

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

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

**ITA No.2469/Mum/2023
(Assessment Year :2015-16)**

| | | |
|---|-----|----------------------------------|
| Moreshwar Krushna Baria M. Baria Business House, Virat Nagar P.P.Marg, Virar (W) Dist: Palghar - 401 303 | Vs. | ACIT, Central Circle 3, Thane |
| PAN/GIR No.ABSPB1365N | | |
| (Appellant) | .. | (Respondent) |

| | |
|------------------------------|-------------------------|
| Assessee by | Shri Subodh Ratnaparkhi |
| Revenue by | Smt. Mahita Nair |
| Date of Hearing | 30/10/2023 |
| Date of Pronouncement | 31/10/2023 |

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeal has been filed by the assessee against order dated 13/06/2023 passed by CIT (A)-Pune-11 in relation to the penalty proceedings u/s.271AAB for the A.Y.2015-16.

2. In the grounds of appeal assessee has challenged the levy of penalty of Rs.18,74,500/- u/s.271AAB.

3. The brief facts are that search and seizure action u/s.132 was carried out on 31/07/2014 on Ameya group of cases at various premises wherein, assessee was also covered. Accordingly, notice u/s.153A was issued on 15/12/2014 for the A.Y. 2009-10 to 2014-15 and regular return of income was filed for A.Y.2015-16. In the regular return assessee had declared income of Rs.2,58,46,780/- which included sum of Rs. 84,22,000/- on account of consideration received in cash as admitted during the course of search u/s.132(4). There was a categorical finding by the ld. AO in the assessment order that documents revealed undisclosed cash receipts which were found and seized during the course of search action and the details of such cash receipts on account of online receipts have been discussed in detail by him in the statement for the F.Y.2014-15 i.e. relevant to A.Y.2015-16. The assessee in the course of search has made following statements:-

Que. N 13: From the booking forms as per the bundle nos. 17 to 41, the year wise and entity wise working of the cash receipts from various projects developed by ABPD, MBD, & ME is prepared as per Annexure-5. Please go through the same and confirm that the cash receipts consolidated in the Annexure-5 are as per the cash receipts in the booking forms?

Ans. I have gone through the Annexure-5 where a consolidated report of consideration received on sale of flats/ Row Houses developed by ABPD, MBD, & ME. I agree that the cash receipts consolidated in the Annexure-5 are as per the cash receipts in the booking forms. I admit that we have accepted the receipts against sale of flats and shops constructed by us. The summary of the amounts so accepted is as per the Annexure-5 prepared by you.

Q.14. The year wise cash receipts on account of flats/Row houses developed by ABPD, MBD & ME as per Anneexure-5 given below:

M Baria Developers

| <i>FY</i> | <i>Total received in cash in Consideration Rs.</i> |
|--------------|--|
| 2011-12 | 90,78,550 |
| 2012-13 | 5,35,78,136 |
| 2013-14 | 3,15,37,000 |
| 2014-15 | 84, 22,000 |
| <i>Total</i> | 10,26,15,686/- |

Ameua Builders and Property developers (Yashwant Nagar Project)

| <i>FY</i> | <i>Total consideration received in cash in Rs.</i> |
|--------------|--|
| 2007-08 | 23,77,320 |
| 2008-09 | 1,29,53,500 |
| 2009-10 | 3,72,66,500 |
| 2010-11 | 5,87,03,500 |
| 2011-12 | 12,08,07,465 |
| 2012-13 | 7,26,87,800 |
| 2013-14 | 8,12,37,001 |
| 2014-15 | 1,98,47,000 |
| <i>Total</i> | 40,46, 18,086/- |

Magnate .Enterprises

| FY | Total consideration received in cash in Rs. |
|---------|---|
| 2011-12 | 10,63,05,050 |
| 2012-13 | 3,61,16,000 |
| 2013-14 | 23,29,550 |
| 2014-15 | 1,01,64,000 |
| Total | 11,17,07,050/- |

The total cash receipts of all the concerns for the period FY 2007-08 to 2012-13 is Rs.61,89,40,822/-. **Please state whether the amount represents the cash received over and above the registered value. Further state whether the said receipts are accounted in the books of accounts.**

Ans. I have gone through the contents as tabulated above, I admit that the above amounts are year wise bifurcation of the consideration totaling to cash, **I also admit that the said- has not been recorded in the books of account of any of my business concern.** I wish to mention that till the property is given possession of such amounts are booking advances. However, I would like to clarify that certain expenses viz. Stamp duty & registration fee, Vat, Service tax and other petty expenses as reflected in the booking form/ Quotation have been met through these cash receipts. I may be allowed to claim such expenses since such expenses have been incurred mandatorily by us and verifiable through the books of account. The quantum of such expenses in respect of sale of flats and shops from the projects in respect of which the cm-money has been received is approximately Rs.10 crores. **I may be allowed to deduct such expenses from •Rs.61,89,40,822/-. Accordingly , after deducting Rs.10 crores and above from entire cash receipts, I am hereby admitting the additional unaccounted income of Rs.51, 89,40,822/-** in the hands of various concerns in which the cash receipts over and above the

agreement value are received. I say and state that our real estate construction ongoing project shall be running for a continuous period of about 3 to 4 years from now. We recognize the revenue in respect of such projects only when the completion of the project is done and the possession is given or partly given. Therefore, I am offering the entire additional income of Rs.51,89,40,822/-. In the hands of different concerns of group for the current financial year ie. 2014-15. We shall submit the distribution of such additional income in the hands of various concerns and firms within a period of one week. Such time of 15 days may kindly be allowed."

4. Ld. AO in his order with regard to cash receipt has made following observations:-

4 During the course of assessment proceedings, the cash receipts over and above the agreement price as appearing in these loose paper bundles were quantified again. In regard to entries pertaining to same transactions appearing on more than one seized document, only single transaction was taken in quantification. The summary of cash received by the assessee firm over and above the agreement price as reflected in Bundle No 17 to 41 is quantified for the period F.Y. 2008-09 to 2014-15 as under:

| Bundle No. | A.Y.2011-12 | A.Y.2012-13 | A.Y.2013-14 | A.Y.2014-15 | A.Y.2015-16 | Total |
|--------------|------------------|------------------|--------------------|--------------------|------------------|--------------------|
| 23 | | 24,77,000 | 1,21,26,000 | 1,05,21,500 | 26,10,000 | 2,77,34,500 |
| 25 | | - | 23,00,000 | 36,44,000 | 8,00,000 | 67,44,000 |
| 27 | | - | - | 25,50,000 | - | 25,50,000 |
| 32 | 47,01,000 | 67,90,000 | 2,77,19,001 | 1,94,61,000 | - | 5,86,71,001 |
| 33 | | | | - | 3,35,000 | 3,35,000 |
| Total | 47,01,000 | 92,67,000 | 4,21,45,001 | 3,61,76,500 | 37,45,000 | 9,60,34,501 |

Thus, the loose paper bundles No. 23, 25, 27, 32 & 33 of Party A-5 reflect cash receipts of Rs. 9,60,34,501/- of the assessee for the A.YS 2011- 12 to 2015-16, From the above amounts the amount of Rs. 37,45,000/- reflects the undisclosed cash receipts to the assessee for the relevant assessment year under consideration.

7.5 in your regular books of account. In response to show cause issued during the course of assessment proceedings, the assessee submitted replies vide its letter dated 04.07.2016, 18.07.2016 & 24.08.2016. The relevant portion of the reply dated 04.07.2016 is extracted as under

“I submit that the seized papers primarily reflect receipts as well as payments/expenditures Incurred towards various business activities carried out from time to time. I have from the seized papers tabulated receipt of cash for the period covered by asst yr 2009-10 to 2015-16 as well as also considered the cash expenditures/payments as per seized records and worked out the day to day cash flow statements summary of which was submitted to DDIT (Inv) Thane during post search proceedings. A copy of the said summary was also submitted on your honours records A copy of day to day cash summary, which has been already been placed on your record on 30.05.16 by Ameya Builders & Property Developers is enclosed herewith as annexure A. I have linked the entries on the seized papers to the cash flow statement so that the correctness of the cash flow statement can be verified. In the cash flow statement, we have considered each and every transaction reflected by the seized paper. The undisclosed income arising us per the cash flow statement has been offered to tax in the returns filed in response to notice u/s 153A for Asst. yrs. 2009-10 to 2014-15 end u/s 139(1) In respect of ast. yr 2015-16 in this manner, the entire undisclosed Income has been offered to tax in our hands for the relevant asst years. Needless to say the relevant tax has also been duly deposited.

As explained earlier in writing as well as by our authorized representative, the seized records pertaining to our firm reflect receipt of port consideration for sale of flats/shops in cash over and above the agreement price. Similarly, the seized records

also reflect substantial expenditure being incurred in cash towards acquisition of land and development of constructed premises. Taking into consideration the extent of expenditure and all the relevant facts, I have offered 20% of on money receipts as our income in the respective asst. years. The income @ 20% of on money receipts is supported by the seized papers. If given suitable opportunity, we will demonstrate from the seized papers that our actual net Income, considering cash receipts is 20% only. This income is accepted by us and offered to tax by crediting the same to profit and loss account in the returns filed in response to notice u/s 153A/u/s 139(1). In respect of all other undisclosed income, the same is offered to tax on actual basis. Deduction u/s 801B(10) has been claimed in respect of income offered to tax for projects entitled for such deduction."

7.6 The submission of the assessee was carefully considered vis a vis the details available on record. It is seen these loose paper bundles evidence that the assessee is accepting cash as 'on money' over and above the sale agreement value on sale of flats/shops. Though the document is titled 'Quotations without prejudice', in fact the actual sale transactions are recorded in these documents. These documents are therefore not mere quotations. It is also seen that there is one separate document for each flat sold by the group concerns. The documents mention name of the flat purchaser, flat number, building name, area, rate and total cost of the flat. Further stamp duty, VAT and Service tax are mentioned. The cost of the flat and stamp duty, VAT and service Tax and other charges are added up and mentioned as Total cost. It can be seen that the total cost of the flat is mentioned in the document out of which a portion is accepted by cheque and a portion in cash. It was found that the sale agreements are executed on the cheque portion mentioned in the documents. Thus it evidences that the cash portion accepted by the assessee is not recorded in the regular books of Accounts

5. Thus, unaccounted cash receipt of Rs.37,45,000/- was taxed for the A.Y.2015-16.

6. Apart from that, AO noted unaccounted cash receipts from sale of FSI which included cash component of Rs.3,73,64,000/- as per the seized documents there was also cost as per seized records which was in the form of cash expenses of Rs.1,52,28,676/- on the ground that these are cash payments exceeding to Rs.20,000/- attracts Section 40A(3) and further, TDS has not been deducted on cash deposits therefore, the same is not allowable u/s.40(a)(ia) and accordingly, the cost was not allowed in the A.Y.2014-15. However, unaccounted cash receipts of Rs.3,73,64,000/- has been taxed in the A.Y.2014-15. Finally he has showed undisclosed cash receipts for various assessments years. In view of the discussions in preceeding paras, total undisclosed cash receipts of the assessee is as under:

- a. ON MONEY RECEIPT loose paper bundles No. 23, 25, 27, 32, & 33 of Party A-5 - Rs. 9,60,34,501/-
- b. CASH RECEIPT ON SALE OF FSI : M/s Kapcon Ventures-loose paper No. 53 of bundles No. 24 of Party A-5- Rs. 3,73,64,000/-
- c. CASH RECEIPT ON SALE OF FSI : M/s Mangal Morya Developers-loose paper No. of bundles No. 24 of Party A-5- Rs. 4,52,64,000/-
- d. UNSECURED CASH LOAN: - bundles No. 16 of party A-5 & Bundle 4 of Party A-13 : Rs. 2,45.85,000/-
- e. Year wise break of above cash receipt is as under:

(Amounts in Rs.)

| Para | A.Y. 09-10 | A.Y. 10-11 | A.Y. 11-12 | A.Y. 12-13 | A.Y. 13-14 | A.Y. 14-15 | A.Y. 15-16 |
|---------|---------------|---------------|-------------|------------|-------------|--------------|------------|
| 7.27(3) | | | 47,01,000 | 92,67,000 | 4,21,45,001 | 3,61,76,500 | 37,45,000 |
| 7.27(b) | 0 | | | | | 3,73,64,000 | 0 |
| 7.27(c) | 0 | 0 | 0 | | | 4,52,64,000 | 0 |
| 7.27(d) | 0 | 0 | 1,47,00,000 | 3,00,000 | 45,85,000 | | 50,00,000 |
| Total | 0 | 0 | 1,94,01,000 | 95,67,000 | 4,67,30,001 | 11,88,04,500 | 87,45,000 |

7. Finally for the A.Y.2015-16, addition has been made with regard to undisclosed cash receipts of Rs.87,45,000/- and after reducing the expenses, undisclosed income has been worked out at Rs. 69,29,399 for A.Y.2015-16. On this addition, AO has initiated penalty proceedings u/s.271AAB in the following manner:-

- Penalty proceedings u/s 271AAB of the I.T.Act, 1961 are initiated separately for concealment of undisclosed income of Rs. 37,45,000/- as discussed in para 7.9 above.
- Penalty proceedings u/s 271AAB of the I.T.Act, 1961 are initiated separately for concealment of undisclosed income of Rs. 50,00,000/- as discussed in para 7.20 above.

8. Before us ld. Counsel for the assessee submitted that *firstly* in A.Y.2015-16, there is no variation in the returned income and assessed income which is evident from the last page of the assessment order. He further submitted that here the ld. AO had initiated penalty proceedings u/s.271(1)(c) r.w.

Explanation 5 for furnishing of inaccurate particulars of income of Rs.1,52,28,676/- and has again initiated the penalty u/s.271AAB for the undisclosed income. Thus, there is non-application of mind by the ld. AO, because he cannot initiate penalty proceedings u/s. 271(1)(c) and again u/s. 271AAB and in support he relied upon the judgment of the Tribunal in the case of Siddhi Home Makers in ITA No.4168/Mum/2013. Without prejudice, he submitted that in so far as levy of penalty on account of undisclosed income of Rs.50,00,000/- the same should be @20% and not 30% as levied by the ld. AO, because assessee had duly shown this income in the return of income after the search. This quantum of penalty under income of Rs.50,00,000/- would work out to Rs.10,00,000/- and not Rs.15,00,000/-.

9. On the other hand, ld. DR strongly relied upon the order of the ld. CIT(A) wherein this issue has been discussed in detail and drew our attention to para 6 & 9 of the appellate order.

10. We have heard rival submissions and also perused the relevant material placed on record and also finding given in the impugned orders. In so far as initiation of penalty proceedings u/s.271(1)(c), first of all as noted above, the ld. AO has levied penalty for furnishing of inaccurate particulars of income on account of disallowance made u/s. 40(A)(3) of Rs.1,52,28,676/-. It is not for the A.Y.2015-16 as the same has been made for A.Y.2014-15. Thus, we are unable to agree

with the contention of the ld. Counsel that simultaneously penalty proceedings have been initiated on the same issue u/s. 271(1)(c) and also u/s. 271AAB. Ld. AO very categorically had made this observation while making addition of Rs.3,73,64,000/- on account of unaccounted cash receipts for A.Y.2014-15 and on these receipts, cash expenses / cash payments made has been disallowed on the ground of 40A(3). It has no relevance in so far as that income which has been determined for A.Y.2015-16. Accordingly, this addition of ld. Counsel is rejected.

11. In so far as levy of penalty u/s.271AAB, it is not in dispute that this amount of Rs.37,45,000/- was admitted to be an undisclosed income, statement recorded u/s.132(4), which falls under Clause (a) of Section 271AAB, which provides levy of penalty @10%. Thus, penalty @ 10% is confirmed which works out to Rs.3,74,500/-.

12. Now, coming to the levy of penalty on account of undisclosed income of Rs.50,00,000/- it was part of an additional income of Rs.1,73,05,070/- which has been offered in the return of income for A.Y.2015-16. The penalty has been confirmed @ 30% on the ground that, exact heads under which this additional income has been declared has not been furnished and therefore, it cannot be presumed that amount of Rs.50,00,000/- has been considered by the assessee in the additional income offered. However, from the perusal of the assessment order, we find that with respect to cash received of

Rs.50,00,000/- in A.Y. 2015-16 the assessee has offered additional income in various assessment years which included this cash amount received in A.Y.2015-16 and that is the reason why at the last page of the assessment order, ld. AO has categorically stated that there is no variation between returned income as well as assessed income. Accordingly, we accept the contention of the ld. Counsel that the rate of levy of penalty on undisclosed income at Rs. 50,00,000/- which is part of the return of income should be levied @20% and not 30%. Accordingly, the penalty of Rs.50,00,000/- is reduced to Rs.10,00,000/- and assessee gets part relief of Rs.5,00,000/-.

13. In the result, appeal of the assessee is partly allowed.

Order pronounced on 31st October, 2023.

Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER

Mumbai; Dated 31/10/2023
KARUNA, *sr.ps*

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Copy of the Order forwarded to :

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

//True Copy//

ITA No. 2469/Mum/2023
Moreshwar Krushna Baria

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai