

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“C” Bench, Mumbai**

**Before Shri Shamim Yahya, Accountant Member  
and Shri Ravish Sood, Judicial Member**

**ITA Nos.2372 & 1860/Mum/2019  
(Assessment Years: 2014-15 & 2015-16)**

M/s Osho Developers  
OSHO, Plot No. 1534A,  
New Link Road,  
Devki Nagar, Borivali (W),  
Mumbai – 400 092

ACIT-32, Mumbai  
Bldg. No. C-11, 3<sup>rd</sup> Floor,  
Vs. Room No. 306,  
Bandra Kurla Complex,  
Bandra (E), Mumbai – 400 051

PAN – AABFO2984J

**(Appellant)**

**(Respondent)**

Appellant by: Dr. K. Shivram, Senior Advocate &  
Ms. Neelam Jadhav, A.R

Respondent by: Shri Uodal Raj Singh, D.R

Date of Hearing: 06.10.2020

Date of Pronouncement: 03.11.2020

**ORDER**

**PER RAVISH SOOD, JM**

The captioned appeals filed by the assessee are directed against the respective orders passed by the CIT(A)-44, Mumbai, dated 08.02.2019, which in turn arises from the assessment orders passed under Sec.143(3) of the Income Tax Act, 1961 (for short 'Act'), dated 02.12.2016 and 30.11.2017 for A.Y. 2014-15 and A.Y. 2015-16, respectively. As the issues involved in the captioned appeals are inextricably interlinked or in fact interwoven, the same are therefore being taken up and disposed off by way of a consolidated order. We shall first take up the appeal of the assessee for A.Y. 2014-15 wherein the impugned order has been assailed before us on the following effective grounds of appeal:

“1. The learned CIT(A) erred in confirming the addition of Rs.43,15,097/- made by the AO in respect of unsold flats which were held as stock in trade as income from house property on

notional basis as deemed rental income applying 8% of value of the unsold flats as income from house property.

2. The learned CIT(A) failed to appreciate that the flats are held as stock in trade and not as investment, hence addition made by the AO on notional basis as deemed rental income and the same is confirmed by the CIT(A) may be directed
3. The learned CIT(A) failed to appreciate the appellant could not have let out the properties as the flats were meant for sale as soon as the prospective buyers approach and inspect the flats, hence it was not possible to let out. Therefore, addition only on notional basis may be directed to be deleted.
4. Without prejudice to above, amendment to S.23(5) is inserted w.e.f. 01/04/2018, hence there cannot be any addition on notional basis in respect of flats held as stock in trade for the year under consideration.
5. Without prejudice to above, even on rental basis the assessee cannot get more than 2% return on investment, hence the estimate of notional rent @ 8% of investment being illogical, may be directed to be deleted.
6. Without prejudice to above, the learned CIT(A) erred in not following the judgments of the Mumbai Tribunal which is applicable to the facts of the appellant and the case laws relied by the CIT(A) is not applicable to the facts of the appellant.
7. The appellant craves leave to add, amend, alter or delete any of the above grounds of appeal.”

2. Briefly stated, the assessee firm had filed its return of income for A.Y. 2014-15 on 27.11.2014, declaring its total income at Rs.nil. The return of income filed by the assessee was processed as such under Sec.143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec.143(2) of the Act.

3. During the course of the assessment proceedings it was noticed by the A.O that the assessee had shown unsold flats in its ‘closing stock’ for the year under consideration. Observing, that pursuant to the judgment of the Hon’ble High Court of Delhi in the case of CIT Vs. Ansal Housing Finance and Leasing Company Ltd. (2013) 354 ITR 180 (Del) the Annual Lettable Value (for short ‘ALV’) of the aforesaid flats held by the assessee as its stock-in-trade was liable to be determined under Sec. 22 of the Act, the A.O called upon the assessee to put forth an explanation as regards the same. In reply, it was submitted by the assessee that as the income on the sale of the unsold flats

forming part of its 'closing stock' was liable to be assessed as its business income and not as income from house property, therefore, the ALV of the said flats was not exigible to tax under the head income from house property. It was further submitted by the assessee that as the aforesaid property was acquired in the course of its business as that of a builder and developer and not for the purpose of letting out, therefore, it could not be subjected to tax under the head house property. The assessee tried to distinguish the facts involved in its case as against those which were there before the Hon'ble High Court of Delhi in the case of Ansal Housing Finance and Leasing Company Ltd.(supra). However, the A.O was not persuaded to subscribe to the aforesaid claim of the assessee. Observing, that the Hon'ble High Court of Delhi in the case of Ansal Housing Finance and Leasing Company Ltd. (supra), had held, that the tax incidence did not depend upon whether the assessee had actually rented out the property with an intention of carrying on business but on the factum of ownership, the A.O held a conviction that the ALV of the aforesaid flats was liable to be assessed under the head income from house property. In the absence of any reasonable ALV having been provided by the assessee the A.O computed the same @ 8% of the cost of the property. In the backdrop of his aforesaid deliberations the A.O worked out the ALV of the flats forming part of the assessee's 'closing stock' for the year under consideration, as under:

(i) Ashwin CHS Ltd. Projects:

Sr. No.	Name of the unsold flats	Value of each flat as on 31.03.2014	Whether occupation certificate received or not
1.	1001	9576415	Occupation certificate received on 22.08.2013
2.	1002	9576415	Occupation certificate received on 22.08.2013
3.	1201	9576415	Occupation certificate received on 22.08.2013
4.	1202	9576415	Occupation certificate received on 22.08.2013
5.	1301	9576415	Occupation certificate received on 22.08.2013
6.	1302	9576415	Occupation certificate received on 22.08.2013

7.	1401	9576415	Occupation certificate received on 22.08.2013
	Total	67034905	Occupation certificate received on 22.08.2013

As Occupation Certificate was received in August 2013 hence period considered from Sep'13 to March'13 to March'14= 07 Months

Gross ALV = 8% of (Rs.6,70,34,905\*07/12) =Rs.31,28,296/-  
Less: Deduction u/s24(a):  
Standard Deduction @ 30% (Rs.3128296\*30%) Rs. 9,38,489/-  
**Annual Letting Value (ALV) Rs. 21,89,807/-**

(ii) Infinity Projects:

Sr. No.	Name of Unsold flats	Value of each flats as on 31.03.2014	Whether occupation certificate received or not
1.	200	3763560	Occupation Certificate received on 31.01.2013
2.	300	3826760	Occupation Certificate received on 31.01.2013
3.	1300	3826760	Occupation Certificate received on 31.01.2013
4.	1400	3763560	Occupation Certificate received on 31.01.2013
5.	1500	3826760	Occupation Certificate received on 31.01.2013
6.	1600	3763560	Occupation Certificate received on 31.01.2013
7.	1700	3826760	Occupation Certificate received on 31.01.2013
8.	1800	3763560	Occupation Certificate received on 31.01.2013
9.	1900	3826760	Occupation Certificate received on 31.01.2013
10.	2000	3763560	Occupation Certificate received on 31.01.2013

As Occupation Certificate was received in Jan'13 hence period considered from April'13 to March'14 = 12 months

Gross ALV = 8% of (Rs.37951600\*12/12) = Rs.3036128  
Less: Deduction u/s24(a):  
Standard deduction @ 30% (Rs.3036128\*30%) = Rs. 910838  
**Annual Letting Value (ALV) = Rs.21,25,290**

On the basis of his aforesaid deliberations the A.O made an addition of Rs.43,15,097/- towards ALV of the aforesaid flats in the hands of the assessee.

4. Aggrieved, the assessee assailed the assessment order before the CIT(A). After deliberating on the contentions advanced by the assessee, it was observed by the CIT(A) that the primary claim of the assessee was that

as it was holding the flats in question as stock-in-trade of its business as that of a real estate developer and not with a purpose of letting out the same, the ALV of the said flats could thus not be determined and therein brought to tax in its hands under the head 'house property'. However, the CIT(A) did not find favour with the aforesaid claim of the assessee. Relying on the judgement of the Hon'ble High Court of Bombay in the case of CIT Vs. Gundecha Builders (2019) 102 taxman.com 27 (Bom), the CIT(A) observed, that as held by the Hon'ble High Court even in a case of a real estate developer who was not engaged in the business of letting out its property, the rental income derived from the property held as stock-in-trade was taxable under the head 'house property'. In the backdrop of his aforesaid deliberations the CIT(A) was of the view that no infirmity could be related to the action of the A.O in assessing the ALV of the unsold flats held by the assessee as stock-in-trade under the head 'house property'. Accordingly, the CIT(A) finding no merit in the appeal of the assessee dismissed the same.

5. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The Id. Authorized Representative (for short 'A.R') for the assessee Dr. K. Shivram, Senior Advocate took us through the facts of the case. The Id. A.R assailed the assessing of the ALV of the flats that were held by the assessee firm, a real estate developer, as its stock-in-trade for the year under consideration. It was the claim of the Id. A.R that as the flats in question were held by the assessee firm as stock-in-trade and not as an investment, therefore, the ALV of the same could not have been determined and brought to tax in its hands. It was submitted by the Id. A.R that now when the aforesaid unsold flats were held by the assessee firm as stock-in-trade of its business as that of civil construction and development of properties and the income on sale was assessable as its business income, the ALV of the said flats, thus, could not have been brought to tax in the hands of the assessee firm under Sec. 23(1) of the Act. In support of his aforesaid contention the Id. A.R relied on the judgment of the Hon'ble High Court of Gujarat in the case of CIT vs. Neha Builders (2008) 296 ITR 661 (Guj). It was

submitted by the Id. A.R that the Hon'ble High Court in its said judgment, had observed, that if a property is used as stock-in-trade, then the same would become or partake character of stock and any income derived from the stock would be 'Income from business' and not 'Income from property'. Further, reliance was placed by the Id. A.R on the judgment of the Hon'ble Supreme Court in the case of Chennai Property and Investments Ltd. Vs. CIT (2015) 373 ITR 673 (SC). Taking us through the facts involved in the said case, it was submitted by the Id. A.R that the Hon'ble Apex Court had observed that as the main object of the assessee company before them was to acquire properties and earn income by letting out the same, the income, there from, was to be taxed as business income and not as income from house property. In order to drive home his claim that the lower authorities were in error in computing the ALV of the flats held by the assessee firm as stock-in-trade of its business of a builder and developer the Id. A.R relied on a host of orders of the coordinate benches of the Tribunal viz. (i) C.R. Development Pvt. Ltd. Vs. JCIT, ITA No. 4277/Mum/2012, dated 13.05.2015; (ii) Runwal Constructions Vs. ACIT, ITA No. 5408 & 5409/Mum/2016, dated 22.02.2018 (Mum); (iii) Balaji Ventures Vs. ITO, ITA No. 1914/Pune/2018, dated 19.02.2019 (Pune); (iv) Rafiaahmad Patel Vs. ITO, ITA No. 898/Pune/2019, dated 23.12.2019 (Pune); and (v) ITO, Vs. Arihant Estates Pvt. Ltd., ITA No.7037/Mum/2016, dated 27.06.2016 (Mum). On the basis of his aforesaid submissions, it was the claim of the Id. A.R that the addition made/sustained by the A.O/CIT(A) towards ALV of the flats held by the assessee firm as stock-in-trade of its business of a builder and developer could not be sustained and was liable to be vacated. Adverting to the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Gundecha Builders (2019) 102 taxman.com 27(Bom) as was relied upon by the CIT(A), it was submitted by the Id. A.R that the facts involved in the said case were distinguishable as against those involved in the case of the present assessee. The Id. A.R took us through the aforesaid judgment of the Hon'ble jurisdictional High Court and submitted, that the issue before the Hon'ble High Court was as to under which head the rental income

received from the unsold property held by the assessee, a real estate developer, was liable to be assessed. It was submitted by the Id. A.R that the Hon'ble High Court in the backdrop of the facts that were involved in the case before them had observed, that the rental receipts were liable to be assessed under the head income from house property. The Id. A.R in his attempt to distinguish the facts involved in the present case submitted, that unlike the facts involved in the case before the Hon'ble High Court, the issue involved in the present case was as to whether or not the ALV of the property held by the assessee, a real estate developer, as stock-in-trade, was to be determined and therein brought to tax in its hands under the head income from house property. As such, it was the claim of the Id. A.R that as the present assessee was not in receipt of any rental income, therefore, the facts involved in its case were clearly distinguishable as against those involved in the case before the Hon'ble High Court. Alternatively, it was submitted by the Id. A.R. that the lower authorities had erred in determining the gross ALV of the properties in question on an ad hoc basis @ 8% of their value.

6. Per contra, the Id. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities. It was submitted by the Id. D.R that the issue was squarely covered against the assessee by the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Gundecha Builders (2019) 102 taxmann.com 27 (Bom).

7. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements that have been pressed into service by them for driving home their respective contentions. Admittedly, it is a matter of fact that the flats in question were held by the assessee firm, a real estate developer, as stock-in-trade of its respective projects viz. (i) Ashwin CHS Projects; and (ii) Infinity Project. As observed by us hereinabove, the A.O had determined and therein brought to tax the ALV of the aforesaid flats under the head 'house property' in the hands of the assessee firm. Our indulgence in

the present appeal has been sought by the assessee, to adjudicate, the sustainability of the view taken by the lower authorities that the ALV of the flats held by the assessee as stock-in-trade was liable to be determined and therein brought to tax under the head 'house property'. As is discernible from the assessment order, the A.O by relying on the order of the **Hon'ble High Court of Delhi** in the case of **CIT Vs. Ansal Housing Finance and Leasing Company Ltd. (2013) 354 ITR 180 (Del)**, had determined the ALV of the flats which were held by the assessee as part of the stock-in-trade of its business of a builder and developer, and had brought the same to tax under the head 'house property'. On appeal, the CIT(A) had found favour with the view taken by the A.O by drawing support from the order of the **Hon'ble High Court of Bombay** in the case of **CIT Vs. Gundecha Builders (2019) 102 CCH 426 (Bom)**.

8. On a perusal of the order of the Hon'ble Jurisdictional High Court in the case of Gundecha Builders (supra), we find, that the issue before the High Court was that where an assessee, a real estate developer, was in receipt of rental income from a property held as stock-in-trade of its business as that of a real estate developer, then, whether the said receipts were to be brought to tax under the head 'house property' (as claimed by the assessee) or as 'business income' (as claimed by the revenue). The High Court after relying on its earlier order passed in the case of **CIT Vs. Sane & Doshi Enterprises (2015) 377 ITR 165 (Bom)**, had observed, that in a case where a real estate developer is in receipt of rental income in respect of a property held by him as stock-in-trade of its business as that of a real estate developer, the said rental receipts was to be assessed under the head house property. Accordingly, the issue before the High Court in the aforesaid case was as to under which head of income the rental receipts were liable to be assessed. Finding favour with the claim of the assessee, it was observed by the High Court that the rental income received from letting out of the unsold portion of the property constructed by the real estate developer was assessable to tax as its income from house property. Beyond any scope of doubt, the issue before the Hon'ble



High Court was as to under which head of income the rental receipts were to be taxed i.e as 'business income' or 'income from house property'. Unlike the facts involved in the case before the High Court, in the case before us, the flats held by the assessee as stock-in-trade of its business of a builder and developer, having not been let out, had thus not yielded any rental income. As the Hon'ble High Court of Bombay in the case of Gundecha Builders (supra) was seized of the issue as to under which head of income the rental income received from the unsold portion of the property constructed by a real estate developer was to be assessed, which is not the issue involved in the present appeal before us, therefore, the same in our considered view being distinguishable on facts would not assist the case of the revenue before us.

9. We shall now advert to the judgment of the **Hon'ble High Court of Delhi** in the case of **CIT Vs. Ansal Housing Finance and Leasing Company Ltd. (2013) 354 ITR 180 (Del)** by drawing support from which the A.O had determined and therein brought to tax the ALV of the flats held by the assessee as stock-in-trade of its business as that of a builder and developer. In the aforesaid case, it was the claim of the assessee that unlike the other builders as it was not into letting out of properties, the determination of deemed income which had formed the basis for assessment under the ALV method, was not called for in its case. However, the High Court being of the view that the levy of income tax in the case of an assessee holding house property was premised not on whether the assessee carries on business, as landlord, but on the ownership, thus, turned down the aforesaid claim of the assessee. To sum up, in the backdrop of its conviction that the incidence of charge under the head house property was based on the factum of ownership of property, the High Court was of the view that as the capacity of being an owner was not diminished one whit, because the assessee carried on the business of developing, building and selling flats in housing estates, therefore, the ALV of the flats held as stock-in-trade by the assessee in its business of a builder and developer was liable to be determined and brought to tax under the head 'house property'. But then, we find, that taking a contrary view the

**Hon'ble High Court of Gujarat** had way back in the case of **CIT vs. Neha Builders (2008) 296 ITR 661 (Guj)**, observed, that rental income derived by an assessee from the property which was treated as stock-in-trade is assessable as business income and cannot be assessed under the head "Income from house property". The High Court while concluding as hereinabove, had observed, that admittedly the income derived from 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. In the backdrop of the conflict between the decisions of the aforesaid non-jurisdictional High Courts, as observed by the **Hon'ble High Court of Bombay** in the case of **K. Subramanian and Anr. Vs. Siemens India Ltd. and Anr (1985) 156 ITR 11 (Bom)**, the view which is in favour of the assessee has to be preferred as against that taken against him. Accordingly, following the judgment of the Hon'ble Jurisdictional High Court in the case of **K. Subramanian and Anr. Vs. Siemens India Ltd. and Anr (1985) 156 ITR 11 (Bom)**, we respectfully follow the view taken by the Hon'ble High Court of Gujarat in the case of **CIT vs. Neha Builders (2008) 296 ITR 661 (Guj)**. In fact, we find that the issue as to whether the ALV of a property held by an assessee as stock-in-trade of its business as that of a real estate developer had earlier come up before a 'SMC' bench of the **ITAT, Mumbai** in the case of **Shri. Rajendra Godshalwar Vs. ITO-21(3)(1), Mumbai [ITA No. 7470/Mum/2017, dated 31.01.2019]**. The Tribunal after considering the judgment of the Hon'ble High Court of Delhi in **Ansal Housing Finance & Leasing Co. Ltd. (2013) 354 ITR 180 (Delhi)** and that of the Hon'ble High Court of Gujarat in **CIT vs. Neha Builders Pvt. Ltd., (2008) 296 ITR 661 (Guj)**, had concluded, that the ALV of the unsold property held by the assessee as stock-in-trade could not be determined and brought to tax under the head 'house property'. The Tribunal while concluding as hereinabove had also distinguished the judgment of the Hon'ble High Court of Bombay in the case of **CIT Vs. Sane & Doshi Enterprises (2015) 377 ITR 165**

(Bom), as was relied upon by the revenue. The Tribunal while concluding as hereinabove had observed as under:

“6. We have carefully considered the rival submissions. The short point involved in this appeal is the validity of addition sustained by the CIT(A) on account of notional ALV of the unsold flat, which is held by the assessee as stock-in-trade. Factually speaking, it is not in dispute that the flat in question is not yielding any rental income to the assessee, as it has not been let-out. It is also not in dispute that the project in question has been completed during the year under consideration, and the said flat is shown as stock-in-trade at the end of the year. At the time of hearing, the learned representative also pointed out that the flat has been ultimately sold on 06.11.2012. We find that our coordinate Bench in the case of C.R. Developments Pvt. Ltd. (supra) dealt with charging of notional income under the head 'Income from House Property' in respect of unsold shops which were shown by assessee therein as part of 'stock-in-trade'. As per the Tribunal "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 Shri Rajendra Godshalwar 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."

7. In our view, the aforesaid observation of our coordinate Bench squarely applies to the facts of the present case. In the case of M/s. Runwal Constructions (supra) also, similar issue has been dealt with by our coordinate Bench. In the case of M/s. Runwal Constructions (supra), the Bench noted the judgment of the Hon'ble Gujarat High Court in the case of CIT vs Neha Builders Pvt. Ltd., 296 ITR 661 (Guj.) as also the judgment of the Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd., 354 ITR 180 (Delhi) and finally observed as under :-

"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."

Following the aforesaid precedents, we find merit in the plea of the assessee, which deserves to be upheld.

8. Insofar as the judgment of the Hon'ble Bombay High Court in the case of Sane & Doshi Enterprises (supra) relied by the CIT(A) is concerned, the same, in our view, does not help the case of the Revenue. Quite clearly, the case before the Hon'ble High Court was relating to actual rental income received on letting out of unsold flats. The dispute pertained to the head of income under which such income was to be taxed - whether as 'Business Income' or as 'Income from House Property'.

In the present case, the facts are quite different inasmuch as the unsold flat in question has not yielded any rental income as the flat has not been let-out, and is being held by the assessee purely as stock-in-trade; and, what the Assessing Officer has tried to do is to assess only a notional income thereof. Thus, the ratio of the judgment of the Hon'ble Bombay High Court in the case of Sane & Doshi Enterprises (supra) has been rendered in the context of qualitatively different facts, and is not applicable in the present case.”

Accordingly, preferring the view taken by the Hon'ble High Court of Gujarat in CIT vs. Neha Builders Pvt. Ltd. (2008) 296 ITR 661 (Guj), as per which the ALV of the unsold property held by an assessee as stock-in-trade could not be determined and brought to tax under the head 'house property', as against that arrived at by the Hon'ble High Court of Delhi holding to the contrary in CIT Vs. Ansal Housing Finance and Leasing Company Ltd. (2013) 354 ITR 180 (Del); and also following the order of ITAT, Mumbai in Shri. Rajendra Godshalwar Vs. ITO-21(3)(1), Mumbai [ITA No. 7470/Mum/2017, dated 31.01.2019], we herein conclude that the ALV of flats held by the assessee as part of the stock-in-trade of its business as that of a builder and developer could not have been determined and therein brought to tax under the head 'house property'.

10. Before parting, for the sake of clarity, we may herein observe that vide the Finance Act, 2017 w.e.f 01.04.2018 the legislature had inserted Sec. 23(5) of the Act. As per the said statutory provision, 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 a period up to “one year” [“two years” vide the Finance Act, 2019 i.e w.e.f 01.04.2020] 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. As the said statutory provision i.e Sec. 23(5) is applicable prospectively i.e w.e.f A.Y 2018-19, the same, thus, would have no bearing on the year under consideration in the case of the present assessee before us. Our aforesaid view is fortified by the aforesaid order of the ITAT, Mumbai in the case of Shri. Rajendra Godshalwar Vs. ITO-21(3)(1),

Mumbai [ITA No. 7470/Mum/2017, dated 31.01.2019], wherein in context of the said aspect it was observed as under:

“9. Apart therefrom, we find that Sec. 23(5) of the Act has been inserted by the Finance Act, 2017 w.e.f. 01.04.2018. In terms of the said section, it is prescribed 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 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 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". Though the said provision is effective from 01.04.2018, yet even if one is to see the present case from the standpoint of Sec. 23(5) of the Act, no addition is permissible in the instant year. It may be relevant to note that the completion certificate is stated to Shri Rajendra Godshalwar have been obtained on 28.11.2011 and going by the provisions of Sec. 23(5) of the Act, no addition is permissible in the instant assessment year. Be that as it may, we are only trying point out that the assessability of notional income in respect of unsold flat, which is taken as stock-in-trade, is not merited in the instant case. Thus, we set-aside the order of CIT(A) and direct the Assessing Officer to delete the addition.”

11. We, thus, in the backdrop of our aforesaid deliberations not being able to concur with the view taken by the lower authorities, therein, set aside the order of the CIT(A) and direct the A.O to delete the addition made by him towards the ALV of the flats held by the assessee as stock-in-trade of its business as that of a builder and developer. The **Grounds of appeal Nos. 1 to 4** are allowed in terms of our aforesaid observations.

12. As we have concluded that the assessability of notional income i.e ALV in respect of unsold flats held by the assessee as stock-in-trade of its business as that of a builder and developer is not merited in the instant case, therefore, the grounds of appeal nos. 5 to 7 having been rendered as merely academic are not being adverted to and therein adjudicated upon. The **Grounds of appeal nos. 5 to 7** are dismissed as not pressed in terms of our aforesaid observations.

13. The appeal of the assessee is allowed in terms of our aforesaid observations.

**A.Y. 2015-16**  
**ITA No. 1860/Mum/2019**

14. We shall now take up the appeal of the assessee for A.Y.2015-16. The assessee has assailed the impugned order on the following effective grounds of appeal:

- “1. The learned CIT(A) erred in confirming the addition of Rs.49,17,907/- made by the AO in respect of unsold flats which were held as stock in trade as income from house property on notional basis as deemed rental income by applying 8% of value of the unsold flats as income from house property.
2. The learned CIT(A) failed to appreciate that the flats are held as stock in trade and not as investment, hence addition made by the AO on notional basis as deemed rental income and the same is confirmed by the CIT(A) may be directed to be deleted.
3. The learned CIT(A) failed to appreciate the appellant could not have let out the properties as the flats were meant for sale as soon as the prospective buyers approach and inspect the flats, hence it was not possible to let out. Therefore, addition only on notional basis may be directed to be deleted.
4. Without prejudice to above, amendment to S.23(5) is inserted w.e.f. 01/04/2018, hence there cannot be any addition on notional basis in respect of flats held as stock in trade for the year under consideration.
5. Without prejudice to above, the even on rental basis the assessee cannot get more than 2% return on investment, hence the estimate of notional rent @ 8% of investment being illogical, may be directed to be deleted.
6. Without prejudice to above, the learned CIT(A) erred in not following the judgement of the Mumbai Tribunal which is applicable to the facts of the appellant and the case laws relied by the CIT(A) is not applicable to the facts of the appellant.
7. The appellant craves leave to add, amend, alter or delete any of the above grounds of appeal.”

15. Briefly stated, the assessee firm had e-filed its return of income for A.Y. 2015-16 on 30.09.2015, declaring a total loss of Rs.2,03,99,862/-. The return of income filed by the assessee firm was processed as such under Sec. 143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

16. The A.O while framing the assessment determined the ALV of the flats held by the assessee as stock-in-trade of its projects viz. (i) Ashwin CHS Ltd: and (ii) Infinity Project, and therein made an addition of Rs.49,17,907/- under the head income from house property. Accordingly, the A.O vide his order passed under Sec. 143(3), dated 30.11.2017 scaled down the returned loss of the assessee to (-) Rs.1,54,81,960/-.

17. Aggrieved, the assessee assailed the assessment order before the CIT(A). However, the CIT(A) not finding favour with the contentions advanced by the assessee upheld the addition made by the A.O.

18. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. As the facts and the issue involved in the present appeal remains the same as were there before us in the appeal of the assessee for A.Y. 2014-15 in ITA No. 2372/Mum/2019, our order therein passed shall thus apply *mutatis mutandis* for the purpose of disposal of the present appeal. Accordingly, the appeal filed by the appeal for A.Y 2015-6 in ITA No. 1860/Mum/2019 is allowed in terms of our observations recorded while disposing off its appeal for A.Y 2014-15 in ITA No. 2372/Mum/2019.

19. The appeal of the assessee is allowed in terms of our aforesaid observations.

20. Resultantly, both the appeals of the assessee i.e ITA No. 2372/Mum/2019 for A.Y 2014-15 and ITA No. 1860/Mum/2019 for A.Y 2015-16 are allowed in terms of our aforesaid observations.

Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.

Sd/-  
SHAMIM YAHYA  
(ACCOUNTANT MEMBER)

Mumbai, Date: 03.11.2020  
R. Kumar

Sd/-  
RAVISH SOOD  
(JUDICIAL MEMBER)

**Copy of the Order forwarded to :**

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "G" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar  
ITAT, Mumbai