

IN THE INCOME TAX APPELLATE TRIBUNAL

SURAT BENCH, SURAT

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

AND

SHRI O.P. MEENA, ACCOUNTANT MEMBER

ITA No.3035/AHD/2016
Assessment Year: 2009-10

Samruddhi Corporation, Megh Dhvani Complex, City Light Road, Surat - 395007. [PAN: AAOFM 5334 M]	Vs.	The Deputy Commissioner of Income Tax, Circle-1(2), Surat.
(Appellant)		(Respondent)

ITA No.3390/AHD/2016
Assessment Year: 2009-10

The Deputy Commissioner of Income Tax, Circle-1(2), Surat.	Vs.	Samruddhi Corporation, Megh Dhvani Complex, City Light Road, Surat - 395007. [PAN: AAOFM 5334 M]
(Appellant)		(Respondent)

Assessee by	Shri Rasesh Shah - CA
Department by	Shri Srinivas T.Bidari - CIT-DR
Date of Hearing	16.07.2019
Date of Pronouncement	17.07.2019

ORDER

PER H.S. SIDHU, JM:

These are cross appeals filed by the Assessee as well as Revenue against the impugned order passed by the Id.Commissioner of Income Tax(Appeals)-2, Surat dated 08.09.2016 pertaining to assessment year 2009-10.

2. Grounds raised by the Assessee in ITA No.3035/Ahd/2016 read as under:

- “1. On the facts and circumstances of the case as well as law on the subject, the learned Commissioner of Income Tax (Appeals) has erred in confirming the action of the assessing officer in reopening the assessment of the assessee u/s 147/148 of the act without establishing positively that any income has escaped assessment in the case of the assessee.
2. It is therefore prayed that the above addition made by assessing Officer and confirmed by learned Commissioner of Income-tax (Appeals) may please be deleted.”

3. Grounds raised by the Revenue in ITA No.3390/Ahd/2016 read as under:

- “1. Whether on the fact and the circumstance of the case and in law, the Ld.CIT(A) was justified in deleting the addition of Rs.3,38,44,000/- made by estimating the income at 25% on the advance received from its customers without appreciating the fact that the assessee has worked as a contractor therefore the AO has rightly applied the revised provisions of AS-7.
2. On the facts and in the circumstances of the case, the Ld. CIT(A) has ought to have upheld the order of the Assessing Officer.
3. It is, therefore, prayed that the order of the CIT (A) may be set aside and that of Assessing Officer may be restored to the above extent.”

4. The assessee filed its Return of Income for the A.Y. 2009-10 on 09.03.2010 showing total income of Rs.1,32,140/-. The Assessing Officer processed the same u/s.143(3) of the Income Tax Act on 16.12.2011 determining the total income at Rs.1,32,140/-. Thereafter the case of the assessee was reopened u/s.147 of the Income Tax Act by issuing notice u/s.148 of the Income Tax Act on 10.03.2014 which were duly served upon the assessee after recording the reasons for reopening of the assessment.

5. In response to the same, the Authorised Representative of the assessee appeared and filed his letter dated 20.03.2014 stating that the Original Return

filed u/s.139(1) of the Income Tax Act may be treated as Return filed in response to the notice u/s.148 of the Income Tax Act. The Authorised Representative of the assessee has requested the Assessing Officer to supply the copy of reasons recorded for reopening, same was provided by the Assessing Officer and the assessee filed its objection vide letter dated 10.02.2015 which was disposed off by the Assessing Officer vide letter dated 13.03.2015 rejecting the same. Thereafter, notice u/s.143(2)/142(1) of the Income Tax Act were issued and served upon the assessee. In response to the same the Authorised Representative appeared and filed the details.

6. During the year under consideration is engaged in the business of construction of commercial premises and lands selling. The books of accounts were called for and the same were examined on test check basis. Perusal of the same the Assessing Officer find that the assessee was having Rs.5,21,47,182/- on account of work in progress on asset side and Rs.13,53,76,000/- as advance from the customers (M/s.Pusti Enterprise Pvt. Ltd.,) on liabilities side. Further, scrutiny of the contract entered into by the assessee with M/s.Pusti Enterprise Pvt. Ltd., revealed that the total consideration for the construction of the Mini Hyper Store at Ved road, Surat was fixed at Rs.16,73,50,400/- out of which Rs.13,53,76,000/- was received as advanced by the assessee. The Assessing Officer of the view that the majority of the consideration amount assessee has received and Rs.4,39,20,677/- was expended on that contract and show as work in progress and no matching income on proportionate completion method as per the provision of AS-7 was offered for taxation. In view of the above the assessee

was asked to show cause as to why 25% of Rs.13,53,76,000/- i.e. Rs.3,38,44,000/- should not be added relying upon the case decision of Hon'ble Mumbai ITAT, in the case of Param Anand Builders Pvt. Ltd., Vs. ITO 59 ITD 29. In response to the same the Authorised Representative of the assessee filed its reply and raised the objection on issuance of notice u/s.147/148 of the Income Tax Act as well as on merits by stating that so long as sale deed has not executed and the amount received from the above parties only represented advance and the same was not taxable as no income was accrued to the assessee. In view of the Hon'ble Gujarat High Court decision in the case of CIT vs. Asha Land Corporation [133 ITR 55 (Guj)]. The Authorised Representative of the assessee filed detailed reply which the Assessing Officer mentioned in the assessment order. After considering the reply filed by the assessee as well as the books of accounts the Assessing Officer has decided the legal issue against the assessee as well as they do not accept the contention raised by the assessee in its reply and finally stated that the expenditure was not admissible u/s.40A(3) of the Income Tax Act and added to the total income of the assessee vide order dated 31.03.2015 u/s.143(3) r.w.s 147 of the Income Tax Act.

7. Aggrieved by the assessment order dated 31.03.2015 passed u/s.143(3) r.w.s. 147 of the Income Tax Act the assessee filed appeal before the Id.First Appellate Authority vide impugned order dated 08.09.2016 who partly allowed the appeal filed by the assessee in which the addition in dispute has been deleted and the legal issue raised by the assessee has been decided against the assessee.

8. Now, the assessee is aggrieved against deciding the issue against the assessee and the Revenue is aggrieved against the deletion of addition made by the Assessing Officer in the impugned order. They both filed these cross appeals before the Tribunal.

9. At the time of hearing, the Id.CIT-DR relied on the order passed by the Assessing Officer and on the contrary the Id.Counsel for the assessee relied upon the order passed by the Id.CIT(A) on the deletion of addition in dispute as regard to the legal issue he argued the appeal and requested that the notice u/s.148 of the Income Tax Act is invalid may be cancelled.

10. We have heard both the sides and perused the relevant material on record, especially the order passed by the Revenue Authorities along with documentary evidence filed by the Id.Counsel for the assessee. As regards to the Revenue appeal in which the Revenue has challenged the deletion of addition in dispute. We are of the considered view that the Id.First Appellate Authority has decided the issue in dispute in para no.6.11 to 6.2.4 at page 12 to 17 for the sake of convenience that is reproduced as under :

*“6.1.1. I have considered the assessment order as well as the submissions of the appellant. The Grounds of appeal- **Ground No. 1** pertains to reopening the assessment of the u/s 147/148 of the act without establishing positively that any income has escaped assessment in the case of the assessee. The AO re-opened the case u/s 147 of the Act as the AO noticed that the appellant was having Rs.5,21,47,182/- on account, of work in pi-ogress on asset side and Rs.13,53,76,000/-as advances from customers. (Pusti Enterprise Pvt. Ltd, on liability side) but the matching income on percentage completion method as per the provision of AS-7 was not offered for taxation. In addition it was also held by the AO that an amount of Rs.3,76,496/- was inadmissible u/s 40A(3) as per item no.*

17(h)(B) of Audit Report. The appellant was issued notice u/s 148 on 10.03.2014 which was served on the appellant. The appellant filed a letter dated 20.03.2014 contending that the return filed originally u/s 139(1) of the Act may be treated as return filed in response to notice u/s 148 of the Act. The appellant was provided the copy of the reasons for reopening by the AO. The appellant vide his letter dated. 10.02,2015 raised objections on the reopening of the assessment which were duly disposed of by the AO on 13.03.2015. The appellant submitted vide his submission dated 22.06.2016 that the reopening was erroneous as he had filed the correct return of income and had shown all the income from the all sources and had disclosed the complete details in the audit report submitted during the assessment proceedings. The advances received of Rs.13,53,76,000/- from Pusti Enterprise Pvt. Ltd. was duly disclosed in the books of account as advances received from customer. It was contended that the AO has reopened the case on the ground that 25% of Rs.13,53,76,000/- i.e. Rs.3,38,44,000/- was the income which had escaped from taxation and it is nowhere mentioned as how the profit was arrived by the AO at 25% of the advances received by the appellant. It was also submitted that the AO observation that the appellant had not disallowed the expenditure of Rs.3,76,496/- u/s 40A(3) is also erroneous as the said expenditure was not claimed by the appellant against income in the P&L account and the entire expenditure had been transferred to work in progress. The appellant contended that the case was reopened on the basis of the audit objection and the AO had arrived to reopen the case on the basis of the audit objection and therefore void-ab-initio,

6.1.2. On the perusal of the details, it is observed that the case was reopened on the issue of non-disclosure of profit as per AS-7 accounting standards and non-disallowance of certain expenses u/s 40A(3) of the Act. The provisions of section 147 have undergone a drastic change since 01.04.89. The leading case on this issue is that of **Indian & Eastern Newspaper Society, 119 ITR 996** wherein, the Hon'ble Supreme Court held that the opinion of the Internal Audit Party on a point of law could not be regarded as "information" enabling the assessing officer to initiate reassessment proceedings u/s 147(b). It has also been stated that though the audit party does not possess the power to pronounce on the law, it nevertheless may draw the attention of the assessing officer to it. **That part alone of the note of the audit party which mentions the law which escaped the notice of the assessing officer constitutes 'information' within the meaning of section 147,** the true evaluation of the law and its bearing on the assessment must be made directly and solely by the assessing officer.

6.1.3 Delving further on this issue the Hon'ble Supreme Court, in the case of **CIT v, PVS Beedies (P) Ltd. 237 ITR 13**, has stated that the internal audit party is entitled to point out a factual error or omission in the assessment and that the reopening of the case on the basis of such factual error is permissible under law. With this judgment the issue of 'information' supplied by an audit party, both on point of law and of fact, has been settled in favour of revenue. In this case also, the Audit Party had pointed out the issue to the AO which constitutes information on the basis of which the reassessment proceedings have been initiated. Also, in the case of New **Light Trading Co, 170 CTR 138 (Delhi)** held that Audit Party is entitled

to point out a factual error/ admission in the assessment and the reopening of the case on that basis is permissible under law.

6.1.4 Section 147 of the Act, pertains to the powers of the Assessing Officer to assess, re-assess income chargeable to tax which has escaped assessment or re-compute loss or re-compute loss or depreciation or other allowance. Section 147 authorizes and permits an Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that the said income for any assessment year has escaped assessment. The expression 'escaped assessment' clearly connotes a very basic postulate that the income for a particular assessment year went unnoticed by the Assessing Officer and because of it not being noticed by him for any reason, it escaped assessment. The meaning of the expression 'escaped assessment' is so simple and straight that it does not leave anyone in doubt that power under section 147 could be invoked by the Assessing Officer if it is a case of escape of assessment of income for a particular year.

6.1.5 The provisions of section 147 require that the Assessing Officer should have '**reason to believe**' that any income chargeable to tax has escaped assessment. The word 'reason' in the phrase 'reason to believe'⁵ would mean cause or justification. If the Assessing Officer has a cause or justification to think or suppose that income had escaped assessment, he can be said to have a reason to believe that such income had escaped assessment. The words '**reason to believe**' **cannot mean that the Assessing Officer should have finally ascertained the facts by legal evidence. They only mean that he forms a belief from the examination he makes or from any information that he receives.** If he discovers or finds or satisfies himself that the taxable income has escaped assessment, it would amount to saying that he has reason to believe that such income had escaped assessment. The justification for his belief is not to be judged from the standards of proof required for coming to a final decision. A belief though justified for the purpose of initiation of the proceedings under section 147, may ultimately stand altered after the hearing and while reaching the final conclusion on the basis of the intervening enquiry. At the stage where he finds a cause or justification to believe that such income has escaped assessment, the Assessing Officer is not required to base his belief on any final adjudication of the matter.

6.1.6. In view of the above discussions and various judicial pronouncements, it is evident that the AO has initiated the reassessment proceedings u/s 147/148 of IT Act, 1961 as per the provisions of the Act and all the conditions laid down for reopening has been fulfilled. Hence, this ground of the appellant fails and the **ground of appeal is dismissed.**

6.2.1. The Grounds of appeal- **Ground No. 2** pertains to making addition of Rs.3,38,44,000/- by estimating the income of the assessee firm at 25% on the advance received by the assessee from its customer amounting to Rs.13,53,76,000/- without appreciating the facts and circumstances of the case in right perspective. The AO reopened the case u/s 147 of the Act as the AO noticed that the appellant was having Rs.5,21,47,182/- on account of work in progress on asset side and Rs.13,53,76,000/- as advances from customers (Pusti Enterprise Pvt. Ltd, on liability side) but the matching income on percentage completion method

as per the provision of AS7 was not offered for taxation. The AO held that the appellant had entered into contract with M/s Pusti Enterprise Pvt. Ltd. for Rs.16,73,50,400/- out of which Rs.13,53,76,000/- was received as advance but the income was not disclosed @25% relying on the judgment of the ITAT Mumbai in the case of Param Anand Builders Pvt. Ltd. Vs. ITO 59 ITD 29. The AO held that as per the agreement the average cost of construction was fixed at Rs.1000/- per sq. feet and accordingly the appellant had received more than 80% of the total cost as advanced on 31.03.2008 and the property was to be handed over before 30.12.2008. But the property was not handed over on or before 30.12.2008 and the appellant had shown WIP in his balance sheet for FY 2008-09, 2010- 11 and 2011-12. The AO held that the appellant was not following the accounting system as prescribed under AS-7 relating to construction contract, made the addition of Rs.3,38,44,000/- @25% of the total receipts of Rs.13,53,76,000/-. The appellant submitted that the out of the total area the appellant had agreed to sell the part of the building i.e. 34720 sq. feet, of area at different rates to M/s Pusti' Enterprise Pvt. Ltd. for a total consideration of Rs.16,76,50,400/-. In the year under construction a very limited construction work was carried out of Rs.4,39,20,677/- which included the cost of the land of Rs.3,44,04,150/-. It was further contended that no sale deed was executed for the property in the relevant assessment year.

6.2.2. On the perusal of the details, it is observed that during the relevant assessment year a very limited construction work was carried out as per the audited accounts work in progress of Rs.4,39,20,677/- wherein the land cost was Rs.3,44,04,1.50/- and the construction expenses was Rs.95,16,527/-. The project was under construction upto 2015-16 wherein the construction expenses in each financial year was as following:

Financial Years	Cost of Construction (Rs)
2009-10	2784218
2010-11	10899178
2011-12	7599366
2012-13	9511635
2013-14	2596548
2014-15	4274084
2015-16	7494113

6.2.3. The actual construction cost incurred during the year including the land cost as per the WIP was only 26% $(43920677/167350400 * 100)$ of the value of property agreed to be sold. As per the agreement the appellant was required to give clear and complete title of the property after obtaining the BUC/any other certificate from the competent authority before the execution of the sale deed. The terms and conditions of the agreement clearly lays down that only on the execution of the sale deed on the completion of the projection the property was to be transferred to Pusti Enterprise Pvt. Ltd. Initially the appellant had agreed to sell 34730 sq. ft. but due to certain restrictions imposed by the Government Authorities, the development plan was revised and the appellant was only able to build 26258 sq. ft. The customer Pusti Enterprise Pvt. Ltd. also reduced the requirement to 18954 sq. ft, from the original requirement and the sale deed was executed in FY 2015-16 for 18954 sq. ft. only for a. total consideration of

Rs.117670000/- . The excess amount received was refunded by the appellant. The total area sold by the appellant was as following:-

Sold Area	Sq. Feet	Sale Value (Rs)	Date of execution of sale deed
Ground Floor	6560	5,29,83,700	15.12.2015
First Floor	6566	4,31,43,300	15.12.2015
Part of Second Floor	5828	2,15,43,000	15.12.2015
Total	18954	11,76,70,000	

6.2.4. From the above facts it is evident that the transfer of the legal title was the condition precedent to the buyer. No registered sale deed was executed in the year under consideration and the amount of the total area sold was also reduced from 34720 to 18954 sq. ft. for the total consideration of Rs.11,76,70,000/- instead of the original amount of Rs.16,73,50,400/-. The AO has arbitrarily determined the profit @25% of Rs.13,53,76,000/- without any basis or material in possession. The AO's presumptive profit of Rs.3,38,44,000/- cannot be sustained for the reasons discussed above and therefore, **the ground of appeal are being allowed.**"

11. After going through the finding given by the Id.First Appellate Authority on the issues involved in the Revenue appeal in which the Id.First Appellate Authority has deleted the addition in dispute, we are of the view that in compliance of the agreement no registered sale deed was executed in the year under consideration and the amount of total area sold was also reduced from 34720 to 18954 sq.ft for the total consideration of Rs.11,76,70,000/- instead of the original amount of Rs.16,73,50,400/-. Therefore, the Assessing Officer has wrongly determined the profit @25% of Rs.13,53,76,000/- without any basis or material in position merely on the basis of presumption which is not sustainable in the eye of law. Even otherwise, the sale deeds in dispute was executed in financial year 2015-16 for which the assessee has offered its income. Therefore, the Id.First Appellate Authority has rightly deleted the

addition in dispute by passing the detailed order mention above. Therefore, no interference is called for in the well-reasoned order passed by the Id.First Appellate Authority in deleting the addition in dispute and we dismiss the Revenue appeal and uphold the impugned order.

12. As regards to the assessee appeal, in which the assessee has raised legal ground challenging the notice u/s.147/148 of the Income Tax Act. After going through the findings given by the Id.First Appellate Authority, which we have reproduced above, we fully agree with the same and uphold the impugned order for initiating the proceedings u/s.147 of the Income Tax Act and dismissed the appeal filed by the assessee.

13. In the result, cross appeals of Revenue as well as Assessee are dismissed.

Order pronounced on 17-07-2019.

Sd/-
(O.P. MEENA)
ACCOUNTANT MEMBER

Dated: 17/07/2019

"GANGADHARA RAO.S"

Copy forwarded to:

1. Appellant
2. Respondent
3. Pr.CIT
4. CIT(A)
5. DR

/ / **TRUE COPY** / /

Sd/-
(H.S. SIDHU)
JUDICIAL MEMBER

Asst. Registrar,
ITAT, Surat