

आयकर अपीलिय अधिकरण, सुरत न्यायपीठ, सुरत  
**IN THE INCOME TAX APPELLATE TRIBUNAL-SURAT-BENCH-SURAT**  
**BEFORE SHRI SANDEEP GOSAIN, JUDICIAL MEMBER**  
**AND SHRI O.P.MEENA, ACCOUTANT MEMBER**

आ.अ.सं./I.T.A No.1196/AHD/2013

निर्धारण वर्ष/Assessment Year:2009-10

<b>M/s. Jay Kesar Bhavani Developers Pvt. Ltd.,  A-48, Kesar Kunj, Shri Bhulabhai Desai Marg,  Laxmikant Ashram Road  Katargam Surat 395004</b>  <b>PAN:AABCJ 6278 P</b>	<b>V.</b>	<b>Income Tax Officer,  Ward-1(3) Surat</b>
अपीलार्थी <b>Appellant</b>		प्रत्यर्थी/ <b>Respondent</b>

निर्धारिती की ओर से / <b>Assessee by</b>	<b>Shri Sapnesh Sheth, CA</b>
राजस्व की ओर से / <b>Revenue by</b>	<b>Shri Srinivas T. Bidari, CIT(D.R.)</b>

सुनवाई की तारीख/ <b>Date of hearing:</b>	<b>12.02.2020</b>
उद्घोषणा की तारीख/ <b>Pronouncement on</b>	<b>13.02.2020</b>

**आदेश /O R D E R**

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

1. This appeal by the Assessee is directed against the order of learned Commissioner of Income tax (Appeals)-I, Surat(in short “the CIT (A)”) dated 01.02.2013 pertaining to Assessment Year 2009-10, which in turn has arisen from the assessment order passed under section 143 (3) dated 09.12.2011 of Income Tax Act, 1961 (in short ‘the Act’) by the Income Tax Officer, Ward- 1(3),Surat (in short “the AO”).

**2. Ground No. 1 to 3: relating to disallowance deduction of Rs. 5,02,25,387 u/s. 80IB(10) are not pressed before us, by the Learned Counsel on the ground that the original return of income was not filed within statutory period for eligible to make claim of deduction under section 80IB(10) of the Act, ex-consequenti, these grounds of appeal are treated as dismissed as not pressed.**

**3. Ground No. 4 to 6 relates to rejection of books of accounts under section 145(3) of the Act, confirming the addition of Rs. 4,72,02,368 on account of entire construction receipts as alleged unrecorded receipts, without appreciating in the right and true perspective, that the expenditure directly incurred for the construction of the residential units, duly recorded in the books of accounts and the accounts are duly supported by authentic evidences i.e. bills, vouchers, Government Approved Valuer reports, work progress filed with HUDCO, and CIT (A) had erred in overlooking and in summarily rejecting the detailed statement of facts hence, addition of entire gross receipts made under presumption, assumption and allegation of non-incurrence of any construction expenditure for the construction of residential units and ignoring various evidence placed in Paper Book furnished before the AO, hence, version of the AO is not justified.**

**4. Succinct facts are that the assessee is engaged in the business of construction of residential units. The assessee has filed return of income on 08.10.2009 declaring total income of Rs.8,82,070. Book profit was shown at Rs. 25,84,547 for the purpose of section 115JB of the Act. The assessee has shown turnover of Rs.567.44 lakhs and**

other income of Rs.123.49 lakhs and shown net profit at Rs. 25,54,547. The assessee has claimed deduction of Rs.30,23,019 u/s. 80IB(10) of the Act. A survey under section 133A conducted on 30.12.2009 by the DDIT(Inv.) Surat as to how business premises of the assessee. The AO noted that the assessee has shown turnover of Rs. 6,90,92,636 and claimed expenses of Rs.6,65,08,089 and shown gross profit at Rs.25,84 547 before tax in original return of income whereas after survey the assessee has filed revised Profit & Loss Account disclosing turnover at Rs.25,94,55,680 and expenditure of Rs.25,71,84,057 showing gross profit at Rs.22,71,622. The AO noted that the assessee has claimed additional expenditure of Rs.4,29,02,369 to cover up additional amount of construction work of Rs.4,29,02,369 credited in the revised Profit & Loss Account. The AO further observed that each cash payment is shown below Rs.20,000 and vouchers are made, hence, books of accounts are not reliable accordingly, same were rejected under section 145(3) of the Act. The AO has observed that total receipts as per impounded Page No. 5 to 39 of annexure B-I is at Rs.10,39,86,000 whereas in the return of income same has been shown at Rs.5,67,83,632 Hence, gross receipts are shown less by Rs.4,72,02,368. The AO further observed that during the course of assessment proceedings the assessee has

confessed to have received total receipts of Rs.9,98,17,066 out of total gross receipts of Rs.10,39,86,000 and balance receipts of Rs. 41,68,934 were not received during year. The AO further observed that the assessee has admitted additional income of Rs.5.11 crores, in addition to regular income during survey before DDIT(Inv.) Surat for A.Y.2010-11. The assessee company also confessed to have received unrecorded receipts for the customers. The assessee has already claimed the expenses to the extent of Rs. 665 crores. In view of above discussion, the AO brought to tax, the unaccounted receipts of Rs.4,72,02,368 and made addition to total income.

**5.** Being, aggrieved, the assessee filed an appeal before the Ld. CIT (A). However, the Ld. CIT(A) observed that the assessee has receipts at Rs.6,90,92,636 in the original return of income, which are increased to Rs.25, 94, 55, 680, in the revised Profit & Loss Account and balance sheet. The assessee has also increased its expenses from Rs.6,65,08,089 to Rs. 25,71,84,057 in the revised Profit & Loss Account. The additional expenses have been claimed on the basis of cash vouchers which were not produce before the survey team on the date of survey. The assessee has stated that the auditors did not consider the same correctly in the audited accounts. For some units sale consideration was shown as booking advance. The appellant also

stated that even the expenditure has not been correctly accounted for by the auditors. In view of these facts, the Ld. CIT(A) observed that the receipts and expenses have been increased several times in comparison to those reflected in the audited books of accounts, itself is sufficient reason for rejection of the books of accounts of the appellant. Therefore, the rejection of books of accounts by made the AO, was upheld. The Ld. CIT(A) further observed that as per the impounded materials the gross receipts are shown at Rs.10,39,86,000, while in the return of income the corresponding receipts in respect of 38 units have been disclosed at Rs.5,67,82,632. Therefore, the difference of Rs.4,72,02,368 has been rightly added by the AO as unaccounted receipts. The appellant's contention that the AO should have allowed the deduction for unaccounted expenditure out of unaccounted receipts and should not have added the gross receipts was not found acceptable as the disputed unaccounted receipts of Rs.4,72,02,368 have been worked out on the basis of impounded materials. It is also fact that in the revised Profit & Loss Account, the assessee has increased its expenses to Rs.25, 94, 55, 680 by adding closing stock of Rs.14, 74, 60, 675 and construction work of Rs.4, 29, 02, 369. Further, the claim of additional expenses are supported only by cash vouchers with cash payment less than Rs.

20,000 in each case as mentioned by the AO. These vouchers were not found or produce before the survey team and were not given to the auditors. The Profit & Loss Account and balance sheet, prepared by the auditors did not include these receipts and expenditure. Therefore, the appellant's claim was not found maintainable. In view of these facts, the addition made by the AO at Rs.4, 72, 02,368 being entire unrecorded receipts was confirmed.

**6.** Being, aggrieved the assessee filed this appeal before the Tribunal. The learned Counsel submitted that the AO has made the addition of entire on money receipts, without allowing expense which were duly supported by the vouchers which were reflected in the impounded material. It is fact that the assessee has incurred expenditure corresponding to the gross receipts. The corresponding expenditure in cash is the requirement of construction business. The assessee has accordingly made a claim of expenditure by way of filing revised Profit & Loss Account by which the expenditure was increased and also the gross receipts were increased. However, the AO based on impounded material computed gross receipts at Rs.10 29 crores as against the receipts shown in the books of accounts at Rs.5.67 crores, which was filed before survey under section 133A carried out. However, the AO has failed to considered expenditure so incurred

and claimed by way of filing vouchers of the same. The AO has made addition of the difference between gross receipts and receipts in books of accounts of Rs.4.72 crores but did not allow credit of expenses incurred. Learned Counsel contended that the entire on money receipts cannot be considered as net income of the assessee as the assessee has incurred corresponding expenditure to earn such on-money receipts. Therefore, only profit embedded therein in the line of business which has been disclosed by the assessee should be considered for arriving at true and net income. The learned counsel for the assessee placing reliance on the decisions of Hon'ble Gujarat High Court in the case of CIT v. President Industries [2002] 258 ITR 654 (Gujarat) /124 Taxman 654 (Gujarat) submitted that entire sales could not be added as income of the assessee, but addition could be made only to the extent of estimated profits embedded in sales for which net profit disclosed in the books of accounts was to be adopted. It was further submitted that even otherwise also, the entire on money cannot be taxed in the year of receipt as the same is required to be tax in the year in which actual sales takes place. The learned counsel for the assessee also placed reliance in the case of Jay Builders v. ACIT, 33 taxmann.com 62 and also decision of Hon'ble ITAT, Ahmedabad in the case of Kishor Telwala [199] 64 TTJ

543. It was contended that the addition could be made only in respect of those units where evidences relating to receipt of on-money has been found and not in respect of other units where there are no such evidences. The learned counsel for the assessee further relied on the judgement in the case of the Hon'ble Gujarat High Court in the case of CIT V. Ashland Corporation 133 ITR 55 and in CIT v. Motilal C Patel & Company 173 ITR 666 wherein it laid down that it is settled law that no addition can be made purely based on statement recorded during survey. The learned counsel for the assessee further relied on the judgement of Hon'ble Gujarat High Court in the case of DCIT V. Panna Corporation [Tax Appeal No. 323 and 325 of 200 dated 16.06.2012] 74 DTR 89, wherein it was held that it has been consistently held by this court and some other courts have been following the principle that even upon detection of on-money receipt or unaccounted cash receipt, what can be brought to tax is the profit embedded in such receipts and not the entire receipts themselves. If that were, the legal position, what should be estimated as a reasonable profit out of such receipts, must bear an element of estimation. Further in the case of **Abhishek Corporation v. Dy. CIT [1999] 63 TTJ (Ahd.) 651** it was held that "Where it was found that assessee had been charging 'on money'/premium in respect of

booking of flats, the entire receipts on account of 'on money'/premium charged by the assessee on booking of flats would not be the undisclosed income of the assessee for the block period, but only net profit rate could be applied on unaccounted sales/receipts for the purpose of making the addition.

**7.** In view of above stated judicial pronouncements, it was contended that only element of profit is to be considered. It was submitted that the net profit disclosed before tax by the assessee for the assessment year under consideration was @4.55% in assessment year 2009-10 and was @ 4.59% in assessment year 2010-11. Therefore, the only net profit should be adopted, and the entire on-money receipts of Rs. 4.72 crores. The learned counsel for the assessee further placed reliance on the decision of ITAT Surat bench in the case of ACIT V. M/s. Mansi Reality Pvt. Ltd. [I.T.A.No. 540/AHD/2016 A.Y. 11-12 dated 13.12.2019, wherein net profit of on-money receipts was adopted by the Id.CIT (A) was upheld by the tribunal by holding that in the case of on-money receipts, only profit embedded therein is to be taxed and not the entire on-money receipts.

**8.** *Per contra*, learned CIT(D.R.) relied on the order of CIT (A) and submitted that the expenditure claimed by way of cash vouchers were not produced during survey, hence, same is not found

acceptable by the AO lower authorities. The expenditure incurred by the assessee has been already accounted for in audited books of accounts hence, the CIT (A) was justified in confirming addition of entire on-money receipts.

**9.** We have heard the rival submissions and perused the relevant material on record. We find that the impounded material revealed that the assessee has earned gross receipts amounting Rs.10,39,86,000 whereas in the return of income, the same were shown at Rs.5,67,83,632. Hence, the AO made addition of difference in gross found and shown by the assessee at Rs.4,72,02,368 received by the assessee on account on-money on sale of flats during the year under consideration. We find that the assessee had claimed the expenditure by way of filing cash vouchers during the course of assessment proceedings, however, the AO has disbelieved the same without giving cogent reason and investigation and verification. The learned counsel for the assessee contended that considering the fact that the entire money receipts cannot be taxed in entirety and only the profit embedded therein in such receipts is to be considered for arriving at correct, true and real income for taxation. The learned counsel for the assessee supported his views by placing reliance on the judgement of the Hon'ble Gujarat High Court in the case of DCIT

V. Panna Corporation [Tax Appeal No. 323 and 325 of 2000 dated 16.06.2012] [2012] 74 DTR 89 (Gujarat) where it was held that *“it has been consistently held by this court and some other courts have been following the principle that even upon detection of on-money receipt or unaccounted cash receipt, what can be brought to tax is the profit embedded in such receipts and not the entire receipts themselves. If that were the legal position, what should be estimated as a reasonable profit out of such receipts, must bear an element of estimation.”* Therefore, respectfully following the ratio of judgement of Hon`ble jurisdictional High Court, we are of the considered opinion that only profit elements embedded in on-money receipts is required to be taxed and not the entire on-money receipts.

**10.** The learned Counsel has further placed reliance on the decision of Honourable judicial High Court in the case of CIT v. President Industries [2002] 258 ITR 654 (Gujarat) head note reads **“Section 69B, read with section 256, of the Income-tax Act, 1961 - Undisclosed investments - Assessment year 1994-95 - Whether amount of sales by itself cannot represent the income of the assessee who has not disclosed the sales - Held, yes - During survey it was found that assessee had not disclosed certain sales in books of account -**

Whether Tribunal was justified in holding that unless there was a finding that investment by way of incurring cost in acquiring goods which had been sold, had been made by assessee and that had also not been disclosed, only net profits embedded in sales, and not wholesale proceeds itself, would be treated as undisclosed income of assessee - Held, yes”.

**11.** In the case of CIT v Abhishek Corporation [2000] 158 CTR 374 (Gujarat) the Hon’ble Gujarat High Court of which catch note reads as under: addition on account of unaccounted receipts- Assessee-firm under took supervision of construction work and booking of flats on behalf of two co-operative societies - Inference was drawn from a paper seized from one M that flats were sold at premium - In response to a notice declared undisclosed income of Rs. 30 lakhs - Considering the fact that assessee was entitled supervision charges only and taking into consideration depreciation , salary , etc. . Tribunal determined the profit rate 1.31 percent - same was not disputed by Revenue - Tribunal found that undisclosed income of Rs. 30 lakhs declared by the assessee was not less than net profit calculated at 1.31 percent - investment in land and in construction was not shown to have been made by the assessee - Thus, , Tribunal rendered its decision on appreciation of material

**placed on record - No referable question of law arises.** The learned counsel for the assessee submitted that the decision of Hon'ble Gujarat High Court the net profit rate disclosed at 4.55% during the assessment year under consideration by the assessee in books of accounts and considering the facts that the project undertaken by the assessee comes under deduction of section 80IB(10) hence, there was no occasion to suppress the profit rate as disclosed by the assessee.

**12.** The Ahmedabad tribunal in above case in the of DCIT v. Abhishek Corporation v. DCIT [1999] 63 TTJ(Ahd0 651 (Ahmedabad-Trib)held that *“Where it was found that assessee had been charging ‘on money’/premium in respect of booking of flats, the entire receipts on account of ‘on money’/premium charged by the assessee on booking of flats would not be the undisclosed income of the assessee for the block period, but only net profit rate could be applied on unaccounted sales/receipts for the purpose of making the addition.* Similarly the ITAT Surat bench in the case of ACIT V. M/s. Mansi Reality Pvt. Ltd. [I.T.A.No. 540/AHD/2016 A.Y. 11-12 dated 13.12.2019, wherein net profit of on-money receipts was adopted by the Id.CIT (A) was upheld by the tribunal by holding that in the case

of on-money receipts, only profit embedded therein is to be taxed and not the entire on-money receipts.

**13.** In the light of above discussion, and respectfully following the judgements of Hon`ble Jurisdictional High Court as discussed above and also of Tribunal, we of the considered opinion that Ld. CIT (A) was not justified in confirming the addition of entire on-money receipts amounting to Rs.4,72,02,368. Therefore, only estimated net profit is required to be taxed. We find that the assessee has shown net profit at 4.55.% for the assessment year under consideration and 4.59% for A.Y. 2010-11. Further, the Hon`ble High Court in the case of CIT V. Abhishek Corporation (supra) has upheld the net profit at 1.31% as declared by the assessee in that case. The net profit rate disclosed at 4.55% during the assessment year under consideration by the assessee in books of accounts and considering the facts that the project undertaken by the assessee comes under deduction of section 80IB(10) of the Act, hence, there may not be any intention to disclose the lower rate of profit. Considering these facts, and taking in to account net profit in construction business, it would be reasonable to estimate 6% of net profit on total on-money receipts of Rs. 4,72,02,368. Accordingly, the AO is directed to tax net profit @6% on

total on-money receipts of Rs.4,72,,02,368. In view of these facts and circumstances, the Ground No. 4 to 6 of appeal are partly allowed.

**14.** In the result, the appeal of the assessee is partly allowed.

**15.** The order pronounced in the open Court on 13.02.2020

**Sd/-  
(SANDEEP GOSAIN)  
JUDICIAL MEMBER**

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

Surat: Dated: 13<sup>th</sup> February, 2020/opm  
Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/  
Guard file of ITAT.

// TRUE COPY //

**By order**

**Assistant Registrar, Surat**