IN THE INCOME TAX APPELLATE TRIBUNAL, 'G' BENCH MUMBAI

BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER
&
SHRI AMARJIT SINGH, JUDICIAL MEMBER

ITA No.3059/Mum/2017
(**Assessment Year :2012-13**)

The Income Tax Officer, Ward-11(1)(3) Mumbai Room No.201, Aayakar Bhavan, M.K.Marg Mumbai – 400 020	Vs.	M/s. Salient Traders Pvt. Ltd., Ground Floor, C-Laram Centre, CHSL, Madhu Kunj Building, Andheri (W) Mumbai – 400 058
PAN/GIR No.AAICS2454B		
(Appellant)	..	**(Respondent**)

ITA No.331/Mum/2018 & 332/Mum/2018
(**Assessment Year :2013-14 & 2014-15**)

M/s. Salient Traders Pvt. Ltd., Ground Floor, C-Laram Centre, CHSL, Madhu Kunj Building, Andheri (W) Mumbai – 400 058	Vs.	The Income Tax Officer, Ward-11(1)(3) Mumbai Room No.201, Aayakar Bhavan, M.K.Marg Mumbai – 400 020
PAN/GIR No.AAICS2454B		
(Appellant)	..	**(Respondent**)

Revenue by	Shri Firoze Andhyarujina
Assessee by	Shri Hoshang Boman Irani
Date of Hearing	**29/11/2021**
Date of Pronouncement	**23/12/2021**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

These appeals in ITA Nos.3059/Mum/2017, 331/Mum/2018 & 332/Mum/2018 for A.Yrs.2012-13 to 2014-15 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-18, Mumbai in appeal No.CIT(A)-18/IT-183/ACIT-11(1)(2)/15-16, CIT(A)-18/IT-261/ACIT-11(1)(3)/16-17 & CIT(A)-18/IT-18/ITO-11(1)(3)/2016-17 respectively dated 30/01/2017 & 28/09/2017 respectively (ld. CIT(A) in short) against the order of assessment passed u/s.143(3)of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 30/03/2015, 25/11/2016 & 14/03/2016 respectively by the ld. Asst. Commissioner of Income Tax-11(1)(1), Mumbai(hereinafter referred to as ld. AO).

ITA No.3059/Mum/2017 (A.Y.2012-13)

2. The only effective issue to be decided in this appeal of the Revenue is as to whether the ld. CIT(A) was justified in deleting the addition made on account of determination of net profit @8% of turnover as arbitrary in the facts and circumstances of the case. The interconnected issue involved therein is whether the ld. CIT(A) was justified in dismissing the action of the ld. AO rejecting the books of accounts in the facts and circumstances of the instant case.

3. We have heard rival submissions and perused the materials available on record. We find that assessee is a private limited company engaged in the business of construction and re-development of properties. The return of income for the A.Y.2012-13 was filed by the assessee on 30/09/2012

declaring total loss of Rs.7,59,52,387/-. The assessee is a Private Limited Company engaged in the business of construction and redevelopment of properties. The assessee had undertaken redevelopment of a Slum Rehabilitation Project by entering into agreement with Triveni Sangam SRA CHS Ltd. at village Gundavli, Andheri (E), Mumbai.

3.1. The assessee submitted that it obtained various approvals from Slum Rehabilitation Authority (SRA) for construction of rehab buildings; for housing eligible slum dwellers on rehab plot and also for construction of building for sale to outsiders.

3.2. The assessee submitted that in the meantime, it entered into an agreement with M/s. Joy and Savla Realtors, a partnership firm, for transfer of development rights on the sale plot i.e. building to be constructed for sale to outside parties. The agreement was entered on 11.11.2011 for total consideration of Rs.45 cr. The assessee submitted that even though it did not receive that entire amount of sale consideration of Rs.45 cr. during the financial year under consideration, however, following mercantile system of accounting, the entire amount of Rs.45 cr. was offered to tax and therefore simultaneously in order to follow the matching concept, the expenses relating to the same that the assessee was liable to incur, was provided for in the books of account and claimed deduction against the sale consideration.

3.3. The assessee submitted that there were many encroachers (illegal and unauthorized slum dwellers - i.e. apatra expenses) on the said plot of land apart from the actual eligible slum dwellers. The assessee had to vacate all these unauthorized slum dwellers and rehab the eligible slum

dwellers. The assessee submitted that there are total 115 unauthorized slum dwellers and total 261 eligible slum dwellers.

3.4. The unauthorized slum dwellers had to be vacated by paying compensation since the slum dwellers filed legal suit in the Bombay Civil Court and as per the consent terms of the Bombay Civil Court of 2010, the assessee was liable to pay each such unauthorized slum dweller Rs.10 lacs. However, the assessee submitted that there was delay in payment of compensation to these slum dwellers. Hence, as per the agreement entered into with Vikasak & Sanstha Society, these unauthorized slum dwellers were to be paid compensation @12 lacs per slum dweller as against Rs.10 lacs agreed upon earlier. Thus, in terms of the said agreement, the assessee provided total amount of Rs.13.80 cr. [115 unauthorized slum dwellers * Rs.12 lacs].

3.5. The assessee submitted that at the same time, in respect of the legal and eligible slum dwellers to whom constructed flats were to be given in rehab buildings, since there was delay in construction of rehab buildings, they were agreed to be compensated by additional amount of Rs.3 lacs per slum dweller. The assessee submitted that this was also agreed as per the same agreement entered into with Vikasak & Sanstha Society. Thus, in terms of the said agreement, the assessee provided a sum of Rs.7.80 cr. as compensation for delay in project and this amount was to be payable only to eligible slum dwellers totaling to 261.

