

**आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत**  
**INCOM TAX APPELLATE TRIBUNAL-SURAT-BENCH-SURAT**  
**श्री सी.एम.गर्ग, न्यायिक सदस्य तथा श्री ओ.पी.मीना, लेखा सदस्य के समक्ष**  
**BEFORE C .M. GARG, JUDICIAL MEMBER**  
**AND O. P. MEENA, ACCOUNTANT MEMBER**  
**आ/ .सं.अ. I.T.A No's.2372 & 2373/Ahd/2014/SRT**  
**निर्धारण वर्ष/Assessment Year: 2010-11**

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| The Deputy Commissioner of Income Tax,<br>Circle-3, Surat - 395 009. | V. | Sai Enterprise,<br>TP 10, FP No.75, B/h<br>Western City, LP Savani<br>School Road, Adajan,<br>Surat - 395 009.<br><br>[PAN: ABLFS 3025 M] |
| अपीलार्थी Appellant  |    | प्रत्यर्थी/Respondent   |
| निर्धारिती की ओर से Assessee by                                      |    | Shri Rajesh M.Upadhyay - ITP  |
| राजस्व की ओर से Revenue by   |    | Shri Dileep Kumar - Sr.DR   |

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|---|------------|
| सुनवाई की तारीख Date of hearing         | 11.10.2018 |
| उद्घोषणा की तारीख Date of pronouncement | 14.11.2018 |

**आदेश /ORDER**

**PER O. P. MEENA, AM**

1. This appeal filed by the Revenue directed against the order of learned Commissioner of Income tax (Appeals)-IV, Surat [in short CIT(A)] dated 15.05.2014 for the Assessment Year 2010-11.

**ITA No.2372/Ahd/2014/SRT for A.Y.2010-11(by Revenue) :**

2. Ground No. i to iii states that the CIT (A) is not justified in not sustaining the rejection of books of accounts without taking into

consideration the fact that the assessee had not accounted for on money receipts to the extent of Rs.1,50,01,225/- and that it had failed to furnish the cost of construction of the built up area showed during the year and CIT (A) not justified in sustaining the estimation of profit @15% of the sale consideration of flats without going into the merits of the case.

3. Briefly stated facts are that a survey u/s.133A was conducted wherein unaccounted on money of receipts Rs.1,50,10,225/- were detected. The assessee has also admitted as undisclosed income in his statement recorded during the course of survey. Relying on the decision in the case of Fakir Mohd. Haji Hasan 247 ITR 290 (Gujarat), the AO was of the opinion that the on money receipts were required to be taxed u/s.69 and being in the nature of deemed income would not fall under any head of income including income from other sources. In response to show cause notice, it was explained that the assessee had disclosed 1.50 crores on account of collection of money against the sale of flats and the same was offered for taxation. It was further submitted that same cannot be taxed under the head income from other sources, as diary BF-1 was found from the business

premises of the assessee and in their statement the partners have stated that the recordings on page no.1 to page no.5 pertained to unaccounted payment for the purchase of flats which were not recorded in the books and withdrawn by the partners of the firm. It was further submitted that the said receipts were declared though not recorded in the books of accounts are of the character of business receipts as soon as disclosure is admitted, the same is recorded in the books of accounts, closed and adjusted as on 31.03.2010, it was therefore argued that said receipts are required to be assessed as business receipts. However, the AO was not satisfied with the explanation and held that on money disclosed by the assessee at that time of survey amounting to Rs.1.50 crores was deemed income u/s.69 of the Act and also held that no deduction under this income was allowed to the assessee.

4. Being aggrieved, the assessee filed an appeal before the Id.CIT(A). It was submitted before the CIT(A) that in the statement of Dineshbhai J.Dagliya recorded on 01.09.2009 in answer to question no.12 it was submitted that the page no.1 to 5 of the diary BF-1 is on money receipts from the flat holders which was declared as income

of the firm for the A.Y. 2010-11. Thus, it was contended that the assessee has shown the said income in its trading account for the year ended on 31.03.2010 separately and offered for taxation under the 'head' business, the AO has taxed the same u/s.69 of the Act without giving any deduction. The assessee contended that the AO misinterpreted section 69, 69A, 69B and 69C of the Act and it was contended that section 69 is for taxing of unrecorded investment and section 69A for taxing for unrecorded assets, like money, bullion, jewellery etc., found in position of the assessee, further, the decision in the case of Fakir Mohd. Hazi Hasan (supra) relied by the AO that income under the deeming provision do not fall under any head of income was disapproved by the same court in their subsequent decision in the case of Radhe Developers India Ltd., 329 ITR 1 (Gujarat) and it was held that the Act does not envisage taxing any income under any head not specified in section 14. Further, reliance was placed on the decision of Tribunal in the case of Fashion World vs. ITO, ITA No.1634/Ahd dated 12.02.2010 wherein it was held that if the assets disclosed during the survey are identified with the business of the assessee, then the same have to be treated as part of business income while computing total income and the consequential

deduction u/s.40(b) has to be allowed. Similarly, reliance was placed in the case of DCIT vs. Om Terrace [ITA No.440/Ahd/2012] therefore it was submitted that profit earned on on-money or unrecorded sales can be taxed as business income and not the entire gross receipts of the sale. Considering the explanation of the assessee, the CIT (A) observed that it is undisputed fact that the amount of Rs.1,50,10,225/- was received as “on-money” and deduced during the course of survey at the business premises of the appellant. As the source of the “on-money” was the business of the appellant and it has been recorded in the books as such accepted as income and offered for taxation in the return, there is no reason to consider it as an income without head. Further, the decision in the case of Fakir Mohd. Haji Hasan (supra) holding that income under deeming provisions do not fall under any head of income has been disapproved by same court in the case of Radhe Developers India Ltd., (supra) wherein it was held that the Act does not envisage taxing any income under any head not specified with section 14. Since the source of receipt was the business activity of the appellant, it has been to be taxed as business income. The AO was therefore, directed to consider this the on money receipts of Rs.1,50,10,225/- as income from

business. With regard to rejection of books of account invoking section 145(3) and estimation of net profit @15% of recorded turnover it was observed that the work in progress as on 31.03.2009 was shown at Rs.1,24,79,432/- whereas corresponding opening was in progress as on 01.04.2009 was at Rs.1,71,61,664/- it was explained that this was on account of cost of land of Rs.46,82,232/- being added to the opening WIP. The AO observed that if disclosure income of Rs.1.50 crores is reduced from the trading results the net profit from construction activities will be a loss of Rs.14,75,488/-. The AO inferred that the assessee had not made any profit from sale consideration of Rs.3,60,09,000/- received during the previous year. Though asked for the assessee did not furnish copy of construction account and total cost of construction showed during the year. The AO worked out the net profit from sale of flats at Rs.8,41,230/- (2.336%) on the basis of information available in the account. The AO states that such low margin of profit is not possible unless the assessee has taken "on-money" over and above sale account shown in the books of accounts. He, therefore, doubted the veracity of the book results and accounts and asked the assessee to explain whether net profit from sale should not to be taken @15% of sale consideration

giving net profit of Rs.54,01,350/-. It was explained that the assessee has maintained regular books of accounts on mercantile system and profit is offered for taxation on WIP method, in earlier year and in subsequent years, as regards, estimation of income at 15% it was submitted that when regular books of accounts are maintained and audited, estimation of income is prohibited. However, the AO was not satisfied with the explanation and observed that the “on-money” was reduced from trading results and copy of construction account and cost of construction of units sold was not given, therefore, low profit @2.336 % shown by the assessee could not be correct, accordingly, the AO rejected the books of accounts and estimated net profit from the business at 15% of total value of flats sold during the previous year and determine net profit from such transaction at Rs.54,01,345/-.

5. Being aggrieved, the assessee filed this appeal before CIT(A). Wherein it was contended that low profit cannot be a valid ground for rejection of books of accounts whereas the books of accounts are audited by a qualified CA, there is no adverse remarks from him in his report. Therefore, relying in the case of Alluminium Industries

Pvt. Ltd., vs. CIT [1995] 80 Taxmann 184 (Guwahati) submitted that the addition to the profit of the assessee made purely on the ground that it was low without giving a specific finding that the accounts of the assessee were not correct and complete. The AO has neither disputed the method of accounting nor stated that there is a change in the method of accounting regularly followed. The AO himself has worked out Net Profit @ 2.336% on the basis of appellant's books, hence, it cannot be said that true profit cannot be deduced from the books of accounts. With regard to estimation of profit at 15% of Net Profit there is nothing on record which establishes that expenses claimed by the assessee are bogus except AO's presumption that it cannot be believed that a prudent businessman can dispose of his property at meagre margin of profit at 2.336%. The AO has wrongly worked out the Net Profit whereas the assessee has disclosed net profit @ 27.80%. Considering these submissions, CIT (A) observed that the only defect pointed out by the AO are low profit and not providing cost of construction of flats sold. Neither of them can justify the rejection of books in the case of the appellant. The AO has himself worked out the profits from the details provided and therefore it cannot be said that profit could not be properly

determined. Low Profit by itself cannot be a reason for rejection of books. The difference in closing WIP as on 31.03.2009 and opening WIP of 01.04.2009 has explained by the appellant. The “on-money” receipts from the sale of flats detected during the survey have already been incorporated in the books. The books of accounts are audited and the system of accounting adopted has been regularly followed. There is no finding that accounting standards have not been adhered to. In fact, there is no specific defect pointed out by the AO in the accounts maintained by the appellant, therefore, the CIT (A) was of the view that there was no ground for rejection of the accounts and book results and therefore the action of the AO cannot be upheld. As far as estimation of net profit at 15% of sale consideration is concerned, no comparable case or proper comparison with assessee’s own performance in preceding or subsequent years has been taken into account by the AO in making such estimation. Since the rejection of books of account is pre-condition for estimating business income of the assessee, the estimation of net profit at 15% of sale consideration of flats cannot be upheld.

6. Being aggrieved, the Revenue has filed this appeal before the Tribunal. The Id.Senior Departmental Representative submitted that the AO has given a specific finding in para 9 of the order that if the amount of disclosure of income of Rs.1,50,10,225/- is reduced from the trading results it would result in loss of Rs.14,75,488/-, therefore the assessee was asked to furnish the total cost of construction of built up area which was sold out during the year, so that accounting results could be verified. However, the assessee has failed to produce such details clearly suggest that books of accounts are not complete. It was further contended that the margin of profit increase to 27.80% during the A.Y. 2010-11 as compared to 7.41 % in previous year and 2.79% in subsequent year clearly suggest that accounting for the assessment year under consideration is not correct and the book results are not reliable. During survey, the assessee has admitted unaccounted income of Rs.1.50 crores stated to be “on-money” receipts clearly indicates that the sale consideration to that extent was not recorded in the books of accounts, therefore, this default clearly attracts the provision of section 145(3) of that Act. As regards, there is difference by an amount of Rs.46,86,223/- in opening and closing WIP, therefore, the observation of the Id.CIT(A)

that the only defect pointed out by the are low profit and not providing cost of construction of flats sold is not legally tenable. Further, CIT (A) has not observed on estimation of profit rate of 15% of the sale consideration and merely observe that estimation of net profit of sale consideration of flats cannot be upheld.

7. On the other hand, the Id.Counsel for the assessee supported the order of the CIT(A) and referred the para 3.5 at page 13 of the appellate order and submitted that the only defect pointed out by the AO was low profit and not providing cost of construction of flats sold. Neither of the can justify the rejection of books, further the books of accounts are audited and no adverse comments has been made by the auditor and the AO has himself has worked out NP @ 2.336% on page 8 of assessment order on the basis of books of accounts of the assessee, therefore, it cannot be said the true profit cannot be deduced from the books of accounts maintained by the assessee, accordingly, the CIT(A) has rightly held that rejection of books of accounts was not justified. With regard to estimation of profit the Id.Counsel submitted that the net profit for the year and consideration comes to 27.80% as compared to preceding year's net

profit of 7.41% and subsequent year's net profit of 2.79%, thus, estimation of profit @15% of the sale consideration of flats is without any basis and without citing any comparable cases and finding fault in the books of accounts maintained by the assessee. Therefore, CIT (A) was justified in not sustaining the estimation of net profit at 15% of sale consideration of flats and rejection of books of accounts and treating the "on-money receipts" to the extent of Rs.1,50,10,225/-.

8. We have heard the rival submissions and perused the relevant material on record. The perusal of assessment order as well as appellate order reveals that the assessee has made disclosure of 1.50 crores on account of collection of "on-money" against the sale of flats as found recorded on page no.1 to 5 of a diary BF-1. This diary was found from the business premises of the assessee and the partners in their statement recorded during the course of survey has clearly stated that these receipts were collection of "on-money" from sale of flats and the unaccounted payments for purchase of flats which were not recorded in the books of accounts and withdrawn by the partners of firm, therefore, we are of the considered opinion that "on-money receipts" is clearly linked with sale of flats in the form of "on-money" which were disclosed as unaccounted income of the

assessee during the course of survey. Therefore, the source of “on-money receipts” is business receipts and hence same has to be taxed as business income, therefore, we do not find any infirmity in the order of CIT (A), accordingly ground no. i raised by the Revenue is therefore, dismissed. With regard to rejection of books of accounts and estimating of net profit of 15% against the sale of flats, we find that the AO has not pointed out any defects in the maintenance of books of accounts, which are audited. Further, the auditors have not made any adverse comments thereon. The only defect pointed out by the AO was low profit and not providing cost of construction of flat is cannot be basis of rejection of books of accounts as rightly pointed by the CIT (A). Therefore, the ground related to rejection of books of accounts is also dismissed. As regard, estimation of net profit at 15%, we find that the assessee has clearly explained the reasons in the closing of WIP and opening WIP. The “on-money receipts” from sale of flats found during the course of survey has already been incorporated in the books of accounts and there is no specific defects pointed out by the AO. Further the AO has not referred any comparable cases or proper comparison with assessee’s own performance in the preceding or subsequent years, whereas net profit rate including disclosure of survey comes to 27.80%, therefore,

further estimation of net profit at 15% of sale consideration of flats is without any cogent material and basis, therefore, the CIT (A) has rightly rejected the estimation of net profit at 15% of sale consideration of flats. In the light of these circumstances, we do not find any merits in the appeal of the Revenue in respect of all the above ground raised by the Revenue, accordingly the findings of the CIT (A) are upheld and grounds of appeal of the Revenue are therefore dismissed.

**ITA No.2373/Ahd/2014/SRT for A.Y.2010-11(by Revenue) :**

9. The grounds of appeal raised by the Revenue as under :

- i. *Whether, in the facts and circumstances of the case, Ld. CIT(A) is justified in not sustaining the penalty u/s. 271(1)(c) only for the reason that the appeal of the assessee in respect of the quantum order was allowed without taking into consideration the fact that the assessee had not accounted for "ON money" receipts to the extent of Rs.105,01,225/- and that it had failed to furnish the 'Construction account' to substantiate the cost of construction and that the revenue has not accepted the order of the Ld. CIT(A) and further appeal before the Hon'ble ITAT has been preferred.*
- ii. *On the facts and in the circumstances of the case, the Ld. CIT(A) ought to have upheld the order of the Assessing Officer."*

10. Briefly stated facts of the case are that the assessment was completed on 28.03.2013 by determining total income at Rs.2,04,11,580/- after making addition of Rs.1,50,10,225/- on account of deemed income u/s.69A of the Act on which penalty

u/s.271(1)(c) was also initiated. Meanwhile, the assessee has filed an appeal before CIT (A). However, the AO has levied penalty u/s.271(1)(c) by an amount of Rs.23,37,437/- on the whole amount of addition i.e. difference between return of income and income assessed.

11. Being aggrieved, the assessee filed appeal before the Id.CIT(A). The CIT (A) has deleted the penalty levied by the AO by observing that the AO's contention regarding on-money received by the assessee is not a business income and comes under the head 'deemed income' was not accepted by him. Further, the rejection of books of accounts and consequent estimation of income from recorded sale consideration was not proper. Since the CIT (A) has allowed the appeal in respect of quantum addition, hence penalty levied was also deleted.

12. Being aggrieved, the Revenue has filed this appeal before us. The Id.Sr.DR submitted that the Revenue has filed an appeal against the quantum addition deleted by the CIT(A), therefore, the penalty deleted by the CIT (A) is not acceptable as it depends on the quantum appeal.

13. We have heard the rival submissions and perused the relevant material on record. As we have dismissed the Revenue's quantum appeal as rejection of books of accounts and "on-money receipts" were treated as business receipts and estimation of net profit as deleted by CIT (A) in the quantum as discussed in earlier part of this order, therefore, the consequent penalty deleted by the CIT (A) is accordingly, upheld. In view of these facts, the grounds raised by the Revenue is therefore, dismissed.

14. In the result, penalty appeal for A.Y. 2010-11 is therefore dismissed.

15. To sum up, both appeals filed by the Revenue are dismissed.

16. The order pronounced in the open court on 14.11.2018.

Sd/-

(सी.एम.गर्ग /C.M. GARG)

Sd/-

(ओ.पी.मीना/O.P.MEENA)

न्यायिकसदस्यतथा/JUDICIAL MEMBER लेखासदस्यकेसमक्ष /ACCOUNTANT MEMBER

सुरत/ Surat, दिनांक Dated: 14<sup>th</sup> November, 2018/opm

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

1. अपीलार्थी/ The Appellant;
2. प्रत्यर्थी/ The Respondent;
3. आयकरआयुक्त(अपील-The CIT(A),
4. Pr. CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, सुरत/ DR, ITAT, Surat;
6. गार्डफाईल / Guard file.

**By order**

/ / **TRUE COPY** / /

**Assistant Registrar, Surat**