

आयकर अपीलीय अधिकरण

मुंबई पीठ "एच", मुंबई

श्री ओम प्रकाश कांत, लेखा सदस्य एवं

श्रीमती कविता राजगोपाल, न्यायिक सदस्य के समक्ष

IN THE INCOME TAX APPELLATE TRIBUNAL

MUMBAI BENCH "H", MUMBAI

BEFORE SHRI. RI OM PRAKASHRI. KANT, ACCOUNTANT MEMBER AND

SMT. KAVITHA RAJAGOPAL, JUDICIAL MEMBER

आ.अ.सं.529 /मुं/2022 नि.व.2006-07

आ.अ.सं.531/मुं/2022 (नि.व.2006-07)

I.T.A No.529/Mum/2022 (A.Y. 2006-07)

I.T.A No.531/Mum/2022 ( A.Y. 2006-07)

M/s Samira Habitats India Ltd

G-8, Shri.rikant Chambers

Sion Trombay Road

Chembur, Mumbai-400 071

**PAN:AAGPR1508N**

..... अपीलार्थी /Appellant

बनाम Vs.

Assistant Commissioner of Income Tax

Central Circle-35 [Now DCIT, CC-6(2), Mumbai

Room No.104, 1<sup>st</sup> Floor,

Aayakar Bhavan, M.K. Road

Mumbai-400 020

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Gaurav Kabra

प्रतिवादी द्वारा/Respondent by : Smt. USha Gaikwad, Sr.AR

सुनवाई की तिथि/ Date of hearing : 21/09/2022

घोषणा की तिथि/ Date of pronouncement : 28/10/2022

आदेश/ ORDER**PER OM PRAKASHRI. KANT (AM):**

These appeals by the assessee are directed against two separate orders both dated 23/02/2022, passed by the Learned Commissioner of Income-tax (Appeals)-54, Mumbai [in Shri.ort the Ld. CIT(A)] for Assessment Year 2006-07. The appeal bearing ITA No. 529/Mum/2022 pertains to assessment, where quantum addition has been made, whereas the appeal bearing ITA No. 531/Mum/2022 pertains to penalty proceedings in relation to the quantum addition. Both appeals being connected, same heard together and dispose of by way of this consolidated order for convenience and avoid repetition of fActs.

**ITA No. 529/Mum/2022**

2. First we take up the appeal in relation to assessment proceedings. The grounds raised by the assessee in the appeal are reproduced as under:

- “1. *On the fActs and circumstances of the case as well as in law, the Learned Assessing Officer has erred in reopening the assessment completed u/s 143(3) of the Income Tax Act, 1961, without considering the fActs and circumstances of the case.*
2. *On the fActs and circumstances of the case as well as in law, the Learned CIT(A) has erred in confirming the Action of Learned Assessing Officer in making an addition of Rs.30,58,864/- on account of alleged on-money in respect of Nagaon project was not disclosed by the appellant, without considering the fActs and circumstances of the case.*
3. *On the fActs and circumstances of the case as well as in law, the Learned CIT(A) and Learned Assessing Officer has erred in not considering the fActs that 20% on-money disclosed was not supported with any fActs and were only on the basis of assumption.*
4. *On the fActs and circumstances of the case as well as in law, the Learned CIT(A) and Learned Assessing Officer has erred in completing*

*the assessment on the basis of statement given by the Director without going into the facts of the case.”*

3. Briefly stated, facts of the case are that the assessee company is a builder and developer of real estate properties. For the year under consideration, the assessee filed return of income on 17 Nov. 2006 declaring total income of ₹ 59,66,730/-. The assessment under section 143(3) of the Income-tax Act, 1961 ( in Shri.ort the Act) was completed on 19/11/2008 by the Assessing Officer determining total income at ₹ 64,54,310/-. Subsequently a search was carried out in the premises of the assessee on 21/03/2013, wherein director of the company admitted of receiving on-money on sale of land. The year under consideration being not falling in search assessment period u/s 153A of the Act i.e. six years prior to the year in which search was carried out, the assessment was reopened under section 147 of the Act after recording reasons to believe that income escaped assessment. The reassessment under section 147 of the Act was completed on 25/03/2014 wherein the Assessing Officer treated 20% of the sale of ₹ 1,52,94,320/-as on-money received and accordingly undisclosed income of ₹ 30,58,864/-was added to the business income assessed vide order under section 143(3) dated 19/11/2008. On further appeal, the Ld. CIT(A) upheld the undisclosed income added by the Assessing Officer.

4. Aggrieved, the assessee is before the Income Tax Appellate Tribunal (ITAT)[in Shri.ort the Tribunal] raising grounds as reproduced above.

5. The ground No. 1 of the appeal challenging the validity of the assessment was not pressed by the Learned Learned Counsel of the assessee, accordingly same is dismissed as infructuous.

6. The ground No..5 being general in nature, therefore, same is also dismissed as infructuous.

7. The grounds No. 2 to 4 of the appeal relate to addition of on-money on sale of land.

8. We have heard rival submissions of the parties on the issue in dispute and perused the relevant material on record. During the course of search Action, the director of the assessee company, Shri. Sameer A Nerukar, in the statement recorded under section 132(4) of the Act on 22/03/2014 admitted of accepting on-money in sale of land in Nogaon project. During the course of the assessment proceeding, it was explained that addition at the rate of the 20% for on-money was not acceptable due to the reasons, firstly, said disclosure of on-money in Nagaon project was made to avoid litigation and buy peace of mind only, secondly, it was contended that on-money was not received on all the sales as a stated during the course of statement, thirdly, it was submitted that large portion of the said on-money would have been expended for purchase, construction and element of the land. In view of above reasons, it was submitted that a reasonable percentage of the profit should be estimated for undisclosed income rather than entire on-money. The Learned Assessing Officer rejected the contention of the assessee in view of the statement given on both by the director of the company. He also rejected the claim of the assessee for set off for unaccounted expenses

while purchase, construction, et cetera as uncorroborated. Before the Ld. CIT(A), the assessee made detailed submissions contending that no addition could have been made solely on the basis of the statement recorded during the course of the search, ( which was subsequently retracted), without any corroborative evidences. It was also submitted that during statement it was clarified that on-money was not received from all the customers and amount so offered by Shri. Sameer Nerulakr was on adhoc basis, without properly appreciating the facts and circumstances of the case. Further it was submitted, in view of statement of Shri. Sameer Nerulkar and statements recorded of various brokers including Shri. Anil Shri.Shantaram Patil, Shri Sunil Mahtre, Smt Asha Janardan Hale, Shri Manohar Janardan Thakur, Shri Nitin Narayan Adhikari, Shri Nitin Nagwekar etc., it was evident that cash payments were incurred for purchase of the land, which was not recorded in the books of accounts of the assessee. It was also referred to an affidavit filed by Shri. Sameer Nerulkar in post-search assessment proceeding modifying/retracting his statement under section 132(4) of the Act wherein he submitted that addition can only be made after giving set off of the expenses as incurred by the assessee. It was also submitted that the seized paper found during the course of the search also indicated that on-money received was utilised to make payment of ₹ 6,00,77,175/-for purchase of land. In view of the submissions it was prayed that on-money at the rate of the 10% could only be added to the income of the assessee after taking into consideration the expenses incurred. The Ld. CIT(A), however, held that statement recorded under section 132(4) of the Act constitutes an important piece of the evidence. In support, he relied on the decision of the Hon'ble Delhi High Court in the case of CIT Vs Kuwar Fibres P Ltd

(2017) 77 taxmann.com 345 (Delhi) and decision of Hon'ble Kerala High Court in the case of Medical land Vs CIT(Appeals), Kochi (2014) 45 taxmann.com 488 (Kerela). He declined the prayer of the assessee of considering 10% of on-money as unaccounted income on the ground that no working of unaccounted expenses recorded in seized document for arriving at profit of 10% was submitted.

9. On perusal of the order of the Ld. CIT(A), we find that though in para 6.3.1 of the impugned order he has mentioned that there are ample evidence of taking on-money on sale of land which were seized during the course of the search, however, there is not a mention of single seized paper in the finding of the Ld. CIT(A) in impugned order. In the submissions filed before the Ld. CIT(A) by the assessee, there is a reference "Annexure A", on which a broker namely, Shri Nitin Nagwekar was questioned to explain cash component in purchase of the lands by the assessee. In the statements of various brokers, reproduced by the Ld. CIT(A) as part of submission of the assessee, there is a clear mention of amount of cash component in purchase of land. The relevant statements of brokers reproduced by the Ld. CIT(A) is extracted as under:

***"Statement of Shri Anil Shantaram Patil:***

***Q5. Please state the amount of commission you have got for facilitating M/s Samira Habitats India Limited in the land dealings at Nagaon. Please also state that there is any amount of cash paid by M/s Samira Habitats India Limited to land owners/ farmers during the purchase of land. If so, also state the quantum of payment made by M/s Samira Habitats India Limited to the concerned land owners/brokers.***

***Ans: Sir, I confirm that I have facilitated M/s. Samira Habitats India Limited in the land dealings at Nagaon. The details of the gut numbers and the commission for the same are depicted as under: -***

Sr No.	Gut No.	Approx Commission and the rate (Amount in Rs.)	Approx. value of consideration paid in of cash  (Amount in Rs.)
1	1931	9,982	Nil
2	1744	11,150	2,00,000
3	3	56,760	3,00,000
4	2041, 2048	50,000	18,00,000
5	1938, 1894	12,660	4,20,000
6	2073	6,438	2,20,000
7	1742	10,500	2,00,000
8	1893	3360	3,70,000
9	1720	26,654	Nil
10	1749, 1934	68,900	Nil
11	Nagaon & Parhur	2,01,960	Nil
12	1735 & Parhur	37,100	Nil
13	1992	109,800	Nil

1 4	1760	21,975	Nil
1 5	1774	11,000	Nil
1 6	1756, 1767, 1941	18,575	Nil
1 7	1756, 1761,1763 ,1940	12,700	11,96,500
1 8	306	32,900	Nil
1 9	1932	7,000	Nil
2 0	1754, 1680	55,000	4245000
	Total	7,64,414	89,61,500

Further, I confirm that the amount referred in column 3 of the above table represents the amount of commission received in cheque against my PAN AGQPP5057J. I didn't receive any commission in cash. Column 4 of the above table represents the cash consideration paid for and, dealings by M/s Samira Habitats India Limited to the respective farmer/ farmers in cash."

**Statement of Shri Sunil Mhatre:**

**"Q5. Please state the amount of commission you have got for facilitating M/s Samira Habitats India Limited in the land dealings at Nagaon. Please also state that there is any amount of cash paid by M/s Samira Habitats India Limited to land owners/farmers during the purchase of land, If so, also state the quantum of payment made by M/s Samira Habitats India Limited to the concerned land owners/brokers.**



**that there is any amount of cash paid by M/s Samira Habitats India Limited to land owners/ farmers during the purchase of land. If so, also state the quantum of payment made by M/s Samira Habitats India Limited to the concerned land owners/brokers.**

Ans: Sir, I confirm that I have facilitated M/s Samira Habitats India Limited in the land dealing at Nagaon & Sahan village. The details of the gut numbers and the commission for the same are depicted as under:-

Sr. No.	Gut No.	Approx. Commission and the rate  (Amount in Rs.)	Approx. value of consideration paid in of cash  (Amount in Rs.)
1	1688	44,413	70,40,000/-
2	1723	33,215	Nil
3	1745	48,388	6,97,000/-
4	2041	47 450	18,01,000/-
5	2048		
7	2025/1 2025/2	75,148	Nil
8	1906, 1920	36,967	
9	1732	6,967	2,65,000

10	1778, 1743	48,474	ffi Nil
11	1992	1, 94,860	Nil
12	1998, 1671,	76,735	6,52,000
13	1889, 1903, 1928, 1979	93,703	Nil
14	1996, 2000, 2002, 2006	2,52,876	Nil
15	2043, 2046	70,435	5,75,000
	Total	9,68,941	50,30,000

Further, I confirm that the amount referred in column 3 of the above table represents the amount of commission received in cheque against my PAN ADHPH3807Q. I didn't receive any commission in cash. Column 4 of the above table represents the cash consideration paid for land dealings by M/s Samira Habitats India Limited to the respective farmer/farmers in cash."

**Statement of Shri Manohar Janardan Thakur:-**

**"Q5. Please state the amount of commission you have got for facilitating M/s Samira Habitats India Limited in the land dealings at Nagaon. Please also state that there is any amount of cash paid by M/s Samira Habitats India Limited to land owners/ farmers during the purchase of land. If so, also state the quantum of payment made by M/s Samira Habitats India Limited to the concerned land owners/brokers.**

Ans: Sir, I confirm that I have facilitated M/s Samira Habitats India Limited in the land dealing at Nagaon. The details of the gut numbers and the commission for the same are depicted as under:-

Sr. No.	Gut No.	Approx. Commission and the rate (Amount in 1 Rs.)	Approx. value of consideration paid in of cash(Amount in Rs.)
1	1931	9,982	Nil
2	2041, 2048	50,000	18,00,000
3	1938, 1894	12,660	4,20,000
4	2073	6,438	2,20,000
5	1893	3,360	3,70,000
6	1720	26,654	Nil
7	1899	66,220	7,20,000
8	1770, 1773	70,000	Nil
9	1992	1,09,800	Nil
10	1774	11,000	Nil
11	2028	10,920	Nil
12	1934, 2077 2035,2038 ,	1,41,350	11,16,000

	1761,1763 ,1940		
13	1755,1767 ,1941	18,575	Nil
14	1932	7,000	Nil
	Total	5,43,959	46,40,000

Further, I confirm that the amount referred in column 3 of the above table represents the amount of commission received in cheque against my PAN AGSPT4436F, I didn't receive any commission in cash. Column 4 of the above table represents the cash consideration paid for land dealings by M/s Samira Habitats India Limited to the respective farmer/farmers in cash."

**Statement of Shri Nitin Narayan Adhikari:-**

**"Q5. Please state the amount of commission you have got for facilitating M/s Samira Habitats India Limited in the land dealings at Nagaon. Please also state that there is any amount of cash paid by M/s Samira Habitats India Limited to land owners/farmers during the purchase of land. If so, also state the quantum of payment made by M/s Samira Habitats India Limited to the concerned land owners/brokers.**

Ans: Sir, I confirm that I have facilitated M/s Samira Habitats India Limited in the land dealings at Nagaon. The entire amount of consideration which was to be paid through cheque has been directly paid to the concerned owners/farmers, through my account. The company used to give the cash portion of the consideration to me to suther hand over the amount to the concerned farmers. As per terms and condition laid down during negotiation, I kept Rs. 70,0007- per gunta and I used to give balance amount to concerned owners/farmers. The same amount I used to

charge from the company i.e. Rs.10,000/- per gunta. The details of the gut numbers and the commission for the same are depicted as under-

S r · A / o ·	G ut H o.	Commissi on received in cash from company as well as owner/ farmer	Approx. Value of considera tion paid in cash (Amount in Rs.)	Amount paid to farmers/ow ners	Financia l Year
1	20	11,04,000	35,05,000	29,53,000	2008-09
2	22	3,40,000	10,80,000	9,10,000	2008-09
3	24	4,22,000	13,40,000	11,29,000	2008-09
4	26	18,50,000	58,73,000	49,48,000	2008-09
5	28 /1	6,90,000	2191,000	18,46,000	2008-09
6	28 /2	90,000	2,86,000	2,41,000	2008-09
7	18	2,50,000	7,95,000	6,70,000	2008-09
8	34	3,10,000	9,85,000	8,30,000	2008-09
9	16	6,22,000	19,75,000	16,64,000	2008-09
1 0	26	3,00000	9,55,000	8,05,000	2008-09
1 1	27	4,22,000	13,40,000	11,29,000	2008-09
1 2	13	4,22,000	13,40,000	11,29,000	2008-09
1 3	14	4,00,000	12,70,000	10,70,000	2008-09
1 4	21	2,20,000	7,00,000	5,90,000	2008-09

	To tal	74,42,000	2,36,35,0 00	1,61,93,000	
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Further, I confirm that the amount referred in column 3 of the above table represents the amount of commission received in cheque against my PAN ACUPA6541N.

**Q6. After going through your information, it is clear that you got Rs.2,36,35,000 from M/s Samira Habitats India Limited. Please state the application of this money.**

Ans: Sir, I confirm that I got Rs.2,36,35,000/- from M/s Samira Habitats India Limited, I paid to Rs.1,61,93,000/- to the concerned farmers/owners. \ have constructed my own home for Rs.30,00,000, purchased one vehicle for Rs.19,00,000/- (Out of this Rs.7,00,000/- from bank loan), \ have given Rs. 25,00,000/- advance for a plot of land and rest of amount has been spent as household expenses.

**Statement of Shri Nitin Nagwekar**

**"Q22. On perusal of Annexure-A submitted by you it is seen the following cash components are involved in the purchase of, land.. Please comment on the same.**

Sr. No.	Financial Year	W" Cash Component
1	2006-07	63,56,600
2	2007-08	43,38,400
3	2008-09	3,06,74,475
4	2009-10	29,15,700
5	2010-11	86,70,000
6	2011-12	43,00,000
7	2012-13	28,22,000

	Total	6,00,77,175
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Ans: Sir, I confirm that the above mentioned amount to the tune of Rs. 6,00,77,175/- have been paid in cash to the farmers/owners."

10. In the seized documents also reference of payment of ₹ 6, 00, 77, 175/- for purchase of the lands. Thus, in the light of statements of the brokers and seized documents, it cannot be denied that on-money was paid while purchase of land by the assessee. We find that identical issue of addition of on-money in assessments under section 153A for search period i.e AY 2007-08 onward has been restored back to the file of the Assessing Officer by the Tribunal wide order dated 19/07/2022, therefore, in the facts and circumstances of the case, we feel it appropriate to restore the issue in dispute involving grounds raised by the assessee to the file of the Learned Assessing Officer for considering the claim of the assessee for making addition for undisclosed income for on-money at the rate of the 10% of the sales after giving set off of the expenses of on-money incurred for purchase of the land. The grounds of the appeal of the assessee accordingly allowed for statistical purposes.

### **ITA No. 531/MUM/2022**

11. The grounds raised in ITA No. 531/MUM/2022 reproduced as under:

"1. On the facts and circumstances of the case as well as in Law, the Learned CIT(A) has erred in confirming the action of Learned Assessing Officer in imposing of penalty by invoking provisions of section 271(1)(c) of the Income Tax Act, 1961 which is bad, illegal, void abinitio or without jurisdiction.

2. On the facts and circumstances of the case as well as in Law, the Learned CIT(A) has erred in confirming the action of Learned Assessing Officer in levying a penalty of Rs.10,29,613/- u/s 271(1)(c) of Income Tax Act, 1961, without considering the facts and circumstances of the case."

12. In the grounds raised, the assessee is aggrieved with the penalty amounting to ₹ 10, 29, 613/-levied under section 271(1)(c ) of the Act in relation to addition of ₹ 30, 58, 864 in assessment under section 147 of the Act.

13. Since we have already restored the addition in dispute made in assessment proceedings in IT No. 529/Mum/2022 to the file of the Learned Assessing Officer, therefore, the penalty levied in respect of the addition cannot survive; accordingly same is also restored to the file of the Learned Assessing Officer for deciding afresh after adjudicating on the issue of addition in quantum proceedings. The grounds of the appeal of the assessee accordingly allowed for statistical purposes.

14. In the result, both the appeals of the assessee are allowed for statistical purposes.

Order pronounced in the open court on this 28<sup>th</sup> day of October, 2022.

Sd/-

sd/-

(KAVITHA RAJAGOPAL)

(OM PRAKASHRI. KANT)

न्यायिक सदस्य/JUDICIAL MEMBER

लेखा सदस्य/ACCOUNTANT MEMBER

मुंबई/Mumbai, दिनांक/Dated: 28/10/2022

*Dragaon Legal / Pavanan, Sr.PS*

**प्रतिलिपि अग्रेषितCopy of the Order forwarded to :**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,  
Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)  
**ITAT, Mumbai**