

**IN THE INCOME TAX APPELLATE TRIBUNAL 'B' BENCH, PUNE**

**(Through virtual court)**

**SHRI PARTHA SARATHI CHAUDHURY, JM  
AND  
SHRI RIPOTE DIPAK PANDURANG, AM**

ITA No. 109/PUN/2018  
Assessment Year : 2014-15

M/s. Nirman Homes  
205 City Centre,  
Opp. Ayurved Rasshala, Karve Road,  
Pune-411 005.

Appellant

PAN AAAAN5785E

Vs.

The I.T.O. Ward 3(1) Pune

Respondent

Appellant by : Shri Suhas Bora

Respondent by : Shri Piyush Kumar Singh Yadav

Date of Hearing : 01-02-2022

Date of Pronouncement : 04-02-2022

**ORDER**

**PER PARTHA SARATHI CHAUDHURY, JM :**

This appeal preferred by the assessee emanates from the order of the Id. Commissioner of Income Tax (Appeals)-3, Pune dated 16-11-2017 for the Assessment Year 2014-15 raising following grounds of appeal.

On the facts and in the circumstances of the case:

1. The learned CIT(A) erred in confirming the addition made by the AO u/s 23(4) by estimating the deemed rent by considering ALV at the rate of Rs. 18,000/- per month on the unsold stock of flats, disregarding the submissions of the appellant.
2. The learned CIT(A) while confirming the addition failed to appreciate the following contention of the appellant that:
  - a. The amended provisions about the deemed rental u/s 23(4) are applicable from AY 2017-18.

b. All the unsold flats are stock in trade of the appellant and therefore the income from the same is not assessable u/s 23(1).

3. The Id. CIT(A) has erred in rejecting the alternate contention of the appellant that even if deemed rent is to be assessed u/s 23(4) it is to be assessed on the basis of fair value adopted by municipal corporation and not on the estimation basis, on the ground that the Bombay High Court decision relied upon by the appellant is related to the valuation of assets for purpose of wealth-tax.

4. The appellant may kindly be permitted to add to or alter any of grounds of appeal, if deemed necessary.”

2. The relevant facts of the case are that the assessee is an Association of Persons carrying on business of promoters and builders. The assessee filed its return of income for the year under consideration on 22-9-2014 declaring NIL income. The assessee claimed deduction u/s 80-IB(10) of the Income-tax Act 1961 (“the Act”), in respect of its housing project “Nirman Viva” situated at Survey No. 11+12, Ambegaon Bruk, Pune. The A.O completed the assessment u/s 143(3) of the Act determining the total income at Rs. 3,23,48,839/-. The A.O added the profit on sales made during the year amounting to Rs. 3,04,67,608/- and deemed rent of vacant flats of Rs. 18,81,231/- to the total income of the assessee.

3. In this case, the assessee has challenged the decision of the learned CIT(A) in confirming the addition made by the A.O u/s 23(4) of the Act by estimating the deemed rent considering the ALV at the rate of Rs. 18,000/- p.m. on the unsold stock of plant disregarding submissions of the assessee. It is further the case of the assessee that the learned CIT(A) while confirming the addition has not appreciated the facts as submitted by the assessee that the provisions are regarding deemed rental income u/s 23(4) of the Act are applicable from A.Y. 2017-18 and not applicable in the present assessment year 2014-15 in case of the assessee. All the unsold flats are stocks in trade of the

assessee and income from the same is not assessable u/s 23(4) of the Act. The A.O has dealt with this issue from para 10 onwards of his order and has given his finding at page 10.2 which is as follows:

“10.2 It is seen that all the residential units were completed and final occupancy certificate was issued by PMC in March 2013. Thus, the assessee was having unsold completed units as stock as on 31-3-2014. The cost of closing stock of unsold units as per profit and loss account of the assessee is Rs. 3,83,92,477/-. Following the decision of Hon’ble Delhi High Court Vs. Ansal Housing Finance and Leading Company and Hon’ble Allahabad High 2. In this case the assessee has also filed additional grounds of appeal. The additional ground No. 1 is taken along with grounds No. 1 and 2 of the grounds of appeal in the appeal memo filed by the assessee for adjudication. In the case of Radhadevi Dalmia cited in 125 ITR 134, the ALV of the flats is arrived at 7% of the investment cost of the project (WIP value) of Rs. 3,383,92,477/-. Thus, the ALV is arrived at Rs. 26,87,473/-. The amount of addition on account of deemed rent after considering standard deduction of 30% works out to Rs. 18,81,231/-. The same is therefore, added to the total income of the assessee for the year under consideration under the head “House property”. Penal proceedings u/s 271(1)(c) of the I.T. Act for furnishing inaccurate particulars of income are initiated separately.”

