

**IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "B" BENCH**

**BEFORE: SMT. ANNAPURNA GUPTA, ACCOUNTANT MEMBER
AND SHRI T.R. SENTHIL KUMAR, JUDICIAL MEMBER**

**ITA No. 973/Ahd/2019
(Assessment Year: 2014-15)**

Deputy Commissioner of Income-tax Central Circle-3, 603, 6 th Floor, Aaykar Bhavan, Race Course Circle, Vadodara - 390007	V/S	M/s. Aarya Developers Twin Tower, Near FGI, Opp. Vecenza Highland, Sevasi, Gotri, Vadodara
PAN NO. : AARFA5865G		
(Appellant)		(Respondent)

**Appellant by : Shri Sudhendu Das, CIT. DR
Respondent by : Shri S. N. Soparkar, Sr. Advocate
& Shri Parin S Shah, A.R.**

(आदेश)/ORDER

Date of hearing : 22 -11-2023
Date of Pronouncement : 12 -01-2024

PER T.R. SENTHIL KUMAR, JUDICIAL MEMBER:

This appeal is filed by the Revenue as against the common appellate order dated 20.03.2019 passed by the Ld. Commissioner of Income Tax (Appeals)-12, Ahmedabad (in short 'CIT(A)') arising out of the assessment order passed under Section 143(3) of the Income Tax Act, 1961, (hereinafter referred to as 'the Act') relevant to Assessment Year 2014-15.

2. Brief facts of the case is the assessee is a partnership firm engaged in the business of land development work and construction

work. For the Assessment Year 2014-15, the assessee filed its Return of Income on 31.10.2014 declaring total income of Rs.8,96,600/-. During F.Y. 2011-12, the assessee firm commenced a project, namely Twin Towers for construction of 42 residential flats and 6 penthouses at Sewasi, Vadodara. The assessee firm follows mercantile system of accounting and offers construction income based on "percentage of completion method" at the end of each year. There was a survey action under Section 133A of the Act in the business premise of the assessee on 30.08.2013, during which, certain documents were found and impounded. In the survey proceeding, certain booking slips relating to Mr. Sunil Sarangpani one of the buyer of the flat was found and seized, in which cost of the flat was mentioned at Rs.43,75,000/-. The Ld. AO issued summons to the various purchasers including Sunil Sarangpani and recorded the statements on oath under Section 131(1) of the Act. All the purchasers of the flats confirmed the booking of flats, price, payment details and other details before the Ld. AO. Thereafter project site was examined by the Inspector attached with the Ld. AO on 04.11.2015. On verification of the said flats and the prevailing prices at which the project is being sold was found to be Rs.2500/- per sq.ft. Thus, the Inspector reported to the A.O. that the flats were sold at Rs.50,00,000/- which is inclusive of documentation and maintenance charges. Whereas the assessee submitted that the flats were sold at the prices ranging from Rs.18 Lakhs to Rs.43.75 Lakhs, depends upon the quality and facilities as required by the buyers. Similarly, penthouses were sold for Rs.35 Lakhs to Rs.50 Lakhs. The above explanation was not accepted by the Ld. AO and relying upon his Inspector report, determined each flat cost at Rs.42 Lakhs,

thereby there was difference in consideration between Rs.14 to 24 Lakhs which amounting to Rs.4.51 Crores which was treated as unaccounted profit from the construction business and added to the total income of the assessee. Similarly, in the case of Duplex Penthouses based upon the rough plan sketch found during survey action, determined the cost of the Duplex Penthouses at Rs.78,82,500/- as against the claim of Rs.50 Lakhs by the assessee and the difference being on money receipt of Rs.1,46,12,500/- was added as the income of the assessee.

3. Aggrieved against the above additions, the assessee filed an appeal before the Ld. Commissioner of Income Tax (Appeal). The Ld. CIT(A) after detailed discussion on facts of the case deleted the addition observing as follows:

“...5.6 I find enough merit and adequate strength in the submission of the appellant It is evident that the AO has neither brought out any defect to reject the books of accounts nor brought out any material to make a case of suppression of consideration (or receipt of on-money) and earning of unaccounted income by the appellant. This is so in spite of the fact that a survey was conducted on the appellant and various customers/members were examined u/s 131 of the Act. The AO has not been able even reject the books of accounts of the appellant. The cost of construction has not been disputed by the AO. If the Assessing Officer had any basis to suspect that consideration in some of the flats was under reported by the appellant and below the market value/jantri rate, he should have referred to the Department's Valuation Officer for valuation of fair market value of the units in the Project. Though the DVO's report in these facts and circumstances (specially without rejecting the books of accounts of the appellant) could not be a good and legally tenable basis for such addition but at least the DVO's report has more standing and credibility whereas the Inspector's report has no real worth. The report of the Inspector does not have any sanction of the Income-tax Act and acceptance of the Court that it can be sole basis for any adverse inference and for making any addition to the total income.

8.1 From the assessment order and the appellant's submission it is seen that the facts of the case in relation to the flats are same as those for the A.Y. 2013-14, that no incriminating evidence has been brought on record by the AO in spite of the survey conducted and some of the customers examined on the oath and that the addition is based on only Inspector's report. Following the decision made before for A.Y. 2013-14,

the addition made by the AO for A.Y. 2014-15 also cannot be upheld. Though it is not material, it is also noted that flat No.A-302 against which an addition of Rs.14,00,000/- (Rs.42,00,000/- (-) Rs.28,00,000/-) was sold in F.Y. 2014-15 related A.Y. 2015-16 and therefore it does not pertain to A.Y. 2014-15. The AO is directed to delete the addition of Rs.4,51,00,000/-. The ground succeeds.

3.1. Regarding the addition on account of sale of pent houses of Rs.1,46,12,500/-, the assessee made detailed submission as follows:

D. Price at which a penthouse is sold-

The consideration at which a penthouse is sold to a member depended upon the type of penthouse, the construction work carried out on it and the quality of material used for construction, etc. Normally when a flat is constructed, the builder charges the price for the flat depending upon the facilities provided by him and the material used for the basic interior work apart from construction.

Construction includes building the apartment with walls, rooms and bathrooms, plumbing, electrical work, balcony/ terrace, etc. Basic interior work includes bathroom tiles, floor tiles, sanitary fittings, pop ceiling, kitchen platform, sink, utility area tiles, terrace flooring, etc. These are the basic facilities provided by the builder when he sells a flat.

Basic construction and common amenities remain same for all buyers but type of interiors varies from person to person depending upon factors such as choice, taste, budget etc. Therefore the final price of every flat/ pent house differs from case to case.

The basic price includes sale price of land, sales price of basic construction work and sales price of development expenses of the flat. Further, in case of five penthouses, due to bigger area and standard quality fittings as explained in detail, the flat prices was Rs.49,00,000/- or Rs.50,00,000/- as the case may be.

The detailed list of building materials agreed to be fitted as per the choice of different customers in their respective flats is submitted herewith for your ready reference- Refer Annexure -9-

No customer has confirmed that he/she has given any unaccounted money and therefore there is no suppression in the sales price of the flat.

Price depends largely upon what is being sold, which in the present case ranges from a basic constructed flat, a flat with low quality fittings to a flat with medium or high quality fittings as the case may be.

Price is usually arrived at by considering the quality of the material used and this is the scientific and correct method of arriving at the price. Price also depends upon payment terms, for example, if a customer is willing to pay all the money at once, the builder may give some discount if he wishes. Price also depends on market scenario, boom or recession, geographical location, which in the present case is Sevasi, which was a backward area and away from main city of Vadodara. Price also depends on relationship of seller and buyer and terms of negotiation. Thus, there are many factors that influence the price of a product in the market.

Thus it is apparently clear that there is no underlying rule that the flats/ penthouses in a particular building should be sold for a uniform price. The Ld. AO, without any fact-finding and without a detailed appreciation of the facts, and purely on the basis of assumptions, considered the mean price of all pent houses at Rs 78,82,500/- and extrapolated all the pent houses at the same value and made a bogus addition in the hands of the appellant firm.

E. Confirmations from the members in respect of which addition has been made -

We are enclosing herewith copy of confirmations, PAN Card/ Aadhar Card, copy of basic quotation agreed with member at the time of booking, break up of construction cost, counter signed by 5 members in respect of whom the addition has been made in the A.Y.2014-15. Refer Annexure - 10-

In the said year, the Ld. AO added the difference between 78,82,500/- as assumed by him as price for all pent houses and the actual executed price in case of 5 members. As already explained above, actual pent houses booked in the said year were only 3 instead of 5. Therefore, the addition in respect of 5 penthouses is itself erroneous.

Further, a perusal of above confirmations clearly reveals that the members have themselves confirmed the actual consideration for the said pent houses. There absolutely nothing to prove that the AO's assumptions are true in any way. The AOs findings are purely based on conjecture and surmises and without any fact finding.

There is nothing on record or even found during the course of survey, which leads to the belief that there was some unaccounted money accepted by the appellant firm. In absence of any proof the addition made under this ground amounting to Rs.1,46,12,500/- deserves to be deleted in full.

3.2. After considering the above detailed submissions of the assessee, Ld. CIT(A) deleted the addition by observing as follows:

"...9.2 On perusal of the assessment order, I find that the notings of Page 3 of Annexure A1 does mention "SBA 3152 sq. feet = 7882500" and that 3152 sq.ft. is also super built-up area of the penthouses. But also other figures including 81,00,000 encircled below 7882500. However, it appears that neither during the survey nor during the assessment proceedings were statements recorded to identify the person in whose handwriting those figures were mentioned and what were the significance of those figures. The onus u/s 133A or u/s 292C could be discharged by the appellant only if the survey teams and the AO had posed the appropriate questions to the appellant, otherwise the appellant has no opportunity to rebut the presumptions and discharge its onus. Page 3 of Annexure A1 is not specific also and cannot be construed for suppression of sale consideration. It does not carry any name, date and unit number. The appellant has submitted confirmation of accounts from various buyers. Those may be said to be self-serving but they cannot be ignored if there is no any cogent incriminating evidence brought on record. Also during the survey no evidence was found as to suppression of sale consideration. There is no mention that any of the customer/member admitted to have paid any amount over and above the amount recorded in the books of the appellant. For the A.Y. 2013-14, it has been held that the report of the Inspector cannot at all be relied upon for the purpose of drawing adverse inference and making addition on account of suppression of sale consideration. A stray loose paper like Page 3 of Annexure A1 without specific finding and linking with the appellant cannot be basis for making addition on account of suppression of sale consideration.

9.3 Under the facts and circumstances, the addition of Rs. 1,46,12,500/- made by the AO on account of unaccounted profit from the 5 penthouses during the A.Y. 2014-15 cannot be sustained. The AO is directed to delete the addition. The ground succeeds."

4. Aggrieved against the appellate order, the Revenue is in appeal before us raising the following grounds of appeal:

"1. On the facts and in the circumstances of the case and in law, the id. CIT(A) erred in deleting the addition of Rs. 4,51,00,000/ on account of Unaccounted profit from business without appreciating that the above addition was made by the Assessing officer on the basis of impounded material, statement given by certain purchasers and field enquiry.

2. *On the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in deleting the addition of Rs. 1,46,12,500/- on account of Unaccounted profit from business without appreciating that the above addition was made by the Assessing officer on the basis of impounded material and field enquiry*

3. *It is therefore, prayed that the order of the Ld. CIT(A) 12, Ahmedabad may be set aside and that of the AD may be restored to the above extent.*

4. *The appellant craves leave to add, alter, amend and/or withdraw and/or ground(s) of appeal either before or during the course of hearing of the appeal."*

5. Heard rival submissions at length and perused the materials available on record including the Paper Book and Case laws filed by the assessee. It is an undisputed fact, there was a survey action in the business premises of the assessee during which certain piece of loose paper found and impounded. Pursuant to the survey, the purchasers of the flats were summoned u/s. 133(1) and their statements were recorded. None of the purchasers having admitted to pay extra money or on-money, other than agreed prices entered with the developer/assessee. Having not satisfied with the statements recorded, the Assessing Officer sent his Inspector to the Project namely Twin Towers. On his enquiry, the Inspector found the cost of the flat being Rs.2500/- per sq.ft., pursuant to the above report of the Inspector, the Assessing Officer held that the sale of flats at Rs.50 Lakhs and determined the Rs. 4.51 crores as unexplained income. Similarly in the case of Duplex Pent Houses determined the value at Rs.78,82,500/- each and difference being on-money receipt of Rs.1,46,12,500/- was added as the income of the assessee.

5.1. It is seen from record, there is no any other incriminating document except the piece of loose paper found during the course of

survey. In order to determine the value of the flat and to determine the Fair Market Value, the A.O. ought to have referred the matter to the prescribed authority namely District Valuation Officer u/s. 55A of the Act. But the A.O. has merely relied upon the report given by his Inspector and determined the fair market value of the flats and pent houses, which is against the provisions of the Act. The Inspector attached to the Ld. A.O. is not an expert to determine the fair value of the flats and Duplex Pent houses. Further when the A.O. summoned the various purchasers of the flats and recorded their statements u/s. 131 of the Act, None of the purchasers having said to have paid on-money to the developer/assessee, except to having agreed the prices entered with the developer. The Assessing Officer do not find any infirmity in the books of account maintained by the assessee, thereby he has not rejected the books of account. Thus in the absence of any incriminating evidence found during the course of survey, the additions made by the Ld. A.O. based only on Inspector's report is not sustainable in law. Therefore the addition made by the Assessing Officer on this count is liable to be rejected and we do not find any infirmity in the order passed by the Ld. CIT(A). Thus Ground No. 1 raised by the Revenue is liable to be rejected.

6. Similarly addition of Rs.1.46 crores on account of sale of Duplex Pent Houses merely based on Inspector's report. During the course of survey, there is no unaccounted money found and seized by the Authorities in the business premises of the assessee. The assessee submitted confirmation of accounts from various buyers and the Ld. A.O. could not find any defect in those records. However based on

loose paper information and without corresponding evidences, the entire addition is made which is not permissible in law.

6.1. This view of ours is supported by the Jurisdictional High Court in the case of CIT Vs. Amar Corporation in Tax Appeal No. 26 of 2012 dated 18-07-2012 wherein it is held as follows:

“....A search was carried out under section 132 of the Act on 18.06.2003 in which certain loose papers and documents were found and were seized. The statement of Vimal Chimanbhai Shah, partner of the assessee firm, and that of one Chimanbhai Shah, whose proprietary concern had carried out the construction work, came to be recorded. In the initial statement, undisclosed income was admitted, but that was retracted in statement under section 132(4) of the Act by way of affidavit. 3.1 From the loose papers being page No.19, page No.80 and page No.65 found during the search, the Assessing Officer came to a conclusion that the assessee had received On-money at the rate of Rs.180/- per sq. ft. On that basis, he worked out the ‘On-money’ additions for all the Assessment Years 1988-99 to 2004-05, the amounts of Rs.96,50,613/-, Rs.10,54,695/-, Rs.11,95,195/-, Rs.1,58,17,291/-, Rs.41,23,447/- and Rs.1,03,18,945/- respectively. In respect of the year under consideration i.e. 2005-06, in course of assessment proceedings under section 143(3), the Assessing Officer made addition of Rs.1,52,53,128/-.

.....

5. It could be seen from the facts that the housing projects were developed during the years prior to Assessment Year 2004-05. The search was conducted on 18.06.2003 wherein the loose papers or the documents were seized. The material seized in form of loose paper was qua one flat No. A/204 only in respect of which taking of ‘on-money’ could be alleged. It was on the basis of such loose papers, the addition on On-money account was sought to be made. That material could not have been used for the subsequent years for making addition on the same count. The addition in the Assessment Year 2004-05 was not sustained by the Tribunal in the appeal before it on the ground that the Assessing Officer ought to have confined himself in respect of sale transaction of one particular flat and he could not have on that basis calculated the addition for all flats. Accordingly, in respect of previous Assessment Year 2004-05, it was held by the Tribunal that the addition for On-money, made in the said year was not proper inasmuch as such addition could have been made only in respect of the flat in respect of

which the evidence of On-money was found at the time of search. The said decision dated 31.03.2011 of ITAT, Ahmedabad was relied on, on behalf of the assessee.

5.1 Even as for the year 2004-05 also, the addition on account of On money was held to be on the basis of guess work and extrapolation, again in the next year 2005-06 being year under consideration the addition of Rs.1,52,53,128/- was made repeating the same story. When in respect of previous Assessment Year 2004-05 also the Tribunal had dismissed the Department's appeal on the ground that the addition in that year also was based on extrapolation, it emerged beyond pale of doubt that for the addition made for the year 2005-06 there was no evidence whatsoever and the same was presumptive in nature.

6. In above view, the findings recorded by the Tribunal were proper and legal flowing logically from the facts on record. The Tribunal has not committed any error in passing the impugned order. The appeal is devoid of merit, and raises no substantial question of law required to be considered.”

6.2. Similarly the Jurisdictional High Court in the case of CIT Vs. Maulikkumar K. Shah reported in 307 ITR 137 held as follows:

“The assessee has booked 35 shops as on the date of search, on which the Department has charged "on-money" in the asst. yr. 1995-96. In his statement recorded under s. 132(4), S denied to have charged any "on-money". The notings on the seized diary found from the premises of S is the only material on the basis of which the AO has made the impugned additions. The AO has not brought any corroborative material on record to prove that such sales were made and "on-money" was received by the assessee outside the books of account. The AO has not examined any purchaser to whom the sales of shops were effected. Onus heavily lay on the Revenue to prove with corroborative evidence that the entries in the seized diary actually represent the sales made by the assessee. Such onus has not been discharged by the Revenue. Mere entries in the seized material are not sufficient to prove that the assessee has indulged in such a transaction. It is well-settled that if certain documents were found from the possession of the assessee during the course of search operation, burden lies on the assessee to explain the nature of transactions recorded in the said seized material. The assessee is duty-bound to explain discrepancy, if found, on the basis of seized materials vis-a-vis books of account. But when the assessee furnishes explanation which sought to be supported by evidence, the burden is shifted to the Revenue to establish that the explanation of the assessee is false. Right from the beginning the assessee is stating that

the notings appearing in the diary are rough estimates and estimation was made for submission to the bank for obtaining the loan from bank. The inference of the AO that the assessee has received "on-money", i.e., the differential amount as shown in the seized diary and books of account, is merely based on suspicion and surmises and there is no material whatsoever to support the conclusion of the AO that the assessee has in fact received any "on-money". The AO has no evidence with him to support his conclusion. The Court also take juridical note of the fact that the assessee has worked out floor-wise rate of the shop on the seized paper but it is not possible that every shop can be sold at that price and while selling the shops many purchasers may pay advance money. Therefore, rates of all the shops at the time of actual sales cannot be the same as estimated in the seized paper. The additions as made by the AO being based on mere presumptions and assumptions and without any corroborative evidence, cannot be sustained and the said additions have rightly been deleted by the CIT(A) in all the years under consideration. The amount mentioned along with rates per square feet of different floors on the loose papers is in respect of an estimate asking for the loan from the bank. No other evidence has been shown to justify that these amounts were received from purchasers. The CIT(A) and the Tribunal both found that on the basis of these loose papers, no addition is justified. No interference is, therefore, called for in the order of the Tribunal.”

6.3. It is appropriate to place on record the Hon'ble Supreme Court decisions in the case of Omar Salav Mohamed Sait reported in (1989) [37 ITR 151] (SC) where it is held that no addition can be made on the basis of surmises, suspicion and conjectures. In the case of CIT(Central), Kolkata vs. Daulat Ram Rawatmull reported in [87 ITR 349], the Hon'ble Apex Court held that, the onus to prove that the apparent is not the real is on the party who claims it to be so. The burden of proving a transaction to be bogus has to be strictly discharged by adducing legal evidences, which would directly prove the fact of bogusness or establish circumstance unerringly and reasonably raising an interference to that effect. The Hon'ble Supreme Court in the case of Umacharan Shah & Bros. Vs. CIT [37 ITR 271] held that suspicion however strong, cannot take the place of evidence.

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6.4. Respectfully following the above judgments, we have no hesitation in deleting the additions made by the Assessing Officer on account of on-money received by the assessee on the sale of duplex pent house. Thus the Ground No. 2 raised by the Revenue is devoid of merits and the same is liable to be dismissed.

7. In the result, the appeal filed by the Revenue is hereby dismissed.

Order pronounced in Open Court on 12 -01- 2024

Sd/-

(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER True Copy
Ahmedabad: Dated 12/01/2024

Sd/-

(T.R. SENTHIL KUMAR)
JUDICIAL MEMBER

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.
3. The CIT (Appeals) –
4. The CIT concerned.
5. The DR., ITAT, Ahmedabad.
6. Guard File.

By ORDER

Deputy/Asstt.Registrar
ITAT, Ahmedabad