

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'D' BENCH, MUMBAI**

**[Coram: Pramod Kumar (Vice President),
and Amarjit Singh (Judicial Member)]**

ITA No. 735/Mum/2019
Assessment year: 2015-16

M/s. Dosti Corporation (Pinnacle)Appellant
*Natvarlal Vepari & Co., Chartered Accounts,
Oricon House, 4th Floor, 12, K. Dubash Marg,
Fort, Mumbai -400023 [PAN: AAGFD2142J]*

Vs

Income Tax Officer, Ward-17(1)(4)
MumbaiRespondent

Appearances by

Ruchi Tamhankar *for the appellant*
Bharat Andhle *for the respondent*

Date of concluding the hearing : June 06, 2021
Date of pronouncing the order : September 3, 2021

O R D E R

Per Pramod Kumar, VP:

1. This appeal, filed by the assessee, is directed against the order dated 27th November 2018 passed by the Assessing Officer, under section 143(3) r.w.s. of the Income Tax Act, 1961, for the assessment year 2015-16.

2. Grievances raised by the appellant are as follows:

1. *The Commissioner of Income-tax (Appeals)-28, Mumbai erred in confirming the addition of Rs. 7,16,098/- made by the Assessing Officer (AO) as deemed rental income in respect of unsold stock of units.*

2. *The appellant submits that the appellant is in the business of development of properties and the unsold units shown as closing stock under the head 'current assets' are part of the business of the appellant profit of which is chargeable to Income tax and therefore not liable to tax in respect of unsold stock of units.*

3. *The CIT(A) erred in not following the decision of Mumbai Tribunal in the case of C R Developments Pvt. Ltd. vs DCIT (ITA No. 4277/Mum/2012 dated 13th May 2015) wherein the Tribunal following the ratio laid down by the Supreme Court in the case of*

M/s. Chennai Properties and Investments Ltd. vs CIT (2015) 56 taxmann.com vide judgement dated 9th April 2015 held that it did not find justification in the order of the AO for estimating rental income from vacant flats u/s. 23 which is the assessee's stock in trade as at the end of the year.

3. When this appeal came up for hearing learned representatives fairly agree, even as learned Departmental Representative duty fully relied upon the authorities below, when the issue in appeal is covered in favour of the assessee by the decision of the coordinate bench in the case of **M/s. Saranga Estates Pvt. Ltd., vs DCIT** which, *inter alia*, it is observed as follows:-

7. We have heard the rival submissions. The Ld. AR at the outset placed reliance on the decision of Hon'ble Gujarat High Court in the case of CIT vs. Neha Builders Pvt. Ltd., reported in 296 ITR 661 (Guj) which had held that where the property was held as stock in trade of the assessee, then the said property would partake character of stock and any income derived from stock would be income from business and not income from house property. In the instant case, admittedly, the assessee had treated the unsold flats at Jolly Bhavan and Aurovilla as its stock in trade. It is not in dispute before us that the assessee had not let out its unsold flats at Jolly Bhavan and Aurovilla to any person and had rather actually occupied the same for the purpose of its business. Hence, there cannot be any assessment of notional rental income or deemed rental income under the head 'income from business' in the absence of specific provisions contained in the statute. At this juncture, it would be pertinent to note that the amendment brought in by the Finance Act 2017 w.e.f. 01/04/2018 wherein a new sub-section (5) has been inserted in Section 23 of the Act wherein the properties held as stock in trade which are not let out during the previous year, the annual value of the said property, for a period up to one year from the end of the financial year in which the certificate of completion of construction and property is obtained from the competent authority, shall be taken to be nil. This amendment brought in Section 23 sub-section(5) of the Act is effective only from A.Y.2018-19 onwards and cannot be applied retrospectively. Hence, there cannot be any addition that could be made based on notional rental income or deemed rental income in the hands of the assessee in respect of unsold flats held as stock in trade by the assessee during the year under consideration under the head 'income from business' also. We have already held that the rental income, if any, derived from properties held as stock in trade cannot be assessed as income from house property by placing reliance on the decision of Hon'ble Gujarat High Court referred to supra. We find that the Delhi High Court in the case of Ansal Housing Finance referred to supra had held the decision in favour of the revenue which are on the very same set of facts. We find when there are divergent views given by two non-Jusisdictional High Courts by interpreting the provisions of the Act, then the construction that is favourable to the assessee should have to be construed. Reliance in this regard is placed on the decision of Hon'ble Supreme Court in the case of CIT vs. Vegetable Products reported in 88 ITR 192 (SC).

7.1. In any case, this issue had been duly adjudicated by the Co-ordinate Bench of this Tribunal in the case of Chamber Construction Pvt. Ltd., vs. DCIT in ITA No.4418/Mum/2017 for A.Y.2012-13 dated 30/11/2018 wherein it has been held as under:-

"7. We have heard the authorized representatives of both the parties, perused the orders of the lower authorities and the material available on record. We find that our indulgence has been sought by the assessee by preferring the present appeal, for adjudicating as to whether the CIT(A) is right in law and facts of the case in

concluding that the deemed notional lettable value of the completed unsold flats held by the assessee company as stock-in-trade was liable to be determined and brought to tax under the head „Income from house property“. We find from a perusal of Sec. 22 of the Act that the „annual value“ of any property consisting of any building or land appurtenant thereto of which the assessee is the owner, other than such portions of such property as he may occupy for the purposes of any business or profession carried on by him the profits of which are chargeable to income tax, shall be chargeable to income tax under the head „Income from house property“. Further, the determination of the „annual value“ of the property is envisaged in Sec. 23 of the Act. Sec. 23(1)(a) contemplates that the sum for which the property might reasonably be expected to let from year to year is to be deemed as the „annual value“ of the property which though might not have been let out by the assessee.

8. We have deliberated at length on the issue under consideration in the backdrop of the aforesaid statutory provisions, and are of the considered view that though the „annual value“ of a property simpliciter owned by an assessee would be liable to be assessed under the head „Income from house property“, however a similar treatment cannot be accorded to a property which is held by the assessee as stock-in-trade of his business. In our considered view a property which is held by an assessee as stock-in-trade of his business as that of a developer would lose its color and character as that of a property simpliciter owned by him. Our aforesaid view is fortified by the judgment of the Hon“ble High Court of Gujarat in the case of CIT Vs. Neha Builders (P) Ltd. (2008) 296 ITR 661 (Guj). The Hon“ble High Court while disposing off the appeal filed by the revenue in the case of an assessee company which was engaged in the business of construction of property, had observed that where a property is held as stock-in-trade, then the same would become or partake the character of the stock, and any income derived therefrom would be income from business and cannot be held as income from property. The Hon“ble High Court while concluding as hereinabove had observed as under:

“7. From the order passed by the learned CIT(A), it would clearly appear that the case of the assessee was that the company was incorporated with the main object of purchase, take on lease, or acquire by sale, or let out the buildings constructed by the assessee. Development of land or property would also be one of the businesses for which the company was incorporated.

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 business“, and not income from the property. If the business of the assessee is to construct the property and sell it or to construct and let out the same, then that would be the „business“ and the business stocks, which may include movable and immovable, would be taken to be „stock-in-trade“, and any income derived from such stocks cannot be termed as „income from property“. Even otherwise, it is to be seen that there was distinction between the „income from business“ and „income from property“ on one side, and 'any income from other sources'. The Tribunal, in our considered opinion, was absolutely unjustified in comparing the rental income with the dividend income on the shares or interest income on the deposits. Even otherwise, this question was not raised before the subordinate Tribunals and, all of sudden, the Tribunal started applying the analogy.”

9. Admittedly, the lower authorities had relied on the judgement of the Hon^{ble} High Court of Delhi in the case of CIT Vs. Ansal Housing Finance & Leasing Company Ltd. (2013) 354 ITR 180 (Delhi) and had therein concluded that the notional lettable value of the unsold flats held by the assessee was liable to be determined and brought to tax under the head „Income from house property“. We find that the issue under consideration before us i.e whether the notional lettable value of the property held by an assessee as stock-in-trade in its business as that of a developer is liable to be assessed under the head „income from house property“, has been differently answered by the Hon^{ble} High Court of Gujarat in CIT Vs. Neha Builders Pvt. Ltd. (2008) 296 ITR 661 (Guj) and the Hon^{ble} High Court of Delhi in CIT Vs. Ansal Housing Finance and Leasing Ltd. (2013) 354 ITR 186 (Del). We are of the considered view that in the backdrop of the aforesaid conflicting views of the aforesaid nonjurisdictional High Courts, the view in favour of the assessee as had been arrived at by the Hon^{ble} High Court of Gujarat is to be preferred. Our aforesaid view is fortified by the judgment of the Hon^{ble} Supreme Court in the case of CIT Vs. Vegetable Products (1973) 88 ITR 192 (SC), wherein the Hon^{ble} Apex Court had observed that if two reasonable constructions of a taxing provision is possible, then that construction which favours the tax payer must be adopted. Further, we find that ITAT, Mumbai in the case of ACIT-15(2)(1) Vs. M/s Haware Construction Pvt. Ltd. [ITA no. 3321 & 3172/Mum/2016; dated 31.08.2018] had after deliberating on the aforesaid judgments of the Hon^{ble} High Court of Gujarat in Neha Builders (P) Ltd.(supra) and that of the Hon^{ble} High Court of Delhi in Ansal Housing Finance & Leasing Company Ltd.(supra), had by taking support of the judgment of the Hon^{ble} Supreme Court in the case of CIT Vs. Vegetable Products Ltd. (1973) 88 ITR 192 (SC), had followed the decision of the Hon^{ble} High Court of Gujarat in Neha Builders (P) Ltd. (supra), and had concluded that the notional lettable value of the unsold flats held by the assessee cannot be determined and brought to tax under the head „Income from house property“. Still further, a similar view had also been taken by the Tribunal in the case of M/s C.R Development Pvt. Ltd. Vs. JCIT-8(1)(OSD), Mumbai [ITA No. 4277/ Mum/2012; dated 13.05.2015]. It was observed by the Tribunal that estimating of the rental income of the flats held by the assesses as stock-intrade was not justified, as the said flats were neither given on rent nor the assessee had any intention to earn rent by letting out the same. We further find that another coordinate bench of the Tribunal i.e. ITAT, Mumbai Bench “G”, Mumbai in ITO-2(1)(1), Mumbai Vs. M/s Arihant Estates Pvt. Ltd. [ITA No. 6037/Mum/2016; dated 27.06.2018] had relied on an earlier view taken by the Tribunal in the case of M/s Runwal Constructions Vs. ACIT in [ITA No. 5408 & 5409/Mum/2016; dated 22.02.2018], and after deliberating on the judgment of the Hon^{ble} High Court of Gujarat in CIT Vs. Neha Builders Pvt. Ltd. (2008) 296 ITR 661 (Guj) and that of the Hon^{ble} High Court of Delhi in Ansal Housing Finance & Leasing Company Ltd. (2013) 354 ITR 186 (Del), has held that the assessing officer was not correct in bringing to tax the notional annual lettable value of the unsold flats which were held by the assessee as stock-in-trade. On a similar footing a similar view had also been taken by the ITAT, Mumbai Bench “G”, Mumbai in the case of Progressive Homes, Mumbai Vs. ACIT-Circle 4(4), Mumbai [ITA No. 5082/Mum/2016; dated 16.05.2018) and ITAT “H” Bench, Mumbai in Haware Engineers & Builders Pvt. Ltd. Vs. DCIT, Central Circle-4(2), Mumbai [ITA No. 7155/Mum/2016; dated 10.10.2018].

10. In the backdrop of our aforesaid observations, respectfully following the judgment of the Hon^{ble} High Court of Gujarat in the case of CIT Vs. Neha Builders (P) Ltd. (2008) 296 ITR 661 (Guj) and the aforesaid orders of the coordinate benches of the Tribunal, we are of the considered view that the lower authorities had erred in determining the notional lettable value of the unsold flats held by the assessee

company as stock-in-trade of its business of builders and property developers, and bringing the same to tax in the hands of the assessee under the head „Income from house property“. We thus in terms of our aforesaid observations set aside the order of the CIT(A).

11. The appeal of the assessee is allowed.

7.2. In view of the aforesaid observations and respectfully following the judicial precedents relied upon hereinabove, we direct the Ld. AO to delete the addition made towards annual letting value of Rs.23,71,200/- in respect of two unsold flats. Accordingly, grounds raised by the assessee are allowed

4. Respectfully following these of esteemed view of the coordinate bench we direct the Assessing Officer to delete impugned the addition of Rs. 7,16,098/- as deemed rental income in respect of unsold stock of units. The assessee gets the relief accordingly.

5. In the result, the appeal is allowed in the terms indicated above. Pronounced in the open court today on the 03rd day of September, 2021.

Sd/-
Amarjit Singh
(Judicial Member)

Sd/-
Pramod Kumar
(Vice President)

Mumbai, dated the 03rd day of September, 2021

Copies to: (1) *The appellant* (2) *The respondent*
 (3) *CIT* (4) *CIT(A)*
 (5) *DR* (6) *Guard File*

By order

*Assistant Registrar/Sr.PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai*