

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'D' BENCH, MUMBAI.

Before Shri B.R. Baskaran (AM) & Smt. Kavitha Rajagopal (JM)

I.T.A. No. 1987/Mum/2022 (A.Y. 2012-13)

I.T.A. No. 1988/Mum/2022 (A.Y. 2013-14)

I.T.A. No. 1989/Mum/2022 (A.Y. 2014-15)

Magnates Enterprises A-103, Garden View Apartment, Virat Nagar Virar West, Dist. Thane Maharashtra-401 303. (Appellant)	Vs.	ACIT, CC-3 6 th Floor, A-Wing Ashar IT Park Road No. 16Z Wagle Estate, Thane (Respondent)
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I.T.A. No. 2215/Mum/2022 (A.Y. 2013-14)

I.T.A. No. 2216/Mum/2022 (A.Y. 2014-15)

ACIT, CC-3 6 th Floor, A-Wing Ashar IT Park Road No. 16Z Wagle Estate, Thane (Appellant)	Vs.	Magnates Enterprises A-103, Garden View Apartment, Virat Nagar Virar West, Dist. Thane Maharashtra-401 303. (Respondent)
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PAN : AAKFM5364M

Assessee by	Shri Subodh Ratnaparkhi
Department by	Smt. Riddhi Mishra
Date of Hearing	20.03.2023
Date of Pronouncement	30.05.2023

ORDER

Per B.R.Baskaran (AM) :-

The assessee has filed the appeals for A.Y. 2012-13 to 2014-15. The Revenue has filed appeals for A.Y. 2013-14 & 2014-15. All these appeals were heard together and hence they are being disposed of by this common order, for the sake of convenience.

2. Common issue urged by the assessee in all the three years relates to following two items :

- a) Estimation of income from on-money receipts
- b) Year of taxation of income so estimated.

3. In A.Y.2012-13 the assessee has also raised a ground seeking deduction under section 80IB(10) of the I.T. Act on the income estimated from on-money receipts. At the time of hearing learned AR did not press this ground and hence the said ground is dismissed as not pressed.

4. The revenue is aggrieved by the decision of the learned CIT(A) in granting partial relief to the assessee in respect of on-money receipts.

5. The facts relating to the case are stated in brief. The assessee is engaged in the business of developing building properties. It belongs to Ameya Group. The Department carried out search and seizure operations in the hands of M/s. Ameya Builders & Property Developers and also in the hands of its partners Shri Upesh M. Baria, Shri Uday M. Baria & Shri Moreshwar M. Baria. The search was carried out on 31.7.2014. During the course of search operations, certain documents belonging to the assessee were seized and the said documents were transferred to the Assessing Officer of the assessee. Accordingly, the Assessing Officer initiated assessment proceedings under section 153C of the Act. We are concerned with AY 2012-13 to 2014-15.

6. The seized documents revealed that the assessee has received on-money on sales already executed and also received advances by way of cash in all the three years. The assessee had also not accounted certain expenses. Accordingly, the Assessing Officer deducted those expenses from the aggregate amount of cash receipts and assessed the balance amount as income of the assessee in all the three years.

7. Before Ld CIT(A), the assessee contended that the income element involved in the on-money receipts alone can be subjected to tax. The assessee placed its reliance on certain case laws. The learned CIT(A) agreed with the contentions of the assessee. Accordingly, the learned CIT(A) estimated the income from on-money receipts @ 45% of unaccounted cash receipt.

8. The Assessing Officer had assessed the cash receipts as income of the assessee in the year of receipt. The assessee contended before the learned CIT(A) that the taxability of on-money should be on the basis of accounting policy followed by the assessee. The learned CIT(A) did not accept the same and accordingly upheld the assessment of cash receipts in the year of receipt.

9. Aggrieved by the additions confirmed by the learned CIT(A) and rejecting the claim for assessing on-money receipts as per its accounting policy, the assessee has filed appeals for the three years mentioned above. In the two appeals filed by the Revenue is challenging the relief granted by the learned CIT(A) in reducing the addition to 45%.

10. We heard the parties and perused the record. The first issue relates to the estimation of income on the on-money receipts. While the assessee contends that the estimation of income @ 45% made by the AO is on the higher side, the revenue contends that the entire on-money receipts should be assessed as income, i.e., the revenue is opposing the relief granted by the Ld CIT(A).

11. We notice that an identical issue has been disposed of by the Tribunal in the assessee's group concern named M/s Ameya Builders & Property Developers (ITA No.1936 to 1938/Mum/2022 dated 26-04-2023), wherein the Tribunal has reduced the rate of profit to 22.5%. The relevant portion of

the order passed by the co-ordinate bench in the above said case is extracted below:-

16. We have considered the rival submissions and perused the material on record.

17. We note that the Assessing Officer had accepted the fact that the expenses were incurred in cash but had denied deduction for the same by holding that the Assessee has failed to show that the provisions of Section 30 to 36, 37 and/or 40A(3) of the Act have been complied with. The Assessing Officer had, in paragraph 8.25 of the Assessment Order, distinguished the decisions cited by the Assessee during the assessment proceedings holding that in the cases cited, the income was computed on percentage basis or ratio basis whereas in present case the unaccounted sale and expenditure has been worked out based on the seized documents. However, in our view, given the facts and circumstances of the case, it cannot be said that in the income of the Appellant has not been estimated. The income of the Appellant has been estimated by the Assessing Officer after taking into account the information/material gathered. In our view, where income has estimated on the basis of information/material gathered, as is the situation in the present case, an Assessee cannot be deleted to a possession worse than in a case where income has estimated on ad-hoc basis, say in a case where an Assessee chooses not to furnish relevant document/details or not to participate in the assessment proceedings, and the estimate is made on ad-hoc basis any supporting information/details. A perusal of the decision relied upon by the Assessee during the course of hearing (placed at pages 15 to 38 of the Compendium of Cases) shows that estimation of profits as ad-hoc percentage of the cash receipts has been accepted. In the case of Bhalchandra Trading Pvt. Ltd. Vs. DCIT: [ITA No. 2977/Mum/2017, dated 25.02.2021] and ACIT Vs. Om Constructions [ITA No. 6234/Mum/2012, dated 09.01.2015] 12% of the cash receipts from sale of flats was accepted as profit element liable to tax. Similarly, in ACIT Vs. M/s Sahakar Developers [ITA No. 6235/Mum/2012, dated 30.01.2017] 17% of the cash receipts were accepted as profit element liable to tax. In the aforesaid cases the assessee was not required to establish that the provisions of Section 30 to 36, Section 37 and/or Section 40A(3) were complied with. In our view, in the present case the Assessee is on a better footing as the profits have been estimated on the basis of documents/information which indicates that expenses were incurred by the Assessee. However, while estimating taxable profits the fact that an assessee has not recorded all transactions in the books of accounts and has not maintained proper documents supporting incurring of expenditure can surely be taken into consideration and a higher profit rate could be adopted keeping in view the facts and circumstances of the case, and the nature of income/business of assessee. In this regard, we note that the CIT(A) has accepted the contention of the Assessee that only profit element embedded in cash receipts can be brought to tax by

placing reliance on the decisions of the Hon'ble High Courts in the case of Lalchand Gopaldas Vs. CIT: 48 ITR 324 (All), DCIT Vs. Panna Corporation: Tax Appeal 323 & 325 of 2000 (16.06.2012)(Gujarat High Court) and CIT Vs. P D Abrahm : 20 Taxmann.com 823 (Ker). The CIT(A) has also taken into consideration the abovesaid decisions of Mumbai Bench of the Tribunal in the case of Bhalchandra Trading Pvt. Ltd. (supra), Om Constructions (supra) and Sahakar Developers (supra). We have perused the aforesaid judgments/decisions wherein it has been held that only profit element embedded in cash/on-money receipts could be brought to tax in the hands of the Assessee. Therefore, we find no infirmity in the order passed by the CIT(A) to the extent that the CIT(A) holds that only profit element embedded in the cash receipts is liable to be taxed in the hands of the Assessee. In view of the aforesaid, we reject the contention of the Revenue that entire cash receipts should be brought to tax.

18. This takes us to the issue of computation of profit element. The CIT(A) has concluded that 45% of the on-money receipts are the profit element liable to tax in the hands of the Assessee. The relevant extract of the decision of CIT(A) reads as under:

“33. In the present case, the appellant contends that the profit element out of the 'on-money' should be computed by applying the rate of 20%. However, no reasonable basis for adopting this figure of 20% has been given by the appellant. The appellant has attempted to justify this percentage on the basis of net profit percentage declared by it in the Income Tax Returns filed for the A.Y. 2009-10 to 2015-16 which ranges between 8.48% to 25.75%. The huge unaccounted 'on-money' uncovered during search is sufficient evidence that the Net Profit being returned was grossly suppressed. Another basis given by the appellant for adopting the rate of 20% is the profit rate on the basis of seized documents, in the case of M/s Jupiter Constructions. However, the said argument is also incorrect because in the case of M/s Jupiter Constructions (sister concerns of the appellant), my predecessor has finally estimated the income @ 46% of unaccounted receipts. Therefore, the profit rate of 20% as argued by the appellant cannot be applied.

34. In the present case, the total cash receipts for the period A.Y. 2009-10 to 2015-16 as discussed earlier in this order, after modification as per the remand report comes to Rs. 36,20,77,167/-. The cash expenses on stamp duty and registration charges comes to Rs. 4,06,84,117/- Other cash expenses as quantified earlier in this order as per modifications suggested in the remand report comes to Rs. 16,11,23,822/-. Thus, the profit on cash transactions comes to Rs. 16,02,69,228/- (36,20,77,167 - 4,06,84,117 - 16,11,23,822). Thus, the net profit ratio on cash transactions, comes to 44.27%. So, this profit ratio can be an indication to be used for estimating the income embedded in the 'on-money' received by the appellant. It may here be mentioned that the appellant has claimed that some of the

expenses recorded in the seized documents pertain to other group concerns, in that situation, the net profit of the appellant should be higher than 44.27% as computed above. It may also be mentioned that in the case of sister concern of the appellant namely M/s Jupiter Constructions, my predecessor has finally estimated the income @ 46% of unaccounted receipts. It is a well settled legal principle that the net profit rate estimated in the sister concerns, engaged in the similar business, can also be taken as basis for estimating the net profit rate in other group concerns. Therefore, keeping in view the facts of the case in entirety and the proposition laid down by various High Courts as discussed above, the Assessing Officer is directed to take 45% of the "on- money as the appellant's income for each year, rather than treating the entire amount (as reduced by the stamp duty and registration charges) as suppressed income." (Emphasis Supplied)

19. On perusal of the above we can see, that while estimating the profit at the rate of 45% the CIT(A) has taken into account the Stamp Duty & Registration Charges as well as Other Expenses computed on the basis of ceased material by the Assessing Officer and which have been accepted to have been incurred in cash. However, the CIT(A) has not considered the expenses incurred in cash for purchase of land. We note that while estimating the amount of cash receipts from the Promoters the payments made in cash for purchase of land have been taken into account and deficit of INR 1,75,13,115/- for the Assessment Year 2009-10 has been considered as cash receipt [as noted by the CIT(A) in paragraph 7 of the order and computed in paragraph 10.4 of the Assessment Order]. In our view, since payments in cash for purchase of land were not taken into consideration by the CIT(A), the aforesaid deficit estimated for the Assessment Year 2009-10 and included in cash receipts on the assumption that such payment towards purchase of land were made in cash should also be excluded from cash receipts. The exclusion of the aforesaid amount of INR 1,75,13,115/- from cash receipts results in reduction of net profit ratio as computed by CIT(A) to around 39.43%. During the hearing it was contended on behalf of the Assessee that the Assessee was engaged in construction of housing for low income group at Virar, Palghar. The actual expenses incurred in cash were more than those recorded in material ceased. The Assessee had disclosed healthy net profits in the range of 8.48% to 25.75% for the Assessment Year 2009-10 to 2015-16. On the basis of the aforesaid, it was submitted by the Learned Authorised Representative for Assessee that the net profit rate of 20% be adopted. We note that the CIT(A) had stated that the profits declared by the Assessee range from 8.48% to 25.75% for Assessment Year 2009-10 to Assessment Year 2015-16. Thus, for the Assessment Year 2009-10 to 2015-16, the maximum net profit rate declared by the Assessee was 25.75%. The average of the profit for the Assessment Year 2009-10 to 2015-16 comes to

around 14.15% whereas it has been contended on behalf of the Assessee that rate of 20% be adopted for determining the profit element embedded in cash receipts. Keeping in view the facts and circumstances of the case, and to meet the ends of justice we hold that 22.5% of on-money receipts would be fair estimate of profit element which should be brought to tax in the hands of the Assessee.”

We noticed that the assessee belongs to the Ameya group and hence the same modus operandi has been followed in all the group concerns. The co-ordinate bench has estimated the income on the on-money received by the assessee @ 22.50%. We notice that the principle to assess only income component of the on-money receipts followed by the Ld CIT(A) in the present cases and by the co-ordinate bench in the case of Ameya Builders & Property Developers (supra) finds support from the decision rendered by Hon'ble jurisdictional Bombay High Court in the case of The CIT vs. Kardda Constructions P Ltd (Income tax Appeal (L) No.1960 of 2012 dated 25th February, 2013), wherein it was held as under:-

“In this appeal by the revenue for assessment year 2009-10 following question of law has been framed for our consideration.

Whether on the facts and in the circumstances of the case and in law the Tribunal was justified in deleting the addition made by the Assessing Officer of Rs.71,67,000/- being unaccounted cash receipts found during the time of search action by accepting the explanation of the assessee that the unaccounted cash receipts of Rs.71,67,000/- found at the time of search were booking advances collected by the assessee from its customers and were part of sale consideration declared by the assessee at the time of sale of flats after the date of search?

2) The Tribunal by the impugned order upheld the finding of fact recorded by the CIT(A) that receipt of Rs.71,67,000/- was part of the sale consideration of the flats sold by the respondent assessee and the same has to be taxed in the year in which the assessee has recorded the sale of flats. The objection of the revenue is that amount of Rs.71,68,000/- found in cash has to be taxed in the year in which cash was received by the respondent assessee and not in the year the sale of the flats took place. The Tribunal records a fact that there is no dispute that unrecorded entries of cash found with the respondent assessee were in respect of sale of flats and forming part of consideration for sale of flats. Further the names of the buyers of the flats and the cash receipts from the buyers were also found during the course of the search. In these circumstances, on the basis of the finding of fact that cash receipts were undisputedly in

respect of sale of flats and the same were offered to tax in the year in which flats were sold that the appeal of the revenue before the Tribunal was dismissed.

3) Since the decision of the Tribunal is essentially based on a concurrent finding of fact, we see no reason to entertain the proposed question of law.

4) Accordingly, the appeal is dismissed with no order as to costs.”

Accordingly, following the decision rendered by the Hon’ble Bombay High Court in the above said case, we hold that the entire amount of on-money receipts cannot be subjected to tax and only the income component therein is assessable. We noticed that the co-ordinate bench has estimated the income @ 22.50% of the on-money receipts in the above cited group concern’s case. Accordingly, we are of the view that, in the instant cases also, the income can be estimated @ 22.50% of the on-money receipts. Accordingly, we modify the orders passed by Ld CIT(A) on this issue in all the three years and direct the AO to estimate the income on on-money receipts @ 22.50% in all the three years. Accordingly, revenue’s contention on this issue is rejected in both the years.

12. The next issue relates to the year in which the income from on-money receipts is assessable to tax. We noticed that the AO has assessed the entire on-money receipts in the year of receipt itself and the Ld CIT(A) has held that the income element estimated by him is also assessable in the year of receipt only. The assessee is disputing the said decision of Ld CIT(A). We notice that an identical issue has been adjudicated by the co-ordinate bench in the above said case of Ameya Builders & Property Developers (supra) and it has been held as under:-

“20 The next issue that arises for consideration is the year in which 22.5% of on-money receipts should be brought to tax.

.....

24. We have considered the rival submissions and perused the material on record pertaining to this issue. We note that the paragraph 7.26 of the Assessment Order, the Assessing Officer has rejected the contentions raised by the Assessee holding. Before the CIT(A) the it was contended on behalf of

Assessee that on-money receipts were offered to tax in the subsequent year. The CIT(A) rejected has observed that the Assessee has not substantiated that on-money receipts were offered to tax in subsequent assessment years. However, in appellate proceedings before us the Ld. Authorised Representative for the Assessee reiterated the submission that Assessee has offered the on-money receipts to tax in subsequent years and has provided the above details. The on-money receipts offered to tax by the Assessee in the subsequent assessment years have been accepted by the Revenue. It is settled legal position that same income cannot be taxed twice. We have allowed already held that only the profit element consisting of 22.5% of on-money recipes can be brought to tax (as opposed to the entire on-money receipts as contended by the Revenue). Accordingly, we restrict the addition under consideration for the Assessment Year 2012-13 to 22.5% of INR 1,90,71,000/- being the balance amount of on-money receipts not offered to tax by the Assessee till the date and the same shall be taxed in the year of sale of flats booked by the Assessee.”

We notice that the co-ordinate bench has taken the view that the income portion of the on-money is assessable in the year in which the sale of concerned flat is declared by the assessee. This is based on simple logic. When a product sold, then the sale consideration of that product can be brought to tax in the year of sale only. In the instant cases, the on-money is received towards sale consideration only, i.e., it is part of sale consideration only and hence the same can be taxed in the year in which sale of flats is declared, i.e., taxability of cash component (on-money) and cheque component will go-together. Accordingly, following the above said order of the co-ordinate bench, we set aside the order passed by Ld CIT(A) on this issue in all the three years and direct the AO to assess the income portion of the on-money receipts in the year in which the sale of flat is accounted for by the assessee, i.e., both the cheque component and on-money component should be assessed in the same year.

13. In the result, the appeal filed by the assessee for AY 2012-13 to 2014-15 are partly allowed. The appeals filed by the revenue for AY 2013-14 and 2014-15 are dismissed.

Pronounced in the open court on 30.5.2023.

SD/-
(KAVITHA RAJAGOPAL)
Judicial Member

SD/-
(B.R. BASKARAN)
Accountant Member

Mumbai; Dated : 30/05/2023

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(Judicial)
4. PCIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

PS