

IN THE INCOME TAX APPELLATE TRIBUNAL  
“G” Bench, Mumbai  
Before S/Shri B.R.Baskaran (AM) & Amarjit Singh (JM)  
I.T.A. No. 1569/Mum/2016 (Assessment Year 2005-06)

M/s. Arihant Developers Arihant Compound Near Rice Mill Kopar Bus Stop Purna Village, Bhiwandi Thane, Maharashtra PAN : AAFFA0035	Vs.	ACIT Circle 1 Kalyan
(Appellant)		(Respondent)

Assessee by	Dr. K. Shivram & Shri Sasank Dundu
Department by	Shri Suman Kumar
Date of Hearing	20.6.2018
Date of Pronouncement	04.7.2018

ORDER

Per B.R. Baskaran (AM) :-

The appeal filed by the assessee is directed against the order dated 28-12-2015 passed by Ld CIT(A)-2, Thane and it relates to the assessment year 2005-06. The assessee is aggrieved by the decision of Ld CIT(A) in confirming the addition of Rs.40.00 lakhs to the total income of the assessee.

2. The assessee is a partnership firm engaged in the business of construction of godowns, galas, shops, warehouses etc. The revenue carried out a survey operation u/s 133A of the Act on 30-09-2005 in the hands of the assessee and also in the hands of its sister concern named M/s Arihant Corporation. During the course of survey operation, statement of one of the partners named Shri Mukesh R Ghadka was taken, wherein details of business activities were taken. With regard to the accounting aspects, he could not answer properly as he was dependent upon his accountant for answering those questions. The survey officials also took a statement from Shri Hashmukh Dodhia, the partner of M/s Arihant Corporation. It is pertinent to note that Shri

Hashmukh Dodhia was also a partner in the present assessee firm up to 22-04-2004. In the statement taken from Shri Hashmukh Dodhia, he agreed to offer a sum of Rs.65.00 lakhs as net profit of the assessee firm M/s Arihant Developers and Rs.110.00 lakhs in the hands of sister concern M/s Arihant Corporation.

3. Subsequently, the assessee filed its return of income declaring a total income of Rs.16,33,812/-, which was later revised to Rs.41,93,810/-. In the revised return of income, the assessee offered additional income of Rs.25.00 lakhs. The AO took the view that the assessee should have offered additional income of Rs.65.00 lakhs as offered in the statement taken during the course of survey. Accordingly he added the difference amount of Rs.40.00 lakhs, which was also confirmed by Ld CIT(A). The assessee is aggrieved by the same.

4. The Ld A.R submitted that the additional income was offered by a person, who was only an ex-partner and not a partner of the assessee firm at the time of survey. Further he submitted that the statement taken during the course of survey does not have evidentiary value as held by Hon'ble Supreme Court in the case of CIT vs. S Khader Khan Sons (2013)(352 ITR 480) affirming the decision rendered by Hon'ble Madras High Court in the case of CIT vs. Khader Khan Sons (2008)(300 ITR 157). He submitted that the assessee has implied retracted from the statement by not disclosing the additional income in the original return of income. Subsequently, assessee filed a detailed explanation on 24.12.2007 explaining as to why the additional income was not offered as deposited in the statement taken during the course of survey. The Ld A.R also submitted that the revenue is precluded from forcing the assessee to make disclosures as per the CBDT instruction No.286/2/2003 dated 10-03-2003 & CBDT Circular No. F.No.286/98/2013 (Inv-II) dt. 18-12-2014. He further submitted that the assessee has given all the details of sales and the AO did not make any enquiry at the time of making addition of Rs.40.00 lakhs. He submitted that the assessee has explained to the AO that the difference in the

selling rate is on account of provision of amenities only and as such there is no actual difference in the selling price.

5. The Ld A.R, in the alternative, submitted that the income of Rs.65.00 lakhs disclosed by the assessee is the "Net profit" and not additional income as presumed by the tax authorities. Further it was made clear in the statement that the above said figure of Rs.65.00 lakhs includes income earned in F.Y 2004-05 and also income from undisclosed sources. Accordingly the Ld A.R submitted that the addition, if any, should be made for the difference of Rs.65.00 lakhs and the income declared in the revised return of income.

6. The Ld A.R further submitted that if the addition is sustained, then the corresponding expenditure should be allowed.

7. When the bench asked as to what happened in the case of M/s Arihant Corporation, as the income of Rs.1.10 crores was offered in its hands, the Ld A.R furnished a copy of order dated 16.11.2011 passed in ITA No.363/Mum/2009. On a perusal of the order passed by the Tribunal, we notice that M/s Arihant Corporation had also offered Rs.50.00 lakhs only as additional income as against the offer of Rs.110.00 lakhs. The AO added the balance amount of disclosure of Rs.60.00 lakhs, which has been confirmed by the Tribunal.

8. The Ld D.R strongly supported the order passed by Ld CIT(A). He submitted identical disclosure has been made in the case of Arihant Corporation, but the income was offered at a lower amount. The addition made by the AO has since been sustained by the Tribunal. He submitted that the assessee did not produce books of accounts before the AO on the plea that the computer was destroyed by floods in July 2005. However the assessee has furnished the return of income after obtaining tax audit report dated 22.10.2005. Accordingly he submitted that there is no truth in the explanations of the assessee. The Ld A.R also placed reliance on the decision rendered in the case of *Diamond Investment & Properties vs. ITO (2016)389*

ITR 289)(Bom). Accordingly he submitted that the order passed by Ld CIT(A) should be sustained.

9. We heard the parties and perused the record. It is contended that the income has been offered by Shri Hashmukh Dodhia, who was not a partner at the time of giving statement. However we observe that M/s Arihant Developers and M/s Arihant Corporation are sister concerns and a common statement has been taken for both the concerns, meaning thereby, Shri Hashmukh Dodhia was having a say in the affairs of the assessee firm also. Admittedly, the assessee firm offered additional income of Rs.25.00 lakhs in its revised return of income on the strength of the above said statement only. This action of the assessee would show that it has partially acted upon the disclosure made by Shri Hashmukh Dodhia and hence it is too late to contend that his statement is not binding. Further we notice that there is contradiction in the explanations of the assessee with regard to the books of accounts. It was claimed that the computer, in which accounts were maintained were damaged during the floods in July, 2005. Accordingly the books of accounts were not produced before the AO. On the contrary, the tax audit report was obtained by the assessee from its auditors in October, 2005. Without books of accounts, the tax audit could not have been conducted, meaning thereby, there was deliberate attempt on the part of the assessee in not producing the books of accounts. Hence the explanation of Ld A.R that the difference in selling rates was due to amenities cannot be accepted and in any case, the assessee has not substantiated this explanation before the tax authorities. In the absence of books of accounts and further in the absence of any evidence to show that the assessee has also incurred expenditure relatable to the additional income, the claim of the Ld A.R for deduction of relevant expenditure is liable to be rejected. In the case of Arihant Corporation, we have noticed that the Tribunal has upheld the addition made by the AO on the basis of disclosure made in the statement.

10. However, we find merit in the contentions of the assessee that the disclosure of Rs.65.00 lakhs was the Net profit of the assessee firm for the assessment year 2005-06. A perusal of the statement given by Shri Hashmukh dodhia makes it very clear. It is clearly stated that the disclosure of Rs.65.00 lakhs includes profit for the year and the additional income offered during the year. We notice that the Tribunal, in the case of Arihant Corporation, did not consider this aspect, i.e., this specific answer was not brought to the notice of the Tribunal. Accordingly we are of the view that the income of the assessee for the AY 2005-06 should be taken as Rs.65.00 lakhs as disclosed in the statement.

11. Accordingly we modify the order passed by Ld CIT(A) and direct the AO to restrict the addition to the difference of Rs.65.00 lakhs and the income disclosed in the revised return of income.

12. In the result, the appeal filed by the assessee is partly allowed.

Order has been pronounced in the Court on 4.7.2018.

Sd/-  
(AMARJIT SINGH)  
JUDICIAL MEMBER

Sd/-  
(B.R. BASKARAN)  
ACCOUNTANT MEMBER

Mumbai; Dated : 4/7/2018

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

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BY ORDER,  
(Senior Private Secretary)  
ITAT, Mumbai