

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

**BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER AND  
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA No.4278/M/2018  
Assessment Year: 2013-14**

ITO – 13(1)(2), 2 <sup>nd</sup> Floor, Room No.225, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	M/s. Orchid Builtcon Pvt. Ltd., B-202, Shah Arcade II, Ranisati Marg, Near W.E.H., Malad East, Mumbai – 400 097 <b>PAN: AAACO9140N</b>
(Appellant)		(Respondent)

**ITA No.3966/M/2018  
Assessment Year: 2013-14**

M/s. Orchid Builtcon Pvt. Ltd., B-202, Shah Arcade B, Rani Sati Marg, Malad, Mumbai – 400 097 <b>PAN: AAACO9140N</b>	Vs.	ITO – 13(1)(2), 2 <sup>nd</sup> Floor, Room No.225, Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

**Present for:**

Assessee by : Dr. K. Shivram, A.R.  
Ms. Neelam Jadhav, A.R.

Revenue by : Shri Uday Raj Singh, D.R.

Date of Hearing : 13.10.2020

Date of Pronouncement : 15.12.2020

**ORDER**

**Per Rajesh Kumar, Accountant Member:**

The present appeal has been preferred by the Revenue against the order dated 28.03.2018 of the Commissioner of

Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2013-14.

2. The grounds raised by the Revenue are as under:

“On the facts and the circumstances of the case, the Ld. CIT(A) erred in deleting the addition of Rs. 4,57,28,077/- on account of 'Suppression of Sales' without appreciating the fact that department has not accepted the decision of Hon'ble ITAT in the case of Sandhu Builders.

2. On the facts and the circumstances of the case, the Ld. CIT(A) erred in allowing depreciation on motor car without appreciating the fact that the motor car was not owned by the assessee.

2. The appellant prays that the order of CIT(A) on the above ground be set aside and that of assessing Officer be restored.

3. The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary.”

3. The issue raised in ground No.1 is against the order of Ld. CIT(A) deleting the addition of Rs.4,57,28,077/- as made by the AO on account of suppression of sales.

4. The facts in brief are that the assessee is engaged in the business of builder and developers and during the year was redeveloping a project in Happy Home Apartment CHS Ltd. The assessee has sold the flats during year, the preceding year and the subsequent years the details whereof are given on page No.7, 8 & 9 of the assessment order. The AO observed that assessee has sold the flats on varying rates ,the details whereof ,is given on page No.10 & 11 and came to conclusion that assessee has suppressed the sales as per details below:

Flat no	Name of purchase party	of	Carpet area sq.ft.	Agreement value	Booking date	Rate per sq.ft	Difference per sq.ft adopting value at Rs.16822	Suppression of sales in Rs.
1504	Rina Doshi	M.	760	9260000	02/04/2012	12184	4638	3524720
403	Harsha Doshi	L.	535	6700000	26/04/2012	12523	4299	2299965

1501	Prashant N. Shah	760	9600000	16/05/2012	12632	4190	3184400
201	Vaishali S. Sancheti	571	6900000	16/05/2012	12084	4738	2705398
1702	Paresh P. Doshi	535	7100000	09/07/2012	13271	3551	1899785
1403	Chetan Salot	535	7100000	09/07/2012	13271	3551	1899785
1203	Geeta Sanghavi	535	7100000	09/07/2012	13271	3551	1899785
1901	Hiren B. Soni	571	6700000	13/07/2012	11734	5088	2905248
1801	Neelam D. Maheshwari	760	8000000	04/08/2012	10526	6296	4784960
1802	Vatan D maheshwari	535	7200000	12/08/2012	13458	3364	1799740
2103	Kalpesh C. Patel	535	6750000	29/08/2012	12617	4205	2249675
1603	Jayprakash B Jhaveri	534	7500000	09/09/2012	14019	2803	1496802
2105	Manish a. Shah	615	7600000	07/12/2012	12358	4464	2745360
2104	Purvi P. Shah	760	9600000	07/12/2012	12632	4190	3184400
1803	Krishna N. Vora	535	7500000	22/12/2012	14019	2803	1499605
2005	Rupal P. Soni	615	7500000	15/01/2013	12195	4627	2845605
1103	Hansha B. Dudhwala	535	7500000	04/03/2013	14019	2803	1499605
2004	Nirmal P. Soni	760	11500000	25/03/2013	12500	4322	3284720
							45709558

On this basis the AO calculated the suppressed sale at Rs.4,57,09,558/- on the ground that sale of flats was made at

varying rates and similarly on sale of shops the undisclosed income was calculated at Rs. 18,920/- aggregating to Rs. 4,57,28,077/-. According to the AO the assessee has failed to give any cogent reasons or justification for such varying sale rates of the property and came to conclusion that assessee has suppressed the same to that extent and added the same to the income of the assessee.

5. In the appellate proceedings the Ld. CIT(A), after taking into consideration the reply of the assessee, deleted the addition by observing and holding as under:

“26. I have considered the facts of the case and submissions made by the appellant. The Assessing Officer, during the assessment proceedings has observed that there are huge variations in the sale price of the available saleable area sold to flat buyers by the appellant company at the same period of time. The 'AO1, therefore asked explanation from the assessee and the assessee submitted as under :-

As regard, different rates for different parties to whom flats/shops are sold by the assessee company, we would like to say that, the rate of sales price is decided at the time of booking of the flat/shops. All the flats/shops are sold by the assessee are at the prevailing market rates only at the time of backing made by them and thus we request you to not to consider the difference in rates as undisclosed sales.

The reply filed by the assessee was not convincing to the 'AO', therefore the Assessing Officer analysed the details of sale rates of all the flats and mentioned that the assessee did not submit any cogent explanation backed by documentary evidence Therefore, the AO had adopted Rs. 16.822/- per sft as prevailing market rate for flat No. 1903 where the stamp duty value is Rs. 67,50,000/- and market value is Rs. 90,00,000/- (@ Rs 16,822/-) and applied to all the other 18 flats sold/booked and arrived at a figure of Rs. 4,57,09,558/- and added as suppression of sale.

Aggrieved by the addition made by the Assessing Officer, the appellant raised grounds of appeal and made submissions during the appellate proceedings. The appellant submitted that it has submitted all the details, pertaining to the project to the Assessing Officer. The Appellant's Representative has also brought to my notice the chart submitted by the appellant at the time of assessment proceedings for my perusal and the same has been perused which gives the details of booking date, agreement value, rate per sft, agreement date and registration date. The appellant also

submitted these details during the appellate proceedings and the same are reproduced under the head Appellant's submissions for the ground no.'s 8 to 12 in this order.

The appellant further submitted that the Assessing Officer has grossly erred and not justified in adoption and applying the sale price of one flat to all the flats i.e. one unit of Shri Mayur Chandula Sondagar sold at the rate of Rs. 16,822/- per sft pertaining to the F.Y. 2014-15 and applied to the flats booked in Financial Year 2012-13. The appellant during the appellate proceedings made further submissions on this issue which are as under:

This is with reference to the appeal proceedings before your goodself and as regard difference in selling rates of Flat no. 1903 sold to Shri. Mayur Chandula! Sondagar, as compare to the flats sold to other purchases, we explain as under:-

One, Mr. Mayur Sondagar had booked the Flat no. 1903 in our project Happy Home Society in February 2012, Flat admeasuring 535 sq. ft carpet area, for lumpsum amount of Rs. 70,00,000/- and paid token amount of Rs. 1,11,000/- on 21/02/2012. The party had further made payments on different dates upto 16/08/2012 total amounting Rs.30,11,000/-.

Meanwhile, we had issued an allotment letter dated 09/06/2012 to Mr. Mayur Sondagar and Family. (Copy enclosed for your reference).

The last payment made by Mr. Mayur Sondagar was on 16/08/2012 and thereafter till March 2013 he had not made any payment. Mr. Mayur Sondagar approached us and requested vide his letter dated 10-04-2013(Copy enclosed for your reference) to cancel the flat booking due to his inability to manage the balance amount and he stated that his bank loan is not sanctioned and is not position to make further payments. He finally decided to cancel the booking and asked for refund of Rs. 30,11,00/- paid by him to us.

After the discussions vide letter dated 11/05/2013 (Copy enclosed for your reference), we both the parties cancelled the booking of the flat but the amount was not refunded to him as the company could not sell the flat to other party and the company was not having the cash liquidity to make him payment.

Again vide letter date 07/03/2014 (copy enclosed for your reference), Mr. Mayur Sondagar has approached us saying that his bank loan is now sanctioned and he may be able to buy the flat by making necessary payments and requested us to allot same flat to him.

As there was a gap of more than 1 year of cancellation and more than 2 years of allotment, we had informed that it is not possible for

us to given fresh allotment to him at same rate at which he had booked in February 2012. After negotiations, we had finalized the total consideration at revised price of Rs.90,00,000/- in comparison with Rs.70,00,000/- booked in February 2012, as there was increase in price. Accordingly, we have issued a letter dated 25/03/2014 (Copy enclosed for your reference) for giving information of re-allotment to him of Flat no. 1903 for total price and consideration of Rs. 90,00,000/-.

All these explanations and details have been submitted by us before the Ld. Assessing Officer at the time of hearing. However the Ld. Assessing Officer has ignored the fact that thought the original booking made by Mr. Mayur Sondagar was in February 2012, but the same was cancelled. The Flat was re-booked by the party in the year 2014 and hence the price rate at which the flat sold to Mr. Mayur Sondagar was naturally higher than price and rate at which flat sold to other party in year 2012 and 2013.

We further say that, flats sold to each and every party is much more higher than the prevailing stamp duty ready reckoner rate and all rates are based on prevailing market rates at time of sales and based on negotiations between the parties.

Ignoring the facts, the Ld. Assessing Officer had compared the rate of flat booked by Mr. Mayur Sondagar in year 2014 to the rate in FY.2013-14 to the rate at which other flats sold to other parties and applied the difference arbitrarily, without any findings, without any opportunity given to us and ignoring the evidences submitted with him and made addition on per sq.ft. difference rates to all flats sold during the period.

In light of the facts and circumstances, we pray your honour to kindly delete the additions made by Ld. Assessing Officer, which is made by him on the basis of merely surmises and conjectures without putting on record any facts and evidences and ignoring the facts and evidences submitted with him and also ignoring the facts and evidences submitted with him and also ignoring the facts that all rates are much more than stamp duty ready reckoner rates.

It could be seen from the above that the assessee had explained the reason r charging higher sale price as the flat was rebooked in the case of Shri Mayur Sondagar in the FY 2014-15, but not in FY 2011-12. Whereas other flats were booked in the FY 2011-12 and subsequently on different dates, for that the assessee charged different rates depending on the date of booking, floor level, facing of the flat and other factors- It is submitted that this entire information was provided to the Assessing Officer during the assessment proceedings, but the AO did not consider the explanation. On the other hand, the Assessing Officer has presumed that the amount received on account of sale of the flat to Shri Mayur Chandulal Sondagar

was actual, and the other flat owners also would have paid the same amount to the assessee. However as per the facts available on record the AO's view is not supported by any evidence. Therefore, the same cannot be accepted. Moreover, the Assessing Officer has also not brought any evidence to support his decision of estimating the receipt of unaccounted amounts in sale of flats over and above what was mentioned in the agreement for sale. Therefore, in the light of above facts, the explanation offered by the assessee appear to be correct.

From the facts on record, it is observed that the AO made addition on estimate basis but failed to bring any evidence on record for his contention that the appellant had received unaccounted sale amount of Rs.4,57,28,077/- . It is also to be mentioned that when a project is spread over several years the market price is likely to be different in different years. The marginal difference in the sale price in the flats booked have got different reasons. Here sale price difference in agreement of sale cannot be taken into consideration unless it is corroborated by some documentary evidence of unaccounted sale receipts. The onus lies on the assessing officer to prove that the appellant had received unaccounted sale consideration from flat owners. This onus is not discharged by the AO. The appellant has relied on the decision in the case of K.P. Varghese Vs C1T 131 ITR 597 SC and also the decision of jurisdictional ITAT in the case of ACIT Vs Sandhu Builders, ITA No. 5049/Mum/2012 dated 6-12-2013. The relevant portion of the decision in the case of M/s Sandhu Builders is as under:

21. The CIT(A), on the basis of these arguments and placing reliance on a number of decisions observed, "4.14 In view of the above discussion coupled with the fact that the A.O. has failed to bring on record any evidence for his contention that the appellant had received unaccounted sale consideration of Rs. 23,42,06,400/- and in view of various court's judgment discussed above including judgment of Hon'ble Supreme Court in the case of K.P. Varghese, the addition so made by the A.O. cannot be sustained. The A.O. has not brought on record any evidence to prove that any extra consideration was received over and above agreement amount. It is a known fact that in a project which is spread over several years, the market price is bound to be different in different years. The mere difference in sale price of agreement is no evidence unless it is corroborated by some concrete evidence of unaccounted sale transactions. In fact, the A.O. had carried out survey action on the appellant on 26-09-2008 when the project was going on but no evidence of unaccounted sale consideration over and above the agreement value was found. The onus lies on the A.O. to prove that the appellant had received unaccounted sale consideration from the flat owners. This onus has not been discharged. Further, suspicion howsoever grave cannot take place of proof. Therefore, the A.O. is not justified in making impugned addition of Rs. 9,36,82,560/- being 40% of Rs. 23,42,06,400/-, the same is directed to be deleted."

The Hon'ble ITAT in the above mentioned case, considering the facts of the case has held as under:

40. We have heard the detailed arguments of the contesting parties and have perused the orders of both the revenue authorities. The case before us has the following aspects:

- a) the project has been in operation from the preceding years, as evident from the assessment orders passed under section 143(3);
- b) that the accounts have been prepared on percentage completion method, where all the expenses have been debited to WIP;
- c) there was a survey operation under section 133A of the Income Tax Act, on the office premises of the assessee;
- d) no evidence was found in the search, suggesting any money received by the assessee over and above the sale consideration;
- e) the documents in the form of sale deeds submitted by the assessee showed that there was a difference of price of sale of flats received from buyers with that of the sale consideration received from Mr. Anil Shroff;
- f) there is no corroborative evidence which the AO used to frame assessment suggesting an addition of Rs. 9,36,82,5607-, being 40% of money received at Rs. 23,42,06,400/-; and
- g) decisions relied upon by the AR.

41. It may be mentioned that the AO applied all the possible angles to justify the addition, which he had sought to make & which, ultimately, he did make, relying on various decisions rendered by various fora. The addition, as impugned here in the instant appeal, has been accepted to be not based on any evidence.

42. The assessee has been relying on the percentage completion method for maintaining its books and since the project has been coming from preceding years, where neither there is any reference nor any action taken by the AO to disturb the method of accounting, which was being regularly followed by the assessee, since the commencement of project. In the submissions made before the AO, the assessee pointed out that as per the requirements of accounting standards, the 15 M/s Sandhu Builders ITA 5049/Mum/2012 ITA 4964/Mum/2012 assessee is only taking into consideration the revenues being booked by it. In fact, the assessee has submitted before the AO that "no expenditure has been claimed and the income is offered on estimate basis" (page 3 of the assessment order). "In P&L account for AY 2009- 10, only income on the basis of gross receipts is considered and no expense have been claimed". This proves the point of the assessee that the assessee had only shown/declared estimated 12% income on the total receipts upto 6th slab, though the assessee had actually received sale considerations upto 5th slab only. This negates the presumption of

the AO, that the project had been completed upto 7th slab, and therefore, the AO was taking the deemed sale consideration theory.

