आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD – BENCH 'A'

BEFORE SHRI RAJPAL YADAV, VICE-PRESIDENT
AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./ ITA No.952 /Ahd/2019
Asstt.Year : 2016-17

Greenfield Realty P.Ltd. C/o. Kiran & Pradip Associates 202, Rajkamal Plaza A-Navjivan Press Road Ahmedabad. PAN : AACCG 8342 E	Vs	DCIT, Cir.1(2) Ahmedabad.

आयकर अपील सं./ ITA No.1271 /Ahd/2019
Asstt.Year : 2016-17

DCIT, Cir.1(2) Ahmedabad.	Vs	Greenfield Realty P.Ltd. C/o. Kiran & Pradip Associates 202, Rajkamal Plaza A-Navjivan Press Road Ahmedabad. PAN : AACCG 8342 E

अपीलार्थी/ (Appellant)		**प्रत्यर्थी/** (Respondent)

Assessee by :	Jwalin Nanavati, AR
Revenue by :	Shri Virendra Ojha, CIT-DR

सुनवाई की तारीख/Date of Hearing : 26/07/2021
घोषणा की तारीख /Date of Pronouncement : 27/07/2021

O R D E R

PER RAJPAL YADAV, VICE-PRESIDENT: These are cross-appeals by the assessee and the Revenue against common order of the ld.CIT(A)-11, Ahmedabad dated 1.5.2019 for the assessment year 2016-17. Both are disposed of by this common order.

2. Core issue involved in both the appeals is that during the course of search evidence exhibiting receipt of on-money i.e. money in cash, over and above booking amount was found. The AO was of the view that the gross amount calculated on the basis of such evidence is to be treated as unexplained income of the assessee; whereas on appeal, the ld.CIT(A) has recorded a finding that only element of profit embedded in such cash receipts is to be treated as income of the assessee. The assessee has accounted for 8% of such receipts as its income, whereas the ld.CIT(A) has estimated the profit element on such receipt at 20%. The Revenue is impugning deletion of addition by the ld.CIT(A) i.e. according to the Revenue gross amount should have been treated as unexplained income of the assessee, on the other hand, the assessee is impugning the addition retained by the ld.CIT(A) over and above 8%.

3. With the assistance the ld.representatives we have gone through the record. It emerges from the record that a search has taken place at the premises of the assessee, whereby it revealed that the assessee has received on-money out of books for the project viz. "Shiv Kartik Enclave, at Vesu, Surat. The ld.AO has added the gross amount of on-money received by the assessee as its income, whereas the ld.CIT(A) after following his decision in Asstt.Year 2012-13 to 2015-16 restricted the addition to 20% of the gross-receipts. In this way, the ld.CIT(A) has calculated the income of the assessee at Rs.4,48,63,600/- as against the addition of Rs.22,43,18,000/-. The brief finding of the ld.CIT(A) thus reads as under:

> *"5 Submission of the appellant and assessment order has been carefully considered. The only effective ground of appeal is against the additions of Rs.22,43,18,000/- made by the AO considering on-money receipt as income of the appellant. During the*

search at the premises of the appellant on 4.12.2014, several documents were found which contain details of on-money receipt & expenditure made out of books for the project. Shiv Kartik enclave, at Vesu, Surat, which was developed by the appellant. The appellant had admitted receipt of on-money as under:-

AY	*2012-13*	*2013-14*	*2014-15*	*2015-16*	*2016-17*
Amount of on-money received	*15,25,00,000*	*2,50,07,000*	*11,55,00,000*	*7,02,75,000*	*22,43,18,000*

The AO stated that inspite of admission of on-money receipt during the search & later on before the Settlement Commission (application was rejected by the Settlement Commission), the appellant did not show on-money receipt as its income in the return filed.

5.1 Facts of the case have been considered carefully. There is no dispute about the receipt of on money related to the project developed by the appellant. But the AO considered on-money receipt of Rs.66.40 crores as income of the appellant for AY 2014-15 & 2015-16, whereas the appellant has considered on-money receipt of Rs.58.76 crore is 5 years. Appeals for previous years have been decided by me. The summary of additions made by the AO & decision taken by me in appeal is summarized in table below ;-

A.Y.	*Additions made by A.O.*		*CIT(A)*
	Substantive Addition	*Protective Addition*	*C1T Appeal's Direction*
2012-13		*15,25,00,000/-*	*Deleted substantive addition and protective confirmed as substantive @20% for A.Y. 2012-13 to 2015-16*
2013-14		*2,50,07,000/-*	
2014-15	*24,23,93818/-*	*11,55,00,000/-*	
2015-16	*42,16,06,182/-*	*7,02,75,000/-*	
TOTAL	*66,40,00,000/-*	*36,32,82,000/-*	
2016-17 (under appeal)		*22,43,18,000/- (assessed substantive by AO) instead of protective.*	
GRAND TOTAL	*66,40,00,000/-*	*58,76,00,000/-*	

As I have decided that income (@20% of the total on-money receipt should be considered as income of the appellant while deciding appeals of previous years. By

following those orders, additions are restricted to 20% of the on-money receipt. Thus, income of the appellant from on-money receipt is calculated at Rs.4,48,63,600/- (i.e. 20% of Rs.22,43,18,000). Thus, additions are restricted to Rs.4,48,63,600/- and remaining additions are deleted. This ground of appeal is partly allowed.

6. In the result, the appeal is partly allowed."

4. At the time of hearing, the ld.counsel for the assessee at the very outset submitted that order of the ld.CIT(A) for the Asstt.Years 2012-13 to 2015-16 was challenged before the Tribunal by the assessee vide IT(SS)A.No.289, 290, 291 and 292/Ahd/2018. Similarly, order of the ld.CIT(A) dated 14.8.2018 for the above assessment years were challenged by the Revenue also vide IT(SS)A.No. 320, 321 and 322/Ahd/2018. These appeals have been decided by the Tribunal vide its order dated 21.2.2020. The issue on these appeals was whether the profit element embedded in the alleged on-money receipts is to be computed at 8% as declared by the assessee or 20% as determined by the CIT(A) or the gross-amount as assessed by the AO. After detailed discussion, the Tribunal has accepted the contentions of the assessee and held that profit element embedded in those unaccounted receipts is to be taken at 8%. Consequently the appeals of the Revenue were rejected.

5. We find that exactly similar issue is involved in the present appeals, and therefore the issue is squarely covered by the Tribunal's order. The discussion made by the Tribunal on this aspect read as under:

"16. We have duly considered rival submissions and gone through the record carefully. On an analysis of the record, it would reveal that during the course of search not only details of on-money received by the assessee on booking of flats and shops in "Vesu Project" was found, but details of certain expenditure, which are not recorded in the books were also found. This included cash payment for purchase of land. Therefore,

the ld.CIT(A) has rightly observed that the gross on-money noticed on the seized paper cannot be considered as income of the assessee. There are certain expenditures which were not recorded in the books. Those expenditure must have been made from this on-money. Therefore, after going through the well reasoned order of the ld.CIT(A), and in the light of judgment of Hon'ble jurisdictional High Court in the case of Panna Corporation (supra) as well as Koshor Mohanlal Telwala (supra), we are of the view that only element of income embedded in the on-money received by the assessee for booking of flats/shops in "Vesu Project" is required to be assessed in its hand in all these years.

17. Next question arose, what is the element of income involved in this on-money. On one hand, the assessee is showing income at 8%, on the other hand, the ld.CIT(A) is estimating it at 20%. It is pertinent to observe that section 144 of the Income Tax Act provides discretion in the AO to pass best judgment when an assessee failed to appear before him, and to submit requisite details. In other words, it provides power in the AO to estimate an income of the assessee. We deem it appropriate to take note the relevant part of this section. It reads as under:

18. For exercising the best judgment, section 144 of the Income Tax Act provide the guidance to the ld.AO. This section reads as under:

"144. [(1)] If any person—

(a) fails to make the return required [under sub-section (1) of section 139] and has not made a return or a revised return under sub-section (4) or sub-section (5) of that section, or

(b) fails to comply with all the terms of a notice issued under sub-section (1) of section 142 [or fails to comply with a direction issued under sub-section (2A) of that section], or

(c) having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of section 143,

the [Assessing] Officer, after taking into account all relevant material which the [Assessing] Officer has gathered, [shall, after giving the assessee an opportunity of being heard, make the assessment] of the total income or loss to the best of his judgment and determine the sum payable by the assessee [* *] on the basis of such assessment :*

[Provided that such opportunity shall be given by the Assessing Officer by serving a notice calling upon the assessee to show cause,

on a date and time to be specified in the notice, why the assessment should not be completed to the best of his judgment :

Provided further that it shall not be necessary to give such opportunity in a case where a notice under sub-section (1) of section 142 has been issued prior to the making of an assessment under this section.]

[(2) The provisions of this section as they stood immediately before their amendment by the Direct Tax Laws (Amendment) Act, 1987 (4 of 1988), shall apply to and in relation to any assessment for the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year and references in this section to the other provisions of this Act shall be construed as references to those provisions as for the time being in force and applicable to the relevant assessment year.]"

19. It is pertinent to note that that section 144 would suggest that in order to estimate income, learned Assessing Officer has to exercise his discretion which should be in consonance with best of his judgment. We are conscious of the fact that in various authoritative pronouncements, it has been propounded that in making a best judgment assessment, the Assessing Officer must not act dishonestly or vindictively or capriciously. He must make, what he honestly believe to be a fair estimate of the proper figure of assessment and for this purpose he must be able to take into consideration, local knowledge, reputation of the assessee about his business, the previous history of the assessee or the similarly situated assessee. It is also pertinent to mention that judgment is a faculty to decide matter with wisdom, truly and legally. Judgment does not depend upon the arbitrary, caprice of an adjudicator, but on settled and invariably principles of justice. Thus, in a best judgment, even if, there is an element of guess work, it should not be a wild one, but shall have reasonable nexus to the available material and circumstances of each assessee.

20. During the course of hearing, we have confronted the ld.counsel for the assessee to show the basis for estimating income at 8%. Similarly, we have confronted the ld.CIT-DR as to how the figure of 20% should be taken up. The ld.counsel for the assessee drew our attention towards page nos.50-51 of the paper book wherein the assessee has kept the details of receipts received through account payee cheque as well as received cash

in the booking of flats as well as shops. In the case of Koshor Mohanlal Telwala (supra) the Tribunal has observed that 8% profit offered by the assessee on the alleged gross receipts of on-money received in cash is fair and reasonable. This figure was construed as fair and reasonable by taking guidance from section 44AD of the Act, wherein it was provided by the Legislature that in case an assessee is engaged in civil construction, and if gross receipts remains under a particular slab, then such assessee needs not to maintain books of accounts, and its profit can be assumed at 8%. Though this special provision is not applicable in the present case, because gross receipts exceeded the turnover provided under section 44AD, but again we are required to find out a reasonable percentage of income which could have been alleged as earned by the assessee out of such gross receipts. This formation of opinion at the end of the Tribunal met the approval of Hon'ble Gujarat High Court in the case of Koshor Mohanlal Telwala (supra). As against this, the AO has not collected any data either from other assessees who are engaged in this line of business, and who have developed identical projects. We have perused the finding of the ld.CIT(A) also, but the ld.CIT(A) has also not mentioned any attending circumstances for harbouring a belief that 20% could have been earned from this activity. Thus after taking guidance from the judgment of Hon'ble Gujarat High Court in the case of Koshor Mohanlal Telwala (supra), we deem it proper that the assessee has rightly disclosed the profit element embedded in the gross profit at 8%. Accordingly, we allow the ground of appeal raised by the assessee, and hold that profit which has been directed to be adopted by the ld.CIT(A) at 20% of the alleged turnover should be taken at 8%. The income of the assessee is to be computed thereafter. Consequently, ground no.2 and 3 raised by the Revenue in the Asstt.Years 2012-13, 2013-14 and 2014-15, and ground nos.1 to 3 in the asstt.Year 2015-16riased by the Revenue are rejected.

6. Respectfully following the decision of ITAT (authored by us) in the Asstt.Years 2012-13 to 2015-16, we are of the view that there is no disparity of the facts, and accordingly, the appeal of the assessee is allowed. We direct the AO to assess the income of the assessee by adopting 8% of the profit out of the alleged unaccounted on-money receipts. In other words, the income declared by the assessee at the rate of 8% is to be accepted instead of 20% directed by the ld.CIT(A). To

make it more specific, this appeal of the assessee is partly allowed in the same term as the appeals of the Asstt.Years 2012-13 to 2015-16, which have been allowed by the Tribunal, whereas the appeal of the Revenue is dismissed. Other grounds raised in the appeal of the assessee are consequential to this main issue, hence rejected.

7. In the result, appeal of the assessee is partly allowed, whereas the appeal of the Revenue is dismissed.

Pronounced in the Open Court on 27th July, 2021

Sd/-	**Sd/-**
(WASEEM AHMED)	**(RAJPAL YADAV)**
ACCOUNTANT MEMBER	**VICE-PRESIDENT**