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

BEFORE HON'BLE JUSTICE (RETD.) C. V. BHADANG, PRESIDENT
&
SHRI PRABHASH SHANKAR, ACCOUNTANT MEMBER

ITA No.5603/MUM/2025
(A.Y. 2020-21)
ITA No. 5604/MUM/2025
(A.Y. 2018-19)

Sheth Developers Private Limited Ground and 3rd Floor, Prius Infinity, Paranjape B Scheme, Subhash Road, Ville Parle(E), Mumbai– 400 057, Maharashtra	v/s. बनाम	Assistant Commissioner of Income Tax, Central Circle –4(2),Kautilya Bhavan, 4th Floor, BKC, Mumbai–400051, Maharashtra
स्थायी लेखा सं./जीआइआर सं./ PAN/GIR No: AAACS9943H		
Appellant/अपीलार्थी	..	**Respondent/प्रतिवादी**

ITA No.6204/MUM/2025
(A.Y. 2020-21)

Assistant Commissioner of Income Tax, Kautilya Bhavan, 4th Floor, BKC, Mumbai – 400051, Maharashtra	v/s. बनाम	**Sheth Developers Private Limited** Sheth House Gen A K Vaidya Marg, Off W Express Highway, Malad East, Mumbai – 400 097, Maharashtra
स्थायी लेखा सं./जीआइआर सं./ PAN/GIR No: AAACS9943H		
Appellant/अपीलार्थी	..	**Respondent/प्रतिवादी**

Assessee by :	Dr. K. Shivaram & Shri Rahul Hakani,ARs
Revenue by :	Shri Basavaraj Hiremath,(CIT-DR)a/w Shri Kavan Limbasiya, Sr. DR

Date of Hearing	10.06.2026
Date of Pronouncement	24.08.2026

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आदेश / O R D E R

PER PRABHASH SHANKAR [A.M.] :-

The instant appeals have been preferred by the assessee and ITA 6204/Mum/2025 is Cross appeal by Revenue against the orders of even date as passed by the Ld. Commissioner of Income-tax, Appeal, CIT(A) 52, Mumbai [hereinafter referred to as "CIT(A)"] pertaining to assessment orders passed u/s. 143(3) of the Income-tax Act, 1961 [hereinafter referred to as "Act"] for Assessment Years [A.Ys.] 2018-19 and 2020-21. All the above stated appeals are interrelated involving identical grounds of appeal and also these have been heard together, therefore, they are being adjudicated in this composite order for the sake of brevity. We take up the appeals in the case of **ITA 5603/MUM/2025 (A.Y.2020-21) in the case of Sheth Developers Private Limited** first, which is taken as 'Lead Case'.

2. Thegrounds of appeals are as under:

ITA No.5603/MUM/2025(AY 2020-21)

1. *Addition of Rs.24,66,366/- on account of Deemed Income from House Property of unsold finished stock u/s 22 of Income Tax Act, 1961.*
   1.1 The Ld. CIT (A) erred in confirming addition on account of Deemed Income from House Property of unsold units lying in stock u/s 22 of the Income Tax Act, 1961 without appreciating the fact that the detailed explanation was furnished by appellant during the course of assessment proceeding and the same had been not been considered by the Ld AO while passing the Assessment order.

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1.2 The Ld. CIT(A) erred in confirming addition based on 8.5% of the total investment made by the assessee in the property (Cost of Construction of Property in the appellant case) without appreciating the fact that Ld. AO has not made any enquiry as the appellant agreed to offer the notional income on the said properties or not.

1.3 The Ld. CIT(A) erred in not appreciating the fact that "purchase, sell land or building and give land and/or building and lease, sub-lease and to deal in properties" has also specified as main object of appellant in Main object clause of MOA of appellant company. If letting out of property is one of the main object of the appellant company and factually so carried out, then income is assessable under the head business income and not house property.

1.4 The Ld. CIT(A) erred in not appreciating the fact that appellant was holding flats not as flat owner but as businessman awaiting customers who is ready to buy at price which is on offer by the appellant as a businessman.

1.5 The Ld. CIT(A) erred in not appreciating the fact that income prescribed under section 14 are exclusive and income falling under one head cannot be assessed under another head. If onsale income is assessable under the head business incomethen stock in trade cannot be treated under the head income from house property merely because it is unsold.

3. The assessee engaged in the business of real estate construction and development of properties, filed its return of income declaring loss of Rs.13,60,02,531/-. The Assessing Officer made certain additionswhile passing the order u/s. 143(3) of the Act and thereby assessed the total income of Rs. 5,33,78,582/- as per normal provisions of and Book profit of Rs. 84,92,22,741/- u/s 115JB of the Act. All the grounds relate to the addition made and partly allowed by the appellate authority in respect of Deemed Income from House Property of unsold finished stock u/s 22 of the Act although it was claimed before the AO that the unsold units lying in stock were either under legal disputes or

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used for business purpose of the assessee and hence couldn't be given on rent to earn Rental Income. The AO made the addition based on 8.5% of the total investment made by the assessee in the property,being thecost of construction of the property. It contested the addition made before the ld.CIT(A) who observed that the AO did not agree with the reply of the assessee that such income was not taxable as in view of the decision of the Hon'ble Delhi High Court in the case of Ansal Housing Finance and Leasing Co. Ltd., 354 ITR 180, the tax incidence does not depend upon whether the appellant actually rented out the property but on the fact that the appellant was the owner of the building and apartment thereto during the year under consideration. The AO relied upon various decisions including that of the Hon'ble Apex Court in the case of S. G. Mercantile Corpn. (P) Ltd. v. CIT AIR 1972 SC 732. The AO estimated the ALV @ 8.5% by relying on the Hon'ble decisions of Mumbai ITAT in M/s Om Prakash & Co. (87 TTJ 183 Mum) and M/s ChemMech (P) Ltd. (83 ITD 427 Mum). Before the ld.CIT(A),theassesseecited various decisions includingKaranpura Development Co Ltd. (1962) 44 ITR 362 ii. National Storage (66 ITR 596),Universal Plast (237 ITR 454), Chennai Properties and Investments Ltd. (373 ITR 673) v. Neha Builders (296 ITR 661),M/s. Kolte Patil Developers Limited Vs DCIT ITA No.2206/PUN/2016 .

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3.1 On due consideration, the ld.CIT(A) observed that by way of section 23(5) of the Act, an additional clause was inserted by the Finance Act, 2017 w.e.f. 01.04.2018. It specifically provides for treatment of computing annual value of property held as stock-in-trade and certain moratorium period has been given for such treatment. Thus, it was clear that after 01.04.2018 onwards the house property held as stock in-trade was liable to be taxed by computing the annual lettable value. In the case of Dimple Enterprises V. Deputy Commissioner of Income-tax, the Hon'ble Mumbai ITAT vide order dated 28.08.2023 held that the amendment to Section 23(5) introduced by the Finance Act 2017 and effective from Assessment Year 2018-19. At the same time, all the case laws relied by appellant were distinguishable on facts and therefore, were not acceptable. The Hon'ble Delhi High Court in the case of Ansal Housing Finance and Leasing Co. Ltd(supra) held that even though the flats constructed by the assessee were part of its stock-in-trade and remained unsold at the end of the year, the Annual Letting Value (ALV) of such flats was liable to be taxed under the head 'Income from House Property'. He further noted that in the decision of the Commissioner of Income-tax-12 v. Tip Top Typography dated 8.08.2014 ([2014] 368 ITR 330 Bom HC), in this regard, the Hon'ble Bombay High Court clarified the method for determining the "Annual Value" of a property under

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Section 23 of the Income-tax Act. The Hon'ble Court held that while the municipal rateables value was not absolutely binding on the Assessing Officer, it serves as a "safe guide" and should generally be accepted unless the officer is convinced based on reliable evidence that the agreed rent or security deposit is unrepresentative of the market rate. Only in such cases is the Assessing Officer permitted to undertake independent inquiries into prevailing rents in the locality. The decision affirmed that Municipal Valuation is ordinarily the benchmark for computing annual value, Further, in the case of M/s. Chalet Hotels V. ACIT, CC-4(2) vide order dated (appellant's group company case), the ITAT upheld the addition of notional interest but found that the AO erred in calculating deemed income from house property. The Tribunal ordered a fresh computation accordingly. The ld.CIT(A) further noted that in the case of Dimple Enterprises V. Deputy Commissioner of Income-tax, the Hon'ble Mumbai ITAT held that the developer included unsold flats and shops in its balance sheet as stock-in-trade, yet the Assessing Officer treated these idle assets as "Income from House Property" by imputing a notional rent of 8.5 % of the construction cost. However, the ld.CIT(A) noted that the assessee had failed to provide any detailed calculation, documentary evidence, or comparable working to support a claim that the presumed "fair rent or ALV" was lower than the sum determined by

the Assessing Officer, as established by the various decisions as mentioned above, when asserting that deemed rent must be based on fair or standard rent, the burden lay squarely on the assessee to furnish cogent evidence, be it valuation reports, comparable actual letting agreements, municipal or rent-control records, or public market-data portals that can be objectively relied upon. The assessee must present specific details such as property size, locality, and amenities, along with reliable comparable.It offered no valuation report, no industry data, no comparable or public documents to substantiate their claimed fair rent, in the absence of such workings, there is simply no basis to disturb the AO's exercise of judgment. Since, no such evidence had been placed on record, the Assessing Officer's determination of deemed rent on a must stand on that singular factual finding that no working or documentation supports a lower fair rent there is no legal or factual foundation to interfere. Thus, on principle and precedent, the assessee's absence of evidentiary support meant the additions made by the AO on account of Deemed Income from House Property of finished goodwas proper and justifiable. For remaining 4 flats, appellant argued that 4 flats of Project Vasant Vally -Ivy pertains to Tank Family. He noted that the assessee and the Tank Family were two distinct entities therefore to transfer the ownership to Tank Family, specific agreement was required. However,

neither agreement was registered nor any advance was received by assessee. Accordingly, the contention of the appellant that 4 flats owned by Tank Family wasnot acceptable to him. Considering the discussion above, the total addition of ALV net of 30% standard deduction was restricted to Rs 24,66,366/- and the assessee got part relief of Rs 6,82,344/-.

4. Before us, the ld.AR has contended that assessee during the year had 18 unsold flats lying in stock-in-trade in project Sigma Estate Zandu Dadar having a cost of construction of Rs 23,90,96,000/-. It also submitted that for flats remaining unsold being demonetisation, new RERA and GST provisions and stated that deemed rental income could not be taxed on stock-in-trade. It is contended that both AO and CIT(A) have confirmed the addition of notional rent @ 8.5% of the cost of construction as the assessee had not given any details of fair rent i.e. market rent which the property could fetch or the municipal rateable value.InTivoli Investment and Trading Co. Pvt. Ltd. v. ACIT [2025] 481 ITR 730 (Bom) it is held that the AO must make an independent enquiry about the market rent prevailing in the area for the purposes of estimating rent u/s 23(1)(a) or adopt the municipal rateable value. No such exercise had been carried out by the A.O. However, the assessee had now filed Index II of the rent agreement registered for other

property in the same building for the same period. The area is 460 sq. feet and the monthly rent was Rs. 50,000/-. In Sabarmati Capital One Ltd. v. DCIT [2025] 172 taxmann.com 344 (Mum)(Trib.), the Hon'ble ITAT set-aside the ALV calculated at 8% of the cost of construction and held that ALV should be actual rent or fair rent which a property might fetch from the open market in the same locality, therefore, the Assessing Officer was to be directed to recompute ALV. In view of the above submissions, it is stated that the appeal may be remitted to AO to determine the ALV as per law.

5. The ld.DR on the other hand relied on the orders of the lower authorities. However, he did not raise any objection to the proposal of the ld.AR.

6. We have carefully considered the relevant facts of the case. It is evident that the ld.CIT(A) affirmed the addition mainly on the ground that the assessee did not furnish relevant details to arrive at the municipal rateable value of the said properties. It may be stated here that the **Hon'ble Bombay High Court in the case CIT Vs. Tip top Typography reported in 368 ITR 330,** held that rent should be computed at Municipal rateable value which has also been followed by

ITAT Mumbai Bench in the case of **Dimple Enterprise Vs. DCIT (Supra),** in the following manner:-

> *"Now the question is of the rental value. The assessing officer has not levied the deemed rent on municipal rateable value or any nearly similar instance. The reliability of municipal rateable value has been duly upheld in several decisions. The Assessing Officer cannot make any ad hoc computation of deemed rent. Honorable Bombay High Court decision in the case of CIT vs. Tip Top Typography [2014] 48 taxmann.com 191/[2015] 228 Taxman 244 (Mag.)/[2014] 368 ITR 330 duly supports this proposition. Thus assessing officer has made an ad hoc estimate of 8.5% of investment on the plea that assessee has not been able to provide the municipal rateable value. This is not sustainable on the touchstone of Hon'ble Bombay High Court decision in the case of Tip Top Typography (supra). In our considered opinion nothing stops the assessing officer from obtaining the municipal rateable value from Departmental or government machinery. Hence we direct the assessing officer to compute the valuation of deemed rent in accordance with our observation as above and take into account the Hon'ble Jurisdictional High Court decision as above. Since we have decided the issue by duly taking note of Hon'ble Jurisdictional High Court decision and have also applied Hon'ble High Court decision, the reference to other decision in this case is not considered relevant to adjudication in this case."*

6.1 On careful consideration, we find that the provision of section 23(5) of the Act which are applicable in the impugned assessment year. Therefore, the AO was justified in invoking the said provisions and the ld.CIT(A) having agreed, we do not find any infirmity therein. Therefore, the provisions of section 23(5) of the Act were found applicable by the ld.CIT(A) which remains uncontested before us. The only issue for consideration is the application of rate of 8.5% of the cost by the AO and the ld.CIT(A) are required to be adjudicated. In this regard, we find that the ratio laid downy by the jurisdictional high Court in the case of CIT Vs. Tip Top Typography(supra) is clearly applicable to

the facts of the case,wherein it was directed to restrict the addition to the Municipal rate only. Accordingly, we hold that in view of the binding orders of the coordinate bench and the judgment of the Hon'ble Bombay High Court in the case CIT Vs. Tip top Typography, notional rent should be computed at Municipal Rateable Value. Accordingly, we set aside the impugned order for quantification of notional rent with the direction to the AO to recalculate the quantum of addition after ascertaining the Municipal Rateable Value. The assessee would, in turn, furnish relevant details in this regard as sought by the AO. Therefore, the ground in this regard is set aside for statistical purposes.

6.2 In the result,the above appeal of the **assessee is allowed for statistical purposes.**

7.ITA No.5604/MUM/2025(AY 2018-19)

1.Addition of Rs.24,66,366/- on account of Deemed Income from House Property of unsold finished stock u/s 22 of Income Tax Act, 1961

1.1 The Ld. CIT(A) erred in confirming addition on account of Deemed Income from House Property of unsold units lying in stock u/s 22 of the Income Tax Act, 1961 without appreciating the fact that the detailed explanation was furnished by appellant during the course of assessment proceeding and the same had been not been considered by the Ld AO while passing the Assessment order.

1.2 The Ld. CIT(A) erred in confirming addition based on 8.5% of the total investment made by the assessee in the property (Cost of Construction of Property in the appellant case) without appreciating the fact that Ld. AO has not made any enquiry as the appellant agreed to offer the notional income on the said properties or not.

1.3 The Ld. CIT(A) erred in not appreciating the fact that "purchase, sell land or building and give land and/or building and lease, sub-lease and to deal

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in properties" has also specified as main object of appellant in Main object clause of MOA of appellant company. If letting out of property is one of the main object of the appellant company and factually so carried out, then income is assessable under the head business income and not house property.

1.4 The Ld. CIT(A) erred in not appreciating the fact that appellant was holding flats not as flat owner but as businessman awaiting customers who is ready to buy at price which is on offer by the appellant as a businessman.

1.5 The Ld. CIT(A) erred in not appreciating the fact that income prescribed under section 14 are exclusive and income falling under one head cannot be assessed under another head. If onsale income is assessable under the head business incomethen stock in trade cannot be treated under the head income from house property merely because it is unsold.

2. Addition of Rs 1,86,85,749/-on account of Interest paid on delay in payment of TDS u/s 37 (1) of Income Tax Act, 1961.

2.1 The Ld. CIT(A) erred in confirming addition on account of Interest paid on delay in payment of TDS without appreciating the fact that the detailed explanation for no addition shall be made was furnished by appellant during the course of assessment proceeding.

2.2 The Ld. CIT(A) erred in appreciating the fact that Interest paid on delay in payment of TDS is compensatory in nature and not penal.

2.3 The Ld. CIT(A) erred in appreciating the facts that the TDS Amount represent the amount of Income Tax of the party which had been paid by the appellant and cannot be linked to the income tax of the appellant.

8. **Ground no.1** pertains to the addition on account of Deemed Income from House Property of unsold finished stock u/s 22 of the Act.The issue involved is exactly identical to the ground raised in appeal on ITA No.5603/MUM/2025(AY 2020-21)which has already been deliberated in para 6.1/6.2 above and the matter has been restored to the AO for statistical purposes. The order applies *mutatis mutandis* to the instant ground as well which is therefore, set aside for statistical purposes.

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9. **Ground no. 2.** relates to the addition of Rs 1,86,85,749/- on account of Interest paid on delay in payment of TDS u/s 37 (1) of the Act. The AO made the addition applying the provisions of Explanation to section 37 of the Act holding that the amount paid was penal in nature and thus, violation of the statute amounted to infraction of law. The ld.CIT(A) upheld the addition. It is submitted that the Ld. CIT(A) erred in appreciating the fact that Interest paid on delay in payment of TDS is compensatory in nature and not penal. The Ld. CIT(A) erred in appreciating the facts that the TDS Amount represent the amount of Income Tax of the party which had been paid by the appellant and cannot be linked to the income tax of the appellant.

10. Before us, ld. Counsel for the assessee submitted that the amount paid for delay in payment of TDS was not in the nature of penalty and it is not in violation of any law. The payment made towards late remittance of TDS was only compensatory in nature. The ld.DR on the other hand, relied on the orders of lower authorities.

11. We find that both the lower authorities failed to examine the nature of expenses in proper perspective. Such interest in our considered opinion cannot be treated as penal in nature and is rather compensatory as the TDS was not deposited in time for which the

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assessee was liable to compensate the exchequer by way of additional interest. Reliance could be placed on the decision of the Mumbai Bench in the case of Mangal Keshav Securities Ltd v. ACIT [46 ITR (trib) 458] in support of the above view. The assessee paid interest for delay in remitting of TDS and paid penalty for delay in filing return. On a plain reading of the Explanation to Section 37(1) of the Act, it is clear that any expenditure incurred by the assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and such expenditure is not allowed as deduction. The delay in payment of interest in late payment of TDS cannot be said to be an offence or incurred for the purpose which is prohibited by law. In the circumstances, the appellate order is, therefore, set aside with the direction to the AO delete the addition. The ground is therefore, allowed.

12. In the result, **appeal of the assessee is partly allowed.**

13. **<u>ITA No.6204/MUM/2025(Revenue)(AY 2020-21)</u>**

1. *Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT appeal was justified in restricting the addition on account of deemed rental income from house property to Rs.24,66,366/- as against Rs.31,48,710/-made by the Assessing Officer, without appreciating that as per section 22 of the Act, the annual value of property owned by the assessee, not used for the purposes of its business, is chargeable to tax irrespective of actual letting.*
2. *Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT appeal was justified in deleting the addition of Rs. 14,75,200/-*

made under section 43CA by wrongly applying tolerance limit provisions of section 50C retrospectively, ignoring that the said benefit was not applicable to AY 2020-21 and the Assessing Officer had correctly invoked section 43CA sub section 1 read with section 43CA subsection 3.

3. *Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT appeal was justified in allowing depreciation on goodwill of Rs.18,47,57,203/- by placing reliance on the decision of the Honorable Supreme Court in CIT v. Smifs Securities Ltd., without appreciating that in the present case the so called goodwill was merely a balancing entry arising on amalgamation of a non-operational company, and therefore did not represent any real intangible asset eligible for depreciation under section 32 of the Act.*
4. *Whether the facts and circumstances of the case and in law, that the learned CIT appeal has erred in deleting the addition made on account of Annual Letting Value of the property, without appreciating the fact that mere pendency of litigation OR the subsequent sale of the property does not absolve the assessee from tax liability as ownership of the property lies with the assessee.*
5. *Whether the facts and circumstances of the case and in law, that the learned CIT appeal is justified in allowing the benefit of section 115BAA to the assesee, even when as per sub clause 5 of 5 the section 115BAA, it was clearly brought out that form 10 IC should be filed on or before due date of filling of ITR, as prescribed under section 139 of the Act and not as per 139 subsection of the Act of which assessee has failed to follow.*

14. The **ground no.1 and 4** relate to the part deletion of the addition made on account of notional rental income. As we have already set aside the appellate order and restored the entire issue to be considered by the AO in the light of jurisdictional High Court decision in the case of CIT Vs. Tip top Typography(supra) as per para 6.1/6.2(supra) in ITA No.5603/Mum/2025, the ground is accordingly allowed for statistical purposes.

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15. The **ground no.2** concerns the addition of Rs.14,75,200/- on account of difference in the Stamp Duty value and agreement value u/s 43CA of the Act. It is claimed the ld.CIT(A) erred in deleting the addition on account of difference in the stamp duty value and agreement value. It was noticed by the appellate authority that the property had been sold during the year at a value less than a value adopted by the stamp duty valuation authority. The assessee was requested to justify as to why section 43CA should not be applied to it. The assessee contended that the difference between the agreement value and the value adopted by stamp duty valuation authority is less than 10%. The ld.CIT(A) observed that the only issue which remained was whether the tolerance limit claimed by the appellant with retrospective effect had to be given or not. Section 43CA of the Act prescribing the special provision for full value of consideration for transfer of assets other than capital assets in certain cases was brought into the statute w.e.f. 01.04.2014. This was a deeming provision and no tolerance limit was prescribed. By virtue of insertion of first proviso to section 43CA(1) w.e.f. 01.04.2019, a tolerance band of 5% was prescribed.

16. The ld.CIT(A) observed that find that Hon'ble ITAT Mumbai in the case of Maria Fernandes Cheryl vs. Income Tax Officer

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reported in 187 ITD 738, held that the tolerance limit of section 50C of the Act was retrospective. Though this decision had been rendered in the context of Section 50C of the Act for a capital asset, the same analogy could be drawn for Section 43CA also for asset held as 'stock in trade'.Following the same, the ld.CIT(A) held that the claim of the assessee had merit. Further, a tolerance limit of 5% was already prescribed for during the year and there is only meagre difference of 0.67%. Therefore, the addition was deleted.

17. Before us, the ld.DR has claimed that the revised tolerance limit could not be applied retrospectively. However, he did not bring to our knowledge any contrary decision as relied upon by the ld.CIT (A) in the case of Maria Fernandes Cheryl vs. Income Tax Officer(supra).

18. The Ld.AR further argued that the issue is squarely covered by the order of the co-ordinate bench of ITAT, Mumbai Bench in several cases.

19. On careful consideration,we find no infirmity in the appellate order. It may be stated that similar addition was deleted by the coordinate bench of ITAT in the case of in the case of Balkrishna Venkappa Bhandary v. DICT (2024) 169 taxmann.com 76 (Mum. Trib.).

The point of consideration before us that the application of the section in impugned assessment year whether it is treated as clarificatory/curative in nature having retrospective application or otherwise qua the provisions of section 43CA or not. The issue is squarely covered by the order of the co- ordinate bench of ITAT-Mumbai in the case of Glory Ship management Private Limited vs CIT (Appeals) ITA No.3149/MUM/2023 and also the decision of the co-ordinate bench of ITAT-Kolkata in the case of Sandeep Kumar Poddar v. ITO, Wared-44(1), Kolkata ITA No.484/Kol/2022 dated 13/03/2023. The said amendment was also held to be applicable retrospectively by various decisions of coordinate bench of this Tribunal ie.Maria Fernandes Cheryl vs. Income Tax Officer- Mumbai ITAT,Aaeshka Riddhi Realty, Mumbai vs. CIT(A)- NFAC - ITO - 19(1)- Mumbai ITAT and Chandra Prakash Jhunjhunwala vs. DCIT ITA- Kolkata ITAT,SulochanaSaijan Modi vs. ITO, Mumbi- Mumbai ITAT ii. Gurukrupa Developers D N Nagar vs. Pr. CIT- 32, Mumbai- Mumbai ITAT,Ms. Shilpa Gautam vs. The Income Tax Officer- Mumbai ITAT" and in ITA Nos. 5352 & 5218/Mum/2024 NRB Developers.

19.1 Respectfully following the decisions referred above, we hold that the provision of section 43CA of the Act has retrospective effect and

is applicable to the impugned assessment year. Accordingly, we uphold the view adopted by the ld. CIT(A) in deleting the addition is upheld. Consequently, the ground of appealis **dismissed.**

20. The **ground no.3** relates to the deletion of addition of Rs.18,47,57,203/- on account of disallowance of depreciation amount claimed on Goodwill u/s 32 of the Act. The AO observed that Precious Trading & Investments Limited got merged into the assessee company with effect from 1 April 2019 vide order of National Company Law Tribunal, Mumbai Bench (NCLT) dated 22 March, 2021. As per the Scheme of merger, the assessee had to give Rs. 7,38,96,930 (10% redeemable, cumulative, non-convertible) preference shares to the shareholders of the amalgamating company amounting to Rs.73,89,69,300/. The assets of transferor company being less than the liabilities, net balancing amount of Net assets and payment to shareholders was treated as Goodwill and depreciation was claimed on the same. The AO disallowed the depreciation on said Goodwill stating that there was no actual business being run by the company and considering the same as selfgenerated Goodwill. The AO also stated that in the judgement of the Hon'ble Supreme Court of India in the case of Smiff's Securities, the Hon'ble court was only deciding on whether

goodwill is a depreciable asset. Whether the balancing entry is Goodwill was never presented before Hon'ble Court to adjudicate.

21. The ld.CIT(A) observed that the issue involved in the present appeal pertains to the claim of depreciation by the resulting company upon generation of intangible asset upon amalgamation. The facts in the instant case were that the assessee underwent an amalgamation, as per the directions of the NCLT, vide which the amalgamation was effected in AY 2020-21 i.e. the current assessment year. The amalgamation was achieved by way of a swap ratio decided for the shareholders of the amalgamated company. On the basis of the valuation done by the registered valuer the total shares issued. Excess Consideration of Rs.73.90 crores have been recorded as Goodwill in the books of the resultant company. The Goodwill was brought into the books of the appellant company in the AY 2020-21.

21.1The ld.CIT(A) while deliberating on the issue after taking consideration of the submissions made by the assessee noted that issues arises for adjudication in the present appeal:- a. Can excess payment on merger be treated as goodwill even transferor company do not have any business during the year. b. Is net balancing amount of Net assets and payment to shareholders treated as Goodwill. With respect to the first

issue, the assessee submitted that the scheme of amalgamation was approved by the NCLT vide its order dated 22.03.2021 wherein all the assets and liabilities of the companies were considered by the NCLT. It submitted copy of NCLT order and Scheme. It was seen that M/s. Precious Trading & Investments Limited (Transferor company) was listed on the Bombay Stock Exchange (BSE) in which public was substantially interested. The assessee M/s. Sheth Developers Private Limited (Transferee Company) was holding 75% of Share Capital in transferor company and balance 25% was held by the public shareholders. From the Order of NCLT, it was evident that transferor company was holding 17.02% shares of Sheth Developers and Realtors (P) Ltd ('SDRIL') having substantial valuation because SDRIL was having Viviana Mall situated at Thane. Further, the merger of the Transferor Company with the Transferee Company in accordance with Scheme and the relevant provisions of the Act, read with the Rules and as per the Scheme of merger and Order of NCLT said merger would be beneficial in following manner: facilities such as manpower, office space and other infrastructure could be better utilized by the Transferee Company and duplication of facilities could be avoided resulting in optimum use of facilities to the advantage of the Transferee Companyi.e.the unutilised assets of the Transferor Company could be

put to better use by the Transferee Company; the Transferee Company able to ensure better turnover and profits and would ultimately contribute substantially to the future business expansion and will be able to exploit the market to the fullest possible extent; the merger reduced compliance costs, i.e., listing fees, audit fees, for the Transferor Company; significant reduction in the legal, regulatory reporting and compliances; balance sheet of the Transferee Company become stronger; simplification of corporate structure by reducing the number of legal entities and reorganizing the legal entities in the group structure; the merger provided significant impetus to the growth of the Transferee Company;to increase the efficiency of combined business by pooling of resources and their optimum utilisation, thereby availing synergies from combined resources;to consolidate business for cost control; and the Scheme created enhanced value for shareholders and allow a focused growth strategy which would be in the best interest of all the stakeholders. He observed further that all these factors led to synergies of operations and a stronger and wider capital and financial base for future growth/expansion of the Transferee Company.

21.2. Apart from the above benefits public shareholders holding 25% share capital of the transferor company were allotted the 7,38,969

10% redeemable, cumulative, nonconvertible preference shares of Rs. 100 each totalling to Rs.73,89,69,300/- of the amalgamating company. The assessee had claimed that the above benefits are nothing but goodwill of the transferor company which has been created at the time of merger on payment to public shareholders of transferor company. Excess payment over net assets is generally recognized as goodwill, and this treatment has also been affirmed in various NCLT (National Company Law Tribunal) orders, especially in cases involving mergers and amalgamations under Sections 230-232 of the Companies Act, 2013. He opined that assesseehad rightly claimed excess payments in the form of Benefits as goodwill in its books of account.

21.3 With respect to the second issue, the appellant submitted before the appellate authority that the AO failed to appreciate that the difference between the cost of an asset and the amount paid constituted Goodwill and that the assessee-Company in the process of amalgamation had acquired a capital right in the form of goodwill because of which the market worth of the assessee-Company stood increased. The finding of Hon'ble Supreme Court in the case of Smiff's Securities were:

> "6. One more aspect needs to be highlighted. In the present case, the Assessing Officer, as a matter of fact, came to the conclusion that no amount was actually paid on account of goodwill. This is a factual finding. The

> Commissioner of Income Tax (Appeals) ['CIT(A)', for short] has come to the conclusion that the authorised representatives had filed copies of the Orders of the High Court ordering amalgamation of the above two Companies; that the assets and liabilities of M/s. YSN Shares and Securities Private Limited were transferred to the assessee for a consideration; that the difference between the cost of an asset and the amount paid constituted goodwill and that the assessee-Company in the process of amalgamation had acquired a capital right in the form of goodwill because of which the market worth of the assessee-Company stood increased.This finding has also been upheld by Income Tax Appellate Tribunal ['ITAT', for short]. We see no reason to interfere with the factual finding."

21.4 The ld.CIT(A) further argued that the dispute has been put to rest by the **Hon'ble Supreme Court in the case of CIT v Smifs Securities Ltd. (2012) 348 ITR 302 (SC)** wherein it was held that Goodwill arising at the time of merger is an intangible asset and is entitled to be depreciated u/s 32 of the Act. The facts of the case were that YSN Shares and Securities Pvt Ltd (YSN) amalgamated with the assessee company in accordance with a scheme of amalgamation sanctioned by both the Bombay and Calcutta High Court. The excess consideration paid over the net assets acquired was treated as goodwill arising on amalgamation and depreciation was claimed by the assessee. The AO denied the depreciation holding that goodwill is not an asset by referring to explanation 3 to section 32. The question before the Apex Court was whether goodwill is an asset under section 32 and whether depreciation is allowable or not. The decision of the Apex Court is squarely applicable in current case also. Respectfully following the Apex

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Court decision in the case of Smif Securities and facts of this case, the addition of Rs.18,47,57,203/- depreciation on account of goodwill made by the AO was deleted by the ld.CIT(A).

22. Before us, the ld.CIT(DR) relied on the assessment order claiming that no depreciation could be allowed on notional basis as no Goodwill was acquired by way of merger.

23. We have carefully considered all the relevant facts of the case and find no infirmity in the conclusion drawn by the appellate authority in deleting the addition made. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that the Assessing Officer has totally ignored the decision of Hon'ble Apex Court/NCLT which categorically approved the scheme of amalgamation/scheme of arrangement at which point the Revenue/A.O. has not objected the valuation report regarding the difference between the net acquisition of assets and total consideration. The same was recorded as goodwill by the assessee at the said point of time through valuation report. Looking into the decision of Hon'ble Apex Court in case of CIT vs. Smifs Securities Ltd.(supra) in case of amalgamation if consideration paid by amalgamated company to the amalgamating company is more than the net assets acquired by it, then the differential

amount shall be treated as Goodwill and the amalgamated company shall be eligible for claim of depreciation on such goodwill. It is undisputed that Thus, following the decision of Hon'ble Apex Court supra the ld.CIT(A) has rightly allowed the depreciation on goodwill.

23.1 Moreover, the Hon'ble Bombay High in CIT v. Aditya Birla Nuvo Ltd. (2017) 246 Taxmann 202 (Bom), concluded that the assessee was rightly entitled to such depreciation on similar facts. The facts are undisputed, and the legal position is settled. The ratio declares, in clear that Goodwill acquired on amalgamation constitutes an intangible Section 32(1)(ii). This decision has reaffirmed the position, holding that excess consideration over net assets acquired on amalgamation, being the reflection of commercial reputation and advantage, assumes the character of Goodwill.As the issue in dispute involved in this case is squarely covered in favour of the assessee by the binding precedent of the Hon'ble Bombay High Court in the case of Aditya Birla Novu (supra), we do not find any infirmity in the appellate order and uphold the same and grounds of appeal of the Revenue are accordingly dismissed.

24. In **ground no.5**, it is claimed that the ld. CIT(A)was not justified in allowing the benefit of section 115BAA to the assesee, even

when as per sub clause 5 of 5 the section 115BAA, it was clearly brought out that from 10 IC should be filed on or before due date of filling of ITR, as prescribed under section 139 of the Act and not as per 139 subsection of the Act of which assessee has failed to follow.

25. The assessee challenged the action of the AO in calculating the tax liability as per Book profit u/s 115JB.It was contended before the ld.CIT(A) that the assessee made such claim opting for new Tax regime u/s 115BAA of the Act vide return filed u/s 139(4) of the Act.Theld.CIT(A) having considered the decision of the ITAT,Mumbai bench in the case of Suminter India Organics P.Ltd 140 taxmann.com 591 allowed the claim of the assessee.

26. We have carefully considered the above acts and find that the issue was not raised before the AO.However,theld.CIT(A) allowed the plea of the assessee based on the coordinate bench decision referred above.We have heard both the parties and perused the records. We find that furnishing of Form 10IC beyond the stipulated date can be considered as procedural lapse, since assessee has filed the same. In our considered view, the authorities below have erred in holding that since Form 10IC has been filed after due date the assessee is not entitled to benefit under the Act. Therefore, in the interest of justice, the issues in

dispute are remitted back to the file of the AO with the directions to decide the same afresh, after giving adequate opportunity of being heard to the assessee. Therefore, for the sake of completeness of record and to ensure that the requisite formality under Rule 21AE is complied with and in the light of the decision of the jurisdictional ITAT(supra), we deem it appropriate to restore the matter to the file of the Assessing Officer who shall verify the relevant factual matrix and ensure that all other conditions for availing the benefit of concessional taxation under section 115BAA are duly satisfied. Upon such verification, the Assessing Officer shall allow the benefit of concessional tax rate of under section 115BAA of the Act for the assessment year under consideration, in accordance with law.In the result, the ground of appeal is allowed for statistical purposes.

27. In the result, the appeal of the **Revenue is partly allowed.**

28. **ITA No. 5605/MUM/2025(A.Y. 2018-19)**

Sheth Corp Private Limited Ground and 3rd Floor, Prius Infinity, Paranjape B Scheme, Subhash Road, Ville Parle(E), Mumbai – 400 057, Maharashtra	v/s. बनाम	Assistant Commissioner of Income Tax, Central Circle – 4(2), Kautilya Bhavan, 4th Floor, BKC, Mumbai – 400051, Maharashtra

स्थायी लेखा सं./जीआइआर सं./	PAN/GIR No: AAOCS8862R	
Appellant/अपीलार्थी	..	**Respondent/प्रतिवादी**

1. Addition of Rs.1,42,26,212/- on account of Deemed Income from House Property of unsold finished stock u/s 22 of Income Tax Act, 1961

1.1 The Ld. CIT (A) erred in confirming addition on account of Deemed Income from House Property of unsold units lying in stock u/s 22 of the Income Tax Act, 1961 without appreciating the fact that the detailed explanation was furnished by appellant during the course of assessment proceeding and the same had been not be considered by the Ld.AO while passing the Assessment Order.

1.2 The Ld. CIT(A) erred in not accepting the facts that the unsold units lying in stock are stock in trade and not capital assets and hence question of Deemed Rental Income chargeable to tax under the head "Income from House Property" should not arise.

1.3 The Ld. CIT(A) erred in simply making the addition based on 8.5% of the total investment made by the assessee in the property (Cost of Construction of Property in the appellant case) without appreciating the fact that Ld. AO has not made any enquiry as the appellant agreed to offer the notional income on the said properties or not.

1.4 The Ld. CIT(A) erred in not appreciating the fact that "purchase, take on lease or in exchange otherwise acquire any estates, lands, buildings, easements or other rights and interests in immovable property, to sell, let on lease, mortgage, hypothecate or otherwise dispose or grant rights over any immovable property belonging to the Company" has also specified as one of the objects incidental or ancillary to the attainment of Main object clause of MOA of appellant company. If letting out of property is one of the object of the appellant company and factually so carried out, then income is assessable under the head business income and not house property.

1.5 The Ld. CIT(A) erred in not appreciating the fact that appellant was holding flats not as flat owner but as businessman awaiting customers who is ready to buy at price which is on offer by the appellant as a businessman.

1.6 The Ld. CIT(A) erred in not appreciating the fact that income prescribed under section 14 are exclusive and income falling under one head cannot be assessed under another head. If on sale income is assessable under the head business income then stock in trade cannot be treated under the head income from house property merely because it is unsold.

1.7 The Ld. CIT(A) erred in accepting the facts that the basic criterion to charge income to tax is income must have been earned or accrued to the appellant in real and not notional.

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29. Facts in brief as culled out from the impugned order reveals that the AO made an addition of Rs.1,42,26,212/- on account of Deemed Income from House Property of unsold finished stock u/s 22 of the Act. The ld. CIT (A) erred in confirming addition on account of Deemed Income from House Property of unsold units lying in stock u/s 22 of the Act without appreciating the fact that the detailed explanation was furnished by the assessee during the course of assessment proceeding and the same had been not be considered by the AO while passing the assessment order. The ld. CIT(A) erred in not accepting the facts that the unsold units lying in stock are stock in trade and not capital assets and hence question of Deemed Rental Income chargeable to tax under the head "Income from House Property" should not arise.

30. We find that exactly identical issue has already been adjudicated in the ITA No.5603/Mum/2025(supra) in paras 6.1/6.2 above and the matter has been restored to the file of AO, allowing the appeal for statistical purposes. The above decision applies *mutatis mutandis* to the above mentioned appeal. Accordingly, we set aside the orders of the lower authorities and allow the appeal of the assessee for statistical purposes.

31. In the result, the appeal is **allowed for statistical purposes.**

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32. In the final summing up, **ITA Nos. 5603/5604/5605 and 6204/Mum/2025** are **partly allowed.**

Order pronounced in the open court on **24/08/2026**.

Sd/-	**Sd/-**
[Justice (Retd.) C.V.BHADANG]	**[PRABHASH SHANKAR]**
PRESIDENT	**ACCOUNTANT MEMBER**

Place: मुंबई/Mumbai
दिनांक /Date 24.08.2026
Lubhna Shaikh / Steno

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench, Mumbai.