3.6. The ld. AO observed in his order as under:-

> ***3.5*** *Out of the expenses claimed of Rs. 52.81 crores the following expenses are significant:*
>
> *Cost of materials consumed* *Rs. 16.76 crores*

*Other **expenses:***

Apatra expenses	*Rs. 13.80 crores*
Compensation for delay in project	*Rs. 7.80 crores*
Cost of construction for tenant building	*Rs. 10 crores*
Rent expenses	*Rs. 2.12 crores*

3.6 ADMISSIBILITY OF EXPENSES CLAIMED:

3.6.1. Apatra & Compensation for delay in project:

The assessee has claimed a sum of Rs. 13.80 crores as apatra expenses. When assessee was asked to explain the details of these expenses, it was stated that they represented payments to be made to certain illegal dwellers residing on the plot who are not eligible for the SRA Scheme but are still required to be paid certain compensation as a onetime settlement for evacuating the premises and that it was a normal procedure followed by every SRA Developer. Originally the sum agreed to be paid was Rs. 10 lacs per person. Thereafter the assessee is stated to have received notices from lawyers of some of the apatra dwellers for non-payment/delay in payment of consideration. The assessee submitted copy of sample notices received alongwith a copy of the consent terms with the Bombay City Civil Court wherein the assessee company was directed to pay compensation to these dwellers for vacating the land. Hence the assessee submitted that it entered into agreement with 115 such dwellers and has agreed to pay Rs 12 lacs per such dweller for vacating the land.

It was further submitted that the assessee had to incur such expenses to give a clear title to the buyers, M/s Joy & Savla Realtors before it can receive the full sale consideration and therefore, it should be allowed. The assessee also submitted that on matching concept principle these expenses were claimed in the A Y 2012-13 itself since the entire income of Rs. 45 crores was offered for taxation in the same year though not received in full.

Apart from the apatra expenses, a further sum of Rs. 7.80 crores was also debited by the assessee as additional compensation payable for delay in project. As stated by the assessee earlier the lawyers of some of the apatra dwellers had also claimed for an extra sum of amount, in case there is a delay in the payment of compensation of Rs. 12 lacs. It was stated that therefore, an additional compensation at the rate of Rs. 3 lacs per person was required to be paid for the delay in the payment of initial compensation of Rs. 12 lacs which has been provided for.

*The submissions of the assessee and the agreement have been perused. It appears that **the** assessee provided for a sum of Rs. 7.80 crores as its liability in its books payable to both legal as well as illegal occupants @ Rs. 3 lacs per person.(i.e for 261 beneficiaries under SRA scheme and for 115 illegal occupants). However,on perusal of the agreement dated22-2-2012 entered into by the assessee with the society M/s Triveni Sangam CHS shows that only 261 beneficiaries under SRA scheme alone are entitled for the additional compensation for delay in handing over the newly constructed units. On the contrary the assessee claimed that the sum of Rs. 3 lacs is also payable for delay in payment of compensation to the illegal dwellers too.*

Further the agreement also does not specify any time period within which the initial compensation of Rs. 12 lacs is to be paid. The question of payment of additional compensation of Rs 3 lacs will arise only in the event of delay in payment of the original compensation of Rs. 12 lacs. When the time period for payment of Rs 12 lacs is not specified in the agreement, it is also not possible to determine or ascertain the year in which the liability to pay the additional compensation arises. In these circumstances, the additional compensation of Rs 7.80 crores cannot be held to be an ascertained liability for the A.Y 2012-13.

During the assessment proceedings the assessee was also asked to give the details of the parties to whom the additional compensation was due. The assessee gave details of only 86 parties amounting to Rs. 2.68 crores. No details were furnished in respect of the balance sum claimed of Rs. 5.12 crores.

The submissions of the assessee with regard to the apatra expenses and the compensation for delay have been duly considered. On perusal of the submissions made It is seen that there are certain inconsistencies that arise with respect to the claims made by the assessee. They are discussed point-wise as under:

1. Total no. of parties to whom the apatra expenses and the compensation is payable is not known:

a. The assessee had submitted in the clarification filed on 23,03.2015 that the total number of parties to whom apatra expenses are to be paid are 112 in number whereas vide earlier submissions filed on 11.03.2015 such parties are stated to be 115 in number.

b. In any case, the assessee failed to furnish the entire list of parties to whom a total of Rs. 13.80 crores was stated to be payable as apatra expenses.

c. The assessee gave details of only 86 parties to whom compensation amounting to Rs. 2.68 cr was payable. No information has been provided as regards the balance sum of Rs. 5.12 crores.

2. Period to which the expenditure relates :

a. The agreement does not show the date or period by which the original compensation of apatra expenses of Rs. 12 lacs was required to be paid failing which additional compensation for delay was liable to be made by the assessee

b. Further the assessee has also provided for expenses spreading beyond the year of accounting by way of provision on estimation basis without ascertaining the actual liability for the year under consideration

3. Whether claim of both apatra and additional compensation payments are bonafide and genuine:

a. The additional compensation can be quantified only in the event that there is a delay in the payment Rs. 12 lacs. The assessee failed to establish that there is a delay in the project leading to a consequent delay in payment of compensation.

b. List of parties to whom the payments are due are also not furnished thereby not proving the identity of the parties as well as its bonafides.

c. Further the assessee is providing for the same amount of Rs. 3 lacs per person as additional compensation payable for delay irrespective of whether the said party is a legal dweller or an illegal dweller. It is not logical to provide for same amount to both the parties irrespective of their legal status which does not establish the genuineness of the provision for such payments.

FINDINGS:
In view of the above the conclusions that are drawn from the given set of facts and circumstances are as under:

1 In the absence of providing the list of parties to whom the apatra expenses was claimed to be payable by the assessee, the department was thus precluded from examining such parties so as to verify the veracity of the claim made by the assessee.
2 There was no time frame specified in the agreement and no other evidence or material was furnished to show that the additional payment of Rs. 3 lacs per person got accrued to the assessee during the relevant previous year.
3 Mere averment that all the expenses corresponding to the income shown have to be debited on matching concept basis is not acceptable when the legitimacy and genuineness of the same was not proved.
4 A majority of the expenses have been quantified provisionally and debited in the P & L Account on the ground that the entire income had been offered in the A Y under:-
consideration without proving that such expenses have indeed accrued or ascertained during the year under consideration.

5. On calling for these relevant details, the assessee vide letter filed on 23-3-2015 itself had interalia offered for a disallowance of 5% of the alleged expenses which amounts to a huge sum. This disclosure by the assessee cannot be made suomoto if it is able to prove the correctness of the results as per the books of account.

3.6.2 <u>Rent expenses:</u>
The assessee had claimed a sum of Rs. 2.12 crores as rent expenses during the year under consideration. The details were called for in this regard. Assessee replied stating it is liable to pay compensation to the existing tenants of the property for the inconvenience caused to them due to dislocation. As a part of this compensation, it was stated that monthly amount is paid to these tenants which is debited to the account "rent for alternate accommodation" The assessee furnished party-wise details of reimbursement paid.

On perusing the details it is seen that the assessee has paid the sum of Rs. 2.12 crores to a total of 239 parties. It was stated to include a sum of Rs. 10 lacs paid to one Murlidhar Madhukar Rane which was claimed as capital compensation paid. A copy of agreement signed towards this deal was also submitted. Further, these expenses provided are spread over for a period beyond the financial year 2011-12 and are not limited to the A Y under consideration only. In this regard it is the submission of the assessee that since the entire income of Rs. 45 crores has been offered and on matching concept principle the corresponding expenses have to be debited in the A Y 2012-13 itself.

The claim of the assessee is not acceptable since there is no basis for making a provision of different amounts for each such party. The period to which the amount relates has also not been mentioned. Moreover, the genuineness of the payments also could not be verified in the absence of addresses of these parties.

Notwithstanding the above, the above payments are also liable for deduction of tax at source before making/crediting such payments as per the provisions of S. 1941 of I T Act. The assessee contended that TDS would not be applicable on these payments as they are not his rent expenses but are in the nature of reimbursement of rent expenses for the tenants and therefore, TDS is not liable to be deducted. The submissions are not acceptable since the nature of expenses is for providing for accommodation of the tenants which is the responsibility of the assessee till such time the newly constructed accommodation is made available. It is not a case of reimbursement of expenses as claimed since the tenants are not liable to pay the rent and it is the sole responsibility of the assessee. These expenses are also directly liable to be incurred ***by*** *the assessee and therefore, the provisions of S. 1941 of I T Act is clearly attracted. the assessee failed to deduct tax, the amount of rent expenses is liable for disallowance as* ***per*** *provisions of s. 40(a)(ia) of IT Act.*

4. Cost of construction for tenant building:
During the year the assessee claimed Rs. 10 crores as expenses under the head cost of construction for tenant building. The assessee has furnished only a rough estimate of the expenses to be incurred by him and has passed journal entries by creating a provision for this cost. These expenses have neither been incurred nor have been accrued during the P Y relevant to A Y 2012-13, Therefore, this estimate cannot be called as an ascertained liability for the year under consideration.

5. Cost of materials consumed:
During the year the assessee had shown Work In Progress of a sum of Rs. 124392726/-towards cost of materials consumed and had stated to have incurred a further sum of Rs. 4,32,06,621.50 during the year under consideration under this head of expense. This was submitted to have been incurred for construction of the rehabilitation buildings for the tenants.

5.2 *Though assessee had furnished breakup of the expenses incurred party wise, it had failed to furnish the day-to-day stock register or quantitative tally of the purchases effected as well as the record of consumption of stores maintained. Further it was also submitted that it had engaged a contractor, namely M/s Krishna Enterprises vide letter dated, 18.01.2012 for carrying out the construction activity of the rehabilitation buildings. A copy of the acceptance letter from the said party was also produced. As per the acknowledgement furnished by the assesses from M/s Krishna Enterprises it is clearly stated therein that the said contractor would be responsible for effecting purchases and for the safety of the materials so purchased.*

5.3 *Under these circumstances, it is not clarified as to how the assessee as well as the contractor would incur expenses for purchase of materials for construction for the same project simultaneously. Moreover, the total construction expenses debited by the assessee including the provision of Rs, Ten Crores works out to Rs. 27.70 cr which translates the cost of construction per sft for rehab building is much more than normal rate.*

5.4 *Thus the expenses debited towards cost of construction is prima facie not allowable in entirety as the genuiness of the same and the actual liability to incur by the assessee has not been established with the relevant supporting documents.*

6. REJECTION OF BOOKS OF ACCOUNTS AND ESTIMATION OF INCOME:
In view of the detailed discussion as above, the true and correct income of the assessee cannot be ascertained from the books of account prepared by the assessee. The assessee has provided for expenses in its books as can be seen from the discussions in the earlier paras without proving that the legally enforceable rights or liability of such expenses had matured during the year under consideration. The mercantile system cannot be used for provisional, contingent or notional payments. A contingent and conditional liability cannot be taken cognizance of, as held by the Allahabad High Court in Swadeshi Cotton Mill Co. Ltd. v. O7-[1980] 125 ITR 33 / 3 Taxman 280.

6.2 *It is pertinent to mention at this juncture the fact that the assessee itself is not bound by the entries made in it books has been revealed when it itself has agreed to offer a 5% disallowance of the expenses claimed in its books. No plausible explanation or detail or evidence for offering the percentage of disallowance @ 5% has been given by the assessee. And this offer of disallowance has also been made after having got the accounts audited by a tax auditor u/s 44AB of IT Act who after effecting due diligence in the matter has certified not only the correctness of net profit but also the correctness of the impugned expenses in arriving at it.*
6.3 *Under these circumstances, it is hereby held that the books of accounts prepared by the assessee in arriving at the loss of Rs. 7,59,52,387/- cannot be relied upon and are thus rejected by invoking the provisions of Section 145(3)(a) of IT Act.*

6.4 *The provisions of S. 145 of the Act provide as under:*

"Section 145
(1) Income Chargeable under the head "Profit and Gains of business or profession" or Income From other sources" shall, subject to the provisions of sub section(2), be \ computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee.
(2) the Central Government may notify in the official gazette from time to time accounting standards to be followed by any class of assessee or in respect of any class of income.
(3) where the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee, or where the method of accounting provided in sub section (1) or accounting standards as notified under sub section (2), have not been regularly followed by the assessee, the Assessing Officer may make an assessment in the manner provided in sec 144."

6.5. In accordance with the provisions of S. 145(3)(a) of I T Act, since the books do not . ***provide*** *a correct and complete picture of the income of the assessee for the year under consideration, the same are hereby rejected. Having rejected the books it is now proposed to determine the income of the assessee by applying a reasonable net profit rate on the total sale consideration. In this connection it may be mentioned that the Slum Rehabilitation Projects are usually very profitable as compared to the normal housing projects. In the instant case, however, the fact that the assessee is not*

constructing and selling the "Sale Plot" Building itself but had transferred its development rights for a consideration to a third party and has also not constructed the rehabilitation building itself but had outsourced the construction of the to a third party are specific to the facts of this case. Therefore, considering the specific facts and circumstances of the case and based on the reasonable nexus to the available material and circumstances of the case it is hereby opined that a reasonable percentage of profits @ 8% on the sale consideration of Rs. 45 crores is proposed to be adopted as the net income of the assessee.

***6.6** This rate of profit of 8% on the turn over or the gross receipts is also provided in section 44AD of I T Act and thus conforms to the standards mentioned in the provisions of section 44AD of IT Act. Though the provisions of section 44AD of IT Act cannot be applied in this case yet the section is referred to for conforming to the standards of 8% adopted in the case of civil construction business merely to prove the reasonableness of the percentage adopted.*

***6.7** Accordingly the net profit liable to be taxed @ 8% on Rs. 45.04 crores is worked out at Rs.3,60,34,820/- and this is treated as the total income of the assessee for the A Y under consideration in place of the loss of Rs.7,59,52,387/- shown in the return. Penalty proceedings u/sec. 271(1)(c) of the IT Act, 1961, are initiated on this issue.*

3.7. The assessee submitted before the ld. CIT(A) that the observation made in the assessment order in last para at page 3 and first para at page 4 is factually incorrect as the ld. AO had mixed both the issues i.e. payment of Rs.12,00,000/- per person to 115 unauthorised slum dwellers (Apartra expenses) with that of 261 eligible slum dwellers to whom additional compensation was to be paid @Rs.3,00,000/- per person due to delay in construction of rehab buildings. It was submitted that assessee had correctly provided for these liabilities which it has to pay as per the agreement entered into and also as per the consent terms of the Hon'ble Civil Court. Hence, both these amounts i.e. Rs.13.80 Crores and Rs.7.80 Crores are to be paid to separate slum dwellers i.e. the former is to be paid to illegal and unauthorised slum dwellers whereas the latter is of Rs.7.80 Crores is to be paid to legal and eligible slum dwellers. The assessee also submitted that the observation made by the ld. AO in his order at page 4 is also incorrect since the details given by the assessee in respect of 86 parties where the parties to whom the amount was already

paid out of the total amount to be paid of Rs.7.80 Crores and hence, the amount of Rs.5.12 Crores is shown as payable in the details filed. The details were filed only in respect of parties to whom the actual payment was made.

3.8. The assessee specifically submitted before the ld. CIT(A) as under:-

> *In respect of the inconsistencies pointed out in the assessment order at pages 4 to 6, the appellant submits as under-*
>
> *AO - points **1 (a** to c) - **page 4:***
> *a) The appellant submits that total numbers of parties to whom apatra expenses are to be paid are 115 and this is also found in the agreement entered into. The number mentioned as 112 in letter dated 23.03.2015 is merely typographical error.*
> *b) The appellant has furnished whatever details were asked and called for and hence, the AO ought to have specifically called for any further details that was required and therefore cannot allege that details were not furnished. Further, there is agreement to this effect and also consent term of Civil Court and hence, the same could not be disputed.*
> *c) With respect of details of 86 parties, as explained earlier, the additional compensation of Rs.3 lacs was paid to 86 parties out of total 261 parties and hence, the details were submitted accordingly and the balance amount of Rs.5.12 cr. was still payable to the parties.*
>
> ***AO - point** 2 **(a** & **b) -** page 5:*
> *a) The appellant submits that as explained earlier, the AO has mixed two separate issues i.e. one relating to payment of Rs.13.80 cr. in respect of apatra expenses and other relating to additional compensation to eligible slum dwellers and thus, the observation is contrary to facts.*
>
> *b) The appellant submits that the provision is not made on estimation basis but on actual basis ascertaining the actual liability. Further, the spreading over of the payment has no relevance since even the sale consideration is offered to tax in the year itself even though the entire amount is not received. The appellant submits that it has followed mercantile system of accounting and hence, the liability ascertained against the sale consideration has to be provided for even if the actual payment is to be made at a later date.*
>
> ***AO - point 3 (a to c) - page 5:***
> *a) Again this observation is due to not understanding the facts correctly and hence, has no relevance whatsoever. The additional compensation is paid to eligible slum dwellers and not to encroachers (unauthorized dwellers).*

b) *List of 261 parties, i.e. eligible slum dwellers is already furnished to the AO and no other details were called for. The AO ought to have specifically called for the same. Further, the copy of agreement and consent terms of Civil Court was filed, which proves the bonafides and genuineness of the transaction.*
c) *As already explained above, the appellant has not provided additional compensation of Rs.3 lacs to illegal dwellers and hence, the observation is factually incorrect.*

14. The appellant submits that the findings given on pages 5 & 6 are based on incorrect appreciation of facts. The appellant submits that when the facts itself are not correctly taken into consideration, the finding arrived at considering incorrect facts would also lead to incorrect conclusions. Hence, all the findings listed out in these pages are factually incorrect and are misplaced. Further, in respect of offering 5% of expenses for disallowance does not mean that the appellant did not have details or that the appellant does not have supporting documents to prove its bonafides and genuineness, but the same was offered to buy peace and avoid protracted litigation, which in any case, the AO has also not accepted and hence, no cognizance of the same needs to be taken.

15. In view of the above, the appellant submits that it has correctly claimed apatra expenses of Rs.13.80 cr. and compensation for delay in project of Rs.7.80 cr. and hence,, the same is allowable since the same are ascertained liability and not mere provisions and thus, could not be held to be not allowable fully.

16. In respect of Rent Expenses, the appellant submits that it has claimed total amount of Rs.2.12 cr. in the profit and loss account towards the compensation payment to the existing tenants of the property for the inconvenience caused to them due to dislocation. The appellant submits that it has reimbursed to the tenants amount incurred by them towards rent for alternate accommodation and this amount of reimbursement is fixed as per the area that was occupied by the said tenant in the property.

17. The appellant submits that since this was in the nature of reimbursement of expenses, it has not deducted TDS as per the provisions of section 1941 of the Act.

18. The AO has however held otherwise and observed that the liability was that of appellant and not the tenants and hence, the appellant was liable to deduct TDS u/s.1941 and since it has not deducted, the amount of Rs.2.12 cr. is liable to be disallowed u/s.40(a)(ia) of the Act.

19. The appellant submits that without prejudice to the contention of the appellant that the compensation of rent paid is towards reimbursement of expenses, the provisions of section 1941 of the Act does not get triggered for the reason that the reimbursement payments made to each of the party does not exceed the limit prescribed u/s.1941 of the Act. Hence, the question of

IDS does not arise and therefore applying the provision of sec.40(a)(ia) does not arise.

20. Hence, the appellant submits that the rent claimed in the profit and loss account is not disallowable and the observations of the AO in this respect are factually incorrect. Thus, the amount of Rs.2.12 cr. is fully allowable as expenses.

21. With respect to the cost of construction of the rehab building, the appellant submits that the estimation made of Rs.10 cr. toward the same is in fact on lower side and the actual expenses incurred till date exceeds far more and hence, the observation that this cannot be called ascertained liability is contrary to the facts of the case. Further, following mercantile system of accounting, the provision made for ascertained liability ought to be allowed. Thus, the provision of Rs.10 cr. cannot be said to be unascertained liability more particularly when in the development agreement, the appellant and the third party has estimated the liability to be about Rs.15 cr. and therefore this amount was withheld to be paid as and when the construction of rehab buildings are in progress and gets completed.

22. With respect to the cost of material consumed, the appellant submits that it has not claimed any excess material cost and entire details in this regard i.e. party-wise with complete details of invoice and the amount incurred is furnished to the AO and no discrepancy is pointed out.

23. The appellant submits that for the purpose of construction of the rehab buildings, it has appointed third party contractor i.e. M/s. Krishna Enterprise who was also responsible for procurement of material and keeping the same at site with proper safety. The appellant submits that the payment for the procurement of material had to be done by the appellant. Hence, the observation that both the appellant and the contractor is purchasing material simultaneously for the same project is factually incorrect. The appellant submits that material was to be procured by the contractor however the payment towards the same had to be made by the appellant.

24. The appellant submits that the observation in para 5.2 regarding non-maintenance of stock records and consumption records, the appellant submits that it is practically impossible to maintain such records in the line of business of the appellant. There are various raw materials which goes in to the construction of the building and hence, not possible to keep records of the same and consumption records is also impossible.

25. The appellant further submits that the AO has observed in para 5.3 that the total cost of rehab building is much more than the normal rate, however the AO has not brought on record any evidence in this regard. Further, no discrepancy is pointed out in respect of the cost of construction incurred by the appellant towards the construction of rehab buildings.

26. The appellant therefore submits that the expenses incurred towards cost of construction of rehab buildings are genuine and no part of the same could be held to be not allowable.

27. The appellant submits that there are no discrepancies in the regular books of account maintained and therefore the rejection of the same is not justified. The appellant submits that the conclusion arrived at by the AO on various issues as discussed hereinabove are based on incorrect assumption of facts and due to such incorrect facts considered by the AO, the finding arrived at is also incorrect. The appellant submits that it has correctly maintained the books of account and has correctly claimed the liabilities, which are duly proved by third party agreements, consent terms of the Civil Court, legal notices issued, agreements entered, etc.

28. The observation made in para 6.2 is already dealt with above and the offer to disallow ad hoc 5% of the expenses claimed was to buy peace and avoid protracted litigation. However, this does not and cannot lead to inference that the books of accounts are not correctly maintained. The AO has failed to point out discrepancy in the books of account and therefore the AO is not justified to take the offer of the appellant as basis for rejecting the books of account. The appellant submits that in any case, the AO has not accepted the offer of the appellant and therefore the AO was not justified in taking cognizance of the same.

3.9. The assessee pointed out that books of accounts of the assessee are audited by qualified Chartered Accountant and no discrepancy was pointed out in the tax audit report. The audited books of accounts clearly give correct and complete picture of the accounts and income derived therefrom. The observation of the ld. AO in para 6.5, the slum rehabilitation projects are usually more profitable is again general observation without any evidence to this fact and more particularly when the assessee has sold out the development of the said plot at a lumpsum consideration without constructing the same and hence, the observation has no bearing on the case, even otherwise. It was also submitted that the ld. AO having stated that, provisions of Section 44AD of the Act are not applicable in the instant case, ought not to have estimated the profit element @8% by applying the very same provisions of Section 44AD of the Act. In support of the various contentions of the assessee, the

assessee also placed reliance on the following decisions before the ld. CIT(A):-

a) The decision of Hon'ble Supreme Court in the case of Bharat Earth Movers Ltd., vs. CIT reported in 245 ITR 428(SC)
b) The decision of Hon'ble Supreme Court in the case of CIT vs. Woodward Governor of India Pvt. Ltd., reported in 312 ITR 254.
c) The decision of Hon'ble Supreme Court in the case of Rotork Controls India Pvt. Ltd., vs. CIT reported in 314 ITR 62 among others.

3.10. The assessee also submitted that against various provisions made, it has in subsequent years discharged the liabilities to certain extent and even as on 31/03/2016 certain sums are still payable to the respective unauthorised and authorised slum dwellers. It was also pointed out that the subsequent assessment years were also selected for scrutiny i.e. A.Yrs. 2013-14 and 2014-15 wherein the method of accounting followed by the assessee has been duly accepted by the ld. AO and no additions were made on estimated basis by rejecting the books of accounts of the assessee. In fact in respect of payments made to the various slum dwellers and towards incurrence of construction cost for rehab buildings, the same were duly verified by the ld. AO and on verification of details submitted by the assessee, the same were accepted in the scrutiny proceedings for subsequent years. The assessee submitted the following chart revealing all the payments made and payments outstanding as on 31/03/2016 as under:-

Provisions made for	31.03.2012	Actual Payments made / Cost Incurred as at				Balance as at 31.03.2016
		31.03.2013	31.03.2014	31.03.2015	31.03.2016	
a) Apatra Exp.	13,80,00,000	4,84,00,000	60,00,000	60,00,000	25,00,000	7,51,00,000

b) Compensation for delay in project	7,80,00,000	1,50,00,000	1,15,48,000	51,57,000	Nil	4,62,95,000
c) Construction cost	10,00,00,000	5,98,30,359	2,16,83,777	24,16,186	1,33,08,852	27,60,825
Total	31,60,00,000	12,32,30,359	3,92,31,777	1,35,73,186	1,58,08,852	12,41,55,825

3.11. The assessee further submitted that from the above chart, it would be appreciated that out of the total provision made of Rs.31.60 cr., the assessee has already incurred and paid a sum of Rs. 19,18,44,175/- during the period from 01.04.2012 to 31.03.2016. Further, as at 31.03.2016, one Rehab building is yet to be constructed and thus the cost of construction for the said building would be in crores of rupees, which itself show that the cost of construction for Rehab building estimated as at 31.03.2012 at Rs.10 cr. was at lower side. In any case, the assessee submitted that the provisions made were in respect of ascertained and accrued liabilities, which has been discharged to a certain extent and thus, the provision made could not be disallowed.

3.12. The assessee also gave chart of the amounts actually received against the sale consideration of Rs.45 cr as under:-

Asst. Year	Amount Received	Balance receivable
2012-13	15,60,00,000	29,40,00,000
2013-14	20,06,00,000	9,34,00,000
2014-15	3,62,00,000	5,72,00,000
2015-16	33,00,000	5,39,00,000
2016-17	98,00,000	4,41,00,000

3.13. The assessee submitted that as per the above chart, the sale consideration is also received in piecemeal and still receivable as at 31.03.2016 is Rs.4.41 cr. However, the assessee submitted that on the basis of accrual system of accounting, it has offered the entire amount of Rs.45 Crore in the profit and loss account as income. The assessee submitted that as per the agreement, the assessee is required to vacate the slum dwellers - both illegal and legal and also construct the Rehab buildings. The assessee submitted that as and when the Rehab buildings are constructed, the FSI is made available for the saleable area, which is constructed by Joy & Savla Realtors. Thus, the assessee submitted that as against the sale consideration of Rs.45 Crore, it has to incur liability of payment to slum dwellers as also construction Rehab buildings and thus, the provision made is proper and correct. In fact, from the charts produced above, the assessee has still to incur the liability and construct one entire Rehab building and thus, the loss claimed in the impugned year is proper and correct and ought to be allowed. The profit thus estimated @8% is without any justification and liable to be deleted.

4. In respect of rent expenses which was disallowed u/s.40(a)(ia) of the Act by the ld. AO, the assessee submitted that the compensation paid for alternate accommodation is not in the nature of rent and hence, the provisions of Section 194I of the Act do not apply. In this regard, the assessee placed reliance on the decision of Mumbai Tribunal in the case of Jatinder Kumar Madan vs. ITO reported in 32 CCH 0059 Mumbai Tribunal dated 25/04/2012 wherein it was held that displacement compensation or compensation received for alternate accommodation in excess of actual rent paid by assessee is taxable as income from other sources and not income from house property in the hands of the recipient. The assessee also placed reliance on the decision of Mumbai

Tribunal in the case of Sahana Dwellers Pvt. Ltd., vs. ITO reported in 158 ITD 78 wherein it was held that compensation paid by assessee to tenants for alternate accommodation could not be treated as rent as defined in Section 194I of the Act and there was no requirement for deduction of tax at source thereof. Accordingly, no disallowance u/s.40(a)(ia) of the Act could be made.

4.1. The ld. CIT(A) observed that assessee is not a Director and company is engaged in the business of construction and re-development of properties. Accordingly, the application of provisions to Section 44AD of the Act and the profit percentage determined thereon is misplaced. The ld. CIT(A) also observed that the ld. AO had not brought any evidence on record to prove that whether in this line of industry, assessee could have earned 8% net profit. No comparable instances were brought on record. With regard to the disallowance voluntarily offered by the assessee @5% in the course of assessment proceedings, the ld. CIT(A) observed that the same was done only to avoid protracted litigation and to buy peace and does not in any way tantamount to acceptance by the assessee that there are some defects in the books of accounts. Since, no disallowances were made by the ld. AO in the scrutiny assessment proceedings for subsequent two years for the very same genuine project and the assessee's method of accounting has been fully accepted by the ld. AO in the subsequent years, there is no need to reject the books of accounts of the assessee and estimate the net profit at 8% thereon. With these observations, the ld. CIT(A) held that the rejection of books by the ld. AO is without any basis and estimation of net profit at 8% as arbitrary and accordingly, deleted the same.

4.2. Later on, the ld. CIT(A) proceeded to examine the allowability of various expenses on merits. He accepted to the fact that a sum of Rs.13.80 Crores provided by the assessee represents compensation payable to unauthorised slum dwellers @12 lakhs per dweller for 115 persons and similarly the compensation of Rs.3 lakhs per slum dweller payable to various slum dwellers in respect of 261 people were made on a scientific basis, based on an agreement and based on the consent terms of the Hon'ble Civil Court. Hence, these liabilities cannot be construed as unascertained liabilities. Accordingly, he granted relief to the assessee in respect of these two items.

4.3. With regard to disallowance of rent expenses of Rs.2.12 Crores u/s. 40(a)(ia) of the Act, the ld. CIT(A) agreed with the case law relied upon by the assessee as detailed supra and granted relief to the assessee.

4.4. The ld. CIT(A) with regard to observations made by the ld. AO on the aspect of cost of construction and cost of materials consumed, observed that maintenance of stock records and consumption details in this line of business is difficult and that alone cannot lead to rejection of books of accounts. He agreed with the views of the assessee that the cost of construction of Rs.10 Crores claimed by the assessee was made on a conservative basis and in fact the assessee had withheld Rs.4.41 Crores upto 31/03/2016 which shows that actual cost was approximately Rs. 15 Crores. Hence, no excess cost of construction has been claimed by the assessee during the year under consideration.

4.5. Accordingly, he held that no separate addition is warranted in respect of aforesaid items.

4.6. We find that in respect of compensation payable of Rs.12 lakhs for unauthorised slum dwellers for 115 persons and compensation payable @Rs.3 lakhs to authorised slum dwellers in respect of 261 persons were correctly provided by the assessee and based on consent terms of the Civil Court and agreement entered into with Vikasak and Sanstha Society. These provisions could not be categorised as contingent liability or as an unascertained liability. It is also a fact that assessee had been continuing to make payments by discharging the liabilities as could be seen in the aforesaid table in subsequent years. Hence, we hold that Apatra Expenses and compensation payable to various slum dwellers are genuine liabilities not warranting any disallowance thereon.

4.7. With regard to rent expenses, we find that the ld. CIT(A) had rightly placed reliance on the Co-ordinate Bench decision of this Tribunal in the case of Sahana Dwellers referred to supra wherein it was held as under:-

> *6. We have considered the submissions of the parties and perused the material available on record. Undisputedly, the property in question where the tenants were staying earlier, was owned by the Brihan Mumbai Mahanagar Palika and the tenants were paying rent to the Municipal Corporation. It is also a fact on record that the subject building having become old and in a dilapidated condition the authorities concerned decided to demolish the said building and construct a new building in its place under the SRA Project and the construction of the new building was entrusted to the assessee. It is also a fact that since the entire building had to be demolished for the purpose of constructing the new building, the tenants had to vacate the said premise and alternative accommodation was required to be provided to them. On a perusal of the agreement entered into between the assessee and the society formed by the tenants, it is relevant to note that since the assessee was not able to provide alternative accommodation to the tenants, it was provided under the agreement that assessee would pay them compensation towards expenditure to be incurred by them on account of rent payable by them for alternative accommodation and in accordance with such terms assessee initially paid compensation of Rs. 5,000 per month to each tenant which was subsequently revised from time–to–time as the assessee could not construct the building within the stipulated time period for various reasons. From the aforesaid facts, it is very clear that the concerned persons to whom the assessee had made the payment are neither tenants of the assessee nor the assessee has in reality paid rent on behalf of them. Only because the assessee was not able to provide alternative accommodation to these*

tenants the assessee had to pay compensation for enabling the tenants to meet the expenditure to be incurred by them towards rent payable whether they are actually paying rent or not. This is for the simple reason that tenants were displaced from the property where they were staying for construction of new building. On a perusal of section 194I of the Act, it is seen that under clause (i) rent has been defined as under:—

'Explanation.—For the purposes of this section, —

(i) "rent" means any payment, by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of (either separately or together) any,—

(a) land; or

(b) building (including factory building); or

(c) land appurtenant to a building (including factory building);

or

(d) machinery; or

(e) plant; or

(f) equipment; or

(g) furniture; or

(h) fittings,

whether or not any or all of the above are owned by the payee;'

7. On a plain reading of the aforesaid definition of rent, it becomes clear that the payment made by the assessee does not come within the purview of rent as prescribed in the said provision as the assessee is not making such payment for use of any land, building, etc. On the contrary, if the facts involved are considered as a whole the payment made by the assessee is nothing else but in the nature of compensation. The Tribunal in case of Jitendra Kumar Madan (supra) while considering the nature of payment received for alternative accommodation by the recipients held such payments at their hand as income from other sources instead of income from house property. That being the case, the payment made by the assessee also being in the nature of compensation for alternative accommodation cannot be treated as rent. Moreover, such compensation cannot be treated as rent for the simple reason that not only the assessee is not using any land and building but it may also be a fact that persons to whom such payments have been made may not be incurring any expenditure on account of rent. In any case of the matter, payments made by assessee under no circumstances can be construed to be coming within the meaning of "Rent" as provided under section 194I. Thus, after considering the totality of the facts and circumstances of the case, we are of the considered opinion that compensation

> *paid by the assessee to the tenants towards alternative accommodation not being in the nature of rent as defined in section 194I, there is no requirement for deduction of tax under the said provisions. Therefore, the disallowance made under section 40(a)(ia) of the Act cannot be sustained. Consequently, we delete the addition made on that account. Grounds raised by the assessee are allowed.*

4.7.1. Respectfully following the aforesaid decision, we hold that tax is not required to be deducted on the rent component of Rs.2.12 Crores and hence, no disallowance u/s.40 (a)(ia) of the Act could be made thereon.

4.8. With regard to cost of materials consumed and cost of construction, we find that the ld. CIT(A) had categorically observed that the cost claimed by the assessee in the sum of Rs.10 Crores is very conservative and on the lower side and that the actual cost has reached approximately Rs.15 Crores in subsequent years. This factual finding has not been controverted by the Revenue before us. Going by the conduct of the assessee, we find that assessee though had not received the sum of Rs.45 Crores in full even upto 31/03/2016, but the assessee had volunteered to offer the said sum of Rs.45 Crores in the year under consideration and had claimed the expenses that are to be incurred for the smooth execution of the project in consonance with the matching principle of income and expenditure thereon, and also considering the fact that the very same modus operandi adopted by the assessee in subsequent years i.e. in A.Yrs.2013-14 and 2014-15 were accepted by the ld. AO in scrutiny assessment proceedings without making any additions thereon or rejecting the books of accounts of the assessee, we are not inclined to accept to the arguments of the ld. DR that atleast 5% of expenses offered by the assessee during the course of assessment proceedings need to be taxed. The ld. CIT(A) had already pointed out that the said offer was made only to buy peace and avoid protracted litigation. We also find that the alleged defects pointed out by the ld. AO

had been duly addressed by the assessee and in these peculiar facts and circumstances of the case, we are not inclined to direct the ld. AO to add 5% of expenses offered by the assessee during the course of assessment proceedings. Hence, we do not find any infirmity in the order of the ld. CIT(A) granting relief to the assessee. Accordingly, the grounds raised by the Revenue are dismissed.

ITA No.332/Mum/2018 (A.Y.2013-14)

6. The grounds raised by the assessee for A.Y.2013-14 are only with regard to set off and carry forward of losses of earlier years. We find that the ld. AO in A.Y.2012-13 had converted the returned loss of the assessee into assessed income. The said income was determined by the ld. AO by estimating net profit @8%. In the aforesaid order, we have already deleted the entire addition made by the ld. AO and affirmed the order of the ld. CIT(A) for A.Y. 2012-13. Hence, assessee would be eligible to carry forward loss pertaining upto A.Y.2012-13 to subsequent assessment years as per law. Hence, the grounds raised by the assessee for A.Y.2013-14 are allowed.

ITA No.331/Mum/2018 (A.Y.2014-15)

7. The grounds raised by the assessee are similar to that raised by the assessee for A.Y.2013-14. We find that the ld. AO had sought to disallow the loss of A.Y.2012-13 on the pretext that no loss was available in A.Y.2012-13 in view of additions made by him. As stated earlier, the additions made by the ld. AO in A.Y.2012-13 has already been directed to be deleted, hence, assessee would be eligible for carry forward of the losses of A.Y.2012-13 for consequential set off in subsequent years. During this year, there was a change in shareholding beyond 51% of voting power which was stated to be in violation of provision of Section

79 of the Act. Hence, in the opinion of the Revenue, the assessee is not entitled for set off of losses. But we find that the shares were only transferred from Karta to its Coparceners and hence, there was no change in shareholding at all. But from the perusal of the assessment order, we find that there is no finding recorded by the ld. AO in this regard. Hence, we are inclined to dismiss the ground No.3 raised by the assessee as not emanating from the order of the ld. AO. However, we hold that assessee would be entitled for set off of loss of A.Y.2012-13 with the profits, if any, of A.Y.2014-15 as stated supra.

8. In the result , appeal of the assessee for A.Y. 2014-15 is partly allowed.

9. To SUM UP:-

Sr. No.	ITA No.	AY	Appeal By	Result
1.	3059/Mum/2017	2012-13	Revenue	Dismissed
2.	332/Mum/2018	2013-14	Assessee	Allowed
3.	331/Mum/2018	2014-15	Assessee	Partly Allowed

Order pronounced on 23/12 /2021 by way of proper mentioning in the notice board.

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 23/12/2021
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai