THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Pavankumar Gadale (JM)

I.T.A. No. 2022/Mum/2019 (Assessment Year 2013-14)
I.T.A. No. 2023/Mum/2019 (Assessment Year 2014-15)

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| Ferani Hotels Pvt. Ltd.<br>Construction House-B<br>2nd Floor, 623, Linking Road, Khar-West<br>Mumbai-400 052.<br><br>PAN : AAACF0693B | Vs. | DCIT, Central Circle-4(1)<br>Room No. 1906<br>19th Floor<br>Air India Building<br>Nariman Point<br>Mumbai-400 021. |
| (Appellant) | | (Respondent) |

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| Assessee by | Shri Sanjay Sawant |
| Department by | Shri Hemant Kumar Chimanlal-CIT-DR & Shri Therian Oomen-DR |
| Date of Hearing | 09.07.2021 |
| Date of Pronouncement | 04.10.2021 |

O R D E R

Per Shamim Yahya (AM) :-

These are assessee's appeals directed against the order of learned CIT(A) dated 6.12.2017 for A.Y. 2013-14 & 2014-15. Since issues are identical in both the years. We refer grounds in A.Y. 2013-14.

2. The grounds of appeal for A.Y. 2013-14 read as under :

1. (a) On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding that A.O. has rightly assessed deemed income from unsold units/flats which is closing stock of the appellant as per provisions of sections 22 and 23 of the Act, and confirmed addition of Rs. 12,70,41,7807- under the head "Income from House Property".

1.(b) On the facts and in the circumstances of the case and as well as in law, the learned CIT(A) erred in not following the jurisdictional hon'ble Income-tax Appellate Tribunal judgment in the case of M/s. C.R. Developments Pvt. Ltd. v/s JCIT-8(1)(OSD), Mumbai (ITA No. 42777 Mum/2012) which was relied on Hon'ble Supreme Court decision in the case of Chennai Properties & Investments Limited v/s CIT (2015) 373 ITR 673 (SC).

3. Brief facts are that the assessee filed its return of income on 30.09.2013 declaring a total income of Rs. NIL, In the course of assessment proceedings, the AO observed that the assessee has earned dividend income of Rs 43,97,077/-. It was further observed by the AO that the assessee was maintaining a common pool of funds as well as accounts for all its activities. He, therefore, asked the assessee as to why the provisions of sec. 14A r.w. Rule 8D may not be applied and after considering the reply of the assessee made a disallowance of Rs. 34,83,905/- u/s. 14A r.w.r. 8D(2)(iii). Further, in due consideration of the facts of the case, the AO added a sum of Rs. 18,14,88,257/- under the head "income from House Property" as per provision of section 22 of the Act by estimating deemed rent on unsold flats/ apartments of assessee's various projects. Thereafter allowing of Rs 12,70,41,780/- was added as 'Income from House Property'. Further, the AO recomputed the claim of deduction u/s 80IB(10) allowable to the assessee after excluding the interest income of Rs 8,37,772/-.

4. Apropos the issue of income from house property :-

Upon assessee's appeal learned CIT(A) confirmed the Assessing Officer's action as under :-

> 7.3 I have considered the facts of the case, submissions and contentions of the assessee, as also the order of the AO. In the case of Ansal Housing Finance & Leasing Co. Ltd. (2013) 354 ITR 180, the Hon'ble Delhi High Court had decided an identical issue. The relevant portion of the judgement is reproduced as under:-
>
> > *"13. In the present case, the assessee is engaged in building activities. It argues that flats are held as part of its inventory of stock-in-trade, and are not let out. The further argument is that unlike in the other instances, where such builders let out flats, here there is no letting out and that deemed income - which is the basis for assessment under the ALV method, should not be attributed. This Court is of the opinion that the argument, though attractive cannot be accepted. As repeatedly held, in East India, Housing & Land Development Trust's case (supra) Sultan Bros's case (supra) and Karan Pura Development Co. Ltd. 's case (supra) the levy of income tax in the case of one holding house property is premised not on whether the assessee carries on business, as landlord, but on the ownership. The incidence of charge is because of the fact of ownership. Undoubtedly, the decision in Vikram Cotton Mills Ltd.' case (supra) indicates that in every case, the Court has to discern*

> *the intention of the* assessee; *in this case the intention of the assessee was to hold the properties till they were sold. The capacity of being an owner was not diminished one whit, because the assessee carried on business of developing, building and selling flats in housing estates. The argument that income tax is levied not on the actual receipt (which never arose in this case) but on a notional basis, i.e. ALV and that it is therefore not sanctioned by law, in the opinion of the Court is meritless. ALV is a method to arrive at a figure on the basis of which the impost is to be effectuated. The existence of an artificial method itself would not mean that levy is impermissible. Parliament has resorted to several other presumptive methods, for the purpose of calculation of income and collection of tax. Furthermore, application of ALV to determine the tax is regardless of whether actual income is received; it is premised on what constitutes a reasonable letting value, if the property were to be leased out in the marketplace. If the assessee's contention were to be accepted, the levy of income tax on unoccupied houses and flats would be impermissible - which is clearly not the case. 14. As far as the alternative argument that the assessee itself is occupier, because it holds the property till it is sold, is concerned, the Court does not find any merit in this submission. While there can be no quarrel with the proposition that "occupation" can be synonymous with physical possession, in .law, when Parliament intended a property occupied by one who is carrying on business, to be exempted from the levy of income tax was that such property should be used for the purpose of business. The intention of the lawmakers, in other words, was that occupation of one's own property, in the course of business, and for the purpose of business, i.e. an active use of the property, (instead of mere passive possession) qualifies as "own" occupation for business purpose. This contention is, therefore, rejected. Thus, this question is answered in favour of the revenue, and against the assessee."*

7.4. It would be seen from the above that as in the present case, the assessee in the case decided by the Hon'ble Delhi High Court also was engaged in the business of construction and certain flats were held as part of its inventory of stock-in-trade. In the said case also, the assessee's intention was to hold the properties till they are sold. Further, in that case, it was also contended before the Hon'ble High Court that the assessee itself was occupier, because it would hold the property till it was sold. However, the Hon'ble Court rejected all the contentions of the assessee and upheld the action of the AO in assessing deemed income from the unsold flats. The facts and contentions of the assessee in the present case are identical and, therefore, the decision of Hon'ble Delhi High Court in the above-mentioned case is squarely applicable to this case.

7.5. It is important to note here that while deciding the issue raised in the case of Chennai Properties & investments Ltd., the Hon'ble Supreme Court has also discussed about the judgment of the same Court in the case of East India Housing and Land Development Trust Ltd., as under :-

> *"With this background, we first refer to the judgment of this Court in East India Housing & Land Development Trust Ltd.'s case (supra) which*

*has been relied upon by the High Court. That was a case where the company was incorporated with the object of buying and developing landed properties and promoting and developing markets. Thus, the main objective of the company was to develop the landed properties into markets. It so happened that some shops and stalls, which were developed by it, had been rented out and income was derived from the renting of the said shops and stalls. In those facts, the question arose for consideration was whether the rental income that is received was to be treated as income from the house property or the income from the business. This court while holding that the income shall be treated as income from the house property, rested its decision in the context of the main objective of the company and took note of the fact that letting out of the property was not the object of the company at all. The court was therefore, of the opinion that the character of that income which was from the house property had not altered because it was received by the company formed with the object of developing and setting up properties.*

7.6. In the judgment in the case of Chennai Properties & Investments Ltd., the Hon'ble Supreme Court has also discussed the law laid down by it in the case of Karanpura Development Co. Ltd. vs. CIT, West Bengal. The relevant portion of the judgment is reproduced as under:-

"*Before we refer to the Constitution Bench judgment in the case of Sultan Brothers (P.) Ltd. (supra), we would be well advised to discuss the law laid down authoritatively and succinctly by this Court in 'Karanpura Development Co. Ltd. v. CIT[19621 44 ITR 362 (SC). That was also a case where the company, which was the assessee, was formed with the object, inter alia, of acquiring and disposing of the underground coal mining rights in certain coal fields and it had restricted its activities to acquiring coal mining leases over large areas, developing them as coal fields and then sub-leasing them to collieries and other companies. Thus, in the said case, the leasing out of the coal fields to the collieries and other companies was the business of the assessee. The income which was received from letting out of those mining leases was shown as business income. Department took the position that it is to be treated as income from the house property, it would be thus, clear that in similar circumstances, identical issue arose before the Court. This Court first discussed the scheme of the Income Tax Act and particularly six heads under which income can be categorised/classified. It was pointed out that before income, profits or gains can be brought to computation, they have to be assigned to one or the other head. These heads are in* a sense *exclusive of one another and income which falls within one head cannot be assigned to, or taxed under, another head. Thereafter, the Court pointed out that the deciding factor is not the ownership of land or leases but the nature of the activity of the assessee and the nature of the operations in relation to them. It was highlighted and stressed that the objects of the company must also be kept in view to interpret the activities. In support of the aforesaid proposition, number of judgments of other jurisdictions, i.e. Privy Counsel, House of Lords in England and US Courts were taken*

*note of. The position in law, ultimately, is summed up in the following words: —*

*"As has been already pointed out in connection with the other two cases where there is a letting out of premises and collection of rents the assessment on property basis may be correct but not so, where the letting or sub-letting is part of a trading operation. The diving line is difficult to find; but in the case of a company with its professed objects and the manner of its activities and the nature of its dealings with its. : property, it is possible to say on which side the operations fall and to what head the income is to be assigned."*

7.7. After applying the aforesaid principle to the facts, which were there before the Court, it came to the conclusion that income had to be treated as income from business and not as income from house property. We are of the opinion that the aforesaid judgment in Karanpura Development Co. Ltd.'s case (supra) squareiy applies to the facts of the present case.

7.8. It is also relevant to refer to the concluding part of the judgement of the Hon'ble Supreme Court in the case of Chennai Properties & Investments Ltd. the relevant portion of the judgement is reproduced as under :-

*"No doubt in Sultan Brothers (P.) Ltd.'s case (supra), Constitution Bench judgment of this Court has clarified that merely an entry in the object clause showing a particular object would not be the determinative factor to arrive at an conclusion whether the income is to be treated as income from business and such a question would depend upon the circumstances of each case, viz., whether a particular business is letting or not. ^ This is so stated in the following words: —*

*"We think each case has to be looked at from a businessman's point of view to find out whether the letting was the doing of* a *business or the exploitation of his property by an owner. We do not further think that a thing can by its very nature be* a *commercial asset. A commercial asset is only an asset used in a business and nothing else, and business may be carried on with practically all things. Therefore, it is not possible to say that a particular activity is business because it is concerned with an asset with which trade is commonly carried on. We find nothing in the cases referred, to support the proposition that certain assets are commercial assets in their very nature."*

7.9. It would be seen from the above that the Hon'ble Supreme Court has held that for deciding the issue whether income from a property is to be assessed as business income or income from house property, the deciding factor is the nature of the activity of the assessee and the nature of the operations in relation to the property. In the case of East India Housing and Land Development Trust Ltd., the assessee-company was incorporated with the object of buying and developing landed properties and promoting and developing markets. Accordingly, the rental income from some shops and stalls developed and rented out by the assessee was held to be assessable as income from house property. While holding so, the Hon'ble Court took note of

the fact that letting out of the property was not the object of the assessee. Similarly in the case of Karanpura Development Co. Ltd. v. CIT, the assessee was engaged in the activity of acquiring coal mining leases over large areas, developing them as coal fields and then sub-leasing them to collieries and other companies. Therefore, the Hon'ble Court held that the income received from letting out of mining leases should be treated as income from business. Further, in the case of Chennai Properties & Investments Ltd. also, it was held that rental income received from letting out of properties should be treated as business income, observing that letting out of the properties was the business of the assessee. Thus, it is clear from the judgements of the Hon'ble Supreme Court discussed above that income earned from letting out of property will be assessed as income from business, only if the assessee is engaged in the business of letting out of properties. In the present case, the appellant has never taken a stand that it is engaged in the business of letting out of properties. A stated above, it is clear from the statement of facts filed along with Form no.35 and written submissions filed by the appellant during assessment proceedings and appellate proceedings that it is engaged in the business of construction of properties and sale thereof. In fact, in the submissions, the appellant has also admitted that it was never its intention to earn income by letting out the premises. Therefore, the ratio of the decision of Hon'ble Supreme Court in the case of East India Housing and Land Development Trust ltd. is squarely applicable to the facts of the present case. Further, the facts in the present case are identical to the facts in the case of Ansal Housing Finance & Leasing Co. Ltd. decided by the Hon'ble Delhi High Court, and, therefore, the said decision is also squarely applicable to the present case.

7.10 In view of the discussion in the foregoing paragraphs, I hold that the AO has rightly assessed deemed income from the unsold units in the hands of the appellant as per the provisions of Sec.22 and 23 of the Act. It may be mentioned here that before me, the appellant has not objected to the AO's working of annual letting value and computation of income from house property. Accordingly, the addition of Rs. 12,70,41,780/- made by the AO after adopting the deemed rental income to be of Rs 18,14,88,257/- is upheld and the ground of appeal taken by the appellant is rejected. Accordingly, Ground Nos. 3(a), (b) & (c) of the appeal of the assessee are dismissed."

5. Against the above order assessee is in appeal before us. We have heard both the parties and perused the records.

6. At the outset it is noted that there is delay of 383 days for filing the appeal before the ITAT. As regards the issue of condonation of there is an affidavit by a person known Kathubhai Nanubhai Gandhi stating to be a CA and auditor of the company claiming to be counsel of the assessee that the delay was attributable due to his wrong advice. The same reads as under :-

> "3. That for Assessment Years 2013 - 14 & 2014-15, the appellant-company had preferred an appeal before the Ld. Commissioner of Income Tax (Appeals) against the orders passed by the Assessing Officer, Mumbai.
>
> 4. That, the order in respect of the above said appeal before the CIT(A) was passed on 06.12.2017 received by the appellant-company on 17.01.2018.
>
> 5. That the said appeal before the Hon'ble ITAT for AY 2013-14 & 2014-15 had to be filed within 60 days from the date of receipt of the order of the CIT(A), i.e., on or before 16.03.2018. However, the same had been filed by appellant-company on 05.04.2019.
>
> 6. Thus there was a delay of 383 days in filing of appeal before the Honorable Income Tax Appellate Tribunal.
>
> 7. That an appeal had not been filed within stipulated time due to my advise to the Appellant company that no fruitful purpose would be served by filing an appeal before Hon'ble Tribunal since the Hon'ble »High Court and jurisdictional Tribunal was against the appellant.
>
> 8. That now appellant received the Tribunal order in ITA No. 6332/Mum/ 2016 dated 21st December 2018 on 18th March, 2019 wherein identical issue was in the favour of the appellant. Therefore, I have immediately advised to file appeal and prepare the appeal memo and filed the appeal on 4th April, 2019.
>
> 9. That I understand that relying upon a Consultant is a bonafide cause upon the Appellant and the Appellant should not suffer because of my advise.
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> 10. That the Appellant has a good case on merits.
>
> 11. That the delay in filing the appeal may kindly be condoned and the issue involved may be decided on merits of the case.
>
> 12. That I would humbly submit that no mala fide intention or deliberate attempt is involved in delaying the filing of appeal."

7. There is a further submission of the director of the company as under :-

"The Appellant once again submit, at the cost of repetition, that the Appellant received CIT (A)'s order on 17th January, 2018 and appeal should have been filed within 60 days from receipt of the said order i.e. on or before 16th March, 2018. However, the appeal had been filed on 4th April, 2019. Therefore, there is delay of about 380 days. The appellant humbly submits that there was no clarity on the issue and opinion/advice received to the appellant which will reveal from Affidavit of the Auditor filed herewith. More particularly the Hon'ble Delhi High Court had decided an identical issue against the appellant in the case of Ansal Housing Finance & Leasing Co. Ltd. 354 ITR 180. Following the said decision even ITAT Mumbai also held against the appellant's sister concern. The copy of ITAT order in ITA No. 5248/Mum/2016 and ITA No. 5249/Mum/2016 is attached herewith. Therefore, it was advised that no fruitful purpose would be served by filing an appeal before Hon'ble Tribunal since the Hon'ble High Court and jurisdictional Tribunal was against the appellant. But thereafter appellant received the Tribunal order in ITA No. 6332/Mum/2016 dated 21st December 2018 on 18th March, 2019 wherein identical issue was in the favor of the appellant. The appellant immediately thereafter prepare the appeal memo and filed the appeal on 4th April, 2019. Even the Appellant's sister concern viz. Palm Grove Beach Hotels Pvt. Ltd. filed M.A. bearing number 97/mum/2019 which was dismissed as unadmitted due to barred by limitation vide ITAT order dated 05.04.2019. The copy of the said ITAT order is attached herewith for your perusal & information. The Appellant further submit that there is not any appeal filed before Bombay High Court in this matter by the said Palm Grove Beach Hotel Pvt. Ltd.

The appellant further submits that the delay in filing of appeal is due to the bona fide and genuine belief and no mala fides intentions were involved in filing the appeal late and the appellant does not stand to benefit by filing the appeal late.

The appellant humbly submits to take a liberal approach where delay has ; occurred for 'bona fide reasons' on the part of the appellant, otherwise a refusal to condoned the delay can result in a meritorious matter being thrown out at the threshold, which may lead to miscarriage of justice. The judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice.

The appellant rely on the Hon'ble Supreme Court celebrated decision in the case Collector, Land Acquisition Vs Mst. Katiji & Ors. (1987) 167 ITR 471 wherein it was opined that when technical considerations and substantial justice are pitted against each other, the cause of substantial justice deserves to be preferred.

The appellant also rely on Hon'ble Bombay High Court decision in Artis Tree Pvt. Ltd. Vs. CBDT & ORS. (2015) 369 ITR 691, wherein it was held that if the acceptable explanation is offered and a case of genuine hardship, delay has to be condoned.

The appellant further rely on the Hon'ble Madhya Pradesh High Court in Mahaveer Prasad Jain Vs. CIT (1988) 172 ITR 331, wherein it was held that

applicant cannot be made to suffer for the negligence of his counsel by following the decision of Hon'ble Apex Court in Rafiq Vs. Munsilal (AIR 1981 (SC) 1400). Identically, jurisdictional Tribunal in the case of Y. P. Trivedi Vs. JCIT (ITA No. 5994/M/2010, order dated 11.07.2012), it was held that the assessee should not suffer and a bona-fide mistake has to be condoned.

The appellant further rely on following jurisdictional Tribunal decisions for Condonation Delay of filing of Appeal:

i) Anandkumar Jain Vs. ITO, Ward 18(2)(20, Mumbai. (ITA No. 4192/Mum/2012; Order dated 20.08.2019),

ii) M/s Lahoti Overseas Ltd. Vs DCIT Asr / 2015- 4 (2), Mumbai. (ITA No. 3786/Mum 72012; Order dated 18.03.2016)

iii) Phoenix Mills Ltd. Vs. Asst. CIT, Circle 7(1), Mumbai (ITA No. 6240/M/ 2007 order dated 23.3.2020).

The Appellant would like to further rely on following decisions for Condonation Delay of filing of Appeal:

1) Collector, Land Acquisition Vs Mst. Katiji & Ors. (1987)167ITR471(SC)

2) Concord of India Insurance Co. Ltd. Vs Smt. Nirmala Devi [1979] 118 ITR 507 (SC)

3) Vijay Vishin Meghani Vs Dy. CIT & Anr. [2017] 398 ITR 250( Bom)

4) Mercedes Benz Education Academy Vs. ITO. Ward-11(1), Pune. ITA No. 745/PUN/2015; Order dated 17.05.2019

5) M/s Bhagwati Colonizers Pvt. Ltd. Vs. The ITO, ward-1(4), Mansa. ITA No. 169, Order dated 22.10.2019

The Appellant humbly prays that, based on the totality of the facts & circumstances stated herein above and in Memorandum of condonation of delay and Affidavits filed and various case laws relied upon, the Tribunal may take a liberal approach and further prays to condon delay of filing of appeal."

8. Per contra learned Departmental Representative objected to condonation of delay. He submitted as under :-

"2) Issue before Hon'ble bench was firstly 'Condonation of delay' and subsequently on merits on account of Annual Letting Value of Unsold flats as income from House property.

3) This is to submit before your honour that for condonation of delay - appellant should demonstrate 'Sufficient cause', which has been now well catalogued in catena of judgments. Above all sufficient cause should be

backed by coming before Hon'ble ITAT with clean slate, stating all facts on record as they existed.

4) Appellant has affirmed as deponent in affidavit on record that Appeal before the ITA T could not be filed within the stipulated time as there was no clarity on the issue whether the Annual Letting Value of unsold flats', however, it may kindly be noted that C.R. Developments Pvt. Ltd. ITA No.4277/M/2012 order dated 13.05.2015 for AY 2009-10 was already available to appellant to take support to file appeal before Hon'ble ITAT.
It may kindly be noted that as per representation made on 25.03.2021 before Hon'ble Bench, no appeal is filed before Hon'ble HC.

5) An affidavit was filed on record by appellant on 02.03.2020, from which para 6 and 7 reproduced below for ready reference: -

> *"6. That, the Appeal before the ITA T could not be filed within the stipulated time as there was no clarity on the issue whether the Annual Letting Value of unsold flats (which is the Closing Stock of Construction companies/Builders) is taxable or not and there were difference of opinions and decisions. In the said circumstances there was delay in taking decision to file the Appeal.*
>
> *7. That, in the preceding assessment year i.e. A. Y., 2012-13, the issue involved was identical to the present assessment year and the appeal was filed by the Appellant-Company against a similar Order of the CIT(A) within the prescribed time limit. The Hon'ble ITA T by its Order dated 21.12.2018 in ITA No. 6332/MUM/20 16 allowed the Appeal of the Appellant-company in favour of the Appellant-Company."*

In affidavit, appellant has quoted order in its own case, wherein relief has been granted by Hon'ble ITAT, Mumbai.

Further, appellant has also sent an email on 24.03.2021 at 6.30 PM after office hours, to Hon'ble Bench copy marked to CIT DR's official email id, wherein following orders of Hon'ble ITAT Mumbai have been enclosed.

| Sr.No. | Name | Address | AY | Relation to Appellant | AR | ITA No. | Order date | Remarks |
|---|---|---|---|---|---|---|---|---|
| 1 | Palm Grove Beach Hotels Pvt. Ltd. | Construction House 'B', 2nd Floor, 623, Linking Road, Khar (W), Mumbai - 400052 | 2012-2013 | Group Concern | Sanjay Swami | 5248/2016 | 21.03.2018 | Decision in favour of Revenue |
| 2 | Makewaves Sea Resorts Pvt. Ltd. | Construction House 'B', 2nd Floor, 623, Linking Road, Khar (W), Mumbai - 400052 | 2012-2013 | Group Concern | Sanjay Swami | 5249/2016 | 21.03.2018 | Decision in favour of Revenue |
| 3 | Ferani Hotels Pvt. Ltd. | Construction House 'B', 2nd Floor, 623, Linking Road, Khar (W), Mumbai - 400052 | 2012-2013 | Appellant | Sanjay Sawant | 6332/2016 | 21.12.2018 | Decision against revenue (Mentioned in para 7 of the Affidavit) |
| 4 | Palm Grove Beach Hotels Pvt. Ltd. | Construction House 'B', 2nd Floor, 623, Linking Road, Khar (W), Mumbai - 400052 | 2013-2014 | Group Concern | Sanjay Sawane | 5062/2017 | 13.03.2019 | Decision against revenue |

Copies of decision are attached with email for kind perusal

From above orders and sequence, following facts emerge -

a) Orders in case of Palm Grove Beach Hotels Pvt. Ltd. and Makewaves Sea Resorts Pvt. Ltd.at Sr.No. 1 and 2 in favour of revenue were available at the time of passing of subsequent orders at Sr.No.3 and 4; however, they were not bought to kind attention of respective benches before orders were passed in cases mentioned at Sr. No. 3 and 4.

b) In fact, orders which were in favour of revenue were submitted before Hon'ble bench vide email dated 24.04.2021, well after office hours at 6.30 PM for hearing on 25.03.2021.

c) Be that as may be, Sirs, this has created a piquant situation. At this juncture, it would be worthwhile to look at ratio laid down in case of Commissioner of Income
tax vs. Thana Electricity Supply Ltd. 206 ITR 727. A portion of headnote is reproduced as below for a ready reference -

'Precedent—High Court decision—Binding nature—Single Judge is bound by decision of Single Judge or Division Bench of same High Court —Division Bench by Division Bench or Full Court decisions and incase of difference of opinion, question should be referred to larger Bench'

The above principle elucidated in para 17 of the decision is explained as follows in held portion of decision: -

> 'A Single Judge of a High Court is bound by the decision of another single judge or a Division Bench of the same High Court. It would be judicial impropriety to ignore that decision. Judicial comity demands that a binding decision to which his attention had been drawn should neither be ignored nor overlooked. If he does not find himself in agreement with the same, the proper procedure is to refer the binding ] decision and direct the paper s t o be placed before the Chief Justice to enable him to constitute a larger Bench to examine the question. A Division Bench of a High Court should follow the decision of another Division Bench of equal strength or a Full Bench of the same High Court. If one Division Bench differs with another Division Bench of the same High Court. It should refer the case to a larger Bench. Where there are conflicting decisions of Courts of co-ordinate jurisdiction, the later decision is to be preferred if reached after full consideration of the earlier decision. —
>
> Food Corporation of India vs. Yadav Engineer & Contract or AIR 1982 SC 1302 relied on'

Above clearly lays down ratio that if there are conflicting decisions available, they should be invariably followed by benches of similar strength. If there is a difference of opinion, it should be referred to a larger bench. Further, in case of conflicting decisions later decision be preferred 'IF' (Emphasis added by undersigned) it is reached after considering earlier decisions.

Appellant failed to bring to conflicting decisions to notice of Hon'ble Benches over a period of time. Hence, it is humbly prayed that following jurisdictional HC's decision in case of Thana Electricity, matter should be referred to a large bench for deliberation, (that too presuming condonation of delay is allowed)

6) The following case laws in favour of revenue on issue of Condonation and on merits regarding Annual Letting Value of Unsold flats as income from House property are enclosed for kind perusal.

| **Condonation of Delay** | | | |
|---|---|---|---|
| Sr.No. | Name | Reference | Ratio |
| 1 | SoorajmullNagarmal vs Golder Fibre and Products (Cal HC) | AIR 1969 Cal 381 dated 24.02.1969 | Para 15 – Delay for each day must be explained |
| 2 | CIT vs Ram Mohan Kabra (P&H HC) | 257 ITR 773 dated 12.01.1999 | Para 3 – Provisions relating to specified period of limitation be applied with their rigour and effective consequences |
| 3 | The Phoenix Mills Ltd. vs ACIT (ITAT Mumbai) | 6240/M/2007 dated 23.03.2000 | Para 8.3 –Condoning delay in mechanical or routine manner amounts to jeopardizing legislative intent behind Section 5 of Limitation Act |
| 4 | Basawaraj&Anr Vs Spl.LandAcq Office (SC) | Civil Appeal No.6974 of 2013 dated 22.08.2013 | Para 9 onwards – Specially para 13 –Unlimited limitation would lead to sense of insecurity and uncertainty, and therefore, limitation prevents disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence' or laches. |
| 5 | Somerset Place Co-operative Housing Society Ltd. vs ITO (Mumbai HC) | ITA 874 of 2014 dated 13.02.2015 | Head note explained with ref to para 12 – *'Voluntary decision of the assessee is not to assail the order of the Tribunal at the relevant time and accepting the decision of the Tribunal for the assessment year 2003-04. Only because the assessee has succeeded on the same issue for the assessment year 2008-09, the same can not be said to be a sufficient cause so as to condone the delay of five years for the applicant to approach this Court in filing the appeal. [Para 12]'* |

**On issue of Annual Letting Value of Unsold flats as income from House property**

9. We have carefully considered the submissions on this issue of condonation of delay. As evident there is delay of 383 days in filing this appeal before the ITAT. As regards reasonable cause for delay it is submitted that in assessee's said counsel's opinion and in assessee's opinion that since the issue was against the assessee by in Hon'ble High Court and Hon'ble Jurisdictional Tribunal it was earlier decided that so no fruitful purpose was served by filing

an appeal. However, the assessee contends that on 18.3.2019 assessee received a decision of ITAT which was in favour of the assessee and hence assessee filed appeal before ITAT on 4.4.2019. It may also be noted that advice to this effect is said to have been by the auditor and not by the tax consultant/advocate who has appeared before learned CIT(A) and ITAT and in other group cases of the assessee.

10. However, learned Departmental Representative in rejoinder has pointed out that this is totally an afterthought and it is a misleading statement that the appeal before the ITAT could not be filed within stipulated time as there was no clarity on the issue of the annual letting value of unsold flats. Learned Departmental Representative pointed out that decision in C.R. Developments Pvt. Ltd. (ITA No. 4277/Mum/2012 vide order dated 13.5.2015 for A.Y. 2009-10) was already available to the assessee to take support to file appeal before the ITAT. However, CIT-DR has pointed out that there were both decisions in favour of the assessee and against the assessee in assessee's own group cases and argued by same assessee's counsel. Hence, submission of DR is that the assessee has taken conscious decision not to file appeal before the ITAT and thereafter has changed the view and filed an appeal after a delay of 383 days. Hence it is the Revenue's plea that the delay is not at all explained.

11. We note that in fact there was considerable delay in filing the appeal. Facts on record clearly indicate that the assessee has consciously decided not to file the appeal. Undoubtedly there was delay of 383 days in filing the appeal before the ITAT. The reason not to file the appeal within stipulated time is that the only decision of Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd. (supra) was available and that was against the assessee. The assessee's pleading that decided to file the appeal only after receipt of particular ITAT order is not convincing as it was not the first case in which the ITAT has decided the issue in favour of the assessee. There were already other ITAT decisions which were in favour of the assessee. However, assessee has consciously decided not to file the appeal. As there were

conflicting decision of the Tribunal and only decision on the specific issue was of Hon'ble Delhi High Court and it was against the assessee. Now conscious decision not to file the appeal by no stretch of imagination can be said to be a matter of technical consideration. Thus the assessee had decided not to file the appeal as the only High Court decision which was available on the specific issue was that of Hon'ble Delhi High Court and that was against the assessee. Then after delay of 383 days when the assessee changes its mind to take a chance before the Tribunal, by no stretch of imagination it can be said to be reasonable cause. On similar issue Hon'ble Third Member decision of ITAT Chennai in Tractors & Farm Ltd. (104 ITD 149) has considered by Hon'ble Apex Court decision on this issue and held as under :-

> 4. The learned counsel for the assessee vehemently relied on the decision of the Apex Court rendered in the case of Mst. Katiji (supra), wherein it was held that when substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have a vested right in injustice being done because of a non-deliberate delay. In this case an appeal preferred by the State of Jammu & Kashmir arising out of a decision enhancing compensation in respect of acquisition of lands for a public purpose to the extent of nearly 14 lakhs rupees by making an upward revision of the order of 800 per cent which also raised important questions as regards principles of valuation was dismissed as time barred being 4 days beyond time by rejecting an application for condonation of delay. Hence the Collector of Land Acquisition filed appeal by special leave before the Apex Court. The Hon'ble Supreme Court held that there is no warrant for according a step-motherly treatment when the State is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinery and the inherited bureaucratic methodology imbued with the note-making, file-pushing, and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community, does not deserve litigant non-grata status. The courts, therefore, have to be informed of the spirit and philosophy of the provision in the course of the interpretation of the expression 'sufficient cause'. So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even-handed justice on merits in preference to the approach which settles a decision on merits. On facts it was found that there existed sufficient cause for the delay. Therefore, the order of the High Court dismissing the appeal before it as time barred was set aside and the delay of 4 days was condoned. 5. In the case of Sreenivas Charitable Trust (supra) the assessee was a charitable trust. The copy of the order served on the assessee was misplaced and thereafter it was found and sent to the counsel for preparing the appeal and then the appeal was prepared and filed before the Tribunal and in that process the delay of 38 days occurred. The delay of 38

days was condoned by the Apex Court in view of the decision of the Apex Court rendered in the case of Vedabai alias Vaijayanatbai Baburao Patil (supra). In this case it was held that in exercising discretion under section 5 of the Limitation Act the courts should adopt a pragmatic approach. A distinction must be made between a case where the delay is inordinate and a case where the delay is of a few days. Whereas in the former case the consideration of prejudice to the other side will be a relevant factor so the case calls for a more cautious approach but in the latter case no such consideration may arise and such a case deserves a liberal approach. No hard and fast rule can be laid down in this regard. The court has to exercise the discretion on the facts of each case keeping in mind that in considering the expression 'sufficient cause', the principle of advancing substantial justice is of prime importance.

6. It is pertinent to note that in the case of Mst. Katiji (supra) the delay was only four days. In the case of Vedabai alias Vaijayanatabai Baburao Patil (supra) there was a delay of seven days in filing the appeal. In this case the Apex Court clearly laid down that a distinction must be made between a case where the delay is inordinate and a case where the delay is of a few days. The law assists those who are vigilant, not those who sleep over their rights. This principle is embodied in the dictum: vigilantibus non dormientibus jura subveniunt.

7. The delay cannot be condoned simply because the appellant's case is hard and calls for sympathy or merely out of benevolence to the party seeking relief. In granting the indulgence and condoning the delay it must be proved beyond the shadow of doubt that the appellant was diligent and was not guilty of negligence whatsoever. The sufficient cause within the contemplation of the limitation provision must be a cause which is beyond the control of the party invoking the aid of the provisions. The Hon'ble Supreme Court in the case of Ramlal v. Rewa Coalfields Ltd. AIR 1962 SC 361 has held that the cause for the delay in filing the appeal which by due care and attention could have been avoided cannot be a sufficient cause within the meaning of the limitation provision. Where no negligence, nor inaction, or want of bona fides can be imputed to the appellant a liberal construction of the provisions has to be made in order to advance substantial justice. Seekers of justice must come with clean hands.

8. In the present case I find that the assessee justified the delay only with reference to the affidavit of Shri M.L.S. Rao, Director of the company. In the said affidavit Mr. Rao stated that the Commissioner (Appeals)'s order was misplaced and forgotten. It was found while sorting out the unwanted papers. Thereafter steps were taken for the preparation of the appeal. Consequently the delay was caused. This clearly shows that the delay was due to the negligence and inaction on the part of the assessee. The assessee could have very well avoided the delay by the exercise of due care and attention. In my opinion there exists no sufficient and good reason for the delay of 310 days."

12. Examining the present case on the touchstone of the above said decision, we find that the ratio from the above said decision is fully

applicable hereinabove. The above said decision also draws support from Hon'ble Supreme Court decisions. As already examined by us reasonable cause for the delay attributed by the assessee has not been found by us to be acceptable. Hence, we decline to condon the delay in filing the appeal. Hence, the appeal is dismissed in limine.

13. As the appeal has been dismissed in limine on account of non-condonation of delay, merits of appeal are not being adjudicated.

14. In the result, these appeals by the assessee stand dismissed.

Pronounced in the open court on 4.10.2021.

| Sd/- | Sd/- |
|---|---|
| (PAVANKUMAR GADALE) | (SHAMIM YAHYA) |
| JUDICIAL MEMBER | ACCOUNTANT MEMBER |

Mumbai; Dated : 4/10/2021

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Assistant Registrar)

*PS* ITAT, Mumbai