4. The learned CIT(A) has discussed this issue in his order from para 8 onwards while giving his reasoning on his decision. That at para 8.3.7.4, the learned CIT(A) has however, given partial relief to the assessee by observing as follows:

“8.3.7.4 : However, in the case under consideration, the rent of Rs. 26,87,473/- (calculated based upon 7% of the closing stock) for a year for 6 flats translates into Rs. 37,302/- per flat per month on an average. The average area of these 6 flats comes to 900 sq.ft. Based upon location and area of flat, I am of opinion that the average rent of a flat of 900 sq.ft. should be taken around half of this rent i.e. approximately Rs. 18,000/- per flat per month. Thus, the A.O is directed to take the ALV of 6 flats at Rs. 13,43,736/- (being 50% of ALV of Rs. 26,87,473/- as taken by the AO). After allowing 30% as standard deduction, the addition on account of deemed rent should be reduced to Rs. 9,40,616/-. The appellant thus gets a relief of Rs. 9,40,615/-.”

5. At the time of hearing, the learned counsel for the assessee vehemently submitted that this issue has been decided in favour of the assessee in the case of the assessee’s sister concern itself Narmada Nirman Developers Vs. The ITO in ITA No. 107 and 108/PUN/2018 for A.Y. 2013-14 and 2014-15 dated 25-1-2019, wherein the Tribunal has considered various judicial pronouncements and

decided the case in favour of the assessee on identical facts and circumstances.

The facts before the Tribunal were as follows:

“Assessee a partnership firm stated to be engaged in the business of promoters and builders. Assessee electronically filed its return of income for A.Y 2013-14 on 26-9-2013 declaring total income at Rs. NIL. The case was selected for scrutiny and thereafter assessment was framed u/s 143(3) of the Act vide order dated 9-3-2016 and the total income was determined at Rs. 45,62,311/-. Aggrieved by the order of the AO, assessee carried the matter before Id. CIT(A), who vide order dated 23-11-2017 (in appeal No. CITA(a), Pune-3/10050/2016-17) granted partial relief to the assessee. Aggrieved by the order of the Id. CIT(A), the assessee is now in appeal before us and has raised the following grounds:

“1. The learned CIT(A) erred in confirming the addition to the extent of Rs. 8,76,575/- made by the AO u/s 234) by estimating the deemed rent @ 7% on the value of closing stock of unsold flats, disregarding the submissions of the appellant.

The learned CIT(A) while confirming the addition failed to appreciate the following contentions of the appellant t:

a. The amended provisions about the deemed rental u/s 23(4) are applicable from A.Y. 2017-18.

b. All the unsold flats are stock in trade of the appellant and therefore the income from the same is not assessable u/s 23(1).

3. The Id. CIT(A) has erred in rejecting the alternate contention of the appellant that even if deemed rent is to be assessed u/s 23(4) it is to be assessed on the basis of fair value adopted by municipal corporation and not on the estimation basis, on the ground that the Bombay High Court decision relied upon by the appellant (323 ITR 104) is related to the valuation of assets for purposes of Wealth tax.”

6. In this case, the Tribunal has held as follows:

“8. We have heard the rival submissions and perused material on record. The issue in the present ground is with respect to addition under the head 'income from house property' on the four unsold flats by the assessee. We find that the a-ordinate Bench of the Tribunal on identical issue in the case of Pinnacle Constro and Ecohomes Pvt. Ltd., (supra) and after considering various decisions cited therein has held that no addition on account of deemed rent of six unsold flats can be made in the hands of assessee. The relevant findings of the Co-ordinate Bench of the Tribunal are as under:

*“8. I have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to addition under the head 'income from house property' on the six unsold flats by the assessee. It is an undisputed fact that assessee is in the business of Civil*

*Engineers, Builders and Developers and had in the closing stock the unsold six flats. It is also an undisputed fact that these six flats were vacant and no rental income was derived by the assessee during the year under consideration. I find that Hon'ble Gujarat High Court in the case of CIT Vs. Neha Builders Pvt. Ltd., (supra) has held that when the business of the assessee is to construct the property and sell it or to construct or let out then that would be the "business" and the business stocks which may include movable and immovable properties would be taken to be "stock-in-trade" and any income derived from such stocks cannot be termed as "income from house property". I further find that the Co-ordinate Bench of the Mumbai Tribunal in the case of C.R. Developments Pvt. Ltd., Vs. CIT (supra) after considering the decision of Hon'ble Apex Court in the case of Chennai Properties and Investments vs. CIT (2015) 373 ITR 673 (SC) has held that on the flats which were unsold, which were neither given on rent nor the assessee had intention to let out the flats, no deemed rental income could be considered in assessee's hands.' I further find that the Co-ordinate Bench of Pune Tribunal in the case of M/s. Cosmopolis Construction (supra) after considering the decision of Hon'ble Gujarat High Court in the case of CIT Vs. Neha Builders (P) Ltd., (supra), the decision of Mumbai Tribunal in the case of C.R. Developments Pvt. Ltd., (supra) M/s. Runwal Constructions Vs. ACIT (supra) and after also considering the decision in the case CIT Ansal Housing and Construction (supra) has held that no notional annual rental value on unsold flats held in stock-in-trade can be made in assessee's hands. The relevant findings of the Co-ordinate Bench of the Tribunal is as under:*

*7. The issue before us for adjudication is whether the notional annual rental income on unsold flats held as stock-in-trade by the assessee is to be assessed under the head "Business income" or under the head income from House property. The Hon'ble Gujarat High Court in the case of Commissioner of Income-tax Vs. Neha Builders (P) Ltd. (supra) has held that where the property is held as stock in trade any income derived from stock would be income from business and not income from house property. The relevant extract of the findings of Hon'ble High Court are as under:*

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

*8. True it is, that income derived from the property would always be termed. as 'income' from the property, but if the property is used as 'stock-in-trade', then the said property would become or partake the character of the stock and any income derived from the stock, would be 'income' from 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', and any income derived from such stocks cannot be termed 'income from property'. Even otherwise, it is to be seen that there was distinction between the 'income from business' and 'income from property on one side, and 'any income from other sources'. The Tribunal, in our considered opinion, was absolutely unjustified in comparing the rental income with the dividend income on the shares or interest income on the deposits. Even otherwise, this question was not raised before the subordinate Tribunals and, all of sudden, the Tribunal started applying the analogy.*

*9. 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.'"*

*8. In the case of Commissioner of Income Tax Vs. Ansal Housing Finance And Leasing Co. Ltd. (supra) the Hon'ble Delhi High Court taking a contrary view has held that annual rental value on unsold flats built by assessee engaged in construction business is assessable as income from house property. It is a well settled law that when two divergent views of non-jurisdictional High Courts are available and there is no decision on the issue from the Jurisdictional High Court, the view in favour of the assessee has to be adopted [Commissioner of Income Tax Vs. Vegetable Products Ltd. (supra)].*

*9. In so far as the decision of Hon'ble Bombay High Court in the case of Commissioner of Income Tax Vs. Sane & Doshi Enterprises (supra) is concerned we find that the facts in the said case are at variance. In the said case the assessee was engaged in construction business. The assessee rented out unsold flats and suo-motu offered rental income from the flats under the head "Income from House Property". On the contrary the Revenue wanted to tax rental income under the head "Business Income". The matter travelled to the Tribunal. The Tribunal held that the income earned by the assessee from renting of flats is to be assessed under the head "Income from House Property". The Department carried the matter in appeal before the Hon'ble High Court. The Hon'ble High Court confirmed the findings of Tribunal and held that rental income received from unsold portion of property constructed by the assessee, is assessable as income from house property. The core difference between the case of the assessee and in the case of Commissioner of Income Tax Vs. Sane & Doshi Enterprises (supra) is that in the case of assessee, it is notional annual rental income on flats held as stock which is sought to be taxed, whereas in the case of Commissioner of Income Tax Vs. Sane & Doshi Enterprises (supra) it was the case of actual rental income earned by the assessee from renting of flats constructed by it. Hence, the decision rendered in the case of Commissioner of Income Tax Vs. Sane & Doshi Enterprises (supra) would not apply in the facts of the present case,*

*10. We further find that Mumbai Bench of the Tribunal in M/s. C.R, Developments Pvt. Ltd. Vs. JCIT (supra), M/s. Runwa / Constructions Vs. ACIT (supra) and Shri Girdhariial K. Lulla Vs. DCIT (supra) under similar set of facts have taken a consistent view in holding notional annual rental value on unsold flats held as stock-in-trade by the assessee engaged in construction and development activities as "Business Income".*

*9. In view of the aforesaid facts, I following the decision of Co-ordinate Bench of the Tribunal in the case of M/s. Cosmopolis Construction Vs. ITA in ITA Nos.230 & 231/PUN/2018 hold that in the present case no addition on account of deemed rent of six unsold flats can be made in hands of the assessee. I therefore set aside the addition made by AO. Thus, the ground of the assessee is allowed."*

9. Before us, no contrary decision in support of Revenue has been cited by Ld.D.R. Further Ld.D.R. has also not placed any material to demonstrate that the decision of the Tribunal in the case of Pinnacle Constro and Ecohomes Pvt. Ltd., (supra) has been set aside or over ruled by higher Judicial Forum. In view of the aforesaid facts, we following the decision of Co-ordinate Bench of the Tribunal in the case of Pinnacle Constro and Ecohomes Pvt. Ltd., (supra) hold that in the present case no addition on account of deemed rent of four unsold flats can be made in the hands of assessee. We therefore set aside the addition made by the AO. Thus, the grounds of the assessee are allowed."

7. The assessee has also relied on the decision of Pune Bench of the Tribunal in the case of Pinacle Constro and Ecohomes Pvt. Ltd. in ITA No. 2650/PUN/2017 for A.Y. 2012-13 dated 20<sup>th</sup> November 2018 and Shri Gajendra D. Pawar in ITA No. 1359 / PUN/2018 for A.Y. 2012-13 dated 14<sup>th</sup> February 2019. That on the identical grounds and similar facts and circumstances, we also find that in a recent decision of Pune Bench of the Tribunal in the case of Kumar Properties and Real Estate Pvt. Ltd. Vs. DCIT in ITA No. 2977/PUN/2017 dated 28-4-2021, the Tribunal held as under:

"13. A close scrutiny of the provision inducted by the Finance Act, 2017, transpires that where a property is held as stock-in-trade which is not let out during the year, its annual value for a period of one year, which was later enhanced by the Finance Act 2019 to two years, from the end of the financial year in which the completion certificate is received, shall be taken as NIL. The amendment has been carried out w.e.f. 1-4-2018 and the Memorandum explaining the provisions of the Finance Bill also clearly provides that this amendment will take effect from 1-4-2018 and will,

accordingly apply in relation to the assessment year 20-18-19 and subsequent years. Obviously, it is prospective amendment. The effect of this amendment is that stock-in-trade of buildings etc. shall be considered for computation of annual value under the head "Income from house property" after one/two years from the end of the financial year in which the certificate of completion of construction of the property is obtained on and from the A.Y. 2018-19. Instantly we are concerned with the assessment year 2013-14. As such, the amendment cannot apply to the year under consideration. In the absence of the applicability of such amendment, no income can be said to have accrued to the assessee from unsold flats available as stock in trade. We therefore, overturn the impugned order on this score and delete the addition of Rs. 1.47 crore sustained in the first appeal."

8. Therefore, in the aforesaid case, it has been categorically held that the amendment has been carried out about the deemed rental provision u/s 23(4) of the Act w.e.f. 1-4-2018 i.e. it will apply prospectively from A.Y. 2018-19 onwards, whereas in the instant case of the assessee, pertains to the A.Y. 2014-15. In absence of applicability of amendment no income can be said to have been accrued to the assessee from the unsold flats available as stock-in-trade. Respectfully following the aforesaid judicial pronouncement with the same parity of reasoning, we set aside the order of the learned CIT(A) and allow the appeal of the assessee.

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

Order pronounced in the open Court on this 4<sup>th</sup> February 2022.

Sd/-

sd/-

**RIPOTE DIPAK PANDURANG**  
**ACCOUNTANT MEMBER**

**PARTHA SARATHI CHAUDHURY**  
**JUDICIAL MEMBER**

Pune; Dated : 4<sup>th</sup> February 2022  
Ankam

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The Pr. CCIT Pune
4. The Pr. CIT 3, Pune.
5. Guard File

BY ORDER,

Sr. Private Secretary  
ITAT, Pune.**///TRUE COPY///**

		Date	
1	Draft dictated on	01-02-2022	Sr.PS/PS
2	Draft placed before author	03.02.2022	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on		Sr.PS/PS
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11	Date of dispatch of order		