43. Coming to the aspect of under valuing of sale consideration by the assessee with regard to 12 buyers against one buyer, Mr, Anil Shroff, the CIT(A), relying primarily on facts, notes, that not one piece of evidence has been used by the AO to show that there was actually, under valuation of sale consideration from 12 buyers. This fact not only gets corroborated on the face of it that no evidence is against the assessee. but the AO could not make out any case when the sale agreements were produced before him.

44. This conclusion drawn by the AO, would have tilted the balance of presumption in the AO's favour, but since there was a survey operation under section 133A of the Income Tax Act, where the department actually entered the premises of the assessee and gathered the evidence and took statement of the attending partner on oath, the case has shifted from presumptions to facts. The fact that the survey party was privy to documents, books and evidence and also recorded the statement of the partner, it is seen that not one question pertained to either differential of rates or the system of accounting. We have gone through the statement recorded on oath, which runs in 11 pages and appended in the APB, along with the un disturbed assessment orders for assessment years 2007-08 and 2008-09, accepting the method of 16 M/s Sandhu Builders ITA 5049/Mum/2012 ITA 4964/Murn/2012 accounting, regularly followed by the assessee. In these circumstances, the case has slipped out of the precinct of presumptions conjectures and surmises, and falls in the field of facts.

45. We cannot ignore the fact that the AO has based the impugned addition, placing reliance on decisions gathered from various courts and presuming the deemed sale consideration, which by itself is far from the facts, gathered from the orders of the revenue authorities and evidences placed in the APB.

46. On the other hand, the AR has placed reliance on a number of decisions, taken into consideration by us in pre paras, are against the department, where the department has tried to make addition without any firm foundation based on facts, but creating an edifice which does not have any solidity.

47. Taking the entire facts, circumstances and case laws cited before us, we find no justification to disturb the conclusion of the CIT(A).

48. In the result, we sustain the order of the CIT(A) deleting the addition of Rs. 9,36,82,560/- made by the AO.

It is seen from the decision of Sandhu Builders (mentioned above) that the facts of the appellant's case are similar to the case cited by the Appellant, in view of the above facts and respectfully following decision of the Hon'ble ITAT Mumbai, it is held that the AO is not justified in making an estimated addition of Rs. 4,57,28,077/- on account of suppression of sale. Thus, the addition is deleted and hence these grounds of appeal are allowed.

6. After hearing both the parties and perusing the material on record, we observe that in this case the assessee has sold the flats at different rates in the earlier, current and subsequent years. The dates of booking are spread over in different years and furnished detailed explanation for selling flats at different rates. The Ld. CIT(A), after taking into account and relying on the decisions namely K.P. Varghese Vs CIT (supra) and ACIT vs. Sandhu Builders (supra) came to conclusion that assessee has discharged the onus by filing the necessary evidences and explanation for selling the flats at varying rates and the AO has failed to prove that the assessee has received unaccounted consideration from the flat owners and thus AO has failed to discharge the onus cast upon. Finally, the Ld. CIT(A) deleted the addition relying on the above decisions. After considering the facts in totality and perusing the case laws as discussed by Ld. CIT(A) while passing the order, we are of the view that the order passed by Ld. CIT(A) is very reasoned order, and in consonance with the ratio laid down by the various judicial forums as referred to above. Accordingly, we are inclined to dismiss ground No.1 raised by the Revenue.

7. The issue raised in ground No.2 by the Revenue is against the order of Ld. CIT(A) allowing the depreciation on motor car without appreciating the facts that motor car was not owned by the assessee.

8. The facts in brief are that the assessee bought a car in the name of its director Shri Ashok Khimavat and according to the AO the assessee is not entitled for the depreciation as asset is not in the name of the assessee company.

9. In the appellate proceedings, the Ld. CIT(A) allowed the appeal of the assessee on this issue by holding and observing as under:

“14. Decision:

I have considered the facts of the case and submissions made by the appellant. Basic contention of the assessee is that the car was booked in the name of the director of the company and all the payments were made by the company and the car was used by the director of the company for business of the company and hence the deduction is allowable in respect of interest, depreciation, insurance and other expenses relatable to the maintenance of the car. Assessee has also cited several decisions in its support. There is no dispute about the use of the motor car for business purposes and hence only area of dispute is regarding the ownership of car purchased in the name of the director of the company. Prima facie, the Motor Vehicle Act records will show that the car was registered in the name of the director, however all the payments were made by the assessee company and reflected in the books of the company and moreover, there is no dispute about the user of the car for company business purposes. Therefore keeping in view the facts of the case, and case laws cited by the assessee on this point assessee's claim for deduction of expenses, including depreciation of Rs 13,13,077/- is hereby allowed. Thus the ground of appeal no.5 is allowed.”

10. After hearing both the parties and perusing the material on record, we observe that in this case the assessee has purchased the car in the name of his director Shri Khimavat by after raising loan on its name and also paid the interest thereon along with repayments of installments. The assessee has also paid the insurance charges of the car. It is also undisputed that the car was used in connection with the business of the assessee. Therefore, we do not find any infirmity or anomaly in

the order of Ld. CIT(A) and accordingly uphold the same by dismissing the ground raised by the Revenue.

11. The other ground is general in nature and needs no adjudication.

**ITA No.3966/M/2018 (Assessee's appeal)**

12. The assessee has challenged the order of Ld. CIT(A) against the confirmation of two additions (i) Rs.24,50,000/- loan taken from Payal Bhatad and (ii) Rs.6,50,000/- loan taken from VRV Capital Service Pvt. Ltd. which have been added by the AO as cash credit under section 68 of the Act on the ground that the assessee could not prove these loans with evidences.

13. At the outset, the Ld. A.R. of the assessee submitted that the assessee has filed all the evidences/details/documents before the authorities below comprising confirmations from the loan creditors, bank statements of the lenders and assessee's bank statement evidencing the receipt of loan from these parties. However, the AO as well as the Ld. CIT(A) have not examined these evidences. The Ld. A.R. therefore, prayed that the matter may kindly be restored to the file of the AO so that both these issues could be decided afresh after examining the said evidences filed by the assessee. The Ld. D.R. also fairly conceded to the submission of the Ld. A.R. that if the issue is restored back to the AO he has no objection.

14. After hearing both the parties and perusing the material on records, we note that the assessee has filed the confirmations of loan creditors, their bank statements, copies of the PAN, copy of assessee's bank account etc in order to prove the genuineness,

creditworthiness of the transactions and identities of the loan creditors. However, we find that the same has not been taken into account while deciding these issues by both the authorities below. Accordingly, we, set aside the findings of Ld. CIT(A) on these issues and restore both the additions to the file of the AO with the direction that same may kindly be decided afresh after examining the evidences filed by the assessee. Needless to say that the assessee may be provided reasonable opportunity of hearing before deciding these issues.

15. Appeal of the assessee is allowed for statistical purposes.

16. In the result, the appeal of the assessee is allowed for statistical purposes and the appeal of the Revenue is dismissed.

**Order pronounced in the open court on 15.12.2020.**

**Sd/-  
(Vikas Awasthy)  
JUDICIAL MEMBER**

**Sd/-  
(Rajesh Kumar)  
ACCOUNTANT MEMBER**

Mumbai, Dated: 15.12.2020.

\* Kishore, Sr. P.S.

Copy to: The Appellant  
The Respondent  
The CIT, Concerned, Mumbai  
The CIT (A) Concerned, Mumbai  
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.