IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT)
"SMC" BENCH, MUMBAI

BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER

ITA NO. 1521/MUM/2020 (A.Y: 2015-16)

M/s. Aricia Construction 1501, 15th Floor, B-Wing 02 Commercial Complex Opp. Asha Nagar, Mulund(W) Mumbai-400080 **PAN: AAOFA9504F**	*v.*	ACIT -29(1) C-10, 1st Floor, Room No. 108 Pratyakshkar Bhavan Bandra Kurla Complex Bandra (E), Mumbai – 400051
(Appellant)		**(Respondent)**

Assessee by	**:**	**Shri Dilip Shah**
Department by	**:**	**Shri Sanjay J. Sethi**
Date of Hearing	**:**	**16.09.2021**
Date of Pronouncement	**:**	**25.11.2021**

O R D E R

PER C.N. PRASAD (JM)

1. This appeal is filed by the assessee against the order of the Learned Commissioner of Income Tax (Appeals) – 40, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 22.11.2019 for the A.Y. 2015-16.

2. The only issue in appeal of the assessee is Ld.CIT(A) erred in upholding the order of the Assessing Officer in adding ₹.26,64,830/- as

deemed let out value of the closing stock under the head income from house property.

3. Briefly stated the facts are that, the Assessing Officer while completing the assessment u/s. 143(3) of the Act computed the annual letting value at 8% of ₹.4,75,86,240/- being the closing stock of the flats as on 31.03.2015. Assessee contended that the notional rent cannot be charged on the unsold flats which are closing stock of the assessee. On appeal the Ld.CIT(A) sustained the order of the Assessing Officer.

4. At the outset, Ld. Counsel for the assessee submits that the issue in appeal is squarely covered by various decisions of the Mumbai benches of the Tribunal wherein the decision of the Hon'ble Gujarat High Court in the case of CIT *v.* Neha Builders Pvt. Ltd., [296 ITR 661] was followed. Ld. Counsel for the assessee submits that the Hon'ble Gujarat High Court held that if property is used as stock in trade then the said property would become or partake character of stock and any income derived from stock in trade would be income from business and not "income from house property". Further, placing reliance on the decision of the Hon'ble Culcutta High Court in the case of Madgul Udyog *v.* CIT [184 ITR 484] submitted that the Hon'ble High Court held that the question of notional

income would not arise in relation to stock in trade. Ld. Counsel for the assessee submits that in assessee's sister concerns case namely M/s. Runwal Constructions *v.* ACIT in ITA.No. 5408/Mum/2016 dated 22.02.2018 similar issue had come up and the Tribunal deleted the notional rent assessed by the Assessing Officer on the stock in trade under the head "income from house property".

5. Ld. DR strongly placed reliance on the orders of the Authorities below.

6. Heard both sides, perused the orders of the Authorities below. It is not in dispute that the Assessing Officer assessed the notional rental value on unsold flats held by the assessee as stock in trade. The Assessing Officer adopted 8% of the cost as fair and reasonable ALV of the property. This Tribunal following the decision of the Hon'ble Gujarat High Court in the case of CIT *v*. Neha Builders Pvt. Ltd., (supra) held that when once the property is stock in trade no notional rent can be assessed under the head "income from house property". It is also noticed that similar issue had come up in the case of M/s. Runwal Constructions *v.* ACIT in ITA.No. 5408/Mum/2000 dated 22.02.2018 wherein the Tribunal held as under: -

"7. 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 assessees are in the business of builders, developers and construction. Both the assessees have constructed various projects and the projects were treated as stock in trade in the books of account. Flats sold by the assessees 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 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*

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 so 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.23(1) 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 180 (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 CIT(A) 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 not 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 I.T.Act."*

10. In the case on hand before us it is an undisputed fact that both assessees have treated the unsold flats as stock in trade in the books 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."

7. Facts being identical, respectfully following the said decision, I allow the grounds raised by the assessee and direct the Assessing Officer to delete the notional rent assessed on the property held as stock in trade. Grounds raised by the assessee are allowed.

8. In the result, appeal of the assessee is allowed.

Order pronounced on 25.11.2021 as per Rule 34(4) of ITAT Rules by placing the pronouncement list in the notice board.

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER
Mumbai / Dated 25.11.2021
Giridhar, Sr.PS

<u>Copy of the Order forwarded to</u>:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum