

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA, AM AND SHRI AMARJIT SINGH, JM

(Hearing through Video Conferencing Mode)

आयकर अपील सं/ I.T.A. No.596/Mum/2020
(निर्धारण वर्ष / Assessment Year: 2011-12)

M/s. Aastitva Builders & Developers Pvt. Ltd. C/62, Vibgyor Towers, 9 th Floor, Bandra Kurla Complex, Bandra (E), Mumbai-400051.	बनाम/ Vs.	ITO-12(1)(1) Room No.226, 2 nd Floor, Aayakar Bhavan, Maharshi Karve Road, Mumbai- 400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AADCA8254A		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri Hitesh Trivedi (AR)	
Revenue by:	Shri Brajendra Kumar (DR)	

सुनवाई की तारीख / Date of Hearing: 10/08/2021
घोषणा की तारीख /Date of Pronouncement: 20/10/2021

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The assessee has filed the present appeal against the order dated 25.11.2019 passed by the Commissioner of Income Tax (Appeals)-20, Mumbai [hereinafter referred to as the “CIT(A)”] relevant to the A.Y. 2011-12 wherein the penalty levied by the AO has been ordered to be upheld.

2. The assessee has raised the following grounds: -



“1.1 On the facts and in the circumstances of the case, the Ld. CIT(A) has erred both on facts and in law in dismissing the appeal on account of non-prosecution of appeal which is not in accordance the provisions of Section 250(6) of the Act.

1.2 The Ld. CIT(A) has erred both on facts and in law in confirming the said penalty order despite the appellant during the course of appellate proceedings bringing on record the order of the Hon’ble Tribunal in the appellant’s own case deleting the quantum which formed the basis for the said penalty.

2. All the above grounds are without prejudice to each other.

3. The appellant craves leave to add, to alter and/or amend the grounds of appeal as and when given.”

3. The brief facts of the case are that the assessee filed its return of income on 22.09.2011 declaring total income to the tune of Rs.10,48,035/-. The return was processed u/s 143(1) of the I. T. Act, 1961. Thereafter the case was selected for scrutiny. Notices u/s 143(2) & 142(1) of the I. T. Act, 1961 were issues and served upon the assessee. The assessee company is carrying on the business of Development/Construction of Property. The assessee along with other Co-owner had undertaken a project of construction of 13 storey building known as H & M Towers, situated at Bandra West, Mumbai. The company is one of the joint developer and co-owner of the property situated at Bandra, Mumbai having 14% share in the project as a co-owner along with other co-owners mentioned as under:-

Name of Co-owners	Percentage
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Arti Deepak Kothari	29%
Hemani Vinod Gowani	29%
Aangan Properties Pvt. Ltd.	14%
Aastitva Builders & Developers Pvt. Ltd.	14%
Shilpi Property Developers (Bombay) Pvt. Ltd.	14%

Interest was allotted according to share of the company. According to the share, the receivable price of the assessee should be @ 70.12316 as against the total income shown to the tune of Rs.6,50,84,500/-. There was a difference of Rs.61,62,620/-, therefore, the difference was taken and added to the income of the assessee. The penalty proceeding was initiated by issuance of notice and after the reply, the penalty to the tune of Rs.10,80,233/- was levied. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who confirmed the penalty, therefore, the assessee has filed the present appeal before us.

4. All the issues are in connection with confirming of penalty levied by AO. The Ld. Representative of the assessee has argued that the quantum has been deleted by Hon'ble ITAT in ITA. No.3614/Mum/2017 dated 07.12.2018, therefore, in the said circumstances, the penalty is not liable to be sustainable in the eyes of law. However, on the other hand, the Ld. Representative of the Department has refuted the said contention. Before going further, we deem it necessary to advert the finding of the Hon'ble ITAT in the assessee's own case in ITA. No.3614/Mum/2017 dated 07.12.2018 as under.:-

"7. The AO noted that the assessee's right/ interest is only to the extent of 14%, whereas the assessee has disclosed its share of



consideration of receipts at 12.69% of the total consideration of the project. According to AO, assessee's actual share of consideration receivable from the project is ₹ 7,12,47,120/- as against the disclosed consideration at ₹ 6,45,84,500/-. Therefore, the difference of ₹ 66,62,620/- was added to the total income of the assessee. Aggrieved, assessee preferred the appeal before CIT(A). 8. The CIT(A) apart from confirming the action of the AO, directed the AO to exclude the profit of unsold unit from the income of the assessee for the current year but also directed to bring this income to tax in the hands of the assessee in the year in which these units are actually sold. For this the CIT(A) has observed at para 7.3 as under: -

“7.3 I have gone through the assessment order and submissions made in this regard. It is seen that the company is one of the joint developer and coowner of the project situated at Bandra, Mumbai, having 14% share in the project as a co-owner along with other co-owners which are as under: Sr. No. Name of co-owner percentage 1. Arti Deepak Kothari 29% 2. Hemani Vinod Gowani 29% 3. Aangan Properties Pvt. Ltd. 14% 4. Aastiva Builders & Developers Pvt. Ltd 14% 5. Shilpi Property Developers (Bombay) Pvt. Ltd. 14%” It was submitted by the assessee before the AO that each co-owner had been allotted interest in the built up areas in proportion of their percentage of share in the Building constructed on the above said property by virtue of deed of declaration. The assessee company has been allotted certain unit/units as its share from the constructed property. On perusal of the chart it transpires that the assessee had rights in the Units situated at 2nd Floor, 3 Floor and 4th



Floor. It is mentioned in the assessment order that the units allotted to the assessee were of lower value compared to the units at upper floors. The assessee was having rights of 14% in the total project and accordingly the assessee was eligible for its share of profits in the total project consideration. The consideration apportioned to the assessee did not match with its rights and interest of 14% in the project. The A.O. requested the assessee to explain as to why the addition should not be made to the total income after considering the total saleable value of the project. The explanation furnished by the assessee was duly considered but the same was not found to be acceptable nor tenable. Hence, the A.O. made an addition of ₹ 66,62,620/- to the total income of the assessee. It is seen that the AO has rightly noted that the assessee had 14% share in the property where as per the details on record the company had received only 12.69% in the distribution of profit, whereas the assessee had claimed 14% of the expenses in its books. It is noted that the assessee has not shown the full profit accrued to it as per its share in the project which is 14%. The working of the AO in bringing to tax 14% of the project receipts in the hands of the assessee is found to be correct and the same is upheld. However there is merit in the alternate ground of the assessee that profit of unsold units cannot be brought to tax till the time of realization of money from sale of such units. Accordingly, the AO is directed to exclude the profit of unsold units from the income of the assessee for the current year and bring this income to tax in the hands of the assessee in the year in which



these units are actually sold. Accordingly these grounds of appeal are partly allowed.”

Aggrieved, now assessee is in second appeal before Tribunal.

9. We have heard rival contentions and gone through the facts and circumstances of the case. We find from the facts of the case and the arguments of both the sides and material available on cash, records including assessee's paper book consisting of pages from 1 to 136. The facts are that the assessee has undertaken a project for consideration of building known as H&M Tower, Bandra West, Mumbai. The assessee has one of the co-owner of the joint developers of the building holding rights in the unit aggregating to 14%. The assessee entered into a Deed of Declaration dated 02/02/2008 wherein each co-owner has been allotted interest in the build-up area in proportion of their percentage of shareholding in the building to be constructed. It is a fact that the assessee has been allotted right and interest in certain unit/units aggregating to 14%. The details of co-owner's right and interest in the units are enclosed in assessee's paper book at pages 6 & 7 and we have also reproduced above in para 4 pages 3 & 4 of this order.

10. In view of the above, before us Ld Counsel filed the details of assessee's right and interest in the units allotted as per the Deed of Declaration dated 02/02/2008, which are as under: -

<i>Unit No.</i>	<i>Location of Unit</i>	<i>Total Build-up area (Sq. mt)</i>	<i>% of share (sq.mt)</i>
<i>1.</i>	<i>2 nd floor</i>	<i>129.46</i>	<i>5.40</i>
<i>2.</i>	<i>3 rd floor</i>	<i>129.46</i>	<i>64.73</i>
<i>3.</i>	<i>4 th floor</i>	<i>129.46</i>	<i>129.46</i>
<i>Total</i>		<i>199.59</i>	

The appellant has sold the above units and income there from have bene



*shown as under: - Unit No. Area in Sq. mt. Year of sale
Consideration (₹) 1 5.40 2010-11 20,84,500 2 64.73 2008-09
2,25,00,000 3. 129.46 2008-09 4,00,00,000 Actual sale
consideration is ₹ 4,05,00,000/- Total 6,45,84,500/-*

11. The assessee explained the entire position by filing the details before the AO and CIT(A) and even now before us. It was explained before us that during the course of assessment proceedings the AO asked to explain as to why the addition should not be made in its case as it is appearing that the units allotted to the assessee are on lower floors i.e. lower values compared to the units at upper floors. In reply, It was explained that the assessee is having rights of 14% in total project and accordingly it is eligible for 14% share of entire sale consideration of the project. The also furnished the details of comparative chart of sale consideration of all units during the course of assessment as well as appellate proceedings. These are reproduced in the order in above para 5 at page 4. We find from the facts of the case that the AO and CIT(A), based on the above chart came the conclusion that the assessee should have considered 14% income of the total consideration realized on sale of all units. According to revenue, the assessee has shown less income on sale of units allotted which are at lower floors compared to sale consideration of upper floors and accordingly allocated 14% of entire sale consideration realized on sale of all units to determine the share of the assessee in the entire project.



12. We have gone through entire facts and noted that the action of the AO in allocating 14% total consideration realized on sale of all the units of the project is wrong and contrary to the Deed of Declaration dated 02/02/2008 entered into by the assessee with other co-owners. We are of the view that factually once the units have been allotted to each coowners, it is upto each co-owner to decide at which price, at which time or at which such other conditions it want to sell its allocated units and that would be relevant to determine its share of profit on sale of its units. The sale consideration realized by other co-owners cannot be taken into consideration to arrive at its profits on sale of units. We also asked the Ld Counsel for the assessee, whether the sale considerations realized by the other co- owners on sale of their allotted units have been included in computing their income he answered the same that might have been included but was not aware about the same. We find that the sale consideration realized during the current year is only Rs.20,84,500/- but the AO has made the additions in respect of sales made during the earlier assessment years by the co-owners and such addition made by the AO amount to double taxation in the hands of co-owners in earlier years upon actual sales made by them and in the hands of the assessee in the current year without any basis and is unwarranted.

13. We are of the view that on actual basis none of the co-owner would share their income with the assessee as intended to be done by the AO. Accordingly, we are of the view that as per Deed of Declaration dated 02/02/2008, the share of each co-owner in each unit is pre- decided mutually and agreed by all



and same will determine profitability on sale of such units. We are of the view that the very basis adopted by the AO is without any basis and also not practical. One co-owner may be willing to sell the unit at available price whereas the other would be willing to hold on to get a better price and that is dependent on the risk appetite of the seller and their financial stability to negotiate the deal. This could result into conflicts between the co-owners. To avoid the same and to have ease in sale of units and its procedures on sale, all co-owners decided mutually to allocate units within themselves in such a manner that each would receive their proportion of share in the total build up area and have complete authority to decide the sale of units allocated to them, the price and the time etc.

14. We also find from the facts of the case that assessee had sold unit no.2 and 4 for a total sale consideration of Rs 4,50,00,000/- and ₹ 4,05,00,000/- respectively during the financial year 2008-09 i.e. relevant to assessment year 2009-10. The assessment for assessment year 2009-10 was completed and the returned income of the assessee has been accepted by the department. Hence, we delete the addition made by AO and confirmed by CIT(A). This issue of assessee's appeal is allowed."

5. Since the quantum has been deleted by Hon'ble ITAT in the assessee's own case bearing ITA. No.3614/Mum/2017 dated 07.12.2018, therefore, in the said circumstances, the penalty is not liable to be sustainable in the eyes of law, therefore, we set aside the finding of the CIT(A) on this issue and delete the penalty.



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A.Y. 2011-12

6. In the result, the appeal filed by the assessee is hereby allowed.

Order pronounced in the open court on 20/10/2021

Sd/-

(SHAMIM YAHYA)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 20/10/2021

Vijay Pal Sing/Sr. PS

Sd/-

(AMARJIT SINGH)

न्यायिक सदस्य/JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai