

आयकर अपीलीय अधिकरण  
मुंबई पीठ "ई", मुंबई  
IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "E", MUMBAI  
श्री विकास अवस्थी, न्यायिक सदस्य एवं  
श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष  
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &  
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

आअसं. 3492/मुं/2019 (नि.व.2015-16)  
ITA NO.3492/MUM/2019 (A.Y.2015-16)  
आअसं. 3493/मुं/2019 (नि.व.2014-15)  
ITA NO.3493/MUM/2019 (A.Y.2014-15)

TATA HOUSING DEVELOPMENT  
COMPANY LIMITED,  
'E' BLOCK, VOLTAS COMPOUND,  
T.B. KADAM MARG, CHINCHPOKLI,  
MUMBAI 400 033  
PAN: AAAC0191Q

..... अपीलार्थी /Appellant

**बनाम Vs.**

The PCIT- 8,  
Room No.611, Aaykar Bhavan,  
M.K.Road, Mumbai 400 020

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Madhur Agarwal

प्रतिवादी द्वारा/Respondent by : Shri R. Manjunatha Swamy

सुनवाई की तिथि/ Date of hearing : 24/09/2020

घोषणा की तिथि/ Date of pronouncement : 28/09/2020

आदेश/ ORDER

**PER VIKAS AWASTHY, JM:**

These two appeals by the assessee/appellant are directed against the orders of Principal Commissioner of Income Tax -8, Mumbai (in short 'the

PCIT') passed under section 263 of the Income tax Act,1961 (herein after referred to as 'the Act') for the Assessment Years 2014-15 and 2015-16, respectively. Both the impugned orders are of even date i.e. 30/03/2019. Since, the grounds raised in both the appeals and the facts giving rise to present appeals are identical, these appeals are taken up together for adjudication and are decided by this common order. For the sake of convenience the facts are narrated from the appeal in ITA No.3493/Mum/2019 for the assessment year 2014-15.

2. The assessee/appellant is a real estate developer. The assessee filed its return of income for the assessment year 2014-15 on 29/11/2014 declaring total income of Rs.4,01,24,090/-. The assessee had declared income from the business of real estate development as 'Business Income'. The Assessing Officer in scrutiny assessment proceedings made disallowance under section 36(1)(iii) and 14A of the Act and determined the taxable income of the assessee as Rs.23,52,81,848/- vide assessment order dated 29/12/2016. Thereafter, the PCIT invoked revisional jurisdiction under section 263 of the Act and issued show cause notice dated 15/03/2019. The PCIT following the decision of Hon'ble Delhi High Court in the case of CIT vs. Ansal Housing Finance & Leasing Co. Ltd., reported as 354 ITR 180 held that notional rental income on vacant flats should have been added to the total income of the assessee by the Assessing Officer. Since, the Assessing Officer failed to consider this aspect, the assessment order is erroneous as well as prejudicial to the interest of revenue. Aggrieved by the order passed under section 263 of the Act, the assessee is in appeal before the Tribunal.

3. Shri Madhur Agarwal, appearing on behalf of the assessee/appellant submitted that the PCIT has erred in invoking revisional powers. The Assessing Officer in assessment proceedings had applied his mind and after being satisfied made no addition in respect of notional annual letting value on unsold flats held as stock in trade. The Id. Counsel for the assessee referred to the notice issued by Assessing Officer under section 142(1) r.w.s. 129 of the Act dated 15/06/2016 at pages 109 and 110 of the Paper Book. The Id. Authorized Representative of the assessee submitted that a perusal of the notice would show that at Sl.No. 9-A a query was raised by the Assessing Officer seeking explanation on large investments made in the property during the period relevant to the assessment year 2014-15. Further, at Sl. No.9-N, the Assessing Officer made specific query regarding difference in the closing stock shown in Balance Sheet and P&L Account for the impugned year as per Return of Income. The assessee filed reply to the said notice on 22/12/2016 (at page 112 to 124 of the Paper Book). In reply the assessee furnished details of the business and also explained the reasons for difference in the closing stock, as shown in the Balance Sheet and P&L Account for the impugned Financial Year. The Assessing Officer was well aware about the nature of business of the assessee and the closing inventory of the flats. The Assessing Officer after having applied his mind made no addition in respect of notional annual letting value of flats held as stock. The assessee has been consistently declaring income from real estate development business as 'Business Income'. And there has been recoded inventory of completed flats in every financial year. The Assessing Officer has never made addition on account of notional rental value of completed flats held as stock. To substantiate his contents, the Id. Counsel

filed copies of assessment orders for AY 2010-11 to 2013-14. In the impugned assessment year as well, the Assessing Officer after examining the facts and application of mind made no addition of notional rental income from flats held as stock in trade. The Id. Counsel for the assessee submitted that the PCIT has invoked provisions of section 263 only by placing reliance on the decision of CIT vs. Ansal Housing Finance & Leasing Co. Ltd. (supra). The Id. Counsel pointed Hon'ble Gujarat High Court in the case of CIT vs. Neha Builders Pvt. Ltd., 296 ITR 361 has taken a contrary view holding that any income derived from property held as stock would be business income and not income from house property.

3.1. The Id. Counsel for the assessee asserted that two divergent views from non-jurisdictional High Courts on the issue were available on the date of passing of the assessment order, the Assessing Officer took one of the possible view. The assessment order would not become erroneous if the PCIT does not subscribe to the view of Assessing Officer and prefers the other possible view. The twin conditions for invoking provisions of section 263 of the Act are not satisfied in the present case. The Id. Counsel for the assessee relied on following decisions to contend that notional annual letting value of unsold flats held as stock-in-trade is a debatable issue, therefore, section 263 of the Act could not be invoked:-

- (1) S D Corporation (P) Ltd. vs. Pr.CIT, 102 taxmann.com 226(Mum)
- (2) Archie Creation vs. Pr. CIT, ITA NO.4449/M/2019, A.Y. 2014-15 decided on 13/07/2020.

The Id. Counsel pointed that in both the aforesaid cases, the PCIT invoked the provisions of section 263 of the Act by placing reliance on the decision rendered in the case of CIT vs. Ansal Housing Finance & Leasing Co. Ltd.(supra).

3.2. The Id. Counsel for the assessee further referred to the following decisions to contend that notional annual letting value of unsold flats cannot be assessed under the head 'Income House Property':-

- (1) C.R. Development P Ltd. vs. JCIT(ITA No.4277/M/2012 (Mum-ITAT);
- (2) Runwal Constructions vs. ACIT,(52 CCH 569)(Mum-ITAT);
- (3) ACIT vs. Haware Constructions Pvt. Ltd., (ITA No.3321/Mum/2016);
- (4) ITO vs. Arihant Estates Pvt. Ltd. (53 CCH 321)(Mum-ITAT)
- (5) Mahanagar Constructions vs. ITO (ITA No.623/Pun/2018 (Pune-ITAT)

4. Per contra, Shri R. Manjunatha Swamy, representing the Department vehemently defended the impugned order and prayed for dismissing the appeal of the assessee. The Id.Departmental Representative submitted that the case of the assessee is squarely covered by the decision rendered in the case of Ansal Housing Finance & Leasing Co. Ltd. (supra).

5. We have heard the submissions made by rival sides and have examined the documents available on record. We have also considered the decisions on which rival sides have placed reliance. We find that the only reason for invoking revisional jurisdiction by the PCIT is that the Assessing Officer has failed to examine taxability of notional rental value of flats held as stock-in-trade by the assessee. We find that during the assessment proceedings the Assessing Officer had issued notice to the assessee, wherein query was raised

regarding nature of assessee's business and discrepancies in the closing stock. The assessee replied to the notice on 22/12/2016. After considering the reply of assessee, the Assessing Officer finalised the assessment. It is emanating from the documents on record that the Assessing Officer was well aware of the fact that the assessee is in the business of real estate development and had inventory of completed flats at the end of financial year. The Assessing Officer applied his mind on the issue and has thereafter come to the conclusion that no addition is required to be made in respect of notional rental value of flats held as stock-in-trace.

6. De-hors the fact that the Assessing Officer has considered this issue during the assessment proceedings, there are judgments by two non-jurisdictional Hon'ble High Courts taking divergent view on the taxability of notional rental value of flats held as stock. The Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd. has held that notional annual lettable value of unsold flats should be assessed as 'Income from House Property'. Whereas, the Hon'ble Gujarat High Court in the case of Neha Builders P. Ltd. (supra) has held that any income derived from the property held as inventory is taxable as 'Business Income'. Thus, the issue that has been raised by the PCIT in revisional jurisdiction is debatable. The Assessing Officer has taken one of the possible views. The Hon'ble Supreme Court of India in the case of Malabar Industrial Co. Ltd. v. Commissioner of Income-tax, reported as 243 ITR 83 in an unambiguous manner has explained that where two views are possible and the Assessing Officer has taken one of the possible views to which CIT does not agree, this would not make the assessment order erroneous. The relevant extract of the judgement by the Hon'ble Apex Court is as under:

*“9. The phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an ITO adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the ITO has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the ITO is unsustainable in law.”*

Similar view has been expressed by the Hon'ble Supreme Court of India in the case of Commissioner of Income-tax (Central) v. Max India Ltd, reported as 295 ITR 282.

7. The provisions of section 263 of the Act can be invoked if, the twin conditions mandated under the section are satisfied, i.e:

- (i) the order of the Assessing Officer sought to be revised is erroneous;
- and**
- (ii) it is prejudicial to the interests of the revenue.

If any one of these two conditions is absent, the Commissioner of Income Tax cannot take recourse to section 263 of the Act. In the present case we are of considered view that the assessment order sought to be revised does not suffer from error as pointed by the PCIT. Merely for the reason that PCIT does not agree with one of the possible view taken by the Assessing Officer, would not make the assessment order erroneous. The PCIT has erred in invoking the provisions of section 263 of the Act, therefore, the impugned order is liable to be quashed.

8. We may also like to add here that sub-section (5) to Section 23 has been inserted by the Finance Act, 2017 w.e.f. 01-4-2018, whereby notional annual value of property/part of property held as stock-in-trade has been brought to

tax subject to conditions specified in the newly inserted sub-section. The amendment is substantive in nature and hence, would be effective prospectively i.e. it would no application in the impugned assessment year. Thus, no addition on account of notional rental value of the flats held as stock in trade by the assessee could have been made by the Assessing Officer in the impugned assessment year.

9. The Co-ordinate Bench of the Tribunal in the case of S D Corporation (P) Ltd. vs. Pr.CIT (supra) under similar situation has held that invoking of provisions of section 263 of the Act is bad in law. The relevant extract of the order of the Tribunal reads as under:-

*“13. We have noted that during the assessment, the assessee vide its reply/letter dated 24.11.2015 furnished the detail of opening and closing stock consisting of flat readily available for sale in respect of Imperil project. In the details of inventory, the assessee clearly bring on record that at the time of opening of written down value of 21 flat, consisting of area of 80000 (may be sq.ft.) total value of Rs. 170,41,088,56/- out of which the assessee has sold 14 flats of total area 48830 (may be sq.ft.) of value of Rs. 104,01,45,443/-. Thereby the assessee remained in possession of total 7 unsold flats consisting area of 31170 (may be sq.ft.) value of which was shown at Rs. 66,39,63,413/-. The assessee has also furnished the complete details of name of parties, flat number and details of the cost of flats sold during the year. Moreover, the Id. CIT(A) in the notice under section 263 has referred that on verification, certain discrepancies were found in the assessment order. The Id. CIT(A) has also referred that the assessee has shown unsold flat valuing of Rs. 66,39,63,413/- in closing stock. Thereby, all the information/details were gathered by the Id. PCIT from the assessment record. We have further noted that in the notice, the Id. CIT(A) has referred the decision of Hon'ble Delhi High Court in Ansal Housing Finance & Leasing Co. Ltd.'s case (supra). The Id. AR of the assessee while making submission has vehemently submitted that issue is debatable and there is contrary decision of Hon'ble Gujarat High Court in Neha Builders (P.) Ltd.'s case (supra) wherein the Hon'ble Court has taken a view that, if property is used as a stock-in-trade, then said property would become or partake character of stock and any income derived from such stock would be "Income from Business" and not "Income from House Property". Therefore, keeping in view the contrary decision of non-jurisdictional High Court, we are of the view that issue is debatable and two views are possible. The Hon'ble*



*Supreme Court in Max India Ltd.'s case (supra) held that when two views are inherently possible, the provision of section 263 would not attract. We may refer here that the unsold flat was treated by assessee as stock-in-trade in its books of account. The flats sold by the assessee were assessed under the head "Income from Business". Therefore, in our considered view that the order for not bringing the unsold flats to tax at notional letting value under the head "Income from Other Sources" is not erroneous. The assessing officer has taken one of the possible views. Even otherwise, sub-section (5) in section 23 was inserted by Finance Act, 2017 and is applicable only from 01.04.2018 and not for the Assessment Year under consideration. Therefore, the twin condition as prescribed under section 263 are not fulfilled in respect of first issue i.e. taxability of unsold flats under the head "Income from House Property".*

Similar view has been taken by the Tribunal in the case of Archie Creation vs. PCIT(supra).

10. In the light of facts of the case and the judgements/decisions discussed above, we hold that the PCIT clearly fell in error in invoking revisional jurisdiction u/s 263 of the Act. Consequently, the impugned order is quashed and the appeal of assessee is allowed.

**ITA No.3492/Mum/2019 - A.Y 2015-16:**

11. The Id.Authorized Representative of the assessee submitted that the facts are similar and the reasons for issuing notice under section 263 of the Act are identical to assessment year 2014-15. The Id.Authorized Representative of the assessee further pointed that in assessment year 2015-16, the Assessing Officer had made a specific query vide notice issued under section 142(1) of the Act dated 29/01/2017 asking the assessee to furnish break-up of finished goods, the name of the project, flat/unit, carpet area, cost and to show cause as to why the Annual Value of finished property held as stock- in- trade be not assessed under the head 'Income

from House Property. The assessee vide reply dated 22/12/2017 made detailed submissions. The Assessing Officer after being satisfied with the reply made no additions on account of notional rental value of flats in inventory.

12. The Id.Departmental Representative defended the findings of PCIT and prayed for dismissing the appeal of assessee.

13. Both sides heard. We find that facts in the assessment year under appeal are *pari-materia* to the facts in the assessment year 2014-15. The reasons for invoking revisional jurisdiction under section 263 of the Act in both the assessment years are identical. The findings given by us while adjudicating the appeal of the assessee for assessment year 2014-15 would *mutatis mutandis* apply to the present appeal. In the result, the impugned order is quashed and the appeal of the assessee is allowed.

14. In the result, both appeals by the assessee are allowed.

Order pronounced on Monday the 28th day of September, 2020.

Sd/-

Sd/-

(MANOJ KUMAR AGGARWAL)

(VIKAS AWASTHY)

लेखा सदस्य/ACCOUNTANT MEMBER न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated: 28 /09/2020

Vm, Sr. PS (O/S)

**प्रतिलिपि अग्रेषितCopy of the Order forwarded to :**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,  
Mumbai
6. गार्ड फाइल/Guard file.

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BY ORDER,

(Dy./Asstt. Registrar)  
**ITAT, Mumbai**