

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI**

**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND
SHRI SANJAY GARG, JUDICIAL MEMBER**

ITA NO. 982/MUM/2012 : (A.Y : 2006-07)

ITO-17(3)(1),
Mumbai (Appellant) Vs. M/s. Arsh Constructions
1, Albion Place, Hotel Heritage
Compound, Sant Savta Marg,
Byculla (E), Mumbai 400 027
PAN : AAFFA6000K (Respondent)

**Assessee by : Aasifa Khan
Revenue by : Shri A. Ramachandran**

Date of Hearing : 28/07/2016

Date of Pronouncement : 19/08/2016

ORDER

PER G.S. PANNU, AM :

The captioned appeal by the Revenue is directed against the order of CIT(A)-29, Mumbai dated 30.11.2011, pertaining to the Assessment Year 2006-07, which in turn has arisen from the order passed by the Assessing Officer, Mumbai dated 30.12.2010 under section 143(3) r.w.s. 263 of the Income Tax Act, 1961 (in short 'the Act').

2. In this appeal, Revenue has raised the following two Grounds of appeal :-

"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in relying upon incorrect facts that there cannot be adhoc estimate of profit at 8% in the A Y 2006-07.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not appreciating the facts relied by the Assessing Officer in assessment order and directed to delete an addition made of Rs.37,70,718/-."

3. Although Revenue has raised two Grounds of appeal, but there is a solitary issue relating to the manner in which the Assessing Officer has assessed the income of assessee from the business of development and construction at Rs.37,70,718/-.

4. Briefly put, the relevant facts are that the respondent-assessee is a partnership firm engaged in the business of developers and construction. It has undertaken a slum rehabilitation project in terms of a scheme formulated by Slum Rehabilitation Authority (SRA) at Sewri. The project comprised of two wings, namely 'A' wing, wherein the existing tenants had to be rehabilitated and the development of which was undertaken free of cost. The construction of this wing commenced in the year 2002. The other wing comprised of 'B' & 'C' which was constructed by the assessee for sale and such construction commenced during the Assessment Year 2004-05. For Assessment Year 2006-07, assessee had originally filed a return of income on 30.10.2006 declaring NIL income from such project on the ground that it was following the 'project completion method' and during the year under consideration the construction of such project was not completed. An assessment, based on such return of income, was finalised u/s 143(3) of the Act on 29.12.2008 whereby the returned income was accepted. It transpires

that subsequently the assessment was set-aside by the Commissioner by invoking Sec. 263 of the Act with direction to redo the same. In the ensuing assessment, which is the subject matter of dispute before us, the Assessing Officer gave a go-by to the 'project completion method' adopted by the assessee for deducing the income from the construction of the project in question. Instead, the Assessing Officer estimated the profits for the year by applying a rate of 8% on the advances of Rs.4,71,33,974/- received by the assessee upto the year under consideration, thereby resulting in an addition of Rs.37,70,718/- to the returned income. Such an action of the Assessing Officer was carried in appeal before the CIT(A), raising contentions on facts and in law.

5. In appeal before the CIT(A), assessee pointed out that in the earlier two Assessment Years of 2004-05 and 2005-06 the 'project completion method' adopted by the assessee was accepted by the Department and it was also pointed out that so far as assessment for Assessment Year 2005-06 is concerned, same was also a scrutiny assessment made u/s 143(3) of the Act. Assessee also explained the factual matrix that so far as construction of 'A' wing was concerned, it was commenced in 2002 and the construction of the other saleable wing was commenced only in Assessment Year 2004-05. It was also pointed out that the aggregate of loans and advances were utilized in construction of 'A' wing meant for the old tenants, which was given free of cost and only thereafter the construction of the saleable wings, i.e, 'B' & 'C' was started. Assessee also asserted that certain disputes had arisen amongst the partners and various cases were filed in court which brought the work to a standstill and even the bank account was frozen

for a certain period of time. It was also pointed out that due to the aforesaid disputes and delay in the construction, the possession of the flats in the case of saleable wings, i.e., 'B' & 'C' was not given to the buyers. Before the CIT(A), it was also pointed out that the methodology adopted by the Assessing Officer was fallacious inasmuch as the rate of 8% has been applied on the total advances received since inception of the project and not merely with respect to the advances received during the year under consideration. It was also pointed out that in the subsequent Assessment Year of 2007-08 assessee received advances of a lesser amount than the amount of refunds paid to the prospective buyers who had cancelled their bookings. It was, thus, explained that the methodology adopted by the Assessing Officer was incorrect. With regard to the reliance placed by the Assessing Officer on the decision of the Mumbai Bench of the Tribunal in the case of *Champion Construction Co., 5 ITD 494*, assessee pointed out that the said decision was inapplicable inasmuch as in the present case neither 80% of the projected receipts of the project were received and nor 80% of the work was completed during the year under consideration; and, thus the criteria laid down in *Champion Construction Co. (supra)* was not applicable. Considering the factual and other submissions put forth by the assessee, CIT(A) called for a remand report from the Assessing Officer on certain points which he has tabulated in para 7 of his order. After considering the reply of the Assessing Officer and the submissions of the assessee, CIT(A) concluded that *ad-hoc* estimation of profit @ 8% made by the Assessing Officer was untenable. The major points noted by him in this regard have been summarized by him in para 9 of his order, which are reproduced hereinbelow :-

“9. I have carefully considered the facts of the case, arguments of the Assessing Officer and the written submissions of the Authorised Representative of the appellant. I find that during the year under consideration the project was completed only about 50%. The total sale consideration upto AY 2006-07 was only Rs.471,33,924/- as against the cumulative sale figure of Rs.7,68,91,449/- in AY 2010-11. Therefore it cannot be said that there was substantial completion of the project. Profit can be estimated only when the project is substantially completed usually at about 80%. There is no evidence that there was substantial completion of the project.

ii) Appellant has been consistently following the project completion method and this has been accepted by the Assessing Officer in earlier two years. Therefore there cannot be a sudden departure without assigning reason.

iii) Admittedly, there was lot of litigations by partners against the project. Even till FY 2011-12 the cases filed by the partners were in Supreme Court, National Consumer Redressal Commission. The final verdict of the Supreme Court came in FY 2011-12. Therefore the profit from the project cannot be estimated in the financial year 2005-06. The final verdict of Supreme Court has arrived in June 2011.

iv) Because of constant litigations between partners Bombay High Court had issued injunction stopping the project in August, 2006 and the injunction got lifted in the year 2008. Therefore it can be seen that in the financial year 2005-06 project was nowhere near completion.

v) In fact, the sales and booking money received upto AY 2006-07 has been partly refunded to the investors in the AY 2007-08. Therefore the profit from the project cannot be estimated on the work-in-progress.

vi) The profit from the project will depend upon several expenses including cost of litigation which will affect the cost of the goods sold. Therefore it will be premature to estimate profit in AY 2006-07.”

6. On the aforesaid basis CIT(A) proceeded to set-aside action of the Assessing Officer in making an *ad-hoc* estimation of profits from the construction of the impugned project. Against such a decision of the CIT(A), Revenue is in appeal before us.

7. Before us, the learned Departmental representative has placed reliance on the order of the Assessing Officer whereby it was sought to be justified that the 'project completion method' adopted by the assessee would lead to postponement of tax liability considering that the assessee has taken long period for completion of the project and received substantial advances before completion.

8. On the other hand, the learned representative for the assessee pointed out that CIT(A) made no mistake in deleting the addition for the reasons assigned by him. Apart therefrom, it was pointed out that the assessment for Assessment Year 2007-08 was also finalised by the Assessing Officer in an order passed u/s 143(3) r.w.s. 147 of the Act on 30.12.2010 on a similar pattern and the CIT(A) vide his order dated 7.12.2011 has deleted the addition and no appeal has been preferred by the Department against such order. It was further contended that the instant appeal of Revenue is thus misplaced and is contrary to its stand for Assessment Year 2007-08. Apart therefrom, it has been pointed out that entire profit for the project has been declared and assessed to tax in Assessment Year 2011-12. Before us, a chart was also furnished showing the total profit from the project declared in the subsequent periods which showed that the ultimate profit declared by the assessee was much more than 8% estimated and that the instant

action of the Assessing Officer was an *ad-hoc* exercise which was impermissible in law. It was, therefore, contended that there was no justification for interfering with the ultimate conclusion of the CIT(A).

9. We have carefully considered the rival submissions. In the present case, it is quite clear that the income of Rs.37,70,718/- has been assessed to tax purely on an *ad-hoc* basis. Even if the Assessing Officer was to give a go-by to the 'project completion method' adopted by the assessee and deduce the income from the impugned project, it was imperative for the Assessing Officer to adopt a rationale basis. The reliance placed by the Assessing Officer on the decision of Tribunal in the case of Champion Construction Co. (*supra*) to justify application of percentage rate to deduce profit is also misplaced on facts. In the case of Champion Construction Co. (*supra*) it was found on the basis of fact-situation that the methodology adopted by the assessee was resulting in postponement of tax liability inasmuch as the project was already substantially completed and income was not being offered for taxation. In the present case, assessee had demonstrated that there was no substantial completion of project in the instant assessment year, and rather the fact-situation clearly showed that on account of litigation amongst the partners the continuation of the project itself was in jeopardy. In any case, the facts brought out by the CIT(A), and which have not been negated by the Assessing Officer in his remand report to the CIT(A), clearly point out that the stage of project in the instant year could not be construed to have been substantially completed. It is also noted by the CIT(A) that the sale and booking money received upto the instant assessment year was also partly refunded to the intending

buyers in the subsequent assessment year. We are also conscious of the fact that in the earlier two assessment years, where in one of the assessment years assessment was completed u/s 143(3) of the Act, the income has been assessed by following the 'project completion method' adopted by the assessee. There is also no repudiation to the assertions of the assessee before us that the decision of CIT(A) for Assessment Year 2007-08, rendered under similar situation, has not been appealed against by the Revenue before the Tribunal. For all the above reasons, in our considered opinion, CIT(A) made no mistake in holding that in view of the uncertainties involved, the action of the Assessing Officer in deducing the income of the assessee in the current year by making an *ad-hoc* estimation of profits is not justified. Apart therefrom, in our view, the Assessing Officer has not been able to demonstrate any justifiable reason for departing from his earlier accepted position of Assessment Year 2005-06 that the income is to be computed on 'project completion method'. For all the above reasons, the order of CIT(A) deserves to be affirmed. We hold so.

10. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on 19th August, 2016.

Sd/-

(SANJAY GARG)
JUDICIAL MEMBER

Mumbai, Date : 19th August, 2016

SSL

Sd/-

(G.S. PANNU)
ACCOUNTANT MEMBER

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "A" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai