**IN THE INCOME-TAX APPELLATE TRIBUNAL "H" BENCH MUMBAI**

**BEFORE SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER &**

**SHRI RAVISH SOOD, JUDICIAL MEMBER**

ITA No.7109/Mum/2018 (Assessment Year 2012-13)

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| K. Raheja Corporate Services Pvt. Ltd., Plot No. C-30, G-Block, Opp. SIDBI, BKC, Bandra, Mumbai-400 051<br>PAN: AABCN 9309B | Vs. | ACIT-14(2)(1), Room No. 432, 4th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400 020. |
| Appellant | | Respondent |

ITA No.3862/Mum/2019 (Assessment Year 2015-16)

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| K. Raheja Corporate Pvt. Ltd., Plot No. C-30, G-Block, Opp. SIDBI, BKC, Bandra – (E), Mumbai-400 051<br>**PAN: AAACP0522B** | Vs. | DCIT- Central Circle 4(2), Room No. 1918, 19th Floor, Air India Building, Nariman Point, Mumbai-400 021. |
| Appellant | | Respondent |

ITA No.4085/Mum/2019 (Assessment Year 2015-16)

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| DCIT, Central Circle -(2)(1), Central Range -4 Pr.CIT (C)-2 Room No. 1918, 19th Floor, Air India Building, Nariman Point, Mumbai-400 021. | Vs. | M/s K. Raheja Corp. Pvt. Ltd., Plot No. C-30, Block -G, BKC, Bandra (Eest), Mumbai-400 051<br>**PAN: AAACP0522B** |
| Appellant | | Respondent |

Appellant by : Shri. Madhur Aggrawal (AR)
Revenue by : Shri. Shiddaramappa (DR)

Date of Hearing : 12.10.2021
Date of Pronouncement: 25.10.2021

## ORDER

**PER RAVISH SOOD, J.M :**

The captioned appeal/cross-appeals are directed against the respective orders passed by the Commissioner of Income-Tax (Appeals),Mumbai [for short 'CIT(A)'], which in turn arises from the respective orders passed by the Assessing Officer [for short 'A.O'] under section 143(3) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'], dated 26.03.2015 for the Assessment Year 2012-13 AND under section 143(3), dated 12.10.2017 for Assessment Year 2015-16. As certain common issues are involved in the captioned appeals, therefore, the same are being taken up and disposed off by way of a consolidated order. We shall first take up the cross-appeals for A.Y 2015-16. The assessee has assailed the impugned order on the following grounds before us:

> **"Ground 1:** On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) ought to have restricted the disallowance under Section 14A of the Act to the amount of exempt income earned during the year under consideration of Rs. 1,43,78,956, although the appellant has sumo moto disallowed sum of Rs.4,85,50,063 in its Return of Income. The apppellant hereby prays that on the basis of the findings given by the learned CIT(A) in his orders, stating that disallowance under Section 14A cannot exceed dividend income , the disallowance under section 14A of the Act must be restricted to dividend income earned of Rs 1,43,78,956.
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> **Ground 2:** On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred by confirming the addition of notional income of Rs. 2,09,73,057/as "Income from House Property" (net of standard deduction @30% of Rs. 89,88,453)

by estimating @ 8.50% on the Unsold inventory of Rs. 35,24,88,351/- appearing in Schedule "Inventories" to the Balance Sheet." The appellant prays that the said addition may please be held as bad in law and be deleted."

Also, the assessee has filed before us the following additional ground of appeal :

1. On facts and circumstances of the case and in law, the Ld. AO ought to have held that lease rental income earned by the appellant by letting out premises in the IT Parks is taxable under the head Income from Business & Profession and not under the head income from House Property. The appellant accordingly prays that the lease rentals be assessed to tax under the head Income from Business & Profession.

On the other hand, the revenue is aggrieved with the impugned order on the following grounds:

1. "On the facts and circumstances of the case and in law, the Id CIT(A) has erred in restricting the disallowance u/s 144A of the IT Act to the extent of exempt income received by the assessee during the year under consideration without appreciating the Circular No.5 of 2014 dated 11.02.2014 of CBDT."

2. On the facts and circumstances of the case and in law, the ld CIT(A) has erred in restricting the disallowance u/s 14A of the IT Act to the extent of exempt income received by the assessee during the year under relying upon the decision of the Hon'ble P & H High Court whereas in the said decision it has been held that Rule 8D is not applicable to the stock-in-trade earning exempt income."

3. "Whether, on the facts and circumstances of the case and in law, Id the CIT(A), was justified in directing the AO to restrict the disallowance u/s 14A of the IT Act to 9 80,874 instead of Rs. 13,46,65,720 relying upon the decision in the case of Reliance utilities and HDFC Bank even when the assessee could not submit the fund flow so as to establish as to how the investments have been made from the own surplus funds because the assessee has also made investments in various assets out of its available funds."

4. "On the facts and under the circumstances of the case and in Law, the Ld. CIT(A) erred in restricting the disallowance u/s 14A of the Income Tax Act,1961 thereby overlooking the computational procedure laid down in Rule 8D of the I T Rules,1962 which has to be necessarily followed whenever a disallowance u/s 14A was to be made ?"

5. "On the facts and under the circumstances of the case, and in Law, the Ld. CIT(A) erred in restricting the disallowance u/s 14A of the Income Tax Act,1961 without noticing that the decision of the Hon'ble Jurisdictional High Court relied upon was rendered in the context of the pre-amended provisions of section 14A relevant for Assessment Years 2001-02 to 2005-06?"

6. On the facts and circumstances of the case and in law, the Id CIT(A) has erred in directing to delete the addition of disallowance u/s 14A of the IT Act to the book profit of the assessee without appreciating the clause (f) of explanation 1 to section 115JB(2) of the IT Act."

7. "On the facts and circumstances of the case and in law, the Id CIT(A) has erred in directing to delete the addition of disallowance u/s 14A of the IT Act to the book profit of the assessee without appreciating the decision of the Hon'ble ITAT Mumbai 'F' Bench in the case of Deputy Commissioner of Income-tax, Central Circle -18 & 19, Mumbai v. Viraj Profiles Ltd. in ITA NO. 4439/ (MUM.) of 2013 for A.Y. 2008-09."

2. Briefly stated, the assessee company which is engaged in the business of development of real estate, leasing and that of a Hotelier had e-filed its return of income for A.Y 2015-16 on 30.11.2015, declaring an income of Rs. 43,94,57,240/- under the normal provisions and "Book Profit" of Rs. 57,40,39,755/ under section 115JB of the Act. Subsequently, the assessee company filed a revised return of income on 30.03.2017, declaring an income of Rs. 43,98,18,510/-. Thereafter, the case of the assessee was selected for scrutiny assessment under section 143(2) of the Act.

3. During the course of the assessment proceedings, it was observed by the A.O that the assessee during the year under consideration had shown substantial investment of Rs. 435,28,77,089/- in shares of various companies as on 31.03.2015, as compared to Rs. 433,69,26,706/- on 31.03.2014. Also, it was observed by the A.O that the assessee had debited an amount of Rs. 237,13,80,256/- as interest paid on its borrowed funds. It was noticed by the A.O that the assessee had offered a suo-motto

disallowance under section 14A of Rs. 4,85,50,063/-. However, the A.O holding a conviction that the assessee was obligated to have computed the disallowance under Sec. 14A as per the mechanism provided under Rule 8D of the Income Tax Rules, 1962, therein called upon it to show cause as to why the disallowance may not be accordingly worked out. In reply, the assessee vide its letter dated 03.10.2017 tried to impress upon the A.O that the disallowance offered under section 14A was in order. However, the A.O did not find favor with the aforesaid explanation of the assessee and computed the disallowance under section 14A r.w Rule 8D at an amount of Rs. 11,21,54,888/-. As the assessee had voluntarily disallowed an amount of Rs. 4,85,50,063/- under section 14A of the Act, therefore, the A.O restricted the additional disallowance to an amount of Rs. 6,36,04,825/- [Rs. 11,21,54,888 (-) Rs. 4,85,50,063/-].

4. Also, it was observed by the A.O that the assessee during the year was holding unsold stock of flats/shops as stock-in-trade of its business. Relying on the judgment of the Hon'ble High Court of Delhi in the case of CIT Vs. Ansal Housing Finance & Leasing Co. Ltd. (2013) 354 ITR 180 (Del), the A.O called upon the assessee to explain as to why "Annual Lettable Value" (ALV) of the aforesaid properties may not be determined as per Sec. 22 of the Act under the head "House Property". As the reply filed

by the assessee did not find favor with the A.O, therefore, he determined the ALV of the unsold stock of flats/shops held by the assessee as its stock-in-trade at Rs. 2,99,61,510/- [8.5% of Rs. 35,24,88,351/- (i.e the cost of construction of the finished stock)]. After allowing a deduction under section 24(b) of the Act i.e @ 30% of the ALV of Rs. 2,99,61,510/- the A.O worked out the net addition at Rs. 2,09,73,057/- in the hands of the assessee. Backed by his aforesaid deliberations the A.O vide his order passed under section 143(3), dated 12.10.2017 assessed the income of the assessee-company at Rs. 52,40,35,118/- under the normal provisions and 'book profit' under section 115JB at Rs. 63,76,44,580/-.

5. Aggrieved, the assessee carried the matter in appeal before the CIT(A). Although the CIT(A) found favor with the assessee's claim that the disallowance under section 14A was to be restricted to the quantum of the exempt income that was earned by it during the year, however, he observed that the same could not be scaled down below the amount of the suo-motto disallowance that was offered by the assessee in its return of income. In so far the claim of the assessee that the A.O had erred in assessing the notional lettable value of the flats/shops that were held by it as stock-in-trade of its business as that of a developer, the CIT(A) not finding favor with the said claim of the assessee rejected the same.

6. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The ld. Authorized Representative (for short "A.R") for the assessee at the very outset assailed the order of CIT(A), on the ground, that he had erred in not restricting the disallowance under section 14A to the extent of the exempt income that was earned by the assessee during the year under consideration. In support of his aforesaid contention the ld. A.R had relied on a host of judicial pronouncements to which our attention was drawn in the course of the hearing of the appeal. In so far the addition of ALV of the flats/shops held by the assessee as stock-in-trade of its business was concerned, it was submitted by ld. A.R that both the lower authorities had erred in failing to appreciate that no such addition was called for in the hands of the assessee. In order to support his aforesaid claim the ld. A.R had pressed into service certain judicial pronouncements. It was further submitted by the ld. A.R that the assessee had raised an additional ground of appeal which pertained to assessing of the lease rental income earned by the assessee company under the head "Income from Business & Profession", and not under the head "Income from House Property". It was submitted by ld. A.R that after the filing of the revised return of income by the assessee company, the CBDT vide its Circular No. 16 of 2017, dated

25.04.2017 had clarified that the entire income earned by an assessee from letting out of building/developed space in an Industrial Park/SEZ is to be treated as business income. It was, thus, submitted by ld. A.R that the present additional ground of appeal has been filed only pursuant to the aforesaid CBDT Circular No. 16 of 2017 (supra). It was further averred by the ld. A.R that the adjudication of the issue in hand was based on the facts available on record and no new material was required to be looked into. It was submitted by the ld. A.R that the aforementioned additional ground of appeal may be admitted and necessary directions be issued to the A.O to assess the lease rental income of the assessee as per the CBDT Circular No. 16 of 2017 (supra).

7. Per contra, the ld. Departmental Representative (DR) relied on the orders of the lower authorities. It was submitted by ld. D.R that as observed by the AO, and rightly so, as per the CBDT Circular No. 5 of 2014, dated 11.02.2014 the disallowance under section 14A is to be made even if no exempt income was earned by the assessee during the year under consideration. In so far the assessing of the ALV of the flats/shops held by the assessee as stock-in-trade of its business was concerned, the ld. D.R relied on the judgment of the Hon'ble High Court of Delhi in the case of Ansal Housing Finance & Leasing Co. Ltd. (supra). As regards the additional

ground of appeal that was filed by the assessee, the ld. D.R had not advanced any contention or rebutted the same before us.

8. We have heard the ld. Authorized Representatives for both the parities, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by them to drive home their respective contentions. We shall first deal with the claim of the ld. A.R that the CIT(A) had gravely erred in law and the facts of the case in not restricting the disallowance under section 14A to the extent of the exempt income. In our considered view, as stated by the ld. A.R, and rightly so, the issue that the disallowance under section 14A cannot exceed the amount of exempt income, as on date, is settled by a plethora of judgments of the Hon'ble High Courts and the co-ordinate benches of the Tribunal. We may herein observe, that the said issue had came up before the Hon'ble High Court of Bombay in the case of Pr. CIT-10 Vs. HSBC Invest Direct (India) Ltd., ITA No. 1672/2016; dated 04.02.2019. In the case before the Hon'ble High Court, the auditors of the assessee-company had reported a disallowance under section 14A r.w Rule 8D of Rs. 2.53 crores. However, the assessee in the course of the assessment proceedings had restricted the disallowance at Rs. 1.30 crores. Observing, that the disallowance cannot exceed the

exempt income so earned by the assessee during the year under consideration, the Hon'ble High Court had upheld the view taken by the Tribunal that the disallowance under section 14A was liable to be restricted to the extent of the exempt income of Rs. 1.30 crore. Also, we find that a similar view had thereafter been taken by the Hon'ble High Court of Bombay in the case of M/s Nirved Traders Pvt. Ltd. Vs. DCIT, Circle-1(2), Mumbai in ITA No. 149/2017 dated 23.04.2019. In its aforesaid order, the Hon'ble High Court after exhaustive deliberations observed that the disallowance under section 14A was liable to be restricted to the extent of the exempt dividend income of Rs. 1,13,72,545/- that was earned by the assessee during the year. The Hon'ble High Court while concluding as herein above had set-aside the view taken by the lower authorities which had worked out the disallowance under section 14A r.w Rule 8D at Rs. 4,22,72,425/-. Accordingly, in the backdrop of our aforesaid deliberations, we are of the considered view that the disallowance under section 14A in the case of the assessee before us, as claimed by the ld. A.R, and rightly so, is liable to be restricted only to the extent of the exempt dividend income of Rs. 1,43,78,946/- that was earned by it during the year under consideration. WE, thus, in terms of our aforesaid observations direct the A.O to restrict the disallowance u/s 14A to an amount of Rs. 1,43,78,946/-

i.e the amount of exempt income earned by the assessee during the year under consideration. The **Ground of appeal no. 1** is thus allowed in terms of our aforesaid observations.

9. We shall now take up the grievance of the assessee, that both the lower authorities had erred in assessing under Sec. 22 of the Act the ALV of the flats/shops held by it as stock-in-trade of its business as that of a developer under the head "House Property". Notably, the controversy involved qua the issue in hand lies in a narrow compass i.e. as to whether or not the ALV of the flats/shops held by an assessee as its stock-in-trade is liable to be determined and therein assessed under the head "House Property". We find that the aforesaid issue had came up before a co-ordinate bench of the Tribunal i.e ITAT, 'C' Bench, Mumbai in the case of M/s. Osho Developers, Mumbai Vs. ACIT-32, Mumbai, ITA No. 2372 & 1860/Mum/2019, dated 03.11.2020. After exhaustive deliberations and considering the contrary views of two non-jurisdictional High Courts i.e. Hon'ble High Court of Delhi in the case of CIT Vs. Ansal Housing Finance & Leasing Co. Ltd. [2013] 354 ITR 180 (Del.) and that of the Hon'ble High Court of Gujarat in the case of CIT Vs. Neha Builders [2008] 296 ITR 661 (Guj.), the Tribunal had directed the A.O to delete the addition made by him towards the ALV of the flats that were held by the assessee as stock-

in-trade of its business as that of a builder and developer. For the sake of clarity the observations of the Tribunal are culled out as under:

"7. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements that have been pressed into service by them for driving home their respective contentions. Admittedly, it is a matter of fact that the flats in question were held by the assessee firm, a real estate developer, as stock-in-trade of its respective projects viz. (i) Ashwin CHS Projects; and (ii) Infinity Project. As observed by us hereinabove, the A.O had determined and therein brought to tax the ALV of the aforesaid flats under the head 'house property' in the hands of the assessee firm. Our indulgence in the present appeal has been sought by the assessee, to adjudicate, the sustainability of the view taken by the lower authorities that the ALV of the flats held by the assessee as stock-in-trade was liable to be determined and therein brought to tax under the head 'house property'. As is discernible from the assessment order, the A.O by relying on the order of the **Hon'ble High Court of Delhi** in the case of **CIT Vs. Ansal Housing Finance and Leasing Company Ltd. (2013) 354 ITR 180 (Del)**, had determined the ALV of the flats which were held by the assessee as part of the stock-in-trade of its business of a builder and developer, and had brought the same to tax under the head 'house property'. On appeal, the CIT(A) had found favour with the view taken by the A.O by drawing support from the order of the **Hon'ble High Court of Bombay** in the case of **CIT Vs. Gundecha Builders (2019) 102 CCH 426 (Bom)**.

8. On a perusal of the order of the Hon'ble Jurisdictional High Court in the case of Gundecha Builders (supra), we find, that the issue before the High Court was that where an assessee, a real estate developer, was in receipt of rental income from a property held as stock-in-trade of its business as that of a real estate developer, then, whether the said receipts were to be brought to tax under the head 'house property' (as claimed by the assessee) or as 'business income' (as claimed by the revenue). The High Court after relying on its earlier order passed in the case of **CIT Vs. Sane & Doshi Enterprises (2015) 377 ITR 165 (Bom)**, had observed, that in a case where a real estate developer is in receipt of rental income in respect of a property held by him as stock-in-trade of its business as that of a real estate developer, the said rental receipts was to be assessed under the head house property. Accordingly, the issue before the High Court in the aforesaid case was as to under which head of income the rental receipts were liable to be assessed. Finding favour with the claim of the assessee, it was observed by the High Court that the rental income received from letting out of the unsold portion of the property constructed by the real estate developer was assessable to tax as its income from house property. Beyond any scope of doubt, the issue before the Hon'ble High Court was as to under which head of income the rental receipts were to be taxed i.e as 'business income' or 'income from house property'. Unlike the facts involved in the case before the High Court, in the case before us, the flats held by the assessee as stock-in-trade of its business of a builder and developer, having not been let out, had thus not yielded any rental income. As the Hon'ble High Court of Bombay in the case of Gundecha Builders (supra) was seized of the issue as

to under which head of income the rental income received from the unsold portion of the property constructed by a real estate developer was to be assessed, which is not the issue involved in the present appeal before us, therefore, the same in our considered view being distinguishable on facts would not assist the case of the revenue before us.

9. We shall now advert to the judgment of the **Hon'ble High Court of Delhi** in the case of **CIT Vs. Ansal Housing Finance and Leasing Company Ltd. (2013) 354 ITR 180 (Del)** by drawing support from which the A.O had determined and therein brought to tax the ALV of the flats held by the assessee as stock-in-trade of its business as that of a builder and developer. In the aforesaid case, it was the claim of the assessee that unlike the other builders as it was not into letting out of properties, the determination of deemed income which had formed the basis for assessment under the ALV method, was not called for in its case. However, the High Court being of the view that *the levy of income tax in the case of an assessee holding house property was* premised not on whether the assessee carries on business, as landlord, but on the ownership, *thus, turned down the aforesaid claim of the assessee. To sum up, in the backdrop of its conviction that t*he incidence of charge under the head house property was based on the factum of ownership of property, the High Court was of the view that as the capacity of being an owner was not diminished one whit, because the assessee carried on the business of developing, building and selling flats in housing estates, therefore, the ALV of the flats held as stock-in-trade by the assessee in its business of a builder and developer was liable to be determined and brought to tax under the head 'house property'. But then, we find, that taking a contrary view the **Hon'ble High Court of Gujarat** had way back in the case of **CIT vs. Neha Builders (2008) 296 ITR 661 (Guj)**, observed, that rental income derived by an assessee from the property which was treated as stock-in-trade is assessable as business income and cannot be assessed under the head "Income from house property". The High Court while concluding as hereinabove, had observed, that admittedly the income derived from property would always be termed as 'income' from the property, but if the property is used as 'stock-in-trade', then the said property would become or partake the character of the stock, and any income derived from the stock would be 'income' from the business and not income from the property. In the backdrop of the conflict between the decisions of the aforesaid non-jurisdictional High Courts, as observed by the **Hon'ble High Court of Bombay** in the case of **K. Subramanian and Anr. Vs. Siemens India Ltd. and Anr (1985) 156 ITR 11 (Bom)**, the view which is in favour of the assessee has to be preferred as against that taken against him. Accordingly, following the judgment of the Hon'ble Jurisdictional High Court in the case of K. Subramanian and Anr. Vs. Siemens India Ltd. and Anr (1985) 156 ITR 11 (Bom), we respectfully follow the view taken by the Hon'ble High Court of Gujarat in the case of CIT vs. Neha Builders (2008) 296 ITR 661 (Guj). In fact, we find that the issue as to whether the ALV of a property held by an assessee as stock-in-trade of its business as that of a real estate developer had earlier came up before a 'SMC' bench of the **ITAT, Mumbai** in the case of **Shri. Rajendra Godshalwar Vs. ITO-21(3)(1), Mumbai [ITA No. 7470/Mum/2017, dated 31.01.2019]**. The Tribunal after considering the judgment of the Hon'ble High Court of Delhi in Ansal Housing Finance & Leasing Co. Ltd. (2013) 354 ITR 180 (Delhi) and that of the Hon'ble High Court of Gujarat in CIT vs. Neha Builders Pvt. Ltd., (2008) 296 ITR 661 (Guj), had concluded, that the ALV of the unsold property held by the assessee as stock-in-trade could not be determined and brought to tax under the head 'house property'. The Tribunal while concluding as hereinabove had also distinguished the judgment of the

Hon'ble High Court of Bombay in the case of CIT Vs. Sane & Doshi Enterprises (2015) 377 ITR 165 (Bom), as was relied upon by the revenue. The Tribunal while concluding as hereinabove had observed as under:

> "6. We have carefully considered the rival submissions. The short point involved in this appeal is the validity of addition sustained by the CIT(A) on account of notional ALV of the unsold flat, which is held by the assessee as stock-in-trade. Factually speaking, it is not in dispute that the flat in question is not yielding any rental income to the assessee, as it has not been let-out. It is also not in dispute that the project in question has been completed during the year under consideration, and the said flat is shown as stock-in-trade at the end of the year. At the time of hearing, the learned representative also pointed out that the flat has been ultimately sold on 06.11.2012. We find that our coordinate Bench in the case of C.R. Developments Pvt. Ltd. (supra) dealt with charging of notional income under the head 'Income from House Property' in respect of unsold shops which were shown by assessee therein as part of 'stock-in-trade'. As per the Tribunal "The three flats which could not be sold at the end of the year was shown as stock-in-trade. Estimating rental income by the AO for these three flats as income from house property was not justified insofar as these flats were neither given on rent nor the assessee has intention to earn rent by Shri Rajendra Godshalwar letting out the flats. The flats not sold was its stock-in-trade and income arising on its sale is liable to be taxed as business income. Accordingly, we do not find any justification in the order of AO for estimating rental income from these vacant flats u/s 23 which is assessee's stock in trade as at the end of the year. Accordingly, the AO is directed to delete the addition made by estimating letting value of the flats u/s 23 of the I.T. Act."
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> 7. In our view, the aforesaid observation of our coordinate Bench squarely applies to the facts of the present case. In the case of M/s. Runwal Constructions (supra) also, similar issue has been dealt with by our coordinate Bench. In the case of M/s. Runwal Constructions (supra), the Bench noted the judgment of the Hon'ble Gujarat High Court in the case of CIT vs Neha Builders Pvt. Ltd., 296 ITR 661 (Guj.) as also the judgment of the Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd., 354 ITR 180 (Delhi) and finally observed as under :-
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> > "10. In the case on hand before us it is an undisputed fact that both assessees have treated the unsold flats as stock in trade in the books of account and the flats sold by them were assessed under the head 'income from business'. Thus, respectfully following the above said decisions we hold that the unsold flats which are stock in trade when they were sold they are assessable under the head 'income from business' when they are sold and therefore the AO is not correct in bringing to tax notional annual letting value in respect of those unsold flats under the head 'income from house property'. Thus, we direct the AO to delete the addition made under Section 23 of the Act as income from house property."
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> Following the aforesaid precedents, we find merit in the plea of the assessee, which deserves to be upheld.

> 8. Insofar as the judgment of the Hon'ble Bombay High Court in the case of Sane & Doshi Enterprises (supra) relied by the CIT(A) is concerned, the same, in our view, does not help the case of the Revenue. Quite clearly, the case before the Hon'ble High Court was relating to actual rental income received on letting out of unsold flats. The dispute pertained to the head of income under which such income was to be taxed - whether as 'Business Income' or as 'Income from House Property'. In the present case, the facts are quite different inasmuch as the unsold flat in question has not yielded any rental income as the flat has not been let-out, and is being held by the assessee purely as stock-in-trade; and, what the Assessing Officer has tried to do is to assess only a notional income thereof. Thus, the ratio of the judgment of the Hon'ble Bombay High Court in the case of Sane & Doshi Enterprises (supra) has been rendered in the context of qualitatively different facts, and is not applicable in the present case."

Accordingly, preferring the view taken by the Hon'ble High Court of Gujarat in CIT vs. Neha Builders Pvt. Ltd. (2008) 296 ITR 661 (Guj), as per which the ALV of the unsold property held by an assessee as stock-in-trade could not be determined and brought to tax under the head 'house property', as against that arrived at by the Hon'ble High Court of Delhi holding to the contrary in CIT Vs. Ansal Housing Finance and Leasing Company Ltd. (2013) 354 ITR 180 (Del); and also following the order of ITAT, Mumbai in Shri. Rajendra Godshalwar Vs. ITO-21(3)(1), Mumbai [ITA No. 7470/Mum/2017, dated 31.01.2019], we herein conclude that the ALV of flats held by the assessee as part of the stock-in-trade of its business as that of a builder and developer could not have been determined and therein brought to tax under the head 'house property'.

10. Before parting, for the sake of clarity, we may herein observe that vide the Finance Act, 2017 w.e.f 01.04.2018 the legislature had inserted Sec. 23(5) of the Act. As per the said statutory provision, where the property consisting of any building or land appurtenant thereto is held as stock-in-trade and the property or any part of the property is not let during the whole or any part of the previous year, the annual value of such property or part of the property, for a period up to "one year" ["two years" vide the Finance Act, 2019 i.e w.e.f 01.04.2020] from the end of the financial year in which the certificate of completion of construction of the property is obtained from the competent authority, shall be taken to be nil. As the said statutory provision i.e Sec. 23(5) is applicable prospectively i.e w.e.f A.Y 2018-19, the same, thus, would have no bearing on the year under consideration in the case of the present assessee before us. Our aforesaid view is fortified by the aforesaid order of the ITAT, Mumbai in the case of Shri. Rajendra Godshalwar Vs. ITO-21(3)(1), Mumbai [ITA No. 7470/Mum/2017, dated 31.01.2019], wherein in context of the said aspect it was observed as under:

> "9. Apart therefrom, we find that Sec. 23(5) of the Act has been inserted by the Finance Act, 2017 w.e.f. 01.04.2018. In terms of the said section, it is prescribed that "where the property consisting of any building or land appurtenant thereto is held as stock-in-trade and the property or any part of the property is not let during the whole or any part of the previous year, the annual value of such property or part of the property, for the period up to one year from the end of the financial year in

which the certificate of completion of construction of the property is obtained from the competent authority, shall be taken to be nil". Though the said provision is effective from 01.04.2018, yet even if one is to see the present case from the standpoint of Sec. 23(5) of the Act, no addition is permissible in the instant year. It may be relevant to note that the completion certificate is stated to Shri Rajendra Godshalwar have been obtained on 28.11.2011 and going by the provisions of Sec. 23(5) of the Act, no addition is permissible in the instant assessment year. Be that as it may, we are only trying point out that the assessability of notional income in respect of unsold flat, which is taken as stock-in-trade, is not merited in the instant case. Thus, we set-aside the order of CIT(A) and direct the Assessing Officer to delete the addition."

11. We, thus, in the backdrop of our aforesaid deliberations not being able to concur with the view taken by the lower authorities, therein, set aside the order of the CIT(A) and direct the A.O to delete the addition made by him towards the ALV of the flats held by the assessee as stock-in-trade of its business as that of a builder and developer. The **Grounds of appeal Nos. 1 to 4** are allowed in terms of our aforesaid observations."

10. As the facts and the issue involved in the case before us i.e assessing of the ALV of the Flats/shops held by the assessee as stock-in-trade of its business as that of a builder and developer remains the same as were involved in the aforesaid case, therefore, we, respectfully follow the view therein taken by the Tribunal and vacate the addition towards notional lettable value of Rs. 2,09,73,057/- made by the A.O under the head "House Property". The **Ground of appeal no.2** is accordingly allowed.

11. We shall now advert to the additional ground of appeal raised by the assessee before us. As the adjudication of the additional ground of appeal involves purely a question of law based on the facts borne from the records, therefore, we have no hesitation in admitting the same. It is the claim of the ld. A.R that the assessee-company, inter alia, is engaged in the

business of development and operation of IT Park at Pune, viz. "Commerzone" and SEZ at Hyderabad. Accordingly, from its aforesaid business the assessee company earns income from two streams, viz. (i) lease rentals from letting out of properties; and (ii) maintenance income from the activity of facility management services. It is stated by the ld. A.R that the assessee had in its original/revised return of income offered the lease rentals from letting out of the properties under the head "House Property", while for the maintenance income from the activity of facility management services was shown under the head "Profit & Gains of Business or Profession". It is stated by the ld. A.R that the CBDT, vide its Circular No. 16/2017, dated 25.04.2017 had clarified that the entire income earned from letting out of buildings/developed spaces in Industrial Park/SEZ is to be treated as the assessee's business Income. Backed by the aforesaid facts, the ld. A.R had sought for directions to the A.O to subject the lease rental income of the assessee to tax under the head "Income from Business & Profession".

12. We have given a thoughtful consideration to the aforesaid claim of the ld. A.R and find substantial force in the same. Admittedly, the CBDT vide its Circular No. 16/2017 dated 25.04.2017 had after referring to certain judicial pronouncements observed, that the income from the Industrial

Parks/SEZ established under various schemes framed and notified under section 80IA(4)(iii) of the Income Tax Act, 1961 is to be treated as the assessee's income from business, provided the conditions prescribed under the schemes are met. As the aforesaid CBDT Circular No. 16/2017 (supra) was issued subsequent to the filing of the revised return of income by the assessee on 30.03.2017, therefore, there was no occasion for the assessee to have offered the lease rental income for tax under the head "Income from Business & Profession". Be that as it may, as the Circulars issued by the CBDT are binding on the Income-tax department, therefore, we herein restore the issue to the file of the A.O with a direction to consider the aforesaid claim of the assessee in the backdrop of the aforementioned Circular No. 16/2017 (supra). At this stage, we may herein clarify that we are refraining from commenting on the satisfaction by the assessee of the eligibility criteria as stated in the aforesaid CBDT circular No. 16/2017 (supra), which the A.O shall remain at a liberty to look into in the course of the set-aside proceedings. Needless to say, the A.O shall in the course of the set-aside proceedings afford a reasonable opportunity of being heard to the assessee. The **additional ground of appeal** is allowed for statistical purpose in terms of our aforesaid observations.

**ITA No. 4085/Mum/2019 AY-2015-16**

**(Revenues Appeal)**

13. In so far the Grounds of appeal nos. 1 to 5 raised by the Revenue before us are concerned, as we have restricted the disallowance under section 14A up to the extent of the exempt dividend income of Rs. 1,43,78,956/- earned by the assessee during the year under consideration, therefore, no separate adjudication on the issues therein raised would be required. Resultantly, the **Grounds of appeal nos. 1 to 5** are disposed off in terms of our aforesaid observations.

14. We shall now deal with the grievance of the Revenue that the CIT(A) had erred in directing the A.O to delete the addition of disallowance under section 14A that was made to the "Book Profit" of the assessee company, without considering the import of clause (f) of "Explanation 1" to section 115JB(2) of the Act. In our considered view, the aforesaid issue is squarely covered by the order of the "Special Bench" of the Tribunal in the case of ACIT Vs. Vireet Investments Pvt. Ltd., ITA No. 502/Del/2012, dated 16.06.2017. In its aforesaid order, the "Special Bench" of the Tribunal, had observed, that "book profit" under section 115JB is not to be enhanced by the disallowance made by the A.O under section 14A of the Act. We, thus, respectfully following the aforesaid view taken by the Tribunal, uphold the

view taken by the CIT(A). The **Grounds of appeal nos. 6 & 7** raised by the revenue are dismissed.

15. Resultantly, the appeal filed by the assessee is allowed, while for that filed by the revenue stands dismissed.

## ITA No. 7109/Mum/2018 - AY-2012-13 (Assessee's appeal)

16. We shall now take up the appeal filed by the assessee for A.Y 2012-13. The assessee has assailed the impugned order on the following grounds of appeal before us.

> 1. On the facts and in circumstances of the case and in law, the learned CIT(A) erred in confirming the disallowance of brokerage expenses made by the Assessing Officer [hereinafter referred to as the 'AO'] and allowing the brokerage expenses partially in proportion to the income offered under the head Business.
>
> The Appellant prays for the following relief:
>
> (a) The Hon'ble Tribunal be pleased to hold that the entire brokerage expenses claimed by the appellant in its return of income be allowed and not in proportion to the income offered under the 'Business'.

17. Briefly stated, the assessee-company had e-filed its return of income for A.Y 2012-13 on 29.09.2012, declaring a loss of Rs. 34,38,88,614/-. The return of income was initially processed as such under section 143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment under section 143(2) of the Act.

18. During the course of the assessment proceedings, it was observed by the A.O that the assessee had claimed deduction of commission and

brokerage expenses of Rs. 1,33,90,855/-. On being queried, the assessee submitted the requisite details with the A.O, which revealed that the aforesaid amount was paid to two companies, viz. (1) M/s Cushman and Wakefield (India) Pvt. Ltd. (C&W) : Rs. 1,02,49,000/-; and (2) M/s. Jones-Lang Lasalle Property Consultancy (India) Pvt. Ltd. (LLPC): Rs. 31,40,855/-. It was observed by the A.O, that the commission/brokerage was paid to the aforementioned companies for leasing of premises from which the assessee was earning rental income. Backed by the aforesaid fact, the A.O was of the view that the assessee had claimed deduction of commission/brokerage expenses which were incurred for the purpose of earning house property income and not business income. It was, thus, observed by the A.O that the commission/brokerage paid by the assessee to the aforementioned companies, viz. C&W and LLPC amounting to Rs. 1,33,90,855/- was not allowable as a deduction under section 37(1) of the Act. Accordingly, the A.O disallowed the assessee's claim for deduction of commission/brokerage of Rs. 1,33,90,855/-.

19. On appeal, the CIT(A) observed that the commission/brokerage was paid by the assessee to the aforementioned companies on account of finding tenants for the assessee's premises. Noticing, that though the assessee had shown the rental income under the head "House Property" for

which no deduction for brokerage/commission was allowable under section 24 of the Act, however, it had also earned income from maintenance charges which otherwise would not have been possible without tenants. Accordingly, the CIT(A) in all fairness allowed as a deduction the proportionate share of the commission/brokerage expenses that was attributable to earning of the maintenance charges. At the same time, the CIT(A) was not inclined to accept the claim of the assessee that 50% of the expenses should be allowed under section 37(1) as a business expenditure. Adopting a holistic view, the CIT(A) taking cognizance of the respective incomes that were earned by the assessee from its aforesaid two streams of income, viz. maintenance charges and rental income, thus, apportioned the expenses in the same ratio. Accordingly, on the aforesaid basis, the CIT(A) allowed the assessee's claim for deduction of brokerage/commission expenses to the tune of Rs. 6,75,536/-.

20. Aggrieved with the part sustaining of the disallowance of commission /brokerage expenses by the CIT(A) the assessee has carried the matter in appeal before us. It was submitted by ld. A.R that not only in the preceding years, but also in the succeeding years the Department had after duly scrutinizing the assessee's claim for deduction of commission/brokerage expenses had accepted the same. Our attention was drawn by the ld. A.R

to the assessment orders passed by the A.O under section 143(3) for A.Y. 2011-12, A.Y 2013-14, A.Y 2014-15 and A.Y 2015-16. Backed by his aforesaid contentions, it was submitted by ld. AR that the assessee's claim for deduction of commission/brokerage expenses be allowed and the order of the CIT(A) be set-aside.

21. Per contra, the ld. DR relied on the orders of the lower authorities.

22. We have heard the ld. Authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record. Admittedly, it is a matter of fact borne from the records that the commission/brokerage expenses paid by the assessee to the aforementioned companies, viz. C&W and LLPC were towards finding of tenants for the premises from which assessee was earning rental income. As observed by us hereinabove, the CIT(A) had after considering the respective incomes of the assessee company from its activities, viz. (i) earning of maintenance charges (received from tenants) that was offered for tax under the head "Income from Business & Profession"; and (ii) earning of rental receipts (that was offered under the head "House Property"), had on a pro-rata basis apportioned the same on the said basis. Accordingly, the assessee's claim for deduction of commission /brokerage expenses was restricted by the CIT(A) to the extent the same was

apportioned and therein attributable to its earning of maintenance charges. At the first blush, the aforesaid view taken by the CIT(A) was found to be logical and correct. However, the very fact that the assessee's claim for deduction of such commission/brokerage expenses had consistently been accepted by the department not only in the preceding years but also in the succeeding years, and that too in the course of scrutiny assessments framed under section 143(3) of the Act therein dislodges our aforesaid conviction. On a perusal of the records, we find that the respective assessments in the case of assessee-company for the preceding/succeeding years had been framed as under :

| Assessment Year | Assessment order |
|---|---|
| A.Y 2009-10 | Order U/s 143(3), dated 30.12.2011 |
| A.Y 2010-11 | Order U/s 143(3), dated 31.01.2013 |
| A.Y 2011-12 | Order U/s 143(3), dated 31.07.2013 |
| A.Y 2013-14 | Order U/s 143(3), dated 21.03.2016 |
| A.Y 2014-15 | Order U/s 143(3), dated 23.12.2016 |
| A.Y 2015-16 | Order U/s 143(3), dated 23.06.2017 |

23. In our considered view, now when the Department after duly scrutinizing the aforesaid claim of deduction of commission/brokerage expenses raised by the assessee in the preceding and the succeeding years, had accepted the same vide its respective assessment orders passed

under section 143(3) of the Act, therefore, in the absence of any change in the circumstances, there was no justification on its part in taking a different view and declining the said claim for deduction of expenses during the year under consideration. Although the principle of res-judicata is not applicable to income-tax proceedings, however, we cannot remain oblivious of the fact that an inconsistent approach of the Department can also not be permitted. Our aforesaid view is fortified by the judgment of the Hon'ble Supreme Court in the case of Radha Soami Satsang Vs. CIT (1992) 193 ITR 321 (SC). In its aforesaid order, the Hon'ble Apex Court had observed that in the absence of any material change justifying the Revenue to take a different view of the matter, a different and contrary stand could not be taken. We, thus, in the backdrop of our aforesaid observations find favor with the claim of the assessee that in the absence of any shift qua the facts attending to the assessee's claim for deduction of commission/brokerage expenses during the year under consideration, as in comparison to the preceding and succeeding years, there was no justification on the part of the lower authorities in declining its claim for deduction of the said expenditure during the year under consideration. Accordingly, the disallowance of commission/brokerage expenses of Rs. 1,27,15,319/-

sustained by the CIT(A) is herein vacated. The **Ground of appeal no.1** is allowed.

24. Resultantly, the appeal filed by the assessee is allowed in terms of our aforesaid observations.

25. Both the appeals of the assessee i.e. ITA No. 3862/Mum/2019 for A.Y 2015-16 & ITA No. 7109/Mum/2018 for A.Y 2012-13 are allowed, while for the appeal filed by the Revenue in ITA No. 4085/Mum/2019 for AY 2015-16 is dismissed.

Order pronounced in the open court on 25th October 2021.

| | |
|---|---|
| Sd/- | Sd/- |
| **S. RIFAUR RAHMAN** | **RAVISH SOOD** |
| (**ACCOUNTANT MEMBER)** | (**JUDICIAL MEMBER)** |

Mumbai, Date: 25.10.2021
SK

**Copy of the Order forwarded to :**
**1.** Assessee
**2.** Respondent
**3.** The concerned CIT(A)
**4.** The concerned CIT
**5.** DR "H" Bench, ITAT, Mumbai
**6.** Guard File

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai