

**IN THE INCOME TAX APPELLATE TRIBUNAL,
AHMEDABAD D BENCH, AHMEDABAD**

[Coram: Pramod Kumar Vice President and Madhumita Roy JM]

**ITA No.1135/Ahd/2014
Assessment Year: 2007-08**

**Income Tax Officer,
Ward – 2(5), Baroda.**

.....**Appellant**

Vs.

**Shailesh Ramniklal Patel,
B-3, Mangaldeep Apartment,
Alkapuri,
Baroda – 390 007.
[PAN: ACPPP 3031 P]**

.....**Respondent**

**C.O. No.17/Ahd/2017
(In ITA No.1135/Ahd/2014)
Assessment Year: 2007-08**

**Shailesh Ramniklal Patel,
B-3, Mangaldeep Apartment,
Alkapuri,
Baroda – 390 007.
[PAN: ACPPP 3031 P]**

..... **Appellant**

Vs.

**Income Tax Officer,
Ward – 2(5), Baroda.**

.....**Respondent**

Appearances by

Lalit P. Shah for the Revenue

Sakar Sharma for the assessee

Date of concluding the hearing : 30.07.2018

Date of pronouncement : 22.10.2018

O R D E R

Per Pramod Kumar, Vice President:

1. This appeal filed by the Assessing Officer, as also Cross Objection filed by the assessee, are directed against the order dated 6th December 2013 passed by the learned CIT(A), in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2007-08.

2. Learned counsel for the assessee states that he does not wish to pursue the Cross Objection. The Cross objection is, accordingly, dismissed for want of prosecution.

3. Grievance raised in the appeal filed by the Assessing Officer is as follows :-

On the facts and in the circumstances of the case and in law, the Id. CIT (Appeals) erred in deleting the addition of Rs.2,26,56,250/- made on account of profit estimated on gross receipts without appreciating the fact that the assessee was into the business of construction and his income should be determined on the basis of 'percentage completion method' as per the provisions of A.S.-7"

4. The relevant material facts are like this. The assessee is engaged in construction activity and also derives property rental income and income from other sources. This is a reopened assessment. The Assessing Officer noted that, accordingly to him, the assessee is following the project completion method, and as per the law laid down by the Tribunal in the case of Param Anand Builders Pvt. Ltd. vs. ITO (29 ITD 29), the assessee's claim is liable to be rejected and 25% of total receipt should be brought to tax. He further noted that during the relevant financial period, the assessee has receipts aggregating to Rs.8,30,35,246/-, and accordingly, 25% thereof, i.e. Rs.2,07,58,812/-, should be taxed in the hands of the assessee. It was noted that out of receipts of secured loan of Rs.6,24,40,702/-, the amount of Rs.6,03,78,996/- were pertaining to the ongoing projects and some of these projects were completed in the immediately following financial year, and that out of sundry creditors of Rs.4,62,52,991/-, the amount of Rs.2,26,56,250/- pertained to advance received against sale of property which was executed during the immediately following financial year. It was noted that one of the conditions of the loan agreement was that the assessee was to give vacant and peaceful possession of property on or before 15.03.2007 which showed that the property was indeed handed over to the lender. It was in this backdrop that the Assessing Officer finally concluded as follows :-

"The assessee has obtained secured loan of Rs.6,25,40,702/- out of which Rs.6,03,78,996/- has been used for ongoing projects and also received Rs.2,26,56,250/- which is included in the sundry creditors. Both these amounts are utilised in his business but has not recognised any income on account of his business of property development. Since the assessee is required to maintain his books of account on "percentage completion method" which he has failed to do so. As per accounting standard (AS7 – construction contract) the assessee is required to maintain books of account on percentage completion method. Further, Hon'ble Mumbai ITAT in case of Param Anand Builders Pvt. Ltd. Vs. ITO 59 ITD 29 (Mum) has held that assessee has to recognise his revenue on the basis of "percentage completion method" and not on "project completion method". The assessee was specifically asked to show cause why his income should not be estimated on "percentage completion method" but assessee has not offered any explanation why provision of section 145(2) should not be applied in his case. I, therefore, hereby, reject his books of accounts and estimate his

net income @ 25% of total receipts. In considering the net profit @ 25%, I have considered the fact that the assessee has claimed interest expenses 11,19,048/- at the same time assessee has cash on hand of Rs.1,19,92,373/- as on 31.03.2007. The same is worked out as under :

Secured loan utilised in the project -	Rs.6,03,78,996/-
Add: advance receipt	<u>Rs.2,26,56,250/-</u>
Total	<u>Rs.8,30,35,246/-</u>
Net profit @ 25% of	Rs.2,07,58,812/-

Rs.8,30,35,246/-”

5. Aggrieved, assessee carried the matter in appeal before the learned CIT(A) who reversed the stand of the Assessing Officer on the basis of following reasons:-

“4.3.1. I have considered the submission of the learned Authorized Representative and the order of the Assessing Officer. The Assessing Officer has calculated the Net Profit on estimated rate of 25% of Rs.8,30,35,246/-(secured loan amount of Rs.6,03,78,996/- & advance receipt for sale of property for Rs.2,26,56,250/-) by rejecting books of accounts of the assessee and estimated assessee's net income on percentage completion method as mentioned in AS-7 "Construction Contract".

4.3.2. With the submissions made by Learned Authorized Representative of the assessee, copy of sale deed dated 07-04-2007 has been submitted for the property situated at Ground Floor, Mangaldeep-II, Opp. New Police Station, Varachha, Surat along with computation of income for the A. Y. 2008-2009 and copy of assessment order for A Y 2008-2009. In the AY 2008-2009, assessee has offered the capital gain for sale of property situated at above address and Assessing Officer in his assessment order made u/s 143(3) has accepted the claim of the appellant. Moreover, the Authorized Representative has also submitted IDS Register & 26AS of the assessee for the period from AY 2006-07 to AY 2012-2013, computation of Income for the AY 2006-07 to AY 2008-09 and copies of Lease Agreements for other properties owned by him which shows that main source of income of the assessee is Rent Income. Assessee derives rent income from various tenants.

4.3.3. On the basis of the submissions made by the appellant and various documents produced before me as discussed in para above, it is held that the main activity of assessee is renting of commercial properties. Assessee is not involved in the activity of construction in the capacity of builders as its main stream of activity. From the balance sheet of the assessee, it transpires that the assessee buys the land, constructs the property on his own and retains the property as fixed assets. Most of the properties are retained for years and assessee has shown rental income from such properties for several years. This has been accepted by the AOs in past. In the present AY also, initially, Assessing Officer accepted the return of income under section 143(3) of

the Act and assessed the income at Rs.14,32,020/-, whereas the returned income was Rs.13,72,020/-. The Assessing Officer reopened the assessment following the ratio laid by ITAT, Mumbai in the case of M/s. Param Anand Builders (P) Ltd. Vs. ITO [1996] 59 ITD 29 (Mumbai). As submitted by the assessee before the AO during the reassessment proceedings as well as during the appellate proceedings, the facts of M/s. Param Anand Builders are different from the case of the appellant. This is clearly reflected from the balance sheets of the appellant where all properties are shown as fixed assets and these are given on rent. The Assessing Officer has completely ignored these facts of the case and borrowed the concept of "percentage completion method" and applied to the loans and advances shown by the assessee in his balance sheet observing that the assessee is following the project completion method, which is incorrect. As mentioned in this para the assessee himself constructs the property and there may be some creditors in the books of assessee. It is not the business of the assessee to construct & sell the property. As far as advance of Rs.2,26,56,250/- is concerned the assessee has sold the floor of his property "Mangaldeep" at Surat and income from Capital Gain from such sale has been offered by the appellant in the subsequent assessment year which has been accepted by the Assessing Officer under 143(3) order which was passed subsequent to the reopening of the current year's assessment by the Assessing Officer. The purchaser M/s Pushti Enterprises Pvt. Ltd. had paid the advance of Rs.2,26,56,250/- to the assessee. After selling of ground floor, possession of First & Second Floor was retained by assessee and given on rent to tenants. Appellant has submitted copies of rent agreements of properties at First Floor & Second Floor given on rent to tenants by him assessee during the course of assessment proceedings. This itself proves that main activity of assessee is to earn rent income and not the construction in the capacity of builders. Income from such rented property has been shown as the Rent Income from the First Floor of Mangaldeep Complex in immediate succeeding financial year. In preceding financial years or in the succeeding financial year, assessee has not carried on any activity of Construction contract. The sale of ground floor property was reflected in immediate succeeding years' books of account on which capital gain was duly offered in the return of income.

4.3.4. Since it is held that the main activity of the assessee is renting of immovable properties and not the construction contractor, the action of Assessing Officer rejecting books of accounts of assessee & calculation of net profit on estimation basis by considering utilization of secured loan & advance receipts for sale of property without verifying the facts was unwarranted & the same is directed to be deleted. This ground of the appellant succeeds."

6. The assessing Officer is aggrieved of the relief so granted by the learned CIT(A) and is in appeal before us.

7. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of applicable legal position.

8. We are of the considered view that the Assessing Officer's reliance on Param Anand Builders (supra), for estimating 25% profits, was wholly irrelevant. That was a case in which admittedly assessee has taken 17.5% on money and the co-ordinate bench was of the view that the assessee would reasonably show a book profit of 7.5% anyway. It was a case of search and seizure operation in which incriminating material was found. These facts are simply not present in the case before us. The very starting point of the present proceedings is devoid of legally sustainable basis. There was also an inordinate delay, in the said case, in bringing related profits to tax. Whereas the project had started in 1980, there were no profits shown till 1985-86. In the present case, in the very next year the sale transaction has taken place and the related profit, accordingly, brought to tax. We have also noted that predominant activity of the assessee is to let out the property and earn rental income. In these circumstances, the action and the grievance of the appellant Assessing Officer clearly lacks merit and it cannot meet judicial approval. Learned CIT(A) was, therefore, indeed justified in his conclusions. We approve the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

9. In the result, the appeal is dismissed, and, for the reasons set out earlier, the Cross Objection has also been dismissed. Pronounced in the open court today on the 22nd day of October, 2018.

Sd/-
Madhumita Roy
(Judicial Member)

Sd/-
Pramod Kumar
(Vice President)

Ahmedabad, dated the 22nd day of October, 2018

Copies to: (1) *The appellant* (2) *The respondent*
 (3) *CIT* (4) *CIT(A)*
 (5) *DR* (6) *Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad