

**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**MUMBAI BENCH "G" MUMBAI**

**BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)**  
**AND**  
**SHRI PAVAN KUMAR GADALE (JUDICIAL MEMBER)**

**ITA No. 2918/MUM/2019**  
**Assessment Year: 2011-12**

Dy. CIT, Central Circle-6(3),  
Room No. 1925, 19<sup>th</sup> floor, Air  
India Building, Nariman Point,  
Mumbai-400021.

**Appellant**

M/s Samridhi Dealers Pvt.  
Ltd.,  
**Vs.** 132, Utkalmoni Gopabandhu  
Sarani Burra Bazar, Kolkata,  
West Bengal-700 007.  
**PAN No. AAJCS 1840 E**  
**Respondent**

**ITA No. 2207/MUM/2019**  
**Assessment Year: 2011-12**

**&**

**ITA No. 2208/MUM/2019**  
**Assessment Year: 2012-13**

**&**

**ITA No. 2209/MUM/2019**  
**Assessment Year: 2013-14**

M/s Samridhi Dealers Pvt. Ltd.,  
43, Balkrishna Niwas, 1<sup>st</sup> Floor,  
47, 2<sup>nd</sup> Pranjapole Lane, Gulal  
Wadi, Girgaon,  
Mumbai-400 004.

**PAN No. AAJCS 1840 E**  
**Appellant**

Dy. CIT, Central Circle-6(3),  
Room No. 1925, 19<sup>th</sup> floor,  
**Vs.** Air India Building, Nariman  
Point,  
Mumbai-400021.

**Respondent**

**Revenue by** : Dr. Kishor Dhule, CIT-DR  
**Assessee by** : Mr. Vijay Mehta, AR

Date of Hearing : 21/02/2023  
Date of pronouncement : 23/03/2023



## **ORDER**

### **PER OM PRAKASH KANT, AM**

These cross-appeals of the assessee and the Revenue for assessment year 2011-12 are directed against order dated 28.02.2019 passed by the Ld. Commissioner of Income-tax (Appeals)-40, Mumbai [in short 'the Ld. CIT(A)']. The appeals of the assessee for assessment year 2012-13 and 2013-14 are directed against two separate orders, both dated 20.02.2019 passed by the Ld. CIT(A)54, Mumbai.

2. A common issue-in-dispute is involved in all these appeals and therefore, these appeals have been heard together and disposed off by way this consolidated order for convenience and avoid repetition of facts.

2.1 Firstly, we take up the cross appeals for assessment year 2011-12. The grounds raised by the assessee are reproduced as under:

*On the facts and in the circumstances of the case and in law the Hon'ble CIT(A) erred in sustaining total addition of Rs.54,96,161/- to the returned income which she divided on pro rata basis according to the alleged cash payment made in the relevant assessment year merely on statement of third party, without bringing on record any corroborative evidence that appellant company has paid the impugned amount in cash over and above the agreement price in making investment in flat at One Avighna Park project of M/s Nish Developers Pvt. Ltd. and*



*the reasons assigned for doing so are wrong and contrary to the provision of Income Tax Rules made there under.*

2.2 The ground raised by the Revenue are reproduced as under:

1. *Whether on the facts and circumstances of the case and in law, the id. CIT(A) has erred in restricting the addition of on-money to the extent of Rs.54,96,161/- as against the addition of Rs.4,15,00,000/- made by the A.O. as unaccounted investment of the assessee within the meaning of Section 69 of the Income-tax Act, 1961.?*

2. *Whether on the facts and circumstances of the case and in law, the id. CIT(A) has erred in estimating the addition only to the extent of Rs.4,000/- per sq. ft. being the differential rate per square feet in the form of on-money paid by the assessee to Nish Developers Private Limited, taking the basis of some other flats booked by some other parties during the same period, disregarding the fact that corroborative evidences of on-money paid by the assessee of Rs. 4,15,00,000/- Crore for the year under consideration, in the form of data from pendrive found and seized from Shri Pravin Mishra, a key employee of M/s Nish Dealers Pvt. Ltd., found during the course of search.?*

3. *"Whether on the facts and circumstances of the case and in law, the Id. CIT(A) has erred in not accepting the statement of Shri Gulabchand Jain as evidence even though no evidence has been brought on record for co-ercion particularly when the admittance of payment of Rs.1.14.00.000/- for the flat by Shri Gulabchand Corroborated the evidence found during the course of search in the case of M/s Nish Developers (P) Ltd.?"*

4. *"Whether on the facts and circumstances of the case and in law, the Id. CIT(A) took cognizance of and relied upon the statement of Shri Gulabchand of having paid on money to partly confirm the addition made by the AO and thereby disregarding specific evidence directly related to the case in favour of general evidence?"*

3. Briefly stated, facts of the case are that a search and the seizure action in the case of 'Nish Developers (P.) Ltd., Mumbai' was



carried out by the Investigation Wing of the Income-tax Department on 04.04.2014. The assessee had booked a flat at 'One Avighna' a project developed by M/s Nish Developers Pvt. Ltd. Simultaneously a search action was conducted at the residential premises of Shri Sanjay Jain i.e. Director of the assessee-company and survey action u/s 133A of the Income-tax Act, 1961 (in short 'the Act') was carried out at the premises of the assessee-company 'M/s Samridhi Dealers Pvt. Ltd.' on 04.04.2014. The statement of Shri Sanjay Jain Director of the assessee company was recorded wherein he stated that all financial matters were dealt with by his uncle, Shri 'Gulabchand Jain' who was also a Director of M/s Samridhi Dealers Pvt. Ltd. Statement of Shri Gulabchand Jain was also recorded u/s 131 of the Act wherein he admitted to have paid an amount of Rs.1.14 crores as on-money to M/s Nish Developers Pvt. Ltd. for the flat purchased/booked. During the course of search in the case of M/s Nish Developers Pvt. Ltd., a pen drive was found and seized from Shri Pravin Mishra, a key employee of M/s Nish Developers Pvt. Ltd. The data in the pen drive contained details of on-money received in respect of flats booked in 'One Avighna' including on-money in respect of flat booked by the assessee. The total on-money of Rs.5.21 crores in respect of flat of the assessee was reflected in the pendrive for three assessment years i.e. 2011-12 to 2013-14. The relevant break up of said sum of Rs.5.21 crores is reproduced as under:



AY 11-12	27.09.2010	Nemichand Jain	50.00
AY 11-12	27.09.2010	Nemichand Jain	25.00
AY 11-12	4.10.10	Nemichand Jain	35.00
AY 11-12	7.10.10	Nemichand Jain	30.00
AY 11-12	28.12.10	Nemichand Jain	25.00
AY 11-12	31.12.10	Nemichand Jain	15.00
AY 11-12	12.10.10	Nemichand Jain	35.00
AY 11-12	19.10.10.	Nemichand Jain	50.00
AY 11-12	25.10.10	Nemichand Jain	35.00
AY 11-12	02.11.10	Nemichand Jain	15.00
AY 11-12	15.01.11	Nemichand Jain	25.00
AY 11-12	01.02.11	Nemichand Jain	25.00
AY 11-12	03.03.11	Nemichand Jain	25.00
		<b>Total (A)</b>	<b>415</b>
AY 12-13	06.09.11	Nemichand Jain	25.00
AY 12-13	07.09.11	Nemichand Jain	25.00
AY 12-13	29.12.11	Nemichand Jain	25.00
		Total (B)	75.00
AY 13-14	06.09.12	Nemichand Jain	20.00
AY 13-14	10.09.12	Nemichand Jain	11.00
		<b>Total (C)</b>	<b>31.00</b>
		<b>Total (A+B+C)</b>	<b>521</b>

3.1 In view of the material belonging to the assessee found during the course of the search of third person, a notice u/s 153C of the Act was issued on 19.10.2016. In response, the assessee filed return of income on 27.10.2016 declaring total income of Rs.1016/- i.e. the same income which was declared by the assessee in the original return of income filed on 30.09.2011. In the return of income filed, the assessee submitted that though a sum of Rs.1.14 crores was admitted during the course of recording of the statement before the DDIT Investigation, Mumbai but the same was not included in the return of income filed u/s 153C of the Act for the reason that the disclosure was taken by force hence, Sh. Gulabchand Jain, director of the company filed a retraction letter.



Shri Gulabchand Jain director of the company also appeared before the Assessing Officer. In response to the summon issued u/s 131 of the Act, he submitted that he had already retracted his statement given before the Investigation Wing. He further stated that no on-money in cash had been given for booking of flat in project of M/s Nish Developers Pvt. Ltd. The Assessing Officer, in the view of date wise payment of on-money recorded in the pendrive found from Shri Pravin Mishra and statement of Pravin Mishra that said amount represented 'on-money' received in respect of flats booked by the assessee, made addition for the unexplained investment of Rs.4.15 crores paid relevant to the year under consideration.

4. On further appeal, the Ld. CIT(A) held that in assessee has paid on-money, however as far as the amount of 'on-money' recorded in the pendrive, he was not agreed. He however taken note of two instances of flat booked @ Rs.24,106/- and @ Rs.25,239/- per sq. ft. respectively and compared those two rate with the flat booked by the assessee @ Rs.20,927/-. It was held by the Ld. CIT(A) that on-money was paid at the rate of Rs.4000/- per SFT was paid by the assessee and accordingly he sustained the addition of Rs.69 lakhs (=1725 x 4000) which was to be apportioned in the three assessment years in the same ratio as on-money added by the Assessing Officer. The relevant finding of the Ld. CIT(A) is reproduced as under:



“5.4 The submissions of the Ld. Counsel have been considered. It is the contention of the Id.Counsel that the addition has been made by the Ld.AO on the basis of a third party statement. The name mentioned in the data recorded by Shri Praveen Mishra is Shri Nemichand Jain. No statement of Shri Nemichand Jain has been taken nor did he make any admission at any point of time. Shri Gulabchand Jain has given a statement that cash of Rs.1.14 crores was paid to M/s. Nish Developers Pvt. Ltd. He had subsequently retracted this statement for the reason that he was pressurized and coerced into making such an admission. In spite of the search undertaken in the assessee's premises, the investigation team could not unearth any incriminating material or any evidence that on-money has been paid by the assessee. It is a fact that other than the statement of Shri Gulabchand Jain, there is no corroborative evidence which was found during the search. It is also the Id.Counsel's contention that no cross-examination of Shri Praveen Mishra has been provided to the assessee. The Ld.AO proposed to add Rs.5.21 Crores which was the on-money paid by the assessee as per the pendrive. The assessee has purchased the flat with a carpet area of 1725 sq. ft. at a consideration of Rs.3,61,00,000/-, The stamp duty value of this flat is Rs.3,58,00,000/-. The rate per sq. ft. works out to Rs.20,927/- which is higher than the stamp value rate. If the amount of Rs.5.21 Crores is added to the consideration of Rs.3.61 Crores, it will make the total consideration paid Rs.8,82,00,000/- and the per sq. ft. rate would be Rs.51,130/- which is abnormally high and not feasible. Therefore, it does not appear that the assessee has paid on-money of Rs.5.21 Crores for this flat.

5.5 Though there are no corroborative evidences for payment of on-money detected during the search or during the assessment proceedings, there is an indicator that on-money would have been paid by the assessee. The appeal of M/s. Nish Developers Pvt. Ltd. was disposed off by the undersigned. During the course of appellate proceedings in that case, the undersigned had an occasion to call for the list of purchasers along with the date of booking and the rate at which the flats were booked. It was also held that a lot of purchasers have paid on-money to the builder. It is noticed that around the same time as the assessee's booking of the flat, two flats were booked @ Rs.24,106/- and Rs.25,239/- per sq. ft., respectively whereas the assessee has booked it @ Rs.20,927/-. It appears that the



*assessee had also paid on-money and it is for the same reason that he made an admission of Rs. 1.14 crores. No other reason can explain the difference in booking rate by the assessee. Therefore, it is presumed that the assessee had also paid certain amount of on-money which is estimated based on the booking rates of similar flats around the same time. The differential rate of a round figure of Rs.4,000/- (25000-20927) per sq. ft. is estimated as the on-money paid by the assessee. The flat purchased by the assessee has a carpet area of 1,725 sq. ft. and the same was purchased at a cost of Rs.3,61,00,000/-, this gives the rate per sq. ft. as Rs.20,927/-. If the differential rate of Rs.4,000/- is taken, the same would work out to Rs.69,00,000/- (1,725 X 4,000/-). It is held that the assessee has paid on-money of Rs.69,00,000/- for the purchase of this flat and the same amount will have to be apportioned in the three years in the same ratio as the on-money added by the Ld.AO. The addition for this year accordingly works out to Rs.54,96,161/-. The Ld.AO is directed to restrict the disallowance to Rs.54,96,161/- and the appellant gets relief for the balance amount. This ground of appeal is Partly Allowed.”*

5. Before us, the Ld. Counsel of the assessee assailed the order of the Ld. CIT(A). **Firstly** that the Ld. CIT(A) has sustained the addition merely on the basis of estimation of the rates of the two flats. **Secondly**, addition was made by the Assessing Officer relying on the statement of third party i.e. Sh. Pravin Mishra which was also retracted. **Thirdly** the disclosure made by the assessee and amount recorded in the pendrive are different and the assessee has also retracted his statement. **Fourthly**, no cross-examination of Shri Pravin Mishra i.e. a key person on whose statement addition has been made was, provided to the assessee despite being specifically asked.



5.1 Further, he supported the contention that no addition for on-money should be made in the case of the assessee. He relied on the decision of the Tribunal in the case of **M/s Sanjay V. Parmar in ITA No. 3534/M/2019 and CO No. 61/M/2020 for assessment year 2014-15** and in the case of **Jayesh Kewalchan in ITA No. 5640/M/2017 for assessment year 2013-14**. The Ld. Counsel also referred to the decision in the case of **Nish Developers Pvt. Ltd. in ITA No. 3490, 3523, 2514, 3524 & 3525/M/2018 and 3131, 3129, 3130, 2440, 3102 & 3127/M/2018** but he submitted that rate fixed for calculation of the 'on-money' in the said case might not be followed in the case of the assessee.

6. On the other hand, the Ld. Departmental Representative (DR) submitted that the information contended in the pendrive was corroborated by the statement of the three buyers which was recorded during the course of search proceedings, he submitted that such a fact is recorded on page 47 of the order of the Tribunal in the case of Nish Developers Pvt. Ltd. (supra). Further, he submitted that the pendrive is date-wise payment of cash paid by the assessee has been recorded. He further submitted that the Ld. CIT(A) has confused himself regarding application of the sale rate of the flats of the building. He submitted that there could not be any uniform rate for all the flats and rate of the flats differs on basis of floor. He submitted that the Ld. CIT(A) himself has directed to take the statement of on-money on said pendrive for apportionment of



addition sustained by him in the three years. So according to him, on one side he is taking the information of on-money paid by the assessee for apportionment of the addition sustained but for the purpose of sustaining addition he is adopting only sales rate recorded in respect of two flats. According to him, the Ld. CIT(A) is not justified in selectively taking rate of two flats for computing the on-money payment.

7. We have heard rival submission of the parties on the issue-in-dispute and perused the relevant material on record. We find that in the case issue-in-dispute is in respect of amount of on-money assessed in respect of flat booked by the assessee-company. The Director of the assessee company himself admitted payment of on-money Rs.1.14 crores during the statement recorded u/s 131 of the Act however later on he retracted and said on-money was not offered in the return of income by the assessee.

7.1 Further, the information of the on-money payment made by the assessee recorded in the pendrive found from key person of the 'Nish Developers Pvt. Ltd. i.e. Shri Pravin Mishra, reflects total on-money payment of Rs.5.21 crores relevant to three assessment years from assessment year 2011-12 to 2013-14. The said amount relevant to the assessment years is of Rs.4.15 crores. The Assessing Officer accordingly made the said addition of Rs.4.15 crores in the year under consideration. The Ld. CIT(A) has following the two



instances of sale of the flats as reflected in the pendrive sustained the addition of the amount of Rs.68 lakhs for three assessment years. According to the Ld. CIT(A) those two flats were booked around same time when the assessee booked flat. Therefore, he took differential rate of around Rs.4,000/- and after multiplying with carpet area of 1750 sq. ft. of assessee's flat, he estimated disallowance to Rs.69 lakhs.

7.2 Before us, the Ld. Counsel of the assessee submitted that no cross-examination was provided to the assessee of Shri Pravin Mishra, but in our opinion addition has not been made merely on the basis of his statement and it is on the basis of the entries recorded in the pendrive data maintained by Shri Pravin Mishra on behalf of the company M/s Nish Developers Pvt. Ltd. It is also not out of place that director of the assessee company himself admitted payment of on-money of Rs.1.44 crores though same was retracted later on. In the case of Sanjay V. Parmar (supra), relied upon by the Ld. Counsel of the assessee, the Tribunal has recorded that no flat was booked in the name of the said assessee in the building 'One Avighna' of M/s Nish Developers Pvt. Ltd. and therefore addition was deleted but facts of the instant case are different as the assessee has booked the flat in its name. We find that in the case of M/s Nish Developers Pvt. Ltd. (supra) the Tribunal after considering the objections against considering the rates provided in the pendrive directed to apply rate of Rs.22,214/- for the flat sold and



any flat sold lower than this rate, the difference was directed to be considered as on-money received on the said flat. The relevant finding of the Tribunal in para 28 in the case of **Nish Developers Pvt. Ltd.** (supra) is reproduced as under:

*“28. In the present case also during cross examination before AO during assessment proceeding, Mr Pravin Mishra admitted that he has prepared all this data on his own imagination which is not related to the assessee. The cross examination being conducted in the presence of the AO, the AO has also not reexamined Mr Pravin Mishra, thus acceding to the same. In case the AO was not convinced of the said statement, he ought to have re-examined or carried out further investigation to gather further evidences for substantiating his stand. Therefore, considering the facts of the case and judicial pronouncements in this regard, the order of CIT(A) on the issue of pen drive cannot be accepted. Considering all these facts of the assessee, we are of the view that the order of Ld. CIT(A) applying a blanket rate of 20% on the on-money calculated on the basis of data in the pen drive wherein the name of the customers were not even matching with the data in the pen drive and also the fact the amounts mentioned against the various flats purchasers having glaring and huge variations and that the pen drive was recovered from the premises of the employee of the assessee, the onus is on the Revenue to prove that data in pen drive are related to affairs of the assessee. Though the AO has not done his duty to determine correct income of the assessee by carrying out proper investigation of the case, yet the Tribunal being highest fact finding body is equally duty bound to determine correct income of the assessee based on the facts available on record. Considering the statement of third parties and sales pattern of the assessee as submitted before us by the assessee as also before the authorities below, we observe that the selling rate of the flats in the assessee's project is varying from Rs.20,000 per sq Ft to Rs.30,000 per sq. ft. during this period. Such variation pattern suggest that there may be some involvement of on-money in these transactions. This fact was also admitted by five buyers in their statement recorded U/s '132(4) of the Act during the course of search. Therefore to meet ends of justice, it would be*



*reasonable to determine on-money by comparing average rate of sale for each year with the transaction to determine on-money for the period upto the date of search for all 71 flats sold during this period, as out of 72 flats one of the flat was cancelled. In other words as per data available on records, average rate for A Y 2011-12 works out to Rs.22,214/> so any flats sold during this year lower than this rate. the difference should be considered as on-money received on account of sale of the said flat. In our considered this aspect needs to examined at the level of AO to ascertain the amount of on-money. Accordingly, we set aside the order of Id CIT(A) on this issue and direct the AO to examine working of average 'sale rate on the basis of sales data on yearly basis and determine on-money for A Y 2011-12 to A Y 2014-15 on the same lines Needless to mention that the AO will give sufficient opportunity of hearing to the assessee."*

7.3 Since, the Tribunal (supra) in the case of Nish Developers Pvt. Ltd. has directed to adopt the rate of Rs.22,214/- per sq. ft. as the reasonable market rate and difference amount recorded by Nish Developers Pvt. Ltd. as the on-money received by the said company. Thus the amount of on-money received by the Nish Developers P. Ltd. i.e. company becomes the amount of on-money paid by the customers for booking of those flats. In the instant case, the rate which the assessee has booked i.e. Rs.20,927/-, is found to lower than Rs.22,214/- per sq. ft. fixed by the Tribunal (supra) and therefore, difference amount i.e. Rs.2927/- is held to be on-money paid by the assessee. Accordingly,  $2927 \times 1750 = 51,22,250/-$  is sustained in the case of the assessee. The respective ground of Revenue and the assessee are accordingly partly allowed. This amount of addition sustained is accordingly directed to be apportioned in three assessment years in the ratio of the payment



made by the assessee for booking of the flat. Therefore, for allocation of addition in all three assessment years matter is restored to the file of the Ld. Assessing Officer for verification and then decide the amount of addition accordingly. Since, the ground in appeal of the assessee for assessment year 2012-13 and 2013-14 are identical with ground raised in assessment year 2011-12 and therefore following our finding above, the appeals in assessment year 2012-13 and 2013-14 are also allowed partly for statistical purposes.

8. In the result, the appeals of the Revenue as well as appeals of the assessee are partly allowed for statistical purposes.

**Order pronounced under Rule 34(4) of the ITAT Rules,  
1963 on 23/03/2023.**

**Sd/-  
(PAVAN KUMAR GADALE)  
JUDICIAL MEMBER**

**Sd/-  
(OM PRAKASH KANT)  
ACCOUNTANT MEMBER**

Mumbai;

Dated: 23/03/2023

Rahul Sharma, Sr. P.S.

**Copy of the Order forwarded to :**

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

BY ORDER,



//True Copy//

(Assistant Registrar)  
**ITAT, Mumbai**