

IN THE INCOME TAX APPELLATE TRIBUNAL
"H" BENCH, MUMBAI

SHRI PRAMOD KUMAR, VICE PRESIDENT
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 3627/MUM/2019
(ASSESSMENT YEAR: 2014-15)

DCIT-15(2)(1),
Room No. 357, 3rd Floor,
Aayakar Bhavan,
M.K. Road, Marine Lines,
Mumbai - 400020

..... Appellant

M/s Haware Infrastructure Private
Limited,
413-416, Vardhaman Market, Sector-17,
Vashi, Navi Mumbai - 400705
[PAN: AABCH3852R]

Vs

..... Respondent

ITA No. 2544/MUM/2019
(ASSESSMENT YEAR: 2014-15)

M/s Haware Infrastructure Private
Limited,
413-416, Vardhaman Market, Sector-17,
Vashi, Navi Mumbai - 400705
[PAN: AABCH3852R]

..... Appellant

ACIT-15(2)(1),
Room. No. 357, 3rd Floor,
Aayakar Bhavan,
M.K. Road, Mumbai - 400020

Vs

..... Respondent

Appearances

For the Appellant/Department : Shri Tejinder Pal Singh Anand (DR)
For the Respondent/ Assessee : Shri Raturaj Gurjar (AR)

Date of conclusion of hearing : 15.02.2022
Date of pronouncement of order : 30.03.2022

ORDER

Per Rahul Chaudhary, Judicial Member:

1. These are cross appeal arising from the order, dated 20.02.2019, passed by the Commissioner of Income Tax (Appeals)-24, Mumbai

[hereinafter referred to as 'the CIT(A)'] in appeal [CIT(A)-24/ACIT-15(2)(1)/IT-335/2016-17] for the Assessment Year 2014-15, whereby the CIT(A) has partly allowed the appeal filed by the Assessee against the assessment order, dated 27.12.2016, passed under section 143(3) of the Income Tax Act, 1961 [Act].

2. The Assessee, a private limited company, engaged in the business of real estate development and construction, filed its return of income for Assessment Year 2014-15 on 14.11.2014 declaring total income at INR 3,20,33,750/-.
3. The case of the Assessee was picked up for detailed scrutiny and the assessment was completed under Section 143(3) of the Act on 30.03.2016 at total income of INR 7,41,76,715/- after making following additions/disallowances : (a) Addition of INR 3,15,79,936/- as income from house property being deemed rental income from closing stock, and (b) Disallowance of INR 1,05,63,033/- in respect of direct cost and material consumed.
4. In appeal before CIT(A) against the assessment order dated 30.03.2016, the addition of INR 3,15,79,936/- was deleted by the CIT(A), While the ground related to disallowance of INR 1,05,63,033/- was not adjudicated upon by the CIT(A).
5. Both, Assessee as well as the Revenue, being aggrieved by the order passed by the CIT(A) have preferred appeal before the Tribunal.
6. In ITA No. 3627/MUM/2019 following grounds of appeal have been raised by the Revenue:

"1. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in allowing assessing estimation ALV on unsold flats being stock-in-trade stating that

identical issue for A.Y. 2009-10 & 2011-12 had been decided in the favour of the assessee company in the own case, without appreciating the fact that as per the provisions of section 22 of the IT Act, 1961, the notional rental income from unsold properties ought to have been brought to tax as income from house property. The position has been upheld in the case of CIT vs. Ansal Housing Finance & Leasing Co. Ltd. by the Hon'ble Delhi High Court.

2. *The appellant prays that the order of the CIT(A), Mumbai on the above directions be set aside and that of the assessing officer be restored."*

7. On the other hand, the Assessee has, in ITA No. 2544/Mum/2019, raised the following grounds

" On the facts & circumstances of the case and in law, the CIT(A) has erred in:

1) Upholding the disallowance of expenditure of Rs.1,05,63,033/- in respect of expenditure incurred on the project 40/30A, Vashi Site Fantasia."

8. The Ld. Authorized Representative for the Assessee appearing before us, at the outset, submitted that solitary issue related to disallowance of expenditure of 1,05,63,033/- raised by the Assessee in his appeal that has not been adjudicated by the CIT(A) and therefore, this issue be remanded back to the CIT(A) for adjudication. As regards appeal preferred by the Revenue, the Ld. Authorized Representative submitted that the issue raised by the Revenue relating to notional rental income from closing stock stands decided in favour of the Assessee in the case of the Assessee for Assessment Year 2013-2014 in ITA No. 4021/Mum/2019 wherein the Departmental Appeal on identical issue was dismissed by the Tribunal.

Per contra, the Ld. Departmental Representative relied upon the assessment order and submitted that the CIT(A) has erred in not following decisions of Hon'ble Delhi High Court in the case of CIT Vs Ansal Housing Finance & Leasing Co. Ltd. (2013) : 354 ITR 180 (Del). Ld. Departmental Representative also placed reliance on the recent decision of the Tribunal in the case of Dimple Enterprises Vs, DCIT: ITA No.5269/Mum/2019, dated 21.05.2021.

Responding to the submission of the Ld. Departmental Representative the Ld. Authorized Representative for the Assessee, relying upon the 'Object Clause' of the assessee-company, submitted that the aforesaid decision of the Tribunal in the case of Dimple Enterprises (supra) is not applicable to the facts of the present case.

ITA No 3627/MUM/2019

9. We would first take up Departmental Appeal (ITA No. 3627/MUM/2019) wherein both the grounds raised pertain to addition of INR.3,15,79,936/-, being deemed rental income from closing stock, which was made by the AO and deleted by CIT(A).
10. We have heard the rival submission on this issue and perused the material on record. In Assessee's own case for the Assessment Years 2013-2014 in ITA No. 4021/Mum/2019 identical ground raised by the Revenue has been decided against the Revenue by placing reliance on the following decisions of the Tribunal in the case of group companies and after giving due consideration to the decision of Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd Vs. DCIT (supra):
 - ACIT Vs. Haware Constructions Pvt. Ltd. : Assessment Years 2009-10 & 2011-12 : ITA No.3321/Mum/2016 (31.08.2018),
 - Haware Engineers Pvt. Ltd. Vs DCIT : Assessment Year 2012-13 : ITA No.7155/Mum/2016 (10.10.2018),

- Haware Infotech Ltd. Vs ACIT : ITA No. 281&291/Mum/2018 :
Assessment Year 2013-14 & 2014-15 (08.05.2019)

11. The Ld. Departmental Representative had placed reliance on the decision in the case of Dimple Enterprises (supra). However, in that case the objects of the assessee did not include letting out of property and even during the assessment proceedings the assessee in that case took a stand that it had never contemplated letting/renting of property. For the Assessee before us, this is not the case, and to this extent the case before us is distinguishable on facts. Further, the AO has not made any such observation regarding object clause or the nature of business of the Assessee while making the disallowance. In any case, since there is no change in facts as compared to the immediately preceding assessment year, we are not persuaded to take a view different from one taken by the co-ordinate bench in Assessee's own case for the Assessment Years 2013-2014 in ITA No. 4021/Mum/2019 (30.08.2019), the relevant extract of which reads as under:

"14 We have considered the rival submissions of the parties and have gone through the order of the lower authorities. We have also gone through the order of the Tribunal in assessee's group case in ACIT vs. M/s Haware Constructions Pvt. Ltd. for AY 2009-10 & 2011-12 in ITA No.3321/Mum/2016 dated 31.08.2018. We have also perused the order of Tribunal in assessee's group case in M/s Haware Engineers Pvt Ltd. vs. DCIT in ITA No. 7155/Mum/2016 dated 10.10.2018 for AY 2012-13 wherein the order of M/s Harware Constructions Pvt. Ltd. (supra) in ITA No. 3321/Mum/2016 dated 31.08.2018 was followed. We have noted the coordinate bench of Tribunal is assessee's group case in M/s Haware Constructions Pvt. Ltd. for in appeal for AY 2009-10 has passed the following order:

"4. The 2nd ground of appeal raised by the revenue is that the Id. CIT(A) erred in holding the unsold flats as stock-in-trade used for purpose of business relying on the decision of the Hon'ble Supreme Court in the case

of M/s. Chennai Properties and Investment Ltd. vs. CIT ,231 Taxman 336. It is stated that the above decision pertains to assessee is engaged in the business of letting out properties.

4.1. As stated earlier, the assessee is a builder and developer and at the end of the year it had inventory of stock-in-trade which are not sold and lying vacant of Rs.12,10,05,508/-. The AO relied upon the judgment of the Hon'ble Delhi High Court in CIT vs. Ansal Hsg. Finance & Leasing Co. Ltd., (ITA No.18/1999 dtd. 31/10/2012) and computed deemed income from house property by estimating @8.5% of cost of construction and after allowing the deductions of 30%, computed the income.

4.2. Aggrieved by the order of the AO, the assessee filed appeal before the Id. CIT(A). We find that the Id. CIT(A), relying on the decision in Shyam Burlap Co. Ltd. vs. CIT, 61 taxmann.com 121 (Calcutta High Court), M/s. Chennai Properties and Investment Ltd. (supra) and the order of the Tribunal in C.R. Development Pvt. Ltd. (ITA No.4277/Mum/2012 dtd. 13/05/2016), deleted the addition as per para 2.4.60 of his appellate order dtd.01/02/2016.

4.3. The Id. DR relies on the decision in Ansal Hsg. Finance & Leasing Co. Ltd., (supra), and submits that the order passed by the AO may be restored.

4.4. On the other hand, the Id. counsel of the assessee relies on the judgement of the Hon'ble Gujarat High Court in CIT vs. Neha Builders Pvt. Ltd. 296 ITR 661 (Guj.) and the order of the Tribunal in M/s. Runwal Constructions vs. ACIT (ITA No.5408/Mum/2016 dtd.22/02/2018) and Progressive Homes vs. ACIT (ITA No.5082/Mum/2016 dtd. 16/05/2018).

4.5. We have heard the rival submissions and perused the relevant materials on record. On the above issue, we come across one decision for the assessee and another decision for the revenue. The

decision in Neha Builders Pvt. Ltd.(supra) is for the assessee, whereas the decision in Ansal Hsg. Finance & Leasing Co. Ltd., (supra) is for the Revenue. The Hon'ble Supreme Court in the case of CIT vs. Vegetable Products 88 ITR 192 (SC) has held that "if two reasonable constructions of a taxing provisions are possible, that construction which favours the tax payer must be adopted."

In view of the above position of law, we shall follow the decision in Neha Builders Pvt. Ltd.(supra).

4.5.1. We now come to the relevant provisions in the Act. The following subsection (5) has been inserted after sub-section (4) of section 23 by the Finance Act, 2017, w.e.f. 01.04.2018:

"(5) Where the property consisting 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 nil."

Thus, in order to give relief to Real Estate Developers, section 23 has been amended w.e.f. AY 2018-19 (FY 2017-18). By this amendment, it is provided that if the assessee is holding any house property as his stock-in- trade which is not let out for the whole or part of the year, the annual value of such property will be considered as Nil for a period up to one year from the end of the financial year in which a completion certificate is obtained from the competent authority.

In view of the above amendment to section 23, we are not adverting to the other case laws relied on by the Ld. counsel.

In the instant case, the assessee is a builder and developer. The issue of taxability is with regard to unsold flats. The AY is 2009-10. In view of the insertion of sub-section (5) in section 23 by the Finance Act, 2017, w.e.f. 01.04.2018 narrated hereinbefore, we uphold the order of the Ld. CIT(A) and dismiss the 2nd ground of appeal filed by the revenue.

15. *The similarly in assessee's other group case in M/s Haware Infotech Ltd. vs. ACIT in ITA No. 281 & 291/Mum/2018 for AY 2013-14 & 2014-15 the Tribunal vide order dated 08.05.2019 on similar grounds of appeal passed the following order;*

"7. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record and judicial pronouncements relied upon by them. Admittedly, the assessee who is a developer of real estate had developed a property viz. project at Plot No. 16- 30-A, Vashi, under the name and style of Vashi Infotech Park. As is discernible from the orders of the lower authorities, the assessee was holding 'closing stock' of finished unsold units in Vashi Infotech Park of Rs.87,46,129/-. In sum and substance, there is no dispute on the fact that the finished unsold units in Vashi Infotech Park were held by the assessee as the 'closing stock' of its business as that of a developer of real estate.

8. We find that our indulgence in the present appeal has been sought by the assessee for adjudicating, as to whether the CIT(A) is right in law and the facts of the case in concurring with the A.O that the 'Annual Lettable Value' of the vacant unsold units held by the assessee as stock-in-trade of its business of a real estate developer, were liable to be brought to tax under the head "Income from house property", or not. Admittedly, the assessee on 31.03.2013 was holding stock-in-trade of vacant unsold completed flats/shops of Rs.87,46,129/-. The A.O drawing support from 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), had concluded that the 'ALV' of the aforesaid vacant properties held by the assessee as stock-in-trade of its business of real estate developer, was liable to be assessed under the head "Income from house property". As the assessee failed to furnish the details as regards the 'Annual Rateable Value' of the aforementioned properties, therefore, the A.O estimated the 'ALV' of the said properties @ 8.5% of the aggregate cost of their construction and worked out the same at Rs.7,43,420/- (i.e 8.5% of 87,46,129/-

). Further, after allowing the statutory deduction under Sec. 24(b) @ 30% of the ALV of Rs. 7,43,420/-, the A.O brought the balance amount of Rs.5,20,394/- to tax under the head "Income from house property".

9. We have deliberated at length on the issue under consideration, in the backdrop of the observations of the lower authorities. We find that the Hon'ble High Court of Gujarat in the case of CIT Vs. Neha Builders (P) Ltd. (2008) 296 ITR 661 (Guj), had observed that if the business of the assessee is to construct property and sell it or to construct and let out the same, then any income derived from the immovable properties held by it as its stock-in-trade cannot be assessed under the head "Income from house property". The Hon'ble High Court while concluding as herein above, had 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-intrade', then the said property would become or 'partake the character of the stock, and any income derived from the stock, would be 'income' from p 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 as 'income from property'. Even otherwise, it is to be seen that there was distinction between the 'income from business' and 'income from property' on one side, and 'any income from other sources'. The Tribunal, in our considered opinion, was absolutely unjustified in comparing the rental income with the dividend income on the Shares or interest income on the deposits. Even otherwise, this question was not raised before the subordinate Tribunals and, all of

sudden, the Tribunal started applying the analogy.”

10. Further, we find that the Hon'ble High Court of Bombay in the case of PCIT, Central-1 Vs. M/s Classique Associate Ltd. (ITA No.1216 of 2016, dated 28.01.2019) concurring with the view taken by the Hon'ble High Court of Gujarat in the case of CIT Vs. Neha Builders Pvt. Ltd. (2008) 296 ITR 661 (Guj), and further relying on the judgment of the Hon'ble Supreme Court in the case of Chennai Properties & Investments Ltd. Vs. CIT (2015) 377 ITR 673 (SC), had observed, that the income generated by an assessee who was engaged in the business of acquiring and holding properties from such source would be its 'business income' and not its income under the head 'house property'. Also, we find that the Tribunal while disposing off the appeal in the case of the 'sister concern' of the assessee in Haware Engineers and Builders Pvt. Ltd. Vs. DCIT, Central Circle-4(2), Mumbai [ITA No. 7155/Mum/2016, dated 10.10.2018], had concluded that if an immovable property in the shape of flats/shops is held by the assessee as stock-in-trade of its business, then it becomes part of its trading operations, and any income derived there from would be its 'business income' and not 'Income from house property'. On the basis of the aforesaid deliberations, the Tribunal while disposing off the aforesaid appeal had vacated the addition of the 'ALV' that was made by the lower authorities in respect of the flats/shops which were held by the assessee before them as stock-in-trade of its business of a real estate developer. In fact, the Tribunal while concluding as hereinabove, had primarily relied on the view earlier taken by it in the case of another 'sister concern' of the assessee viz. ACIT Vs. Haware Construction Pvt. Ltd. [ITA No.3321/Mum/2018 & 3172/Mum/2016, dated 31.08.2018]. Apart there from, the Tribunal had also drawn support from the orders of the coordinate benches of the tribunal viz. (i) M/s Runwal Construction Vs. ACIT [ITA No. 5408/Mum/2016, dated 22.02.2018]; and (ii). Progressive Homes Vs. ACIT [ITA No.5082 /Mum/2016, dated 16.05.2018]. In the backdrop of the aforesaid

facts, we are of the considered view that the issue involved in the present appeal is squarely covered in favour of the assessee. It may also be relevant and pertinent to point out that the Tribunal while disposing off the appeal in the case of the 'sister concern' of the assessee viz. ACIT Vs. Haware Construction Pvt. Ltd. [ITA No.3321/Mum/2018 & 3172/Mum/2016, dated 31.08.2018] had duly considered the judgment of the Hon'ble High Court of Delhi in CIT Vs. Ansal Housing Finance & Leasing Company Ltd. (2013) 354 ITR 180 (Del).

11. We thus in the backdrop of our aforesaid deliberations, respectfully following the aforesaid settled position of law, vacate the addition of ITA No. 2543 & 4021 Mum 2019-Haware Infrastructure Pvt. Ltd. 18 Rs.5,20,394/- (i.e net 'ALV') made by the A.O towards deemed income from 'house property', which thereafter was sustained by the CIT(A). The order of the CIT(A) is set aside in terms of our aforesaid observations.

12. The appeal of the assessee is allowed.

16. Further, we have noted that the Id. CIT(A) while granting relief to the assessee followed the decision of assessee's group case in Haware Construction Pvt. Ltd. for A.Y. 2010-11 in appeal no. CIT(A)-24/ACIT-15(2)(1)/IT-435/2015-16 allowed relief to the assessee, which have been confirmed by the co-ordinate bench of Tribunal as referred above. Therefore, considering the above factual and legal discussion, we do not find any infirmity in the order passed by the Id. CIT(A), which we affirms."

12. Respectfully following view taken by the co-ordinate bench in Assessee's own case for the Assessment Year 2013-2014 in ITA No. 4021/Mum/2019 (30.08.2019), and in the case of its group companies, we decide Ground No.1 and Ground No. 2 of the Departmental Appeal in favour of the Assessee and against the Revenue. Order of the CIT(A) to this extent is confirmed.

13. In result the Departmental appeal is dismissed.

ITA No. 2544/Mum/2019

14. Now we take up the solitary ground in appeal by the Assessee pertaining to disallowance of INR 1,05,63,033/- in respect of direct cost and material consumed which has not been adjudicated by the CIT(A). Perusal of grounds of appeal filed by the Assessee before CIT(A) shows, that in total three grounds were raised before the CIT(A), out of which two grounds [i.e. Ground No.1, & 2.i)-iii)] have been adjudicated upon while Ground No.3 which pertains to the issue before us, has been disposed by the CIT(A) without any adjudication holding the same to be general in nature. We are of the view that interest of justice would be served in case the issue is remitted to the CIT(A) for adjudication, after giving sufficient opportunity to the Assessee to present his case. It is ordered accordingly.
15. In result the appeal of the Assessee stands allowed for statistical purposes.

Order pronounced on 30.03.2022.

Sd/-
(Pramod Kumar)
Vice President

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 30/03/2022
Alindra, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार //(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai