

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

**BEFORE SHRI KULDIP SINGH (JUDICIAL MEMBER)**  
**AND**  
**SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)**

**ITA Nos. 610 & 611/MUM/2023**  
**Assessment Year: 2011-12**

Dy. CIT CC-1(2),  
906, 9<sup>th</sup> floor, Pratihtha  
Bhavan, Old CGO Building  
(Annexe), M.K. Road,  
Mumbai-400020.

**Appellant**

M/s Sunny Vista Realtors  
Pvt. Ltd.,  
**Vs.** 511, Dalamal Towers, 211,  
Nariman Point,  
Mumbai-400021.  
**PAN No. AAKCS 1269 E**  
**Respondent**

**Assessee by** : None  
**Revenue by** : Dr. Koshor Dule, CIT-DR

Date of Hearing : 09/05/2023  
Date of pronouncement : 25/05/2023

**ORDER**

**PER OM PRAKASH KANT, AM**

These two appeals by the Revenue are directed against two separate orders, both dated 02.12.2022, passed by the Ld. Commissioner of Income-tax (Appeals) -47, Mumbai [in short 'the Ld. CIT(A)'] for assessment year 2011-12, first one, in relation to assessment completed u/s 143(3) of the Income-tax Act, 1961 (in short 'the Act') dated 24.03.2014 and another, in relation to assessment completed u/s 153C of the Act dated 28.03.2016.



2. Facts and circumstances and the additions challenged in these appeals being connected, both these appeals were heard together and disposed off by way of this order for convenience.

3. First, we take up the appeal of the Revenue in ITA No. 611 for assessment year 2011-12, which is in relation to order u/s 143(3) of the Act dated 24.03.2014. The grounds of appeal are reproduced as under:

1. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance made by the AO of the business expenditure of Rs. 28,24,28,829/- comprising of administrative expenses, marketing and selling expenses and finance expenses and treating the same as capital work in progress, without considering the fact that assessee company had only one contract and therefore, entire expenses were liable to be capitalized as work in progress.*
2. *On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in not appreciating that the assessee follows percentage completion method of accounting and is not carrying on any other business activity except construction of the residential project on hand, the entire business expenses claimed of Rs.28,24,28,829/- were correctly disallowed by the A. O. capitalizing it, and treating it as work-in-progress of the project being constructed by the assessee.*
3. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in placing reliance in respect of capitalization of expenses on the decision of the ITAT in case of sister concern of the assessee, Ms. Hiranandani Palace Gardens Pvt. Ltd. Vs ACIT (A.Y. 2009-10, ITA No.4579/M/2013 dated 03/12/2015) without considering that the Department had not accepted the decision of the ITAT in the case and the appeal before the Hon ble*



*Bombay High Court (Appeal us. 260A filed on 14/09/2016, vide Appeal No. ITXA/212/2017 for A. Y. 2009-10) is pending for adjudication.*

4. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in holding that no adverse findings has been given by the AO in the Remand Report called for with respect to the additional evidences filed by the assessee and has deleted the other additions and disallowances made by the AO without considering the fact that in the remand report submitted to the CIT(A) on 28.07.2021, the AO has categorically mentioned that the documents in support of its claim submitted by the assessee as additional evidences had already been dealt by the AO during the assessment proceedings and a speaking order had been passed by the erstwhile AO after due consideration of these evidences."*

4. At the outset, we may like to mention that despite notifying neither anyone attended on behalf of the assessee nor any adjournment was filed. We were of the opinion that the assessee was not interesting in prosecuting the appeal and hence same was heard *exparte* qua the assessee after hearing the arguments of the Ld. Departmental Representative (DR).

5. Briefly stated, facts of the case are that the assessee filed return of income for the year under consideration on 30.09.2011 declaring current year losses at Rs.29,12,14,681/-. The assessee further revised its return of income on 05.10.2012 declaring current year losses at Rs.27,42,19,208/-. The return of income filed by the assessee was selected for scrutiny and statutory notices under the Act were issued and complied with. The assessee company was incorporated on 08.05.2006 with the objective of real estate



development of special economic zone. The assessee was engaged in Construction and Development activity. The assessee followed percentage completion method for recognizing profit from the projects of construction and development of real estate since inception of company. The assessee entered into agreements for sale of the SEZ units, however no revenue was recognized from the sale of the units, despite claimed to have followed percentage completion method of accounting. The Assessing Officer after considering submission of the assessee disallowed the claim of administrative and other expenses holding the same as part of the work in progress. The Assessing Officer also disallowed certain purchases and expenses as non-verifiable. In this manner, the Assessing Officer made addition of Rs.28,24,829/- for expenditure capitalized and Rs.37,15,319/- for purchases/expenses non-verifiable. On further appeal, the Ld. CIT(A) deleted both the additions. Regarding the First addition, the Ld. CIT(A) has relied on the decision of the Tribunal in the case of the assessee in the preceding year as well as decision in the case of sister concerns and deleted the addition of administrative and other expenses. Regarding the second addition, the Ld. CIT(A) called for the remand report on the additional evidences filed by the assessee. However, the Ld. Assessing Officer merely objected admissibility of the additional evidence and did not give specific comment on the allowability of such expenses. The Ld. CIT(A) observing that no



adverse comments were given by the Assessing Officer, therefore, he deleted the addition.

6. Aggrieved, the Revenue is in appeal before the Tribunal by way of raising grounds as reproduced above.

7. We have heard submission of the Ld. DR and perused the relevant material on record. As far as ground Nos. 1 to 3 of appeals regarding capitalization of administrative and other expenses is concerned, we find that the Assessing Officer has capitalized the same as no revenue from the project has been recognized, despite the entire project being single project. According to the Assessing Officer entire expenses including direct expenses on the project along with administrative marketing and other expense should be capitalized as work in progress. But the Ld. CIT(A) has referred to the decision of the Tribunal in the case of the assessee in ITA No. 4580/M/2013 for assessment year 2009-10. In the said decision the Tribunal noted that assessee was following percentage completion method of accounting regularly in the assessment year 2010-11. The Assessing Officer accepted the deductibility of the identical nature of the expenses in the assessment passed u/s 143(3) of the Act. The Tribunal (supra) after considering the facts of the case agreed with the contention of the Ld. Counsel for the assessee that employee's expenses referred were the salary paid to the employees for looking after the administrative office of project construction and therefore it was part of the administrative



expenses. Therefore, administration, salary and marketing expenses were to be charged to the profit and loss account and to be excluded from the cost of the inventory or closing work in progress. Thus, the Tribunal held that only direct expenses could be charged to work in progress and the expenses in the nature of salary, administrative, marketing and selling expenses were to be debited to the profit and loss account and to be accounted for the purpose of computing profit and gains from business and profession as per the relevant provisions of the Act. However, we note that for the year under construction, the Ld. CIT(A) has presumed that the assessee commenced the project and started construction activity in the year under construction and the project being in the initial development. But actually, the assessee commenced its activity since 2006 and therefore, in the circumstances, it need to be ascertained whether substantial construction has been carried out on the project and if so, the assessee is required to recognized revenue from the project and accordingly allocate the expenses thereafter to work out the profit, following the percentage completion method, which the assessee has not shown. Therefore, in the facts and circumstances, we feel it appropriate to restore this issue back to the file of the Ld. CIT(A) for deciding afresh after taking into consideration, the percentage of work completed and if substantial work is carried out on the project, then revenue has to be recognized and administrative and marketing expenses has to be deducted thereafter from the profit from the project computed as



per the percentage completion method. The grounds of appeal of the Revenue are accordingly allowed for statistical purposes.

8. As far as grounds related to issue of non-verifiable purchase expense, the Ld. CIT(A) deleted the addition observing as under:

*“19. Considering the fact that no adverse finding has been given by the A.O. in the remand report with respect to the additional evidences filed and submission of the assessee, there is no occasion for impugned additions as resorted to by the A.O. Hence, it is held that purchases of Rs. 88,28,374/- and expenses of Rs. 4,87,97,603/- as unexplained bogus and reducing the same from WIP are unjustified. Further, purchases of Rs. 28,04,194/- and expenses of Rs. 37,15,395/- as unexplained, are uncalled for. Finally purchases of Rs. 11,71,916/- and expenses of Rs. 44,60,080/- as unexplained being excess in difference, deserved to be deleted. Thus, grounds of appeal no. 4, 5 & 6 are Allowed.”*

9. We have heard submission of ld DR and perused the material on record. The Ld CIT(A) has deleted the addition for the reason that no comments were given by the AO on additional evidences. In our opinion, if the Assessing Officer has not given any comment on the additional evidences while objecting admissibility, then the Ld. CIT(A) after admitting the evidence should have again called for comments on the merit of the expenses which the Ld. CIT(A) has not followed. Further, in view of decision of the **Hon'ble Delhi High Court dated 11/03/2015 in the case of Jansampark Advertising and Marketing p ltd in ITA 525/2014**, the Ld. CIT(A) himself should have carried out inquiries on those additional evidence, which he has not done. In the facts and circumstances, we feel it appropriate to restore this issue also back to the file of the Ld. CIT(A) for adjudication afresh after following due procedure of law.



10. Now, we take up the appeal of the Revenue in ITA No. 610 for assessment year 2011-12 arising from the order passed u/s 153C of the Act by the Assessing Officer dated 28.03.2016. The grounds raised by the Revenue are reproduced as under:

1. *"In the facts and in the circumstances of the case and in law, the Ld. CIT(4) has erred in not appreciating the fact that there is nothing in the language of the provisions which would indicate that the assessment is restricted to incriminating material or the basis of the assessment would be that which is discovered during the search or during the process contemplated by Section 132A of the Income Tax Act, 1961 and that this view finds full support from the judgement of the Hon'ble Delhi High Court in the case of CIT Vs. Anil Kumar Bhatia, 352 ITR 493 (Del) and the judgement of the Karnataka High Court in the case of Canara Housing Development Company Vs. DCIT, 274 CTR 122 (Kar).*
2. *In the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in placing reliance on various judicial pronouncements including in the Warehousing cases of CIT Vs. Continental Warehousing Corporation, All Cargo Global Logistics Vs. DCIT, etc., without appreciating that these judgements have not been accepted by the Department and in fact, SLP filed by the Department against Bombay High Court's order in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd., has been admitted by the Hon'ble Apex Court [vide order dated 12.10.2015 in Special Leave to Appeal (C) CC 18506/20157 and is pending for adjudication.*
3. *In the facts and in the circumstances of the case and in law, the Id. CIT(4) has erred in not appreciating that the assessee follows percentage completion method of accounting and is not carrying on any other business activity except construction of the residential project on hand, and therefore the depreciation and amortization expenses of Rs.52,96,960/- were correctly disallowed by the 10 by capitalizing it.*



4. *In the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating that assessee company had only one contract and therefore, entire expenses were liable to be therefore, capitalized as work in progress.*
5. *In the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating that purchases and expenses which remained unexplained/unverifiable/bogus were rightly reduced by the AO from Capital work-in-progress and/or added to the total income of the assessee company.*
6. *In the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating that the interest income of Rs.72,55,7471 earned on surplus funds of the assessee, which did not have direct and proximate relationship with the business activity of the assessee, would fall under the head 'Income from other Sources' as has held by the jurisdictional High Court in the case of Swami Spice Mills Pvt. Ltd. (332 ITR 288).*

11. We find that the Assessing Officer has mainly made additions which were made by him in the original assessment proceedings u/s 143(3) of the Act. The Ld. CIT(A) has deleted the addition on the ground that there was no incriminating material qua the addition made and the assessment being in the category of the completed/non-abated assessment no assessment could have been made otherwise made incriminating material. The relevant finding of the Ld. CIT(A) is reproduced as under:

*“7.3 I have carefully considered the facts of the case, submissions of the Appellant, the observations of the AO contained in the assessment order, various judgements and other materials on record on this issue. In this Ground, the appellant has contended that the assessment order passed us 153C r.w.s 143(3) of the Act for the impugned assessment year is bad in law as the additions made in the assessment*



*order are not based on or connected with any incriminating documents found or seized during the search proceedings, which can be relatable to the appellant.*

*7.4 It has been observed from the assessment order that the AO has not highlighted any incriminating material found and or seized during the search action, which can be relatable to the appellant, based on which the impugned additions are made. The appellant, on the other hand, has emphatically stated that the impugned additions are not based on any material found/seized during the course of search action at the premises of the appellant. The appellant has also relied on a no. of judicial decisions on this issue.*

*7.5 On perusal of the impugned assessment order, it is evident that the AO has not referred to any seized material found during the course of search to make the impugned additions. The due date for issuing notice u/s 143(2) had already expired on the date of search or the date of issue of notice u/s 143(2) in the current proceeding, which was issued on 24.08.2015. Since, the proceedings for A.Y. 2011-12 had not abated, the contention of the appellant that the AO was empowered to make additions based on the incriminating material found and seized during the course of search operation, appears to Conte be true, as held in a no. of judicial decisions including the decision of jurisdictional High Court.*

*7.6 Before proceeding further, it is necessary to apprise with the legal principles settled by Hon'ble Jurisdictional High Court and other courts on this issue. The Hon'ble Bombay High Court in the case of CIT vs. Continental Warehousing Corporation [374 ITR 645], has held that when the assessment has attained finality, then the AO while passing the independent assessment order us 153C of the Act can't disturb the assessment / reassessment order which has attained finality, unless the materials gathered in the course of the proceedings us 132 of the Act establish that the reliefs granted under the*



*finalized assessment/reassessment were contrary to the facts unearthed during the course of search operation.”*

12. We have heard submission of the Ld. DR and perused the relevant material on record. It is undisputed that no assessment was pending as on the date of the search as far as the assessment year is concerned and therefore, the assessment is in the category of the non-abated assessment. Hence, no addition could have been made without the aid of the incriminating material as held by **the Hon'ble Bombay High Court in the case of Continental Warehousing Corporation 374 ITR 645 (Bombay)**. Since in the assessment order, there is no reference to any incriminating material qua the additions made and therefore, no addition could have been sustained. We do not find any error in the order of the Ld. CIT(A) on the issue in dispute and accordingly, we uphold the same. However, we may like to mention that as far as computation of the total income for the purpose of assessment u/s 153A is concerned, the Assessing Officer should begin with the returned income and thereafter he should have added the additions made us/ 143(3) of the order, which have been sustained by the latest order of appellate authority. Thereafter, he could have further added any additions based on the incriminating material. The Assessing Officer is accordingly required to compute the final total income under order passed u/s 153A of the Act. The grounds of the Revenue are accordingly dismissed.



13. In the result, the appeal in ITA NO. 611 is allowed for statistical purposes whereas appeal in ITA No. 610 is dismissed.

**Order pronounced in the open Court on 25/05/2023.**

**Sd/-**  
**(KULDIP SINGH)**  
**JUDICIAL MEMBER**

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

Mumbai;

Dated: 25/05/2023

Rahul Sharma, Sr. P.S.

**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,

(Assistant Registrar)  
**ITAT, Mumbai**