

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B", HYDERABAD**

**BEFORE SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER
AND
SHRI V. DURGA RAO, JUDICIAL MEMBER**

ITA No.	Asst. Year	Appellant	Respondent
2237/Hyd/17	2010-11	Sri Sri Gruhanirman India Pvt. Ltd., HYDERABAD [PAN: AALCS2721G]	Assistant Commissioner of Income Tax, Central Circle-2(3), HYDERABAD
2238/Hyd/17	2011-12		
2239/Hyd/17	2012-13		
2240/Hyd/17	2013-14		
2241/Hyd/17	2014-15		
2273/Hyd/17	2012-13	Assistant Commissioner of Income Tax, Central Circle-2(3), HYDERABAD	Sri Sri Gruhanirman India Pvt. Ltd., HYDERABAD [PAN: AALCS2721G]
2274/Hyd/17	2013-14		
2275/Hyd/17	2014-15		

For Assessee : Shri K.A. Sai Prasad, AR

For Revenue : Smt. Pallavi Agarwal, DR

Date of Hearing : 27-06-2018

Date of Pronouncement : 27-07-2018

ORDER

PER BENCH :

There are five appeals by assessee for the AYs. 2010-11 to 2014-15 and three cross-appeals by Revenue for the AYs.

2012-13, 2013-14 & 2014-15 against the respective orders of the Commissioner of Income Tax (Appeals)-12, Hyderabad. Since common issues are involved in all these appeals, they were heard together and disposed-off by this common order.

2. Briefly stated facts are that assessee herein is involved in the business of real estate and construction. There were search and seizure operations conducted in the group cases of M/s. Sri Sri Gruha Nirman India Pvt. Ltd., on 24-12-2014 and consequent to that, notice u/s. 153A of the Act have been issued. Assessee has filed returns of income in response to notices mostly, admitting the same incomes which were admitted in the returns originally.

3. In the course of assessment proceedings, AO has made an addition of Rs. 11,53,810/- for violation of Section 40(a)(ia) of the Act. In addition, AO noticed that assessee has suppressed its receipts over a period of time and quantified the suppressed receipts at Rs. 10,60,25,463 and distributed over the assessment years as under:

A.Y.	Suppressed Income (Rs)
2010-11	8,40,000
2011-12	32,44,000
2012-13	95,19,850
2013-14	1,98,99,770
2014-15	3,53,54,958
2015-16	3,71,66,885
Total:	10,60,25,463

3.1. After considering the suppressed receipts in the respective assessment years as above, AO treated the entire amount as income of assessee in respective assessment years.

4. Before the Ld.CIT(A), assessee has made submissions that the disallowance u/s. 40(a)(ia) of the Act does not arise and that the suppressed turnover is not based on any valid material and further, there were mistakes in the computation of suppressed turnover and that entire receipt cannot be considered as income. On these issues CIT(A) allowed the contentions on Section 40(a)(ia), confirmed the estimation of suppressed turnover but directed the AO to reduce certain accounted turnover [partly allowed the ground] and further reduced the income estimation to 40% of the suppressed turnover as against 100% adopted by AO.

4.1. Assessee is aggrieved on - (a) Estimation of suppressed turnover; (b) Non-granting of amounts accounted for/future receipts; (c) Estimation of income whereas Revenue is aggrieved on major issue of estimation of income when AO estimated the entire suppressed turnover as income. There is one issue of 40(a)(ia) to the extent of Rs. 22,000/- in the AY. 2013-14. Revenue appeals for other assessment years are not placed before us and we were not informed whether Revenue has preferred appeals or not in those years. These issues are considered after hearing the arguments of Ld. Counsel and Ld.DR and their arguments are considered issue-wise:

Estimation of suppressed turnover:

5. Assessee has raised contentions that quantification of undisclosed turnover is only an estimate based on figures in pencil with respect to few plots only and that there is no corroborative evidence and further it was submitted that AO adopted uniform value for all the plots, ignoring the fact that in this line of business, the consideration differs from case to case, customer to customer. It is also submitted that when compared to the declared turnover, estimated turnover is very meagre and considering that the total volume of admitted turnover, the working of AO is only assumptions and presumptions. On this issue, Ld.CIT(A) after considering assessee's submissions has rejected the same as under:

“8.1 As regards the first contention of the appellant's AR, that the entire quantification of suppressed turnover made by the AO is invalid, being based on assumptions, presumptions and estimates, this ground is found to be devoid of any merits. The quantification has been made by the AO after careful examination and analysis of the seized material, containing details of sale of plots pertaining to nine ventures carried on by the assessee company. The AO has painstakingly quantified the sale value of each of the nine ventures, in each of the sub-categories, i.e. (i) where evidence of rate of plot is available, (ii) where evidence of date of booking is available, and (iii) where neither is available, registered sale value is adopted. The methodology of quantification adopted by the AO is therefore entirely logical and correct, and is backed by solid facts and evidences found in the seized material during the course of the search. The methodology of the quantification is discussed in great detail by the AO in para 4 of the assessment order (which is reproduced in para 6.2 of this order). I therefore find no merits in the contentions of the appellant on this account, and ground nos.4 & 5 related to this issue are DISMISSED”.

5.1. Before us also assessee has not furnished any evidence to counter the working of AO. Since there is some

basis for working out the so called suppressed turnover and assessee's main contentions are on the reconciliation of the said working, we are of the opinion that estimation of turnover based on the so called registers/entries in pencil cannot be faulted. Thus, the grounds on this issue (Ground Nos. 1 to 6) are accordingly rejected.

Determination of suppressed turnover:

6. As seen from the assessment order, AO has worked out the gross receipts at Rs. 123.51 Crores and gave credit for the admitted receipts at Rs. 92.43 Crores. From the above amount, AO also gave credit to the vacant plots/future collections at Rs. 20.47 Crores and thereby arrived at suppressed turnover of Rs. 10.60 Crores in about nine ventures till the date of search. Assessee while objecting to the estimation of gross receipts, however, furnished reconciliations that AO has not taken the correct admitted receipts i.e., admitted receipts on AY. 2008-09 which are already accounted for in the books of account. Ld.CIT(A) has considered this contention and vide para 8.2, directed the AO to adopt total disclosed receipts at Rs. 95,13,63,302/- as against Rs. 92,43,84,125/- taken by the AO. On this issue, there is no appeal of Revenue.

6.1. However, the other issue, about the receipts accounted for in later year i.e., post search period is in dispute. It was the contention before the AO that in respect of 79 plots, there were no sales even as on the date of search and

the salable value in respect of those plots to an extent of Rs. 26,67,61,465/- was also included in the gross receipts of Rs. 1,23,51,16,787/- which should be reduced. AO, however, has reduced the amount to an extent of Rs. 18,30,57,700/- and while adopting the values, he has noted down that assessee has only shown the registered value and accordingly adopted the registered value. He has given relief to an extent of Rs. 20,47,07,200/-. It was the assessee's contention that AO has wrongly considered the 'registered value' as against the 'actual value' recorded post search and therefore, further reduction has to be given.

6.2. Another contention raised before the Ld.CIT(A) was that the so called receipts of future period could not be brought to tax as unaccounted receipts during the pre-search period, as the plots to that extent have not been sold as on the date of search. Assessee has furnished the following reconciliation before the Ld.CIT(A):

"3.5.5 In this regard it is humbly submitted that the Assessing Officer has given credit only to the extent of registered value whereas the assessee has accounted for the total receipts from the plot owners and admitted the same as sales In the returns for the Asst.Year's.2015-16 and 2016-17. As already explained, though the registered value is much less the amount actual received is accounted for and admitted to tax as sales. Hence the actual amounts admitted in the books of accounts post search in respect of these plots on the basis of the receipts should have been reduced from the figure of Rs.1,23,51,16,787 as against Rs.2,16,49,500 allowed as reduction by the Assessing Officer. Thus the total reduction should be Rs.23,74,76,163 (Rs.26,67,61,465 - Rs.2,92,85,302) as against Rs.20,47,07,200 by Assessing Officer.

3.6 Further, even according to the Assessing Officer, these plots were registered after the date of search i.e, in the Asst.Year's.2015-16 or 2016-17. Without conceding the fact that there is no suppressed turnover at all, even if some suppression in turnover is alleged in respect of these plots which were registered in subsequent orders no addition can be made in the Asst. Years under consideration. Any addition in this regard can be made in relevant post asst. years only and not prior to the date of registration.

3.7.1. It is humbly submitted that, without conceding that there is no suppression at all, if the above rectifications were carried out, the alleged suppressed turnover would work out to Rs. 4,62,77,422 as per the details filed before Assessing Officer and extracted at page 6 of the assessment order. Hence, at the outset, it is submitted that for the Asst. Years 2010-11 to 2015-16, the suppressed turnover, if any, be worked out at Rs. 4,62,77,422 and not at Rs. 10,60,25,463 as considered by the Assessing Officer at page 9 of his order period. The comparative table of final computation of suppressed turnover, if any is as under:

3.7.2.

	Assessing Officer		Appellant
Gross Receipts	1,23,51,16,787		1,23,51,16,787
Less: Admitted receipts	92,43,84,124	(*)	95,13,63,202
	-----		-----
	31,07,32,663		28,37,53,585
Less: Vacant plots/ future collections	20,47,07,200	(**)	23,74,76,163
Suppressed turnover	10,60,25,463		4,62,77,422

(*) Detailed submissions are at paras 3.3.2 & 3.4

(**) Detailed submissions are at paras 3.5

Thus, assessee submitted that estimated suppressed turnover would work out to Rs. 4,62,77,422/-. However, Ld.CIT(A) did not agree and dismissed the contentions, stating as under:

“8.3 The second contention of the appellant's AR regarding calculation of the suppressed turnover pertains to the reduction of Rs.20,47,07,200/- on account of vacant plots/future collection,

allowed by the AO while making the computation of suppressed turnover. This plea of the AR is examined but is found to be baseless. It is his contention that in respect of future sales, the AO should have given credit for the total receipts from the plot owners, whereas credit has been given only to the extent of registered value. This aspect has been dealt with by the AO in great details on pages 6 to 9 of the assessment order, where, after reproducing and duly considering the appellant's submissions, the AO has given project wise and plot wise calculation of vacant plots, and has observed as under:

"Thus, to this extent, the evidence value of such plots amounting to Rs.18,30,57,700/- is excluded while computing suppression of receipts. However in respect of some plots which were registered in subsequent years in the name of the same parties who had booked the plots (for which evidence in the form of booking rate was found), the assessee has shown only the Registered value of the said plots as sale value in the subsequent years. As a result, only the Registered value of the said plots amounting to Rs.2,16,49,500/- is allowed to be reduced for such plots while computing suppression of receipts. Finally, the total value of relief to the assessee on this issue works out to Rs.20,47,07,200/- as per Annexure "H".

The AO has thus clearly observed that in respect of some plots accounted for in future sales, the appellant has shown only Registered value of the said plots as sale value in subsequent years, and therefore, only Registered value of the said plots amounting to Rs.2,16,49,500/- is being reduced while computing suppression of receipts. I find no infirmity in the order of the AO on this issue. Ground No.6 related to this issue is therefore DISMISSED".

6.3. It was the contention of the Ld. Counsel that assessee has correctly accounted the amounts post search in books of account which should have been excluded while arriving at the gross receipts. In the alternate, since the sales were accounted for at a later period, any difference in sale amount, if any can only be taxed in the post search assessments but not in the pre-search assessment as many plots have not been sold on the date of search and so the question of suppressed turnover does not arise.

6.4. Ld.DR, however, relied on the orders of AO and CIT(A).

6.5. We have considered the rival contentions. As seen from the working of AO, AO has considered all plots in nine ventures in arriving at the gross receipts. Whatever may be the rate adopted but the fact is that all the plots in a venture have been considered in arriving at gross collections. It is admitted that about 79 plots have not been sold as on the date of search, even though some advances have been received against future sale as per the reconciliation furnished by assessee. AO admitted that some of the plots have been unsold as on the date of search and reduced only the registered value from the gross collections. It means that the gross value adopted includes the future sale amounts also, which cannot be brought to tax during the search/block period. Thus, *prima-facie* there is valid contention of assessee that the future sales on the unsold plots on the date of search cannot be brought to tax. However, it is not clear whether any of the plots were sold in AYs. 2015-16, because that appeal is not before us for consideration. Moreover, it is also to be examined whether assessee has accounted only the registered value as sale price as considered by AO or the actual price i.e., more than the registered value as submitted by assessee in the reconciled statement. This aspect has not been examined by the AO or by the Ld.CIT(A), even though assessee raised the contentions. Since *prima-facie* future sales cannot be considered as suppressed turnover for the period upto date of

search, the gross receipts to that extent requires to be excluded in quantifying the suppressed turnover for the impugned assessment years. Since this aspect requires examination by the AO, we direct the AO to exclude the amounts pertaining to plots unsold as on date of search, so as to quantify the suppressed turnovers upto AY. 2014-15. In the year 2015-16 & 2016-17 i.e., of subsequent years, AO is free to verify this aspect but the unsold plots as on date of search cannot be considered for suppressed turnover particularly for quantifying the turnovers on the ratio of accounted turnover in the impugned assessment years. AO is directed to examine this aspect and exclude the turnover as directed above while determining the suppressed turnover. Grounds are considered allowed for statistical purposes.

Rate of Profit:

7. Coming to estimation of profit, as seen from the order of Ld.CIT(A), Ld.CIT(A) relied on the judgment of the Hon'ble Madhya Pradesh and Gujarat High Courts in determining the profit percentage at 40%. There is no basis for arriving at that percentage. It is an admitted proposition that there cannot be any fixed profit percentage in any business. It depends on case to case on the facts. As seen from the turnovers declared by assessee in the books of account, these are the turnovers in respective assessment years.

A.Y.	Turnover (Rs)
2010-11	10,63,08,947
2011-12	13,03,97,300
2012-13	10,29,96,427
2013-14	13,29,76,651
2014-15	14,69,66,161
2015-16	11,42,81,441
Total:	73,39,26,927

7.1. Compared to the above turnover, the suppressed turnover determined by the AO was roughly at about 14.5% of the total turnover declared. Assessee has admittedly declared only 4% of the profit on the declared turnovers which was not disputed by AO. Consequently, there cannot be 40% profit on the so called suppressed turnover. We are of the opinion that a reasonable profit has to be estimated considering the facts of the case. There are various judgments relied on by the parties, wherein net profit was estimated from 4% to gross profit of 40%. There are various High Court judgments also estimating the income at 25% of the suppressed turnovers, but most of the rates are determined on given facts of the case and the nature of suppression. In this case, the quantification itself was done on the third party registers, where only the indicative sale prices were recorded. Since more than 70% of the turnover was recorded and the profit at 4% was accepted by AO, we are of the opinion that estimation at 12.5% is

reasonable on the facts of the case. Honourable Jurisdictional High Court in the case of ACIT Vs. Ravi Foods Pvt. Ltd., has confirmed net profit rate of 3.91%. That case however, pertains to a food business case, but not real estate. Generally in real estate/contract cases, profit is estimated at 12.5%. As assessee has mostly sold real estate plots, we are of the opinion that estimation of income at 12.5% on the suppressed turnover will meet the ends of justice. Accordingly, modifying the order of CIT(A), we direct the AO to determine the profit at 12.5% of the determined suppressed turnover. Ground on this issue is considered partly allowed.

8. In the result, all the appeals of assessee are partly allowed for statistical purposes.

Revenue appeals:

9. Revenue is contesting that the entire suppressed turnover should have been treated as income by the Ld.CIT(A). This argument of the Revenue cannot be accepted. Hon'ble Gujarat High Court in the case of CIT Vs. President Industries [258 ITR 654] (Gujarat HC) has held that it cannot be the matter of an argument that the amount of sales by itself cannot represent the income of assessee. It is the realization of excess over the cost incurred that only forms part of the profit included in the configuration of sale. Similar view was taken in the case of CIT Vs. Gurubachhan Singh J. Juneja [215 CTR 509] (Gujarat HC) and CIT Vs. Sharda Real Estate (P) Ltd., [99

DTR 100] (MP-HC) and in the case of Jyotibhaichand Bhaichand Saraf & Sons (P) Ltd., Vs. DCIT [139 ITD 10] the Co-ordinate Bench at Pune has confirmed the addition could only be made only to an extent of gross profit earned on an unaccounted/suppressed sales and not on the entire sales itself. Similar view was also taken in the case of ACIT Vs. M/s. Archana Trading Co., in ITA Nos. 351 & 352/Coch/2011, dt. 28-02-2013 and also ACIT Vs. Pahal Food [IT (SS)A No. 42/Hyd/2005, dt. 30-09-2009] by ITAT, Hyderabad.

9.1. Respectfully following the decisions, we are of the opinion that the entire turnover cannot be brought to tax as such and there can only be an estimation of reasonable profit on the so called suppressed turnover. Therefore, there is no merit in Revenue grounds, accordingly, they are dismissed.

10. One more issue which was raised in AY. 2013-14 is with reference to disallowance of an amount of Rs. 22,000/- u/s. 40(a)(ia) of the Act made by the AO, but deleted by the Ld.CIT(A) for the following reasons:

“5.3 I have carefully considered the submissions made by the appellant as well as the observations of the AO in the impugned order. The assessment order, as reproduced in para 5.1 above, on this issue, does not contain any reference to the outcome of the search or any inference derived from the Search that resulted in the impugned addition. Perusal of the assessment record also does not suggest anything to the contrary. The assessee has placed reliance on a plethora of judicial pronouncements, including the decision of the jurisdictional bench of the ITAT in the case of DCIT vs. Lingam Tulsi Prasad [2016] [49 ITR(T)-218 (Hyderabad - Trib.)], Mumbai High Court in case of All Cargo Global Logistics and Delhi High Court in the case of Kabul Chawla (380 ITR 0573). The said orders have been perused.

The Jurisdictional ITAT has noticed several precedents including the Special Bench decision of the ITAT, Mumbai in the case of All Cargo Global Logistics Ltd. (137 ITO 287) as well as decision of Hon'ble Delhi High Court in the case of CIT vs. Kabul Chawla, to hold that the addition in an assessment under section 143(3) r.w.s.153(A)/ 153C can be based only on some incriminating material unearthed during the course of the Search, unless it is an abated assessment or where time limit for issue of notice u/s. 143(2) has not expired. The relevant portion of the ITAT's order is reproduced herewith:

"It has been held that where assessments are not pending, there cannot be any abatement of the assessments and hence, the A.O. has no power to bring to tax any income on the basis of the material or return of income filed by the assessee prior to the date of search. The facts of the case before us are similar to the facts of the cases in these decisions and therefore, respectfully following the above judgements, the assessee's ground No. 3 is allowed".

The facts of the case at hand being similar, the legal ground raised by the assessee vide Sr.No.2 has to be ALLOWED. The addition/disallowance of Rs. 22,000/- made by the AO is therefore ordered to be deleted".

10.1. It was the contention of Revenue that AO can take note of income disclosed in the earlier return and also any disclosed income found during the course of search and relied on the decision of the Hon'ble jurisdictional High Court in the case of Gopal Lal Badruka Vs. DCIT [346 ITR 106] for the contention that AO can take into consideration material other than what was available during the search and seizure operation.

10.2. After considering the rival contentions, we do not see any reason to interfere with the order of Ld.CIT(A). First of all, AO has not specified whether the assessment order has been passed earlier for AY. 2013-14. Even otherwise by that

time the search has happened and assessments have been taken up, the proceedings for AY. 2013-14 have already become crystallised and AO can only consider the undisclosed income on the basis of the seized material or any other information which has come to the knowledge of AO. Since there is no evidence pertaining to the issues on which disallowance was made, we agree with the findings of Ld.CIT(A). As seen from the table mentioned in the assessment order regarding various disallowances, it is also not verifiable on what basis AO has quantified the violations u/s. 40(a)(ia) and 40A(3) of the Act, the details of which are not forthcoming from the order. There is no merit in the contentions of Revenue. Accordingly ground is dismissed.

11. In the result, all the appeals of Revenue are dismissed.

12. To sum-up, all the appeals of assessee are partly allowed for statistical purposes and all the appeals of Revenue are dismissed.

Order pronounced in the open court on 27th July, 2018

Sd/-
(V. DURGA RAO)
JUDICIAL MEMBER

Hyderabad, Dated 27th July, 2018

TNMM

Sd/-
(B. RAMAKOTIAH)
ACCOUNTANT MEMBER

Copy to :

- 1. Sri Sri Gruhanirman India Pvt. Ltd., Hyderabad C/o. Parthasarathy & Co., 1-1-298/2/B/3, 1st Floor, Sowbhagya Avenue, St.No.1, Ashoknagar, Hyderabad.*
- 2. The Asst. Commissioner of Income Tax, Central Circle-2(3), Hyderabad.*
- 3. CIT(Appeals)-12, Hyderabad.*
- 4. Pr.CIT(Central)-Hyderabad.*
- 5. D.R. ITAT, Hyderabad.*
- 6. Guard File.*