the additions deleted by the ld. CIT(A) should be restored.

5. In response, the ld. AR read out extensively from the orders of the ld. CIT(A) and relying heavily on the same, submitted that the ld. CIT(A) has adjudicated the issue after examining the entire controversy from the factual angle and this finding was not disputed by the department also, and therefore, the same should be upheld. Ld. AR also filed written submissions which have been taken on record. Ld. AR urged that the deletions made by

the ld. CIT(A) were correct both on facts as well as in law and therefore, the adjudication by the ld. CIT(A) should be upheld.

5. We have heard the rival submissions and have perused the material on record. It is seen that the Hon'ble Delhi High Court has, on appeal by the department, vide order dated 2.10.2012, held against the assessee by observing that income tax will be leviable on a notional basis on ALV. The relevant observations and adjudication of the Hon'ble Delhi High Court as contained in para 13 and 14 of the said order are as under:-

“13. In the present case, the assessee is engaged in Building activities. It argues that flats are held as part of its inventory of stock in trade, 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, Sultan, and Karanpura, 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 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 is clearly not the case.

14. As far as the alternative argument that the assessee itself is occupier, because it holds the property till it is sold, is concerned, the Court does not find any merit in this submission. While there can be no quarrel with the proposition that "occupation" can be synonymous with physical possession, in law, when Parliament intended a property occupied by one who is carrying on business, to be exempted from the levy of income tax was that such property should be used for the purpose of business. The intention of the lawmakers, in other words, was that occupation of one's own property, in the course of business, and for the purpose of business, i.e. an active use of the property, (instead of mere passive possession) qualifies as "own" occupation for business purpose. This contention is, therefore, rejected. Thus, this question is answered in favour of the revenue, and against the assessee."

6. Thus, it is amply clear that the Hon'ble Delhi High Court has held that the assessee will be taxable on the basis of ALV of

the unsold flats also. A perusal of the impugned orders shows that the ld. CIT(A) has allowed substantial relief to the assessee by taking into account various factors which are summarized as under:-

i) While giving relief in respect of notional ALV in respect of car parking space in Ansal Bhavan, the ld. CIT(A) has noted that only the assessee's registered office was situated on the first floor of Ansal Bhavan but was also occupying large space in other floors of the building for the purposes of business. He went on to delete the addition by holding that car parking space was for the purposes of business and, therefore, the same should not be subjected to notional ALV.

ii) Relief in respect of Akashdeep Building was given by the ld. CIT(A) by relying on the report of Asstt. Valuation Officer-II, New Delhi wherein the Valuation Officer had confirmed that the basement in the said building was being used as a common area.

iii) Addition in respect of Dilkhush Bagh Industrial Area was also deleted on the ground that the property in question was in an open space as capable of being used by any new or independent and exclusive use. Id. CIT(A) based his finding on the report of the Asstt. Valuation Officer in this case also.

iv) The Id. CIT(A) also deleted the addition on account of Ambadeep Building, Palam Vyapar Kendra, 38 Nehru Place, Jyoti Shikhar, 6 Aurangzeb Road, Sushant Vyapar Kendra, Revolving Restaurant and Antriksh Bhavan on the ground that occupation certificate had not been granted to the assessee in the various assessment years as discussed elaborately in the impugned order. However, it is obvious that the Id. CIT(A) has not considered the judgment of the Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd. (supra) in proper perspective and has given relief to the assessee based on the submissions of the assessee.

7. A perusal of the assessment orders dated 7.5.2013 and 27.5.2013 further shows that the AO also has not examined the issue in detail but has simply recomputed the assessee's income in terms of the earlier assessment orders passed u/s 143(3) of the IT Act, 1961. Therefore, it is our considered opinion that it is a fit case to be restored to the file of the AO for re-examining the entire issue in light of the judgment of the Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd. (supra) and also after taking into account the submissions of the assessee in this regard. Needless to say that the AO will allow due opportunity to the assessee of being heard.

8. In the result, all the seven appeals of the department stand allowed for statistical purposes.

Order pronounced in the Open Court on 29th September, 2017.

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMBER

Sd/-

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Dated: 29th September, 2017

'GS'

ITA No.6008, 6010 to 6015/Del/2014
Assessment Years: 1988-89, 1990-91 to 1995-96

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

By Order

ASSTT. REGISTRAR