

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

**SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 2408/MUM/2023
(Assessment Year: 2017-2018)**

**Deputy Commissioner of Income-tax-
Circle-14(1)(1), Mumbai,**
Room No. 432 Aaykar Bhavan, M.K. Road,
Mumbai - 400020

..... **Appellant**

**M/s Neelkanth Urban Developers
Pvt. Ltd.,**
Plot No. 240, 240/1-8, Neelkanth
Corporate I Park, Kirol Road, Vidyavihar
(West), Mumbai - 400086
[PAN: AAFC8887K]

Vs

..... **Respondent**

Appearance

For the Appellant/Department : Shri Ashok Kumar Ambastha
For the Respondent/Assessee : Shri Pratik Jain

Date

Conclusion of hearing : 14.03.2024
Pronouncement of order : 26.03.2024

ORDER

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Revenue has challenged the order, dated 09/05/2023, passed by the Ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC) Delhi [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2017-18, whereby the Ld. CIT(A) had allowed the appeal of the Assessee against the Assessment Order, dated 23/12/2019, passed under Section 143(3) of the Income Tax Act, 1961

(hereinafter referred to as 'the Act').

2. The Revenue has raised the following grounds of appeal:

"1. Whether on the facts and circumstances of the case and in law the Ld. CIT(A) erred in deleting the addition made by the AO u/s 23 of the Act, on account of notional rent on flats held by the assessee as stock in trade ignoring the fact that the provision of Section 23(5) were introduced in the Act, from the A.Y. 2018-19 onwards merely for granting relief to the builders.

2. The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored."

3. The relevant facts in brief are that the Assessee is a domestic company engaged in the business of builders and developers. The Assessee filed return of income for the Assessment Year 2017-18 on 31/03/2018 declaring total Income of INR 6,54,46,210/-. The case of the Assessee was selected for scrutiny. During the assessment proceedings Assessing Officer issued notice, dated 09/12/2019, to the Assessee requiring the Assessee to show cause why notional rental income in respect of closing stock of flats/shops/offices should not be brought to tax as income from house property in hands of the Assessee as per Section 23(1)(a) of the Act. In response, the Assessee filed reply letter, dated 18/12/2019, contending that notional rental income in respect of units forming part of the closing stock could not be brought to tax as income from house property by placing reliance on the judgment of the Hon'ble Gujarat High Court in the case of CIT Vs. Neha Builders (P.) Ltd. : [2008] 296 ITR 661 (Gujarat). It was also contended that there was no provision in Act which specified adoption of rate of 8% (of the value of the closing stock) for

computing the notional rental income as proposed by the Assessing Officer. However, the Assessing Officer was not convinced and rejecting the aforesaid contention of the Assessee, the Assessing Officer concluded that the notional rental income on closing stock of units was liable to tax in the hands of the Assessee. Relying upon the decision of the Tribunal in the case of Emtici Engineering Limited Vs. Assistant Commissioner of Income Tax: 58 TTJ 27, the Assessing Officer computed the notional rental income at the rate of 8% of the value of the closing stock and made addition of INR 1,77,89,901/- as income from house property in the hands of the Assessee invoking provisions of Section 23(1)(a) of the Act.

4. Being aggrieved, the Assessee preferred appeal before the CIT(A). It was contended that the provisions for levying tax on notional rental income from closing stock was introduced with effect from Assessment Year 2018-19 and therefore, notional rental income could not be brought to tax in the hands of the Assessee for the Assessment Year 2017-18. Reliance in this regard was placed on Section 23(5) of the Act. It was further submitted before the CIT(A) that the occupation certificate in respect of units/flats forming part of closing stock was not received by the Assessee till 31/03/2017 and the same were held as work-in-progress. Therefore, no notional rental income in respect of the same could be brought to tax in the hands of the Assessee. The CIT(A) accepted the aforesaid contention of the Assessee; allowed the appeal of the Assessee; and deleted the addition of INR 1,77,89,901/- made by the Assessing Officer under Section 23(1)(a) of the Act.
5. Being aggrieved, the Revenue is now in appeal before us on the

grounds reproduced in paragraph 2 above.

6. The Ld. Departmental Representative relied upon the decision of the Tribunal in the case of Dimple Enterprises Vs. DCIT [ITA No. 5269/Mum/2019, dated 21/05/2021] which was approved in the case of DCIT, Central Circle 4(2), Mumbai Vs. M/s Inorbit Mall Pvt. Ltd., [ITA No. 2220/Mum/2021, dated 11/10/2022.] and submitted that the issue raised in the present appeal stands decided in favour of the Revenue. It was further submitted that the Assessing Officer was justified in bringing to tax the notional rental income computed at the rate of 8% of the value of closing stock of units held by the Assessee. The CIT(A) had incorrectly concluded that there was no provision to bring to tax the aforesaid rental income in the hands of the Assessee prior to the insertion of Section 23(5) of the Act which was applicable from Assessment Year 2018-19.
7. Per contra, the Ld. Authorised Representative for the Assessee supported the order passed by the CIT(A) and submitted that the issue raised in the present appeal stood decided in favour of the Assessee by the judgment of the Hon'ble Gujarat High Court in the case of CIT Vs. Neha Builders (Pvt.) Ltd. (supra) which has since been followed by the Mumbai Bench of the Tribunal in the case of M/s C.R. Developments Pvt. Ltd. Vs. JCIT-8(1)(OSD), Mumbai [ITA No. 4277/Mum/2012, dated 13/05/2015] and in the case of Shri Rajendra Godshalwar Vs. ITO-21(3)(1), Mumbai [ITA No. 7470/Mum/2017, dated 31/01/2019]. He vehemently contended that a view taken in favour of the Assessee should be adopted even if there existed a contrary view taken by the Tribunal on the same issue. He further submitted that the CIT(A) had also returned a factual finding that in respect of units forming part of closing stock,

occupation certificate was not obtained. Further, the aforesaid units were held as work-in-progress. Therefore, no notional rental income could have been brought to tax in hands of the Assessee.

8. In rejoinder, the Ld. Departmental Representative submitted that there was nothing on record to support the factual finding returned by the CIT(A) that occupation certificate was not obtained till 31/03/2017. He further submitted that even if, additional evidence was submitted by the Assessee before CIT(A), the provisions contained in Rule 46A of the Income Tax Rules, 1962 [for short '**IT Rules**'] were not been complied with as no remand report was sought from the Assessing Officer.
9. We have heard the rival submissions and perused the material on record.
10. We note that identical issue came up for consideration before the Mumbai Bench of the Tribunal in the case of DCIT, Central Circle 4(2), Mumbai Vs. M/s Inorbit Mall Pvt. Ltd., [ITA No. 2220/Mum/2021, dated 11/10/2022.] After examining judicial precedents on which reliance has been placed by both the sides, the Tribunal observed that the jurisdictional High Court had taken a view contrary to the view taken by the Hon'ble Gujarat High Court in the case of Neha Builders (supra) while holding that in cases where the there was actual receipt of rental income, the same was to be assessed as income from house property and not as business income. However, the aforesaid judgments were not applicable to a case where there was no actual receipt of rental income in the present case. The relevant extract of the decision of the Tribunal reads as under:

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.

11. After making the above observations, the Tribunal, taking into consideration the judgment of the Hon'ble Delhi High Court in the case of CIT Vs. Ansal Housing Finance & Leasing Company Limited: [2013] 354 ITR 180 (Delhi) [31-10-2012], as well as the provisions of Section 23(5) of the Act, concluded as under:

*"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 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.” (Emphasis Supplied)

12. Thus, on perusal of above it can be seen that in the above decision the Tribunal had, after considering contentions identical to those raised by the parties before us, concluded that notional rental income on unsold stock can be brought to tax as income from house property in the hands of an assessee subject to the following riders. Firstly, the flats/units on which an assessee has received any advance but has not delivered/given final possession to the buyer shall not be subjected to notional rent. Secondly, if unit of flat is shown as work-in-progress in the books of accounts of the assessee then also notional rent could not be computed. Thirdly, as per the judgment of the Hon'ble Bombay High Court in the case CIT Vs. Tip top Typography: 368 ITR 330, notional rent should be computed at Municipal Ratable Value.
13. We note that the CIT(A) has returned a finding that the closing stock of units were held by the Assessee as work-in-progress as the occupation certificate in respect of the same was not received till 31/03/2017. However, the Revenue has disputed the finding returned by the CIT(A) as without any basis. In our view, the factual finding returned by the CIT(A) goes to the root of the matter as it has been held by the Tribunal in the case of Inorbit Mall Pvt. Ltd. (supra) that notional rental income is not chargeable in case closing stock of units was held as work-in-progress. The material placed before us is not sufficient to return a factual finding on this issue. Since the issue requires verification, we remand this issue back to the file of the Assessing Officer with the directions to verify whether the closing stock of the units was held by the Assessee as work-in-progress and decide the issue as per the decision of the

Tribunal in the case of Inorbit Mall Pvt. Ltd. (supra). Accordingly, we set aside the order passed by the CIT(A) as well as the addition of INR 1,77,89,901/- made by the Assessing Officer under Section 23(1)(a) of the Act. Ground No. 1 raised by the Revenue is allowed for statistical purposes.

14. In result, the appeal by the Revenue is allowed for statistical purposes.

Order pronounced on 26.03.2024.

Sd/-
(Om Prakash Kant)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 26.03.2024
Alindra, PS

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

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

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आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai