| आयकर अपीलीय अधिकरण न्यायपीठ, मुंबई |

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

BEFORE SHRI SAKTIJIT DEY, HON'BLE VICE PRESIDENT
&
SHRI NARENDRA KUMAR BILLAIYA, HON'BLE ACCOUNTANT MEMBER

I.T.A. No. 3633 /Mum/2024
Assessment Year: 2015-16

Sabarmati Capital One Limited The IL&FS Financial Centre Plot No. C-22, G Block Bandra Kurla Complex Bandra (East) Mumbai - 400051 **[PAN: AACCI8033N]**	Vs	**Deputy Commissioner of Income Tax – 14(1)(2), Mumbai**
अपीलार्थी/ (Appellant)		**प्रत्यर्थी/** (Respondent)

I.T.A. No. 3687 /Mum/2024
Assessment Year: 2015-16

Deputy Commissioner of Income Tax – 14(1)(2), Mumbai	Vs	**Sabarmati Capital One Limited** The IL&FS Financial Centre Plot No. C-22, G Block Bandra Kurla Complex Bandra (East) Mumbai - 400051 **[PAN: AACCI8033N]**
अपीलार्थी/ (Appellant)		**प्रत्यर्थी/** (Respondent)

Assessee by :	Ms. Fereshte Sethna – Advocate & Mrunal Parekh - Advocate
Revenue by :	Shri Dr. Kishor Dhule, CIT D/R

सुनवाई की तारीख/**Date of Hearing** : **19/02/2025**
घोषणा की तारीख /**Date of Pronouncement:** **25/02/2025**

आदेश/O R D E R

PER NARENDRA KUMAR BILLAIYA, AM:

I.T.A. No. 3633 /Mum/2024 & I.T.A. No. 3687 /Mum/2024 are cross-appeals by the assessee and the revenue preferred against the

order dated 14/08/2023 by NFAC, Delhi [hereinafter 'the ld. CIT(A)'] pertaining to AY 2015-16.

2. These cross-appeals were heard together and are disposed off by this common order for the sake of convenience and brevity.

3. The sum and substance of the grievance of the assessee is that the ld. CIT(A) erred in confirming the addition of Rs. 10,59,48,467/- under the head income from house property as per Section 22 of the Act.

4. Representatives were heard at length. Case records carefully perused and the judicial decisions relied upon by the representatives duly considered.

5. Briefly stated, the facts of the case are that the assessee company is engaged in real-estate business. The return for the year under consideration was filed on 29/09/2015, disclosing loss of Rs. 72,80,65,367/-. The assessment u/s 143(3) of the Act was completed vide order dated 29/12/2017 where the returned income was accepted as such.

6. Assuming the jurisdiction conferred upon him by the provisions of Section 263 of the Act, the ld. Pr. CIT cancelled the assessment made on 29/12/2017 and directed the AO to frame a fresh assessment. Accordingly, statutory notices were issued and served upon the assessee.

7. The quarrel revolves around the unsold inventory of Rs. 1,89,19,36,905/-, work relating to which has been finished. The AO was of the firm belief that the provisions of Section 22 of the Act squarely apply on the said unsold finished inventory. The assessee was asked to furnish details in this respect and was also asked to explain as to how

the provision of Section 22 of the Act should not be applied on the unsold finished inventory.

7.1. In its reply, the assessee stated that its main objection is to sell the commercial units which is the only and the single activity which the assessee is carrying on. It was pointed out to the AO that the impugned amendment in Section 23(5) of the Act has been brought into the statute from AY 2018-19 and prior to AY 2018-19, there is no provision provided under the Act to tax the deemed rental income on unsold property lying as stock-in-trade under the head "income from house property". It was further explained that the provision of Section 23(4) of the Act which meant only for properties that are held as investments and not as stock-in-trade and the charging provisions of Section 22 of the Act specifically gives exemption from determination of actual value of the property which is used for the purpose of any business or profession carried on by the assessee. Reliance was placed on various decisions discussed in the assessment order. But the claim of the assessee did not find any favour with the AO who concluded as under:-

> *"2.10. In order to bring to tax, the income under the head income from house property in respect of the unsold flats lying with the assessee, annual letting value (ALV) need to be determined. Taking into consideration interest rate on Bank FD of 8% during period under consideration, the ALV of the same works out to Rs. 15,13,54,952/- (1891936905 x 8%). The said ALV is eligible for deduction @ 30% as per the provisions of section 24(a) of the Act, which works out to Rs. 4,54,06,485/- (151354952 × 30%). As such, the taxable income of the assessee out of the said unsold inventory works out to Rs. 10,59,48,467/- (151354952 - 45406485)."*

7.2. Before us, strong reliance was placed on the decision of the Co-ordinate Bench in the case of *Tata Housing Development Company Limited vs. The PCIT in ITA NO. 3492 & 3492/Mum/2019* and also on the decision

of the Hon'ble Gujarat High Court in the case of *Neha Builders (P.) Ltd. [2007] 164 TAXMAN 342 (Guj.)*.

8. Per contra the ld. D/R strongly supported the findings of the AO and placed strong reliance on the decision of the Hon'ble High Court of Delhi in the case of *CIT vs. Ansal Housing Finance & Leasing Co. Ltd. [2013] 29 taxmann.com 303 (Delhi)* and *CIT vs. Smt. Godavaridevi Saraf [1978] 113 ITR 589 (Bom.)*.

9. We have given a thoughtful consideration to the orders of the authorities below. It is true that provisions of Section 23(5) of the Act are effective from 01/04/2018 whereby notional annual value of property/part of the property held as stock-in-trade has been brought to tax subject to conditions specified in that Section. The amendment is substantive and prospective. However, on identical situation, the Hon'ble High Court of Delhi in the case of *Ansal Housing Finance & Leasing Co. Ltd. (supra)* has held as under:-

> *"13. 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: 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 is clearly not the case.

14. As far as the alternative argument that the assessee itself is occupier, because it holds the property till it is sold, is concerned, the Court does not find any merit in this submission. While there can be no quarrel with the proposition that "occupation" can be synonymous with physical possession, in law, when Parliament intended a property occupied by one who is carrying on business, to be exempted from the levy of income tax was that such property should be used for the purpose of business. The intention of the lawmakers, in other words, was that occupation of one's own property, in the course of business, and for the purpose of business, i.e. an active use of the property, (instead of mere passive possession) qualifies as "own" occupation for business purpose. This contention is, therefore, rejected. Thus, this question is answered in favour of the revenue, and against the assessee."

10. Finding parity of facts, respectfully following the decision of the Hon'ble Delhi High Court *(supra)*, we hold that the annual let-out value (ALV) has to be taxed in respect of unsold property.

10.1. Having said that, we find that the determination of ALV by the AO is not tenable in law as he has taken 8% of the bank FD during the period under consideration and calculated the ALV. In our considered opinion, the ALV should be the actual rent or the fair rent which a property may fetch from the open market in the same locality. Therefore, we direct the AO to re-compute the ALV as per the market rate prevalent in and around the same locality and decide the issue afresh after affording a reasonable and adequate opportunity of being heard to the assessee. Accordingly, appeal of the assessee is partly allowed.

11. Coming to the revenue's appeal, the sum and substance of the grievance is that the ld. CIT(A) erred in holding that the addition made as per the provision of Section 56(2)(viib) of the Act is beyond the jurisdiction of the AO when the ld. Pr. CIT has cancelled the original assessment order with a direction to decide the case afresh.

12. We have carefully perused the order of the ld. Pr. CIT framed u/s 263 of the Act and find that no such addition was proposed by the ld. Pr. CIT amounting to Rs.1,77,90,14,000/-. In fact, the only issue which prompted the ld. Pr. CIT to assume jurisdiction u/s 263 of the Act was applicability of the provisions of Section 22 of the Act in respect of finished unsold inventory of the assessee and deciding this issue the ld. Pr. CIT cancelled the assessment order dated 29/12/2017 and restored the matter to the AO for fresh examination of the issue. The Hon'ble High Court of Bombay in the case of *PCIT vs. Royal Western India Turf Club Ltd. [2019] 103 taxmann.com 13 (Bombay)* had the occasion to consider the following substantial question of law:-

> *"(i). Whether on the facts and in the circumstances of the case and in law, the Tribunal is justified in holding that the addition towards entrance fees and annual subscription made by the Assessing Officer in the proceedings under Section 143(3) read with Section 263 is beyond the jurisdiction of the Assessing Officer ignoring the facts that the Commissioner of Income Tax has set side the assessment order with a direction to decide the case afresh?"*

12.1. And the Hon'ble Court held as under:-

> *"4. The questions suggested by the Revenue arise out of these proceedings. With respect to the first question, the Tribunal held that the Commissioner's revisional order required the Assessing Officer to examine certain aspects arising out of the return. He could not have travelled beyond such assessment and therefore, his action of making addition of Rs. 2.02 crore towards the entrance fee receipts was beyond the scope of revisional*

5. Having heard the learned counsel for the parties and having perused the documents on record, we are in agreement with the view of the Tribunal. The revisional order passed by the Commissioner has to be read as a whole. It is for this purpose that we have reproduced relevant portion thereof. This order would suggest that the Commissioner found fault with the Assessing Officer on clear four specific aspects arising out of the order of the assessment and require that the Assessing Officer passes fresh order after making proper inquiries. The question of the treatment to the entrance fees was by then nowhere in picture. The Assessing Officer on his own examined said issue. The Commissioner, undoubtedly, has powers under Section 263 of the Act to annul the entire assessment and required passing of fresh assessment order. However, when the Commissioner, as in the present case, requires the Assessing Officer to carry out inquiries with respect to specified issues, the jurisdiction of the Assessing Officer to pass fresh order must be confined to such issues, failing which we would be giving the power to the Assessing Officer to make reassessment.

6. Gujarat High Court in similar background in the case of CIT v. D.N. Dosani [2006] 153 Taxman 13/280 ITR 275 has observed as under:–
"12. The scheme of the Act has provided different powers to different authorities and these are required to be exercised after satisfying the pre-requisite conditions and jurisdictional facts. The assessing officer can disturb/re-open a finalized assessment by invoking his powers either under Section 154 or under Section 147 of the Act, provided he can show that the necessary requirements are fulfilled. If, what the Revenue contends today is accepted, these and other such provisions which empower different authorities to exercise jurisdiction at different point of time in distinct settings would be rendered otiose and that can never be the legislative intent. It is almost akin to providing separate keys for separate locked doors and the person wanting to open a particular door is required to apply the correct key which matches the concerned lock. Therefore, in proceedings, to give effect to order under Section 263 of the Act, the assessing officer cannot be permitted to undertake an exercise not warranted by the legislative

7. We may record that along the same line, the Assessing Officer had made disallowance to annual subscription fee which was also not part of the revisional order of the Commissioner. For the reasons recorded above, the said action of the Assessing Officer was not correct."

13. We find that the ld. CIT(A) has followed the aforementioned binding decision of the Hon'ble Jurisdictional High Court. Therefore, no interference is called for. Accordingly, effective grounds raised by the revenue are dismissed.

14. In the result, appeal of the assessee is partly allowed and that of the revenue is dismissed.

Order pronounced in the Court on 25th February, 2025 at Mumbai.

Sd/-	***Sd/-***
(SAKTIJIT DEY)	**(NARENDRA KUMAR BILLAIYA)**
VICE-PRESIDENT	**ACCOUNTANT MEMBER**

Mumbai, Dated 25/02/2025
SC SPS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)-
5. विभागीय प्रतिनिधि ,**आयकर अपीलीय अधिकरण, मुंबई** /DR,ITAT, Mumbai,
6. गार्ड फाई/ Guard file.

आदेशानुसार/ **BY ORDER**
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Mumbai