

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'A' : NEW DELHI

(THROUGH VIDEO CONFERENCING)

BEFORE SHRI G.S. PANNU, VICE PRESIDENT AND  
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA Nos.790/Del/2015, 791/Del/2015 & 792/Del/2015  
Assessment Years : 2010-11, 2011-12 & 2012-13

M/s Ansal Properties &  
Infrastructure Limited,  
115-Ansal Bhawan,  
16, K.G. Marg,  
New Delhi – 110 001.  
PAN : AAACA0006D.  
(Appellant)

Vs. Deputy Commissioner of  
Income Tax,  
Circle-2(2),  
(erstwhile Central Circle-20),  
New Delhi.  
(Respondent)

Appellant by : Shri H. Siva Prasad Reddy,  
Advocate.  
Respondent by : Shri Sanjay Goyal, CIT-DR.

Date of hearing : 23.06.2021  
Date of pronouncement : 16.07.2021

**ORDER**

**PER G.S. PANNU, VP:**

The captioned are three appeals preferred by the same assessee pertaining to different assessment years of 2010-11 to 2012-13 involving certain common issues and, therefore, they have been clubbed and heard together and a consolidated order is being passed for the sake of convenience and brevity.

2. The appeal in ITA No.790/Del/2015 for assessment year 2010-11 is being taken as the lead case. This appeal of the assessee is directed against the order of learned CIT(A)-24 (erstwhile CIT(A)-31), New Delhi dated 27<sup>th</sup> November, 2014, which in turn has arisen from an order passed by the Assessing Officer under Section 143(3) of the Income-

tax Act, 1961 (in short 'the Act') dated 25<sup>th</sup> March, 2013 pertaining to assessment year 2010-11.

3. In this appeal, the assessee has filed the following Grounds of Appeal along with original Memorandum of Appeal :-

*"1.1 That on the facts and in the circumstances of the case, the learned CIT(A) has erred in law in confirming the addition of notional Annual Letting Value of Rs.5,74,42,675/- (out of Rs.6,93,49,975/-) on closing stock of flats/spaces by following the Hon'ble Delhi High Court's decision in which various relevant facts were not fully brought out before their Lordships and therefore could not be considered by them.*

*1.2 That without prejudice to the Ground No.1.1 above, the appellant has also filed an appeal before the Apex Court which has been admitted and is pending for decision.*

*2. That without prejudice to the foregoing ground, the decision rendered by Hon'ble Delhi High Court related to the assessment year 1988-89 and rendered in the context of the provisions of section 23 as they existed prior to substitution by the Finance Act, 2001 w.e.f. 1.4.2002. The learned CIT(A) failed to consider the issue in the light of the amended provisions as applicable to the year under appeal which were substantially different. The issue should have been reconsidered and decided in the light of the amended provisions.*

*3. That on the facts and circumstances of the case, the learned CIT(Appeals) has erred in rejecting the claim of the appellant for deduction of Rs.34,08,17,701/- u/s 80IA(4)(iii) of the Act on the ground that due notification by the Central Government of the assessee's project was not available in the appellant's case. In the light of the fact and the evidence adduced that the appellant's petition for approval from the Central Government was under process and there was likelihood of the Notification being issued with retrospective effect, the learned CIT(Appeals) should have given direction that in case the Notification was issued by Central Government with retrospective effect covering the year under appeal, his decision to confirm disallowance would accordingly stand reversed.*

4. *That the Appellant craves leave to add, alter or amend or forego any grounds of appeal at the time of hearing."*

4. Thereafter, the assessee has filed the following Revised and Additional Grounds of Appeal which, *inter-alia*, also subsume the Grounds of Appeal originally filed along with the Memorandum of Appeal :-

*"1.1 The Appellant most respectfully prays that the Hon'ble Tribunal may be pleased to allow the admission of additional Grounds of Appeal and redrafting of Ground Nos.1.1, 1.2, & 2 originally taken in Form No.36 for the following reasons.*

*(i) It is considered necessary as well as appropriate to reframe the Grounds of appeal to set-out the relevant facts in right and proper perspective, and;*

*(ii) The additional Grounds go to the root of the matter and does not require consideration of any material evidence outside the record.*

*1.2 It is settled law that legal grounds are allowed to be taken before the Hon'ble Tribunal. The Hon'ble Supreme Court reiterated this settled legal position in the case of the CIT vs Singhad Technical Education Society, Civil Appeal No.11080 of 2017, where the legal ground on recording of satisfaction u/s 153C was taken for the first time as additional Ground before the Hon'ble Tribunal, which the Revenue had objected. Reliance is also placed on the decision of the Larger Bench (3 Member) of Hon'ble Supreme Court in National Thermal Power Co.Ltd., (1998) 229 ITR 383 (SC).*

*1.3 For the sake of clarity and convenience, the additional Grounds and the revised/reframed Grounds are merged and set-out as under.*

**Revised and Additional Grounds of Appeal**

**Notional Annual Letting Value (ALV)**

*1.1 That in the facts and circumstances of the case and in law, learned CIT(A) erred in upholding an addition of*

*Rs.5,74,42,675/- (out of Rs.6,93,49,975/-) under the head 'income from house property' without appreciating that the properties in question were 'stock-in-trade' of the assessee's business and provisions relating to S.22 to S.26 of IT Act are not at all applicable to property forming part of stock-in-trade in the business of the Assessee as argued by the Revenue itself before the Hon'ble High Court in the case of Commissioner of Income Tax vs Neha Builders (P) Ltd. (2008) 296 ITR 661 (Guj) and approved by the Hon'ble High Court way back in 2006.*

*1.2 That in the facts and circumstances of the case, learned CIT(A) erred in upholding an addition of Rs.5,74,42,675/- (out of Rs.6,93,49,975/-) under the head 'income from house property' without appreciating that S.23 of the Income Tax Act 1961 has undergone amendment vide Finance Act 2001 w.e.f. 1.4.2002 and old law cannot be applied to the year under consideration.*

*1.3 Without prejudice to the above ground no.1.1, learned CIT(A) erred*

*(a) In not appreciating that the question of taxation of ALV of unsold flats/office spaces, lying vacant and held as stock-in-trade, arises only when a finding is recorded, having regard to the objects of the Memorandum and Articles of Association of the Appellant-company, that income from such unsold properties is liable to be taxed under the head 'Income from House Property', and not as Business Income in the light of the decision of Hon'ble Supreme Court in the case of Chennai Properties and Investments Ltd. vs Commissioner of Income Tax Central II Tamil Nadu (in Civil Appeal Nos 4491 to 4494 of 2004).*

*(b) In not appreciating that without examining the Memorandum of Association (MOA) and its Object Clauses, it is not permissible to arrive to any finding or conclusion that income from unsold flats/office spaces, lying vacant and held as stock-in-trade, is liable to be taxed as income from house property on the basis of the Notional ALV.*

*(c) In not appreciating that one of the main objects of the assessee is to sell, lease, let, mortgage or otherwise dispose of the lands, houses, buildings and other property, apart from acquiring and developing of properties and therefore, the rental income, if at all earned, from unsold properties held as stock-in-trade is liable to be taxed under the head, Income from Business.*

*(d) In not appreciating that unless the certificate of completion of construction of the property is obtained in respect of the properties lying vacant as stock-in-trade, the ALV of the properties is not liable to be taxed on notional basis as it is illegal to reside/occupy such property and hence could not have been let out.*

*(e) In upholding the addition without returning a finding of fact as to whether it was actually feasible and practically possible at all to earn any rental income from the said unsold flats/space as the said flats were meant for sale and were not ready for immediate occupation by the prospective tenants and did not have the basic necessities like electric fittings, pucca wall painting, completion certificates etc.*

*(f) In upholding the addition without returning a finding of fact as to whether it was factually possible for the Assessee to take the risk of letting out unsold flats/spaces and asking the prospective buyer to wait till the tenant vacates the flat for it to be sold and given possession.*

*(g) In not appreciating that even notional ALV needs to be arrived at based upon realities and actual facts on the ground and could not have been determined through a guess work.*

*1.4 That in the facts and circumstances of the case, learned CIT(A) erred in law as the amendment by way of insertion of sub-section (5) in section 23 of the Act vide the Finance Act, 2017 is prospective with effect from 01-04-2018 enabling taxing of unsold flats/office spaces held as stock-in-trade and the post-amendment law cannot be applied to the pre-amendment assessment years, even if the income in respect of such properties is held to be assessable under the head, Income from House Property.*

#### **Other Grounds Retained**

*2. That on the facts and circumstances of the case, the learned CIT(Appeals) has erred in rejecting the claim of the appellant for deduction of Rs.34,08,17,701/- u/s 80IA(4)(iii) of the Act on the ground that due notification by the Central Government of the assessee's project was not available in the appellant's case. In the light of the fact and the evidence adduced that the appellant's petition for approval from the Central Government was under process*

*and there was likelihood of the Notification being issued with retrospective effect, the learned CIT(Appeals) should have given direction that in case the Notification was issued by Central Government with retrospective effect covering the year under appeal, his decision to confirm disallowance would accordingly stand reversed.*

*3. That the Appellant craves leave to add, alter or amend or forego any grounds of appeal at the time of hearing."*

5. The appellant before us is a company incorporated under the provisions of The Companies Act, 1956 and, is inter-alia, engaged in the business of real estate, including development of infrastructure projects, affordable housing, township, integrated townships for work and residence, constructing and operating holiday homes, etc. In an assessment finalized under Section 143(3) of the Act, the Assessing Officer assessed the total income at ₹75,30,19,546/- as against the returned income of ₹34,22,05,962/- wherein the difference between the assessee and the Revenue was on account of disallowance of claim of deduction under Section 80IA; charging of notional Annual Letting Value (ALV) of unsold vacant properties; depreciation on computers; and, disallowance of amortization of land in respect of wind power projects. In appeal before the learned CIT(A), assessee was allowed partial relief and, not being satisfied with the order of the CIT(A), assessee is in further appeal in above stated Grounds of appeal.

6. In this background, the rival representatives have been heard. Insofar as Ground Nos.1.1 to 2 in the original Memorandum of Appeal as well as Ground Nos.1.2 to 1.4 in the Revised and Additional Grounds are concerned, the sum and substance of the dispute relates to the action of the Assessing Officer in bringing to tax the notional ALV of the unsold properties being vacant commercial, residential/self-occupied assets in terms of Section 22 of the Act. The Assessing Officer noted that there was unsold stock-in-trade being vacant properties and, according to him, the notional ALV of the said properties was

assessable under the head 'income from house property'. The stand of the Assessing Officer is indeed supported by the judgment of Hon'ble Delhi High Court in assessee's own case. When assessee carried the matter in appeal before the learned CIT(A), he also affirmed the stand of the Assessing Officer in principle. However, he granted partial relief inasmuch as in respect of such properties where the completion certificates were not received, and/or the property units were under self-occupation for the purpose of business or such property units which were not in existence during the year, the CIT(A) directed that the ALV of such units be excluded from the computation of income.

7. Before us, the learned representative for the assessee firstly pointed out that so far as the original Grounds are concerned, the same relate to the action of the Assessing Officer in bringing to tax the ALV of the units and that the Additional Grounds sought to be raised are based on a plea that having regard to the fact that the property units in question were held as stock-in-trade and vacant, their assessability could not be considered under the head 'income from house property' and, rather, it was to be considered under the head 'income from business and profession', and, in support of such proposition, reference has been made to the judgment of Hon'ble Gujarat High Court in the case of CIT Vs. Neha Builders P.Ltd. – [2008] 296 ITR 661 (Guj). The learned counsel also pointed out that the aforesaid plea, was a legal issue for which the necessary facts are clearly available on record and that the same be considered for adjudication.

8. The learned DR asserted that the issue was fully covered in favour of the Revenue by the judgment of Hon'ble Delhi High Court in assessee's own case itself and referred to Ansal Housing Finance & Leasing Company Ltd. – [2013] 354 ITR 180 (Delhi) in this regard. He also referred to subsequent judgment of Hon'ble Delhi High Court in

the case of Ansal Housing & Construction Ltd. – [2016] 389 ITR 373 (Delhi) to show that even the ratio of the judgment of Hon'ble Supreme Court in the case of Chennai Properties & Investments Limited – [2015] 373 ITR 673 (SC) has been considered.

9. Having considered the rival stands, in our view, so far as the revised and Additional Grounds relating to the assessment of income by way of notional ALV under Section 22 of the Act is concerned, there is no substantive difference in the dispute raised vis-a-vis the Grounds in the original Memorandum of Appeal. The only difference between the original Grounds of Appeal and the revised one is the fresh plea of the assessee based on the judgment of Hon'ble Gujarat High Court in the case of Neha Builders P.Ltd. (supra) and also of Hon'ble Supreme Court in the case of Chennai Properties & Investments Limited (supra) for the proposition that the income from the properties in the instant case be held to be assessable under the head 'income from business or profession' and that, if it is so held, the same would oust the charge made by the Assessing Officer by invoking Section 22 of the Act under the head 'income from house property'. Even if it is taken that the aforesaid plea is the new plea raised by the assessee, it is quite clear that all the facts necessary to adjudicate the same are available on record and, therefore, we had made known to the parties that the said plea is admissible, and accordingly, both sides had addressed us on the merits of the same also.

10. Coming to the merits of the addition, which has been sustained by the learned CIT(A), in our view, we are in concurrence with the assertion made by the learned CIT-DR that the matter stands fully covered in favour of the Revenue even with regard to the plea of the assessee based on the judgment of Hon'ble Gujarat High Court in the case of Neha Builders P.Ltd. (supra). In fact, Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Company Ltd. (supra)

considered the ratio of the judgment of Hon'ble Supreme Court in the case of Chennai Properties & Investments Limited (supra) and held that the same was not applicable to the facts of the case and, accordingly, had reiterated its earlier judgment on the instant issue in the case of Ansal Housing Finance & Leasing Company Ltd. (supra). Notably, assessee's own case was also clubbed with the case of Ansal Housing Finance & Leasing Company Ltd. (supra) before the Hon'ble High Court. Therefore, in this view of the matter, we find no merit in the plea raised by the assessee. Accordingly, the order of learned CIT(A) is liable to be affirmed.

11. Before parting, we may also mention here that one of the points raised by the assessee before us was to the effect that the matter be restored back to the file of the Assessing Officer to examine as to whether the ratio of the judgment of Hon'ble Supreme Court in the case of Chennai Properties & Investments Limited (supra) and/or Neha Builders P.Ltd. (supra) was applicable so as to mitigate the assessment of impugned sums under the head 'income from house property'. We find no reasons to accede to the aforesaid plea once having noted that Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Company Ltd. (supra) has already considered the ratio of the judgment of Hon'ble Supreme Court in the case of Chennai Properties & Investments Limited (supra) and found it inapplicable to the given facts; and, in any case, it is not the case of the assessee that any fresh facts have arisen which would require any review. In sum and substance, the dispute remains the same as in the past, and thus, we hereby affirm the order of learned CIT(A) and the Grounds raised by the assessee are dismissed.

12. Insofar as Ground of appeal No.3 of the original Grounds and renumbered as Ground No.2 in the Additional Grounds is concerned, they are similar and relate to the assessee's claim for deduction of

₹34,08,17,701/- under Section 80IA(4)(iii) of the Act. Pertinently, assessee had claimed deduction under Section 80IA(4)(iii) with respect to the profits from industrial park. The Assessing Officer as well as learned CIT(A) have denied the claim of the assessee on the plea that the requisite notification by the CBDT in terms of the Industrial Park Scheme, 2008 (as amended by the Industrial Park (Amendment) Scheme, 2010) was not available.

13. In this background, the learned representative submitted that the non-availability of the requisite notification continues even at this stage, so, however, it is pointed out that the assessee had filed a review petition before the CBDT on 12<sup>th</sup> May, 2014, which is still pending for disposal. It was asserted that a reminder application had also been filed before the CBDT. In view thereof, the only prayer of the assessee before us is that suitable orders be passed directing the Assessing Officer to modify the assessment in case the requisite notification is received from the CBDT in future.

14. Learned DR has placed reliance on the orders of authorities below but has not seriously contested the prayer of the assessee.

15. Having considered the rival stands, in our view, the action of the lower authorities in denying the claim of the assessee for deduction under Section 80IA(4)(iii) of the Act cannot be faulted for the reasons ascribed in their respective orders. The requisite notification entitling the assessee for the deduction has been rejected by the CBDT, as is emerging from the record and therefore, we find no reason to interfere with the action of the lower authorities. The plea of the assessee that in case the notification is received in future in pursuance to assessee's review petition pending before the CBDT, it is sufficient to direct the Assessing Officer that in case, he is approached by the assessee with

the requisite notification on a later date, he shall deal with the same in accordance with law.

16. With the above observations, the Ground of Appeal raised by the assessee is dismissed.

17. Insofar as ITA No.790/Del/2015 relating to assessment year 2010-11 is concerned, there is no other issue and accordingly, the same is dismissed as above.

18. Now, we take up the appeal of the assessee in ITA No.791/Del/2015 for assessment year 2011-12, which is directed against the order of learned CIT(A)-24 (erstwhile CIT(A)-31), New Delhi dated 27<sup>th</sup> November, 2014, which in turn has arisen from the order of DCIT, Central Circle-20, New Delhi dated 26<sup>th</sup> March, 2014.

19. As was the case in assessment year 2010-11, herein also, the assessee has filed revised and Additional Grounds of appeal as well as the Grounds filed originally along with the Memorandum of Appeal. The original Grounds as well as revised and additional grounds filed (which, inter-alia, subsume the original Grounds of appeal), are reproduced hereunder :-

Original Grounds :-

*"1.1 That on the facts and in the circumstances of the case, the learned CIT(A) has erred in law in confirming the addition of notional Annual Letting Value of Rs.4,83,96,980/- (out of Rs.5,90,67,704/-) on closing stock of flats/spaces by following the Hon'ble Delhi High Court's decision in which various relevant facts were not fully brought out before their Lordships and therefore could not be considered by them.*

1.2 *That without prejudice to the Ground No.1.1 above, the appellant has also filed an appeal before the Apex Court which has been admitted and is pending for decision.*

2. *That without prejudice to the foregoing ground, the decision rendered by Hon'ble Delhi High Court related to the assessment year 1988-89 and rendered in the context of the provisions of section 23 as they existed prior to substitution by the Finance Act, 2001 w.e.f. 1.4.2002. The learned CIT(A) failed to consider the issue in the light of the amended provisions as applicable to the year under appeal which were substantially different. The issue should have been reconsidered and decided in the light of the amended provisions.*

3.1 *That on the facts and circumstances of the case, the learned CIT(Appeals) has erred in disallowing the entire expenditure of Rs.9,46,22,358/- u/s 37(1) as capital nature on the ground that the same related to issue of equity shares of the company to selected Qualified Institutional Buyers by applying the ratio of the Apex Court in Brook Bond India Limited vs. CIT (1997) 225 ITR 798. He failed to appreciate that unlike in Brook Bond's case, the funds received by issue of shares was not a public issue but was restricted to a few Qualified Institutional Buyers only on negotiated terms.*

3.2 *That without prejudice to Ground No.3.1, the learned CIT(Appeals) erred in completely ignoring and not appreciating that the sum of Rs.9,46,22,358/- included heavy expenses incurred prior to taking the decision whether to go for issue of shares or explore other alternative financial avenues could not be disallowed as expenses incurred on the issue. The disallowance could at best be restricted to expenses incurred on the issue after opting for the avenue of going in for issue.*

3.3 *That without prejudice to the foregoing grounds that the disallowable expenses relating to issue amounted only to Rs.45,89,080 (Rs.23,14,080/- being stamp duty paid for issue of shares, Rs.15,000/- being cost of printing and stationery and Rs.11,30,000/- and Rs.11,30,000/- being fee paid to Stock Exchanges), the other expenses being not in relation to the issue of shares to Qualified Institutional Buyers could not be disallowed u/s 37(1) as capital expenditure.*

3.4 That without prejudice to the foregoing grounds, the learned CIT(Appeals) should have in any case out of Rs.9,46,22,358/- allowed the sum of Rs.27,35,440/- being the expenses incurred prior to taking the decision of going for the capital issue.

4. That the Appellant craves leave to add, alter or amend or forego any grounds of appeal at the time of hearing.”

Revised & Additional Grounds :-

“The Appellant most respectfully prays that the Hon’ble Tribunal may be pleased to allow the admission of additional Grounds of Appeal and redrafting of Ground Nos.1.1, 1.2, & 2 originally taken in Form No.36 for the following reasons.

(i) It is considered necessary as well as appropriate to reframe the Grounds of appeal to set-out the relevant facts in right and proper perspective, and;

(ii) The additional Grounds go to the root of the matter and does not require consideration of any material evidence outside the record.

1.2 It is settled law that legal grounds are allowed to be taken before the Hon’ble Tribunal. The Hon’ble Supreme Court reiterated this settled legal position in the case of the CIT vs Singhad Technical Education Society, Civil Appeal No.11080 of 2017, where the legal ground on recording of satisfaction u/s 153C was taken for the first time as additional Ground before the Hon’ble Tribunal, which the Revenue had objected. Reliance is also placed on the decision of the Larger Bench (3 Member) of Hon’ble Supreme Court in National Thermal Power Co.Ltd., (1998) 229 ITR 383 (SC).

1.3 For the sake of clarity and convenience, the additional Grounds and the revised/reframed Grounds are merged and set-out as under.

REVISED AND ADDITIONAL GROUNDS OF APPEAL

NOTIONAL ANNUAL LETTING VALUE (ALV)

*“1.1. That in the facts and circumstances of the case and in law learned CIT(A) erred in upholding an addition of Rs. 4,83,96,980/ (out of Rs.5 90,67,704/-) under the head 'income from house property without appreciating that the properties in question were 'stock-in-trade' of the assessee's business and provisions relating to S.22 to S.26 of IT Act are not all applicable to property forming part of stock-in-trade in the business o the Assessee as argued by the Revenue itself before the Hon'ble High Court in the case of Commissioner Of Income Tax vs Neha Builders (P) Ltd. (2008) 296ITR 661 (Guj) and approved by the Hon'ble High Court way back in 2006.*

*1.2. That in the facts and circumstances of the case, learned CIT(A) erred in upholding an addition of Rs. 4,83,96,980/- (out of Rs.5,90,67,704/-) under the head 'income from house property' without appreciating that S.23 of the Income Tax Act 1961 has undergone amendment vide Finance c 2001 w.e.f.1.4.2002 and old law cannot be applied to the year under consideration.*

*1.3. Without prejudice to the above ground no. 1.1, learned CIT(A) erred:-*

*(a). In not appreciating that the question of taxation of ALV of unsold flats/office spaces, lying vacant and held as stock-in-trade, arises only when a finding is recorded, having regard to the objects of the Memorandum and Articles of Association of the Appellant- Company, that income from such unsold properties is liable to be taxed under the head 'Income from House Property', and not as Business Income in the light of the decision of the Hon'ble Supreme Court in the case of Chennai Properties and Investments Ltd vs Commissioner of Income Tax Central II Tamil Nadu (in Civil Appeal Nos. 4491 to 4494 of 2004).*

*(b) In not appreciating that without examining the Memorandum of Association (MOA) and its Object Clauses, it is not permissible to arrive at any finding or conclusion that income from unsold flats/office spaces, lying vacant and held as stock-in-trade, is liable to be taxed as income from House property on the basis of the Notional ALV.*

*(c) In not appreciating that one of the main objects of the assessee is to sell, lease, let, mortgage or otherwise dispose of the lands, houses, buildings and other property, apart from acquiring and developing of properties and therefore, the rental income, if at all earned, from unsold*

*properties held as stock-in-trade is liable to be taxed under the head, Income from Business.*

*(d) In not appreciating that that unless the certificate of completion of construction of the property is obtained in respect of the properties lying vacant as stock-in-trade, the ALV of the properties is not liable to be taxed on notional basis as it is illegal to reside / occupy such property and hence could not have been let out.*

*(e) In upholding the addition without returning a finding of fact as to whether it was factually feasible and practically possible at all to earn any rental income from the said unsold flats / space as the said flats were meant for sale and were not ready for immediate occupation by the prospective tenants and did not have the basic necessities like electric fittings, pucca wall painting, completion certificates etc.*

*(f) In upholding the addition without returning a finding of fact as to whether it was factually possible for the assessee to take the risk of letting out unsold flats / spaces and asking the prospective buyer to wait till the tenant vacates the flat for it to be sold and given possession.*

*(g) In not appreciating that even notional ALV needs to be arrived at based upon realities and actual facts on the ground and could not have been determined through a guess work.*

*1.4. That in the facts and circumstances of the case, learned CIT(A) erred in law as the amendment by way of insertion of sub-section (5) in section 23 of the Act vide the Finance Act, 2017 is prospective with effect from 01-04-2018 enabling taxing of unsold flats/ office spaces held as stock-in-trade and the post-amendment law cannot be applied to the pre-amendment assessment years, even if the income in respect of such properties is held to be assessable under the head, Income from House Property.*

**OTHER GROUNDS RETAINED.**

*2.1. That on the facts and in the circumstances of the case, the Learned CIT(Appeals) has erred in disallowing the entire expenditure of Rs. 9,46,22,358/- u/s 37(1) as capital nature on the ground that the same related to issue of equity shares of the company to selected Qualified Institutional Buyers by applying the ratio of the Apex Court*

*in Brook Bond India Limited vs. CIT (19.97) 225 ITR 798. He failed to appreciate that unlike in Brook Bond's case, the fund received by issue of shares was for increasing the working capital of the appellant and secondly, the issue was not a public issue but was restricted to a few Qualified Institutional Buyers only on negotiated terms.*

*2.2. That without prejudice to Ground No. 2.1, the Learned CIT(Appeals) erred in completely ignoring and not appreciating that the sum of Rs. 9,46,22,358/- included heavy expenses incurred prior to taking the decision whether to go for issue of shares or explore other alternative financial avenues could not be disallowed as expenses incurred on the issue. The disallowance could at best be restricted to expenses incurred on the issue after opting for the avenue of going in for issue.*

*2.3. That without prejudice to the foregoing grounds that the disallowable expenses relating to issue amounted only to Rs. 45,89,080 (Rs. 23,14,080/- being stamp duty paid for issue of shares, Rs. 15,000/- being cost of printing and stationery and Rs. 11,30,000/- and Rs. 11,30,000/- being fee paid to Stock Exchanges), the other expenses being not in relation to the issue of shares to Qualified Institutional Buyers could not be disallowance u/s 37(1) as capital expenditure.*

*2.4. That without prejudice to the foregoing grounds, the Learned CIT(Appeals) should have in any case out of Rs. 9,46,22,358/- allowed the sum of Rs. 27,35,440/- being the expenses incurred prior to taking the decision of going for the capital issue.*

*3. That the Appellant craves leave to add, alter or amend or forego any grounds of appeal at the time of hearing. For these and other Grounds that may be urged at the time of hearing, it is prayed that the Hon'ble Tribunal may be pleased to allow the appeal in the interest of equity and justice."*

20. Insofar as ground Nos.1.1 to 1.4 relating to ALV is concerned, the facts and circumstances are pari-materia to the dispute decided by us in the earlier part of this order for assessment year 2010-11. Our decision in the earlier paragraphs in relation to assessment year 2010-

11 applies *mutatis mutandis* herein also. The said Grounds are accordingly dismissed.

21. The only other issue which arises in this appeal is with regard to the claim made by the assessee for deduction of ₹9,46,22,358/- representing expenses incurred in connection with issue of equity shares to Qualified Institutional Buyers (QIBs). Pertinently, the relevant facts in this context, as emerging from the orders of the authorities below as well as the other material on record, are as follows.

22. During the course of assessment proceedings, the assessee company staked a claim for deduction of expenses aggregating to ₹9,46,22,358/- incurred during the year in connection with the issue of equity shares to QIBs. Assessee pointed out that in the books of account, the said expenditure was not debited to the Profit & Loss Account but was debited (or reduced) from the Share Premium Account. The assessee also referred to a 'Note' appended to the return of income whereby the entire facts in relation to the said claim of expenditure were detailed. The said Note appended to the return of income contained an averment that the aforesaid expenditure was an allowable expenditure and that the same be allowed while computing the taxable income during the assessment proceedings. We find that the Assessing Officer, in paragraph 4 of the assessment order, has taken note of such assertion of the assessee but has rejected the claim for allowability of such expenditure. As per the Assessing Officer, any expenditure incurred in connection with the issue of shares for increasing capital by a company was in the nature of a capital expenditure, following the judgment of Hon'ble Supreme Court in the case of Brooke Bond India Limited Vs. CIT – (1997) 225 ITR 798 (SC) and, therefore, the same could not be allowed as a revenue expenditure while computing the taxable income.

23. Before the CIT(A) also, the assessee did not succeed inasmuch as the CIT(A) upheld the reliance placed by the Assessing Officer on the judgment of Hon'ble Supreme Court in the case of Brooke Bond India Limited (supra) for rejecting the instant claim. Before the learned CIT(A), assessee also raised an alternative plea whereby it was canvassed that the disallowance be scaled down to exclude the expenses incurred prior to the issue of equity shares, for instance, professional services, data processing, etc., as, according to the assessee, such expenditure did not bear the character of share issue expenses. The said claim also came to be rejected by the CIT(A) following the judgment of Hon'ble Supreme Court in the case of Brooke Bond India Limited (supra).

24. In the above background, the assessee is in appeal before us on the aforestated Grounds of appeal. Before us, apart from reiterating its stand that the impugned expenditure was allowable as a deduction under Section 37(1) of the Act, a new twist has been imparted to the controversy by the appellant. In support of its claim for deduction of the impugned expenditure, it is sought to be canvassed before us that notwithstanding the claim for deduction under Section 37(1) of the Act, the impugned expenditure incurred in connection with issue of equity shares to QIBs also qualifies for deduction in terms of the provisions of Section 35D of the Act. Explaining the rationale of the aforesaid plea, which was hitherto not raised before the lower authorities, the learned representative of the assessee referred to the judgment of Hon'ble Supreme Court in the case of Shasun Chemicals & Drugs Limited Vs. CIT – [2016] 388 ITR 1 (SC), whereby it has been held that the ratio of the judgment of Hon'ble Supreme Court in the case of Brooke Bond India Limited (supra) would not be attracted in cases where the expenditure related to public issue of shares as the judgment in the case of Brooke Bond India Limited (supra) was rendered when the relevant provisions of Section 35D were not on the Statute.

Elaborating his argument, the learned counsel pointed out that the issue of shares to QIBs is liable to be regarded as issue of shares to 'Public' inasmuch as having regard to the SEBI Guidelines and the relevant Securities Contracts (Regulation) Rules, 1957, QIBs are liable to be regarded as 'Public' shareholders as distinct from 'Promoter' shareholders. On this aspect, specific reliance was placed on the decision of the Mumbai Bench of the Tribunal in the case of Yes Bank Limited – [2020] 117 taxmann.com 974 (Mumbai-Trib.) where the status of QIBs, has been examined and found to be not in the nature of 'Promoter Shareholders'. Justifying the raising of the said new plea before the Tribunal, the learned counsel pointed out that the facts necessary for adjudication of the said plea are already on record and it is a legal issue, and, therefore, such a plea can be admitted for adjudication by the Tribunal. In support, reliance was placed on the judgment of Hon'ble Supreme Court in the case of National Thermal Power Co.Limited – [1998] 229 ITR 383 (SC).

25. On the other hand, learned CIT-DR appearing for the Revenue opposed the plea of the assessee to raise the fresh alternative plea based on Section 35D of the Act. Firstly, according to learned CIT-DR, the said claim is being raised at a late stage and that no formal Ground has been filed and therefore, such fresh alternate claim may not be admitted. Secondly, the learned CIT-DR reiterated that the ratio of the judgment of Hon'ble Supreme Court in the case of Brooke Bond India Limited (supra) treats the expenditure incurred on issue of equity shares as a capital expenditure and, therefore, the instant expenditure does not fall for consideration under Section 35D of the Act. Thirdly, it was pointed out that in the past two assessment years 2007-08 and 2008-09, the expenditure incurred on the issue of shares to QIBs was disallowed by the income-tax authorities, and the same has been affirmed by the Tribunal. According to learned CIT-DR, in the earlier two years, the assessee did not put forth the alternative claim of the

deduction under Section 35D of the Act and therefore, such a plea ought not to be entertained in this year. Another plea which has been raised before us is that in case the plea is to be considered, the question as to whether or not QIBs constitute a part of public shareholding and not that of promoters' shareholding, is required to be examined, and, for that matter, the issue may be remanded back to the Assessing Officer.

26. In reply, the learned representative for the assessee pointed out that the alternative plea based on Section 35D of the Act was in support of the substantive Ground whereby the assessee has agitated the disallowance of its claim for deduction of expenditure incurred on issue of shares to QIBs. According to the learned representative, Rule 11 of the Appellate Tribunal Rules, 1963 clearly empowers the Tribunal to consider and decide the instant plea. Assailing the assertion of the learned CIT-DR that in the absence of a formal filing of Additional Ground, the aforesaid plea cannot be entertained, the learned representative referred to the judgment of Hon'ble Jurisdictional High Court in the case of Sanjay Sawhney Vs. PCIT – [2020] 116 taxmann.com 701 (Delhi), wherein it has been observed that there is no prescribed format for filing an Additional Ground and, in any case, an issue, a plea of which is interlinked with a Ground already taken, ought to be permitted to be urged by the parties. Justifying the raising of the said plea at this stage, the learned representative pointed out that since the plea was based on the judgment of Hon'ble Supreme Court in the case of Shasun Chemicals & Drugs Limited (supra) which was rendered after the passing of the impugned order of the CIT(A), the said plea could only have been raised by the assessee at the present stage; and, therefore, it was also not available to be raised in the past years.

27. In the above background, we have given our anxious thoughts to the rival submissions. At the outset, it is pertinent to observe that so far as the plea of the assessee for deduction of the impugned expenditure incurred on issue of shares to QIBs in terms of Section 37(1) of the Act is concerned, the same is liable to be decided against the assessee following the precedents in the assessee's own case. Be that as it may, the more significant plea raised before us, and which was hitherto neither raised in the past years and nor before the lower authorities in the instant year, is the claim based on the provisions of Section 35D of the Act. Notably, Section 35D(1) of the Act permits deduction by way of amortization over a period of ten years of certain expenditure specified in Sub-section (2) thereof. So far as the instant plea of the assessee is concerned, it is primarily on the basis of the provisions of Section 35D(2)(c)(iv) whereby expenditure incurred in connection with the issue of public subscription of shares of a company of the nature specified therein, qualifies for amortization under Section 35D(1) of the Act. Insofar as the nature of the instant expenditure having been incurred in connection with the issue of shares is concerned, there is no dispute between the parties. It has been explained before us that the said plea came to be raised only after the Hon'ble Supreme Court in the case of Shasun Chemicals & Drugs Limited (supra). In the case of Shasun Chemicals & Drugs Limited (supra), the expenses on the public issue of shares were claimed for amortization over a period of 10 years as one-tenth each year in terms of Section 35D of the Act. The claim was sought to be disallowed by the Revenue on the ground that the share issue expenses are not eligible for deduction in view of the judgment of the Supreme Court in Brooke Bond India Ltd. (supra). The Hon'ble Supreme Court noticed that with the introduction of Section 35D of the Act, the legal position laid down in Brooke Bond India Ltd. (supra) got altered, and that the extant case was to be decided keeping in view the provisions of Section 35D of the Act. Thus, in view of the judgement in the case of

Shasun Chemicals & Drugs Limited (supra), the fresh plea of the assessee, based on Section 35D of the Act, cannot be ousted based on the judgement of Brooke Bond India Ltd. (supra). Furthermore, it has been brought to our notice that our Coordinate Benches at Mumbai and Hyderabad in the cases of Yes Bank Limited (supra) and DCIT Vs. Deccan Chronicle Holdings Limited – [2015] 60 taxmann.com 240 (Hyd-Trib.) respectively held that the 'QIBs' are to be regarded as 'Public' in terms of the Securities Contracts (Regulation) Rules, 1957, SEBI Guidelines, etc., which are applicable to all public listed companies.

28. It is quite obvious that due to the advent of the aforesaid legal situation, which has evolved after passing of the impugned orders by the lower authorities, the assessee has raised this plea for the first time before the Tribunal. There is no controversion to the point made by the learned representative for the assessee that the judgment of Hon'ble Supreme Court in the case of Shasun Chemicals & Drugs Limited (supra) was rendered subsequent to the impugned order of learned CIT(A) and, therefore, it is only in the light of the later-evolved legal position, the said plea is being raised before the Tribunal.

29. In our considered opinion, the aforesaid fresh plea which involves a pure point of law deserves to be admitted and adjudicated. There is no denying the fact that assessee has been consistently canvassing that the expenditure incurred on issue of shares to QIBs is an allowable expenditure. Now, in the light of the judgment of Hon'ble Supreme Court in the case of Shasun Chemicals & Drugs Limited (supra), and the decisions of our Coordinate Benches in the cases of Yes Bank Limited (supra) and Deccan Chronicle (supra), the new plea of the assessee, though based on Section 35D and not Section 37(1) as pursued earlier, is in essence in furtherance of assessee's earlier stand that the impugned is an allowable expenditure. The only difference is

that for supporting its plea that the expenditure is deductible, Section 35D of the Act is being pressed into service, as distinct from the erstwhile plea of the expenditure being deductible under Section 37(1) of the Act. Therefore, the fresh plea based on Section 35D of the Act is very much interlinked with the original claim being pursued by the assessee and, in any case, having regard to the judgment of Hon'ble Supreme Court in the case of National Thermal Power Co.Limited (supra), the said plea deserves to be admitted. Ostensibly, the Hon'ble Supreme Court in the case of National Thermal Power Co.Limited (supra) has laid down that a fresh plea which involves a pure point of law for which the necessary facts are already on record and which is bonafidely raised and is relevant to decide the tax liability of an assessee, should be allowed to be raised even for the first time before the appellate authorities. Having regard to the circumstances in which the said plea has been raised before us, which we have already noted in some detail above, in our view, the same, being a point of law for which the relevant facts are on record, and being bonafidely raised and being relevant for assessing the correct liability of the assessee, deserves to be admitted for adjudication.

30. As regards the objection of the learned CIT-DR that there has been no formal filing of Additional Ground and therefore such a plea cannot be entertained is concerned, the same, in our view, is too technical an approach. Admittedly, there is no format prescribed yet for filing of an Additional Ground before the Tribunal. In any case, in our considered opinion, the instant is not a case of an Additional Ground in abrogation of an earlier claim, but is merely an alternative claim based on a legal position propounded by the Hon'ble Supreme Court. In this context, we may refer to the following observation of Hon'ble Punjab & Haryana High Court in the case of M/s VMT Spinning Co.Ltd. – 389 ITR 326, wherein it has been held that the Tribunal would

be within its power to entertain such like alternative claims made by an appellant in terms of Rule 11 of the Appellate Tribunal Rules, 1963:-

*“the Rule 11 of the ITAT Rules in fact confers wide powers on the Tribunal and although it requires a party to seek the leave of the Tribunal, it does not require the same to be in writing. It merely states that the appellant shall not, except by leave of the Tribunal, urge or to be heard in support of any ground not set forth in the memorandum of appeal. In a fit case it is always open to the Tribunal to permit an appellant to raise an additional ground not set forth in the memorandum of appeal. The safeguard is in the proviso to rule 11 itself.”*

31. In view of the aforesaid, we find no reasons to restrict the assessee from raising a plea for deduction of the impugned expenditure based on Section 35D of the Act. At the time of hearing, the aforesaid was put across to the parties and the merits of the claim have also been argued before us.

32. Insofar as the merit of the claim is concerned, we have already noted hereinabove the relevant provisions of Section 35D of the Act. The Hon'ble Supreme Court in the case of Shasun Chemicals & Drugs Limited (supra) addressed the issue as to whether expenses incurred towards public subscription of shares in the case of a company were allowable under Section 35D of the Act. In this context, the following discussion in the judgment of Hon'ble Supreme Court is relevant :-

*“13. In the Income Tax Return which was filed for the Assessment Year 1995-96 the assessee had claimed that it had incurred a sum of Rs.45,51,890/- towards the share issue expenses and had claimed 1/10th of the aforesaid share issue expenses under Section 35D of the Act from the Assessment Years 1995-96 to 2004-05. This claim of the assessee was found to be justified and allowable under the aforesaid provisions and on that basis 1/10th share issue expenses was allowed under Section 35D of the Act. When it was again claimed for the Assessment Year 1996-97, though it was disallowed and on directions of the Appellate Authority, the Assessing Officer made physical*

*verification of the factory premises. He was satisfied that there was expansion of the facilities to the industrial undertaking of the assessee. It is on this satisfaction that for the Assessment Year 1996-97 also the expenses were allowed. Once, this position is accepted and the clock had started running in favour of the assessee, it had to complete the entire period of 10 years and benefit granted in first two years could not have been denied in the subsequent years as the block period was 10 years starting from the Assessment Year 1995-96 to Assessment Year 2004- 05. The High Court, however, disallowed the same following the judgment of this Court in the case of Brook Bond India Ltd (supra). In the said case it was held that the expenditure incurred on public issue for the purpose of expansion of the company is a capital expenditure. However, in spite of the argument raised to the effect that the aforesaid judgment was rendered when Section 35D was not on the statute book and this provision had altered the legal position, the High Court still chose to follow the said judgment. It is here where the High Court went wrong, the instant case is to be decided keeping in view the provisions of Section 35D of the Income Tax Act, 1961 (hereinafter called 'the Act'). In any case, it warrants repetition that in the instant case under the very same provisions benefit is allowed for the first two Assessment Years and, therefore, it could not have been denied in the subsequent block period. We, thus, answer question No. 1 in favour of the assessee holding that the assessee was entitled to the benefit of Section 35D for the Assessments Years in question.*

*(Underlined for Emphasis by us)*

33. The aforesaid discussion clearly shows that the impugned expenditure incurred in connection with issue of shares be considered in terms of Section 35D of the Act even if before the lower authorities, the claim revolved around Section 37(1) of the Act only. In fact, in the case before the Hon'ble Supreme Court, the matter by the lower authorities was considered in the light of the earlier judgment of Hon'ble Supreme Court in the case of Brooke Bond India Limited (supra), an approach which was not approved by Hon'ble Supreme Court having regard to the fact that Section 35D of the Act came on the Statute after the rendering of the decision in the case of Brooke

Bond India Limited (supra). Therefore, in our view, the instant claim of the assessee would fall for consideration in terms of Section 35D of the Act provided of course, the expenditure is in connection with issue of 'Public subscription' of shares as per Section 35D(2)(c)(iv) of the Act.

34. The case set-up by the assessee is that the expenditure incurred on issue of shares to QIBs is for public subscription of shares inasmuch as QIBs constitute 'Public Shareholders' and do not form part of 'Promoter Shareholders'. In support of this, the following discussion of the Coordinate Bench in the case of Yes Bank Limited (supra) is relevant :-

*"6.2. Further; we find that the appellant being a listed company is bound by Listing Agreement", which provides for the disclosure requirements for the share holding pattern of a listed company. As can be seen therefrom, there are only two categories of shareholders- "promoter/promoter group" and "public". For the definition of these terms in clause 35, reference is made to clause 40A of the Listing Agreement. As can be seen therefrom, Mutual Funds/Financial Institutions which are QIBs are classified under "public shareholding". The terms are defined in clause 40A of the SEBI Listing Agreement. Further, the listing agreement takes us to Securities Contracts (Regulation) Rules, 1957 (in short "SCRR"). Also Rule 19(2)(b) and Rule 19A of the SCRR provide that companies are required to maintain minimum public shareholding of 25% in case of first time listing and in case of continuous listing agreement respectively. In this context, we may refer to section 2(d) of SCRR defining the term "public". It (public) is defined to mean any person other than the promoter, promoter group, subsidiaries and associates of the company. Thus any person other than these four qualify to be considered as public. As can be seen from the list of QIBs to whom shares are issued, the shares are not issued to any of the aforesaid category. Thus QIBs, not being promoters, promoter group, subsidiaries and associates of the company would qualify as "public".*

*As specified in clause 40A(ii) of the listing agreement, public shareholding can be increased by any of the modes specified therein to comply with Rule 19(2) and 19A of*

*SCRR. One such note is the issue of IIP in accordance with Chapter VIIIA of the SEBI-ICDR. Chapter VIIIA has been included to provide for fresh issue of shares to comply with minimum shareholding requirement in Rule 19(2) and 19A of SCRR. Reg. 91B defines IPP as a further public offer made only to QIBs. These regulations provide that when a company has a public shareholding lower than the requirements specified, then the company may issue IPP to QIBs and raise the public shareholding to the required levels. It thus implies that QIBs form part of public. Further, even Reg. 82 which gives conditions for QIP, provides that the same must be in compliance with the requirements of public shareholding.*

*That “a section of public qualifies as public” has been clarified in Nitta Gelatine India Ltd. (supra) and Andhra Chamber of Commerce (supra)”*

*(Underlined for Emphasis by us)*

35. The aforesaid detailed discussion by our Coordinate Bench clearly establishes that the QIBs qualify to be treated as public shareholders in terms of the SEBI listing requirements. Therefore, the most pertinent condition prescribed in Section 35D(2)(c)(iv) of the Act, i.e., the expenditure is in connection with ‘public subscription’ of shares stands fulfilled.

36. At this stage, we may also refer to the plea of the learned CIT-DR that the matter may be remanded back to the Assessing Officer to ascertain whether QIBs are public shareholders or not? In our considered opinion, remanding the matter on this aspect to the Assessing Officer would only prolong the litigation and not achieve any substantive purpose. We have perused the assessment order and the discussion made by the Assessing Officer in this regard. In Paragraph 4, the Assessing Officer has discussed the plea of the assessee for allowability of expenses incurred in connection with issue of equity shares to QIBs. The submissions of the assessee, which have been reproduced by the Assessing Officer in the assessment order, inter-alia contain a reference to the Note appended with the return of income as

well as the furnishing of details of the expenditure in question aggregating to ₹9,46,22,358/-. In fact, it has also been asserted in the submissions that the share placement document which was in the form of a printed booklet along with other documents in connection with the issue of shares was also furnished before the Assessing Officer. None of the assertions have been found to be wrong in any manner. The claim of the assessee has been negated by the Assessing Officer on a single point, i.e., that the expenditure in connection with the issuance of shares for increasing capital by a company is a capital expenditure following the judgment of Hon'ble Supreme Court in the case of Brooke Bond India Limited (supra). Therefore, it is not a case where the fresh alternate plea of the assessee, based on Section 35D of the Act, is required to be examined on the basis of any fresh facts or material, which was hitherto not before the Assessing Officer. The short point is as to whether the ratio of the judgment of Hon'ble Supreme Court in the case of Brooke Bond India Limited (supra) would apply in the context of claim under Section 35D or not? This aspect is clearly answered by the Hon'ble Supreme Court in the case of Shasun Chemicals & Drugs Limited (supra). Furthermore, on the issue of classification of QIBs as a part of 'public shareholders' is concerned, the said issue is covered by the decision of our Coordinate Benches. Thus, the alternative plea of the assessee with regard to the allowability of expenditure of ₹9,46,22,358/- incurred on issue of shares to QIBs is allowable in terms of Section 35D of the Act. So, however, while upholding that the expenditure in question qualifies for the deduction under Section 35D of the Act, we restore the matter to the Assessing Officer for the limited purpose for quantifying such expenditure having regard to the provisions of Section 35D of the Act.

37. In conclusion, we reiterate that so far as the claim of deduction under Section 37(1) of the Act is concerned, the same is decided against the assessee but the claim under Section 35D of the Act is

allowed in terms of our above discussion. Thus, assessee partly succeeds in this Ground of appeal.

38. Now, we take up the appeal of the assessee in ITA No.792/Del/2015 for assessment year 2012-13, which is directed against the order of learned CIT(A)-24 (erstwhile CIT(A)-31), New Delhi dated 27<sup>th</sup> November, 2014, which in turn has arisen from the order of DCIT, Central Circle-20, New Delhi dated 28<sup>th</sup> May, 2014.

39. As was the case in assessment year 2010-11, herein also, the assessee has filed revised and Additional Grounds of appeal as well as the Grounds filed originally along with the Memorandum of Appeal. The original Grounds as well as revised and additional grounds filed (which, inter-alia, subsume the original Grounds of appeal), are reproduced hereunder :-

Original Grounds :-

*“1.1 That on the facts and in the circumstances of the case, the learned CIT(A) has erred in law in confirming the addition of notional Annual Letting Value of Rs.5,19,06,540/- (out of Rs.5,66,49,424/-) on closing stock of flats/spaces by following the Hon’ble Delhi High Court’s decision in which various relevant facts were not fully brought out before their Lordships and therefore could not be considered by them.*

*1.2 That without prejudice to the Ground No.1.1 above, the appellant has also filed an appeal before the Apex Court which has been admitted and is pending for decision.*

*2. That without prejudice to the foregoing ground, the decision rendered by Hon'ble Delhi High Court related to the assessment year 1988-89 and rendered in the context of the provisions of section 23 as they existed prior to substitution by the Finance Act, 2001 w.e.f. 1.4.2002. The learned CIT(A) failed to consider the issue in the light of the amended provisions as applicable to the year under appeal which were substantially different. The issue should have*

*been reconsidered and decided in the light of the amended provisions.*

*3.1 That on the facts and circumstances of the case, the learned CIT(Appeals) has erred in confirming the rejection of the appellant's claim that the surplus of Rs.70.06 crores arising on the transfer of infrastructure assets to its wholly owned subsidiary company Ansal API Infrastructure Limited was exempt u/s 47(iv) on the erroneous grounds :-*

*a) that no sufficient material was there to take a view that the surplus arising out of transfer was capital in nature; and*

*b) that since the receipt was on account of assets employed in the business that receipt could not be treated as of capital assets.*

*No specific query or requirement was raised by the learned CIT(Appeals) during the hearing. All the required evidence was filed.*

*Further, that these capital assets were employed in the business could not alter their capital nature.*

*3.2 That the learned CIT(Appeals) failed to appreciate that infrastructure assets, like trunk roads, trunk sewer network, power distribution network assets etc under construction/development were to be held as capital assets. It was on the transfer of these assets under construction/development that the surplus was realized and the provisions of section 47(iv) were squarely applicable in the case.*

*4. That the Appellant craves leave to add, alter or amend or forego any grounds of appeal at the time of hearing."*

Revised & Additional Grounds :-

*"The Appellant most respectfully prays that the Hon'ble Tribunal may be pleased to allow the admission of additional Grounds of Appeal and redrafting of Ground Nos.1.1, 1.2, & 2 originally taken in Form No.36 for the following reasons.*

- (i) *The Grounds are not conscience and they are not assigned any distinct heads,*
- (ii) *It is considered necessary as well as appropriate to reframe the Grounds of appeal to set-out the relevant facts in right and proper perspective, and;*
- (iii) *The additional Grounds go to the root of the matter and does not require consideration of any material evidence outside the record.*

*1.2 It is settled law that legal grounds are allowed to be taken before the Hon'ble Tribunal. The Hon'ble Supreme Court reiterated this settled legal position in the case of the CIT vs Singhad Technical Education Society, Civil Appeal No.11080 of 2017, where the legal ground on recording of satisfaction u/s 153C was taken for the first time as additional Ground before the Hon'ble Tribunal, which the Revenue had objected. Reliance is also placed on the decision of the Larger Bench (3 Member) of Hon'ble Supreme Court in National Thermal Power Co.Ltd., (1998) 229 ITR 383 (SC).*

*1.3 For the sake of clarity and convenience, the additional Grounds and the revised/reframed Grounds are merged and set-out as under.*

*NOTIONAL ANNUAL LETTING VALUE (ALV).*

*1.1. That in the facts and circumstances of the case and in law, learned CIT(A) erred in upholding an addition of Rs. 5,19,06,540/- (out of Rs.5,66,49,424/-) under the head 'income from house property' without appreciating that the properties in question were 'stock-in-trade' of the assessee's business and provisions relating to S.22 to S.26 of IT Act are not at all applicable to property forming part of stock-in-trade in the business of the Assessee as argued by the Revenue itself before the Hon'ble High Court in the case of Commissioner Of Income Tax vs Neha Builders (P) Ltd. (2008) 296 ITR 661 (Guj) and approved by the Hon'ble High Court way back in 2006.*

*1.2. That in the facts and circumstances of the case, learned CIT(A) erred in upholding an addition of Rs. 5,19,06,540/- (out of Rs.5,66,49,424/-) under the head 'income from house property' without appreciating that S.23 of the Income Tax Act 1961 has undergone*

*amendment vide Finance Act 2001 w.e.f. 1.4.2002 and old law cannot be applied to the year under consideration.*

*1.3. Without prejudice to the above ground no. 1.1, learned CIT(A) erred:-*

*(a). In not appreciating that the question of taxation of ALV of unsold flats/office spaces, lying vacant and held as stock-in-trade, arises only when a finding is recorded, having regard to the objects of the Memorandum and Articles of Association of the Appellant- Company, that income from such unsold properties is liable to be taxed under the head 'Income from House Property', and not as Business Income in the light of the decision of the Hon'ble Supreme Court in the case of Chennai Properties and Investments Ltd vs Commissioner of Income Tax Central II Tamil Nadu (in Civil Appeal Nos 4491 to 4494 of 2004).*

*(b). In not appreciating that without examining the Memorandum of Association (MOA) and its Object Clauses, it is not permissible to arrive at any finding or conclusion that income from unsold flats/office spaces, lying vacant and held as stock-in-trade, is liable to be taxed as income from House property on the basis of the Notional ALV.*

*(c) In not appreciating that one of the main objects of the assessee is to sell, lease, let, mortgage or otherwise dispose of the lands, houses, buildings and other property, apart from acquiring and developing of properties and therefore, the rental income, if at all earned, from unsold properties held as stock-in-trade is liable to be taxed under the head, Income from Business.*

*(d) In not appreciating that that unless the certificate of completion of construction of the property is obtained in respect of the properties lying vacant as stock-in-trade, the ALV of the properties is not liable to be taxed on notional basis as it is illegal to reside / occupy such property and hence could not have been let out.*

*(e) In upholding the addition without returning a finding of fact as to whether it was factually feasible and practically possible at all to earn any rental income from the said unsold flats / space as the said flats were meant for sale and were not ready for immediate occupation by the prospective tenants and did not have the basic necessities like electric fittings, pucca wall painting, completion certificates etc.*

(f) *In upholding the addition without returning a finding of fact as to whether it was factually possible for the Assessee to take the risk of letting out unsold flats / spaces and asking the prospective buyer to wait till the tenant vacates the flat for it to be sold and given possession.*

(g) *In not appreciating that even notional ALV needs to be arrived at based upon realities and actual facts on the ground and could not have been determined through a guess work.*

1.4 *That in the facts and circumstances of the case, learned CIT(A) erred in law as the amendment by way of insertion of sub-section (5) in section 23 of I.T. Act vide the Finance Act, 2017 is prospective with effect from 01-04-2018 enabling taxing of unsold flats/office spaces held as stock-in-trade and the post-amendment law cannot be applied to the pre-amendment assessment years, even if the income in respect of such properties is held to be assessable under the head, Income from House Property.*

#### SURPLUS AND SECTION 47(iv)

2.1. *That in the facts and circumstances of the case, learned CIT(A) erred in confirming the rejection of the appellant's claim that the surplus of Rs. 70.06 crores arising on transfer of its capital asset namely infrastructure assets to its wholly owned subsidiary, M/s Ansal API Infrastructure Ltd., is not taxable without appreciating that such transfer of capital asset by a company to its wholly owned subsidiary is not a 'transfer' as per section 47(iv) of the Act and accordingly the surplus should not be included in computing the total income of the Company.*

2.2. *The learned AO failed to appreciate that mere inclusion of surplus as income in the Return filed is not a bar for allowing the exemption u/s 47(iv), since the total income, as defined in section 2(45) of the Act, ought to be computed in the manner laid down under the Act as per the settled Law and that there is no estoppel against the Law and due claim in this regard was duly made.*

2.3. *The learned CIT(A) erred in confirming the addition on the ground of insufficiency of material without raising any query during the appeal proceedings and ignoring that the relevant material facts were already part of the records*

*and sufficient enough to uphold the Assessee's claim which had been rejected arbitrarily by the learned AO.*

*GENERAL GROUND (as per the original Grounds of Appeal numbered 4 – now renumbered as 3).*

*3. The Appellant craves leave to add, alter or amend or forego any grounds of appeal at the time of hearing.*

*For these and other Grounds that may be urged at the time of hearing, it is prayed that the Hon'ble Tribunal may be pleased to allow the appeal in the interest of equity and justice."*

40. Insofar as Ground Nos.1.1 to 1.4 relating to ALV are concerned, the facts and circumstances are pari-materia to the dispute decided by us in the earlier part of this order for assessment year 2010-11. Our decision in the earlier paragraphs in relation to assessment year 2010-11 applied mutatis mutandis here also. The said Grounds are accordingly dismissed.

41. The only other issue which arises in this appeal is with regard to the claim of the assessee with regard to the surplus of ₹70.06 crores arising on transfer of its capital asset, viz., infrastructure assets to its wholly owned subsidiary M/s Ansal API Infrastructure Ltd. (in short, AAIL). The primary dispute on this aspect is with regard to Section 47(iv) of the Act whereby the claim of the assessee is that the "transfer" in question is not exigible to the charge of capital gains under Section 45 of the Act. On this issue also, the assessee has revised the original Ground of Appeal but, in sum and substance, Ground No.3.2 in the original Memorandum of Appeal and Ground Nos.2.1 to 2.3 in the Revised Grounds of Appeal are substantially the same.

42. The relevant facts in this regard are that the assessee company was shortlisted by the Government of Uttar Pradesh for development of a Hi-Tech Township at Sultanpur Road, Lucknow under the Hi-Tech

Township Policy of the Government of Uttar Pradesh of November, 2003. In terms thereof, assessee started construction of certain infrastructure which would hitherto be described as Trunk Infrastructure Assets (in short, TIA) since earlier years. During the year under consideration, the said TIA or the capital work in progress were transferred to one AAIL. It is to be noted that AAIL was a Special Purpose Vehicle (SPV) set up by the assessee as a 100% subsidiary for the development and maintenance of the infrastructure in the Sushant Golf City, i.e., the Hi-Tech Township being developed by the assessee in terms of the Award by the Government of Uttar Pradesh. It appears from the record that such assets were transferred to AAIL at Fair Market Value in terms of the Infrastructure & Maintenance Development Agreement dated 17<sup>th</sup> March, 2012, a copy of which has also been placed in the Paper Book filed before us. This transfer resulted in a surplus of ₹70.05 crores which was credited to the Profit & Loss Account. In the Return of income filed, the aforesaid surplus remained a part of the income computed i.e., that such surplus was not excluded from the total income declared in the Return of income. However, in the Return of income, a Note No.3 was annexed which has also been reproduced by the Assessing Officer in Paragraph 4 of his assessment order. In terms of the assertions made in the said Note, assessee sought exclusion of such surplus from the total income on the ground that such surplus being a result of transfer of infrastructure assets/capital work-in-progress to a 100% subsidiary, the same was not liable for capital gains in terms of Section 47(iv) of the Act. In the said Note, reference was also invited to Note 32(c) appearing in the notes accompanying the Annual financial statements, which detailed the subject transfer.

43. During the assessment proceedings, the Assessing Officer required the assessee to explain the position and accordingly, assessee made submissions by reiterating the Note annexed to the

return of income, which we have noted above. The Assessing Officer did not accept the submission of the assessee primarily for the reason that the assessee itself has offered for taxation and further that the assessee did not furnish anything to prove that the amount was exempt from tax.

44. Before the CIT(A), assessee submitted that the conclusion drawn by the Assessing Officer was not justified and that Section 47(iv) of the Act clearly brought out that transfer of such infrastructure assets/capital work-in-progress was not regarded as a transfer for the purpose of charge of capital gains. We find that the CIT(A) also sustained the decision of the Assessing Officer by a very brief discussion in Paragraph 4.7.2 of his order. The sum and substance of the reasoning taken by the CIT(A) is to the effect that the instant surplus was on account of the transfer of assets employed in the business and, therefore, the same was not exempt as claimed by the assessee.

45. In this background, the learned Representative for the assessee vehemently pointed out that both the lower authorities have rejected the claim on superficial ground inasmuch as sufficient details were available before them to examine the justified claim of the assessee in terms of Section 47(iv) of the Act. It was pointed out that Section 47(iv) of the Act related to transfer of capital assets to a 100% Indian subsidiary which was the instant case. Referring to various material filed before the lower authorities including the Annual Financial Statements for the year under consideration, it was pointed out that the transferee being a 100% subsidiary i.e., AAIL and the transfer being of an infrastructure asset or capital work-in-progress, the conditions of Section 47(iv)(a) stood satisfied.

46. On the point of law, it was canvassed that the Coordinate Bench of the Delhi Tribunal in the case of Mother Dairy Fruits & Veg.(P) Ltd. – (2011) 45 SOT 186 (Delhi), considered the transfer of a work-in-progress to a 100% subsidiary in the context of Section 47(iv) of the Act and concluded that such surplus was not chargeable to tax as capital gains. In this manner, the claim of the assessee for exclusion of the surplus on transfer of capital work-in-progress to AAIL was sought to be justified.

47. On this point, the learned DR filed written submissions and did not controvert the legal position sought to be canvassed by the assessee in principle but contended that the arrangement of transfer i.e., the Infrastructure and Maintenance Development agreement dated 17<sup>th</sup> March, 2012 has not been analyzed by any of the authorities below and therefore, the matter may require further examination at the level of the Assessing Officer or the CIT(A). It is sought to be pointed out that the CIT(A) has also observed that the surplus is on account of transfer of assets employed in the business and therefore, on this count also, the impugned surplus could not be held as exempt in terms of Section 47(iv) of the Act.

48. In reply, the learned counsel for the assessee vehemently argued that the argument taken by the learned CIT-DR was non starter inasmuch as the entire material was before the Assessing Officer as well as before the CIT(A). It was asserted that the findings of the Assessing Officer as well as the CIT(A), though adverse to the assessee, have been recorded only after examining the relevant material and therefore, there was no justification for the learned DR to seek the remanding of the matter back to the lower authorities. It was pointed out that merely because there was no adverse finding with regard to any of the clauses of the Infrastructure & Maintenance Development Agreement dated 17<sup>th</sup> March, 2012, it could not be said

that the necessary transfer arrangement before the assessee and its 100% subsidiary i.e., AAIL has not been examined by the lower authorities. Our attention was drawn to the copy of the agreement placed in the Paper Book which, according to the learned counsel, was very much before the lower authorities. It was pointed out that in the absence of any contrary material or the finding pointed out by the learned DR as to how the conditions prescribed in Section 47(iv) are not satisfied in the instant case, merely making out a new case for remanding of the matter back to the lower authorities, was not justified. It was pointed out that the necessary material required to decide the impugned controversy clearly forms a part of record of proceedings before the lower authorities and therefore, the plea of the learned DR be rejected.

49. We have carefully considered the rival submissions. Section 47(iv) of the Act prescribes that nothing contained in Section 45 shall apply to the transfers specified therein, which inter-alia include Sub-section (4) enumerating transfer of a capital asset by a company to its subsidiary company. The only condition prescribed is that the holding company or its nominee shall hold the whole of the share capital of the subsidiary company and that the subsidiary company is an Indian company.

50. In the instant case, the transfer in question is of certain infrastructure assets or capital work-in-progress in terms of an Infrastructure & Maintenance Development Agreement dated 17<sup>th</sup> March, 2012 between the assessee and its subsidiary i.e., AAIL. We have perused the said Agreement dated 17<sup>th</sup> March, 2012 (supra) and note that it involves transfer of certain facilities constructed by the assessee at Sushant Golf City, a project which was being developed by the assessee in terms of an Award by the Government of Uttar Pradesh. In terms of the Agreement, it is seen that the assessee was

awarded the project to develop Sushant Golf City spread over 3530 acres and in two parts viz., Mother City and Extension City, each comprising of 1765 acres. The assessee was responsible for development of Trunk Infrastructure of the entire project consisting of developing the roads, water and power supply, sewage and draining systems, security, parks and gardens, street lights, solid waste management, etc. It is seen that the Award by the Government of Uttar Pradesh authorized the assessee to collect user charges for development, operation and maintenance of such Trunk Infrastructure. The assessee had started construction of such Trunk Infrastructure in the Mother City since the Award of the contract. During the year, it was decided that the work pertaining to the construction and development of infrastructure facilities in the Mother City and the provision of maintenance services in the Mother City be undertaken through a special purpose vehicle for which AAIL was set up as a 100% subsidiary. To give effect, the Infrastructure Development and Maintenance Agreement dated 17<sup>th</sup> March, 2012 was entered into. In terms of the said Agreement, the responsibilities of the AAIL evolved development, constructing and managing the Trunk Infrastructure at his own cost after the transfer from the assessee on 1.4.2011 at fair market value. So, however, in terms of Clause 3.2, AAIL had no right to transfer or sell this Trunk Infrastructure to any party without prior consent of the assessee. AAIL was also authorized to connect and linking of the infrastructure for which it was to receive payments from assessee on the basis of running bills. The subsidiary was responsible for the operation upkeep and maintenance of the infrastructure facilities. The subsidiary was also responsible to provide the maintenance services to end users in the Mother City and also charge and collect end user fees which shall go into the Trust and Retention Account of the lenders. The agreement also provided that in order to enable AAIL to carrying out its responsibilities, assessee undertook to

stand guarantee to the lenders/financiers and to make advance payments in case of shortfalls faced by AAIL in servicing its debts.

51. In sum and substance, the terms of the agreement bring out that the development and maintenance of the Trunk Infrastructure was the responsibility of the assessee in terms of the project awarded by the Government of Uttar Pradesh. The assessee was to earn user charges etc. from this asset in terms of the Award by the Government of Uttar Pradesh. This Trunk Infrastructure was transferred to AAIL for the reason that the assessee desired that the infrastructure related work and its maintenance and servicing to end users by a Special Purpose Vehicle. The supporting infrastructure for linking the Trunk Infrastructure to end users was being developed by the assessee itself but through AAIL. Another important feature was that AAIL was not permitted to transfer the Trunk Infrastructure to any third party.

52. In terms of the aforesaid factual background, the case made out by the assessee is that the Trunk Infrastructure or the capital work-in-progress developed by it as on 1.4.2011 was transferred at fair market value to its 100% subsidiary AAIL resulting in a surplus of ₹17.05 crores. Although the said surplus was not excluded from the total income in the return of income, the claim of the assessee was that this surplus was exempt in terms of Section 47(iv) of the Act. Quite clearly, the Trunk Infrastructure assets which have been transferred in terms of the Agreement was a capital asset of the assessee because it was employed as a Profit earning apparatus. This was transferred at fair market value to a wholly-owned subsidiary AAIL and therefore, Section 47(iv) clearly comes into picture. Notably, Section 45 of the Act provides that any profits and gains arising from a transfer of a capital asset effected in the previous year will be chargeable to income tax under the head 'capital gains'. Such capital gains are deemed to be the income of the previous year in which such transfer took place.

Section 47 enumerates a list of transactions which would not be considered as a transfer under Section 45(1) of the Act, which, inter-alia includes Sub-section (iv) prescribing for transfer of a capital asset by a company to its wholly-owned Indian subsidiary. From the aforesaid legal position and the terms of arrangement available before us, it is evident that the transfer in question is of a capital asset under development i.e., capital work-in-progress and such transfer being to a 100% subsidiary, cannot be treated as a transfer for the purpose of Section 45 of the Act in view of Section 47(iv) of the Act. The reliance placed by the learned Representative of the assessee on the decision of our Coordinate Bench in the case of Mother Diary Fruits & Veg.(P) Ltd. (supra) is quite apt under the present circumstances.

53. The case of the Income-tax Authorities, that it was a transfer of 'an asset employed in the business' and therefore Section 47(iv) is not attracted, is quite unjustified and untenable. It does not require much gain saying that even the capital assets owned by a business are employed in the business but the same does not obliterate the difference between the capital asset and revenue/trading assets. The second aspect considered by the Income-tax Authorities viz., that assessee had itself offered the same for taxation in the Return of income does not take the case of the Revenue any further. Ostensibly, the assessee did not exclude such income from the total income in the Return of income but claimed it by way of a Note forming part of the Return of income, and more importantly, also raised this issue during the assessment proceedings. Obviously, during assessment proceedings, the Assessing Officer has considered the efficacy of such a claim and disagreed with the assessee and denied the exemption claimed under Section 47(iv) of the Act. It is a well-settled legal proposition that the claims made by the assessee have to be examined in the light of the applicable factual and legal position and not merely on the basis of the position taken in the financial statements or

otherwise. In this view of the matter, we do not find the stand of the CIT(A) or the Assessing Officer to be tenable in this regard. Insofar as the plea of the learned DR to remand the matter back to the lower authorities is concerned, the same, in our view, is not, at all, merited. It has been demonstrated by the assessee before us, and which has not been controverted by the learned DR, that the entire material was before the lower authorities and there is nothing to show that the same has not been examined by the lower authorities. Therefore, considering the entirety of the circumstances, and in view of the aforesaid discussion, we hereby allow the claim of the assessee.

54. In the result, the appeal of the assessee is partly allowed.

Above decision was announced in the open Court on 16.07.2021.

Sd/-

**(SUCHITRA KAMBLE)**  
**JUDICIAL MEMBER**

Sd/-

**(G.S. PANNU)**  
**VICE PRESIDENT**

VK.

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

Assistant Registrar