

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH, MUMBAI**

**BEFORE SHRI MAHAVIR SINGH, VP &
SHRI S. RIFAUR RAHMAN, AM**

आयकरअपीलसं./ I.T.A. No. 346/Mum/2019
(निर्धारणवर्ष / Assessment Year: 2014-15)

ITO-2(1)(1) Room No. 543, 5 th floor, Aayakar Bhavan, M. K. Road, Mubmai-400 020	बनाम/ Vs.	M/s Arihant Estate Pvt. Ltd. 2 nd floor, Kothari House, 57, Oak Lane, Fort, Mumbai
स्थायीलेखासं ./जीआइआरसं ./PAN No. AADCA6012E		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri Brajendra Kumar, DR
प्रत्यर्थीकीओरसे/ Respondent by	:	Shri Dharan Gandhi, AR
सुनवाईकीतारीख/ Date of Hearing	:	09.12.2020
घोषणाकीतारीख / Date of Pronouncement	:	06.01.2021

आदेश / ORDER

Per S. Rifaur Rahman, Accountant Member:

The present appeal has been filed by the revenue against the order of Ld. Commissioner of Income Tax (Appeals) – 4 in short referred as ‘Ld. CIT(A)’, Mumbai, dated 13.11.2018 for Assessment Year (in short AY) 2014-15.

2. The brief facts of the case are, assessee is engaged in the business of construction activity and filed its return of income on 29/09/2014 for assessment year 2014-15 declaring total income of Rs. 4,65,800/-. Subsequently, the case was selected for scrutiny under compulsory basis. Accordingly, notices u/s 143(2) and 142(1) of the Act were issued and served on the assessee. In response, AR of the assessee filed the relevant information as called for. AR of the assessee submitted that since the assessee is into the business of construction and development of properties, the income from trading assets will not be chargeable to tax u/s.22 and thus, Section 23 would not have any application. Further, relying on the decision of the Hon'ble Apex Court in the case of M/s. Chennai Properties & Investments Ltd. vs. CIT, he submitted that since the assessee has constructed a mall/shopping complex with the intention to exploit it by way of complex commercial activities, such activity falls within the realm of the head 'profits and gains of business or profession' and accordingly, section 23 will not apply.

3. After considering the submission of the assessee, AO observed that the contention of the assessee is not found tenable on the following reasons:-

a. As per the agreement of sale submitted by the assessee, it is seen that the developers have the sole and exclusive right to sell or lease shops, stalls, offices, storage spaces, other units and premises in the said Commercial Building being constructed by the developers on the said property and to enter into agreements and to receive the sale price in respect thereof.

b. The developer received the possession of the land which is constructed the impugned building. The date, on which the assessee received the possession of the land, there is a transfer of the land within the meaning of Section 2(47)(v) and the assessee becomes the owner of the land and building thereon constructed by it.

c. Since the assessee is owner of the building as discussed above, the assessee shall be liable for all the provisions of the Act in respect of the building. The property constructed and remained unsold during the year, shall be liable for tax under the head income from house property.

d. Moreover, this being a debatable issue and on the same ground, the Department is in appeal before the Hon'ble ITAT in the assessee's own case for Assessment Year 2012-13. In view of the same, keeping the law of consistency in mind and with due respect to the CIT's decision, the computation of total income submitted by the assessee is not acceptable.

4. Therefore, AO proceeded to make assessment u/s 143(3) treating the total income at Rs. 2,22,60,750/- by assessing the rental income under the head 'Income from House Property'.

5. Aggrieved with the above order, assessee preferred the appeal before Ld. CIT(A) and Ld. CIT(A) after considering the submission of assessee as well as following the decision of ITAT in assessee's own case for Assessment Year 2012-13, allowed the appeal of the assessee to assess the income under the head 'Income from Business'.

6. Aggrieved with the above order, revenue is in appeal before us by filing the following grounds of appeal, which are reproduced below:-

- 1. "Whether on the facts and in circumstances of the case and law, the Ld. CIT(A) was correct in deleting the addition made on account of income from House Property on shops /Commercial premises held as closing stock by assessee having regard to the nature of business of the assessee and having received Occupancy Certificate from the statutory authorities?"*
- 2. Whether on the facts and circumstances of the case and law, the Ld. CIT(A) was correct in deleting the addition made on account of income from house property despite the facts that the assessee owns more than one property capable of fetching fair market rent and disregarding the provisions of section 23(4)(b) and section 23(1)(a) of the Act., which mandates taxability of notional rent in the hands of owner of such house property? ,,*
- 3. Whether on the facts and circumstances of the case and law, the Ld. CIT(A) was correct in deleting the addition made on account of income from house property despite the fact that the provision of the act does not distinguish or exempt any business asset being the closing stock in the instant case from chargeability of income from house property?"*

7. At the outset, Ld. AR appearing on behalf of the assessee submitted before us that Ld. CIT(A) has discussed these issues elaborately in its order and he brought to our notice para no. 6 (6.1 to 6.3), wherein Ld. CIT(A) by following the decision of ITAT in ITA No. 6037/Mum/2016 in assessee's own case for Assessment Year 2012-13 on similar issues, has decided these grounds in favour of the assessee.

8. On the other hand Ld. DR relied upon the orders passed by AO, however he conceded that these grounds are covered by the order of Coordinate Bench of ITAT.

9. Considered the rival submissions and material placed on record. We notice from the record that the identical ground raised in the present appeal has already been decided by the Coordinate Benches of ITAT in ITA No. 6037/Mum/2016 in assessee's own case for Assessment Year 2012-13 on merits. For the sake of clarity, which is reproduced below:-

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 assesseees, 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 assesseees. The assesseees 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 assesseees 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 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-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 ld. 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, ld. 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. Admittedly in this case on hand the unsold property being shops were held as stock in trade. In the circumstances, respectfully following the above decision we uphold the

order of the Ld.CIT(A) and reject the ground raised by the Revenue.

10. Therefore, respectfully following the above decision which is applicable *mutatis mutandis* in the present case, we are inclined to accept the submission of Ld. AR. Accordingly, the grounds raised by the revenue stands **dismissed**.

11. In the net result, the appeal filed by the revenue stands **dismissed**.

Order pronounced in the open court on 06.01.2021.

Sd/-
(Mahavir Singh)
Vice President

Sd/-
(S. Rifaur Rahman)
Accountant Member

मुंबई Mumbai; दिनांक Dated : 06.02.2021
Sr.PS. Dhananjay

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File
आदेशानुसार/ BY ORDER,

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आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai