

**IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND SHRI O. P. MEENA, ACCOUNTANT MEMBER**

I.T.A. No.3064&3065/Ahd2016: Assessment Year: 2011-12 & 2012-13

Shanti Enterprise, Millennium Textile Market, Shop No. 1013-14, Umarwada, Kamela Darwaja Ring Road Surat 395002 PAN:AALFS5217L	Vs.	Assistant Commissioner of Income Tax, Circle- 1(2) Surat
Appellant		Respondent

Assessee by	Shri Hiren R. Vepari, CA
Revenue by	Shri Prasenjit Singh, CIT(D.R.)
Date of hearing	25.02.2019
Date of pronouncement	27.02.2019

ORDER

PER O. P. MEENA, AM

1. These are two appeals by the Assessee which are directed against the separate orders of learned Commissioner of Income tax (Appeals)-3 and 2, Surat respectively (in short “the CIT (A)”) dated 14.09.2016 and 20.09.2016 pertaining to Assessment Year 2011-112 and 2012-13 respectively, which in turn has arisen from the separate assessment orders passed under section 143 (3) dtd. 31.03.2014 and 31.03.2015 of Income Tax Act, 1961 (in short ‘the Act’) by the Assistant/Day. Commissioner of Income Tax, Circle- 2, Surat respectively (in short “the AO”).

2. We are discussing I.T.A.No. 3064/Ahd/2016 A.Y. 2011-12, the findings of which would apply to A.Y. 2012-13 also as facts are identical.

3. Ground No. I(1) to I(3) relates to confirming the addition of Rs. 3,27,96,000 as income from house property in respect of 911 shops which were not complete and ready as electrification was pending and without prejudice the related shops were agreed to be sold and thus, their interest having been created in the shops on hire as it did not have full ownership rights therein.

4. Briefly, stated the facts of the case are that the assessee firm is a developer who is constructing large textile market called as Millennium Textile Market at Surat. The AO found that 1511 shops were completed by the year end but only 240 were sold and balance 1311 were shown as closing stock. The Ld.AO found that out of these 1311 shops, 400 shops were let on rent and received rent of Rs. 1,74,81,958 which has been included as business income. Hence, the AO added deemed rent of Rs. 3,27,96,000 on the balance 911 shops @ 36,000 per annum.

5. Being aggrieved, the assessee filed an appeal before the Id. CIT (A). Wherein it was contended that the shops in question were not ready and complete as no power connection was given by the Torrent Power Ltd. Therefore, no income from deemed income from house property can be considered from incomplete shops. Additional evidence were also filed on which the CIT (A) has called for remand report from the AO. However, the Id. CIT (A) observed that the AO has mentioned in remand report that

power connection has no reference to shop numbers. With regard to claim that the assessee has received advance from potential buyers does not change the position regarding ownership of the shops. The Id. CIT (A) therefore, relying on the decision in the case of CIT vs. Ansal Housing Fin & Leasing Ltd. 354 ITR 180 (Delhi) 213 Taxman 143 (Delhi) held that the assessee is liable as deemed income from house property on shops which remained unsold.

6. Being, aggrieved the assessee filed this appeal before the Tribunal. The learned counsel for the assessee submitted that out of 1311 shops, under the work in progress at the beginning of the year, 400 were completed. These were given for rent to derive temporary revenue which has been offered as business income. The AO has also accepted the same. However, the AO has classified remaining 911 shops as “property” which is deemed to have been let out and estimated rent at Rs. 3.27,96,000 for the year under consideration. The learned counsel for the assessee took us through Paper Book Page No. 7 and referred Anx A to E (PB-8 to 81) to demonstrate that electric connections were not obtained in respect of 648 shops as the assessee has applied for meters on or after 15.09.2010 to 23-12-2010 to Torrent Power Ltd. i.e. after completion of financial year under consideration. Hence, these cannot be let or even deemed to be let as no shops can be imagined without electricity. Further, in respect of 341

shops, the assessee has received booking deposits from members as per statement submitted during the course of appellate proceedings (PB-82 to 106). Hence, shops could not have been let, as there was an obligation cast on the assessee to supply these shops. It was further submitted that the assessee is a trader and not the owner of assets so as to enable the provision of section 22 and 23. Therefore, these shops are stock-in trade. Further the assessee has shown the rental income from shops as business income for taxation and same has been accepted by the AO(PB-119). The learned counsel for the assessee further supported his view by placing reliance in the case of CIT v. Neha Builders Pvt. Ltd. [2008] 296 ITR 661 (Gujarat) / [2007] 164 Taxman 342 (Gujarat) where 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'.

7. The learned counsel for the assessee further placed reliance in the case of CIT v. Sane & Doshi Enterprise [2015] 120 DTR (Bom) 49, Late

(Smt.) Nirmala Sahu v. CIT [2014] 98 DTR (All) 55, Krishna Lan Developers (P.) Ltd. v. ACIT Circle 2(2) Mumbai [2013] 142 ITD 48/ 32 taxmann.com 325 (Mumbai) in support of his contentions.

8. It was further submitted that the amendment made in section 23 (5) by Finance Act, 2017 to tax the property held as stock-in trade with effect from 01.04.2018 i.e. from A.Y. 2018-19 is prospective in nature, hence, not applicable for the assessment year under consideration. Moreover, provisions which is not beneficial to the assessee cannot be held to be effective retrospectively. Further reliance by the Ld. CIT (A) in the case of CIT vs. Ansal Housing Fin & Leasing Ltd. 354 ITR 180 (Delhi) 213 Taxman 143 (Delhi) is not applicable as that jurisdictional High Court in the case of Neha builders (supra) has given the decision in favour of the assessee. The admission of SLP by the Hon`ble Supreme Court in the case of CIT vs. Ansal Housing Fin & Leasing Ltd. (supra) has not become ls as it is not yet has been decided by the Hon`ble Supreme Court.

9. Per contra, the Ld. CIT (DR) relied on the order of Ld. CIT (A) and contended that Ld. CIT (A) has clearly observed that the power connection has no reference to Shop Nos. and receiving advance from potential purchasers does not change the position of the appellant regarding ownership of said shops, unless the assessee has made registered sale deed of shops. Further, the decision in the case of CIT vs. Ansal Housing

Fin & Leasing Ltd. 354 ITR 180 (Delhi) 213 Taxman 143 (Delhi) supports the case of the AO.

10. We have heard the rival submissions and perused the relevant material on record. We find that out of 1311 shops, under the work in progress at the beginning of the year, 400 were completed, which were given for rent and income the same has been offered to tax as income from business and profession, which has been accepted in assessment made under scrutiny. The AO has classified 911 shops as “property” which is deemed to have been let out and estimated rent at Rs. 3.27,96,000 for the year under consideration. The Paper Book Page No. 7 gives reference to Anx A to E (PB-8 to 81) from which it is discernible that electric connections were not obtained in respect of 648 shops as the assessee has applied for meters on or after 15.09.2010 to 23-12-2010 to Torrent Power Ltd. i.e. after completion of financial year under consideration. Hence, these cannot be let or even deemed to be let as no shops can be imagined without electricity. However, the AO had observed in remand report that shops numbers were not mentioned on application for connection of meters made to Torrent Power Ltd. Further, in respect of 341 shops, the assessee has received booking deposits from members as per statement submitted during the course of appellate proceedings (PB-82 to 106). Hence, these shops could not have been let, as there was an obligation

cast on the assessee to supply these shops. We further submitted that the assessee is a trader and not the owner of assets so as to enable the provision of section 22 and 23. Therefore, these shops are stock-in trade. Further the assessee has shown the rental income from shops as business income for taxation and same has been accepted by the AO(PB-119). The learned counsel has placed reliance in the case of CIT v. Neha Builders Pvt. Ltd. [2008] 296 ITR 661 (Gujarat) / [2007] 164 Taxman 342 (Gujarat) where 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'. In view of these facts and circumstances, we are of the considered opinion that it needs verification at the end of the AO whether the application made for power connection to Torrent Power Ltd. was in respect of these shops and these shops were actually not complete for the assessment year under consideration. Therefore, this issue is set-aside to the file of the AO to verify whether all shops were complete in all respect

of power connection was obtained or not. The AO will also examine whether the assessee has received booking advance in respect of remaining 341 shops as claimed. The AO is therefore, directed to examine these aspect in the light of judgement of Hon'ble Gujarat High Court in the case of CIT v. Neha Builders Pvt. Ltd. [2008] 296 ITR 661 (Gujarat) / [2007] 164 Taxman 342 (Gujarat). In view of these facts and circumstances, both the issues are set-aside to file of the AO for denovo consideration all the facts. The assessee is free to furnish any evidence which he wants to rely upon. Nevertheless, the assessee would be given a reasonable opportunity of being heard and the assessee will cooperate in assessment proceedings.

11. Ground No. II regarding interest u/s. 234A is consequential in nature, hence, no adjudication is required.

12. In the result, the appeal of the assessee for A.Y. 2011-12 is allowed for statistical purposes.

I.T.A.No. 3065/Ahd/2016 /A.Y. 2012-13.

13. Ground No. I(1) to I (6) relates to confirming the addition of Rs. 2,64,11,728 as income from house property in respect of 322 shops which were not complete and ready as electrification was pending , without allowing deduction under section 24 of the Act and without prejudice the related shops were agreed to be sold and thus, their interest having been

created in the shops on hire as it did not have full ownership rights therein.

14. We have heard the rival submissions and perused the relevant material on record. Both the parties have agreed that facts of this year are same except figures. Therefore, our findings given in A.Y.2011-12 would apply mutatis mutandis to this also. Accordingly, the Ground No. I of appeal is also set-aside to the file of the AO for denovo consideration. Ground No. II being interest under section 234A/B/C are consequential in nature hence, no adjudication is required.

15. Thus, this appeal of the assessee for A.Y. 2012-13 is also allowed for statistical purposes.

16. In the result, the appeal of the assessee is allowed for statistical purposes for A.Y. 2011-12 and 2012-13 in I.T.A.No. 3064/Ahd/2016 and I.T.A.No. 3065/Ahd/2016 respectively.

17. The order pronounced in the open Court on 27.02.2019

**Sd/-
(KUL BHARAT)
JUDICIAL MEMBER**

**Sd/-
(O.P.MEENA)
ACCOUNTANT MEMBER**

Surat: Dated: 27th February, 2019/opm
Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard
file of ITAT.

By order

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Assistant Registrar, Surat