

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, "A" JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 1042/JP/2016
निर्धारण वर्ष/Assessment Year : 2013-2014

The ACIT, Central Circle, Kota.	बनाम Vs.	M/s Kaizen Enterprises Pvt. Ltd., S-67-68, Opera Hospital Road, Indra Vihar, Kota.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AABCK 7751 L		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

CO No. 02/JP/2017
(Arising out of ITA No. 1042/JP2016)
निर्धारण वर्ष/Assessment Year : 2013-14

M/s Kaizen Enterprises Pvt. Ltd., S-67-68, Opera Hospital Road, Indra Vihar, Kota.	बनाम Vs.	The ACIT, Central Circle, Kota.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AABCK 7751 L		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri P.C. Parwal (C.A.)
राजस्व की ओर से / Revenue by : Shri Varinder Mehta (CIT)

सुनवाई की तारीख / Date of Hearing : 22/10/2018
उदघोषणा की तारीख / Date of Pronouncement: 18/01/2019

आदेश / ORDER

PER: SHRI VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the Revenue against the order of the Id.
CIT(A), Jaipur dated 30.09.2016 for the assessment year 2013-14 and

the Cross Objection by the assessee wherein the respective grounds of appeal are as under:-

ITA No. 1042/JP2016 (Revenue's Grounds of appeal):

"1. Whether on the facts and in the circumstances of the case, the CIT(A) was right in restricting the addition of Rs. 1,16,10,000/- made by the Assessing Officer to the total income of the assessee to Rs. 10,80,000/- and, in observing that the entire on money receipt by the assessee cannot be added to the total income of the assessee.

2. Whether on the facts and in the circumstances of the case the CIT(A) was right in not considering the fact that the entire on money was admitted by the assessee as its undisclosed income in the statement recorded U/s 132(4) of the Act and such statement was not retracted till filing of return of income.

3. Whether on the facts and in the circumstances of the case, the CIT(A) was right in observing that the entire on money cannot be added to the total income of the assessee and that no fruitful enquiry has been conducted by the AO when the evidence regarding receipt of entire on money was found during the course of search and was admitted by the assessee in the statement U/s 132(4) of the Act and thus there remained nothing to be further enquired by the Assessing Officer."

CO No. 02/JP2017 (Assessee's Grounds of appeal):

"1.(a) That the learned Commissioner of Income Tax (Appeals) has erred on the facts and in the circumstances of the case and in law in computing the profit of Rs. 29,70,000/- in the on money of Rs. 1,35,00,000/- by applying GP rate of 22%, as against the profit of Rs. 18,90,000/- computed by the assessee @ 14% and

thereby sustaining the addition to the extent of Rs. 10,80,000/- (i.e. Rs. 29,70,000 less Rs. 18,90,000) out of the addition of Rs. 1,16,10,000/- (i.e. Rs. 1,35,00,000 on money less Rs. 18,90,000 profit in the on money shown by the assessee) made by the learned Assessing Officer.

(b) That the assessee had computed the profit in the on money @ 14%, even though the actual rate was only 13.02% during the year under consideration.

(c) That the charts showing comparative profitability were furnished during the course of the assessment proceedings of the assessee for the past six years, which were completed under section 143(3) read with section 153A and profitability figures were duly accepted by the learned Assessing Officer.

(d) That for these and some other reasons, it is prayed that the addition to the extent of Rs. 10,80,000/- sustained by the learned Commissioner of Income Tax (Appeals) kindly be deleted."

2. Briefly the facts of the case are that search operations u/s 132 were conducted on 19.12.2012 in the case of Nainani Group, Kota to which the assessee belongs. The statement of Director of the assessee company was recorded U/s 132(4) on 19.12.2012 wherein he made a surrender of undisclosed income of Rs. 1.35 Crores on account of "on money" received from booking of flats in project "Aashrirwad Aanandam" during the period May to November, 2012. The relevant questions no. 12 and 13 and his response in relation thereto in the said statement recorded u/s 132(4) reads as under:-

"प्रश्न 12. तलाशी की कार्यवाही के दौरान आपके कार्यालय परिसर में एक Pocket Diary मिली है जिसे जब्ती की सूची में Annexure A s-1 के Exhibit 16 पर

दिखाया गया है कृपया इसे देख कर बताएं कि इसमें क्या-क्या प्रविष्टियाँ हैं तथा किस से संबंधित है?

उत्तर उपरोक्त Annexure (Pocket Diary) को मैंने भली भाँति देख लिया है इसमें कुल लिखित Page 12 है। Page No.1 पर M/s. Kaizen Enterprises Pvt. Ltd के Project Aashirwad Aanandam के Flats की sale पेटे May 2012 में प्राप्त नकद रूपये बीस लाख का विवरण है Page No.03 पर उपरोक्त co. के ही Flats की sale पेटे प्राप्त नकदी रूपये 15 लाख है जो June 2012 में प्राप्त हुये थे Page No.6 पर M/s Kaizen Enterprises के Flats की sale से Aug 2012 में प्राप्त रूपये कुल सोलह लाख नकद प्राप्त हुये हैं Page No.8 पर Sept 2012 में प्राप्त नकदी रूपये 35 लाख जो Flats बेचने पेटे प्राप्त हुये है कि विगत है Page No.10 पर भी इसी प्रकार Flats बेचने से नकद में प्राप्त रूपये 22 लाख की प्रविष्टि है, Page No.12 पर भी माह Nov 2012 में प्राप्त रूपये 15 लाख नकद में प्राप्त की प्रविष्टि है जो Flats बेचने के पेटे प्राप्त हुये हैं। इस प्रकार कुल रूपये 13500000/- एक करोड़ पैंतीस लाख हमारी Company M/s Kaizen Enterprises Pvt. Ltd. की Scheme Aashirwad Aanandam के Flats की बिक्री से मई 2012 से Nov 2012 के बीच प्राप्त नकदी की प्रविष्टियाँ है।

प्रश्न 13. कृपया उपरोक्त राशि कुल रूपये 13500000/- को अपनी नियमित लेखा पुस्तकों से महीनावार मिलान करवायें।

उत्तर मैंने Pocket Diary व नियमित लेखा पुस्तकों को भली भाँति देख लिया है। Annexure As-1 Exhibit 16 में दर्ज प्रविष्टियाँ मुझे अपनी Co. M/s kaizen Enterprises Pvt. Ltd के Complex Aashirwad Aandam के Flats बेचने से प्राप्त on Money जिसे मैंने अपनी नियमित लेखा पुस्तकों में नहीं दिखाई है। अतः उक्त Diary से संबंधित नकद में प्राप्त कुल रकम रूपये 13500000/- एक करोड़ पैंतीस लाख को मैं अपनी Company M/s Kaizen Enterprises Pvt. Ltd. की चालू वित्त वर्ष की अघोषित आय मानते हुये करारोपण के लिये समर्पित करता हूँ।

3. During the post search proceedings, the statement of the Director of the assessee company was again recorded wherein he confirmed the surrender of undisclosed income of Rs. 1.35 crores made earlier during

the course of search and the relevant portion of his statement recorded U/s 131 dated 22.02.2013 reads as under:-

" प्रश्न 17 आपके कार्यालय में दिनांक 19.12.2012 को तलाशी के दौरान एक Pocket Diary जब्त की गई थी। जिसे Annexure-AS के Exhibit -16 इन्द्राज किया गया था। जिसमें कुल 1 से 12 पेज हैं। आपने अपने बयान दिनांक 20.12.2012 जो कि तलाशी के दौरान कार्यालय मैसर्स काईजन इन्टरप्राइजेज प्रा.लि. के Project Aashirwad Anandam के Flats की Sale पेटे May, 2012 में प्राप्त नकद रुपये बीस लाख का विवरण बताया है Page No.1-3 पर उपरोक्त कम्पनी के Flats की sale पेटे प्राप्त रुपये 15 लाख एवं June, 2012 में प्राप्त एवं पेज नं.6 पर मैसर्स काईजन इन्टरप्राइजेज प्रा.लि. के Flats की Sale से अगस्त, 2012 में प्राप्त रुपये कुल सोलह लाख नकद प्राप्त होना बताया है Page No.8 पर Sep 2012 में प्राप्त नकदी रुपये 35 लाख जो थसंजे बेचने पेटे प्राप्त हुए हैं इसी प्रकार Page No.10 पर Flats बेचने से नकद प्राप्त रुपये 22 लाख की Page No.12 पर भी माह नवम्बर 2012 में प्राप्त रुपये 15 लाख नकद में प्राप्त की प्रविष्टी है जो Flats बेचने के पेटे प्राप्त कुल रुपये 13500000/- (एक करोड़ पैंतीस लाख) आपकी Company M/s Kaizen Enterprises Pvt. Ltd के Complex Aashirwad Anandam के Flats बेचने से प्राप्त On Money चालू वित्त वर्ष की अघोषित आय मानते हुए करारोपण के लिए समर्पित किया था क्या आप इससे सहमत हैं।

उत्तर जी हाँ, जो मैंने जो अपनी कम्पनी Company M/s Kaizen Enterprises Pvt. Ltd. में कुल रुपये 13500000/- एक करोड़ पैंतीस लाख की अघोषित आय मानते हुए करारोपण के लिए समर्पित किया था। उस पर फिर से कायम हूँ।

4. The assessee thereafter filed its return of income on 29.09.2013 declaring total income of Rs. 2,74,08,460/- which includes the amounts surrendered during the search to the extent of

Rs. 18,90,000/- which was computed by the assessee by applying gross profit rate of 14% on the "on money receipts" of Rs. 1.35 Crores. During the course of assessment proceedings, the assessee was issued a show cause to explain the said discrepancy between the amount surrendered during the course of search and the subsequent disclosure made in the return of income. In response, the assessee vide its submission dated 15.10.2014 stated that though a sum of Rs. 1.35 Crores represent "on money" on the sale of flats, however, it is only the profit element in the said "on money" and not the entire "on money" which can be brought to tax. It was further submitted that the surrender of the entire "on money" is blatantly wrong and was made by the director of the company in a confused state of mind. The reply so filed by the assessee was considered, however not found acceptable to the Assessing Officer and his relevant findings are as under:

"6.6.1 The Director of the assessee-company Shri D.N. Nainani in his statement recorded u/s 132(4) during the course of search proceedings has admitted undisclosed income of Rs. 1.35 Crores and confirmed in the post search enquiry in the statement taken u/s 131 on 22.02.2013.

In the statement made above, the assessee has admitted that the amount recorded on the papers of this diary are only the 'On Money' received by it, no element of profit is involved thereof. Further, on the date of search the assessee company has booked all the expenses incurred in its project. No reason has been furnished by the assessee company for non-booking of the said 'On Money' received in the books of account, which he received from Month of May to December for the

F.Y. 2012-13 relevant to A.Y. 2013-14. Further, the cases laws relied upon by the assessee are not applicable in this case as the facts and circumstances of the instant case are different.”

5. Further, the Assessing Officer held that no set off of any expenses can be claimed against the surrender income and even if the surrender has been retracted partly by the Director of the assessee-company on behalf of his company, it would still be binding on the assessee and in support reliance was placed on various judicial decisions. The Assessing officer accordingly brought to tax an amount of Rs. 1,16,10,000/- being the difference between the amount surrendered by the assessee during the course of search amounting to Rs. 1.35 Crores and the amount declared in the return of income amounting to Rs. 18,90,000/-.

6. Being aggrieved, the assessee carried the matter in appeal before the Id. CIT(A). The Id. CIT(A) held that there is no dispute about the gross receipt of “on money” by the assessee during the year. The only issue is whether the “on money” received by the assessee should be taxed as a whole or the profit earned on the “on money” receipts should be taxed. The Id. CIT(A) further held that from the submissions of the Id. Counsel of the assessee, it is evident that evidence of incurring of expenses were not available in the seized documents/material but the fact was that only a part of expenditure pertaining to the “on money” had already been booked in the regular books and not all the expenditures. The Id. CIT(A) thereafter referred to the decisions of the Coordinate Bench in case of Abhishek

Corporation vs. DCIT 63 TTJ 651 and ITO vs. Anand Builders, and held that whole of the gross receipt of "on money" cannot be taxed in the case of the assessee and only a reasonable profit can be taxed. It was further held by the Id. CIT(A) that the AO simply added the differential amount of Rs. 1,16,10,000/- on the basis of sworn statement recorded during the search operation. No fruitful enquiry has been conducted by the AO to support his contention. The Id. CIT(A) further held that the assessee had disclosed 14% profit on these gross receipts which cannot be said to be correct as not based on any reasoning. The Id. CIT(A) held that it will be reasonable if GP rate of 22% be applied on the undisclosed "on money" and therefore, the addition to the extent of Rs. 10,80,000/- was sustained and the balance addition of Rs. 1,05,30,000/- was deleted.

7. Against the said finding of the Id. CIT(A), the Revenue is now in appeal before us. The assessee in its cross objection has supported the order of the Id CIT(A) but at the same time, challenged the rate of gross profit applied by the Id. CIT(A) @ 22% as against 13.02% declared by the assessee in its return of income.

8. The Id CIT DR vehemently argued the matter and submitted that in view of sworn statement of the director of the assessee's company recorded u/s 132(4) and in view of the admission made in the said statement, there is no dispute that the assessee has admitted the receipt of the on-money from sale of the flats. It was further submitted that the said admission has not been retracted till date by the assessee company but at the same time, the assessee company has failed to

honour the surrender so made while filing the return of income. It was accordingly submitted that there is no infirmity in the order of the Assessing officer where he has brought the whole of the on-money to tax in the hands of the assessee company. It was further submitted that decisions relied upon by the Id CIT(A) are distinguishable and doesn't support the case of the assessee company. He thus supported the order of the Assessing officer and submitted that the order of the Id CIT(A) should be set-aside.

9. Per contra, the Id. AR has submitted that the sole basis for assessing the entire on-money receipt of Rs.1.35 crores is the statement of the director of assessee company u/s 132(4) and subsequent reaffirmation of such income in statement u/s 131 recorded in post search proceedings. However, it is a settled law that admission alone cannot be a basis of assessment. CBDT in Instruction No. 286/2003-IT (Inv.) dated 10.03.2003 has accepted that instances have come to the notice of the Board where assessees have claimed that they have been forced to confess the undisclosed income during the course of search & seizure and survey operations. Such confession is not based upon reliable evidences and not considered by the concerned assessee while filing returns of income. In these circumstances, confession during the course of search & seizure and survey operation does not serve any useful purpose. It is therefore advised that there should be focus and concentration on collection of evidence of income which lead to information on what has not been disclosed or is not likely to be disclosed before the Income Tax Department. Similarly, while recording statement during the course of search & seizure and survey

operations no attempt should be made to obtain confession as to the undisclosed income. This view is again reiterated by CBDT in letter [FN 286/98/2013-IT (Inv. II)] dt. 18.12.2014. The fact of getting surrender by extracting pressure on assessee is also accepted by the courts/Tribunal in various cases. In support, reliance was placed on the various decisions in case of CIT vs. Hiranand 272 ITR 626 (Raj), Rajesh Jain vs. DCIT (2006) 100 TTJ 929 (Del), Grandhi Narender vs. ACIT (2010) 41 DTR 227 (Visakha), Surendra Pal Verma vs ACIT (2004) 89 ITD 129 (Chd) and Harshad L. Thankker vs. ACIT (2005) 3 SOT 277 (Mum).

10. The Id. AR further submitted that from the Board's instruction and the case laws referred above, it can be noted that there cannot be a direct evidence of exercising pressure/coercion for seeking surrender in the statement u/s 132(4) but the same is to be gathered from the evidences, mostly circumstantial. From a look at the seized diary, it can be noted that the same appears to have been made in one sitting. It does not contain the name or the flat no. against which the amount is received. Further, no corresponding asset in relation to such amount is found. Whatever asset/ expenditure is found in search, the same is separately offered for tax by Sh. D.N. Nainani, director of the company as is evident from copy of his return for AY 2013-14 where he has offered an amount of Rs.2,08,63,242/- in the income. Therefore, solely on the basis of diary and the statement of assessee, without bringing any material on record that assessee has capitalized such amount in the books or there is a corresponding asset/ expenditure in relation to the same, no addition can be made by treating the receipt as income.

11. The Id. AR further submitted that the assessee under the facts & circumstances of the case, accepted the receipt of on-money but since receipt is not equal to income, he applied reasonable g.p. rate of 14% considering the past history of the case and offered Rs.18,90,000/- in the return of income. In the following cases, it is held that on-money/ sales itself cannot be added to income but only a reasonable g.p. rate on such on-money/ sales can be assessed as income:-

- Jay Builders Vs. ACIT 215 Taxman 50 (Guj.)
- ITO Vs. Anand Builders 265 ITR 37 (St.) (SC)
- Abhishek Corporation Vs. DCIT 63 TTJ 651 (Ahd.)
- CIT Vs. President Industries 258 ITR 654 (Guj.)
- Mohan SadhaniVs. CIT 304 ITR 52 (MP)
- CIT Vs. Balchand Ajit Kumar 263 ITR 610 (MP)
- Agrawal Motors Vs ACIT 68 ITD 407 (Jab)
- ITO V. Gurubachan Singh J. Juneja 216 ITR 99 (Ahd)

The principles laid down in these cases are equally applicable in case of assessee and therefore, the Ld. CIT(A) has rightly held that the on-money receipt as such cannot be taxed as income but only a reasonable g.p. rate on such receipt can be assessed to tax. Hence, the order of Ld. CIT(A) to this extent be upheld by dismissing the ground of department.

12. Regarding assessee's cross objection, the Id. AR further submitted that the Ld. CIT(A) has applied G.P. rate of 22% on the on-money receipt. There is no basis for the same. As against this, assessee

has applied G.P. rate of 14% considering that G.P. rate declared during the year is 13.02% and this is the first year of project. Therefore, the addition of Rs.10,80,000/- sustained by Ld. CIT(A) be deleted.

13. We have heard the rival contentions and perused the material available on record. In this case, the search was conducted on 19.12.2012 wherein the statement of the Director of the assessee company was recorded u/s 132(4) wherein he has surrendered the amount of Rs 1.35 Crores on account of 'on-money' received from booking of flats in project "Aashrirwad Aanandam" during the period May to November, 2012. Subsequently, statement u/s 131 was recorded on 22.02.2013 where statement and surrender so made earlier during the search was confirmed. Subsequently, the assessee company filed its return of income on 30.09.2013. During the course of assessment proceedings, the assessee company has submitted that though a sum of Rs. 1.35 Crores represent "on money" which was received by the assessee company for the sale of flats, however, it is only the profit element in the said "on money" and not the entire "on money" which can be brought to tax. Thus, there is a clear admission by the assessee even during the course of assessment proceedings, besides the statement recorded u/s 132(4) during the search proceedings and u/s 131 during the post-search proceedings. Even from the perusal of the statement, there is nothing which demonstrates that there is any forced surrender by the assessee and nothing has been brought on record in terms of any circumstantial evidence of forced surrender. Further, on perusal of the statement, there is nothing which any

ways suggest that what the assessee has admitted is only the profit on receipt of on-money and not the receipt of on-money. Similar finding has been recorded by the Assessing officer and which has not been disturbed by the Id CIT(A) and we see no reason to disturb the said findings. Therefore, in absence of any retraction and where the assessee continues to maintain his position that it still abides by the statement, the contention of the Id AR has no legal leg to stand where he contends that the Revenue authorities have exerted undue pressure and obtained surrender of income. In absence of any retraction, the assessee is therefore clearly at fault in not declaring the undisclosed income fully in its return of income.

14. Having said that, let's now examine another contention of the Id AR. The Id AR has contended that notwithstanding the fact that the assessee company has accepted the receipt of on-money, given that receipt is not equal to income and it is income which can be brought to tax, income so determined by the assessee company by applying gross profit rate of 14% should have been accepted by the Assessing officer and also should not be disturbed by the Id CIT(A). The said proposition may be applied in a situation where the whole of the transaction relating to sale of flats are not found recorded in the books of accounts in terms of receipt of the sale consideration and the corresponding expenditure for construction of the flats. In that case, it may be said that it is only the sale receipts net of expenditure which can be subject to tax. In the instant case, the Assessing officer has given a finding that on the date of search, the assessee company has booked all the expenses incurred in its project and no reason has been furnished by

the assessee company for non-booking of the said 'On Money' received in the books of account, which he received from Month of May to December for the F.Y. 2012-13 relevant to A.Y. 2013-14. The Id CIT(A) has however returned a contrary finding that "from the submissions of the Id. Counsel of the assessee, it is evident that evidence of incurring of expenses were not available in the seized documents/material but the fact was that only a part of expenditure pertaining to the "on money" had already been booked in the regular books and not all the expenditures." Therefore, it is atleast not a case of complete non-reporting of transactions relating to sale of flats in the books of accounts and certain transactions relating to the same have been reported in the books of accounts. However, in order to determine the actual position relating to receipt of sale consideration and booking of expenses in the books of account relating to this particular project namely "Aashrirwad Aanandam", nothing has been brought to our attention or submitted as part of the paper book by either of the parties. Therefore, in order to determine the actual position of transactions so recorded in the books of accounts of the assessee's company in respect of project "Aashrirwad Aanandam", the matter is set-aside to the file of the Assessing officer. The Assessing officer will determine and examine all the transactions relating to receipts of sale consideration (including the on-money) and incurrence of the expenditure and to what extent, the same has been reported or not, will then determine the taxability thereof in the hands of the assessee for the impugned assessment year.

In the result, the appeal of the Revenue and the cross-objection of the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 18/01/2019.

Sd/-

Sd/-

(विजय पाल राव)
(Vijay Pal Rao)

न्यायिक सदस्य / Judicial Member

(विक्रम सिंह यादव)
(Vikram Singh Yadav)

लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 18/01/2019.

*Santosh.

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

1. अपीलार्थी / The Appellant- ACIT, Central Circle, Kota.
2. प्रत्यर्थी / The Respondent- M/s Kaizen Enterprises Pvt. Ltd., Kota.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. ITA No. 1042/JP/2016 & CO No. 02/JP/2017}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar