

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D", MUMBAI**

**BEFORE SHRI AMIT SHUKLA, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

**ITA NOs. 420, 264, 263, 265 & 266/MUM/2022
(A.Ys: 2012-13, 2013-14, 2014-15, 2015-16 & 2016-17)**

Moraj Building Concepts Pvt Ltd Shop No. 28/29, Moraj Residency Plot No. 1, Sector 16, Sanpada Mumbai- 400703 PAN: AABCM8573A	v.	DCIT – Circle – 5(2) 1908, 19 th Floor Air India Building Nariman Point Mumbai – 400 021
(Appellant)		(Respondent)

Assessee Represented by	:	Shri Jayant Bhatt & Ms. Jitali Gandhi
Department Represented by	:	Shri Rakesh Garg
Date of Hearing	:	30.01.2023
Date of Pronouncement	:	31.03.2023

ORDER

PER S. RIFAUR RAHMAN (AM)

1. All these appeals are filed by the assessee against different orders of the Learned Commissioner of Income Tax (Appeals)-53, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 28.01.2022, 15.12.2021, 15.12.2021, 21.12.2021 & 21.12.2021 for the A.Ys. 2012-13, 2013-14, 2014-15, 2015-16 and 2016-17 respectively.

2. Since the issues raised in all the appeals are identical, therefore, for the sake of convenience, these appeals are clubbed, heard and disposed off by this consolidated order.

3. At the time of hearing, it is brought to our notice that for the A.Y.2012-13 and 2013-14 assessee has filed return of income on 26.09.20102 and 30.09.2013 respectively and time limit for issue of notice u/s. 143(2) of Income-tax Act, 1961 (in short "Act") were expired on 30.09.2013 and 30.09.2014 respectively. It is also brought to our notice that original Assessment Order u/s. 143(3) were passed on 11.02.2015 with regard to A.Y. 2012-13 and 28.03.2016 with regard to A.Y. 2013-14. It was submitted that both these Assessment Years are unabated and it was brought to our notice a search and seizure action was undertaken in Gurnani Group on 04.02.2016 and the assessee was also covered in the above search proceedings. Accordingly, a notice u/s. 153A were issued and served on the assessee. It was submitted that notices u/s. 143(2) and 142(1) were issued and served on the assessee. In response assessee has filed the relevant return of income and filed the submissions.

4. It was brought to our notice, notice u/s. 142(1) of the Act which is placed on record at Page No. 31 of the Paper Book. As per the above

notice the assessee was issued notices with regard to on-money received during the period 2010-11 to 2015-16. However, while completing the assessment u/s. 143(3) r.w.s. 153A the additions were made merely on the basis of information and various financial statements submitted during the assessment proceedings. It was submitted that there is absolutely no connection with the material found during the search, and the facts of the present case is squarely covered by the Hon'ble Bombay High Court in the case of CIT *v.* Continental Warehouse Corporation (2015) 374 ITR 645, Murli Agro Products Ltd., [49 taxmann.com 172 (Bom)] and of the Hon'ble Delhi High Court in the cases of Kabul Chawla 380 ITR 573 and Ms. Lata Jain [384 ITR 543].

5. On the other hand, Ld. DR relied on the orders of the lower authorities and supported their findings.

6. Considered the rival submissions and material placed on record, we observe that there is no doubt that the assessment year 2012-13 and 2013-14 are unabated and we gone through the various notices issued by the Assessing Officer to assess the income of the assessee. We noticed that in the search proceedings certain unaccounted cash receipts were unearthed and merely observed that assessee has huge unsold flats. Only

during post search enquiries and assessment proceedings the details of flats were collected. However, we observe that there is no incriminating material found during the search, we observe that the incriminating material found during the search has no connection with the additions made in the assessment order. The Assessing Officer has made various additions relating to notional income from the unsold flats and further, made additions relating to unsecured loans.

7. On careful consideration of the facts on record, we observe that in the case of CIT *v.* Continental Warehouse Corporation (*supra*) it is held that for assessment u/s. 153A in case of unabated assessment, if no incriminating material was found during the course of search in respect of an issue, then no additions in respect of any other issue can be made to the assessment u/s. 153A and 153C of the Act. The relevant extract of the order is reproduced as under:

"On a plain reading of section 153A, it becomes clear that on initiation of the proceedings under section 153A, it is only the assessment/reassessment proceedings that are pending on the date of conducting search under section 132 or making requisition under / section 132/4 stand abated and not the assessments / reassessments already finalised for those assessment years covered under section 153A. By a Circular No. 8 of 2003, dated 18-9-2003 (See 263 ITR (St) 61 at 107) the CBDT has clarified that on initiation of proceedings under section 153A, the proceedings pending in appeal, revision or rectification proceedings against finalised assessment / reassessment shall not abate. It is only because, the finalised assessments / reassessments do not abate, the appeal

revision or rectification pending against finalised assessment / reassessments would not abate. Therefore, the argument of the revenue, that on initiation of proceedings under section 153A, the assessments / reassessments finalised for the assessment years covered under section 153A stand abated cannot be accepted. Similarly on annulment of assessment made under section 153A(1) what stands revived is the pending assessment / reassessment proceedings which stood abated as per section 153A(1). "Once it is held that the assessment has attained finality, then the Assessing Officer while passing the independent assessment order under section 153A read with section 143(3) could not have disturbed the assessment / reassessment order which has attained finality, unless the materials gathered in the course of the proceedings under section 153A establish that the reliefs granted under the finalised assessment / reassessment were contrary to the facts unearthed during the course of 153A proceedings. If there is nothing on record to suggest that any material was unearthed during the search or during the 153A proceedings, the Assessing Officer while passing order under section 153A read with section 143(3) cannot disturb the assessment order."

8. Respectfully following the above said decision, we are inclined to set aside the orders passed for these two Assessment Years as there is no incriminating material found during the search.

9. In the result, appeals filed by the assessee for the A.Ys. 2012-13 and 2013-14 are allowed.

ITA.No. 263, 265 & 266/MUM/2022 (A.Ys. 2014-15, 2015-16 & 2016-17)

10. Coming to appeals relating to A.Y. 2014-15, 2015-16 and 2016-17. We are taking the facts in A.Y. 2014-15 as lead case and relevant facts are a search and seizure action was undertaken in the case of Gurnani Group on 04.02.2016 and assessee is also covered in the above search

proceedings. Accordingly, notices u/s. 153A dated 09.12.2016 was issued and served on the assessee. In response assessee submitted the relevant information as called for.

11. During the search it was noticed assessee had various flats unsold during the year and assessee was asked to explain why the notional income should not be estimated and also Assessing Officer observed that later assessee has approached Income Tax Settlement Commission and filed the application and subsequently assessee sought permission to file a revise application which the Income Tax Settlement Commission has rejected the same. Apart from certain undisclosed income was found during search and accordingly, to the extent of ₹.93,100/- was added back to the income of the assessee and further, Assessing Officer observed that assessee was holding various flats / shops / offices as closing stock. In the post search proceedings, assessee was asked to furnish year wise details of stock in trade of the fully constructed flats held at the end of the each Financial Year. In response assessee furnished the details of closing stock relevant for the present assessment year as under: -

Sr. No.	Name of Project	Building	Flat No
1	Moraj Riverside Park, Panvel	T4	404
2	Moraj Riverside Park, Panvel	R1	401
3	Moraj Riverside Park, Panvel	S1	102
4	Moraj Riverside Park, Panvel	S2	103

Sr. No.	Name of Project	Building	Flat No
5	Moraj Riverside Park, Panvel	S3	102
6	Moraj Riverside Park, Panvel	S4	603
7	Moraj Riverside Park, Panvel	S5	102
8	Moraj Riverside Park, Panvel	S5	202
9	Moraj Riverside Park, Panvel	S5	302
10	Moraj Riverside Park, Panvel	S6	102
11	Moraj Riverside Park, Panvel	S6	103
12	Moraj Riverside Park, Panvel	S6	203
13	Moraj Riverside Park, Panvel	S6	304
14	Moraj Riverside Park, Panvel	S6	403

12. By relying on the decision of the Hon'ble Delhi High Court in the case of CIT *ν.* Ansal Housing Finance and Leasing Company Limited and the Assessing Officer estimated the rent on the above said flats to the extent of ₹.1,91,814 and the relevant conclusion is reproduced below: -

Sr. No	Name of Project	Building	Flat No	Estimated rent as per property Tax
1	Moraj Riverside Park, Panvel	T4	404	13656
2	Moraj Riverside Park, Panvel	R1	401	13656
3	Moraj Riverside Park, Panvel	S1	102	13656
4	Moraj Riverside Park, Panvel	S2	103	13656
5	Moraj Riverside Park, Panvel	S3	102	13656
6	Moraj Riverside Park, Panvel	S4	603	13656
7	Moraj Riverside Park, Panvel	S5	102	13656
8	Moraj Riverside Park, Panvel	S5	202	13656
9	Moraj Riverside Park, Panvel	S5	302	13656
10	Moraj Riverside Park, Panvel	S6	102	13656
11	Moraj Riverside Park, Panvel	S6	103	13656
12	Moraj Riverside Park, Panvel	S6	203	13656
13	Moraj Riverside Park, Panvel	S6	304	13656
14	Moraj Riverside Park, Panvel	S6	403	13656
			Total	1,91,184

13. Aggrieved assessee preferred an appeal before the Ld.CIT(A) and Ld.CIT(A) sustained the addition made by the Assessing Officer. Aggrieved with the above order assessee is in appeal before us raising following grounds in its appeal: -.

"GROUND NO. 1: ADDITION OF RS. 1.91.184- AS NOTIONAL INCOME FROM HOUSE PROPERTY U/S. 22 [Para 8, Page No. 15-19 of CIT(A) Order dt. 15.12.2021]

(a) The Ld. CIT(A) erred in law and on facts in confirming the action of the Id. AO in making an addition of Rs. 1,91,184 on account of notional income under the head Income from House Property u/s 22 of the Act considering it as a deemed income in respect of fourteen premises held as stock-in-trade and not liable to tax and further erred in confirming the action of the AO;

- i. in estimating such income without any basis and*
- ii. not allowing deductions u/s 23(1)(c) and u/s 24 of the Act and*
- iii. proceeding in gross violation of natural justice and*
- iv. in making addition in respect of Annual Rateable Value for which no material of whatsoever nature was found and/or seized and*
- v. in acting in excess of the scope and the powers vested u/s 153A of the Act.*

(b) Your appellant submits that;

- i. the Ld. CIT(A) has failed to appreciate the fact that the property was held as stock-in-trade and*
- ii. that no notional income was taxable u/s. 22 under the head Income from House Property and*
- iii. in the alternative vacancy allowance should have been granted u/s 23(1)(c) by the AO and*

- iv. *in the further alternative without prejudice, the annual value should have been restricted to lower of the Standard Rent or Municipal Rateable Value, which should have further been reduced by the Municipal taxes paid and by Standard Deduction u/s. 24 @ 30% of adjusted ALV and*
- V. *the appellant further submits that no material of whatsoever nature was found and/or seized during the course of search u/s.132 of the Act in the hands of your appellant and that the additions of Rs. 1,91,184/- as deemed Income from House Property made in the order were in respect of the items and issues that were settled in the original assessment and therefore were not the subject matter of the special assessment u/s. 153A.*

(c) Your appellant prays that the addition of Rs. 1,91,184 be deleted from the total income of the assessee as assessed by the Ld. AO and in the alternative the lower of Standard Rent or Municipal Ratable Value be adopted and such amount be further reduced by the municipal taxes and deductions u/s. 23 and u/s. 24 of the Act.

GROUND NO. 2: INVALID APPLICATION OF S. 153A & ADDITIONS MADE BY EXCEEDING THE SCOPE OF S. 153A [Para 4, Page No. 5-7 of CIT(A) Order dt. 15.12.2021

(a) The Ld. CIT(A) erred in law and on facts in confirming the actions of the ld. AO in making additions or in denying exemptions aggregating to Rs. 1,91,184/- in respect of items and issues for which no material was found and/or seized during the course of search u/s. 132 and in making assessment of total income under the special provisions of s.153A to s.153D of the Income Tax Act, 1961.

(b) Your appellant strongly submits that no material of whatsoever nature was found and/or seized during the course of search u/s. 132 of the Act in the hands of your appellant and that the additions or denials made in the order were in respect of the items and issues that were settled in the original assessment and therefore were not the subject matter of the special assessment u/s.153A of the Act.

(c) Your appellant prays that the additions or disallowances made in passing order in excess of the scope and the powers thereunder be deleted/allowed and the order so passed in gross disregard of the provision of Income Tax, 1961 be quashed.

GROUND NO. 3: CHANGE OF JURISDICTION [Para 6, Page No.12-14 of CIT(A) Order dt. 15.12.2021]

(a) The Ld. CIT(A) erred in law and on facts in confirming the action of the Id. AO in assuming jurisdiction to assess and proceed with the hearing ignoring the fact that the jurisdiction vested with the ITO Ward 10(3)(4), Mumbai and in as much as no order was passed u/s.127 or any other applicable provisions of law for transfer of case to him i.e. DCIT Central Circle-5(2), Mumbai nor any opportunity was given to your appellant to contest the transfer, if any.

(b) It is further respectfully submitted that no notice of transfer was served on assessee and the provisions of s.292BB should not be applicable as these are fundamental changes in the procedure midway through and co-operation of your appellant should not be construed as validation of the procedure.

(c) On this ground alone, the proceedings giving rise to the order under appeal passed us143(3) r.w.s.153A needs to be declared invalid and bad in law and accordingly it is prayed that the said order passed u/s. 143(3) r.w.s.153A should be squashed and set aside.

GROUND NO. 4: SERIOUS VIOLATION OF NATURAL JUSTICE (Para 7, Page No. 14 of CIT(A) Order dt. 15.12.2021]

(a) The Ld. CIT(A) erred in law and on facts in confirming the action of the Id. AO in passing an order of assessment in gross violation of the provisions of natural justice and further erred in confirming the action of the AO in ignoring all the evidences and proofs and documents produced for verification and further erred in proceeding to assess the total income in total disregard of such evidences and in not conducting adequate inquiry or bringing any material on record to support his action and in denying adequate opportunity of hearing including by not furnishing the copies of material used against your appellant and not facilitating the cross examination.

(b) Your appellant submits that the Ld. CIT(A) and AO did not appreciate and instead ignored the evidences produced in assessment and the appellant further submits that all the details and explanations as requested were furnished including those required as per the law and adequate inquiries were not made and the copies of material used was not furnished and examination was not facilitated and the cross examination was not provided.

(c) Your appellant pleads that an assessment made in violation of the provisions of natural justice be quashed.

GROUND NO. 5: LEVY OF INTEREST US. 234A OF RS. 23,158, U/S. 234B OF RS. 92,632/-, U/S. 234C OF RS. 2,02,484/- [Para 9, Page No. 19 of CIT(A) Order dt. 15.12.2021]

(a) The Ld. CIT(A) erred in law and on facts in confirming the action of the Id. AO in levying interest u/s.234A of Rs. 23.158, u/s, 234B of Rs. 92,632 and u/s. 234C of Rs. 2,02,484/- in the course of assessment and further erred in levying interest in gross violation of the provisions of Income Tax Act without giving any opportunity of hearing and without passing any speaking order for the levy of interest.

(b) Your appellant denies any liability of payment of interest and further submits that the tax was paid as per the provisions of the law.

(c) Your appellant pleads that the interest levied be deleted.

GROUND NO. 6: ASSESSMENT OF TOTAL INCOME [Para 10, Page No. 19 of CIT(A) Order dt. 15.12.2021]

The Ld. CIT(A) erred in law and on facts in confirming the action of the Id. AO in assessing the total income at Rs. 27,85,284/- against the returned total income of Rs. 25,94,100/- and in the process erred in making an addition of Rs. 1,91,184/- to the returned total income.

Your appellant submits that he had correctly disclosed the total income at Rs. 25,94,100 as per the provisions of the Income Tax Act as against the assessed income of Rs. 27,85,284/-.

(c) Your appellant pleads that the returned total income of Rs. 25,94,100 be accepted and the addition made to such returned income of Rs. 1,91,184/- be deleted.”

14. At the time of hearing assessee has not pressed Ground No. 2, 3 and 4 accordingly the same are dismissed. Further, Ground No. 5 is consequential in nature and Ground No. 6 is general in nature and needs no adjudication. Accordingly, these grounds are dismissed.

15. With regard to Ground No. 1 Ld. AR of the assessee submitted that the closing stock declared by the assessee is no doubt lying vacant and

Assessing Officer has estimated the notional rent by adopting rent as per property tax and adopted the same. In this regard he relied on the decision of the Coordinate Bench in the case of DCIT v. M/s. Inorbit Malls Pvt. Ltd., in ITA.No. 2220/Mum/2021 dated 11.10.2022 and placed a copy of the same.

16. On the other hand, Ld.DR relied on the order of the lower authorities.

17. Considered the rival submissions and material placed on record, it is fact on record that assessee had unsold closing stock which was kept vacant during the current Assessment Year. The Assessing Officer has estimated the notional income by relying on the decision of the CIT v. Ansal Housing Finance and Leasing Company Limited by adopting the rent based on property tax. The Coordinate Bench in this aspect has considered the similar issue and has decided the issue and the relevant ratio is reproduced below: -

*"7. We have heard the rival submissions and perused the relevant finding given in the impugned orders. The main controversy as raised in ground No.1 is, whether notional income from unsold units held as stock-in-trade can be assessed under the head, "income from house property". It has been canvassed before us that, there are divergent views on this issue, one view proposed by the judgment of **Hon'ble Gujarat High Court in the case of CIT Vs. Neha Builders (Supra)** which is in the favour of the Assessee, whereas*

*the other view has been proposed in the decision of the Hon'ble Delhi High Court in the case of the **CIT Vs. Ansal Housing Financial Leasing Ltd.** (Supra) which is in favor of the revenue. Therefore, judgment favorable the Assessee should be followed.*

8. *We have gone through the judgment in the case of **CIT vs. Neha Builders**, wherein following question of law was referred to the Hon'ble High Court: -.*

"Whether, on the facts and in the circumstances of the case the rental income received from any property in the construction business can be claimed under the head of 'Income from property even though they said property was included in the closing stock and expenses on maintenance were debited to the profit and loss account?"

The facts in that case was that the Assessee Company was engaged in the business of construction of property and one of the building property was included the closing stock in the balance sheet drawn for the business. The Assessee has filed the revised returned submitting that a part of its property was given on rent and the income derived on that basis should be computed under the head income from house property and not business income. The Hon'ble High Court, had noted the following facts:

*"Assessee Company is engaged in the business of construction of property, one of the building properties was included in the closing stock in the balance-sheet drawn for the business. The assessee filed a revised return submitting **that a part of its property was given on rent and the income derived on that basis should be computed under the head "Income from house property and not as business income.** The Assessing Officer, during the course of the assessment proceedings, observed that the expenses on maintenance of the property were debited to the profit and loss account and so also the building was shown as stock-in-trade, therefore, the prop would partake the character of the stock and any income derived from the stock cannot be taken to be income from the property. The Tribunal allowed the appeal observing inter alia, that any dividend*

received on the shares or any interest received from the bank would be taken to be income from other sources, therefore, any income derived under the head of "rent" would also become income from the property, it accordingly allowed the appeal and directed reconsideration of the matter."

8.1. *The Hon'ble High Court, then observed and held as under;*

"9. From the order passed by the learned Commissioner of Income-tax 7 (Appeals), 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. The development of land or property would also be one of the businesses for which the company was incorporated".

10. 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 they said property would become or par take 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 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.

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".

Agreeing with the submissions made by Mr. Naik, learned counsel for the Revenue, we hold that the Tribunal was not correct in granting the appeal of the assessee.

For the reasons aforesaid, the reference deserves to be answered in favor of the Revenue. It is accordingly answered and stands disposed of No costs."

9. *Thus, there was no occasion by the Hon'ble High Court to deal and decide the case were the property shown in the closing stock was not rented and income was to be computed on the basis of some notional rent. Albeit there was actual rent received from the property which was included in the closing stock and the controversy was, whether the rental income derived from letting out the flat is assessable under the head income from house property or business income, which Hon'ble High Court held that it should be assessed as business income.*

10 *On the contrary, on this point, Hon'ble Jurisdictional High Court in the case of **Mangla Homes Pvt. Ltd. Vs. ITO**, reported in **(2010) 325 ITR 281(Bombay)** wherein, the Hon'ble Bombay High Court on the facts where the Assessee Company was incorporated with the object of dealing in properties and the main object of the company as contained in the memorandum of association was to carry on business of dealing and investment in properties, flats, warehouses, shops, commercial and residential houses. The ancillary object was to carry on business of leasing, hire purchase, renting, selling, re-selling or otherwise dispose of all forms of movable or immovable properties and assets including buildings, godowns, warehouses and real estate of any kind. The Assessee claimed by the assessee that the flat could not be sold because of recession in the market and hence it let out the flats on license basis for temporary period and earned monthly rental income as license fees. The assessee treated the said rental income as income from the business. The authorities below have concurrently found in favor of the revenue that the rental income cannot be treated as income from business and treated it as "income from house property" under section 22 of the Income-tax Act. The question thus raised was*

whether the Tribunal is right in so concluding that the rental income is an income from house property. Hon'ble High Court after referring to various decisions of the Hon'ble Supreme Court held that rental income owned by the Assessee was assessable as income from house property.

11. *Then, again in the case of **CIT Vs. Sane & Doshi Enterprises** reported in (2015) 377 165 (Bombay), Hon'ble High Court held that rental income received from unsold portion of the property constructed by the Assessee Real Estate Developer is assessable as income from house property. The Hon'ble Jurisdictional High Court again after analyzing the entire jurisprudence and various judgments of Hon'ble Supreme Court, finally held that rental income received from unsold portion of property constructed by Assessee, Real Estate Developers is assessable as income from house property and not business income. The Hon'ble High Court had further observed that the treatment given in the books of account as stock-in-trade would not therefore, alter the character or nature of the income.*

12. *In another case of **CIT Vs. Gundecha Builders** reported in (2019) 102 taxmann.com 27 (Bombay), where the Assessee was engaged in the business of development of "**Real Estate Project**" rental income received from unsold portion of property constructed by it was assessable tax as income from house property.*

13. *Thus, in all these cases there was actual receipt rental income from the unsold stock of property and the controversy of whether income is to be assets under the head income from house property or business income. Hon'ble Bombay High Court in all the aforesaid decisions has taken a contrary view to judgment of Hon'ble Gujarat High Court in the case of **Neha Builders** and held that the rent received from property held as stock-in-trade and any rent received on such unsold closing stock, then income is assessable as „income from house property“ and not as a "business income".*

14. *The aforesaid ratio and principle, either of the Hon'ble Gujarat High Court or the Hon'ble Bombay High Court is not applicable on the facts of the present case, because, here in this case the Assessee had unsold units which were lying vacant and were in the possession of the Assessee Company. Assessing Officer held that these properties are liable to be taxed on notional rental income under the head „income from house property“ on the basis of ALV. It is not a case that there is any actual receiving of rent as was the case before*

the Hon'ble Gujarat High Court and Hon'ble Bombay High Court. Had it been a case where Assessee have fetched rental income from the unsold stock, then following the principle laid down by the Hon'ble Bombay High Court same would have been assessed under the head income from house property.

15. Now, coming to the decision of Hon'ble Delhi High Court in the case of **CIT Vs. Ansal Housing Finance & Leasing Company Ltd (Supra)**, one of the question of law referred before the Hon'ble High Court was as under;

"Whether the assessee was liable to pay income tax on the annual letting value of unsold flats owned by it under the head "income from house property"?"

15.1 There the facts relevant to the issue raised relate to the addition on account of annual letting value (ALV) of flats, added on notional basis are that the assessee-company engages itself in the business of development of mini-townships, construction of house property, commercial and shop complexes etc. In the assessment completed for the year under consideration, the AO assessed the ALV of flats which the assessee had constructed, but were lying unsold under the head "Income from house property". The assessee however, contended that the said flats were its stock-in trade and therefore the ALV of the flats could not be brought to tax under the head "Income from house property". The AO however did not accept the stand of the assessee and therefore, added the notional value of unsold flats to the total income of the assessee. On appeal by the assessee, the CIT(A) however set aside the addition made by the AO. The revenue's appeal to the Tribunal was unsuccessful.

16. Hon'ble Delhi High Court after referring to various judgments of Hon'ble Supreme Court, finally observed as held in under:

"In the present case, the assessee is engaged in building activities. It argues that flats are held as part of its inventory of stock-intrade, and are not let out. The further argument is that unlike in the other instances, where such builders let out flats, here there is no letting out and that deemed income which is the basis for assessment under the ALV method, should not be attributed. This Court is

of the opinion that the argument, though attractive cannot be accepted. As repeatedly held, in East India, Housing & Land Development Trust's case (supra) Sultan Bros's case (supra) and Karan Pura Development Co. Ltd.'s case (supra) the levy of income tax in the case of one holding house property is premised not on whether the assessee carries on business, as landlord, but on the ownership. The incidence of charge is because of the fact of ownership. Undoubtedly, the decision in Vikram Cotton Mills Ltd. case (supra) indicates that in every case, the Court has to discern the intention of the assessee; in this case the intention of the assessee was to hold the properties till they were sold. The capacity of being an owner was not diminished one whit, because the assessee carried on business of developing, building and selling flats in housing estates. The argument that income tax is levied not on the actual receipt (which never arose in this case) but on a notional basis, i.e. ALV and that it is therefore not sanctioned by law, in the opinion of the Court is meritless. ALV is a method to arrive at a figure on the basis of which the impost is to be effectuated. The existence of an artificial method itself would not mean that levy is impermissible. Parliament has resorted to several other presumptive methods, for the purpose of calculation of income and collection of tax. Furthermore, application of ALV to determine the tax is regardless of whether actual income is received; it is premised on what constitutes a reasonable letting value, if the property were to be leased out in the marketplace. If the Assessee's contention were to be accepted, the levy of income tax on unoccupied houses and flats would be impermissible which clearly not the case is".

17. *Though, the judgment which has been referred by the Hon'ble Delhi High Court in the case in "**East India Housing & Land Development Trust (Supra)**", "**Sultan Bros**" and "**Karan Pura Development Company Ltd**". (Supra) wherein, in all the cases the issue whether the rental income received from the property is to be assessed as business income or income of house property. No where, the Hon'ble Supreme Court in any of the cases which has been referred by the Hon'ble Delhi High Court dealt with issue of*

*notional rental income when the property held as stock-in-trade or closing stock which has not been actually let out, is liable to be taxed as income from house property. However, be that as maybe, there is no contrary decision of any other High Court and therefore, this decision Hon'ble Delhi High Court will have both binding and persuasive value. No direct contrary decision has been brought to our knowledge of any other High Court and we have already noted above that the decision of Hon'ble Gujarat High Court in the case of **Neha Builder** (supra) was not on the issue on notional rent from unsold stock. Therefore, it cannot be held that on this issue the judgment of Hon'ble Gujarat High Court is in favor of the Assessee and therefore, the judgment of Delhi High Court in the case of Ansal Housing Finance Leasing Company Ltd (Supra) should not be followed. Thus, in our opinion this Tribunal in the case of **Dimple Enterprises vs. DCIT (Supra)** as cited and relied upon by the Ld. DR has correctly appreciated this distinction.*

18. One very important development took place post these judgments, that an amendment has been brought in the statute in section 23(5) which is applicable from AY 2018-2019 which reads as under:

"Where the property consisting of any building or land appurtenant there to is held as stock-in trade and the property of 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."

It is trite that the said amendment has to be given effect prospectively from 01.04.2018 as mentioned in the Explanatory Notes to the provisions of the Finance Act, 2017. It is a cardinal principle of the interpretation that the normal presumption which respect to an amendment is that is applicable prospectively unless and until specifically stated otherwise. The logic behind such as interpretation is that the law should govern current

activities; i.e. to say "**lex prospicit non respicit**", which means that "The Law looks forward and not backward."

19. Now, that specific provision has been brought in the statute which provides that, if building or land held as stock in trade and the property has not been let out during the whole or any part of the previous year, then annual value of such property after the period of one year (which was increased 2 years), shall be computed as income from house property and up to period of one year/two years income shall be taken to be „nil“. Thus, when specific provision has been brought with the effect from 01.04.2018 which cannot be applied retrospectively, then in our humble opinion it cannot be imputed that ALV of the flats held as stock in trade should be taxed on notional basis prior to AY 2018-19. Without any legislative intent or specific provision under the Act, such notional or deeming income should not be taxed as cardinal principle, because assessee is not aware that any hypothetical income is to be shown when he has not received any real or actual income. In our view of Hon'ble Delhi High Court is too harsh an interpretation.

20. Since, even prior to the amendment, there is one High Court judgment of Hon'ble Delhi High Court which is directly on this issue and against the Assessee, therefore same needs to be followed. Accordingly, we hold that Assessing Officer is correct in computing ALV on notional rent on unsold stock, but with following riders and directions to the AO as discussed herein after.

21. **Firstly**, the flats or units on which assessee has received any advance in this year or in the earlier years but has not delivered or given final possession of the said flat/unit to the buyer, then no notional rent can be charged as it tantamount to sale. **Secondly**, if unit of flat is shown as work-in-progress in the books then also no notional rent can be computed. And **Lastly**, Ld. Assessing Officer is not justified in making estimate of 8.5% of investment as ALV which is unsustainable in view of the decision of Hon'ble Bombay High Court in the case **CIT Vs. Tip top Typography** reported in 368 ITR 330, wherein, it has been held that rent should be computed at Municipal ratable value. We accordingly direct the AO to ascertain the Municipal ratable value for computing the notional rent. This is also been held by ITAT Mumbai Bench in the case of **Dimple Enterprise Vs. DCIT (Supra)**, in the following manner:-

*"Now the question is of the rental value. The assessing officer has not levied the deemed rent on municipal ratable value or any nearly similar instance. The reliability of municipal ratable value has been duly upheld in several decisions. The Assessing Officer cannot make any ad hoc computation of deemed rent. Honorable Bombay High Court decision in the case of **CIT vs. Tip Top Typography** [2014] 48 taxmann.com 191/[2015] 228 Taxman 244 (Mag.)/[2014] 368 ITR 330 duly supports this proposition. Thus assessing officer has made an ad hoc estimate of 8.5% of investment on the plea that assessee has not been able to provide the municipal ratable value. This is not sustainable on the touchstone of Hon'ble Bombay High Court decision in the case of **Tip Top Typography (supra)**. In our considered opinion nothing stops the assessing officer from obtaining the municipal ratable value from Departmental or government machinery. Hence we direct the assessing officer to compute the valuation of deemed rent in accordance with our observation as above and take into account the Hon'ble Jurisdictional High Court decision as above. Since we have decided the issue by duly taking note of Hon'ble Jurisdictional High Court decision and have also applied Hon'ble High Court decision, the reference to other decision in this case is not considered relevant to adjudication in this case."*

22. Thus, AO is directed to compute accordingly as per direction given above. Accordingly, ground No.1 of the revenue is partly allowed for statistical purposes."

18. Respectfully following the above said decision, we direct the Assessing Officer to estimate the rent on the basis of municipal ratable value for computing the notional rent. Accordingly, ground raised by the assessee is partly allowed.

19. In the result, appeal filed by the assessee is partly allowed.

20. Coming to the appeals relating to A.Ys. 2015-16 and 2016-17, since facts in these cases are mutatis mutandis, therefore the decision taken in A.Y. 2014-15 is applicable to these Assessment Years also. Accordingly, these appeals are partly allowed.

21. To sum-up, appeals filed by the assessee for the A.Y. 2012-13 and 2013-14 are allowed. Appeals filed for the A.Y. 2014-15, 2015-16 and 2016-17 are partly allowed.

Order pronounced in the open court on 31st March, 2023

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER
Mumbai / Dated 31/03/2023
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Assessee
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum