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

BEFORE SHRI NARENDER KUMAR CHOUDHRY, JUDICIAL MEMBER
AND
SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA No.4847/M/2023
Assessment Year: 2014-15

DCIT CC 4(2), Room No.1921, 19th Floor, Air India Building, Nariman Point, Mumbai - 400021	Vs.	**M/s. Raheja Universal Private Limited,** Raheja Centre Point, CST Road, Santacruz, Mumbai - 400098 **PAN: AABCG7955Q**
(Appellant)		(Respondent)

CO No.78/M/2024
(Arising out of ITA No.4847/M/2023)
Assessment Year: 2014-15

M/s. Raheja Universal Private Limited, Raheja Centre Point, CST Road, Santacruz, Mumbai - 400098 **PAN: AABCG7955Q**	Vs.	**DCIT CC 4(2),** Room No.1921, 19th Floor, Air India Building, Nariman Point, Mumbai - 400021
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Anuj Kisnadwala, CA
Revenue by : Smt Mahita Nair, SR. D.R.

Date of Hearing : 10 . 06 . 2024
Date of Pronouncement : 26 . 08 . 2024

O R D E R

Per : Narender Kumar Choudhry, Judicial Member:

The appeal and cross objection under consideration have been preferred by the Revenue and Assessee respectively against the order dated 05.10.2023, impugned herein, passed by the Ld. Commissioner of Income Tax (Appeals) (in short Ld. Commissioner) under section 250 of the Income Tax Act, 1961 (in short 'the Act') for the A.Y. 2014-15.

2. In the instant case, the Assessee had declared its total income of Rs.17,03,84,550/- and the book profit of Rs.16,39,93,902/- u/s 115JB of the Act, by filing its original return of income for the assessment year under consideration on 28.11.2014, which was initially processed u/s 143(1) of the Act and subsequently selected for scrutiny, which resulted into completion of the assessment vide assessment order dated 02.12.2016 u/s 143(3) of the Act whereby the income of the Assessee was assessed at Rs.17,46,69,260/-.

3. Thereafter, the case of the Assessee was reopened u/s 147 of the Act by recording the following reasons for re-opening of assessment:

> *... "1. M/s Raheja Universal Pvt. Ltd. (hereinafter referred as the assessee) is a private limited company. The assessee filed its return of income on 28-11-2014 declaring income at Rs. 17,03,84,550. Subsequently, the case of the assessee was selected for scrutiny and assessment u/s 143(3) of the IT Act was completed on 02-12-2016 with the assessed income of Rs. 17,46,69,260 wherein disallowance u/s 14A r.w.r. 8D of Rs. 42,85,210 was made.*
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> *2. Subsequently, it is found from the schedule 16 of the balance sheet of the assessee for the year under consideration that the assessee has finished goods in the form of flats and shops to the tune of Rs. 32,46,76,775. However, it is also found that the assessee has not shown house property income on such flats and shops.*
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> *3. The assessment record of the assessee has been verified. It is found from the computation of income submitted by the assessee during the assessment proceedings that the Assessee-Company has not offered any rent with respect to these properties held as unsold inventories under section 23(1)(a) of the IT Act, 1961. The Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd. vs. CIT [354 ITR 0180) held that ALV of flats, built by assessee engaged in construction business, lying unsold, is assessable as income from house property. For the purpose of section 22, the annual value of any property shall be deemed to be the sum for which the property might reasonably be expected to let from year to year. As per the decision of Hon'ble Delhi High Court in case of Ansal Housing Finance & Leasing Co. Ltd. us. CIT 354 ITR 180 (Del.), 8% of the cost of the house property is treated as the value at which the property might reasonably be expected to be let out during the year as per section 23(1)(a) of the IT Act. Thus, the rental income of the assessee which escaped assessment*

is worked out to Rs. 2,59,74,142 being 8% of the unsold finished goods of Rs. 32,46,76,775.

4. In view of the fact mentioned at para 2, and 3 (supra), the fact remains clear that the assessee has suppressed its income from house property to the extent of Rs. 1,81,81,899. Thus, there is no denying the fact that the amount of Rs. 2,59,74,142 has escaped assessment as the assessee failed to disclose fully and truly all material facts necessary for its assessment for the year under consideration.

5. In view of the facts mentioned above, I have reason to believe that income of more than Rs. 1 lakh has escaped assessment within the meaning of section 147 of the LT. Act by the reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for the year under consideration. Further, the facts of the case are covered by the explanation 1 to section 147 of the IT Act. As the income chargeable to tax has been under assessed u/s 143(3) of the IT Act, the case of the assessee is required to be reopened within the provision of section 147 of the IT Act.

6. In this case a return of income was filed on 28-11-2014 declaring income at Rs. 17,03,84,550 for the year under consideration and regular assessment u/s 143(3) of the IT Act was made on 02-12-2016 with an assessed income of Rs. 17,46,69,260. Since, 4 years from the end of the relevant year has expired in this case, the requirements to initiate proceeding u/s 147 of the Act are reason to believe that income for the year under consideration has escaped assessment because of the failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for the assessment year under consideration. It is pertinent to mention here that reasons to believe that income has escaped assessment for the year under consideration have been recorded above at paragraph 2,3 and 4 (supra).

It is evident from the above facts that the assessee had not truly and fully disclosed material facts necessary for his assessment for the year under consideration thereby necessitating reopening u/s 147 of the Act.

It is true that the assessee has filed a copy of annual report and audited P&L A/c and balance sheet along with return of income where various information/material were disclosed. However, the requisite full and true disclosure of all material facts necessary for assessment has not been made as noted above. It is pertinent to mention here that even though the assessee has produced books of accounts, annual report, audited P&L A/c and balance sheet or other evidence as mentioned above, the requisite material facts as noted above in the reasons for reopening were embedded in such a manner that material evidence could not be discovered by the AO and could have been discovered with

due diligence, accordingly attracting provisions of Explanation 1 of section 147 of the Act.

It is evident from the above discussion that in this case, the issue under consideration were never examined by the AO during the course of regular assessment. It is important to highlight here that material facts relevant for the assessment on the issue under consideration were not filed during the course of assessment proceeding and the same may be embedded in annual report, audited P&L A/c, balance sheet and books of account in such a manner that it would require due diligence by the AO to extract these information. For the aforesaid reasons, it is not a case of change of opinion by the AO.

In this case more than four years have lapsed from the end of assessment year under consideration. Hence necessary sanction to issue notice u/s 148 of the IT Act is solicited from Principal Commissioner Income-tax (Central)-2, Mumbai as per the provisions of section 151(1) of the I.T. Act, 1961".....

3.1 Consequently, notice u/s 148 of the Act was issued to the Assessee on dated 19.03.2021, in response to which the Assessee filed its return of income on 17.04.2021 declaring the income of Rs.17,46,69,260/-.

3.2 The Assessee also sought copy of the reasons for reopening of the assessment which were provided along with letter dated 25.12.2021 by the Assessing Officer (AO). Thereafter, the Assessee filed its objections on 18.01.2022 against the reasons for reopening the assessment u/s 147 of the Act and the objections filed by the Assessee were disposed of.

3.3 Thereafter, statutory notices were issued to the Assessee, in response to which the Assessee from time to time filed its replies and documents. The AO while going through the schedule "inventories" to the balance sheet observed that the Assessee company under the head "finished goods" has declared unsold inventories in the form of flats and shops to the tune of Rs.32,46,76,775/- however, has not shown house property income on such flats and shops. Accordingly, the AO vide letter dated 07.03.2022 show caused the Assessee as to why the flats should not be deemed as rented out relying upon the case laws laid down by the Hon'ble Delhi High Court in the case of CIT vs. Ansal Housing and Finance

Leasing Co. Ltd. 354 ITR 180 and accordingly as to why the annual value of the same should not be taxed u/s 23(4) of the Act.

3.4 The Assessee in response to the above show cause, filed its reply dated 08.03.2022 and claimed that the earlier reply filed vide letter dated 08.02.2022 may be treated in response to the show cause notice dated 07.03.2022. The Assessee before the AO mainly claimed that it has been following "percentage completion method" of accounting consistently for the last so many years and has not changed its accounting method in previous year relevant to A.Y. 2014-15. Further, in today's realistic market conditions, it is possible that there remains unsold flats even after completion of building which remains as stock-in-trade. They will also be sold in course of time. The very fact that "percentage completion method" of accounting is prescribed for the builder in the guidelines issued by highest accounting body of the country. "ICAI" (Institute of Chartered Accountants of India) and very well recognized and accepted by the Income Tax Department and has been consistently followed by the Assessee. Accordingly, the unsold stock is treated as inventory during the course of business. Such unsold inventory cannot be brought to tax under the head "income from house property" simply because the flats remained unsold at the end of the year. The Assessee never intends to let out for rent the unsold flats held as stock-in-trade. The Assessee further claimed that it is undisputed fact that the Assessee has treated the unsold flats as stock-in-trade in the books of accounts and the flats sold by the Assessee are consistently assessed under the head "income from business". Thus, the unsold flats which are stock-in-trade are assessable under the head "income from business" when they are sold and therefore it is not correct in bringing to tax normal annual letting value in respect of these unsold flats under the head "income from house property". Thus the Assessee submitted that no addition be made u/s 23 of the Act as "income from house property". The Assessee further claimed that section 23 of the Act has been amended by Finance Act, 2017 w.e.f. A.Y. 2018-19 stipulating that where the property consisting of

any building or land appurtenant thereto is held as stock-in-trade and the property or any part of the property is not let out during the half of 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, shall be taken to be "Nil". As this amendment is specifically made affective from 01.04.2018 i.e. w.e.f. A.Y. 2018-19, it is implied that for the A.Y. 2014-15 such provision was not in force thus the notional annual value of the property held by the Assessee as its stock-in-trade as on 31.03.2014 not to be added. The Assessee further claimed that without prejudice to its claim, no notional rent be charged to tax in respect of unsold flats held as stock-in-trade (inventory). The annual lettable value (ALV) should be based on the lettable value of such flats under the head "income from house property". In case, where there is no standard rent, the municipal ratable value to be treated as the annual value. Thus, in the Assessee's case the gross municipal value is the annual value as per section 23 of the Act and various decisions have been held in favour of the municipal ratable value should be the annual value. The Assessee in support of aforesaid submissions also relied on various judgments of the highest courts as well as the Tribunal.

3.5 The AO though considered the submissions of the Assessee but not found as acceptable and ultimately made the addition of Rs.1,93,18,268/- under the head "income from house property" and added the same to the total income of the Assessee by concluding as under:

> *"9. All the issues raised by the assessee in its letter have been discussed in detail by the Hon'ble Delhi High Court in the case of Ansal Housing Finance and Leasing Co. Ltd. 354 ITR 180 and it has been concluded in the said order that income from such property which is deemed to be let out is chargeable to tax under the head income from house property, as per the provisions of section 22 of Income Tax Act. As regards to the assessee's contentions that some units were held by it as a developer is also not acceptable in fact the assessee is owner of these units and is occupying these properties with full right of sale. The*

Hon'ble Delhi High Court in the decision referred above (supra) has held that

"…… in law when parliament intending a property occupied by one, who is carrying on business, be exempted from levy of tax was that such property should be used for the purposes of business."

It is evident from the details submitted by the assessee that these properties were held by the assessee as a developer and the same were also not used for the purposes of their own business. Rather these properties were held as stock- in-trade with the intention of right to realize and utilize the sale value for their benefit. Thus, the instant case of the assessee is squarely covered by the decision of the Hon'ble Delhi High Court in the case of Ansal Housing Finance and Leasing Co. Ltd. 354 ITR 180. Hence this argument of the assessee is not acceptable.

9.1 The assessee has also submitted that on identical reasons, additions were made on account of deemed rental income from house property for A.Y.2013-14 and A.Y.2015-16. In A.Y. 2013-14 and A.Y.2015-16, the assessee filed appeals against additions made on account of deemed rental income under house property. Subsequently, the Honorable ITAT, Mumbai vide its Order dated 7th April 2021 has deleted the additions made on account of deemed rental income from house property. This contention of the assessee is also not found to be tenable because the order of the Hon'ble ITAT was not accepted by the department, however, further appeal was not filed only due to low tax effect involved in these years.

9.2 As mentioned above, for arriving at the annual value of these properties, the assessee was asked to provide the Annual Ratable Value of such shops and units. However, the assessee failed to provide the same. In absence of the ALV, the annual value is arrived at by estimating the same @ 8.5% of the cost of construction of the property. This position has also been upheld by the Mumbai Tribunal in the following cases:

a) M/s. Om Prakash & Co. (87 TTJ 183 Mum) and

b) M/s. ChemMech (P) Ltd: (83 ITD 427 Mum)

10. It was held in the aforesaid cases that the annual value can be reasonably estimated and adopted @ 8.5% of the cost of construction of the property as per the Bombay Rent Control Act in absence of any other specific findings arrived at to adopt a higher fair rental value. Accordingly, the total deemed income from house property is worked out to Rs. 1,93,18,268/- as under:

Cost of property	*Rs.32,46,76,775/-*
Net ALV (8.5% of Rs.32,46,76,775/-)	*Rs.2,75,97,526/-*
Less: Deduction u/s 24A @30%	*Rs.82,79,258/-*
Deemed Income from House Property	*Rs.1,93,18,268/-*

Thus, the addition of Rs. 1,93,18,268/- is made under the head income from house property and added to the total income of the assessee. The assessee failed to offer such income in its return of income which shows its willful attempt to evade tax. In view of the fact mentioned above, I am satisfied that the assessee has furnished inaccurate particulars to conceal the income of Rs. 1,93,18,268/-. Accordingly, penalty proceedings u/s 271(1)(c) of the IT Act is initiated separately for the for furnishing inaccurate particulars of the income."

4. The Assessee, being aggrieved, challenged the aforesaid addition by filing first appeal before the Ld. Commissioner, who vide impugned order deleted the addition under consideration by observing as under:

"7. All the grounds (i.e. Ground 1 to 8) are taken up together for adjudication.

7.1. I have considered the facts of the case and submission of the appellant. It is seen that in Raheja Universal Pvt. Ltd. v. DCIT, ITA No. 4173 & 4174/Mum/2019 for AY 2013-14 and 2015-16 respectively dt. 18.08.2022, the Hon'ble ITAT has allowed the assessee's appeal on this very same issue. Although, there is a contrary opinion that prior to 01.04.2018, the benefit of 2 years waiting period was not available for taxing the unsold as income from house property, I am not inclined to consider the same at this point of time as the decision of the higher forum in the appellant's own case is in its favour and has to be scrupulously followed. In view of the Hon'ble ITAT's decision in the appellant's own case cited above, the addition stands DELETED.

7.2. These grounds of appeal stand ALLOWED."

5. The Revenue Department being aggrieved against the deletion of the addition of Rs.1,93,18,268/- has preferred appeal i.e. ITA No.4847/M/2023 and has raised the following main ground of appeal:

"1. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the addition of Rs. 1,93,18,268/- made by the AO under the head income from house property without appreciating the fact of the case".

6. The Assessee on the contrary by filing CO No.78/M/2024 has challenged the re-opening of the assessment by issuing notice u/s 148 of

the Act, as well as the Assessment order passed by the AO u/s 147 of the Act, by raising the following grounds of appeal:

> *"1. On the facts and circumstances of the case and in law the learned CIT(A) ought to have held that the reopening of the assessment by issuing of notice u/s. 148 of the Act was illegal and bad in law.*
>
> *2. On the facts and in circumstances of the case and in law, the CIT(A) ought to have held that the order passed by the Assessing Officer u/s. 143(3) r.w.s. 147 of the Income-tax Act, 1961, which is illegal and bad in law."*

7. We have heard the parties and given thoughtful considerations to the rival claims of the parties specifically the CO filed by the Assessee. As the Assessee has challenged the legality of the assessment order itself hence for the sake of brevity, we are inclined to decide the CO first. At the outset we observe that there is a delay of 47 days in filing the CO. The Assessee in support of condonation of delay has filed an application wherein it has been pleaded that the CIT(A) vide order dated 05.12.2023 has deleted the addition made by the AO vide order dated 09.03.2022 u/s 143(3) r.w.s 147 of the Act and therefore the Assessee preferred not to file any further appeal before the Hon'ble Tribunal, however, after receiving the notice and copy of Form no.36 on 18.04.2024 qua appeal filed by the Revenue Department against the relief granted in the first appeal by the Ld. Commissioner, the Ld. CA who handled the matter before the AO/Ld. CIT(A) had approached the present Counsel in the first week of January 2024 as the date of hearing in the appeal filed by the Revenue Department was fixed on 04.06.2024. After perusing the records produced, the present counsel expressed his firm view that an appeal ought to have been preferred against the order of the Ld. Commissioner challenging the reopening of the assessment by issuing the notice u/s 148 of the Act. Since no such steps were taken for the reasons stated above, .as the Department has assailed the order of the Ld. Commissioner, therefore the Assessee has been advised for filing of CO

with a prayer for the condonation of delay of 47 days. Hence, the instant cross objection has been filed with such delay. The delay in filing the captioned cross objection was neither malafide nor deliberate or intentional but because of the reasons explained hereinabove. Therefore, it is humbly prayed that the delay of 47 days in filing of the instant cross objections may kindly be condoned.

8. On the contrary, the Ld. D.R. refuted the claim of the Assessee.

9. We have heard the parties on the point of condonation of delay. Prima-facie the reason for delay in filing the cross objection seems to be bonafide, reasonable, plausible and un-intentional, hence we are inclined to condone the delay occurred in filing the cross objection. Consequently, the delay of 47 days in filling of the instant CO, is condoned.

10. Coming to the merits of the CO, we observe that admittedly the Assessee before the Ld. Commissioner did not challenge the reopening of the assessment by issuing notice u/s 148 of the Act as well as passing of the assessment order u/s 143(3) r.w.s 147 of the Act. However, for the first time, the Assessee has raised the aforesaid grounds by filing cross objections. Admittedly, the issues raised by the Assessee are legal in nature and do not require any elaboration of new facts but the same are based on the facts already on record and even otherwise the issues raised by the Assessee goes to the root of the case itself, hence by following the dictum laid down by the Hon'ble Apex Court in the case of National Thermal Power Corporation vs. CIT 229 ITR 383 (SC) *wherein it has been settled that the legal question can be raised at any time in the appellate proceedings*, we are inclined to allow the grounds/issues raised by the Assessee in its cross objections under consideration. Hence the Assessee is allowed to raise the grounds as raised in CO.

11. Coming to the merits of the grounds raised by the Assessee, the Assessee before us mainly emphasized that assessment year involved in

the instant case is 2013-14 and the income declared by the Assessee was assessed by passing the assessment order dated 05.12.2016 u/s 143(3) of the Act and the case of the Assessee was re-opened by recording the reasons for reopening u/s 147 of the Act and issuing the notice dated 19.03.2021 u/s 148 of the Act admittedly after four years from the end of the relevant assessment year, hence the 1st proviso to section 147 of the Act is squarely applicable.

11.1 Admittedly in the instant case, the Assessee by filing its return of income has duly declared its income and financials. The erstwhile AO processed the return filed by the Assessee and ultimately by passing the original assessment order dated 05.12.2016 u/s 143(3) of the Act, completed the assessment, assessing the total income at Rs.17,46,69,260/-.

11.2 The present AO, in fact considered the balance sheet etc., which were the subject matter/available before the erstwhile AO during the original assessment proceedings and while going through the schedule "Inventories" to the balance sheet observed that the Assessee company under the head "finished goods" has declared unsold inventories in the form of flats and shops, however, has not shown house property income on such flats and shops and therefore the flats should be taxed u/s 23(4) of the Act.

11.3 We further observe that the balance sheet etc. and declaring of unsold inventories in the form of flats and shops were before the erstwhile AO in the original assessment proceedings. This goes to show that there was no reason of the failure on the part of the Assessee and in fact the Assessee has disclosed fully and truly all material facts necessary for his assessment for the assessment year under consideration. Even otherwise from the reasons recorded, it is nowhere appears, as to what the material facts the Assessee failed to disclose fully and truly. Simply making the

bald allegations that the Assessee had not disclosed fully and truly the material facts necessary for his assessment for the year under consideration thereby necessitating the reopening u/s 147 of the Act, is not enough to come out from the rigors of 1st proviso to section 147 of the Act. The notice u/s 148 of the Act was issued without brining on record any tangible material but simply relying on the material such as books of accounts, annual report, audited profit & loss account and balance sheet etc. which were already available on record or before the erstwhile AO during the original assessment proceedings u/s 143(3) of the Act and duly considered by making the original assessment and therefore the change of opinion is not permissible, as observed by the Hon'ble High Court in the case of Jindal Photo Films Ltd. vs. Dy. CIT (1999) 105 Taxman 386/(1998) 234 ITR 170.

11.4 In the first proviso, there is a legal fiction that where the Assessment u/s 143(3) or 147 of the Act has been made for the relevant assessment year, then no action shall be taken under section 147 of the Act after the expiry of 4 years from the end of the relevant assessment year. The proviso further put up a rider for initiation of any action u/s 147 of the Act i.e. **unless** where the income chargeable to tax has escaped assessment for such assessment year **by reason of the failure on the part of the Assessee** to make a return under section 139 or in response to a notice issued under subsection (1) of section 142 or section 148 or **to disclose fully and truly all material facts necessary for his assessment,** for that assessment year.

11.5 The Hon'ble Jurisdictional High Court in the case of **Hindustan Lever vs. R. B. Wadkar (2004) 137 taxman 479 (Bom),** has also considered the 1st proviso to section 147 of the Act and ultimately specifically held **that the AO must disclose in the reasons recorded u/s 147 of the Act, as to which material or facts was not disclosed fully and truly necessary for that assessment year so as to**

establish the vital link between the reasons and evidences where impugned notices beyond the period of 4 year from the end of the relevant assessment year and it is not complied with the requirements of proviso to section 147 of the Act, then AO has no jurisdiction to reopen the assessment proceedings, which were concluded on the basis of Assessee u/s 143(3) of the Act and this short count alone, the impugned notice is liable to be quashed and set aside.

11.6 In the instant case, admittedly nothing appears from the reasons recorded, as to what fact or material, the Assessee has failed to disclose fully and truly, which was necessary for assessment year under consideration. Even from the facts referred to above it emerge there was no fault of the Assessee to disclose fully and truly all material facts necessary for his assessment and even otherwise there is no reason of failure on the part of the Assessee to make a return u/s 139 or in response to notice issued u/s 142(1) and 148 of the Act, hence respectfully following the judgments referred to above by the Jurisdictional High Court specifically in the case of Hindustan Lever Ltd. (supra), we are of the considered opinion that as the AO while recording the reasons and initiating the reassessment proceedings u/s 147 r.w.s. 148 of the Act, has not followed the first proviso of section 147 of the Act, consequently, the reopening of the assessment by issuing the notice u/s 148 of the Act and passing of the assessment order in pursuance thereof is un-sustainable being void-ab-initio and therefore liable to be quashed. Thus, the Assessment Order itself is quashed accordingly and impugned order is set aside.

12. As we have quashed the assessment order itself and therefore appeal filed by the Revenue Department has become infructuous, hence, we are inclined not to delve into the appeal of the Revenue Department, as adjudication of the same would prove to be futile exercise.

13. In the result, cross objection filed by the Assessee is allowed, whereas appeal filed by the Revenue is dismissed being infructuous.

Order pronounced in the open court on 26.08.2024.

Sd/-	**Sd/-**
(GIRISH AGRAWAL)	**(NARENDER KUMAR CHOUDHRY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.