

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A" MUMBAI**

**BEFORE SHRI MAHAVIR SINGH (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 5509/MUM/2016
Assessment Year: 2009-10**

Lodha Land Developers
Pvt. Ltd. (now merged
with Lodha Developers
Ltd.) 412, 4th floor, 17G,
Vardhaman Chamber,
Cawasji Patel Road,
Horniman Circle, Fort,
Mumbai-400001.

PAN No. AABCL2223J
Appellant

Vs. DCIT, Circle-7(3), Room
No. 655, Aayakar
Bhavan, M.K. Road,
Mumbai-400020.

Respondent

Assessee by : Mr. Jitendra Jain, AR
Revenue by : Mr. B.S. Bist, DR

Date of Hearing : 09/05/2019
Date of pronouncement: 27/05/2019

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2009-10. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-49, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143(3) r.w.s. 147 of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the assessee read as under:

1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in upholding re-opening the assessment u/s 147 of the I.T. Act.
2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in confirming the addition of Rs.5,63,315/- being alleged receipts on sale of car parking and on-money.
3. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in confirming the disallowance of prior period expenses of Rs.16,500/-.
4. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in making the above addition of Rs.5,63,315/- and Rs.16,500/-, without any evidence and without making any independent enquiry and by solely relying on the application u/s 245C(1), of the I.T. Act filed by the appellant before the Hon'ble Income Tax Settlement Commission (ITSC), which was not admitted on the ground of non-pendency of proceedings.

3. Briefly stated, the facts are that subsequent to the search action u/s 132 of the Act in the Lodha Group of cases on 10.01.2011, the appellant filed a petition before the Income Tax Settlement Commission (ITSC) offering an income of Rs.5,63,315/- being receipts from sale of car parking and on-money. The appellant also offered Rs.16,500/- as disallowance for prior period expenses. It is the contention of the appellant that the above amount of Rs.5,63,315/- and Rs.16,500/- have been offered as income before the ITSC for the sake of meeting the threshold limit for maintainability of the petition before the ITSC, in spite of the fact that it had neither earned such income nor any incriminating material was found during the search. The appellant submits that when no incriminating material was found during the

course of search, just because the assessee had offered some income before the ITSC, without any basis, shall not constitute a 'reason to believe' for reopening the assessment u/s 148 of the Act.

4. In appeal, the Ld. CIT(A) dismissed the ground of appeal against reopening on the reason that notice u/s 148 was issued on the basis of new tangible material after duly recording the reasons.

5. Similar issue arose in the case of the appellant's group company case i.e. *M/s Anantnadh Constructions & Farms Pvt. Ltd. v. DCIT* (ITA No. 5505/M/2016) for the AY 2009-10. The Tribunal *vide* order dated 17.05.2017 held at para 6 as under:

"6. We have heard the rival contentions of both the parties. The AO has recorded the reasons for reopening the case which is reproduced in the order. It is evident that AO had precise and definite information as regard to escapement of income of Rs.5,01,049/- since the said income was declared as additional income before Settlement Commission. The assessee has not disclosed its amount in the return of income. The AO had sufficient information regarding reopening the order and moreover assessee's writ petition before the High Court was also dismissed and the department was free to initiate the proceedings under section 147 of the Act. Therefore, we are of the view that Revenue is justified in reopening the assessment order. The ground No.1 is dismissed."

5.1 Facts being identical, we follow the above order of the Co-ordinate Bench and dismiss the 1st ground of appeal.

6. The 2nd, 3rd and 4th ground of appeal are decided together as they address a common issue.

During the course of reassessment proceedings, the appellant was asked by the AO to explain as to why the income offered in the petition filed before the ITSC shall not be assessed as income of the appellant. It was the explanation of the appellant that during the course of search action, no incriminating document/material was found. However, in the settlement petition filed before the ITSC, the appellant offered an income of Rs.5,63,315/- being received from sale of car parking and on-money and Rs.16,500/- as prior period expenses. The appellant submitted that the above amount had been offered as income before the ITSC for the sake of meeting the threshold limit of maintainability of the petition in spite of the fact that it had neither earned such income nor any incriminating material was found suggesting that it had earned such income. However, the AO did not accept the contention of the appellant and made an addition of Rs.5,63,315/- being income earned by the appellant from sale of car parking and on-money and addition of Rs.16,500/- being prior period expenses.

In appeal, the Ld. CIT(A) agreed with the reasons given by the AO and confirmed the above addition made by him.

7. Before us, the Ld. counsel of the appellant submits that in absence of any material proving that the appellant had really earned any undisclosed income, it is not justifiable to make addition to its returned income solely relying on the petition of the appellant before the ITSC, more particularly when neither there is any direct evidence nor any corroborative proof that the appellant had earned income which is undisclosed. Further, it is submitted that merely a disclosure in the ITSC

petition, without substantiating any evidence, cannot by itself be a legal basis for assessing the income under the Act.

On the other hand, the Ld. DR relies on the order passed by the Ld. CIT(A).

8. We have heard the rival submissions and perused the relevant materials on record. We find that similar issue arose in appellant's group company i.e. *M/s Anantnadh Constructions & Farms Pvt. Ltd. & Ors.* (supra) wherein the Tribunal vide order dated 17.05.2017 held as under:

“19. We find from the above proposition of law by Hon'ble Gujarat High Court and Tribunal that simply relying upon the declaration made before the Settlement Commission no addition can be made. In this group case, the search was conducted in the business premises of Lodha Group and subsequent to search action assessee company along with other companies of Lodha Group filed a petition under section 245C(1) of the Act before Settlement Commission. The assessee has offered additional income of Rs.5 lakhs towards the land brokerage income. This offer was made for maintainability of petition before Settlement Commission as stated in clause (i) and clause (ia) of section 245C(1) of the Act. We are of the view that after reopening of the assessment order no addition can be made on the basis of income offered by the assessee before Settlement Commission. We find that no incriminating material was found during the course of search action substantiating that assessee has actually earned undisclosed income. Therefore, just because assessee has offered additional income before Settlement Commission, no addition can be made without basis. Hence, the addition made by the AO and Ld. CIT(A) is deleted.”

8.1 Facts being identical, we follow the above order of the Co-ordinate Bench and allow the 2nd, 3rd and 4th ground of appeal.

9. In the result, the appeal is partly allowed.

Order pronounced in the open Court on 27/05/2019.

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 27/05/2019.

Rahul Sharma, Sr. P.S.

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.

//True Copy//

BY ORDER,

(Sr. Private Secretary)
ITAT, Mumbai