

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD òDö BENCH

**Before: Shri Mahavir Prasad, Judicial Member
And Shri Amarjit Singh, Accountant Member**

**ITA No. 21/Ahd/2011
Assessment Year 2007-08**

The ACIT (OSD), Circle-9, Ahmedabad (Appellant)	Vs	M/s. N.G. Patel & Associates 10 th Floor, Astron Tech. Park, Opp. Fun Republic Satellite, S.G. Highway, Ahmedabad-380015 PAN: AACFN5395B (Respondent)
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**ITA No. 129/Ahd/2011
Assessment Year 2007-08**

M/s. N.G. Patel & Associates 10 th Floor, Astron Tech. Park, Opp. Fun Republic Satellite, S.G. Highway, Ahmedabad-380015 PAN: AACFN5395B (Appellant)	Vs	The ACIT (OSD), Circle-9, Ahmedabad (Respondent)
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**Revenue by: Shri Vinod Tanwani, Sr. D.R.
Assessee by: Shri M.K. Patel, A.R.**

Date of hearing : 26-11-2019
Date of pronouncement : 09-12-2019

आदेश/ORDER

PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-

These two appeals filed by revenue and assessee's appeal for A.Y. 2007-08, arise from order of the CIT(A)-XV, Ahmedabad dated 18-11-2010, in proceedings under section 143(3) of the Income Tax Act, 1961; in short of the Act.

ITA NO. 21/Ahd/2011 filed by revenue

2. The revenue has raised following grounds of appeal:-

- 1) *The Id. Commissioner of Income-tax(A)-XV, Ahmedabad has erred in law and , on facts in deleting the addition of Rs.19,42,636/- made by the Assessing Officer for unaccounted income.*
- 2) *The Id. Commissioner of Income-tax(A)-XV, Ahmedabad has erred in law and on facts in deleting the addition of Rs.34,55,467/- made by the Assessing Officer for liability ceased u/s.41 (1) of the Act.*
- 3) *The Id. Commissioner of Income-tax(A)-XV, Ahmedabad has erred in law and on facts in deleting the addition of Rs.1,17,68,800/- made by the Assessing Officer on account of highly understatement / undervaluation of cost of construction of Warehouse resulted in transferring of profits generated in overall business to the family members of partners without subjecting to tax.*
- 4) *On the facts and in the circumstances of the case, the Ld. CIT[A] -XV, Ahmedabad ought to have upheld the order of the Assessing Officer.*
- 5) *It is therefore, prayed that the order of the Id. Commissioner of Income-tax(A)- XV, Ahmedabad may be set-aside and that of the Assessing Officer be restored."*

3. The fact in brief is that assessee has filed return of income declaring income of Rs. 40,36,240/- on 10th October, 2007. The case was subject to scrutiny assessment and notice u/s. 143(2) was issued on 18th Sep, 2018. The total income was assessed at Rs. 2,20,20,839/- u/s. 143(3) of the act on 24th December, 2009. The additions contested in this appeal by the revenue are discussed while adjudicating the grounds of appeal filed by the revenue as follows:-

Ground No.1 (Deleting addition of Rs. 19,42,636/- for unaccounted income)

4. During the course of assessment, on verification of the TDS return filed by the assessee, the assessing officer noticed that assessee has received

contract receipt from N.G. Corporation of Rs. 19 lacs and tax deducted at source was shown at Rs. 42,126/-. On examination of the N.G. Corporation (Mall) account in the books of the assessee, it is noticed that assessee has received Rs. 20,08,201 including TDS amount. The assessee explained that the aforesaid amount was accounted in the receipt for the year of Rs. 1,27,31,825/- from Ashwaraj Bunglows. The assessing officer was of the view that amount paid by N.G. Corporation has no connection with Ashwaraj Bungalow. In view of this, the assessing officer has observed that assessee has not shown amount of Rs. 20,08,201/- paid by NG Corporation in its account. Therefore, Rs. 20,08,201/- was treated as unaccounted income of the assessee.

5. Aggrieved assessee has filed appeal before the Id. CIT(A). The Id. CIT(A) has restricted the disallowance to the difference of Rs. 65,565/-.

6. Heard the rival contentions and perused the material on record. It is undisputed fact that Rs. 19 lac +TDS of Rs. 42,126/- totaling to Rs. 19,42,126/- had been accounted for in the amount of Rs. 1,27,31,825/- received by the assessee from N.G. corporation for construction of Ashwaraj Bungalow. Out of Rs. 1,27,31,835/- amount of Rs. 72,16,500/- was debited in the account of M/s. N.G. and Rs. 55,15,335/- was directly debited to the individual bungalow owners whose construction was completed. After considering the reply of the assessee, the Id. CIT(A) has noticed that there was a difference of Rs. 65,565/-, therefore, the Id. CIT(A) has restricted the addition to the said amount as against the addition of Rs. 20,08,201/- made by the assessing officer. In the light of the above facts, we do not find any

infirmary in the decision of Ld. CIT(A), therefore, this ground of appeal of the Revenue is dismissed.

Ground No. 2 (Deleting addition of Rs. 34,55,467/- u/s. 41(1) of the act)

7. During the assessment on verification of the balance sheet, the assessing officer noticed that assessee has shown an amount of Rs. 30,43,399/- as retention money. From the details submitted by the assessee, the assessing officer observed that assessee was in the practice of withholding certain part of payment to the parties who had supplied material or rendered small services in the construction work. The assessing officer further observed that the outstanding amount remained unpaid for long time and assumed that the small parties will not come to receive the amount due to them. The assessing officer has computed the total amount of outstanding payable to the parties to the amount of Rs. 34,55,467/- and treated the same as income of the assessee u/s. 41(1) of the act

8. The assessee has contested this issue before the Id. CIT(A). The Id. CIT(A) has deleted the addition for the same reason for which addition of retention money has been deleted in the last assessment year 2006-07.

9. Heard the rival contentions and perused the material on record. The Id. counsel has submitted the ledger a/c of the retention money a/c along with ledger a/c of parties placed at page no. 91 to 95 of the paper book with particulars of bill amount, payment mode and outstanding payable etc. On identical issue and facts the ITAT vide ITA No. 282/Ahd82010 in the case of the assessee itself held that such addition was not justified. Considering

the above facts and findings, we observe that assessing officer has made the addition on assumption basis without contradicting the claim of the assessee therefore we do not find any error in the decision of Id. CIT(A). Accordingly, the appeal of the Revenue on this issue is dismissed.

Ground no. 3 (Deleting addition of Rs. 1,17,68,800/- of under valuation of cost of construction)

10. During the course of assessment, the assessing officer noticed that assessee has constructed Ashwamegh warehouse during the year under consideration at village Sarkhej Taluka, Ahmedabad on the land belonged to Ganpatbhai G. Patel Mr. Naginbhai G. Patel and Narsibhai G. Patel which was purchased in 1998. The same land was gifted to the sons and daughters of three brothers and their families. Thereafter, these donee having entrusted construction work of the godown to the assessee firm in 2005. The assessee has debited the accounts of the partners and relatives with certain amount towards cost of construction of warehouse. However, the assessing officer has observed that the assessee has shown the construction rate at lower side and the assessee has suppressed the cost of construction of the warehouse. Therefore the assessing officer has adopted the cost of material and the average cost of construction of Rs. 400 per sq. ft and estimated the total value of the warehouse at Rs. 2,12,31,800/- and after deducting the amount debited to relatives account, an amount of Rs. 1,17,68,800/- was added to the total income of the assessee as suppressed value of the warehouse constructed by the assessee.

11. The assessee has filed appeal before the Id. CIT(A). The Id. CIT(A) has deleted the addition stating that assessing officer has estimated the construction cost on assumption basis.

12. We have heard the rival contention and perused the material on record on this issue. The relevant part of the findings of Id. CIT(A) is reproduced as under:-

“15. After going through rival submissions I find that the estimation by the AO about the cost of construction per sq.ft. incurred by the appellant as against the one declared by the appellant is not supported by any material other than the statement by the AO in para 5.3 of the assessment order that the cost of construction (Rs.200 per sq.ft.) is understated, and that the cost of construction taking into account the cost of materials and the average cost of construction of Rs.1000 per sq.ft. in the market at the relevant period, the cost of construction of warehouse has been taken at Rs.400 per sq.ft. As the finding of the AO is not well substantiated and the decisions cited by the appellant (please refer to para 14 above) - CIT Vs Star Builders (2007) 294 ITR 338 (Guj) and CIT v\$. Emerald Construction Pvt.Ltd. (2007) 281 ITR 59 (Raj) support its explanation, the AO is directed to delete the addition of Rs.1,17,68,800.”

After perusal of the facts on this issue reported by the assessing officer and findings of Id. CIT(A) it is clear that the assessing officer has not brought on record any material which demonstrate that the assessee has understated the cost of construction. The assessing officer has not disproved the construction cost recorded in the books of account. Therefore, we do not find any error in the order of the Id. CIT(A). Accordingly, the appeal of the Revenue on this issue stands dismissed.

ITA No. 129/Ahd/2011 filed by assessee

13. The assessee has filed following grounds of appeal:-

- “1. The Ld. Commissioner of Income Tax (Appeal) - XV has erred on facts and in law by upholding the addition of Rs. 4779907/- made by Add. CIT Range -9, Ahmedabad by treating the advance payment received by the appellant as contract receipt Income in Asst year 2007-08.*
- 2. On the facts and circumstances of the case, the Ld. CIT (A) XV Ahmedabad ought to have accepted the submission of the appellant by deleting the addition of Rs. 4779907/- on account of contract receipt made by Add. CIT Range - 9 Ahmedabad.*
- 3. It is therefore prayed that the addition of Rs. 4779707/- made by the Ld. Add. CIT - 9 Ahmedabad be directed to be deleted by upholding the appeal of the appellant.”*

14. All the three grounds of appeal are pertained to the common issue of addition of Rs. 47,79,907/- by treating the advance as contract receipt.

15. The assessing officer noticed that assessee has received an amount of Rs. 47,79,907/- from N. G. Developers after deduction of tax of Rs. 1,04,033/-. The assessing officer observed that assessee has not shown any such receipt in its return of income for the year under consideration. The assessee has explained during the course of assessment that in subsequent year, the final contract could not be executed therefore no income was recognized for the year under consideration. The assessing officer has not agreed with the submission of the assessee and he was of the view that receipt of this year has to be included for the purpose of payment of tax and if the same has been paid back, the same has to be claimed as deduction in the relevant year. Therefore, the amount of Rs. 47,79,907/- was treated as suppressed receipt of the assessee and added to the total income of the assessee.

16. Aggrieved assessee filed appeal before the Id. CIT(A). The Id. CIT(A) has dismissed the appeal of the assessee on the ground that TDS credit has been claimed by the assessee without offering the amount in taxable income.

17. Heard the rival contentions and perused the material on record. The Id. counsel has submitted that amount received was only advance receipt and the same was reflected in the balance sheet placed at page no. 25 & 28 of the paper book. The amount was repaid in the next year as contract was cancelled with N.G. Developer and referred page no. 86 of the paper book

and other pages of ledger account and contra accounts placed at page 75 to 80 of the paper book. It is also pleaded that similar addition in the case of the assessee was deleted by the ITAT vide ITA No. 223/2010 in the assessment year 2006-07 and the copy of the order was placed in the paper book. The relevant part of the findings of the ITAT in the above cited order is reproduced as under:-

“11. We find that it is not in dispute that the assessee returned Rs. 84,64,516/- to the contractee and the project was abandoned. Thus, this undisputed fact shows that the assessee actually received Rs. 37,64,311/- only and also incurred expenditure of equal amount and earned no real income from this project, which was abandoned. In the above circumstances, in our considered view, as no real income was earned by the assessee in respect of the project in question, no income in respect of that project can be messed in the hands of the assessee. Therefore, the action of the A.O. as well as the action of the CIT(A) are unsustainable. We, therefore, delete the addition of Rs. 35,35,789/-.

12. Before parting with the order, we would like to mention the AO has allowed credit for TDS Rs. 1,48,920 to the assessee while treating the sum of Rs.35,35,689/- as income of the assessee of the year under consideration. The AO is directed to withdraw the credit of this TDS amount while giving effect to this order, as per law. This ground of the appeal of the assessee is allowed.”

In the light of the above facts and findings of the ITAT rendered in the case of the assessee on similar issue for assessment year 2006-07, we allow this ground of appeal of the assessee and the assessing officer is directed to withdraw the credit of TDS amount while giving tax effect to this order. Therefore, this ground of the appeal is allowed.

18. In the result, appeal ITA 21/Ahd/2011 filed by revenue is dismissed and appeal ITA 129/Ahd/2011 filed by assessee is allowed subject to the terms as cited above.

Order pronounced in the open court on 09-12-2019

Sd/-
(MAHAVIR PRASAD)
JUDICIAL MEMBER

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

Ahmedabad : Dated 09/12/2019

आदेश कलम अत / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,
उप/सहायक पंजीकार
आयकर अपील अधिकरण,
अहमदाबाद