

आयकर अपीलीय अधिकरण “एच” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “H” BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAVISH SOOD, JM

आयकर अपील सं./I.T.A. No. 2859/Mum/2014

(निर्धारण वर्ष / Assessment Year: 2004-05)

M/s. K. K. Enterprises M/s. Sahakar Developers 5, Sai Sadan, Roshan Nagar, Borivali West, Mumbai-400 092	बनाम/ Vs.	CIT – 25, C-11, 2 nd Floor, Pratyaksh Kar Bhavan, BKC, Bandra (E), Mumbai-400 051
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No.		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Vijay Mehta
प्रत्यर्थी की ओर से/Respondent by	:	Shri B. Srinivas

सुनवाई की तारीख / Date of Hearing	:	02.04.2018
घोषणा की तारीख / Date of Pronouncement	:	05.04.2018

आदेश / ORDER

Per Shamim Yahya, A. M.:

This appeal by the assessee is directed against the order by the Commissioner of Income Tax dated 11.02.2014 and pertains to the assessment year 2004-05.

2. The grounds of appeal read as under:

1. On the facts and in the circumstances of the case, the learned CIT-25 has erred in facts and in law in invoking the provisions of Section 263 of the Income Tax Act, 1961 against the order dated 28-11-2011 of the Assessing Officer passed u/s 143(3) r.w.s. 147 of The Income Tax Act, 1961.
2. On the facts and in the circumstances of the case, the Learned CIT-25 has erred in facts and in law in holding that the order dated 28.11.2011 of the

Assessing officer is erroneous and prejudicial to the interest of revenue and in setting aside the said order u/s 263 of the Act.

3. On the facts and in the circumstances of the case, the Ld. CIT-25 has erred in facts and in law in directing the Assessing Officer to consider the entire on-money of Rs.1,65,62,330/- as income of the assessee as against Rs.60,31,047/- assessed by the Assessing Officer as additional income out of the on-money component.

3. At the outset, it was noted that there was a delay of four days in filing the appeal. The reasonable cause for the delay has been attributed to be misplacement of the document in the office.

4. Upon hearing both counsel and perusing the records, we are inclined to condone the delay in filing the appeal and the same is condoned as such.

5. In this case, the show cause notice u/s. 263 of the Act was issued by the Id. Commissioner of Income Tax (Appeals) which reads as under:

2 The original return of income in this case for A. Y. 2004-05 was filed on 01-11-2004 declaring total income of Rs.3,31,391/-. The return was processed under section 143(1) of the income Tax Act, 1961

3. The assessing officer completed the assessment u/s. 143(3) r.w.s 147 determining total income of Rs.63,62,840/- on 28-11-2011 including addition of Rs.60,31,047/- which was disclosed by the assessee before the Settlement Commission under provisions of section 245C of the Income Tax Act, 1961. In this regard, it is noticed that a survey under section 133A of the Act was conducted in the Gangai Group of cases on 23-02-2006 in which the assessee was one of the enterprises. During the survey, it was revealed that the assessee had received on-money of Rs.1,32,49,864/- against agreement value of Rs.3,31,24,660/- which is 40% of the agreement value, while the assessee had disclosed only additional income of Rs.60,31,047/- before the Settlement Commission under section 245E of the income Tax Act, 1961. The Settlement Commission has not taken any action under section 245E of the Income Tax Act, 1961 on the request of the assessee that assessment in this year had been completed under section 148 of the Income Tax Act 1961 by the Assessing Officer.

4. The Assessing Officer while finalizing the assessment under section 143(3) r.w.s. 147 of the Act, has made addition of Rs.60,31,047/- only which was

disclosed before the Settlement Commission whereas the on-money received was Rs. 165,62,330/-. Thus, the addition made to the total income should have included Rs.1,05,31,283/- i.e. Rs.1,65,62,330/- minus (-) Rs 60,31,047/-. Thus, the assessment order passed by the Assessing Officer erroneous in so far as it is prejudicial to the interest of revenue to the extent of mentioned above.

6. In this regard, the assessee's response was noted by the Id. Commissioner of Income Tax as under:

The assessee in his reply has stated that the assessee-firm, belonging to Gangar Group, carried on business of building construction. The original return of income for A.Y. 2004-05 was filed on 01.11.2004 disclosing a total income of Rs.3,31,391/-. The said return was processed u/s 143(1) of I. T. Act. A survey u/s 133A was conducted on various premises of Gangar Group, including the assessee-firm, on 23.02.2006. The group disclosed unaccounted income of Rs. 5 crores in course of survey operation. Thereafter, all the assessee of Gangar Group, including the assessee-firm M/s K K Enterprises, filed application before the Settlement Commission on 31.05.2007 which amounts to Rs.5,76,18,300/-. in the said application before Settlement Commission, the assessee-firm had disclosed additional income of Rs 60,31,047/- for A.Y 2004-05 and had requested the Hon'ble Settlement Commission to initiate proceeding u/s 245E of I. T. Act for accepting the disclosed additional income On the basis of the disclosure before the Settlement Commission, the Assessing Officer initiated proceeding u/s 147 of I T. Act for reassessment of income for A.Y. 2004-05 and issued notice u/s 148 of IT Act on 17.03.2011. During the course of reassessment proceeding, the assessee offered the same amount of additional income of Rs.60,31,047/-, which was declared before the Settlement Commission Vide reassessment order u/s 143(3) /147 of I.T, Act dated 28,11.2011, the Assessing Officer has accepted this additional income of Rs.60,31,047/- and has completed the reassessment determining the total income at Rs. 63,62,840/-. The assessee begs to submit that there is no case for invoking the provision of 263 of I. T. Act in the facts and circumstances of these case, because of the following reasons'-

i. in this case although the on-money component was calculated at Rs1,65,62,330/-. the net profit was calculated @ 12% of total sale proceeds of Rs.4,96,86,990/- including the disclosed agreement value of Rs.3,31,24,660/- and on-money component of Rs.1,65,62,330/-. The net profit @ 12% of total sale value was calculated at Rs.59,62,439/-. After including further amount of Rs.4,00,000/- towards scrap sale, the total income for this year was calculated at Rs.63,62,439/- As in the original return, profit of Rs.3,31,392/- had been disclosed, additional income of Rs.60,31,047/- (Rs. 63,62,439 – Rs.3,31,392/-) was disclosed before the Settlement Commission as well as before the Assessing Officer in course of the reassessment proceeding. Even in respect of the

assessment year 2005-06. which was admitted by Settlement Commission and was adjudicated upon in the settlement proceeding, the Hon'ble Settlement Commission has not accepted the Assessing Officer's and Commissioner of income tax's contention that the entire on-money amount has to be taxed as assessee's income, and has held that only a percentage of the on-money is taxable as additional income. While disposing off the settlement application in Gangar Group of cases vide order dated 10.08.2011, the Hon'ble Settlement Commission has accepted the fact that builders have to incur lots of expenses relating to construction and liasoning outside the book of account Therefore, the Hon'ble Settlement Commission on accepting such expenditure from impounded books, records and materials had accepted the assessee's contention that there is no case for taxing the entire en-money as income Considering the common business practice of accepting on-money and also incurring expenses outside the books out of such on-money in case of assesseees involved in building construction activity, a fact which has also been accepted by Hon'ble Settlement Commission in its order dated 10 08.2C11. the Assessing Officer came to a conscious decision that the entire on-money of Rs 1.65,62,3307 is not taxable as assessee's additional income. Taking into account the ground realities in construction business, wherein substantial amount of expenditure is also incurred outside the books, which need to be deducted out of the on-money component for determination of true and rea.¹ profit, the AO accepted the assessee's computation by adopting profit rate of 12% on the total sale consideration including the disclosed sales consideration and the on-money component. Hence, the said order of the Assessing Officer cannot be considered erroneous and prejudicial to the interest of revenue.

7. Thereafter, the assessee relied upon the various case laws. However, the Id.

Commissioner of Income Tax was not convinced. He held as under:

5. I have carefully considered the reply filed by the assessee and gone through the assessment records of the assessee it is an admitted fact that the assessee had received on-money of Rs.1,65,62,330/- during the year winch has also disclosed before the Settlement Commission u/s, 245E of the IT Act 1961 The Assessing Officer during the assessment proceedings has not verified the correctness and adequacy of income disclosed before the Settlement Commission. The authenticity of the 'income declared by the assessee has also not been examined by the Assessing Officer in the assessment order passed u/s. 143(3) r.w s. 147 of the I T. Act, 1961 on 28-11-201 1. Thus, the order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of revenue as the entire on-money received was the income of the assessee which it has failed to disclose in the return of income and the Assessing Officer has accepted only 12% of turnover as undisclosed income without making necessary enquiry and without referring the impounded material during survey.

5.1 The assessee has explained that in this case although the on-money component was calculated at Rs.1,65,62,330/-. the net profit was calculated @ 12% of total sale proceeds of Rs.4,96,86,990/- including She disclosed agreement value of Rs.3,31,24,560/- and on-money component of Rs.1,65,62,330/-. The net profit @ 12% of total sale value was calculated at Rs.59,62,439/-. After including further amount of Rs.4,00,000/- towards scrap sale, the total income for this year was calculated at Rs.63,62,439/-. As in the original return, profit of Rs.3,31,392/- had been disclosed, additional income of Rs.60,31,047/- (Rs.63,62,439 – Rs.3,31,392) was disclosed before the Settlement Commission as well as before the Assessing Officer in course of the assessment proceeding. Even in respect of the assessment year 2005-06, which was admitted by Settlement Commission and was adjudicated upon in the settlement proceeding, the Hon'ble Settlement Commission has accepted the fact that builders have to incur lots of expenses relating to construction and liaisons outside the book of account. Therefore, 12% turnover on the on-money should be taxed as its income and therefore, the order of the Assessing Officer accepting the figure declared before the Settlement Commission in the Assessment Year 2004-05 was correct and the order cannot be considered erroneous and prejudicial to the interest of revenue.

5.2 This contention of the assessee is not correct as the disclosure made by the assessee before the Settlement Commission has not been accepted by the Settlement Commission in assessment year 2004-05 as a genuine disclosure. Therefore, the Assessing Officer was duty bound to pass the assessment order as per material available on record. the assessee has failed to give details of unaccounted expenditure recorded in the impounded books of accounts during the survey u/s. 133A of the I. T. Act which has been considered by the Assessing Officer while reducing the on-money received at Rs.60,31,047/- out of total on-money received at Rs.1,65,62,330/-. There is no details available about the unaccounted expenditure incurred by the assessee in earning on-money receipt by the firm over and above the expenditure claimed in the Profit and Loss account for the year. therefore, the Assessing Officer has wrongfully accepted the additional income of the assessee at Rs.60,31,047/- instead of Rs.1,65,62,330/- disclosed by the assessee before the Settlement Commission.

5.3 The assessee has further pointed out that the order passed by me T is not erroneous as the same has been passed on the basis of the Hon'ble Settlement Commission in the Assessment Year 2005-the assessee and it may be prejudicial to the interest of revenue but conditions are fulfilled section 263 cannot be invoked by the Commissioner of Income tax. This contentions of the assessee is not acceptable as the order of the Assessing Officer was not only erroneous but prejudicial to the interest of the revenue also as nothing has been brought on record and discussed in the assessment order while accepting the undisclosed income at Rs.6031047/- against the on-money received at Rs.1,65,62,330/- The assessee has further cited case law of CIT Vs. Gabriel India Ltd., 203 ITR 108 (Bom) in which the Assessing Officer had made enquires in regard to nature of

expenditure incurred by the assessee in which the assessee had given detailed explanation with regard of the expenditure in writing and being satisfied by the explanation of the assessee. The Assessing Officer had accepted the expenditure as genuine. The Hon'ble Bombay High Court has observed that if ITO acting in accordance with law makes certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him the order should have been written more elaborately. The facts of this case are different from the case of the assessee, as in the case of the assessee, the Assessing Officer has failed to bring any material on record for reducing on-money received from Rs.1,65,62,330/- to Rs.60,31,047/- in the assessment order

6 In view of the above facts it is clear that the assessment order passed by the Assessing Officer is erroneous in so far as its prejudicial to the interest of revenue therefore, the same is set aside to this extent and directed to pass assessment order afresh affording reasonable opportunities of being heard to the assessee and after taking into consideration the entire on-money received of Rs.1,65,62,330/- as income of me assessee.

8. Against the above order, the assessee is in appeal before us.
9. We have heard both the counsel and perused the records. The Id. Counsel of the assessee submitted that the Assessing Officer has duly applied his mind and there is no case of order being erroneous so as to be prejudicial in the interest of the Revenue. He submitted that by the time the Assessing Officer has passed the order, the Settlement Commission's order in the assessee's own case had also come. Hence, he pleaded that it has to be presumed that the Assessing Officer has passed the order based upon the Settlement Commission order. Hence, he submitted that the Assessing Officer has passed the assessment order after due application of mind. He further placed reliance upon the decision of the ITAT in group companies, wherein on similar search only 12% out of the total on-money was taken as liable to be added as income.
10. Per contra, the Id. Departmental Representative submitted that the Assessing Officer in this case has simply accepted the return of the assessee without any discussion

whatsoever and the income offered was much below the same accepted during the course of survey. He submitted that there is no discussion by the Assessing Officer as to how much percentage of on-money is accepted as income. Furthermore, he submitted that there cannot be any presumption whatsoever that the Assessing Officer has passed this order on the basis of the Settlement Commission's order. Furthermore, the Id. Departmental Representative submitted that there cannot be any such presumption on this account also due to the fact that the percentage accepted by the Settlement Commission for the assessment year 2005-06 was different from the percentage offered for this year. Hence, he submitted that the Assessing Officer's order is even not in accordance with the Settlement Commission order for the assessment year 2005-06. As regards the ITAT decision, in group cases on merits, the Id. Departmental Representative submitted that these are to be considered when the merits are being considered and not when the revision u/s.263 is in challenge, where the Id. Commissioner of Income Tax (Appeals) has asked the Assessing Officer to examine the issue afresh after affording a reasonable opportunity of being heard to the assessee.

11. We have carefully considered the submissions and perused the records. We note that identical sum as offered for taxation before the Assessing Officer was offered before the Settlement Commission. But the assessee did not press the matter before the Settlement Commission. Hence, the Settlement Commission did not make any order for the current year. Thereafter, the same sum was offered to taxation in return of income for this year, which has been assessed as such by the Assessing Officer.

12. We find that in the assessment order, the Assessing Officer has mentioned that there was a survey in this case and in the survey the incriminating materials were found and the assessee had declared and offered Rs.5 crores as additional income at the time of survey. The Assessing Officer also noted that the assessee has filed an application u/s. 245C for assessment year 2005-06. Thereafter, the Assessing Officer noted as under:

Meanwhile, the assessee had filed letter dtd. 29.1.2008 before the department from which it is seen that the assessee has declared a sum of Rs.60,31,047/- over and above regular income for the A. Y. 2004-05 U/S.245E of the Act before the Settlement Commission. However, the same was not reflected in the Return of Income of the assessee firm.

4. In view of the same, the case was reopened, after recording reasons. The reasons recorded are as under:

"In this case, a survey action u/s.133A of the Act was conducted at the premises on 23.2.2006. Various incriminating documents pertaining to the group were found during the course of survey proceedings and were impounded u/s.133A(3)(ia) of the I.T.Act, 1961. The Gangar Group has declared a sum of Rs.5 crores as undisclosed income over and above the regular income. However, the assessee filed an application u/s.245C to the Settlement Commission on 30.5.2007. Meanwhile, the assessee filed a letter dtd. 29. 1.2008 before the department from which it is seen that the assessee has declared a sum of Rs.60,31,047/- over and above the regular income for the A. Y. 2004-05 u/s.245E of the Act before the Settlement Commission. The return of the assessee for the A. Y. 2004-05 does not include the aforesaid income, therefore, I have reason to believe that income to the extent of Rs.60,31,047/- has escaped the assessment within the meaning of section 147 of the I.T. Act and accordingly, the case of the assessee is required to be reopened by issue of notice u/s.148 of the Act so as to reassess the assessee's correct income for the A. Y. 2004-05."

13. After noting that a representative from the assessee attended from time to time, the Assessing Officer held as under:

7. During the course of proceedings, the assessee has offered amount of Rs.60,31,047/- for taxation which is declared before the Settlement Commission u/s.245E of the Act. Penalty proceedings u/s.271(1)(c) of the Act are initiated separately for furnishing inaccurate particulars of income and concealing the particulars of its income.

8. Subject to the above remarks, the total income is computed as under:

	(Rs.)	(Rs.)
Total Income (as per Return of Income)		3,31,391
Add : <u>Disallowance (as above):</u>		
i) Income from undisclosed sources		<u>60,31,047</u>
Total Income :		63,62,840
Rounded off to		<u>63,62,840</u>

14. From the above, it is apparent that the Assessing Officer has not done any enquiry whatsoever. There is no material on record to show that the settlement commission's order was there before him. The Assessing Officer has not enquired as to how the sum of Rs.60,31,047/- was offered as against the larger amount offered at the time of survey. Moreover, as rightly been pointed out by the Id. Departmental Representative, for assessment year 2005-06, the Settlement Commission has accepted the plea that income out of on-money, should be considered @ 20.14% which is totally different from approx 12% rate offered in the present case for the assessment year. Hence, it is clear that by no stretch of imagination, it can be said that the Assessing Officer has made an application of mind on the issue at hand or that he had referred to the Settlement commission order. In these circumstances, in our considered opinion, acceptance of the return by the Assessing Officer at a figure of Rs.60,31,047/- as against on money receipt of Rs.1,65,62,330/- is erroneous so as to be prejudicial to the interest of the Revenue. The CIT has observed that there are no details available about the unaccounted expenditure by the assessee in earning on money receipt. Hence, he opined that the Assessing Officer has wrongly accepted the addition of the assessee at Rs.60,37,047/- instead of Rs.1,65,62,330/- disclosed by the assessee before the Settlement Commission. Having come to the considered opinion that the order of the Assessing Officer was erroneous

insofar as it is prejudicial to the interest of the Revenue, we find that there is lack of clarity in the final direction given by the Id. Commissioner of Income Tax. The Id. Commissioner of Income Tax has directed the Assessing Officer to pass the order afresh after affording reasonable opportunity of being heard to the assessee and after taking into consideration the entire on-money receipt of Rs.1,65,62,330/- as income by the assessee. Here we find that a confusion can arise as to whether the Id. Commissioner of Income Tax is directing that no opportunity should be given to the assessee to prove that the actual income out of Rs.1,65,62,300/- is only Rs.60,31,047/-. Hence, in order to remove any such ambiguity, we modify the order of the Id. Commissioner of Income Tax and direct that while considering on money receipt of Rs.1,65,62,330/- it will be open to the assessee to prove by cogent means that the actual income out of it was only Rs.60,31,047/-.

15. Our above direction is in accordance with the Hon'ble Apex Court decision in the case of *Kapoorchand Shrimal* [1981] 131 ITR 451 (SC) where the Hon'ble Apex Court has held that it is the duty of the appellate authority to correct the errors in the orders of the authorities below.

16. As regards the case laws from the ITAT, in both cases referred by the Id. Counsel of the assessee we find ourselves in agreement with the submission of the Id. Departmental Representative that they are to be a subject matter of consideration on the merits of the case including the appreciation of the facts prevailing in those cases. Since in the present case, we are only concerned with the aspect as to whether the order of the

Assessing Officer is erroneous insofar as it is prejudicial to the interest of the Revenue is concerned we are of the considered opinion that these case laws are not germane at this juncture. Accordingly, in the background of the aforesaid discussion and precedent, we uphold the order of the Id. Commissioner of Income Tax in passing the order u/s. 263 with partial modification as referred by us hereinabove.

17. In the result, this appeal by the assessee stands partly allowed.

Order pronounced in the open court on 05.04.2018

Sd/-
(Ravish Sood)

न्यायिक सदस्य / Judicial Member

Sd/-
(Shamim Yahya)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 05.04.2018

व.नि.स./Roshani, Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai