

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B", MUMBAI**

**BEFORE SHRI AMIT SHUKLA, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

ITA NO.1127/MUM/2022 (A.Y: 2011-12)

| | | |
|--|----|--|
| Bhavan Lakhman Ravaria 401, D Wing, Golden Oak Opposite D-Mart, Powai Hiranandani, Mumbai Maharashtra - 400076 PAN: ACWPR6513M | v. | Income Tax Officer- 21(3)(1) Mumbai |
| (Appellant) | | (Respondent) |

| | | |
|----------------------------------|----------|--------------------------------|
| Assessee Represented by | : | Shri Khushiram Jadhvani |
| Department Represented by | : | Shri Chetan M. Kacha |
| | | |
| Date of Hearing | : | 09.03.2023 |
| Date of Pronouncement | : | 17.04.2023 |

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [hereinafter in short "Ld.CIT(A)"] dated 21.03.2022 for the A.Y.2011-12.

2. Brief facts of the case are, assessee filed its return of income for A.Y. 2011-12 on 29.09.2012 declaring total income at ₹.5,24,560/-. The case was selected for scrutiny under CASS and notices u/s. 143(2) and 142(1) of Income-tax Act, 1961 (in short "Act") were issued and served on the assessee. In response Authorised Representative of the assessee attended and submitted the relevant information as called for.

3. Assessee is proprietor of M/s. Kiti Nice, reseller of readymade garments and M/s. Govinda Construction. Assessing Officer observed during the assessment proceedings that assessee has outstanding loan of ₹.4,82,95,591/- and assessee was asked to submit loan confirmations and details of advances towards plot/shop' in Govinda Construction amounting to ₹.1.85 crores. In response, vide order sheet dated 19.03.2014 assessee submitted copies of allotment letters for advances received for flats/shops. However, Assessing Officer observed that the letters of allotment did not have the signatures of the allottees. Further, loan confirmations are not submitted by the assessee. Subsequently, on 28.3.2014, the Authorised Representative of the assessee submitted the loan confirmations in respect of eight (8) parties and the same is discussed in Assessment Order at Page No. 2 of the order and the total amount of the above said eight (8) parties are ₹.2,56,65,242/-. Further, Ld. AR of

the assessee filed copies of ITRs and bank statements of following parties from whom the assessee has received loans. The details of the parties are given below: -

| Sr. No. | Name of the party | Amount received. |
|----------------|--------------------------|-------------------------|
| 1 | Arvind B Shah | 2,00,000 |
| 2 | Ashmita Bagadia | 15,50,000 |
| 3 | Dhara S. Bagadia | 46,50,000 |
| 4 | Jaysukh B Shah HUF | 1,99,800 |
| 5 | Kishore B Shah HUF | 11,00,000 |
| 6 | Lataben A Shah | 2,30,000 |
| 7 | Puja S Bagadia | 15,50,000 |
| 8 | Ramesh Patel | 20,53,333 |
| 9 | Ronak A Shah | 2,29,000 |
| 10 | Usha K Shah | 1,00,000 |
| 11 | Virendraprasad Gupta | 8,28,700 |
| | Total | 1,26,90,833 |

4. However, Assessing Officer observed that confirmations from the above said parties are not submitted and assessee has submitted all these details only at the fag end of the year. Therefore, Assessing Officer was not in a position to issue notice u/s. 133(6) of the Act. Accordingly, Assessing Officer allowed to the extent of loan confirmations received from the assessee to the extent of ₹.2,56,65,242/- and the balance amount of ₹.2,26,30,349/- was disallowed u/s 68 of the Act.

5. With regard to advance received from flat/shops of ₹.1.85 crores under the head sundry creditors, Assessing Officer observed that assessee

has not submitted confirmations for advance received for flats and assessee has submitted only copies of allotment letters. Since, these allotment letters do not bear the signatures of the allottees the same were also submitted at the fag end of the year, therefore the same was also disallowed due to want of confirmations.

6. Aggrieved, assessee preferred an appeal before the Ld.CIT(A) and filed the informations in details through ITBA portal and subsequently Ld.CIT(A) remanded the matter to the file of the Assessing Officer and based on the remand report, the details of findings of the Assessing Officer party wise was given in the appellate order. After considering the submissions and rebuttal from the remand report, Ld.CIT(A) observed that based on the receipt of loan confirmations and reconciliation of the loans he observed that to the extent of ₹.2,55,30,677/- assessee has not substantiated nor filed the confirmations. Since the Assessing Officer has made the additions in the original assessment proceedings to the extent of ₹.2,26,30,349/- the same was sustained by the Ld.CIT(A).

7. With regard to other issue of advances received from flat bookings, during the remand proceedings Assessing Officer called for details regarding advances received, however, assessee has submitted that he is

not in a position to furnish the details of the allottees towards the advance by contenting by filing a letter dated 20.06.2018 that his brother-in-law has cheated him and total project was taken over by his brother-in-law. He stated that he has received advances against the flats and shops booking of ₹.1.85 crores but he has expended ₹.1.96 crores towards the Development of the land as per Agreement of the said project and as such he has made a loss and as an alternatively he has offered 4% profit on the receipt of ₹.1.85 crores towards advance booking.

8. After considering the above report, Ld.CIT(A) observed in his order that Assessee was in the process of starting construction of a building named "Govinda Park" at Survey No. 242 in Nalasopara (East), Thane in his proprietary concern M/s Govinda Construction. He also observed that assessee has entered into development agreement with M/s Viva Swastik Developers for developing a land at Survey No. 242, Thane. He has also observed that assessee has issued four (4) cheques and the bifurcation is also given in his order to the extent of ₹.1.96 crores. He has narrated the submissions of the assessee that brother in law of assessee cheated the assessee and taken over the project and all the Books of Accounts are in the custody of his brother-in-law. Since the project was taken over by his brother-in-law and the allottees were demanding their money given to the

assessee as no possession of the flats were given to the allottees till date. Further, he has observed that assessee has filed FIR/complaints to Additional Police Administration, Senior Police Officer, Nalasopara police Station, commissioner of Police, Mumbai and Minister of State. Further, he observed that a suit was also filed against Mr. Ganji Patel (brother-in-law of assessee) in the court of Junior Magistrate First Class at Vasai, Palghar, under Suit No. 489/2015 dated 26.02.2015. Ld.CIT(A) observed that assessee was not in a position to furnish any detail of allottees even though several opportunities were given. Ld.CIT(A) further observed that assessee has not submitted bank statements as well as copy of ledger to show that he has collected advances from 73 customers. Even outflow of payment made to M/s. Viva Swastik Developers through Mr. Ganji Patel is not evidenced through bank statement or copy of bank/cash book. With the above observations Ld.CIT(A) sustained the additions made by the Assessing Officer. Further, with regard to the additional ground on real income theory, Ld.CIT(A) accepted the additional ground, however, he disallowed the same observing that the assessee has not established the money trail for the amount received from the flat owners and payment made to M/s Viva Swastik Developers.

9. Aggrieved assessee is in appeal before us raising following grounds in its appeal: -

"1. Ground no. 1 addition Rs.2,26,30,449/- on account of unsecured loans being Disallowed:-

On the facts and circumstances of the case and in law, the learned Faceless CIT(Appeal) has erred in confirming addition of Rs.2,26,30,449/- being unsecured loan under section 68 as unexplained cash credits.

2. Addition of Rs.1,85,00,000/- on account if Advances received towards flat /shop

On the facts and circumstances of the case and in law the learned Faceless CIT(Appeal) has erred in confirming addition of Rs.1,85,00,000/- under the head Income from other sources on account of advances received towards flat and shop under the head of sundry creditor for failure to file confirmation from parties.

3. Real Income Theory and matching concept:

CIT(Appeal) has erred in confirming addition of Rs.1,85,00,000/- without appreciating the fact that the ultimate beneficiary of these funds is to M/s. Viva Swastik On the facts and circumstances of the case and in law the learned Faceless Developers and appellant has paid Rs.1,96,00,000/- to M/s. Viva Swastik Developers."

10. At the time of hearing, Ld. AR brought to our notice relevant facts of the case and submitted his written submissions. For the sake of clarity, it is reproduced below: -

"Advance accepted from 73 customers Rs. 1,85,00,000/-.

Primarily, Appellant submits that on one hand Appellant has received advance booking of Rs. 1,85,00,000/- and on the other hand it has expensed a sum of Rs. 1,96,00,000/- being deposits made to M/s Viva Swastik Developers for proposed acquisition of development rights for the land for construction of project comprising of shops and flats. Appellant submits that if at all advance booking received are to be taxed in the hands of Appellant, then it should get

deduction of Rs. 1,96,00,000/- incurred on immediate succeeding year.

Appellant during remand proceedings before AO, placed on record the fact that Appellant is running a proprietary concern in the name & style M/s Govinda Construction, carrying on the business of Builder and Developers. During the year Appellant has taken a construction project situated at survey no 442 Village Nilmore, District Vasai District Thane. The Appellant was to enter into Development Agreement with M/s Viva Swastik Developers for developing the said land. Hence assessee issued cheques to M/s Viva Swastik Developers from his bank account of proprietary concern M/s Govinda Construction held in Karnataka Bank Ltd.

| Date | Cheque no | Amount Rs. |
|-------------|------------------|-------------------|
| 06.08.2010 | 412755 | 6,00,000/- |
| 07.07.2011 | 448388 | 20,00,000/- |
| 11.11.2011 | 945301 | 1,00,00,000/- |
| 08.12.2011 | 945309 | 70,00,000/- |
| | | 1,96,00,000/- |

Appellant has annexed copy of certificate from Karnataka Bank Ltd. at Page no of PB which confirms that the above referred cheques has been credited to M/s Viva Swastik Developers. Appellant has also annexed copy of Development Agreement executed between M/s Viva Swastik Developers and brother-in-law of Appellant at page no 280 of PB. At page no 305 of PB a receipt is attach which signifies acceptance of Rs. 1,96,00,000/- by M/s Viva Swastik Developers for grant of development rights of the land. The bank statement annexed to PB at page no to 251 to 277 also reveals that Appellant has given advances to various parties during the year under appeal which has also now become unrecoverable from brother in law in view of fraud. Appellant wish to place reliance on decision of Commissioner of Income- tax, Gorakhpur vs. Abdul Haseeb, Prop. M.S.J.B. Silk [51 taxmann.com 48 (Allahabad)] wherein it has been held that 'any sum is found credited in books of assessee' in section 68 not only means all entries on credit side but also entries on debit side in books of account.

At Page no of paper book Appellant submits that details of proposed construction of Govinda Park, Wing A and Wing B at survey no 442 Village Nilmore Dist Vasai as under:

| | | |
|----------------|--|-----------|
| Wing A (Flats) | 7 Storey Building and on each floor 8 Flats | 56 Flats |
| Wing B (Flats) | 7S toreyy Building and on each floor 8 Flats | 56 Flats |
| | | 112 Flats |

| | | |
|-----------------------|----------------|-----------------|
| <i>Wing A (shops)</i> | <i>8 Shops</i> | <i>8 Shops</i> |
| <i>Wing B (Shops)</i> | <i>8 Shops</i> | <i>8 Shops</i> |
| | | <i>16 Shops</i> |

Out of the total number of flats to be constructed, 69 Flats were booked and advance received. Out of 16 shops to be constructed 13 shops were booked and advance was received. The line of construction was a new line of the business, since this was the first-year construction of project of appellant

Appellant took advance booking from various person for which appellant issued allotment letters to all the 73 parties. The copies of allotment letters were filed before AO and CIT(A) which evident the genuineness of transaction. These allotment letters contain address of parties at the time of issuance of letter to them are being countersigned, hence identity of the parties are also established. Attention is drawn to page no 422 to 487 of PB IV Containing copies of allotment letters. The authenticity of allotment letters are not in dispute.

Appellant submits that the Project of construction under taken was Govinda Construction. It could not be completed due to cheating of close relative - brother-in-law who grabbed the land in support of land-mafias in the area. Despite persuasion, the matter had to be carried to police station, Ministry of law and order and at last in the Hon Court. Under the said circumstance, the allottees are neither allotted shops/ flats nor advances received could be refunded. The Allottees are naturally turned not only non-co-operative but have threatened Appellant of dire consequences. Appellant submits that advances of Rs. 1.85 crores are received by cheques and do show credited to in the bank statement. Appellant rely on audited balance sheet wherein these advance bookings are appropriately classified therein and has been used to give various advances Attention is drawn to asset side of the balance sheet which shows advances given at Rs. 6.82 crores. Appellant has also offered income of Rs 17 lakhs in profit and loss account on the advance given at Rs. 6.82 crores which is not disputed by the authorities below. Many of these advances have now become un-recoverable due to dispute and unfortunate event of fraud in Appellant case Appellant during the course of hearing also wished to placed reliance of Index II for property registration done by his brother in law with 23 parties

appearing in the list of advance booking of Appellant to prove the genuineness of transaction.

Appellant also wish to place reliance on remand report issued by Ld, AO after multiple hearing which is evident from various correspondence held between AO and Appellant. On perusal of the remand report it can be seen that AO has not disputed the receipt of advance booking from various parties vis a vis surrounding documents such as Bank statement, Development Agreement, Agreement for sale and copies of compliant that appellant had commenced the real estate business. However, due to fraud it could not complete the same. Reliance is placed on Sheo Narain Duli Chand vs. Commissioner of Income-tax [72 ITR 766 (ALL.)]

Appellant submits that it has filed of various complains at various forums such as Varsova Police Station, Inspector General of Police-Konkan, Commissioner of police Mumbai, Minister of State, Crime Branch Mumbai and D N Nagar Police Station. The Copy of these complaints are annexed to PB at page no 378 to page no 421 Appellant also filed Suit before Junior Magistrate First Class at Vasai Palghar wherein it prayed for register of FIR and transfer of complaint to Nalasopara Police Station. District Palghar (Refer Page No 370 to 377] However, Appellant was receiving threat from his brother-in-law not pursuing the matter. Appellant in its complaint before Commissioner of Police categorically stated concerned officer of police station of receiving various threats from brother-in-law. Attention is drawn to page no 300 to 393 of PB

Appellant has also submitted copy of the Sale agreement in respect of in respect of flats executed by Mr. Gangji patel with one of the allottee namely Shri Gopal Rama Rai on 06/04/2015 which evident that booking holder in Appellant books has been allotted flat in the project (Refer Page no 306 to 370] Thus the averment of Appellant that these advance bookings from 73 parties are genuine transaction is beyond reasonable doubt.

Since Appellant is a businessman and has family decided not to persuade the matter against its brother-in-law for want of peace and harmony in family. Therefore, appellant pray that income can at all be assessed on the basis of peculiar facts of the case and surrounding circumstance taken as a whole instead of interpreting the transaction of receipt of advance booking in isolation.

Appellant stated that based on MOU dated: 28.04.2010 executed by him with M/s Viva Swastik Developers, payment in succeeding year to M/s Viva Swastik Developers at Rs 1,96,00,000/- is an ascertained liability as per mercantile system of accounting Reliance is placed on decision of hon'ble Mumbai ITAT in case of L'Oreal India Private Limited vs Add Commissioner of Income Tax being ITA NO 1198/Mum/2021 and ITA No 802/Mum/2022 Also in case of Commissioner of Income-tax vs. Central Provinces Manganese Ore Co. Ltd [112 ITR 734 (Bombay)] it has been held that an assessee maintaining books of account on mercantile system, is entitled to claim deduction in year in which liability arises Reliance is also placed on Commissioner of Income-tax vs. Samsung India Electronics Ltd [37 taxmann.com 239 (Delhi)] and Saurashtra Cement & Chemical Industries Ltd vs. Commissioner of Income- tax [80 Taxman 61 (Gujarat)]. AND Travancore Sugars and Chemicals Ltd vs. Commissioner of Income-tax [62 ITR 566 (SC)]

