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

BEFORE SHRI ABY T. VARKEY, JM AND SHRI S. RIFAUR RAHMAN, AM

आयकर अपील सं/ I.T.A. No.1349/Mum/2022
(**निर्धारण वर्ष** / Assessment Year: 2013-14)

DCIT, Central Circle-2(4) Room No. 802, 8th Floor, Prathishtha Bhavan, M. K. Road, Churchgate, Mumbai-400020.	**बनाम** / Vs.	Rustomjee Evershine Joint Venture Global City, Narangi Bypass Road, Close to Viva College, Virar (W), Virar-401303.

Cross Objection No. 27/Mum/2023
Arising out of I.T.A. No.1349/Mum/2022
(**निर्धारण वर्ष** / Assessment Year: 2013-14)

Rustomjee Evershine Joint Venture Global City, Narangi Bypass Road, Close to Viva College, Virar (W), Virar-401303.	**बनाम** / Vs.	DCIT, Central Circle-2(4) Room No. 802, 8th Floor, Prathishtha Bhavan, M. K. Road, Churchgate, Mumbai-400020.

आयकर अपील सं/ I.T.A. Nos.1824 & 1825/Mum/2022
(**निर्धारण वर्ष** / Assessment Years: 2016-17 & 2014-15)

DCIT, Central Circle-2(4) Room No. 802, 8th Floor, Prathishtha Bhavan, M. K. Road, Churchgate, Mumbai-400020.	**बनाम** / Vs.	Rustomjee Evershine Joint Venture Global City, Narangi Bypass Road, Close to Viva College, Virar (W), Virar-401303.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAAAR7687M		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri Naresh Kumar
Revenue by:	Shri P. D. Chougule (Addl. CIT)

सुनवाई की तारीख / Date of Hearing: 25/05/2023
घोषणा की तारीख /Date of Pronouncement: 31/07/2023

आदेश / O R D E R

PER ABY T. VARKEY, JM:

These are appeals preferred by the revenue against the order of the Ld. Commissioner of Income Tax (Appeals)-48, Mumbai [in short 'Ld. CIT(A)'] dated 17.03.2022 for AY 2013-14 and Cross Objection (CO) by the assessee for AY 2013-14; and the revenue appeals against the order of the Ld. CIT(A)-48, Mumbai dated 10.05.2022 for AY 2014-15 & AY. 2016-17 respectively.

2. First, we will deal with the appeal of Revenue & CO of assessee pertaining to AY 2013-14 wherein the ground no. 1 of the revenue is against the action of the Ld. CIT(A) partly allowing the appeal of the assessee by which AO's action of capitalizing interest expenditure of Rs.7,55,87,118/- claimed by the assessee as revenue expenditure by holding that Rs.5,29,71,264/- as revenue expenditure, and balance Rs.1,40,18,981/- be capitalized as work-in-progress (WIP). Assessee is against the part-relief not granted by Ld CIT(A).

3. Brief facts are that the assessee is a Joint Venture carrying out business in the name of M/s. Rustomjee Evershine Joint Venture which is engaged in the business of Construction and Real Estate Development and Commercial and Residential Projects. The assessee filed its return of income for AY 2013-14 on 30.09.2013 declaring total loss at Rs.28,16,17,718/-. The assessee in its profit and loss account had shown revenue of Rs.211,95,60,101/-, and had shown interest income of Rs.7,55,87,187- from short term deployment of borrowed funds and thus claimed to have incurred interest expenditure (net) only to the tune of Rs.15,24,56,505/- out of which the assessee had capitalized an amount of Rs.7,68,69,388/- which was made part of WIP (work-in-progress) and balance amount (Rs.7,55,87,118/-) has

been debited to profit and loss account which was claimed as revenue expenditure. The AO show caused the assessee as to why the revenue expenditure claimed to the tune of Rs.7,55,87,118/- should not be capitalized and made part of the WIP for which the assessee replied as under: -

> "With regards to the Finance Cost, it is submitted that the assessee company has project infloum capitalized finance cost of Rs. 7,68,69,388/ on the basis of project outflows, cumulative fund utilization and calculation of interest is enclose Hence, balance portion of the finance cost is debited to P&L account and capitalized to P&L account.
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> Further it is submitted that the company has followed following accounting policy for recognition and capitalization of borrowing cost which is as per the Accounting Standard 16 'Borrowing Costs".
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> **Borrowing costs that are attributable to the acquisition, construction or production of qualifying assets are treated as direct cost and are considered as part of cost of such assets. A qualifying asset is an asset that necessarily requires a substantial year of time to get ready for its intended use or sale. All other borrowing costs are recognized as an expense in the year in which they are incurred.**
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> The relevant extract of the Accounting Standard 16 is represented as follows
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> As per para 3 of the Accounting Standard 16, following are the definitions of borrowing cost and a qualifying assets.
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> 3.1 Borrowing costs are interest and other costs incurred by an enterprise in connection with the borrowing of funds.

3.2 A qualifying asset is an asset that necessarily takes a substantial period of time to get ready for its intended use or sale.

Borrowing Costs eligible for Capitalization

8. The borrowing costs that are directly attributable to the acquisition, construction or production of a qualifying asset are those borrowing costs that would have been avoided if the expenditure on the qualifying asset had not been made. When on enterprise borrows funds specifically for the purpose of obtaining a particular qualifying asset, the borrowing costs that directly relate to that qualifying asset can be readily identified.

9. It may be difficult to identify a direct relationship between particular borrowings and a qualifying asset and to determine the borrowings that could otherwise have been avoided. Such a difficulty occurs, for example, when the is coordinated centrally or when the range of financing activity of an enterprise debt instruments are used to borrow funds at varying rates of interest and such borrowings are not readily identifiable with a specific qualifying asset. As a result, the determination of the amount of borrowing costs that are directly attributable to the acquisition, construction or production of a qualifying asset is often difficult and the exercise of judgment is required.

Commencement of Capitalisation

16. The activities necessary to prepare the asset for its intended use or sale encompass more than the physical construction of the asset. They include technical and administrative work prior to the commencement of physical construction, such as the activities associated with obtaining permits prior to the

commencement of the physical construction. However, such activities exclude the holding of an asset when no production or development that changes the asset's condition is taking place. For example, borrowing costs incurred while land is under development are capitalized during the period in which activities related to the development are being undertaken. However, borrowing costs incurred while land acquired for building purposes is held without any associated development activity do not qualify for capitalization

From the above, it is submitted that the assessee company has followed Accounting Standard 16-Borrowing Costs to capitalize the finance costs to the extent it is attributable to the project. For the above purpose, the company has prepared a cash flow working considering project inflows, project outflows and cumulative utilization of funds. Hence, amount of finance cost directly attributable to the project based on the cash flow working is capitalized to project WIP and the balance finance cost is charged to the profit and loss account during the year under consideration.

It is therefore submitted that since assessee Company has followed the accounting standard for preparing the annual accounts which is also to be accepted under the Income Tax Act, 1961 and therefore finance cost debited in the profit and loss account should be allowed in full."

4. However, the AO did not accept the aforesaid explanation of the assessee and was of the view that the finance cost needs to be allowed as revenue expenditure to the extent of attribution to the revenue offered, by relying on the decision of this Tribunal in the case of SK

Estates (P.) Ltd. Vs. ACIT, 1997 (60 ITD 621) (Mum). So he disallowed the interest of Rs.7,55,87,118/- as revenue expenditure and added it to the WIP. Aggrieved by the aforesaid action of the AO to capitalize the entire finance cost and addition made to the WIP, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to partly allow the same to the tune of Rs. 5,29,71,264/- [*out of claim made by the assessee to the tune of Rs.7,55,87,118/-]* and the balance amount of Rs.1,40,18,981/- was directed to be capitalized and added to the WIP. Aggrieved by the action of the Ld. CIT(A), revenue is in appeal against the action of the Ld. CIT(A) allowing Rs.5,29,71,264/- as revenue expenditure, whereas, the assessee is in appeal against capitalization of balance amount of Rs.1,40,18,981/- added to the WIP. The relevant portion of the impugned order of Ld. CIT(A) is reproduced as under: -

> "7.4 Considering that in the present year i.e., A.Y. 2013-14, there is no change in the facts and circumstances of issue under consideration, I find no reason to differ with the decision of my Ld. Predecessor who has further relied on the decision of Ld. Commissioner of Income Tax (Appeals)-18 and 36, Mumbai. It can be seen that, consistently the decisions are given on same line, hence the same are to be followed.
>
> 7.5 On this issue, the appellant has already filed submission during the appellate proceedings the same is considered by me. No new submission has been made. At the outset I would like to clarify that there are no doubts about the genuineness of interest expenditure, which has been paid to the financial institutions on borrowed funds. The issue is only with respect to apportioning,

the interest in the ratio of percentage of projects completed, in view of accounting standard AS-16. I have also examined the working given by the assessee. Undoubtedly, the assessee had revenue from sale of flats of Rs. 212 Crs, as is clear from statement of profit and loss account and therefore, no doubt the assessee is eligible for reasonable expenditure in the nature of interest to carry out such turn over. I also agree with the assessee that interest income of Rs. 7,55,87,117/- has been offered in the Profit and loss account, which is from short term deployment of the borrowed funds and therefore net interest of only Rs. 15,24,56,505/- stands debited in the account. Now only thing to be seen is how much out of this interest, is allowable and how much should be taken to the closing WIP. I have gone through the working shown by the assessee in the table in the foregoing paras and agree with the working in respect of projects Avenue G, Avenue H, Avenue J, Avenue M and Avenue I wherein interest has been claimed only in the ratio of percentage of project completed. The eligible interest would work out to Rs. 5,29,71,264/- as per table below:

Project	% age of Completion	Revenue Recognized during the Year	Finance cost debited to Profit & Loss account.	Proportionate interest income offered to Tax	Net finance cost debited to profit and loss account	Allowable P & L Interest based on % age of completion	Project wise interest disallowed.
Avenue G	69.21%	15,91,10,885	1,71,76,701	19,53,585	1,52,23,116	1,05,22,218	47,00,898
Avenue H	56.00%	46,09,84,290	-	-	-	-	-
Avenue J	82.00%	56,76,90,393	5,84,10,415	66,43,286	5,17,67,130	4,24,49,046	93,18,083
Avenue M	82.00%	25,52,41,308	-	-	-	-	-
Avenue I	53.56%	15,16,31,101	-	-	-	-	-
Sale of Infra- A-E	100.00%	32,01,53,505	-	-	-	-	-
Total		1,91,48,11,481	7,55,87,117	85,96,871	6,69,90,245	**5,29,71,264**	**1,40,18,981**
Amount of interest to be disallowed						**1,40,18,981**	

> 7.6Therefore, following the decision of my Ld. Predecessor as well as of Ld. Commissioner of Income Tax (Appeals)-18 and 36, Mumbai, in the case of the assessee, on identical issue, the amount of interest to be disallowed works out to Rs. 1,40,18,981/- which is confirmed and balance of the expenditure amounting to Rs. 5,29,71,264/- is allowed. The AO is directed accordingly."

5. Aggrieved by the aforesaid action of the Ld. CIT(A) giving partial relief to the assessee both revenue as well as assessee has preferred an appeal/CO before us.

6. We have heard both the parties and perused the records. We note that the assessee is a JV (Joint Venture) carrying out the business of Construction and Development of Commercial and Residential Projects and is following the percentage completion method of accounting to recognize the income and expenditure. The assessee has claimed interest expenditure of Rs.7,55,87,117/- in its P & L Account and capitalized interest expenditure of Rs.7,68,69,388/-. However, the AO disallowed the interest cost of Rs.7,55,87,118/- as not admissible to be claimed as revenue expenses and added the same to the WIP of the project. The Ld. CIT(A) has partly reversed the action of the AO by allowing the claim of the assessee to the tune of Rs.5,29,71,264/- as revenue expenditure and balance to be capitalized i.e. Rs.1,40,18,981/- to be added to the WIP. For doing so, the Ld. CIT(A) has found that the interest expenditure which was paid to the financial institution on borrowed funds was genuine; and also noted that the assessee has been

following the percentage of project completion method in accordance to Accounting Standard (AS)-16. And he examined the working given by the assessee and noted that the assessee had revenue from sale of flats of Rs.212 cr, which has been offered as revenue (Rs.211,95,60,101/-) and was of the opinion that reasonable expenditure need to be allowed for such turnover. The Ld. CIT(A) also noted that the assessee has earned interest income of Rs.7,55,87,117/- which has been offered in the P & L account from the short term deployment of borrowed funds and claimed only net interest to the tune of Rs.15,24,56,505/- which has been debited in the account. And from that sum (Rs.15,24,56,505/-) the assessee claimed interest to the tune of Rs.7,55,87,117/- as revenue expenditure and balance amount (Rs.7,68,69,388/-) has been capitalized and added to the WIP. According to the Ld. CIT(A), the only question before him is allowability of interest in the ratio of interest expenditure with the project completed by assessee as per AS-16. And thereafter finding that assessee has shown revenue of Rs.212 crores on sale of flats and is eligible for reasonable expenditure in the nature of interest for earning such a turn-over, he computed the interest expenditure allowable as per the chart given therein, wherein he agreed with the apportionment of interest in respect of projects of assessee i.e. Avenue G, Avenue H, Avenue J, Avenue M and Avenue I, which according to Ld. CIT(A), the assessee's claim of interest expenditure is only in the ratio of percentage of project completed. After having made such a finding at para 7.5 (last line), the Ld. CIT(A) has worked out the allowable interest expenditure in the ratio of project completed and disallowed

interest expenditure in respect of two (2) projects i.e. Avenue G Rs.47,00,898/- and Avenue J Rs.93,18,083/-. Thus, disallowed total interest expenditure of Rs.1,40,18,981/- which is to be taken to the closing WIP. The impugned action of Ld. CIT(A) is under challenge. In this regard, we note that the assessee has followed accounting policy for recognition and capitalization of borrowing cost as per the Accountant Standard-16 "Borrowing Cost" as recognized by the ICAI for determining the quantum of interest cost has been debited to P & L account. The assessee company has followed accounting policy for recognition & capitalization of borrowing cost which is as per the AS-16 "Borrowing Costs". Thus, the assessee had capitalized interest of Rs.7,68,69,388/- out of the total interest of Rs.15,24,56,505/- during the AY. 2013-14. And the balance interest expenses amounting to Rs.7,55,87,118/- was debited to P & L Account and not capitalized to WIP. We further note that the assessee company has capitalized interest of Rs.7,68,69,388/- out of total interest cost on the basis of inflow, project out flow, cumulative funds utilization. As per the Guidance Note on Accounting, for Real Estate transactions issued by ICAI, the project cost which are directly attributable to the project shall only be capitalized. (refer 2.2 project cost revised in 2012) wherein it has been clearly stated under (b) "Borrowing Cost" "*in accordance with Accounting Standard-16, borrowing cost which are incurred directly in relation to the project or which are apportioned to a project*". Therefore, only the cost which are directly attributable to the project should be capitalized to the cost of WIP, and hence it is noted that the assessee has capitalized the financial cost which are

directly attributable to the project to the cost of WIP; and the assessee has debited the financial cost which are not directly attributable to the project and claimed as revenue expenditure i.e. Rs.7,55,87,118/- . It is noted that the financial cost of Rs.7,68,69,388/- out of the net interest of Rs.15,24,56,506/- has been capitalized and became part of the WIP since it was directly related to the project whereas the financial cost of Rs.7,55,87,118/- was debited to the P & L account since it was not directly attributable to the project. We find that the AO accepted the fact that assessee has capitalized only Rs.7,68,69,388/- out of the net financial cost to the tune of Rs.15,24,56,505/- and has claimed as revenue expenses and debited in profit & loss account of Rs.7,55,87,118/-. However, it is noted that the AO has not disallowed interest expenditure for the reason that it was in-genuine or not for the purpose of business. Having accepted the genuineness of the interest expenditure, the only action taken by the AO was that he has capitalized the same and added in WIP. However, since the assessee is following the percentage completion method of Accounting Standard-16, the borrowing cost which are incurred directly in relation to the project should only be capitalized. The Ld. CIT(A) has restricted an amount capitalized to the tune of Rs.1,40,18,981/- and allowed the revenue expenditure to the tune of Rs.5,29,71,264/-. We do not countenance the action of the Ld. CIT(A) for partially allowing the claim of the assessee of Rs.5,29,71,264/- as revenue expenditure and balance to be added as WIP. According to us, the Ld. CIT(A) has not given any reason for making such an adjustment without pointing out any mistake in working as shown by assessee in this regard. Since the

assessee has been following the AS-16 and since there is no doubt about genuineness of the interest expenditure as well as the fact that the assessee has debited the financial cost which are not directly attributed to the project as revenue expenditure, the same ought to be allowed unless the Ld. CIT(A) is able to show that the amount of Rs.1,40,18,981/- was interest cost which was directly attributable to the project and therefore, should have been capitalized to the cost of WIP. Since the Ld. CIT(A) have not given any such reasons, and since we note that the interest expenditure fulfil the criteria mentioned in AS-16, the apportionment made by assessee ought not to have been interfered with unless it is shown to be incorrectly claimed by assessee. And we further note that by debiting such expenses to the profit and loss account, there is no loss to the revenue, as even by capitalization of such expenses, the same will be debited to the revenue in future years. Accordingly, the treatment of debiting interest expenses to the tune of Rs.7,55,87,118/- to the profit and loss account ought to have been allowed. And therefore, we dismiss the appeal of the revenue and allow the CO of the assessee and direct the AO to allow the claim of the assessee the balance amount of Rs.1,40,18,981/- and confirm the action of the Ld. CIT(A) allowing interest expenditure of Rs.5,29,71,264/-. Thus, the assessee's claim of interest expenditure to the tune of Rs.7,55,87,118/- as revenue expenditure is allowed.

7. Next ground of appeal of the revenue is against the action of the Ld. CIT(A) disallowing the commission and brokerage of expenses Rs.17,43,949/-.

8. Brief facts as noted by the AO are that the assessee has debited commission and brokerage expenditure of Rs.17,43,949/- to the profit and loss account. The AO did not accept the assesse's reliance on para -19 of AS-7 issued by ICAI for "Construction Contracts" stating that the General & Administration Cost and Selling Cost are to be excluded from the Construction Cost, since these costs/expenses cannot be attributed to contract activity or cannot be allocated to a contract. And therefore, he disallowed Rs.9,81,384/- u/s 37 of the Act and closing WIP was increased by Rs.9,81,384/-. Aggrieved, assessee preferred an appeal before the Ld. CIT(A) who was pleased to allow the same by holding as under: -

> "8.2 The AO considered the submission but found the same not acceptable. In this regard the appellant has heavily relied on Para 19 of AS-7 issued by ICAI for "Constructions Contracts" stating that the General & Administration Cost and Selling Cost are to be excluded from the Construction Cost since these costs/expenses cannot be attributed to contract activity or cannot be allocated to a contract.
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> 8.3 I have carefully considered the arguments of the appellant and the facts of the case. The selling and marketing costs consist of the expenditure in the nature of advertisement and publicity expenditure, miscellaneous expenses, commission and brokerage, sales promotion expenditure and fair and exhibitions etc. In this connection, the appellant has relied upon the appellate order passed by my Ld. Predecessor for AY 2013-14 and AY 2014-15 in the case of Kapstone Construction Private Limited, the group company of the appellant on the similar

issue. The relevant part of the said decision is reproduced as under for the sake of clarity:

> "6.4 I have considered the facts of the case and submissions of the assessee. The expenditure in the nature of selling cost consists of various heads of expenditure, like advertisement, publicity, fair exhibition, sales promotion, brokerage etc.. I agree with the ld. AR that the expenditure in the nature of advertisement, fair exhibition, pamphlets and sales promotion etc. has to be allowed in full in the year of incurring such expenditure. I also agree with the ld.AR that the expenditure in the nature of brokerage, discount etc. is to be allowed in full in the year where liability has arisen. Further as long as the expenditure is genuine, it should be allowed in the year of sale/ booking of flat. If that be the case, the entire expenditure in the nature of selling costs becomes allowable. The AO has failed to explain the reasons for disallowance of the same on pro rata basis of the progress of the project. However that is not a rational approach, considering the nature of expenditure.
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> 6.5 It is relevant to mention that most of the selling and marketing expenses are incurred by the assessee company, irrespective of whether a project is ongoing or otherwise. In other words these costs are a sort of found costs which are to be incurred by the company under all circumstances during its entire tenure of carrying on its business operations. Further most of these expenses are not associated with any particular project. Such expenses therefore cannot be carried forward under the earmarked project costs, since they are general in nature. Therefore

capitalizing the same under a particular project and treating the same as a part of a project cost does not justify the generally accepted accounting practices, charging off to revenue justifies the matching principle, where expenses of a particular period are to be matched and charged to revenue of the said period alone.

6.6 Further as per the Accounting Standard-7, issued by the ICAL, the project cost includes -

(i) Cost of land and cost of development rights -All costs related to the acquisition of land, development rights in the land or property including cost of land, cost of development rights, rehabilitation costs, registration charges, stamp duty, brokerage costs and incidental expenses.

(ii) Borrowing Costs In accordance with Accounting Standard (AS) 16, Borrowing Costs which are incurred directly in relation to a project or which are apportioned to a project.

(iii) Construction and development costs - These would include costs that relate directly to the specific project and costs that may be attributable to project activity in general and can be allocated to the project.

6.7 Thus Construction and development costs and development costs that relate directly to a specific project include:-

a) land conversion costs, betterment charges, municipal sanction fee and other charges for obtaining building permissions;
b) site labour costs, including site supervision;

c) costs of materials used in construction or development of property:

d) depreciation of plant and equipment used for the project;

e) costs of moving plant, equipment and materials to and from the project site;

f) costs of hiring plant and equipment;

g) costs of design and technical assistance that is directly related to the project;

h) estimated costs of rectification and guarantee work, including expected warranty costs; and

i) claims from third parties.

6.8 However as per the above principle, the following costs should not be considered as part of the construction costs and development costs:

(a) General administration costs;

(b) selling costs;

(c) research and development costs;

(d) depreciation of idle plant and equipment;

(e) cost of unconsumed or uninstalled material delivered at site; and

(f) payments made to sub-contractors in advance of work performed.

6.9 From the above discussion, it is quite clear that the administrative expenses are not related to the project cost and hence should not be capitalized. It is in these circumstances that the company has charged off the said administrative expenses to profit and loss account, as against capitalizing the same to the WIP of an under construction project. Besides the assesse has been executing several projects and these selling costs incurred can not be apportioned in different projects as most of the

expenditure in nature of advertisement is carried out at head office level, which comprises of all the projects. In any case the expenditure is genuine and therefore liable to be allowed as business expenditure, in accordance with the provisions of Section 29 to Section 43B of the Act.

6.10 Coming to the provisions of sec 37, of the Income Tax Act, 1961 which are been reproduced here as under:

37.(1) Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession

6.11 Thus for claiming an expenditure u/s 37 of the Act, the following conditions should be satisfied:

Condition 1: The expenditure should not be of the nature described under Section 30 to 36.

Condition 2: It should not be in the nature of capital expenditure.

Condition 3: It should not be personal expenditure of the assessee.

Condition 4: It should have been incurred in the previous year.

Condition 5: It should in respect of business carried out by the assessee.

Condition 6: It should have been expended wholly and exclusively for the purpose of such business.

Condition 7: It should not have been incurred for any purpose which is an offence or is prohibited by any law.

Apparently all the conditions under section 37 appears to have been fulfilled in the present case and therefore this expenditure appears to be allowable.

6.12 There is no doubt that the Selling Cost is revenue in nature and not a capital in nature and it has been incurred wholly and exclusively for the purposes of business. Further, there is no restriction other than those specified in the Section 37(1) of the Income Tax Act, 1961 regarding the claim of the expenses in relation to income offered in that particular year. Therefore from this angle as well this expenditure is allowable.

6.13 The Ld. AR in this regard has relied upon various case laws which are discussed as under:

6.14 In the case of CIT V. Salora International Ltd (2009) 308 ITR 199(Delhi), the Hon'ble Delhi High Court held that Advertisement expenditure for launching products is an allowable revenue and expenditure and therefore does not call for any interference and therefore, no substantial question of law arises. In doing so the Hon'ble court confirmed the finding of ITAT Tribunal that the assessee had to incur such expenditure to meet the competition in the market for selling its products. The ratio of this judgment is squarely applicable to the facts of the case.

6.15 Similarly in the case of Commissioner of Income Tax vs.Citi Financial Consumer Fin. Ltd. (2011) 335 ITR 0029 it was held that the entire expenditure on publicity and advertisement incurred by the assessee is allowable fully in the year in which it was incurred; there being no advantage

which has accrued to the assessee in the capital field and there is no concept of deferred revenue expenditure in the IT Laws, the expenditure has to be allowed if the tests laid down in s. 37 are fulfilled.

6.16 The Karnataka High Court in the case of Mysore Tobacco Co. Ltd. vs. CIT (1978) 115 ITR 698 (Kar) observed as under:

"An expenditure which can be claimed as a deduction in any assessment year should have been incurred in the relevant accounting year. The entire exercise in the computation and assessment of business profits is to arrive at the true profits of the year which are liable to tax. The unit of assessment is the year and the receipts and expenditure which have to be taken into account must relate to the relevant accounting year. Therefore, if the expenditure of an earlier year is taken into account in a later year, the true profits of the later year cannot be determined and the result would be lopsided and unreal."

6.17 The Hon'ble Delhi High Court in the case of CIT vs. Manish Buildwell Pvt. Ltd. vide order dated 15/1/2011 in ITA No. 928/2011 had ruled that AS7 issued by the Institute of Chartered Accountants of India recognizes the position that in the case of construction contracts the assessee can follow either the project completion method or percentage completion method. Neither revised guidance notes 2012 issued by Institute of Chartered Accountants of India nor "Exposer Draft for Guidance Note on recognition of revenue" issued by Institute of Chartered Accountants of India in 2011 were mandatory. It was option of assessee to follow either completed contract

method or percentage completed method. Therefore percentage completion method in present case in appeal followed by appellant could not be faulted with by revenue authorities and on that basis it was neither correct nor justified to say that the Income Tax Act, 1961 does not have any AS in relation to construction contracts.

6.18 The Hon'ble Apex Court in the case of CIT Vs. Bilahari Investment Pvt. Ltd. 299 ITR 01, had taken a view that "recognition/identification of income under the 1961 Act is attainable by several methods of accounting. Same result could be attained by any one of the accounting methods. On the other hand the Percentage of Completion method tries to attain periodic recognition of income in order to reflect current performance. The amount of revenue recognized under such method was determined by reference to the stage of completion and could be looked at under such method by taking into consideration the proportion that costs incurred to date bears to the estimated total costs of contract". Further the Apex Court again in the case of CIT VS. Hyundai Heavy Industries Co. Ltd., 291 ITR 482 (SC) took the similar view.

6.19 The ITAT Mumbai IT.A. No. 6820/Mum/2012 Vardhman Developers Ltd. ITO Ward 2(3X4) Mumbai under identical circumstances held that no disallowance with regards to the said selling expenses should be done for the year under consideration and entire expenditure is allowable.

The ratio of above judgments and decisions supports assessee's view point.

> 6.20 Therefore in view of the discussion in foregoing paras and considering the overall facts of the case, the addition/ disallowance of Rs. 10,53,40,913/- made by the AO becomes unsustainable in law and is therefore is directed to be deleted. This ground of the assessee is accordingly allowed."
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> 8.4 Considering that in the present year i.e. A.Y. 2013-14, there is no change in the facts and circumstances of issue under consideration, I find no reason to differ with the decision of my Ld. Predecessor. Also, in his assessment order the AO has concluded that the Selling costs are to be allowed as revenue expenditure to the extent of attribution to the revenue offered. On verification of the details of commission and brokerage expenses it is seen that the appellant has rightly offered revenue recognized for F.Y. 2012-13. Therefore, the objection raised by the AO has been clarified by the appellant. In view of the facts mention as above and following the decision of my Ld. Predecessor, this issue as mentioned in the ground of appeal is decided in favour of the appellant. Therefore, this ground of appeal is Allowed."

9. Aggrieved, the revenue is before us.

10. We have heard both the parties and perused the records. We note that the assessee has claimed brokerage and commission expenses to the tune of Rs.17,43,949/- which was debited in the P & L account. The Ld. CIT(A) has allowed the claim by taking note that the selling and marketing costs consist of the expenditure in the nature of advertisement and publicity expenditure, miscellaneous expenses,

commission and brokerage, sales promotion expenditure and exhibitions etc. It is noted that the assessee claimed Rs.17,43,949/- as expenditure towards brokerage and commission. According to the assessee, the amount was paid to its brokers who aid in bringing customers for booking and sale of its flats/properties during the assessment year. It is noted that brokerage and commission is a financial cost/selling expenses which the assessee has incurred wholly and exclusively for the purpose of business. And the selling cost has been incurred by the assessee for the services rendered by brokers who canvas booking of flats of projects in advance which is not project specific and irrespective of whether a project is implemented or not, the brokerage cost/commission paid to broker's need to be allowed being revenue in nature. And since, the commission paid are in terms of agreement rendered between the assessee and the broker, and the genuineness of the expenditure has not been questioned, we are of the opinion that the expenses incurred on brokerage and commission on booking of properties need not be considered as part of business of Construction of units/flats, and are revenue in nature, which needs to be allowed. Therefore, we confirm the action of Ld. CIT(A) and dismiss the grounds of appeal of the revenue.

11. Coming to the revenue appeal for AY. 2014-15, we note that the first two grounds of appeal of the revenue are similar to ground no. 1 & CO of assessee for AY. 2013-14. And since there is no change in facts or law [*except for the fact that the Ld. CIT(A) has reversed the action of the AO and allowed the claim of the assessee in respect of the*

interest expenditure as revenue in nature]. We, for the same reasoning stated therein for ground no. 1 of revenue and CO of assessee for AY. 2013-14 decide the same by confirming the action of Ld. CIT(A) and our decision will apply *mutatis mutandis* for this year. Therefore, the action of the Ld. CIT(A) reversing the action of the AO for capitalization of interest expenditure of Rs.51,18,152/- need to be allowed as revenue expenditure.

12. Ground no. 3 is against the action of the Ld. CIT(A) allowing the commission and brokerage cost of Rs.1,31,20,709/- which is found similar to ground no. 2 for AY. 2013-14, and no change in facts or law could be pointed out by the department. So for the same reasoning stated therein for AY. 2013-14, we confirm the action of Ld. CIT(A) which will apply *mutatis mutandis* for this year. Therefore, the impugned action of the Ld. CIT(A) is upheld.

13. Coming to appeal of revenue for AY. 2016-17, we note that first ground is similar to ground no. 1 for AY. 2013-14 (and ground no. 1 & 2 for AY. 2014-15) and since there is no change in facts or law, for the same reasoning stated therein for AY. 2013-14, the action of the Ld. CIT(A) is upheld; and we confirm his action of allowing the interest cost of Rs.1,45,93,760/- as revenue expenditure. This ground of revenue is dismissed.

14. Ground no. 2 is against the action of the Ld. CIT(A) allowing the commission and brokerage cost of Rs.13,27,767/- which ground we note is similar to ground no. 2 for AY. 2013-14 and since there is

no change of facts or law, for the same reasoning stated therein, we confirm the action of Ld. CIT(A) and our decision will apply *mutatis mutandis* for upholding the action of Ld CIT(A). Therefore, the impugned action of the Ld. CIT(A) is upheld.

15. Ground no. 3 is against the action of the Ld. CIT(A) deleting the addition of Rs.28,73,543/- on account of deemed rent calculated @ 2% of the closing stock of unsold flats and shops where occupancy certificates were received.

16. Brief facts as noted by the AO is that he noted from the balance-sheet of the assessee that it had inventories as on 31.03.2016 which included closing stock of unsold flats of Rs.54,41,25,101/-. So he issued notice to the assessee calling upon the response from it as to why the Annual Letting Value (ALV) of the finished properties which was held in stock should not be assessed under the head "*income from house property*" as per section 23 of the Act. Assessee's reply has been reproduced by the AO at para no. 6.2 to 6.5 of his assessment order and thereafter, he expressed his opinion at para 6.6 to 6.7 and made an addition of Rs.28,73,543/-@ 2% of the closing stock of unsold flats and shops where occupancy certificates were received to the tune of Rs 20,52,53,093/-. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to allow the appeal of the assessee by holding as under: -

"14.2 On careful consideration of entire facts, the disputed issue is as to whether ALV is required to be determined in case of builder when it has unsold units at the year end. From the assessment order, it is observed that the AO has primarily relied upon the decisions of Hon'ble Delhi High Court in the cases of CIT vs Ansal Housing & Construction (2016) (389 TTR 373) and Anasal Housing and Finance and leasing Limited (354 ITR 180) while computing the deemed rent

14.3 It appears that the AO, although admitted that the unsold flats represent stock in trade of the appellant, overlooked the amendment brought in by the Finance Act 2017 w.e.f. 01/04/2018 wherein a new subsection (5) was inserted in Section 23 of the Act to the effect that the property held as stock in trade which are not let out during the previous year, the annual value of the said property, for a period up to one year from the end of the financial year in which the certificate of completion of construction and property is obtained from the competent authorities. This amendment was brought in the section 23 sub section (5) of the Act, effective from AY 2018-19 onwards which is not retrospective in nature. Hence, no addition can be made based on notional rental income or deemed rental income in the hands of the appellant in respect of unsold flats held as stock in trade by the appellant during the year under consideration. For this reliance of the Ld. AR on the decision of Hon'ble Gujarat High Court in the case of CIT vs. Neha Builders Pvt. Ltd., reported in 296 ITR 661 (Guj) is found to be in order. In the said decision, it is held that where the property has been held as stock in trade of the assessee, then the said property

would partake character of stock and any income derived from stock would be income from business and not income from house property.

14.4 In the instant case, there is no dispute between the AD and appellant that the unsold flats are stock in trade of the appellant. There is also no dispute that the appellant had not let out its unsold flats to any persons. Hence, in my considered opinion, there cannot be any assessment of notional rental income or deemed rental income under the head income from business in the absence of specific provisions contained in the statute. The amendment brought in the Act is through section 23 sub-section (5) is applicable prospectively Le from JAY 2018-19 onwards, while the appellants case belongs to period prior to this date.

14.5 It is also observed that Hon'ble Mumbai ITAT in the case of ITO vs Arihant Estate Pvt Limited (TTA No 6037/Mum/2016) dated 27/06/2018 has considered the Hon'ble Delhi High Court decisions of Ansal Housing & Construction & Ansal Housing Finance & Leasing Co. Ltd. (supra) and held as under:

> "We have heard the rival submissions and perused the orders of the authorities below and the decisions relied upon. It is an undisputed fact that the assessee are in the business of builders, developers and construction. Both the assessee have constructed various projects and the projects were treated as stock in trade in the books of account. Flats sold by the assessee were assessed under the head income from business. There were certain unsold flats in stock in trade which the AO treated as

property assessable under the head 'income from house property and computed notional annual letting value on such unsold flats placing reliance on the decision 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 he 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.

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 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 and notionally computing annual letting value under Section 23 of the Act. While holding to the Coordinate Bench observed as under: -

> 3. The ld. 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.2311) of the IT Act.
>
> 4. On the other hand, ld. DR relied on the order of Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd., 354 ITR ISO (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 CITIA) 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 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 nor 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 LT. 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 hooks 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."

6. Admittedly in this case on hand the unsold property being shops were held as stock in trade. In the circumstances, respectfully following the above decision we uphold the order of the Ld. CIT(A) and reject the ground raised by the Revenue.

7. In the result, appeal of the Revenue is dismissed.

14.6 Similar observations have been given by the Hon'ble Mumbai ITAT in the cases of Runwal Construction Vs ACIT (ITA No 5408 and 5409/Mum/2016), Pune ITAT in the case of Shri Vikas K Garud VS ITO (supra) and Jaipur ITAT in the case of Raj Landmark (P) Ltd Vs ITO Ward 3(2) [[2018] 97 taxmann.com 214 (Jaipur - Trib.)]

14.7 Thus, relying upon the decisions referred supra which have duly considered the decision of Hon'ble Delhi High court relied upon by AO and decision of Hon'ble Supreme court in the case of Chennai Properties & Investments Ltd and relying upon the amendment brought by Finance Act 2017 for determining ALV of unsold units, it is held that the AO is not justified in computing ALV in present case of appellant for AY 2016-17. Thus, ground of appeal no.3 is allowed.

15. Accordingly, appeal of the appellant for AY 2016-17 is Allowed."

17. We have heard both the parties and perused the records. The issue is regarding the Annual Letable Value/ALV (deemed rent) calculated by AO at 2% of the closing stock of unsold flats/shops for which occupancy certificates was received by the assessee. It is noted that the AO from perusal of the balance-sheet found the inventories

(unsold flats) as on 31.03.2016 was to the tune of Rs.54,41,25,101/-. On being asked, as to why the ALV of the finished properties held as stock should not be assessed under the head "*income from house property*" as per section 23 of the Act, the assessee submitted that it had received occupancy certificate of the unsold flats and shops only to the tune of Rs.20,52,53,093/- (and not Rs.54,41,25,101/- shown as inventories in balance-sheet) and pleaded that the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Ansal Housing and Construction (389 ITR 373) was not applicable to the facts of the case; and also cited the decision of this Tribunal in M/s. Runawal Construction Pvt. Ltd. which was based on the decision of the Hon'ble Gujarat High Court in the case of CIT Vs. Neha Builders Pvt. Ltd., (296 ITR 661). However, the AO rejected the contention of the assessee and was of the opinion that the decision of the Hon'ble Gujarat High Court in the case of M/s Neha Builders Pvt. Ltd. (supra) was distinguishable because the assessee (M/s. Neha Builder) had offered the income on flats it held as stock-in-trade "*as income from house property*" whereas M/s. Runawal Construction decided by the Tribunal there was no computation of ALV. Thereafter, the AO taking note of the fact that *occupancy certificate* was only in respect of unsold stock/flats to the tune of Rs.20,52,53,093/-, estimated the ALV @ 2% of the closing stock which works out to Rs.41,05,061/- and thereafter allowed 30% standard deduction as provided u/s 24(a) of the Act, and resultantly assessed the *income from house property* at Rs.23,73,543/-. On appeal, the Ld. CIT(A) has deleted the addition by taking note of the amendment brought in by Finance Act, 2017 and

referring to the decision of the Hon'ble Gujarat High Court in the case of M/s. Neha Properties and Hon'ble Supreme Court decision in the case of M/s. Chennai Properties (373 ITR 673). We do not countenance the action of the Ld. CIT(A), since his reliance on the decision of Hon'ble Supreme Court in M/s. Chennai Properties (supra) and Hon'ble Gujarat High Court in M/s. Neha Builders (supra) and amendment brought in by Finance Act, 2017 was misplaced. In the case of M/s. Chennai Properties (supra), the Hon'ble Supreme Court held that if an assessee is having his house property and by way of business he is giving the property on rent, and if he is receiving the rent from the said property, as his business income, the said income even if in the nature of rent, should be treated as "*business income*" because the assessee is having a business of renting his property and the rent which he receives is in the nature of business income. It is noted that the Hon'ble Supreme Court in the case of Karanpura Development Ltd Vs. CIT (44 ITR 362) also emphasized this ratio and held that in order to ascertain the nature of the income (*whether rent received from house property is to be assessed under the head "income from house property or business")* it has to be seen whether letting or sub-letting is part of a *trading operation*. The Hon'ble Supreme Court in the case of M/s. Rayala Corporation Ltd (386 ITR 500) has taken note of the decision in the case of M/s. Chennai Properties (supra) and reiterated the ratio that if the business of the assessee was to lease its property and earning rent therefrom, the income earned should be treated as its business income and to be subject to tax under the "*head profit and gains of business and*

profession". Here in the present case, the assessee failed to show that its business/trading operation was to earn any rental income. Therefore, the Ld. CIT(A)'s reliance on the decision of the Hon'ble Supreme Court in the case of M/s. Chennai Properties (supra) is misplaced. Similarly, the decision of the Hon'ble Gujarat High Court in the case of M/s. Neha Properties (supra) is also not applicable to the facts of this case. In the case of M/s. Neha Properties (supra), the Hon'ble Gujarat High Court did not have any occasion to decide the deemed rent (ALV) arising from unsold flats/closing stock. In that case, actual rent was received from property which was included in the closing stock and the question was whether the rental income derived from letting out of the property shown in closing stock is assessable under the head income from house property or from business income. And the Hon'ble High Court held that it should be assessed as business income. Therefore, the ratio/decision of the Hon'ble Gujarat High Court is distinguishable and not applicable in the facts/issue of the present case. However, on this issue there is a direct decision of Hon'ble Delhi High Court in the case of Ansal Housing Finance and Leasing Company reported in 354 ITR 180 (DEL) wherein it was held that the vacant units in the possession of assessee are liable to be charged under the head "Income from House Property" on the basis of its ALV. And, we note that similar issue had come up for consideration before this Tribunal in the case of DCIT Vs. M/s. Inorbit Malls Pvt. Ltd. in ITA. No.2220/Mum/2021 for AY.2017-18 dated 11.10.2022 wherein this Tribunal considered the Finance Act 2017 and decision of Hon'ble Supreme Court in Chennai Properties and Hon'ble

Gujarat High Court in Neha Builders and Hon'ble Delhi High Court in Ansal Housing (supra) and held as under: -

> "1. The aforesaid appeal has been filed by the revenue against order dated 06.08.2021, passed by the Ld. CIT(A)-52 Mumbai for the quantum of assessment passed under section 153A r.w.s 143(3) for the assessment year 2017-18. In the grounds appeal the revenue has raised following grounds:
>
> i) "Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is justified in deleting the addition of Rs.6,66,43,442/- made by the Assessing Officer on account of notional income as income from house properties in respect of unsold units held by the assessee as its stock in trade without appreciating the decision of the Hon'ble Apex court in the case of S. G. Mercantile Corpn. (P) Ltd us C.I.T. AIR 1972 SC 732 and the decision of Hon'ble Delhi High Court in the case of CIT Vs. Ansal Housing Finance & Leasing Company Ltd. 354 ITR 180."
>
> ii) "On the facts and circumstances of the case and in law, the Ld CIT(A) has erred in restricting the disallowance u/s 14A of the IT Act to the extent of exempt income received by the assessee during the year under consideration without appreciating the Circular No. 5 of 2014 dated 11.02.2014 of CBDT." iii) On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in deleting the disallowance u/s 14A of the IT Act while computing the book profits u/s 115JB of the IT Act without realizing the fact, that clause (f) of explanation (1) to section 115JB requires such adjustment to be made.
>
> iv) "The appellant craves to leave, to add, to amend and / or to alter any of the ground of appeal, if need be."
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> 2. The facts and briefs with regard to issue raised in ground no.1 are that, Assessee is engaged in the business of Real Estate development, leasing and management of shopping malls etc. During the course of assessment proceeding the Assessing Officer has noted that the appellant has a stock of completed units totaling to Rs. 151,13,53,919/- out of which, it has

received advances in respect of properties to the extent of Rs 39,12,96,068/-. The net unsold units with the assessee in closing stock was Rs 112,00,57,852/-. The Assessing Officer relying upon the Hon‟ble Delhi High Court decision in the case of Ansal Housing Finance and Leasing Company, reported in 354 ITR 180, held that the vacant units in the possession of the appellant are liable to be charged of notional rental income under the head „Income from house property‟ on the basis of their ALV. Rejecting the submissions made by the Assessee and in light of the failure of the assessee to provide the Annual Ratable Value (ALV) of the these shops and units, the Assessing Officer computed the ALV relying on certain ITAT decisions that, a return of 8.5% as rent on these properties is rational and acceptable. AO accordingly, proceeded to compute the income of the Assessee under „income from house property‟ by adopting 8.5% of the value of inventory, i.e., unsold stock of flats as its rental income. Thus, the income has been computed at Rs. 6,66,43,442/- under the head income from house property after allowing 30% standard deduction.

3. The Ld CIT(A) on the other hand referring to various decisions of ITAT Mumbai Bench including the judgment of; i) Haware Construction (P) Ltd. (2019) 101 taxmann.com 168(Mumbai-Trib); ii) M/s Runawal Constructions ITA No. 5408/Mum/2016 (AY: 2012-13); & iii) M/s C.R. Development Pvt. Ltd., 2477/Mum/2022(AY: 2009-2010), held that the Tribunal Benches have relied upon the judgment of Hon‟ble Gujarat High Court in the case of CIT Vs. Neha Builders, reported in 296 ITR 661, which has been inferred that Hon‟ble High Court has decided this issue in favour of the Assessee.

4. Here the case of the Assessing Officer is that, since Hon‟ble Delhi High Court in the case of M/s Ansal Housing Finance and Leasing Company (Supra) has held that vacant units in the position of the appellant is liable to be charged of notional rental income on the basis of ALV and has to be assessed as income from house property. Whereas the Ld. CIT (A) had relied upon various Tribunal decisions wherein it has been inferred that Gujarat High Court Judgment in the case CIT Vs. Neha Builders Pvt. Ltd (Supra) lays down that notional rental income on unsold inventory of stock of flats/units cannot be assessed as income from house property. The Tribunal decisions relied upon by Ld. CIT (A) are as under:

i) Hon‟ble Mumbai ITAT in the case of Runawal Constructions (ITA.No.5408 & 5409/Mum/2016).

ii) Hon‟ble Mumbai Tribunal in case of Arihant Estates Pvt. Ltd (ITA No.6037/Mum/2016).

iii) Hon‟ble Pune Tribunal in the case of M/s Kolte Patil Developers Limited V. DCIT (ITA No. 2206/PUN/2016).

The Tribunal in all these decisions have followed the Gujarat High Court judgment in CIT Vs. Neha Builders Pvt. Ltd (Supra) to decide this issue in favour of the assessee that notional rent cannot be taken as ALV for computing the income from house property on unsold inventory of flats.

5. Before us, the Ld. DR has referred to the decision of coordinate Bench decision of ITAT Mumbai in the case of Dimple Enterprises proceed DCIT, reported in 190 ITD 199, wherein the Tribunal has held that if Assessee is a builder but business of the Assessee is not letting of property, then rent from unsold stock is to be assets has income from house property, after following the decision of Hon‟ble Delhi High Court in the case of CIT vs. Ansal Housing Financial and

Leasing Company Ltd (Supra). He pointed out that Tribunal has also considered the decision of Gujarat High Court in the case of CIT Vs. Neha Builders Pvt. (Supra).

6. On the other hand, Learned counsel for the Assessee referred to the decision of K. Raheja Corporate Services Pvt. Ltd vs. ACIT ITA No. 7109/Mum/2018, 3862 & 4085/Mum/2019 order dated 25.10.2021, where in the Tribunal has referred to other decisions of this Tribunal including M/s. Osho Developers Mumbai vs. ACIT, ITA No. 2372 and 1860/Mum/2019 dated 03.11.2020.

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 were 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-in- trade, 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 form 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. In the light of the aforesaid decision of this Tribunal in M/s. Inorbit Malls (supra), we set aside the impugned order of the Ld. CIT(A) and restore the matter back to the file of the AO and direct as given at para no. 21 (supra) of the order in M/s. Inorbit Malls (supra) wherein the Tribunal has held that the AO was correct in computing ALV on deemed rent on unsold stock. However, the Tribunal directed the AO to do so by considering the following facts. 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/deemed 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 be computed. And Lastly, the AO to estimate the ALV after ascertaining Municipal Letable Value for computing the notional rent as held by the Hon'ble Bombay High Court in the case of CIT Vs. Tip Top Typography reported in 368 ITR 30 or @ 2% which was estimated by AO whichever is less. Therefore, the ground no. 3 of the revenue is partly allowed for statistical purposes.

19. In the result, the appeals filed by the revenue for AY 2013-14 & AY 2014-15 dismissed, and cross-objection filed by the assessee for AY 2013-14 is allowed and Revenue appeal for AY 2016-17 partly allowed for statistical purpose.

Order pronounced in the open court on this 31/07/2023.

Sd/-	Sd/-
(S. RIFAUR RAHMAN)	**(ABY T. VARKEY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated 31/07/2023.
Vijay Pal Singh, (Sr. 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,

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