

आयकर अपीलिय अधिकरण "बी" न्यायपीठ पुणे में ।  
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

श्री डी. करुणाकरा राव, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष ।  
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA Nos.230 & 231/PUN/2018  
निर्धारण वर्ष / Assessment Years : 2013-14 & 2014-15

M/s. Cosmopolis Construction,  
Shah Khandelwal Jain & Associates,  
Level 3, Riverside Business Bay,  
Plot No. : 84, Wellesley Road,  
Near RTO, Pune - 411001

PAN : AAAAC3785B

.....अपीलार्थी / Appellant

**बनाम / V/s.**

The Income Tax Officer,  
Ward - 1(1), Pune

.....प्रत्यर्थी / Respondent

Assessee by : Shri Neelesh Khandelwal  
Revenue by : Dr. Vivek Aggarwal

सुनवाई की तारीख / Date of Hearing : 18-06-2018  
घोषणा की तारीख / Date of Pronouncement : 12-09-2018

**आदेश / ORDER**

**PER VIKAS AWASTHY, JM :**

These two appeals are by the assessee. ITA No. 230/PUN/2018 is directed against the order of Commissioner of Income Tax (Appeals)-4, Pune dated 14-07-2017 for the assessment year 2013-14. In ITA No. 231/PUN/2018 the assessee has assailed the order of Commissioner of

Income Tax (Appeals)-4, Pune dated 24-07-2017 for the assessment year 2014-15.

Since, the issues involved in both the appeals are identical and are arising from same set of facts, these appeals are taken up together for adjudication and are being disposed of vide this common order.

2. In ITA No. 230/PUN/2018 the grounds raised by the assessee are as under :

- “1. *On facts and circumstances prevailing in the case and as per provisions & Scheme of the Act it be held that, Honorable Commissioner of Income Tax- (Appeals) (Hon'ble CIT(A)) erred in confirming the addition made by Learned Assessing Officer (Ld. AO) on account of deemed rent from unsold units lying in closing stock under the Head Income from House Property. The addition of Rs.75,50,995/- made by Ld. AO & sustained by the Hon'ble CIT(A) is improper, unwarranted, unjustified and contrary to the provision of the Act and facts prevailing in the case. The addition so made be deleted. The appellant be granted just and proper relief in the respect.*
2. *Without prejudice to above, on facts and circumstances prevailing in the case and as per provisions & scheme of the Act if for any reason the addition made by the AO is held to be sustainable then it be held that the alleged deemed income arising from unsold stock in trade is assessable under the head profits and gains from business or profession and not under the head Income from House Property. The addition made under the head Income from House property is unwarranted, unjustified, contrary to the provisions of the Act and facts prevailing in the case. The addition so made be assessed under the correct head of income. The appellant be granted just and proper relief in this respect.*
3. *Without prejudice to the above, on facts and circumstances prevailing in the case and as per provisions & scheme of the Act if at all it is held that the annual letting value has to be assessed as income of the appellant, it be held that said income arising out of unsold units of 80IB(10) compliant housing project and the same is eligible for deduction u/s. 80IB(10) of the Act while computing the total income. The appellant be granted just and proper relief in this respect.*
4. *Without prejudice to above, on facts and circumstances prevailing in the case and as per provisions & scheme of the Act it be held that, the addition made to the income of the appellant is on a very high side and deserves to be reduced substantially. The appellant be granted just and proper relief in this respect.*

5. *Without prejudice to above, on facts and circumstances prevailing in the case and as per provisions and scheme of the Act, in case the notional rent is assessed to tax under the head Profits and Gains from Business or Profession, depreciation on the completed unsold stock should be allowed as deduction against the said business income in terms of provisions of section 32 of the Act. The appellant be granted just and proper relief in this respect.*
6. *The appellant prays to be allowed to add, amend, modify, rectify, delete, raise any grounds of appeal at the time of hearing.”*

3. Shri Neelesh Khandelwal appearing on behalf of the assessee submitted that the assessee is a builder and developer. During the impugned assessment years the assessee developed two housing projects i.e. Project A and Project B at Survey No. 186, Shastri Nagar, Pune. Project A was completed on 31-03-2008. 53 units in the said project were unsold and was held as stock-in-trade. The assessee received booking amount in respect of 8 units out of the said 53 units in the financial year ending on 31-03-2013. The Project B was not complete till 31-03-2013. The assessee filed return of income for assessment year 2013-14 declaring loss of Rs.7,15,951/-. In scrutiny assessment proceedings, the Assessing Officer made addition of Rs.75,50,995/- under the head 'Income from House Property' on account of notional rent in respect of unsold residential units held as stock-in-trade. The ld. AR pointed that the assessee was holding unsold units as stock-in-trade, which partake the character of stock. Therefore, any notional rent on such flats has to be assessed as 'Business Income' of the assessee and not under the head 'Income from House Property'. In support of his submissions the ld. AR placed reliance on the Hon'ble Gujarat High Court in the case of Commissioner of Income Tax Vs. Neha Builders (P.) Ltd. reported as 296 ITR 661.

3.1 The ld. AR submitted that dominant intention of the assessee is to sell the flats after completion. The unsold flats were held as stock and

were part of business asset of the assessee. The assessee had disclosed all unsold units as closing stock while finalizing its account. The Department has accepted the accounts furnished by the assessee. After the sale of units, the assessee has disclosed income under the head Business Income and not as Long Term Capital Gain. Thus, any income arising from business asset has to be assessed under the head Business Income and not under any other head. The ld. AR submitted that the Hon'ble Gujarat High Court in the case of Gujarat Ginning & Manufacturing Company Vs. Commissioner of Income Tax reported as 205 ITR 314 has held that whether property should be taxed under the head 'profits and gains from business or profession' or 'income from house property' it depends upon the intention of parties while acquiring the property. It is predominantly a matter of intention which may be drawn from the relevant facts. In the present case the intention of the assessee right from the beginning was to trade in the flats and to hold the same for rental income. The ld. AR to further support his submissions placed reliance on the following decisions:

- i. M/s. C.R. Developments Pvt. Ltd. Vs. JCIT in ITA No. 4277/Mum/2012 for assessment year 2009-10 decided on 13-05-2015 (Mum.-Trib.);
- ii. M/s. Runwal Constructions Vs. ACIT in ITA No. 5408/Mum/2016 for assessment year 2012-13 decided on 22-02-2018 (Mum.-Trib.);
- iii. Shri Girdharilal K. Lulla Vs. DCIT in ITA No. 1604/Mum/2016 for assessment year 2011-12 decided on 17-11-2017.

4. On the other hand Dr. Vivek Aggarwal representing the Department vehemently defended the order of Commissioner of Income Tax (Appeals). The ld. DR submitted that notional rent on unsold flats is assessable

under the head 'Income from House Property'. In support of his submissions the ld. DR placed reliance on the following decisions :

- i. Commissioner of Income Tax Vs. Sane & Doshi Enterprises, 377 ITR 165 (Bom)
- ii. Commissioner of Income Tax Vs. Ansal Housing Finance And Leasing Co. Ltd., 354 ITR180 (Delhi).
- iii. S.G. Mercantile Corpn. (P.) Ltd. Vs. Commissioner of Income Tax, AIR 1972 SC 732.

5. The ld. AR controverting the submissions of the DR submitted that the case laws relied upon by the Department is distinguishable. The ld. AR pointed that in the instant case the addition has been made by determining notional annual rental value on unsold units. Whereas, in the case of Commissioner of Income Tax Vs. Sane & Doshi Enterprises (supra) the assessee had actually rented out the flats and had offered the rental income under the head 'Income from House Property'. The Department intended to tax the amount under the head business income. The Tribunal ruled in favour of the assessee. The Department carried the matter in appeal before the Hon'ble High Court, the Hon'ble High Court upheld the findings of Tribunal. In the present case, the assessee has not rented out the flats. The Assessing Officer has determined notional annual rental value.

In respect of decision rendered in the case of Commissioner of Income Tax Vs. Ansal Housing Finance And Leasing Co. Ltd. (supra) the ld. AR fairly admitted that the decision is against the assessee. However, the ld. AR submitted that in view of the decision of Hon'ble Supreme Court of India in the case of Commissioner of Income Tax Vs. Vegetable Products Ltd. reported as 88 ITR 192 the ratio laid down by the Hon'ble Gujarat

High Court in the case of Commissioner of Income Tax Vs. Neha Builders (P.) Ltd. (supra) has to be followed.

6. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. The solitary issue in the appeal by assessee is against the addition of Rs.75,50,995/- under the head 'Income from House Property' in respect of notional rental income on the flats held as stock-in-trade. In so far as the facts narrated by the ld. AR of the assessee, there is no dispute.

7. The issue before us for adjudication is whether the notional annual rental value on unsold flats held as stock-in-trade by the assessee is to be assessed under the head 'Business Income' or under the head 'Income from House Property'. The Hon'ble Gujarat High Court in the case of Commissioner of Income Tax Vs. Neha Builders (P.) Ltd. (supra) has held that where the property is held as stock-in-trade any income derived from stock would be 'income from business' and not 'income from house property'. The relevant extract of the findings of Hon'ble High Court are as under :

*"7. From the order passed by the learned CIT(A), it would clearly appear that the case of the assessee was that the company was incorporated with the main object of purchase, take on lease, or acquire by sale, or let out the buildings constructed by the assessee. Development of land or property would also be one of the businesses for which the company was incorporated.*

*8. True it is, that income derived from the property would always be termed as 'income' from the property, but if the property is used as 'stock-in-trade', then the said property would become or partake the character of the stock, and any income derived from the stock, would be 'income' from the business, and not income from the property. If the business of the assessee is to construct the property and sell it or to construct and let out the same, then that would be the 'business' and the business stocks, which may include movable and immovable, would be taken to be 'stock-in-trade', and any income derived from such stocks cannot be termed as 'income from property'. Even otherwise, it is to be seen that there was distinction between the 'income from business' and 'income from property' on one side, and 'any income from other sources'. The Tribunal, in our considered opinion, was*

*absolutely unjustified in comparing the rental income with the dividend income on the shares or interest income on the deposits. Even otherwise, this question was not raised before the subordinate Tribunals and, all of sudden, the Tribunal started applying the analogy.*

*9. From the statement of the assessee, it would clearly appear that it was treating the property as 'stock-in-trade'. Not only this, it will also be clear from the records that, except for the ground floor, which has been let out by the assessee, all other portions of the property constructed have been sold out. If that be so, the property, right from the beginning was a 'stock-in-trade'."*

8. In the case of Commissioner of Income Tax Vs. Ansal Housing Finance And Leasing Co. Ltd. (supra) the Hon'ble Delhi High Court taking a contrary view has held that annual rental value on unsold flats built by assessee engaged in construction business is assessable as income from house property. It is a well settled law that when two divergent views of non-jurisdictional High Courts are available and there is no decision on the issue from the Jurisdictional High Court, the view in favour of the assessee has to be adopted [Commissioner of Income Tax Vs. Vegetable Products Ltd.(supra)].

9. In so far as the decision of Hon'ble Bombay High Court in the case of Commissioner of Income Tax Vs. Sane & Doshi Enterprises (supra) is concerned we find that the facts in the said case are at variance. In the said case the assessee was engaged in construction business. The assessee rented out unsold flats and suo-motu offered rental income from the flats under the head 'Income from House Property'. On the contrary the Revenue wanted to tax rental income under the head 'Business Income'. The matter travelled to the Tribunal. The Tribunal held that the income earned by the assessee from renting of flats is to be assessed under the head 'Income from House Property'. The Department carried the matter in appeal before the Hon'ble High Court. The Hon'ble High Court

confirmed the findings of Tribunal and held that rental income received from unsold portion of property constructed by the assessee, is assessable as income from house property. The core difference between the case of the assessee and in the case of Commissioner of Income Tax Vs. Sane & Doshi Enterprises (supra) is that in the case of assessee, it is notional annual rental income on flats held as stock which is sought to be taxed, whereas in the case of Commissioner of Income Tax Vs. Sane & Doshi Enterprises (supra) it was the case of actual rental income earned by the assessee from renting of flats constructed by it. Hence, the decision rendered in the case of Commissioner of Income Tax Vs. Sane & Doshi Enterprises (supra) would not apply in the facts of the present case.

10. We further find that Mumbai Bench of the Tribunal in M/s. C.R. Developments Pvt. Ltd. Vs. JCIT (supra), M/s. Runwal Constructions Vs. ACIT (supra) and Shri Girdharilal K. Lulla Vs. DCIT (supra) under similar set of facts have taken a consistent view in holding notional annual rental value on unsold flats held as stock-in-trade by the assessee engaged in construction and development activities as 'Business Income'.

11. Thus, in view of the facts of the case and the decision rendered in the case of Commissioner of Income Tax Vs. Neha Builders (P.) Ltd. (supra) we find merit in the submissions of assessee and allow the appeal.

12. In the result, the impugned order is set aside and the appeal of assessee is allowed.

**ITA No. 231/PUN/2018 (A.Y. 2014-15)**

13. The assessee has assailed the findings of Commissioner of Income Tax (Appeals) by raising following grounds :

- “1. On facts and circumstances prevailing in the case and as per provisions & Scheme of the Act it be held that, Honorable Commissioner of Income Tax- (Appeals) (Hon'ble CIT(A)) erred in confirming the addition made by Learned Assessing Officer (Ld. AO) on account of deemed rent from unsold units lying in closing stock under the Head Income from House Property. The addition of Rs.1,21,28,928/- made by Ld. AO & sustained by the Hon'ble CIT(A) is improper, unwarranted, unjustified and contrary to the provision of the Act and facts prevailing in the case. The addition so made be deleted. The appellant be granted just and proper relief in the respect.
2. Without prejudice to above, on facts and circumstances prevailing in the case and as per provisions & scheme of the Act if for any reason the addition made by the AO is held to be sustainable then it be held that the alleged deemed income arising from unsold stock in trade is assessable under the head profits and gains from business or profession and not under the head Income from House Property. The addition made under the head Income from House property is unwarranted, unjustified, contrary to the provisions of the Act and facts prevailing in the case. The addition so made be assessed under the correct head of income. The appellant be granted just and proper relief in this respect.
3. Without prejudice to the above, on facts and circumstances prevailing in the case and as per provisions & scheme of the Act if at all it is held that the annual letting value has to be assessed as income of the appellant, it be held that said income arising out of unsold units of 801B(10) compliant housing project and the same is eligible for deduction u/s 801B(10) of the Act while computing the total income. The appellant be granted just and proper relief in this respect.
4. Without prejudice to above, on facts and circumstances prevailing in the case and as per provisions & scheme of the Act it be held that, the addition made to the income of the appellant is on a very high side and deserves to be reduced substantially. The appellant be granted just and proper relief in this respect.
5. Without prejudice to above, on facts and circumstances prevailing in the case and as per provisions and scheme of the Act, in case the notional rent is assessed to tax under the head Profits and Gains from Business or Profession, depreciation on the completed unsold stock should be allowed as deduction against the said business income in terms of provisions of section 32 of the Act. The appellant be granted just and proper relief in this respect.
6. The appellant prays to be allowed to add, amend, modify, rectify, delete, raise any grounds of appeal t the time of hearing.”

14. Both the sides agree that the facts in the present case are identical to the facts in ITA No. 230/PUN/2018 for assessment year 2013-14. Since, the grounds raised in the present appeal are identical to ITA No. 230/PUN/2018 and the facts are also identical, the findings given by us in ITA No. 230/PUN/2018 would mutatis mutandis apply to the grounds raised in the present appeal as well. Thus, the impugned order is set aside and the appeal of assessee is allowed.

15. To sum up, both the appeal of the assessee are allowed.

Order pronounced on Wednesday, the 12<sup>th</sup> day of September, 2018.

Sd/-	Sd/-
(डी. करुणाकरा राव/D. Karunakara Rao)	(विकास अवस्थी / Vikas Awasthy)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 12<sup>th</sup> September, 2018  
RK

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-4, Pune
4. The Pr. Commissioner of Income Tax-3, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच,  
पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति // True Copy//

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary,  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune