

**आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत**  
**INCOM TAX APPELLATE TRIBUNAL-SURAT-BENCH-SURAT**  
**श्री सी.एम.गर्ग, न्यायिक सदस्य तथा श्री ओ.पी.मीना, लेखा सदस्य के समक्ष**  
**BEFORE C .M. GARG, JUDICIAL MEMBER**  
**AND O. P. MEENA, ACCOUNTANT MEMBER**

आ/ .सं. अ .I.T.A No.2237/Ahd/2015  
निर्धारण वर्ष/Assessment Year:2011-12

Jaiprakash Khanchand Aswani, 25, Ascon City, City Light Road, Surat - 395 007.	V.	The Additional Commissioner of Income Tax, Range-2, Surat.
<b>[PAN : AASPA 3016 C]</b>		
<b>अपीलार्थी Appellant</b>		<b>प्रत्यर्थी/Respondent</b>
<b>निर्धारिती की ओर से Assessee by</b>		Shri Rajesh Shah - CA
<b>राजस्व की ओर से Revenue by</b>		Shri Vinod Kumar - Sr.DR

सुनवाई की तारीख <b>Date of hearing :</b>	23.10.2018
उद्घोषणा की तारीख <b>Date of pronouncement :</b>	18.12.2018

**आदेश /ORDER**

**PER O. P. MEENA, AM**

1. This appeal at the instance of the Assessee is directed against an order of learned Commissioner of Income tax (Appeals)-II, Surat [in short CIT(A)] dated 06.05.2015 for the Assessment Year 2011-12.
2. Ground No. 1 relates to confirmation of addition of Rs.15,75,840/- on deemed income from house property lying in stock-in trade.

3. We have heard the rival submissions and perused the relevant material on record. We find that the assessee is engaged in sale of shops and flats. The assessee has shown the unsold stock-in trade of 16 shops and flats amounting to Rs.1,91,36,585/- in the inventory of schedule 6 of balance sheet as on 31.03.2010. The AO was of the view that provisions of section 22 and section 23 are applicable which creates deeming provisions for taxing income from house property. Accordingly, the AO has worked out deemed income from house property at Rs.15,75,850/- from these properties and taxed the same as income from house property.

4. Being aggrieved, the assessee filed an appeal before the Id. CIT (A). It was contended that the properties under consideration are part of stock-in trade and in the light of decision of Hon'ble Gujarat High Court in the case of CIT v. Neha Builder Pvt. Ltd. [2008] 296 ITR 661 (Gujarat), hence, no rental income as deemed income can be taxed where properties are kept in stock-in trade. However, CIT (A) following the ratio laid down by the Hon`ble Delhi High Court in the case of CIT vs. M/s. Ansal Housing Finance and Leasing [I.T.A.No. 18/1999 dtd. 31.10.2012] has upheld the addition made by the AO.

5. Being, aggrieved the assessee filed this appeal before the Tribunal. The learned counsel for the assessee submitted that the properties under consideration were used for business purpose and income if any has to be assessed as a business income. Therefore, provisions of section 23 of the Act are not applicable in the case of the assessee. Any property which is held as a stock in trade are used from time to time to show to prospective buyers and their brokers as agents, if such property is let out it will be difficult to treat it as a stock in trade and it will also be difficult to sell. The Id. Counsel further relied on the decision in the case of M/s. Runwal Builders Pvt. Ltd. vs. ACIT ITA No.5408 & 5409/Mum/2016 dated 22.02.2018 and ITO vs. Arihant Estates Pvt. Ltd. ITA No.6037/Mum/2016 dated 27.06.2018 wherein relying on the decision in the case of Neha Builders of Hon'ble Gujarat High Court (supra) it was held that where the assessee was engaged in development construction, sale and lease of immovable property and treated properties as stock in trade income from such property was assessable as business income and not as income from house property. It was further contended that the AO and CIT has not relied on the judgment of jurisdictional Hon'ble

Gujarat High Court and relied on non-jurisdictional Hon'ble Delhi High Court, which is not in accordance with law.

6. Per contra, the ld. Senior Departmental Representative (Sr. DR) supported the orders of the Lower Authorities.

7. We have heard the rival submissions and perused the material on record. It is an undisputed fact the assessee has shown the properties as stock in trade in the books of accounts. The shops and flats sold by the assessee were assessed under head income from business. There were certain unsold flats and shops in stock in trade which the AO treated the property assessable under the head Income from House Property and computed notional annual netting value on such unsold flats placing reliance in the case of Ansal Housing Finance & Leasing Co. Ltd. (supra). The action of the AO was upheld by the learned CIT(A).

8. The Hon'ble Gujarat High Court in the case of Neha Builders Pvt. Ltd. (supra) considered the question whether the rental income received from any property in the construction business can be claimed under the head 'income from property' even though the said property was included in the closing stock. The Hon'ble Gujarat High

Court held that 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 house property. While holding so the Hon'ble High Court observed as under :-

*"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', otherwise, it is to be seen that there was distinction between the 'income from property.'"*

*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.'*

**9.** Similarly the Coordinate Bench in the case of Runwal Builders Pvt. Ltd. (supra) has considered similar issue as to whether the unsold property which is held as stock in trade by the assessee can be assessed under the head 'income from house property' by notionally computing the annual letting value from such property and the

Coordinate Bench considering the decision of the Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd. (supra) which the AO relied upon and the decision of the Hon'ble Supreme Court in the case of Chennai Properties & Investments Ltd. vs. CIT reported in 373 ITR 673, held that unsold flats which are in stock in trade should be assessed under the head 'business income' and there is no justification in estimating rental income from those flats are notionally computing annual letting value under Section 23 of the Act. While holding so the Coordinate Bench observed as under :-

*"3. The Id. AR placed the order of Bombay Tribunal in the case of M/s Perfect Scale Company Pvt. Ltd., ITA Nos.3228 to 3234/Mum/2013, order dated 6-9-2013, wherein it was held that in respect of assets held as business, income from the same is not assessable u/s.23(1) of the IT Act.*

*4. On the other hand, Id. DR relied on the order of Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd., 354 ITR 180 (Delhi) in support of the proposition that even in respect of unsold flats by the developer is liable to be taxed as income from house property.*

*5. We have considered rival contentions and perused the record. The issue under consideration has been restored by the CIT(A) to the file of AO to compute the annual value. Recently the Hon'ble Supreme Court in the case of M/s Chennai Properties & Investments Ltd. Vs. CIT, reported in (2015) 42 SCD 651, vide judgment dated 9-4-2015 has held that where assessee company engaged in the activity of letting out properties and the rental income received was shown as business income, the action of AO treating the rental income as income from house property in place of income from business shown by the assessee was held to be not justified. The Hon'ble Supreme Court held that since the assessee company's main object, is to acquire and held properties and to let out these properties, the income earned by letting out these properties is main objective of the company, therefore, rent received from the letting out of the*

properties is main objective of the company, therefore, rent received from the letting out of the properties is assessable as income from business. On the very same analogy in the instant case, assessee is engaged in business of construction and development, which is main object of the assessee company. The three flats which could not be sold at the end of the year was shown as stock-in-trade. Estimating rental income by the AO for these three flats as income from house property was not justified insofar as these flats were neither given on rent nor the assessee has intention to earn rent by letting out the flats. The flats not sold was its stock-in-trade and income arising on its sale is liable to be taxed as business income. Accordingly, we do not find any justification in the order of AO for estimating rental income from these vacant flats u/s.23 which is assessee's stock in trade as at the end of the year. Accordingly, the AO is directed to delete the addition made by estimating letting value of the flats u/s.23 of the I.T.Act.

10. In the case on hand before us it is an undisputed fact that both assessee have treated the unsold flats as stock in trade in the books of account and the flats sold by them were assessed under the head 'income from business'. Thus, respectfully following the above said decisions we hold that the unsold flats which are stock in trade when they were sold they are assessable under the head 'income from business' when they are sold and therefore the AO is not correct in bringing to tax notional annual letting value in respect of those unsold flats under the head 'income from house property.' Thus, we direct the AO to delete the addition made under Section 23 of the Act as income from house property.

11. In the result, the appeals filed by the assessee are allowed."

**10.** In the light above judicial pronouncements, we are of the considered opinion that provisions of section 23 of the Act are not applicable in the case of the assessee. Accordingly, the AO is directed to delete the addition made by estimating letting value of the flats u/s.23 of the I.T. Act. This grounds of appeal is therefore, allowed.

11. Ground no.2 relates to confirming the disallowance of interest payment for Rs.4,82,785/-.

12. The AO found that the assessee had shown interest income of Rs.7,48,298/- and claimed interest expenses of Rs.4,82,785/-. The AO found that the assessee could not furnish any details regarding the interest expenses of Rs.4,82,785/-. The assessee subsequently claimed it as business expenses. Since the assessee has not furnished any evidence in support of his contention, therefore the AO has disallowed the aforesaid interest expenses.

13. Being aggrieved, the assessee carried the matter before the CIT(A) wherein it was claimed that interest of Rs.4,82,785/- on excess withdrawals on capital account from M/s.Surya Prakash Organisers had paid interest @6% to the said concern. However, no details or supporting evidences were given along with the written submissions, hence the addition made by the AO was upheld.

14. Being aggrieved, the assessee has filed this appeal before this Tribunal. The Id.Counsel for the assessee has drawn our attention to page no.33 to 42 of paper book and submitted that the assessee is

**maintaining bank account in which receipts and payments are made.**

### **The excess withdrawals**

*"The assessee is maintaining bank account in which receipts and payments are made. The excess withdrawal from firm is made on various occasions and the same has been invested in business as and when required. The assessee has received interest from deposit made for the purposes of business and also paid interest on excess money withdrawal from firm which was/is used for the purposes of business. The assessee has sufficient capital of Rs.1709.18 lakhs to invest in non business investment.*

*The excess withdrawals has been shown under current liabilities and used to finance current assets, hence both interest received and paid has nexus and to be treated as business income (interest received) and business expenditure (interest paid). The disallowance only can be made u/s 14 read with rule 8D.*

*In the case of assessee there is positive income from interest and we rely on jurisdictional Hon'ble Gujarat High Court decision in case of Pr.CIT Vs. Nirma Credit and Capital Pvt. Ltd. Vide ITA No. 409 of 2017 and 514 of 2017. The judgment was delivered on 31.08.2017. The copy of judgment is enclosed herewith."*

**15. Per contra, the ld.Sr.DR relied on the CIT(A).**

**16. We have heard the rival submissions and perused the relevant material on record. We find that the assessee has sufficient capital of Rs.1709.18 lakhs to invest in non-business investment, therefore disallowance of interest expenditure of Rs.4,82,785/- made by the AO is without any basis in the light of decision of Jurisdiction High Court of Gujarat in the case of Nirma Credit and Capital Pvt.**

Ltd.,(supra) accordingly disallowance of interest of Rs.4,82,785/- is deleted.

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

18. The order pronounced in the open court on 18.12.2018.

Sd/-

(सी.एम.गर्ग /C.M. GARG)

न्यायिकसदस्यतथा/JUDICIAL MEMBER

सुरत/ Surat, दिनांक Dated: 18<sup>th</sup> December, 2018/S.Gangadhara Rao, Sr.PS

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT  
(DR)/Guard file of ITAT.

Sd/-

(ओ.पी.मीना/O.P.MEENA)

लेखासदस्यकेसमक्ष /ACCOUNTANT MEMBER

By order

/ / TRUE COPY / /

Assistant Registrar, Surat