

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT  
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND  
DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER

**ITA No.160/SRT/2018 (AY 2010-11)**

(Hearing in Virtual Court)

Shri Jaiprakash Khanchand Aswani, RMR & Co. (Chartered Accountants), 7006, World Trade Centre, 7 <sup>th</sup> Floor, Ring Road, Near Udhna Darwaja, Surat – 395 002. PAN: AASPA 3016 C	Vs	The Assistant Commissioner of Income Tax, Circle-1(2), Surat.
Assessee / appellant		Revenue / respondent

Assessee by	Shri Rajesh C. Shah – CA
Revenue by	Ms. Anupama Singla – Sr.DR
Date of hearing	21.10.2021
Date of pronouncement	21.10.2021

**Order under section 254(1) of Income Tax Act**

**PER PAWAN SINGH, JUDICIAL MEMBER:**

1. This appeal by assessee is directed against the order of ld.Commissioner of Income Tax (Appeals)-2, [Ld.CIT(A)], Surat dated 25.01.2018 for Assessment Year (AY) 2010-11. The Assessee raised following grounds of appeal:

*“1. The Hon’ble CIT (Appeals)-II, was not justified in confirming in the addition made by learned ACIT for Rs.21,42,000/- on account of Deemed Income from House Property of the Act.*

*2. The appellant reserves the right to add, alter, amend or withdraw any ground of appeal.”*

2. The assessee vide application filed on 09.06.2021 has raised following additional grounds of appeal:

**“First Additional Grounds of Appeal:**

*“The Ld. Income-tax officer has erred in reopening of the case u/s 147 of the Income-tax Act, 1961 by not obtaining required prior approval from the prescribed authority.*

**Second Additional Grounds of Appeal:**

*“The Ld. Income-tax officer has erred in reopening of the case u/s 147 of the Income-tax Act, 1961 by just on the basis of change of opinion.”*

*The above referred both additional grounds of appeal are on legal issue, and as per ruling of Hon’ble Supreme Court in the case of national Thermal Power Co. Ltd. V. Commissioner of Income-Tax (1998) 229 ITR 383 and in the case of Jute Corporation of India Ltd. v. CIT [1991] 187 ITR 688, the assessee prays to allow him to raise the above referred two additional grounds of appeal.”*

3. At the outset of hearing, the ld.Authorised Representative (ld.AR) for the assessee submits that the grounds of appeal primarily raised by the assessee is covered in favour of the assessee in assessee’s own case for the A.Y. 2011-12 in ITA No.2237/AHD/2015 dated 18.12.2018. The ld.AR further submits that in A.Y. 2011-12, the Assessing Officer (AO) made addition on account of deemed income from house property with regard to various flats/units lying in stock-in-trade of the assessee. On appeal before ld CIT(A), the additions were upheld, however, on further appeal, before Tribunal entire addition were deleted by following the decision of Jurisdictional High Court in CIT vs. Neha Builders Pvt. Ltd., [2008] 296 ITR 661 (Gujarat).
4. The ld.AR further submits that the case of assessee for the year under consideration was reopened under section 147 of the Act. In the re-assessment, the AO made similar addition under the head “ income from

house property” with regard to unsold flats/shops which were part of stock-in-trade. The ld. AR submits that there is no variation of facts, except various number of unsold units i.e. shops / flats.

5. On the other hand, the ld. Senior Departmental Representative (ld. Sr. DR) for the Revenue after going through the decision of the Tribunal in assessee’s own case for the A.Y. 2011-12 and grounds of appeal raised by the assessee relied on the order of ld.CIT(A).
6. We have considered the rival submission of the parties and have gone through the orders of Lower Authorities. We find that a similar set of facts in assessee’s own case for the A.Y. 2011-12, the Co-ordinate Bench of Tribunal by considering the decision of Jurisdictional High Court in Neha Builders Pvt. Ltd.(supra) passed the following order:

*“7. We have heard the rival submissions and perused the material on record. It is an undisputed fact the assessee has shown the properties as stock in trade in the books of accounts. The shops and flats sold by the assessee were assessed under head income from business. There were certain unsold flats and shops in stock in trade which the AO treated the property assessable under the head Income from House Property and computed notional annual netting value on such unsold flats placing reliance in the case of Ansal Housing Finance & Leasing Co. Ltd. (supra). The action of the AO was upheld by the learned CIT(A).*

*8. The Hon'ble Gujarat High Court in the case of Neha Builders Pvt. Ltd. (supra) considered the question whether the rental income received from any property in the construction business can be claimed under the head ‘income from property’ even though the said property was included in the closing stock. The Hon'ble Gujarat High Court held that if the business of the assessee is to construct the property and sell it or to construct and let out the same, then that would be the business and the business stocks, which may include movable and immovable, would be taken to be stock in trade and any income derived from such stocks cannot be termed as income from house property. While holding so the Hon'ble High Court observed as under :-*

"8. True it is, that income derived from the property would always be termed as 'income' from the property, but if the property is used as 'stock-in-trade', then the said property would become or partake the character of the stock, and any income derived from the stock, would be 'income' from the business, and not income from the property. If the business of the assessee is to construct the property and sell it or to construct and let out the same, then that would be the 'business' and the business stocks, which may include movable and immovable, would be taken to be 'stock-in-trade', otherwise, it is to be seen that there was distinction between the 'income from property.'"

9. From the statement of the assessee, it would clearly appear that it was treating the property as 'stock-in-trade'. Not only this, it will also be clear from the records that, except for the ground floor, which has been let out by the assessee, all other portions of the property constructed have been sold out. If that be so, the property, right from the beginning was a 'stock-in-trade.'

9. Similarly the Coordinate Bench in the case of *Runwal Builders Pvt. Ltd. (supra)* has considered similar issue as to whether the unsold property which is held as stock in trade by the assessee can be assessed under the head 'income from house property' by notionally computing the annual letting value from such property and the Coordinate Bench considering the decision of the Hon'ble Delhi High Court in the case of *Ansal Housing Finance & Leasing Co. Ltd. (supra)* which the AO relied upon and the decision of the Hon'ble Supreme Court in the case of *Chennai Properties & Investments Ltd. vs. CIT* reported in 373 ITR 673, held that unsold flats which are in stock in trade should be assessed under the head 'business income' and there is no justification in estimating rental income from those flats are notionally computing annual letting value under Section 23 of the Act. While holding so the Coordinate Bench observed as under :-

"3. The Id. AR placed the order of Bombay Tribunal in the case of *M/s Perfect Scale Company Pvt. Ltd.*, ITA Nos.3228 to 3234/Mum/2013, order dated 6-9-2013, wherein it was held that in respect of assets held as business, income from the same is not assessable u/s.23(1) of the IT Act.

4. On the other hand, Id. DR relied on the order of Hon'ble Delhi High Court in the case of *Ansal Housing Finance & Leasing Co. Ltd.*, 354 ITR 180 (Delhi) in support of the proposition that even in respect of unsold flats by the developer is liable to be taxed as income from house property.

5. We have considered rival contentions and perused the record. The issue under consideration has been restored by the CIT(A) to the file of AO to compute the annual value. Recently the Hon'ble Supreme Court in the case of *M/s Chennai Properties & Investments Ltd. Vs. CIT*, reported in (2015) 42 SCD 651, vide judgment dated 9-4-2015 has held that where assessee company engaged in the activity of letting out properties and the rental income received was shown as business income, the action of AO treating the rental income as income from house property in place of income from business shown by the assessee was held to be not justified. The Hon'ble Supreme Court held that since the assessee company's main object, is to acquire and held properties and to let out these properties, the income earned by letting out these properties is main objective of the company, therefore, rent received from the letting out of the properties is main objective of the company, therefore, rent received from the letting out of the properties is

assessable as income from business. On the very same analogy in the instant case, assessee is engaged in business of construction and development, which is main object of the assessee company. The three flats which could not be sold at the end of the year was shown as stock-in-trade. Estimating rental income by the AO for these three flats as income from house property was not justified insofar as these flats were neither given on rent nor the assessee has intention to earn rent by letting out the flats. The flats not sold was its stock-in-trade and income arising on its sale is liable to be taxed as business income. Accordingly, we do not find any justification in the order of AO for estimating rental income from these vacant flats u/s.23 which is assessee's stock in trade as at the end of the year. Accordingly, the AO is directed to delete the addition made by estimating letting value of the flats u/s.23 of the I.T.Act.

10. In the case on hand before us it is an undisputed fact that both assessee 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.

11. In the result, the appeals filed by the assessee are allowed."

**10. In the light above judicial pronouncements, we are of the considered opinion that provisions of section 23 of the Act are not applicable in the case of the assessee. 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. This grounds of appeal is therefore, allowed."**

7. Considering the aforesaid decision of Co-ordinate Bench of Tribunal in assessee's own case for the A.Y. 2011-12 wherein no contrary fact or law is brought to our notice, therefore, following the principle of consistency, the primary grounds of appeal raised by the assessee is allowed.
8. During the hearing, the ld.AR for the assessee neither made any submission, nor made any statement, not pressed additional grounds of appeal, therefore, the additional grounds of appeal are treated as not pressed and are dismissed as not pressed.

9. In the result, appeal of the assessee is allowed.

Order announced on 21<sup>st</sup> October, 2021 at the time of hearing  
in virtual court hearing.

Sd/-  
**(Dr ARJUN LAL SAINI)**  
**ACCOUNTANT MEMBER**

Surat, Dated: 21 /10/2021 / SGR\*

Copy to:

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

Sd/-  
**(PAWAN SINGH)**  
**JUDICIAL MEMBER**

By order

/ / TRUE COPY / /

Sr. Pvt. Secretary, ITAT, Surat