Therefore, Appellant wish state that if income at has to be assessed in the given set of facts, then only loss of Rs 11,00,000/- [Rs. 196,00,000/- payment made to M/s Viva Swastik Developers less advance booking of Rs 1,85,00,000/- received by Appellant from 73 parties] can be assessed with respect to project. Alternatively, Appellant submits that even though there is loss, in order to buy peace of mind, it requested Ld AO and CIT(A) to estimated profit at 4% on estimate basis on the premise that only profit element can be taxed and not entire receipt Reliance is placed on decision of Cuttack Bench of ITAT in the case of Srabani Constructions Pvt Ltd vs. ACIT Corporate Circle-1(2), Bhubaneswar being ITA No ITA No.458/CTK/2019 AND Jaipur Bench of ITAT in case of ITA NO. 458/CTK/2019 ITO ward 2(1), Ajmer being ITA No. 180/JP/2018."

11. On the other hand, Ld. DR submitted that assessee has not submitted any documents / evidences before the Assessing Officer and Ld.CIT(A), even though several opportunities were given to the assessee. Further, he relied on the Para No. 4 of the appellate order.

12. In the rebuttal, Ld. AR of the assessee brought to our notice Page No. 288 of the Paper Book Volume No. 3 which is copy of the development agreement and he submitted that even though it is in the name of the partnership firm it shows that assessee is entered into a development agreement with M/s Viva Swastik Developers. Further, he submitted that assessee has entered in the development agreement with the good intention to develop the property in the banner of partnership firm. However, due to cheating of his brother-in-law the partnership firm was taken over by him without including the assessee. However, it shows that the project was completed by his brother-in-law, in this regard he brought to our notice Page No. 312 of the Paper Book which is the agreement of sale entered with the parties by the partnership firm and the same was executed by assessee's brother-in-law, it shows that the project was completed by his brother-in-law. The circumstantial evidences prove that there is a direct link with the project undertaken by his brother-in-law and the documents submitted by the assessee and he prayed that the grounds raised by the assessee may be allowed.

13. Considered the rival submissions and material placed on record, we observe from the record that assessee has taken advances from various parties to the extent of ₹.4,82,70,924/- and assessee is managed to get

the loan confirmations from eight (8) parties which was duly accepted by the Assessing Officer. The balance loans which was disputed to the extent of ₹.2,26,05,682/- and assessee has submitted various documents like bank statements and ITR of all these parties and assessee also submitted loan confirmations from all the parties and there were certain discrepancies and mismatch which was noticed by Assessing Officer and Ld.CIT(A) and assessee has given a detailed chart, party wise, before us.

For the sake of clarity, it is reproduced below: -

| Sr. No. | Name | Addition | As per document | Difference | Confirmation | Bank | ITR | PAN | Final decision taken by AO vide remand report dated 08/08/2018 |
|----------------|-----------------------|-----------------|------------------------|-------------------|---------------------|-------------|------------|------------|---|
| 1. | Arvind B Shah | 200,000 | 200,000 | -- | YES | YES | YES | | All the requisite document submitted. But did not attend personally addition was made |
| 2. | Ramesh Patel | 2,053,333 | 2,053,333 | -- | YES | --- | Yes | | All the requisite document submitted. But did not attend personally addition was made |
| 3. | Virendra Prasad Gupta | 828,700 | 828,700 | -- | YES | YES | -- | YES | Party Replied 131 summons. But did not attend personally addition was made |
| 4. | Sanjay Gupta | 448,060 | 200,000 | 248,060 | YES | YES | --- | YES | Ledger confirmation of Rs.4,48.060/- bank statement submitted of ₹.2,00,000/- only. But did not attend personally addition was made |

| Sr. No. | Name | Addition | As per document | Difference | Confirmation | Bank | ITR | PAN | Final decision taken by AO vide remand report dated 08/08/2018 |
|----------------|--------------------------------|-----------------|------------------------|-------------------|---------------------|-------------|------------|------------|---|
| 5. | Bhogilal Babulal Shah | 482,099 | 482,099 | - | YES | YES | YES | | Filed reply to 131 summons with documents. But did not attend personally addition was made |
| 6. | Kirti Gandhi HUF (Party Died) | 200,000 | 459,000 | 259,000 | YES | - | - | YES | Lender died. Wife of lender submitted documents and stated loan of 4,59,000 has been given. Assessee submitted to receive Rs.2,00,000/- in additional evidence. Addition was made |
| 7. | Kishore B Shah | 3,255,203 | 1,896,088 | 1,359,115 | | | | | Party submitted document and claimed to advance only Rs. 18,96,088 and denied Rs.12,14,690/-. Statement recorded addition was made |
| 8. | Kishore B Shah HUF | 1,600,000 | 1,600,000 | - | YES | YES | | | Inspite of accepting AO invoked 69A. 131 statement recorded addition was made |
| 9. | Mahesh Manani | 249,600 | 249,600 | - | YES | YES | | YES | All the requisite document submitted against 131 statement. But did not attend personally, addition was made. |
| 10. | Ramesh Ganger | 22,862 | 121,000 | 98,138 | YES | YES | | YES | Lender attended personally. Submitted details of loan amounting Rs. 1,21,000 addition was made |
| 11. | Ashmitha Bagadia | 2,550,000 | 2,550,000 | | YES | YES | YES | | All the requisite document submitted. But did not attend personally. Assessee submitted Schedule in which this name was not appearing addition was made |

| Sr. No. | Name | Addition | As per document | Difference | Confir mation | Bank | ITR | PAN | Final decision taken by AO vide remand report dated 08/08/2018 |
|----------------|--------------------|-----------------|------------------------|-------------------|----------------------|-------------|------------|------------|---|
| 12. | Dhara Bagadia | 4,650,000 | 4,650,000 | - | YES | YES | YES | | All the requisite document submitted. But did not attend personally, addition was made |
| 13. | Jaysukh B shah HUF | 199,800 | 1 99,800 | - | YES | YES | YES | | All the requisite document submitted. But did not attend personally, addition was made |
| 14. | Lata A shah | 230,000 | 230,000 | - | YES | YES | YES | i | All the requisite document submitted. But did not attend personally, addition was made. |
| 15. | Puj'a Bagadia | 3,525,000 | 3,525,000 | . | YES | YES | YES | | Allegation was made assessee claimed to receive 15,50,0007- and lender submitted details of Rs.35,25000. addition was made |
| 16. | Rajesh Bagadia | 652,025 | 652,025 | - | YES | | YES | | All the requisite document submitted. But did not attend personally, addition was made |
| 17. | Jinisha shah | 430,000 | 230,000 | 200,000 | YES | YES | YES | | All the requisite document submitted. But did not attend personally. AO alleged transaction was explained only to the extent of Rs.2,30,000/- addition was made |

| Sr. No. | Name | Addition | As per document | Difference | Confirmation | Bank | ITR | PAN | Final decision taken by AO vide remand report dated 08/08/2018 |
|---------|--------------|------------------|-------------------|------------------|--------------|------|-----|-----|---|
| 18. | Ronak Shah | 429,000 | 429,000 | - | YES | YES | YES | | Allegation was made assessee claimed to receive 2,00,000/- and lender submitted details of Rs. 4,29,000. Assessee submitted Schedule in which this name was not appearing addition was made |
| 19. | Usha K Shah | 600,000 | 600,000 | | YES | YES | YES | | Allegation was made assessee claimed to receive 1,00,000/- and lender submitted details of ₹. 6,00,000. Assessee submitted schedule in which this name was not appearing addition was made. |
| | Total | 22,605682 | 21,155,645 | 1,450,037 | | | | | |

14. And in summary assessee has filed a chart as under: -

| Sr. No. | Name | Amount | Accepted by AO even in remand proceedings | Loans in dispute before AO and CIT(A) | Mismatch |
|---------|------------------------|--------------|---|---------------------------------------|----------|
| 1 | Bharat D Patel | 1,00,000.00 | 1,00,000.00 | | |
| 2 | Dilip Kumar | 15,01,230.00 | 15,01,230.00 | | |
| 3 | M/s Govinda Developers | 86,91,263.00 | 86,91,263.00 | | |
| 4 | Gulabchand Chheda | 53,51,667.00 | 53,51,667.00 | | |
| 5 | K-3 The Family | 32,71,950.00 | 32,71,950.00 | | |
| 6 | M/s Khushnu Traders | 9,41,433.00 | 9,41,433.00 | | |
| 7 | Rahu! Trivedi | 2,86,699.00 | 2,86,699.00 | | |
| 8 | Tejas Ramniklal | 55,21,000.00 | 55,21,000.00 | | |
| 9 | Virendraprasad Gupta | 8,28,700.00 | | 8,28,700.00 | |
| 10 | Ramesh Patel | 20,53,333.00 | | 20,53,333.00 | |
| 11 | Jaysukh B Shah HUF | 1,99,800.00 | | 1,99,800.00 | |

| Sr. No. | Name | Amount | Accepted by AO even in remand proceedings | Loans in dispute before AO and CIT(A) | Mismatch |
|---------|-------------------|----------------|---|---------------------------------------|---------------|
| 12 | Arvind B Shah | 2,00,000.00 | | 2,00,000.00 | |
| 13 | Lataben Shah | 2,30,000.00 | | 2,30,000.00 | |
| 14 | Usha K Shah | 6,00,000.00 | | 6,00,000.00 | |
| 15 | Kishor B Shah HUF | 16,00,000.00 | | 16,00,000.00 | |
| 16 | Dhara S Bagadia | 46,50,000.00 | | 46,50,000.00 | |
| 17 | Sanjay Gupta | 4,48,060.00 | | 4,48,060.00 | 2,48,060.00 |
| 18 | Ramesh D Gangar | 22,862.00 | | 22,862.00 | (98,138.00) |
| 19 | Bhogilal B Shah | 4,82,099.00 | | 4,82,099.00 | |
| 20 | Ashmita B agadia | 25,50,000.00 | | 25,50,000.00 | |
| 21 | Kirti Gandhi HUF | 2,00,000.00 | | 2,00,000.00 | (2,59,000.00) |
| 22 | Kishor B Shah | 32,55,203.00 | | 32,55,203.00 | 13,59,115.00- |
| 23 | Mahesh Manani | 2,49,600.00 | | 2,49,600.00 | |
| 24 | Pooja S Bagadia | 35,25,000.00 | | 35,25,000.00 | |
| 25 | Ronak A Shah | 4,29,000.00 | | 4,29,000.00 | |
| 26 | Rajesh Bagadia | 6,52,025.00 | | 6,52,025.00 | |
| 27 | Jinisha Shah | 4,30,000.00 | | 4,30,000.00 | 2,00,000.00 |
| | Total | 4,82,70,924.00 | 2,56,65,242.00 | 2,26,05,682.00 | 14,50,037.00 |

15. It is fact on record that assessee has taken loans from all these parties and assessee was managed to submit various confirmations from parties even though with certain discrepancies and mismatch. We further observe from the order of the Ld.CIT(A) in particular to loan from Shri Kumar B. Shah and Ld.CIT(A) has taken the figure as ₹.1,65,02,630/- and at the same time he also discussed the amount of outstanding in the Books of Accounts of the assessee at ₹.1,83,98,718/-. However, we observe from the record submitted before us that the loan was outstanding from Shri Kumar B. Shah only ₹.32,55,203/-, with above observation and various submissions made by the assessee we are of the

view that considering overall facts on record wherever there is a mismatch assessee has accepted the same and agreed to offer the same for taxation. In the statements submitted before us clearly indicate that there is mismatch only to the extent of ₹.14,50,037/- as discussed in the above chart. Therefore, we direct the Assessing Officer to restrict the disallowance to the extent of ₹.14.5 lakhs. Accordingly, ground raised by the assessee is partly allowed.

16. With regard to Ground No. 2 we observe from the record that assessee is having a construction business and in order to construct a building in the name of "Govinda Park" at Nalasopara (East) and this being a proprietary concern assessee has intended to (may be) construct the above business in the name of M/s. Govinda Construction and entered into development agreement with M/s Viva Swastik Developers and paid a sum of ₹.1.96 crores and assessee has submitted a proof of remittance from the bank and its acknowledgment is placed on record. It is also observed that assessee has filed copies of allotment letters along with signatures and also brought to our notice that the construction of the above project was taken over and completed by the partnership firm in the name and style of M/s. Govinda Construction, it does shows that there is connection with the proprietary concern M/s. Govinda Construction and

also the partnership firm M/s. Govinda Construction which was controlled and taken over by his brother-in-law and completed the project on his own without the involvement of the assessee.

17. It clearly shows that there is certainly a connection with the submissions of the assessee that the cheating of the assessee's brother-in-law and also it is supported by the various FIR and complaints filed by the assessee in the various police stations and also a suit filed in the Junior Magistrate First class at Vasai. Therefore, one cannot overlook the various evidences which is brought on record with one end as a proprietor, assessee has collected from various parties and also entered into a development agreement with M/s Viva Swastik Developers and paid a sum of ₹.1.96 crores. However, subsequently this project was taken over by the partnership firm in the name and style of M/s. Govinda Construction. Both these transactions are declared by the assessee in his balance sheet under the proprietary concern. The fact remains that from the proprietary concern assessee has collected advances and also paid the amount of ₹.1.96 crores towards development agreement. Assessee is left with one end, advances received from prospective buyers of the proposed project and also against the same assessee has incurred development charges, which is also declared in the balance sheet of the proprietary concern.

This declaration of these transactions in the Balance Sheet prompted the tax authorities to make the addition.

18. The Assessing Officer and Ld.CIT(A) merely focused on the receipt of advances from one end and not appreciates the outflow of funds from the same proprietary concern. It is relevant to mention at this stage the project was completed in the same name "M/s Govinda Construction" by the so called partnership firm, this fact cannot be overlooked. The case of the assessee can be treated as an adventure in the nature of trade. Considering the facts on record that assessee is with the genuine purpose of completing the project, he has taken advances from various parties with presumption to construct the flats for them and also entered into development agreement. Both these facts are coming out of the financial statements submitted by the assessee for the present assessment year under consideration. The amount of ₹.1.96 crores is part and parcel of loans and advances declared by the assessee in its Balance Sheet. Therefore, we have to consider both the transactions for the purpose of carrying on the business of the assessee. Even though the fact remains that assessee was cheated by his brother-in-law and the same construction was completed by the brother-in-law in the "M/s.Govinda construction" partnership firm. Therefore, the action of the assessee can

be considered as adventure in the nature of trade only. Therefore, only net income or loss has to be considered from the above adventure in the nature of trade, for the sake of overall justice and with regard to theory of real income the benefit of doubt has to be given to the assessee by considering the various facts on record. We observe from the record, even though the project is not undertaken by assessee and in order settle the issue peacefully with the revenue, he offered the income @4% of the advance collected from the flat owners, we deem it fit and justified to accept the same and direct Assessing Officer to restrict the addition to the extent of 4% of the advance received for flat/shop. Therefore, we are inclined to partly allow the Ground No. 2 raised by the assessee.

19. In the result, appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 17th April, 2023

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER
Mumbai / Dated 17/04/2023
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum