



**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"G" BENCH, MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND**  
**SHRI M. BALAGANESH, ACCOUNTANT MEMBER**

ITA no.5038/Mum./2016  
(Assessment Year : 2012-13)

Dy. Commissioner of Income Tax  
Central Circle-8(4), Mumbai

..... Appellant

v/s

Mindset Estates Pvt. Ltd.  
2<sup>nd</sup> Floor, Gordhan Building no.II,  
12/14, Parekh Street, Prarthana Samaj  
Mumbai 400 004 PAN – AAFCM3426Q

..... Respondent

Revenue by : Shri B. Jaya Kumar  
Assessee by : Shri Vijay Mehta

Date of Hearing – 16.09.2019

Date of Order – 06.12.2009

**ORDER**

**PER SAKTIJIT DEY. J.M.**

The captioned appeal has been filed by the Revenue challenging the order dated 19<sup>th</sup> May 2016, passed by the learned Commissioner of Income Tax (Appeals)-47, Mumbai, pertaining to the assessment year 2012-13.

2. The Revenue has filed the present appeal being aggrieved with the decision of learned Commissioner (Appeals) in deleting the

addition of ₹ 34,43,89,459, on account of alleged on-money received on sale of flats.

3. Brief facts are, the assessee company is a real estate developer. A search and seizure operation under section 132 of the Income Tax Act, 1961 (for short "*the Act*") was conducted in case of Rohan Developers Pvt. Ltd., and various other entities promoted by Shri Haresh N. Mehta and Late Shri Jitendra N. Mehta, along with directors and employees of the company. As stated by the Assessing Officer, the Rohan Group has re-developed over 50 buildings through various group entities. In the course of search operation, unaccounted cash and jewellery as well as incriminating documents indicating suppression of sales were found and seized. Statements were recorded on oath under section 132(4) of the Act from one of the directors (now deceased), wherein, he admitted undisclosed income of ₹ 100 crore at the hands of various entities of the group and break-up of such disclosures were also submitted subsequently before the Departmental Authorities. As per the said disclosure, undisclosed income of ₹ 34 crore was offered at the hands of the present assessee in the assessment year 2011-12 towards profit from development of real estate project. On verifying the material on record, the Assessing Officer found that the assessee during the year under consideration was engaged in the construction of a commercial project named "*The*

*Ruby*" at Dadar, Mumbai. He observed, in the return of income filed for the impugned assessment year on 30<sup>th</sup> September 2012, the assessee had declared total income of ₹ 4,49,57,147. Referring to the statements recorded under section 132(4) of the Act from Shri Haresh M. Mehta, director of Rohan Developers Pvt .Ltd., wherein he admitted of accepting on-money @ 30% over and above the registered value as well as statement recorded from Ms. Chaula G. Joshi, Shri Vijay Jasani, Shri Paresh Panchlolia, all employees of the assessee company, stating that the directors of the company have received on-money on sale of flats, the Assessing Officer issued a show cause notice calling upon the assessee to explain as to why addition on account of on-money received should not be made. Though, the assessee objected to the proposed addition by emphasizing that there is no incriminating evidence indicating receipt of on-money, however, the Assessing Officer did not find merit in the submissions of the assessee. Further, the affidavits of the director and employees filed by the assessee retracting their statement recorded under section 132(4) of the Act were rejected by the Assessing Officer as afterthought. Thus, relying upon the statement recorded from the director and certain employees as well as referring to the seized material at Page-114 of Annexure A-1, the Assessing Officer concluded that the assessee has received on-money on sale of Flats. From the material on record, he found that

during the year under consideration the assessee has effected sales of ₹ 34,43,89,459. Computing on-money of 30% on the aforesaid amount, he made addition of ₹ 34,43,89,459. Challenging the aforesaid addition, the assessee preferred appeal before the first appellate authority.

4. After considering the submissions of the assessee in the context of facts and material on record, learned Commissioner (Appeals) found that the receipt of on-money by the assessee has not been established through any corroborative evidence. She observed, the seized / incriminating material referred to by the Assessing Officer neither indicates the name of the assessee nor the project built by it. Further, she observed, the statements recorded from the director as well as the employees were subsequently retracted by them. Thus, on the basis of such facts on record, learned Commissioner (Appeals) deleted the addition made by the Assessing Officer.

5. At the time of hearing, the learned Authorised Representative, at the very outset, submitted that the issue stands decided in favour of the assessee by the Tribunal in its own case in the assessment year 2011-12, vide ITA no.4027/Mum./2016, dated 31<sup>st</sup> May 2019. Further, he submitted, identical issue has been decided by the Tribunal in favour of other group entities/sister concerns. In this context, he drew

our attention to the relevant orders of the Tribunal passed in case of sister concerns. Thus, he submitted, the decisions of the Tribunal in assessee's own case as well as in case of other sister concerns have to be followed as facts are identical.

6. The learned Departmental Representative, though, agreed that similar issue has been decided in favour of the assessee as well as sister concerns in some other assessment years by the Tribunal, however, he relied upon the observations of the Assessing Officer.

7. We have considered rival submissions and perused the material on record. On a careful reading of the impugned assessment order, we find that the addition made on account of on-money is founded on the statements recorded under section 132(4) of the Act from one of the directors as well as certain employees of the assessee company. Besides the statements, the only other incriminating material referred to by the Assessing Officer is Page-114 of Annexure A-1, found and seized from 112-122, Hira Bhavan , Raja Ram Mohan Roy Road, Prarthana Samaj, Mumbai. Thus, except page-114 of Annexure A-1, the Assessing Officer has not referred to any other incriminating material found and seized during the search and seizure operation. On the basis of the aforesaid statements and seized material, the Assessing Officer has concluded that the assessee has received on-

money on sale of flats and quantified the on-money @ 30% of the sales made. At this stage, we must observe that in Para-7.41 of the assessment order, though, the Assessing Officer has stated that addition on account of on money is to be made @30% on the sales made by the assessee of ₹ 34,43,89,459. However, ultimately he has made addition at 100%. Therefore, prima facie, there appears to be an error committed by the Assessing Officer in quantifying the addition of ₹ 34,43,89,459. Be that as it may, reverting back to the issue at hand, in the course of search and seizure operation, a statement was recorded from one of the directors, now deceased, wherein he made disclosure of income to the tune of ₹ 100 crores at the hands of different entities. A bifurcation of such disclosure was also submitted in the course of search and seizure operation. As per the said disclosure, an amount of ₹ 34 crore was offered at the hands of the assessee in the assessment year 2011-12, towards undisclosed profit from real estate project. The learned Commissioner (Appeals) has recorded a clear finding of fact that in terms with the disclosure made at the time of search, the amount of ₹ 34 crore was offered as income in the assessment year 2011-12. Even, the Assessing Officer has not disputed the aforesaid fact. As could be seen from the assessment order, the Assessing Officer has stated that during the year under consideration, the assessee was constructing a commercial project

named "The Ruby" at Dadar, Mumbai. As noted earlier, apart from the statements recorded under section 132(4) of the Act, the only other evidence the Assessing Officer has referred to for making the addition of on-money is the Page-114 of the Annexure A-1 seized during the search and seizure operation. Though, the Assessing Officer has not discussed in detail the content of the said seized material, however, one can get insight into the said seized material from the order of learned Commissioner (Appeals). On reading of Para-5.2.5 of the learned Commissioner (Appeals)'s order, it becomes clear that the said seized material refers to the following projects and entities:-

<i>Sr. no.</i>	<i>Name of Project</i>	<i>Entity of Rohan Group</i>
1.	<i>Siddhesh Darshan</i>	<i>Meridian Construction Pvt. Ltd.</i>
2.	<i>Mayuresh Apartment</i>	<i>Rohan Developers Pvt. Ltd.</i>
3.	<i>Lifescapes Kshitij</i>	<i>Roxina Real Estate Pvt. Ltd.</i>
4.	<i>Siddesh Jyoti</i>	<i>Manav Builders Pvt. Ltd.</i>

8. Thus, it is patent and obvious that the seized material referred to by the Assessing Officer neither has assessee's name nor refers to any project built by it. Therefore, it can be said that the seized material in no way establishes receipt of on-money by the assessee. Further, learned Commissioner (Appeals) on factual examination has found that the sale consideration received by the assessee in some instances is more than the stamp duty value.

9. It is relevant to observe, while dealing with identical addition made by the Assessing Officer in assessee's own case on account of on-money in the assessment year 2011-12 by referring to Page-114 of Annexure A-1, as well as the statements recorded from one of the directors and certain employees, the Tribunal in ITA no.4027/Mum./2016, dated 31<sup>st</sup> May 2019, has upheld the decision of learned Commissioner (Appeals) in deleting the addition on account of on-money upon consideration of the fact that the seized material, being page-114 of Annexure A-1, does not refer to either the assessee or its project. In this context, it is relevant to reproduce the observations made by the Bench in this regard.

*"14. We have heard both the parties, perused materials available on record and gone through the orders of authorities below, along with case laws cited by the Ld.AR for the assessee. The solitary issue that needs to be resolved in this bunch of appeal is addition made by the AO towards on-money in cash on sale of flats. The AO has estimated 30% on total sales declared by the assessee for the relevant financial year towards receipt of on-money in cash over and above normal sales declared in the books of account on the basis of statement recorded from Shri Haresh M Mehta, director of M/s Rohan Developers Pvt Ltd at the time of search u/s 132(4) of the Act. The AO had also taken support from statement of certain key employees, who looked after day today affairs of the assessee group. According to the AO, the contention of the assessee cannot be accepted that there is no evidence to establish that on-money is received in respect of its projects, because the statement of director and other employees threw light on the modus operandi of the assessee group, as per which, the group was indulging in receipt of on-money on sales which is 30% over and above the normal sales price declared in the registered document. The AO, further, observed that this fact is further strengthened by enormous material found during the course of search, including cash seized from premises of the group and other assets. The assessee had also admitted Rs.100 crore undisclosed income in various group companies name on the basis of incriminating material found as a result of search and also to cover up any errors / omissions / discrepancies, etc. There are*

certain specified seized materials, which clearly indicated undisclosed income. Therefore, he came to the conclusion that there is no merit in the arguments of the assessee that there is no evidence to establish receipt of on-money. The AO further observed that when the material gathered during the course of search coupled with statement of directors clearly established the fact of receipt of on-money, it is very essential to infer that the group as a whole was indulging in this kind OF modus operandi and accordingly he estimated 30% on total sales declared for the year towards on-money receipt and made addition to the total income.

15. The facts with regard to declaration of undisclosed income in various group companies names towards omissions / errors, etc. are not disputed. It is also not in dispute that during the course of search cash and other unaccounted income pertaining to the group was found and seized. But, the AO, nowhere in his assessment order, had brought out facts to the effect that the seized material found during the course of search has a direct nexus with the assessee and its project carried out during the year under consideration. Although, the AO has referred to the seized material page 114 of Annexure A-1, to argue that there are seized materials, which indicated collection of on- money from sale of flats, but the assessee has rebutted the allegation of the AO with necessary evidence and also proved that seized material page 114 of Annexure A-i is nothing to do with business activity of the assessee and its project undertaken during the year. Insofar as seizure of cash during the course of search at No.112-122, Hira Bhavan, Rajaram Mohan Roy Road, Prarthana Samaj, Mumbai, the assessee made it clear that said amount has been seized from the residence of Shri Jitendra Mehta, director and this fact has been reflected in the Panchanama drawn during the course of search and also the same has been disclosed to tax in his individual capacity. As regards statement of director, Shri Haresh M Mehta and other employees of the group, the assessee has filed retraction statements alongwith affidavits filed by them before the AO and also explained under what circumstance they have given admission in the statement recorded u/s 132(4) of the Act. The assessee also made it clear that neither Shri Haresh M Mehta, director, nor the employees from whom statements were recorded u/s 132(4) were ever authorised to conclude sales in respect of its projects. Therefore, on the basis of their statements recorded during the course of search, no adverse inference could be drawn against the assessee regarding receipt of on-money by extrapolation of seized material found during the course of search which belonged to some other concerns.

16. Having deliberated at length on the arguments of both sides, we find that although the AO has tried to establish nexus between incriminating material found during the course of search and other undisclosed asset to the assessee, but he has failed to prove the nexus between seized materials and business activity of the assessee and also receipt of on-money. Unless, the Assessing Officer has brought out some cogent materials or evidences which

*establish receipt of on-money from sale of flats, no addition could be made, that too, on adhoc estimation of on-money on the basis of regular sales declared by the assessee. We further note that although the AO has placed his reliance on the statement of Mr. Haresh M Mehta recorded on 05-06-2011, but on perusal of affidavit of Shri Haresh M Mehta dated 11-02-2014, it is seen that reference to on-money is made by Shri Haresh M Mehta only in the answer to question No.12 and that such reference is general inasmuch as Shri Haresh M Mehta stated that he looked after project clearance and tenant association matter and that these areas required lot of cash which was spent through on-money taken in cash on sale of flats. Even in respect of statements of employees of group, nowhere they have specifically attribute the name of the assessee with reference to receipt of on-money while answering questions to statement recorded during the course of search. All along the director as well as the employees made a general statement about receipt of on-money with reference to a question posed by the Investigation wing without any reference to particular seized material found as a result of search. Similarly, the AO has taken circumstantial evidence of cash and unexplained jewellery found during the course of search to argue that the assessee is in the habit of suppression of sales by showing under valuation which was used in its business, but on perusal of cash and other assets found during the course of search it was very clear that the cash was found from 112-122, Hira Bhavan, Rajaram Mohan Roy Road, Prarthana Samaj, Mumbai, which was common premises for four entities of the assessee group and that the total cash found from various premises was almost equivalent to cash balance maintained in the books of account. Although, there is a difference of cash balance of Rs.25,86,687, the same has been offered to tax in the hands of directors and also M/s Rohan Developers Pvt Ltd. Neither the Panchanama drawn during the course of search nor the statement recorded during search indicated that cash and other unaccounted assets found during the course of search belonged to the assessee. The Ld.AO has even failed to establish nexus between incriminating materials found during the course of search to the business of the assessee. Unless there is a direct nexus between incriminating material found during the course of search coupled with statement recorded from the director and employees of the group, merely on the basis of admission of certain parties, that too, after retraction of such statements by the parties, addition cannot be made towards receipt of on-money on adhoc basis taking a clue from statement of those persons. No doubt, estimation is possible in assessment proceedings provided the AO is having sufficient information with him regarding suppression of sales or receipt of on-money. In a case, where the department is in possession of material regarding suppression of sales or receipt of on-money for part of a period, then for the remaining period, the AO may go for estimation by taking into account various parameters including certain degree of estimation. But, then this cannot be extended or enlarged to the extent of extrapolation of information to another assessee, though the same belongs to one group, unless there is specific material in the possession of the AO with regard to*

*suppression of sales or receipt of on-money. Further, statement recorded during the course of search including confession may be a best piece of evidence, but that by itself would not be conclusive evidence unless such statement is further supported by evidence in the form of incriminating material found during the course of search. The AO before estimating income has to bring on record some cogent materials to justify his action. In this case, on perusal of facts available on record, it is abundantly clear that nowhere the AO linked the seized material found during the course of search to the income estimated towards on-money received from sale of flats. While it is true that retraction by itself does not provide an impenetrable shield to the concerned person, but it is also equally true that a statement per se by itself is not conclusive evidence. This legal proposition is fortified by the decision of Hon'ble Supreme Court in the case of CIT vs S Kader Khan Sons (2013) 352 ITR 480(SC) where it was categorically held that admission is a best piece of evidence, but that by itself is not a conclusive evidence unless it is supported by further evidence in the form of incriminating materials. This legal proposition is further fortified by the decision of ITAT, Amritsar Bench in the case of ACIT vs Janakraj Chauhan (supra) where it was held that admission at the time of search is important, but not conclusive. The Tribunal further held that addition should be considered on merits, rather than on the basis of sworn statement made by the assessee. The Hon'ble Bombay High Court in the case of CIT vs Uttamchand Jam (supra) had considered the admission and subsequent retraction of the assessee and held that a retracted confession can be relied upon only if there is independent and cogent evidence to corroborate the statement. In this case, the AO has failed to bring any corroborative evidence to support the statement of directors as well as employees in order to support his action of estimation of on-money on sales declared by the assessee for the relevant financial years. Therefore, we are of the considered view that the AO was erred in estimating ad hoc on-money received from sale of flats on the basis of statement of some employees even after such statement has been retracted and also nothing on record to indicate that the assessee is in receipt of on-money."*

10. It is worth mentioning, in case of other group entities also, the Tribunal having taken note of the very same seized material viz. Page-114 of Annexure A-1 has concluded that the seized material since does not have any reference to the assessee, no addition can be made. In this context, we refer to the following decisions:-

- i) *DCIT v/s Silver Arch Builders and Promoters, ITA no.3162 & 3163/Mum./2016, dated 02.05.2017; and*
- ii) *DCIT v/s Silver Arch Builders and Promoters, ITA no.4024/Mum./2016, dated 30.01.2015.*

11. Thus, on conspectus of the facts and material on record as well as the decisions of the Tribunal referred to above, we are of the considered opinion that the addition made by the Assessing Officer on account of on-money is purely on ad-hoc/estimate basis without having any nexus with any incriminating material brought on record. In our view, merely relying upon the statements recorded under section 132(4) of the Act, which were subsequently retracted, no addition can be made purely on presumption and surmises without any corroborative evidence to follow up the statements recorded under section 132(4) of the Act. Moreover, as rightly observed by learned Commissioner (Appeals), undisclosed income declared at the time of search has already been offered by the assessee in the return of income filed for the assessment year 2011-12. Therefore, if the Assessing Officer wanted to make any addition on account of on-money in the impugned assessment year, he should have brought evidence on record to back his conclusion. As discussed earlier, the incriminating material referred to by him for making the addition in no way is connected with the assessee. Therefore, it cannot form the basis for making the addition. Therefore, on consideration of overall

facts and circumstances of the case and keeping in view the decision of the Tribunal referred to above, we do not find any infirmity in the order of learned Commissioner (Appeals). Ground raised is dismissed.

12. In the result, Revenue's appeal is dismissed.

Order pronounced in the open Court on 06.12.2019

**Sd/-**  
**M. BALAGANESH**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SAKTIJIT DEY**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 06.12.2019**

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

*Pradeep J. Chowdhury*  
*Sr. Private Secretary*

True Copy  
By Order

Assistant Registrar  
ITAT, Mumbai