IN THE INCOME TAX APPELLATE TRIBUNAL KOLKATA BENCH, "B" AT KOLKATA
(समक्ष) श्री ऐ. टी. वर्की, न्यायीक सदस्य **एवं** डॉ. अर्जुन लाल सैनी, लेखा सदस्य)
[Before Shri A. T. Varkey, JM & Dr. A. L. Saini, AM]

I.T.A. No. 429/Kol/2018
Assessment Year: 2011-12

Bengal DCL Housing Development Co. Ltd. [AABCB 9839 N]	Vs.	DCIT, Circle – 8, Kolkata
Appellant		Respondent

I.T.A. No. 210/Kol/2017
Assessment Year: 2012-13

Bengal DCL Housing Development Co. Ltd. [AABCB 9839 N]	Vs.	ITO, Ward – 8(1), Kolkata
Appellant		Respondent

Date of Hearing	28.02.2019
Date of Pronouncement	24.05.2019
For the Appellant	Shri J.P. Khaitan, Sr. Counsel & Shri Bikash Chanda, AR
For the Respondent	Shri Rabin Choudhury, Addl. CIT, Sr. DR

ORDER

Per Shri A.T.Varkey, JM

These appeals filed by the assessee against the order of the CIT(A) – 3, Kolkata dated 14.02.2018 for assessment year 2011-12 and is against the order of CIT(A) – 16, Kolkata dated 05.01.2017 for assessment year 2012-13 respectively.

ITA 429/Kol/2018

2. First we would like to take up the appeal preferred for A.Y. 2011-12. The main grievance of the assessee is against the action of the Ld. CIT(A) in confirming the addition of the AO of deemed annual value of apartments held as closing inventory of the company for the year under consideration.

3. The brief facts of the case as noted by the AO is that when he perused the audited balance sheet furnished by the assessee, he observed that the assessee held finished apartment having cumulative value of Rs. 4,86,600/- under the head 'Inventories' in its balance sheet. During the course of the scrutiny proceedings, the AO asked the assessee to explain as to why income from house property should not be assessed on the annual letable value of such finished apartments as the assessee was the owner of such apartments and as such, the same should be assessed for income from house property arising from such premises. In its reply, the assessee submitted that it was not the owner of the said premises as they had already been allotted to various allottees. The AO acknowledges that the assessee had furnished the copies of terms and conditions of the allotment. The AO after perusal of the terms and conditions of allotment noted that point No. 2 of the terms and conditions mentions:

"2. The expression 'Allotment' wherever used herein shall always mean 'Provisional Allotment' and will remain so till such time a formal deed of transfer is executed and registered in favour of the Allotte for his / her respective Apartment"

4. After taking note of the aforesaid point No. 2 of the terms and conditions, according to the AO, it is evident that mere allotment does not amount to transfer and as such the assessee was the rightful owner of such apartments in the year under consideration. According to the AO this fact is further confirmed by the fact that the assessee was mentioning such apartments in its inventory, in its books of accounts and had also recognised revenue from such transfer. Accordingly, the contention of the assessee was held to be untenable and for that the AO relied upon the Hon'ble Delhi High Court decision in CIT vs Ansal Housing Finance & & Leasing Co. Ltd. (2013) 29 taxmann.com 303 (Delhi). After reproducing para No. 13 and para No. 14 of the said order, the AO was of the opinion that the assessee was required to offer tax on the income from the annual letable value that could be derived from unsold flats held in its inventory and thereafter taking note that the assessee unable to furnish the details in respect of either the municipal value or the fair market value of such flats, the annual letable value was arrived at by the AO as the basis of aggregation of rental value per square feet for similar properties at the same location and this was done by obtaining an average rental value (also including commercial rent value) on the basis of rental value for similar properties at the same location as

available in various real estate related web sites containing detailed information in this regard namely 99 acres.com, magic bricks.com, makaan.com etc and thereafter he arrived at the rental value per square feet at Rs. 21.10 and computed the deemed rental value of the unsold finished apartments comprising of 22,261.45 square feet at Rs. 56,09,885/- after allowing standard deduction @ 30% of the annual rental value of the unsold finished apartments amounting to Rs. 16,82,966/-. According to AO the balance amount of Rs. 39,26,919/- (Rs. 56,09,885/- - Rs. 16,82,966/-) was attributable as income from house property of the assessee company as per Section 24(a) of the Act which was treated as annual letable value and treated as the income from house property of the assessee company and added to the income of the assessee. Aggrieved the assessee preferred an appeal before the Ld. CIT(A) who was pleased to confirm the same. Aggrieved the assessee is before us.

5. Assailing the decision of the Ld. CIT(A), the learned senior counsel for the assessee contended that the assessee firm was engaged in the business of construction of multi-storied buildings and sale of flats therein. According to the learned senior counsel, the assessee treated the constructed and unsold flats area as stock-in-trade and not as capital assets. The assessee completed construction of certain flats and it received consideration from the purchasers of the flats from time to time in accordance with the agreed terms and, on final payment, possession was handed over to the respective buyers. According to the learned senior counsel, the assessee was duly assessed to income-tax in respect of profits and gains arising on construction and sale of flats in the years in which the construction was completed and possession was handed over to the purchasers concerned notwithstanding the fact that the deeds of conveyance had not been executed and is registered in favour of the purchasers. According to the learned senior counsel, the buyers of the respective flats were in exclusive possession of the respective units purchased by them against full and valuable consideration paid to the assessee. In order to buttress the fact, the learned counsel drew our attention to page No. 25 of the Paper Book from where we note that the list of apartments shown in closing finished apartments for A.Y. 2011-12 and drew our attention to the name of allottees which we note as 12 allottees. However, the learned senior counsel fairly pointed out that out of the 12 allottees serial No. 1, 5 and 6 have been allotted flats in the subsequent assessment year i.e. in A.Y. 2012-13 and others 9 allottees have been allotted

flats in this assessment year or earlier assessment years. Therefore, relying on the various judgments of the High Court as well as the Tribunal he contended that the date of allotment of that should be taken as date on which the flats have been allotted to the buyers. The ld. Senior Counsel also invited our attention to the fact that in the subsequent assessments framed u/s 143(3) for AYs 2013-14 & 2014-15, the AO appreciating the aforesaid factual and legal position did not assess deemed notional annual value of the finished apartments under Section 22 & 23 of the Act. Copies of the replies furnished before the AO as well as the assessment orders for AYs 2012-13 & 2013-14 were placed on record.

6. Further the learned senior counsel also drew our attention to the fact that though the assessee had all the intention of giving possession of completed flats to the allottees, they had to take completion certificate from the Newtown Kolkata Development Authority as per the statute requirement governing the Project. It was pointed out by the learned senior counsel that this occupancy certificate given by the NTKDA is mandatory and without which the occupants/buyers cannot occupy the property/flats. The learned senior counsel drew our attention to page No. 189 of the Paper Book which is the letter written by assessee dated 24.12.2010 to the CEO of NTKDA informing that the housing project of assessee named UTTARA has been completed in the month of September, 2010 and along with the letter, the assessee submitted the Form of notice of completion along with all documents and drawing and requested for grant of occupancy certificate. The learned senior counsel took us through the various correspondence between the NTKDA (the statutory authority under the Government of West Bengal) and the assessee from which we note that NTKDA point out various infirmities to be rectified or complied by the assessee vide letter dated March 16, 2011 and inspector report was placed at page 192 wherein he has pointed out certain infirmities and the assessee was following it up with the NTKDA authority and finally after addressing all their concerns the assessee got the occupancy certificate on 01.07.2015 which is placed at page 194-196 of the Paper Book. The learned senior counsel drew our attention to the NTKDA Act, 2007 placed at page No. 207 of the Paper Book and from where we note that as per Section 77 of the said Act, completion certificate is mandatory. According to Section 77(2) no person shall occupy or permit to be occupied any such building or use or permit to be used any building or any part thereof affected by any such work until permission has been granted by the Development Authority in this

behalf in accordance with the rules and the regulations made under this Act. The learned senior counsel drew our attention to relevant portions of section 22 and 23(a) of the Act which is as under:

> *"22. The annual value of property consisting of any buildings or lands appurtenant thereto of which the assessee is the owner, other than such portions of such property as he may occupy. For the purposes of any business or profession carried on by him the profits of which are chargeable to income-tax shall be chargeable to income-tax under the head 'Income from house property'.*
>
> *23.(1) For the purposes of section 22, the annual value of any property shall be deemed to be –*
>
> *(a) the sum for which the property might reasonably be expected to let from year to year."*

7. According to him section 22 can be attracted only if the property is owned by the assessee and it is in a position to be let out as habitable property. It is only when the property in complete in all respect and is certified by the local authority to have attained completion, the charge of tax u/s 22 of the Act can be fastened and not otherwise. Since, in this case, the completion certificate was not issued by the competent authority in respect of flats in question the AO could not have invoked provisions of Section 22 and 23 for bringing to tax the notional annual value of the property. Per contra the Ld. DR appearing on behalf of the Revenue supported the orders of lower authorities. The Ld. DR submitted that as per the appellant's own claim reflected in the audited accounts, the construction of the residential flats was completed and therefore in the Balance Sheet under the head 'Inventories', the flats were shown to be finished apartments which remained in assessee's possession at the end of the relevant year. Since the assessee was the owner of the finished apartments, in terms of Section 22 of the Act the assessee had liability to pay tax in respect of its annual value. The mere fact that the completion certificate was not issued by the local authority did not make any material difference for levy of tax on the annual value once according to assessee's own version the construction of the property was complete in all respects and the property was brought to the point where it was capable being inhabitated as a residential house.

8. After giving a thoughtful consideration to the rival submissions of the parties, it is first deemed necessary to analyze the provisions of Section 22 & 23 of the Act. The income

from house property means the annual value of property including any building or land appurtenant thereto of which the assessee is the owner other than the portion of such property the assessee might occupy for the purpose of his business or profession shall be charged to income tax under the head Income from house property. According to sec. 23 of the Act, the determination of annual value of the property shall be deemed to be as prescribed in sub-clause (a) to sub-section (1) of section 23 of the Act, the same for which the property might reasonably be expected to let from year to year and sub-clause (b) also says about the property or any part of the property which is let and the actual rent received or receivable by the owner which is in excess of the same referred to in sub-clause (a) of sub-section (2), (3) and (4). We note that the annual value for the purpose of sec. 22 shall be deemed to be the sum of money which the owner/assessee might reasonably be expected to get by letting the property. We note that sub-section (5) has been inserted in sec. 23 by the Finance Act, 2017 w.e.f. 01.04.2018 which states that where the assessee has property which consists of any building or land appurtenant thereto which is held as stock in trade and the property or any part of the property is not let during the whole or any part of the 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. The relevant extracts of Section 22 & 23 of the Act as amended by the Finance Act, 2017 is reproduced hereunder

> "22. The annual value of property consisting of any buildings or lands appurtenant thereto of which the assessee is the owner, other than such portions of such property as he may occupy for the purposes of any business or profession carried on by him the profits of which are chargeable to income-tax, shall be chargeable to income-tax under the head "Income from house property".
>
> **Annual value how determined.**
>
> **23.** (1) For the purposes of section 22, the annual value of any property shall be deemed to be—
>
> (*a*) the sum for which the property might reasonably be expected to let from year to year; or
>
> (*b*) where the property or any part of the property is let and the actual rent received or receivable by the owner in respect thereof is in excess of the sum referred to in clause (*a*), the amount so received or receivable; or
>
> (*c*) where the property or any part of the property is let and was vacant during the whole or any part of the previous year and owing to such vacancy the actual rent received or receivable by the owner in respect thereof is less than the sum referred to in clause (*a*), the amount so received or receivable :
>
> **Provided** that the taxes levied by any local authority in respect of the property shall be deducted (irrespective of the previous year in which the liability to pay such taxes was incurred by the owner according to the method of accounting regularly employed by him) in determining the annual value of the property of that previous year in which such taxes are actually paid by him.

Explanation.—For the purposes of clause (*b*) or clause (*c*) of this sub-section, the amount of actual rent received or receivable by the owner shall not include, subject to such rules as may be made in this behalf, the amount of rent which the owner cannot realise.

(2) Where the property consists of a house or part of a house which—

(*a*) is in the occupation of the owner for the purposes of his own residence; or

(*b*) cannot actually be occupied by the owner by reason of the fact that owing to his employment, business or profession carried on at any other place, he has to reside at that other place in a building not belonging to him,

the annual value of such house or part of the house shall be taken to be *nil*.

(3) The provisions of sub-section (2) shall not apply if—

(*a*) the house or part of the house is actually let during the whole or any part of the previous year; or

(*b*) any other benefit therefrom is derived by the owner.

(4) Where the property referred to in sub-section (2) consists of more than [35]**[***one house***]**—

(*a*) the provisions of that sub-section shall apply only in respect of [36][*one*] of such houses, which the assessee may, at his option, specify in this behalf;

(*b*) the annual value of the house or houses, [37][*other than the house*] in respect of which the assessee has exercised an option under clause (*a*), shall be determined under sub-section (1) as if such house or houses had been let.

[38][*(5) 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 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* [39]*[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.]

9. From plain reading of the aforesaid provisions of the Act, it is apparent that the annual value of the property is assessed as income in the hands of the "owner". In order to attract the charge of tax under the head 'House Property' it is necessary for the AO to prove that the assessee is the owner of the house property as defined for the purposes of Chapter – IV-C of the Act. The term 'owner' of the house property is defined in Section 27 of the Act. In the present case we note that the appellant is a joint sector company promoted by West Bengal Housing Board also with M/s DC Properties Ltd for undertaking large scale construction of housing complexes within the State of West Bengal to solve the basic housing problems subject however to the supervision and overall control by the State Government of West Bengal. With this objective in mind the Government of West Bengal had transferred in favour of the Housing Board certain parcels of land and the said Board in turn had entered into a Development Agreement dated 23.09.2004 appointing the appellant herein as developer and/or an agent of the Board for the purpose of construction of the housing complex to be developed on the land parcel allotted to the Board by the State Government. Pursuant to the Developer's Agreement the appellant undertook the construction of the housing complex known as 'Uttara' which consisted of several

apartment buildings which were constructed in phases and the revenue from the activity of development and construction of the apartments was recognized in the books of the appellant at the time of delivery of possession of the apartments to the respective flat purchasers. From the plain reading of the transactional documents we therefore find that the role of the appellant as envisaged in the entire scheme formulated at the behest of the State Government was limited to being Developer of the housing project. The scheme formulated provided that the appellant which was the SPV was obliged to carry out construction of the residential apartments to be sold to actual users so that the housing problems faced by the populous in the urban area was addressed. In the circumstances therefore we find that it was never intended that the appellant would be permitted to hold and own the completed apartments on its own accord or that the appellant would act as the landlord / owner of the property. Since the appellant was an SPV promoted by the Housing Board for undertaking the construction of the housing complex, immediately after the project was launched the appellant and the Housing Board had undertaken drive to allot the apartments amongst the willing purchasers of these apartments. Considering these events harmoniously the only conclusion that one can draw is that the appellant was never owner of the apartments but its role was limited only to the Developer who held the apartments under construction in trust to be ultimately owned by the persons to whom the allotments were approved by the Board. We therefore find merit in the submissions of the Ld. AR that the appellant could never be regarded as 'owner' of the finished apartments and in that view of the matter the provisions of Chapter IV-C was not applicable and therefore the notional annual value of the unsold flats could not be assessed in the hands of the appellant under Section 23 of the Act.

10. We also find merit in the submission that even though the value of finished apartments was included under the head 'Inventory' disclosed in the Balance Sheet, yet such apartments could not be considered to be owned by the appellant for the purposes of Section 22 of the Act. From the detailed break-up of such inventory we note that the apartments included by way of Inventory were allotted prior to Balance Sheet date and in respect of such allotment the substantial part of the consideration was also received by the appellant and the same was reflected by way of 'Liability' in the appellant's books. Once the appellant had executed requisite documentation evidencing the allotment of specific units / apartments in favour of intending purchasers and thereafter received consideration amounts

in accordance with the terms of allotment, then the rights of specific performance as well as right to obtain conveyance in respect of the specified apartment had accrued in favour of the respective purchaser. In the circumstances even though the husk of a title, if any, vested in the Owner, in law such person could not be considered to be the 'owner' of the house property for the purposes of Section 22 of the Act. Once the Board and the appellant-developer had entered into valid documentation for transferring the completed apartment in favour of the purchaser, then vested right in the said property stood accrued in favour of the flat purchaser which the appellant or the Board could not have usurped. Till the completion of the construction of the flats in all respects, the Developer retained its possession only in trust and for the purpose of carrying out its obligations under the Development Agreement. The Developer in such factual and legal background was debarred from claiming ownership rights in the apartments already allotted to the flat purchasers. Viewed from any angle therefore the appellant / Developer could not be regarded as the owner of the house property so as to attract charge of tax under Section 22 read with Section 23 of the Act.

11. We also note that the annual value of the property is to be determined as per the actual rent received or receivable by the owner of the property which is capable of being let legally. The legislative intention that the property which is legally habitable but it is not occupied by the owner then the annual value of such lettable property shall be deemed as income under the head 'House Property'. In this regard we rely on the following observations of the Hon'ble Bombay High Court in the case of Shree Nirmal Commercial Ltd Vs CIT (193 ITR 694) wherein it was held as under:

"14. The contention raised by Dr. Balasubramanian appears attractive at first blush, but on closer examination falls to ground. Even assuming that after the shareholders were allotted the floor space area and the right of occupancy thereof was completely transferred to the shareholders, the assessee still retained some residuary or vestigial rights of ownership, there are two difficulties in the way of the contention being accepted. First, the revenue had made no attempt to identify, quantify or evaluate such residuary rights of ownership. The second, and more formidable, difficulty is that the revenue is not able to show that the residuary or vestigial rights of ownership were of such nature as could be let out. In our view, unless the property owned by the assessee is of such nature as could be let out, the charge under section 22 of the Act cannot be attracted. In our view, if the property is of such nature that it is inherently incapable of being let out and the assessee owner thereof, then the charge under section 22 cannot arise. What is necessary for the charge under section 22 to arise is that the property be inherently capable of being let out."

12. In the given facts of this case, we note that the occupancy certificate for the Uttara Complex was issued by the local authority only on 01.07.2015 which is placed at pages 194 to 196 of the paper book. In absence of the valid occupancy certificate, issued by NTKDA, the property could not be said to be in a position to be let or occupy. The extracts of the relevant provisions of Section 77(2) of the NTKDA Act is as follows:

"77(2) No person shall occupy or permit to be occupied any such building or use or permit to be used any building or part thereof affected by any such work until permission has been granted by the Development Authority in this behalf in accordance with the rules and regulations under this Act;"

13. In the given facts of the present case the property in question was granted the occupancy / completion certificate only on 01.07.2015, so the property in question for the both the assessment years 2011-12 and 2012-13 could not have construed to be properties capable of being legally let so as attract the rigors of Section 23(1)(c) of the Act. We note that the view entertained by us now finds legislative support in sub-section (5) of Sec. 23 of the Act, wherein the Legislature has provided where a builder holds flats as its stock in trade then the annual value of such property shall be taken as NIL for a period of two years from the end of the financial year in which the certificate of completion of construction of the properties obtained from the competent authority is obtained. In view of the latter enactment it is now abundantly clear that until the completion certificate is not issued by the competent authority and two years thereafter; annual value of the unsold units shall be NIL. For the reasons set out in the foregoing and the fact that the completion certificate was issued only on 01.07.2015, we delete the addition of Rs.39,26,919/- being the deemed notional annual value of the apartments included in the Inventory as on 31.03.2011.

ITA No.210/Kol/2017

14. Now we proceed to deal with the appeal in ITA No. 210/Kol/2017 for AY 2012-13. The grounds raised in this appeal relate to the assessment of deemed notional annual value of Rs.42,07,090/- on the value of finished apartments reflected in the Balance Sheet. Both the parties have fairly stated that the issue involved in this ground is similar with the issue involved in AY 2011-12. The reasons for making the addition in the year under consideration are same as discussed in the assessment order for AY 2011-12. The only difference is that in the relevant year the unsold inventory comprised of another project,

'Malancha' whose occupancy / completion certificate project was issued by the competent authority only on 03.10.2016. We note that the order of the Ld. CIT(A) was also passed on identical lines on which the addition was confirmed in the appellate order for AY 2012-13. Following our conclusions drawn in A.Y. 2011-12, we therefore delete the addition the deemed notional annual value of the apartments included in the Inventory as on 31.03.2012.

15. In the result, both the appeals of assessee are allowed.

Order is pronounced in the open court on 24 May, 2019

Sd/-	Sd/-
(Dr. A. L. Saini) Accountant Member	(Aby. T. Varkey) Judicial Member

Dated : 24 May, 2019

Biswajit (Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – Bengal DCL Housing Development Co. Ltd., 24, Park Street, Kolkata – 700 016.
2. Respondent – DCIT, Tax (circle-8), Kolkata/ITO, Wd-8(1), Kolkata
3. The CIT(A)-3, Kolkata
4. CIT , Kolkata
5. DR,

/True Copy, By order,

Assistant Registrar/H.O.O
ITAT, Kolkata