

आयकर अपीलीय अधिकरण "B" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री राजेश कुमार लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, JM AND SRI RAJESH KUMAR, AM

आयकर अपील सं./ ITA No. 2637/Mum/2018

(निर्धारण वर्ष / Assessment Year 2013-14)

3NN Corporation Flat No. B, 1 st Floor, Plot No. 185, Jagdish Building, 15 th Road, Chembur, Mumbai-400 071	Vs.	The Asst. Commissioner of Income Tax, Circle-27(3), 417, Vashi Railway Station Complex, Tower 6, Vashi, Navi Mumbai
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
स्थायी लेखा सं./PAN No. AAAFZ7112L		

अपीलार्थी की ओर से / Appellant by	:	Shri Shekhar Gupta, AR
प्रत्यर्थी की ओर से / Respondent by	:	Shri Ajay Kumar (CIT DR)

सुनवाई की तारीख / Date of hearing:	10-04-2019
घोषणा की तारीख / Date of pronouncement :	10-04-2019

आदेश / ORDER

महावीर सिंह, न्यायिक सदस्य/

PER MAHAVIR SINGH, JM:

This appeal filed by the assessee is arising out of the revision order of Pr. Commissioner of Income Tax (Appeals)-27 Mumbai [in short CIT(A)] under section 263 of the Income Tax Act, 1961 (hereinafter 'the Act') dated 27.03.2018. The Assessment was framed by the Asst. Commissioner of Income Tax, Circle 27(3), Mumbai (in short 'ACIT/ ITO /



AO') for the A.Y. 2013-14 vide order dated 21.03.2016 under section 143(3) of the Act.

2. The only issue in this appeal of assessee is against the revision order passed by PCIT under section 263 of the Act revising the assessment framed under section 143(3) of the Act. For this assessee has raised the following ground No. 1: -

“1. The learned Principle Commissioner of Income Tax has erred in law and on the facts of the case in passing an order under section 263 of the Income Tax Act holding that the assessment order passed under section 143(3) is erroneous in so far as it is prejudicial to the interest of revenue as the assessing officer without verifying the veracity has accepted the contention of the assessee.”

3. Brief facts are that the assessee filed its return of income on 31.07.2013 for the AY 2013-14 and assessment was completed under section 143(3) of the Act vide order dated 21.03.2016. Subsequently, the PCIT issued show cause notice under section 263 of the Act dated 31.08.2017 for the reason that the assessee has shown closing stock of flats/ shops built by the assessee, who is engaged in the construction business, lying unsold. According to him, the flats/ shops completed and pending as unsold closing stock attracts ALV under section 23(1)(a) of the Act. According to PCIT, the issue is covered by the decision of Hon'ble Delhi High Court in the case of CIT vs. Ansal Housing Financing & Leasing Co. Ltd. [2013] 354 ITR 180 (Delhi). On this basis, the PCIT issued show cause notice and the relevant reads as under: -



“....2. On verification of the records for AY 2013-14 it is seen that you have one residential project situated at Gram Panchayat Rahanal, Taluka Bhiwwandi, Distt. Thane. The Building, A, B and C was completed on 25.10.2012 as per the certificate obtained from the competent authority “Gram Panchayat, Rahanal” and Architect. You have offered the income of ₹ 8,06,49,200/- from the sale of flats.

It is seen from the Balance sheets and profit & loss account that you have closing stock of ₹ 8,13,98,13/-. The ALV of flats/ shops, built by you engaged in construction business, lying unsold is assessable as income from house property and you were liable to pay income tax on the annual letting value of unsold flats/ shops owned by you under the head “Income from house property” as held by Deli High Court in the case of CIT vs. Ansal Housing Finance & Leasing Co. Ltd and the ITAT Mumbai Bench in the case of M/s Om Prakash & Co. 87 TTJ 183, Mumbai and other cases. Accordingly the Gross Annual Value of the rent income comes to ₹ 56,97,872/- i.e. (7% of ₹ 8,13,98,173/-) and after statutory deduction (@30%), the Net Annual Value taxable under the head Income from House Property works out to ₹ 39,88,511/-. As the project was completed on 25.10.2012, the



*notional rent for the five months is assessable.
Thus the amount of ₹ 16,61,880/- remained to
be assessed and taxed under the head 'Income
from House Property.'*

4. The PCIT directed the AO to reframe the assessment after verifying the occupation certificate as well as completion certificate regarding these flats and finally set aside the original assessment framed under section 143(3) of the Act. Aggrieved assessee came in appeal before us.

5. Before us, the learned Counsel for the assessee stated that this is a highly debatable issue because two high courts have different propositions and according to the learned Counsel, Hon'ble Gujarat High Court in the case of CIT vs. Neha Builders (P.) Ltd. [2008] 296 ITR 661 (Gujarat) held that the property held as stock-in-trade, the notional annual letting value cannot be computed on such property. On the other hand, the Hon'ble Delhi High court in the case of Ansal Housing Financing & Leasing Co. Ltd. (supra) held that the ALV of unsold flats which are stock-in-trade are assessed under the head of income from house property. The learned Counsel for the assessee stated the co-ordinate Bench of this Tribunal in the case of Runwal Construction Vs. ACIT in ITA No. 5408 & 5409/Mum/2016 vide order dated 22.02.2018 has held that the unsold flats are stock-in-trade only when they are sold and they are assessable under the head of income from business and therefore the notional annual letting value cannot be assessed by the Revenue under section 23(1)(a) of the Act. The Tribunal held as under: -

*"7. We have heard the rival submissions and
perused the orders of the authorities below and*



the decisions relied upon. It is an undisputed fact that the assesseees are in the business of builders, developers and construction. Both the assesseees have constructed various projects and the projects were treated as stock in trade in the books of account. Flats sold by the assesseees were assessed under the head 'income from business'. There were certain unsold flats in stock in trade which the AO treated as property assessable under the head 'income from house property' and computed notional annual letting value on such unsold flats placing reliance on the decision 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', 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'.

9. Similarly the Coordinate Bench 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 and 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 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 assessees 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.”

6. On the other hand, the learned Sr. Departmental Representative relied on the Hon'ble Supreme Court decision in the case of CIT vs. Sane & Doshi Enterprises [2017] 77 taxmann.com 288 (SC), wherein SLP was granted but finally the matter was not decided yet. The learned Sr. Departmental Representative also relied on the decision of Hon'ble Bombay High Court in the case of CIT vs. Gundecha Builders (2019) 102 taxmann.com 27 (Bombay).

7. We have heard rival contentions and gone through the facts and circumstances of the case. We find from the facts of the case that first of all, the contention of the assessee is that the relevant year involved is AY 2013-14 for the year ending 31.03.2013. We find that there are two High Court decisions, one of Delhi High Court in the case of Ansal Housing Financing & Leasing Co. Ltd. (supra), wherein it is held that the flats lying unsold as closing stock as ALV under section 23(1)(a) of the Act can be taken and assessed as income from house property, another decision of Hon'ble Gujarat High Court in the case of Neha Builders (P.) Ltd. (supra) has taken a contrary view, wherein it is held that the ALV of flats built by assessee which is engaged in the construction business lying unsold has not assessable as income from house property and the notional value cannot be assessed as ALV of unsold stock because the unsold stock is to be assessed as business income. According to us, there are two views are possible and in view of the decision of Hon'ble Supreme Court in the case of CIT v. Vegetable Products Ltd. (1973) 88 ITR 192 (SC), wherein it is held that in case there are two views possible and two High Court are having contrary view on a particular issue, the view which is beneficial to the assessee is to be adopted. Accordingly, in the present case the two



views on the issue of assessment of income from house property on account of ALV of unsold flats wherein assessee is engaged in the business of construction and builders is possible. Hence, we are taking a view which is beneficial to the assessee that the ALV of flats built by assessee which is engaged in the construction business lying unsold has not assessable as income from house property and the notional value cannot be assessed as ALV of unsold stock because the unsold stock is to be assessed as business income. Hence, the revision proceeding completed by PCIT under section 263 of the Act for revision of assessment framed under section 143(3) of the Act, is bad in law and hence quashed.

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

Order pronounced in the open court on 10-04-2019.

Sd/-

(राजेश कुमार / RAJESH KUMAR)

(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह / MAHAVIR SINGH)

(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 10-04-2019

सुदीप सरकार, व.निजी सचिव / Sudip Sarkar, Sr.PS

**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. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai