

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "H", MUMBAI

BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER
AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER

ITA No.	A.Y.	Appellant	Respondent
4392/Mum/16	2008-09	DCIT, Central Circle-1(2), MUMBAI	M/s. Hiranandani Palace Gardens Pvt. Ltd., 514, Dalamal Towers, FPJ Marg, Nariman Point, MUMBAI [PAN: AACCC8862H]
4393/Mum/16	2010-11		
4394/Mum/16	2011-12		

Appellant by : Shri B. Srinivas, CIT-DR
Respondent by : Shri Chetan Karia &
Smt. Swati H. Patrawala, ARs

Date of Hearing : 12-07-2019	Date of Pronouncement : 03-10-2019
------------------------------	------------------------------------

ORDER

PER RAJESH KUMAR, A.M:

These appeals filed by the Revenue are directed against the order(s) of the Commissioner of Income Tax(Appeals)-8, Mumbai for the AYs.2008-09, 2010-11 and 2011-12. Since common issues are involved in all these appeals, except the amounts mentioned therein, these appeals are heard together and decided by this common order. For the sake of convenience, appeal in ITA No.4392/Mum/2016 is discussed here under:

2. The Ground No.1 raised by the Revenue is reproduced as under:-

“1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A), has erred by giving relief of Rs.27,32,03,702/- out of the W.I.P. treated by Assessing Officer interest of business expenditure.”

2.1. The facts in brief are that the assessment was re-opened in the current year on the basis of the assessment order for the AY.2009-10 which now stands decided by the Tribunal. The said disallowance was made by the AO out of certain expenses, which were debited in the Profit & Loss A/c by holding the said expenses to be relating to project work and capitalized the same under the head ‘work-in-progress’ consequently resulting into addition of the said amount.

2.2. At the outset, Ld.AR submitted that the issue is squarely covered by the decision of the Co-ordinate Bench of the Tribunal in assessee’s own case in ITA No.4579/Mum/2013 (AY.2009-10), vide order dt.30-12-2015, wherein the Hon'ble Tribunal has decided the issue in favour of assessee and the Ld.CIT(A) has only allowed the appeal of assessee, after following the decision of the assessee’s own case.

2.3. Ld. DR, on the other hand, relied on the orders of Ld.CIT(A) and AO.

2.4. After hearing rival parties and perusing the material on record including the decision of the Co-ordinate Bench in assessee’s own case in ITA No.4579/Mum/2013 (AY.2009-10), dt.30-12-2015, we observe that the identical issue has been decided by the Co-ordinate Bench in favour of assessee by

following the earlier year's order. The operative portion of the said order is as under:

"5. We have considered the rival contentions and have gone through the records and also the decision of the co-ordinate bench of the Tribunal in the case of "M/s. Lodha Palazzo Vs. ACIT" (Supra) (One of us i.e. Judicial Member, being party to the said decision), wherein the Tribunal after deliberating upon the various clauses of Accounting Standard AS-2 and AS-7 and the provisions of section 145A of the act has held that as per the accounting method consistently followed by the assessee and thereby excluding the indirect expenses such as office employees' salary, administrative expenses and marketing & selling expenses was as per the recognized principles of accountings and as such the claim of the assessee deserved to be allowed. The relevant findings of the Tribunal for the sake of completeness are reproduced as under:

"6. We have heard the rival contentions and gone through the records. The Ld. counsel for the assessee has relied upon the "Expert Advisory Committees Report (EAC) on applicability of revised AS 7 to enterprises undertaking the construction activities on their own account as a venture of commercial nature" (copy placed at page 49 & 50 of paper book) wherein it has been stated that revised AS -7 shall not be applicable to the builders undertaking the commercial activity on their own and it was also stated that the work in progress shall constitute inventory for the builders and shall be valued as per AS-2 issued by the Institute of Chartered Accountant of India (ICAI). The Ld. Counsel has further submitted that the assessee has accordingly followed the Accounting Standard -2 for determining the work in progress. He has further brought our attention to para 13 of As-2, wherein it has been mentioned that the following expenses have to be excluded from the cost of inventories being work-in-progress:

"(a) abnormal amounts of wasted materials, labour or other production costs;

(b) storage costs, unless those costs are necessary in the production process before a further production stage;

(c) administrative overheads that do not contribute to bringing inventories to their present location and condition; and

(d) selling costs."

7. The Ld. Counsel has further relied upon para 2.4 of the "Guidance Note on Accounting for Real Estate Transaction" issued by the Institute of the Chartered Accountants wherein it has been stated that:

"The following cost should not be considered part of construction cost and development cost if they are material:

- (a) General administration costs; Selling cost;
- (b) Research and development cost;
- (c) Depreciation of idle plant and equipment;
- (e) Cost of unconsumed or uninstalled material delivered at site; and
- (f) Payment made to sub-contractors in advance of work performed."

8. The Ld. Counsel therefore has stated that as per the above guidelines, the administrative and selling expenses have been specifically excluded from the cost of inventory for work for closing WIP. The Ld. Counsel has further submitted that even as per AS -7 vide paragraph 19 it has been mentioned that the general administrative cost and selling cost does not constitute the cost of the project. He, therefore, has submitted that as per Guidance note, AS 2 and even AS 7, the general administrative expenses and selling expenses are not project cost and are to be charged to the profit & loss account in the very same year in which they are incurred. In view of the above facts and following the Guidance Notes and Accounting Standards, the assessee has individually worked out the expenses directly related to work in progress and expenses not related to work in progress and accordingly debited in respective heads. The Ld. Counsel has further relied upon section 145A of the Act, which read as under:

"[Method of accounting in certain cases.

145A. Notwithstanding anything to the contrary contained in section 145,—

(a) the valuation of purchase and sale of goods and inventory for the purposes of determining the income chargeable under the head "Profits and gains of business or profession" shall be—

(i) in accordance with the method of accounting regularly employed by the assessee; and (ii) further adjusted to include the amount of any tax, duty, cess or fee (by whatever name called) actually paid or incurred by the assessee to bring the goods to the place of its location and condition as on the date of valuation."

9. The Ld. Counsel, therefore, has contended that the assessee has been regularly following the method of accounting recognized by the accounting principles to value the inventory. The assessee had followed the same method of valuing the inventory in preceding year as well as in succeeding years. Even in the assessment year 2010-11, it has debited and claimed the identical nature of expenses which had been accepted as deductible expenses in assessment order passed u/s 143(3) of the I.T. Act. The assessee being regularly following the accounting method duly recognized by the accounting principles and guidelines as stated above and in view of the provisions of section 145A has rightly claimed the proportionate salary expenses, administrative expenses and selling expenses as revenue expenditure. The Ld. counsel has further contended that the Special Bench decision of the Tribunal relied upon by the lower authorities in the case of "Wall Street Construction Ltd. Vs JCIT" [101 ITD 156] is relating to interest expenditure identifiable with the project. In assessee's case, dispute is not with respect to interest as the assessee itself has added the interest cost to the work-in-progress and claimed it in subsequent year in the proportion of revenue offered. Thus, the facts in assessee's case are quite distinguishable and the decision of Special Bench (supra) is not applicable to the facts of the assessee's case.

10. The Id. DR on the other hand has relied upon the findings of the lower authorities. He has stressed that the Ld. CIT(A) has rightly appropriated the indirect expenses to the WIP in proportion to the percentage of completion in respect of the area sold.

11. We have considered rival contentions and carefully gone through the orders of the authorities below. The percentage completion method of accounting has been regularly followed by the assessee. In the succeeding assessment year 2010- 11, the AO has accepted the deductibility of the identical nature of expenses in the assessment order passed u/s 143(3) of the I.T. Act. We agree with contention of the Ld. Counsel for the assessee that the employee cost refers to salary paid to the employees who are looking after the administration of office and not directly related to construction of the project but is part of the administrative expenses. Similarly, the office and administrative expenses and selling and marketing expenses are to be charged to the profit & loss account in the very same year in which they are incurred and have to be excluded from the cost of inventories for working out closing WIP as per the guidelines issued by the ICAI, Accounting Standard AS-2 and AS-7. The assessee has regularly and consistently been following the said method of accounting as per the provisions of section 145A of the I.T. Act. The AO has not assigned any cogent reason as to why the method, which has been consistently followed by assessee and accepted by the department in past as well in succeeding assessment years and which is in accordance with the

recognized principles of accounting by ICAI, is being rejected. In our view, the action of the Revenue Authorities in rejecting the assessee's accounting method, without assigning any reason is not justified. The accounting method followed by the assessee and thereby excluding the indirect expenses such as office employees' salary, administrative expenses and marketing & selling expenses is as per the recognized principles of accountings and as such the claim of the assessee deserves to be allowed. We hold accordingly. The additions made by the lower authorities on this issue are hereby ordered to be deleted."

6. Both the Ld. representatives of the parties have submitted that the issue is squarely covered by the above decision of the Tribunal. We find that rather the case of the assessee is on better footing as the assessee was carrying out different projects though at the same location, hence it was not a case of single project. Even otherwise the resultant income from the project is a loss even after capitalisation of expenditure by the AO to work in progress. Hence, there is no tax implication, so far as the year under consideration is concerned and the loss otherwise also has to be carried forward. Under such circumstances, it cannot be said that the assessee has adopted the above stated accounting method to avoid tax on income for the year under consideration. The assessee, thus, has followed the accounting method which has been consistently followed by it and which is as per the recognized principles of accounting. In view of the above discussion of the matter and following the above decision of the Tribunal for the sake of consistency, this issue is decided in favour of the assessee".

Since the facts in the instant case are identical to ones as decided by the coordinate bench, we, therefore respectfully following the said decision of the Co-ordinate Bench, affirm the order of Id CIT(A) and dismiss this ground, raised by Revenue.

3. The issue raised in Ground No.2 by the Revenue is against the CIT(A)'s order directing the AO to assess the interest income of Rs.1,65,18,814/-, being interest earned on Fixed Deposits, as 'business income', instead of 'income from other sources'.

3.1. The facts in brief are that the assessee treated the interest income of Rs.1,65,18,814/- on Fixed Deposits as 'business income', whereas the AO has treated the same as 'income from other sources'. The said fixed deposits were made in the ordinary course of business of the assessee.

3.2. Ld.AR at the outset, submitted that the issue is squarely covered by the decision of the Co-ordinate Bench of the Tribunal in assessee's own case in ITA No.4579/Mum/2013 (AY.2009-10), dt.30-12-2015, wherein the Hon'ble Tribunal has decided the issue in favour of assessee and against Revenue, which has been followed by the Ld.CIT(A) and allowed the appeal of assessee. Hence, Ld.AR prayed before the Bench that by following the said decision of the Co-ordinate Bench, the ground raised by the Revenue may be dismissed.

3.3. Ld. DR, on the other hand, relied on the grounds of appeal and the order of AO.

3.4. After hearing rival parties and perusing the material on record including the decision of the Co-ordinate Bench in assessee's own case in ITA No.4579/Mum/2013 (AY.2009-10), dt.30-12-2015, we observe that the identical issue has been decided by the Co-ordinate Bench in favour of assessee. The operative portion of the said order is as under:

"10. We find that in the facts and circumstances of the case in hand, the decision of Hon'ble Bombay High Court in the case of "CIT vs. Lok Holdings" (supra) is squarely applicable. In that case the assessee was engaged in development of properties. Advance from customers intending to purchase flats was deposited with the banks in the course of business. The interest income was held to be assessable as business income and not

as income from other sources. Following the decision of Hon'ble Bombay High Court in the case of "Lok Holdings" (Supra) the interest income earned from temporary deposits pending their utilization out of customer advances on the booking of flats related to the project of the assessee is assessable as business income. The A.O. is accordingly directed to assess the same as business income. This ground of appeal is also allowed".

Respectfully following the said decision of the Co-ordinate Bench, we dismiss this ground raised by Revenue.

3.5. In the result, this appeal of Revenue is dismissed.

ITA No.4393/Mum/2016 (AY.2010-11):

4. As far as this appeal of Revenue is concerned, the facts and issues are common vis-à-vis the appeal as decided by us in ITA No. ITA No.4392/Mum/2016 AY 2008-09 (supra). Accordingly, our decisions on both the grounds in the earlier paragraphs for the AY.2008-09, would, mutatis mutandis apply to this appeal of Revenue as well. Hence, this appeal of Revenue is dismissed.

ITA No.4394/Mum/2016 (AY.2011-12):

5. As far as Ground Nos.1 & 3 of this appeal of Revenue are concerned, the same are common vis-à-vis the appeal as decided by us in ITA No. ITA No.4392/Mum/2016 AY 2008-09 (supra). Accordingly, our decisions on both the grounds in the earlier paragraphs for the AY.2008-09, would, mutatis mutandis apply to these grounds raised by the Revenue as well. Hence, the ground no. 1 and 3 are dismissed.

6. The issue raised in the 2nd ground of appeal is against the order of Id CIT(A) challenging the observation of Id CIT(A) stating that the assessee was not required to deduct the TDS

on the payment of Rs.6,44,55,090/- by relying on the documents submitted by the assessee in the appellate proceedings in contravention of Rule 46A.

6.1. The facts in brief are that the AO upon perusal of annexure 2 in letter dated 26.02.2014 furnished by the assessee providing therein partywise details of professional charges along with details of TDS deducted. The details filed are reproduced as under:-

sr. No.	Name of the Party	Amount Paid	TDS required @10°/o	TDS Deducted	Shortage
1.	H. Horizon Support & Services Pvt. Ltd.	10,00,00,000	1,00,00,000	62,00,000	38,00,000
2.	James D. Rosener	23,34,870	2,33,487	Nil	2,33,487
3.	Pepper Hamilton	2,40,71,045	24,07,105	Nil	24,07,105
4.	Sargam Laboratory Pvt. Ltd.	49,173	4,917	Nil	4,917
	Total				64,45,509

The AO, without calling for the explanation of the assessee, came to the conclusion that TDS has either been short deducted or not deducted and disallowed a sum of Rs. 6,44,55,090 u/s 40(a)(ia) of the Act.

6.2. The Id CIT allowed the appeal of the assessee after considering the replies of the assessee which is reproduced as under:-

“5.3.2. I have gone through the contention of the appellant on this issue as reproduced above and also copies of TDS certificates, CA’s certificate in Form 15CB and TDS certificate in Form 16A, which are facts verifiable from records that the appellant has submitted in support of their contention. I am in agreement with the contention of the appellant that there was no need to deduct TDS and, hence, disallowance u/s 40(a)(ia) was not warranted. Accordingly, the same is deleted. This ground of appeal is allowed.”

6.3 After hearing the rival parties and perusing the records as place before us we find no infirmity in the order of Id CIT(A) who has held that there was no need for deduction of TDS after taking into consideration the TDS certificates, C.A certificates and form 15CB . The Ld. CIT(A) has considered the detail arguments as reproduced in appellate order in para 5(a) of page No.14 onwards in the appellate order. We have also examined the explanation offered by the assessee and are of the opinion that assessee is not liable to deduct tax source as observed by the Ld. A.O. The ground no. 2 is dismissed by upholding the order of CIT(A) on this issue.

7. The Ground Nos.4 & 5, raised by the revenue are as under:

“4. On the facts and circumstances of the case and in law the Ld.CIT(A) was not justified, in not upholding the AO’s findings that the income derived by the assessee from letting out of its properties, held as stock-in-trade, represents income from house property, by relying on the decision of the Hon'ble Supreme Court in the case of Chennai Properties Pvt. Ltd., without appreciating the facts of the case of M/s.Chennai Properties Pvt. Ltd., are distinguishable in so far as the main object of Chennai Properties Pvt. Ltd., was to acquire and give properties on rent, whereas the assessee firm is engaged in development and construction of properties?

5. On the facts and circumstances of the case and in law, the Ld.CIT(A), failed to appreciate the ratio of decision in the case of CIT Vs. Ansal Housing Finance & Leasing Co. Ltd., (2013) [29 taxmann.com 303] (Delhi) wherein it was held that the assessee would be liable to pay the

annual letting value of finished flats owned by it under the head 'Income from House Property'."

7.1. The issue raised by Revenue in these grounds is against the deletion of addition by CIT(A) as made by the AO by estimating ALV on closing stocks of flats completed in respect of which agreements for sale had not been entered into. In other words, the said un-sold flats represented the stock-in-trade of the assessee, for which no purchasers had been found till the year end. AO estimated the ALV on the cost of the said stock in hand @8% and treated the same as income u/s.22 of the Act by following the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Ansal Housing Finance and Leasing Co. Ltd., (2013) [354 ITR 180] (Del).

7.2. In the appellate proceedings, Ld.CIT(A) deleted the addition on the ground that the development of property and sales thereof or leasing out the property is the business of the assessee by following the judgment of the Hon'ble Supreme Court in the case of Chennai Properties and Investments Ltd., Vs. CIT (2015) [373 ITR 673] (SC) wherein it was held that no ALV can be assessed on estimated basis on the stock in trade held by the assessee by observing and holding as under:

"5.5.9. Reading the decision of Hon'ble Gujarat High Court in Neha Builders (supra) and in Supreme Court's decision in Chennai Properties, and also applying the ratio of test of determination in Sane & Doshi Enterprises, it has to be concluded that the Assessing Officer was not correct in deciding that Section 22 of the Act applies to the finished flats reflecting in the inventories of the appellant without performing the test of determination on facts and circumstances of the case. The fact that the appellant had not even let out the vacant flats when it could have and the Assessing Officer had to estimate the ALV clearly indicates that in the point of view of the appellant the flats were being held as stock in trade and the intention was to remain in the business of development and

construction and not act as a landlord. In any case, as per its Memorandum of Association, even letting out/lease of property was one of the main objectives of business. Thus, the test of determination as suggested in Sane & Doshi case (supra) would reveal that deemed ALV on vacant flats under section 23(1) cannot be applied. Accordingly, respectfully following the ratio of determination laid down by higher judicial authorities, including Hon'ble Supreme Court, the addition of Rs.24,55,403/- being annual value of the finished flats is deleted and this ground of appeal is allowed."

7.3. Ld.AR vehemently submitted before the Bench that the assessee is primarily engaged in the business of purchase, sale, construction and leasing of the properties in real estate and is a leading builder of Mumbai during the year when the AO found that huge inventory of flats lying unsold in the Balance Sheet as stock in trade. The ld AR contended that the AO's conclusion, that the ALV on estimated basis has to be assessed under the head 'house property', is patently wrong and against the provisions of the Act. In this regard, Ld.AR took us through the main object clause of the assessee. Ld.AR also submitted that during the year the development of some building works were completed and that is the reason, this is the first year in which assessee has finished and completed stocks in hand. The ld AR submitted that the books have been prepared on going concern basis. Ld.AR submitted that construction, development and sale activities continued on daily basis and thus, some flats which were lying un-sold on 31-03-2011 due to scarcity of buyers in the market were shown as 'stock in trade' in the Balance Sheet. The assessee submitted that the stock in trade was held by the assessee, not as a land owner but as a business man. Ld.AR also referred to the provisions of Section 22, 28, 45 and 14 and

also 2(14) of the Act and tried to explain that when the assessee develops land, building or sell them, income is offered by the assessee and assessed by the AO as 'business income'. Ld.AR submitted that assessee has not at all let out these flats and consequently there was no income accrued from letting out of these un-sold stocks of flats. Ld.AR while distinguishing the decision followed by the Ld.AO in the case of CIT Vs. Ansal Housing Finance and Leasing Co. Ltd., (2013) [354 ITR 180] (Delhi) by referring to the decision in the case of Chennai Properties and Investments Ltd., Vs. CIT (2015) [373 ITR 673] (SC) that if the letting out of the property is one of the objects of the company and the business is factually carried on, then income is assessable under the head 'business income' and not under the head 'house property'. Ld.AR submitted that in the present case also the main object of the assessee is to construct, sell or lease out the property and therefore it is the day-to-day business of the assessee and it was held that income was assessable under the head 'business income' and not under the head 'house property'. Ld.AR also referred to the decision in the case of CIT Vs. Neha Builders P. Ltd., (2008) [296 ITR 661] (Guj), wherein it has been held that the company was incorporated with the main object of purchase, taking on lease or acquire by sale or let-out the buildings constructed by the assessee, the income derived from the property would also be termed as 'income of business', as the same is derived from the stock-in-trade, held by the assessee and not from the property. Ld.AR submitted that the Hon'ble Delhi High Court in the case of CIT Vs. Ansal Housing and Construction (2016) [389 ITR 373] (Delhi) has

distinguished the facts of the case of CIT Vs. Ansal Housing Finance and Leasing Co. Ltd., (2013) [354 ITR 180] (Del), which has been relied upon by the AO. The assessee also submitted that stock-in-trade lying unsold and vacant in its hands is held by the assessee as a businessman and not as a land owner. The assessee therefore submits that Section 22 of the Act is not applicable and therefore annual letting value of unsold flats and shops cannot be subjected to tax. The assessee submits that ratio of judgment in the case of Ansal Housing [354 ITR 180] (Del) is not applicable to the case of the assessee due to following reasons:

- i. As held by the Hon'ble Delhi High Court in subsequent judgment reported in 389 ITR 373 (Del), the ratio would not apply to an assessee developer whose business consists of development and sale or lease. In the case of the assessee, business is to develop and to sell or to lease and therefore facts are clearly distinguishable.
- ii. In the said judgment reported in 354 ITR 180, the rejection of alternative plea by the Hon'ble Supreme Court in the case of National Storage [66 ITR 596] (SC) has not been considered. The said part of the judgment, extracted earlier shows that income cannot be partly assessed under the head 'income from house property' and partly under the head 'business'. In the present case, the treatment given that if stock is sold it is assessed under the head 'business income' and if it is unsold it is assessed under the

head 'house property', runs contrary to the judgment of the Hon'ble Supreme Court. To the extent it is contrary to ratio of judgment of the Hon'ble Supreme Court, the judgment of the Hon'ble Delhi High Court is not binding.

- iii. In the said judgment, the ratio of the judgment of the Hon'ble Supreme Court in Universal Plast [237 ITR 454] (SC) has not been considered. The assessee submits that as per the judgment, if business asset is temporarily let out without intention to go out of business, income is assessable under the head 'business income', and not 'house property'. In the present case, the AO has treated holding of property vacant as stock in trade awaiting customer as not being business. The assessee submits that there is no intention to go out of business and rather facts show that business is continuing without any break and factum of holding stock vacant is in course of business awaiting customer at right price. Such a treatment by the AO runs contrary to ratio of judgment of the Hon'ble Supreme Court. To the extent, it is contrary to ratio of judgment of the Hon'ble Supreme Court, the judgment of the Hon'ble Delhi High Court is not binding.
- iv. The assessee submits that on the issue of stock in trade, there is another judgment of a High Court at Gujarat which is favourable to the assessee. The assessee submits that there are two judgments of different High Courts and neither is a judgment of

jurisdictional High Court and therefore, the judgment favouring the assessee may be followed.

7.4. Ld.AR submitted that the Hon'ble Bench at Mumbai has taken a consistent view that ALV of stock-in-trade in case of builder is not assessable u/s.22 of the Act. The assessee relies on the following judgments:

- a) CR Development P Ltd., in ITA No.4277/M/12, dt.13-05-2015;
- b) Runwal Constructions, in ITA No.5408/M/16, dt.22-02-2018;
- c) Arihant Estates P. Ltd., in ITA No.6037/M/16, dt.27-06-2018;
- d) M/s.Shivshankar Singh and others in ITA No.5236/M/16, dt.23-05-2018;
- e) Haware Construction P. Ltd., in ITA No.3321/M/16, dt.31-08-2018;

8. Ld. DR, on the other hand, relied heavily on the order of AO and Grounds of Appeal, by submitting that though the assessee is engaged in the business of sale and purchase of land, buildings, development and selling thereof on day-to-day basis, whatever stock is held at the year end becomes the property of the assessee and the deemed rent has rightly been assessed by the AO and brought to tax. Ld. DR relied heavily on the order of AO, prayed for the Bench that the order of CIT(A) may kindly be set aside and that of AO be restored.

9. We have heard the rival contentions and perused the material on record. We observe that in this case, the assessee

has un-sold flats at the year end, which were shown as stock-in-trade. Undisputedly, the business of assessee was to purchase the land, to construct buildings/flats and to sell the same or to lease out the same. This was also undisputed that these activities were enshrined in the main objects of the Memorandum and Articles of Association of the company as placed before us. Therefore, the issue before us for adjudication is whether the ALV could be estimated by applying percentage as cost of un-sold flats lying as stock in trade and subjected to tax. We find that in this case, the decision relied on by the AO in the case of CIT Vs. Ansal Housing Finance and Leasing Co. Ltd., (2013) [354 ITR 180] (Del) as referred to above is not applicable as the Hon'ble Delhi High Court in the subsequent decision reported in [389 ITR 373] (Del) has categorically held that ratio would not apply to assessee, who is a developer and whose business consists of development and sale or lease. In this case, assessee's business is the development and to sell or to lease the properties and therefore, the facts are distinguishable. In the case of CIT Vs. Neha Builders P. Ltd., (2008) [296 ITR 661] (Guj), the Hon'ble Gujarat High Court has held that any income realized by way of letting out by the assessee from the property, which is held as stock-in-trade has to be assessed as 'business income'. But in the present case before us, the facts are slightly different and on better footing as in this case, property was held as stock-in-trade and the assessee has not let out any part of that property i.e. stock-in-trade.

9.1. We further find that identical issue has been decided in series of decisions by the Co-ordinate Benches with same facts. In the case of M/s.Runwal Constructions Vs. ACIT in ITA No.5408/Mum/2016, dt.22-02-2018, the Co-ordinate Bench has 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 assessee is in the business of builders, developers and construction. Both the assessee have constructed various projects and the projects were treated as stock in trade in the books of account. Flats sold by the assessee 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 assesseees 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".

9.2. In the case of M/s. C.R. Developments Pvt. Ltd., Vs. JCIT in ITA No.4277/Mum/2012, dt.13-05-2015, the Co-ordinate Bench has held as under:

"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".

9.3. In the case of ITO Vs. M/s.Arihant Estates Pvt. Ltd., (AY.2012-13), dt.27-06-2018, the Co-ordinate Bench has held as under:

"5. We have heard the rival submissions, perused the orders of the authorities below. Identical issue has come up before the Coordinate Bench in the case of the M/s. Runwal Constructions v. ACIT (supra) and the Tribunal held as under: -

"3. The brief facts of the case are that the assessees, engaged in the business of builders and developers, filed return of income for A.Y. 2012- 13. The assessment was completed under Section 143(3) of Income Tax Act, 1961 (hereinafter "the Act") and while completing the assessment the AO computed the annual letting value in respect of unsold flats held as stock in trade by the assessees. The assessees contended before the AO that they are engaged in the business of builder, developers and construction and the property they purchased is stock in trade and the income

from sale of such developed property into flats is assessable as business income. Therefore, the unsold flats which are in the stock in trade cannot be brought to tax under the head 'income from house property' simply because the flats remain unsold at the end of the year. The assessee also placed reliance on the decision of the Hon'ble Gujarat High Court in the case of CIT vs. Neha Builders Pvt. Ltd. (296 ITR 661) in support of their contentions. However, the AO referring to the decision of the Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd. (354 ITR 180) computed the notional annual letting value on the unsold flats and brought to tax under Section 23 of the Act as income from house property.

4. On appeal the learned CIT(A) sustained the action of the AO in bringing to tax the notional annual letting value under the head 'income from house property' in respect of the unsold flats. Aggrieved, assessee is in appeal before us.

5. The learned A.R. before us strongly placing reliance on the decision of the Hon'ble Gujarat High Court in the case of Neha Builders Pvt. Ltd. (supra) submitted that if the property is used as stock in trade then such property would become or partake the character of stock and any income derived from such stock in trade would be income from business and not income from house property. The learned counsel also placed reliance on the decision of the Coordinate Bench in the case of C.R. Developers Pvt. Ltd. vs. JCIT in ITA No. 4277/Mum/2013 dated 13.05.2015 and submitted that identical issue has been decided by the Coordinate Bench holding that in the case of property held as stock in trade the income should be assessable under the head 'income from business' and no income shall be brought to tax as notional annual letting value under the head 'income from house property'.

6. The learned D.R., on the other hand, vehemently supported the orders of Authorities below. He also placed reliance decision of the Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd. (supra)

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 assessee is in the business of builders, developers and construction. Both the assessee have constructed various projects and the projects were treated as stock in trade in the books of account. Flats sold by the assessee 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-intrade', 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."

9.4. In the case of ACIT Vs. M/s.Haware Construction Pvt. Ltd., in ITA Nos.3321/Mum/2016 & 3172/Mum/2016 (AYs.2009-10 & 2011-12), dt.31-08-2018, the Co-ordinate Bench has held as under:

"4.5. We have heard the rival submissions and perused the relevant materials on record. On the above issue, we come across one decision for the assessee and another decision for the revenue. The decision in Neha Builders Pvt.Ltd.(supra) is for the assessee, whereas the decision in Ansal Hsg. Finance & Leasing Co. Ltd., (supra) is for the Revenue. The Hon'ble Supreme Court in the case of CIT vs. Vegetable Products 88 ITR 192 (SC)

has held that “if two reasonable constructions of a taxing provisions are possible, that construction which favours the tax payer must be adopted.”

In view of the above position of law, we shall follow the decision in Neha Builders Pvt.Ltd.(supra).

4.5.1. We now come to the relevant provisions in the Act. The following sub-section (5) has been inserted after sub-section (4) of section 23 by the Finance Act, 2017, w.e.f. 01.04.2018:

“(5) Where the property consisting any building or land appurtenant thereto is held as stock-in-trade and the property or any part of the property is not let during the whole or any part of the previous year, the annual value of such property or part of the property, for the period up to one year from the end of the financial year in which the certificate of completion of construction of the property is obtained from the competent authority, shall be taken to nil.”

Thus, in order to give relief to Real Estate Developers, section 23 has been amended w.e.f. AY 2018-19 (FY 2017-18). By this amendment, it is provided that if the assessee is holding any house property as his stock-in-trade which is not let out for the whole or part of the year, the annual value of such property will be considered as Nil for a period up to one year from the end of the financial year in which a completion certificate is obtained from the competent authority.

In view of the above amendment to section 23, we are not adverting to the other case laws relied on by the Ld. counsel.

In the instant case, the assessee is a builder and developer. The issue of taxability is with regard to unsold flats. The AY is 2009-10. In view of the insertion of sub-section (5) in section 23 by the Finance Act, 2017, w.e.f. 01.04.2018 narrated hereinbefore, we uphold the order of the Ld. CIT(A) and dismiss the 2nd ground of appeal filed by the revenue”.

9.5. It is amply clear from the discussion and decisions as have been made above that the notional ALV cannot be determined on the cost of stock-in-trade in order to make addition under the head ‘house property’ *qua* the un-sold stock lying with the assessee. Accordingly, we dismiss the grounds raised by Revenue and the order of Ld.CIT(A) is affirmed on this issue.

9.6. In the result, this appeal of Revenue is dismissed.

10. To sum-up, all the appeals of Revenue are dismissed.

Order pronounced in the open court on 03-10-2019

Sd/-

(RAM LAL NEGI)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/Mumbai; दिनांक/Dated : 03-10-2019

TNMM

Sd/-

(RAJESH KUMAR)

लेखा सदस्य/ACCOUNTANT MEMBER

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), Mumbai
4. आयकर आयुक्त / CIT, Mumbai
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 (Dy./Asst. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai