

**IN THE INCOME TAX APPELLATE TRIBUNAL
“DB” BENCH, VARANASI**

**BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER &
SHRI AMIT SHUKLA, JUDICIAL MEMBER**

**ITA No.75/VNS/2023
(A.Y. 2017-18)**

Tulsiani Infrastructure Private Limited, 37, Elgin Road, Civil Lines, Allahabad- 211001	Vs.	DC/ACIT, 'Central Circle, Varanashi Aaykar Bhawan, 3 rd Floor Maqbool Alam Road, Varanasi - 221002
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AADCT8858R		
Appellant	..	Respondent

Appellant by :	V.K. Jindal & Ashish Jindal
Respondent by :	Robin Chaudhary

Date of Hearing	27.09.2023
Date of Pronouncement	22.11.2023

आदेश / O R D E R

Per Amit Shukla: (JM):

The aforesaid appeal has been filed by the assessee against the order dated 24.05.2023, passed by CIT (Appeals) Lucknow-3 for the quantum of assessment passed in Sec. 153 r.w.s 143(3) for the assessment year 2017-18.

2. In various grounds of appeal the assessee has challenged the addition of Rs.41,64,28,242/- as against Rs.3,50,15,393/- surrendered/offered by the assessee. It has been stated in the grounds that the addition has been made by the AO by extrapolating the figure of alleged on-money noted in seized documents which was rough detail of amount received/ receivable from the buyers for the booking

of flats to all the flat booked. Further, the project of the assessee itself was stalled after search, i.e. from the year 2016 as no construction activity has been carried out. Therefore, there was no reason to make extrapolation for all the units based on just two documents found and seized.

2. Brief facts are that the assessee is a private limited company engaged in the business of real estate. A search and seizure action had taken place at the premises of the assessee and at various business and residential premises of M/s Tulsiani Construction Pvt. Ltd. The assessee company was executing a project in Lucknow in the name of 'Palacio Empire White' which was at initial stage of construction as on the date of search. It has also been brought on record that on the date of search also, the construction activity had already been stalled and the project was completely closed. It has been further informed that this project has been suspended till date almost for more than 7 years. During the course of search and seizure operation, seized document named as NB-2 and NB-3 was found and seized from the business premises of the assessee company which was annexure of diary maintained by the sales/field staff. The said diary revealed certain transactions which according to the assessee was anticipation of receipts from the buyers, though no actual receipt has been made by the company and it is purely rough pages in the diary by the staff. The copy of the said seized document has also been placed in the paper book before us. The assessee based on the figure mentioned in the seized document and in order to buy peace and avoid litigation had offered the entire alleged amount of on-money noted in the seized document to tax before the AO. The undisclosed receipt noted in the seized documents during the year was Rs.3,76,46,681/- and after reducing commission expenses of Rs.26,31,288/-, sum of Rs.3,50,15,393/- for disclosed revised return

of income and assessee also paid the taxes on the said income surrendered to tax.

3. The ld. Assessing officer noted that statement of Shri Anil Kumar Tulsiani was recorded during the search and seizure operation and in his statement he has made surrender of Rs.20 crores for the entire group for various years. AO was of the opinion that if during the course of search has made surrender then it tantamount to tacit approval of receipt of on money by the group. He has also referred to relevant statement in his order. After incorporating the scan copy of seized document, he deduced that assessee was in regular receipt of on money and such document is a conclusive evidence of assessee being in a habit of accepting on money which is not recorded in the books of account. AO has also referred to statement of Ankit Tripathi, employee of the assessee but there is no whisper in the statement that Assessee Company has taken on-money on each and every booking. He has incorporated the assessee's letter wherein revised computation of income was filed on 27.12.2018 in which additional income has been offered based on seized material namely NB-2, NB-3, pages 61-66 of LT-1. The relevant portion of assessee's reply is reproduced as under:

“Under Instruction from our above mentioned client, in response to your query and in continuation of our earlier submission, we wish to submit as under:

1. *The assessee has revised return of income for the year under consideration offering the amount under the head Income from Business & Profession of Rs.3,76,46,681/- as amount received from buyers as recorded in Annexure NB-3, the total amount recorded in Annexure NB-3 relating to Year under consideration is Rs.5,80,37,138/- out of which Rs.2,03,90,457/- has been duly recorded in books of accounts of the assessee and has been duly explained by the assessee in our earlier reply. Complete Working of amount recorded in Annexure NB-3 relating to the year vis-à-vis amount recorded in books of account and amount surrendered during the year is enclosed herewith at Page No. 01.*

2. *Though, the assessee reiterates that no such amount has been received in cash from the buyers, yet the said amount is being offered to tax to buy peace and avoid undue litigation.*
3. *On the seized annexure NB-3, Commission to the tune of Rs.26,31,288/ has also been written. The said commission has been deducted from the amount offered to tax. The working of the same is also there in the chart enclosed supra*
4. *Besides, the assessee has offered to tax under the head Income from Business & Profession Scrap Sales amounting to Rs.684,043/- which is 1% of the total amount of total steel purchase in all the years (Rs.6,84,04,258/-). It is pertinent to mention here that though no papers relating to scrap sales relating to the assessee company was found and seized during search and seizure, yet to avoid litigation and buy peace of mind surrender of additional income in respect of scrap sales is being offered to tax. Detail of steel purchase in all the years is as under:*

<i>Assessment Year</i>	<i>Iron/Steel Purchase</i>
<i>2013-14</i>	<i>1,88,242</i>
<i>2014-15</i>	<i>1,73,74,060</i>
<i>2015-16</i>	<i>Nil</i>
<i>2016-17</i>	<i>4,47,85,237</i>
<i>2017-18</i>	<i>60,56,719</i>
<i>Total</i>	<i>6,84,04,258</i>

5. *Copy of complete set of revised return of income alongwith Computation of Total Income is being enclosed herewith at Page No. 2-31.*

4. Thereafter, the ld. AO based on these evidence of on money he held that this evidence needs to be extrapolated in order to conclude that on money had been received by the assessee on the sale of its entire stock-in-trade which has not been recorded in the books of account because if this malpractice was adopted by the assessee for few then it must be for all. Accordingly, he made an extrapolation for all the flats/units even when no incriminating of seized documents were found qua the other units. After detailed discussion he made addition of Rs.41,64,28,242/-.

5. For justifying the estimate AO referred to the decision of Hon'ble Supreme Court in the case of **CST Vs. H.M. Eusuf Ali HM Abdulali**, and held that such estimate/extrapolation is in accordance with law and has worked out the reasonable estimate of revised booking of the property located in the same project. The relevant observation in this regard reproduced as under:

“Above table has been prepared on the rationale that rate of booking of property located in same project for an interval of time till the next change in rate, would be similar for residential and commercial properties. Highest rate is calculated on the basis of highest recorded rate of booking from the books of assessee or highest rate has been calculated by considering the cash component as found from the seized material in addition to Basic Sale Price (BSP) recorded by assessee in its books of accounts. This rationale finds more logic in view of the fact that all the highest rates as tabulated above have been computed on the basis of seized material found and seized from the premises of the assessee itself. It is not a case where estimation of highest rate for the purposes of extrapolation has been done arbitrarily. Rather, highest rate has been calculated on a very logical footing by taking cash component entries as recorded in seized material into consideration. At the cost of re-iteration, these are the same cash entries which have been owned up by the assessee by revising its computation of income during the assessment or disputed the above mentioned method of extrapolation during the assessment proceedings and hence, in effect the assessee has accepted the above method of extrapolation.

It is a fact that in order to earn such income though unaccounted, one needs to make certain expenses in cash i.e out of the unaccounted receipts. Therefore, on this account, adjustment is required to be made in order to present a fair approach in taxation of income. Here, it must also be noted that, Builders generally book most of the construction related expenses and thus claim deduction. Their preference remains only to suppress sale receipts so that profit margin in the accounts is kept low. However, there are certain expenses which are in general made in cash and out of the receipts made in cash Looking into the facts of the case and general trend of the real estate business, a deduction of 19% is being allowed to the assessee company. To arrive at the deduction following methodology is being adopted:

Sr. No.	Description	Rate Deduction (in percentage)	Amount (in Rs.)	Undisclosed Income (in Rs.)
1.	Differential Amount (As per		51,41,08,941	

6. The ld. CIT (A) has confirmed the said addition on the reason given by the AO. He held that AO was justified in taking a reasonable estimate of all the units for taking into account on money by found for few units by way of extrapolation and allowing expenditure @ 19% and taxing the entire 81% of receipts. In sum and substance, the ld. CIT(A) held that AO has taken into consideration the statement of Shri Anil Kumar Tulsiani, wherein he has made surrender during the course of search operation which can be viewed as approval of receipt of on money by the group and therefore, the estimate made by the AO is justified.

7. Before the ld. Counsel for the assessee submitted that in the statement of Shri Anil Kumar Tulsiani there is no whisper about on money receipt and there was no question asked by the investigation wing or authorised officers regarding loose paper NB-2 and NB-3. In support of this contention he drew our attention to the entire statement enclosed in the paper book at page 215-216 and pointed out that from the bare perusal of the statement it is clear that not a single question has been asked regarding seized material. Further, even the small excerpt of statement of Shri Anil Kumar Tulsiani incorporated by the AO, it will be seen that nowhere he has stated about on money or about seized annexure NB-2 and NB-3. He has mainly offered Rs. 18 crores of the income for the entire group. Further, AO has referred to statement of Ankit Tripathi which was not provided to the assessee, however, that also does not lead to any inference that the assessee has taken on money for the entire project which was still under construction before the date of search which project has been stalled completely. AO has wrongly taken the admission of the employee against the assessee without even cross-examination and offering the same. Further, AO has not made any

enquiry from the buyers of the property and has merely relied upon certain loose sheets seized during the course of search and there is no reason as to why he has to make extrapolation for all the units which was booked by the assessee at that point of time.

8. On the other hand, the ld. CIT-D.R submitted that once the assessee has made surrender and seized document revealed certain receipts of on money and based on that seized document assessee has made surrendered, then the presumption is that assessee must have taken similar on money from the other buyer also. Further, for making a reasonable estimate, relevant material and information was available in the form of seized documents and statement, therefore AO was justified in applying the same rate for all the units. Thus, he strongly referred and relied upon various observations of the AO.

9. We have heard the rival submissions and also perused the relevant finding given in the impugned orders as well as the material referred to before us. As noted above, during the course of search certain documents were found and seized named as 'NB-2' and 'NB-3' which were annexure of a diary maintained by the sale/field staff of the assessee company wherein they have recorded certain transactions. The transactions noted revealed some kind of on-money received/receivable from some of the prospective buyers for few units in the project developed by the assessee. Based on these seized document and transactions noted therein assessee had offered undisclosed receipts as recorded in the diary for sum aggregating to Rs. 3,76,46,681/- and based on this undisclosed receipts, assessee had shown net income of Rs.3,50,15,393/-in the revised computation of income which was offered as additional income before the A.O. It has been stated that the total amount recorded was in fact Rs.5,80,37,138/-, out of which Rs.2,03,90,457/- was duly recorded in

the books of account and the balance amount was offered as undisclosed receipts. The assessing officer based on this evidence has tried extrapolate for all the units in the said project and applied the same rate to all the flats which included on money to make an estimate for extra amount, which has been worked out at Rs.41,64,28,242/-.

10. First of all, in the course of search and seizure operation if any document is found which is incriminating in nature, then what has been mentioned in such seized document alone can be the basis for making the addition within the scope of Sec. 153A. Unless based on these incriminating documents any inquiries are conducted or any post search inquiry certain other information or material has been gathered or brought on record, then AO can definitely go beyond the seized material to make addition taking into consideration all such material. Here in this case, apart from this seized document, nothing has been found or brought on record to show that assessee had received on-money from all the prospective buyers of the flats, who have booked the flat. One very important fact which is culled out from the records is that; firstly only certain advances was received from the prospective buyers who had booked the flat; secondly, on the date of search it was found that the project was stalled and no further construction was carried out and in fact till date no work has been carried out and the project has been abandoned with many unsold inventory. Nothing has been brought on record, whether the alleged buyers which have been mentioned in the assessment order have actually got the possession of the flat or were staying in the flats when it was not even habitable as the project itself was abandoned. AO should have made some prima facie enquiry from the buyers as to on which rate they have made the booking; whether there was any huge

difference in the rates of flats; whether at all the said buyers have made the entire payment, so as to draw some inference that these buyers might have also given on-money. In a search and seizure action what has been found and seized alone can be the basis of addition till any further enquires have been made or any information has come on record. AO has tried to make an estimate of the rate based on few transactions to entire units and thereby making huge addition, which in our opinion is not justified especially in the light of facts and circumstances of the case and such an addition is not justified.

11. Much reliance has been placed by the authorities below, on the statement of Shri Anil Kumar Tulsiani, that he has offered additional income of Rs.18 crores in for the group in different years and therefore, such surrender itself tacitly means Assessee Company was in the habit of receiving on money. First of all, there was no such question put or even asked from Ms. Anil Kumar Tulsiani or was confronted with the seized document or based on this document any question has been asked whether similar kind of on money was received from the other buyers also. Once this fact has neither been brought on record nor same is arising from his statement, then where is the question of making any kind of extrapolation that for all the units' assessee company might have received some extra money.

12. In so far as statement of employee of the assessee company, Shri Ankit Tripathi, he has stated about some amount of Rs. 1.5 Crores as mentioned in the same seized document was received in cash by him on behalf of the company. This seized document where all the cash transaction has been recorded has already been offered to tax by the assessee. Nowhere has he stated that in all the bookings Assessee Company had received on-money from all the prospective buyers nor

even any such question was asked by the authorised officers. Thus no adverse inference can be drawn from his statement justifying extrapolation.

13. The burden of proof in such case lies with the AO to show that in all the cases where flats were booked assessee has received on money. Addition has to be based on some material and information on record and not on whims and surmise or pure guesswork. He cannot travel beyond the seized document to make any kind of estimate on presumption that assessee might have been receiving similar kind of extra money in all the bookings, without conducting some inquiry as stated above. Had he done some inquiry from the buyers or any other information coming on record or there is any statement where any specific question was asked and it has been admitted that in all the bookings assessee company has received on-money invariably in all the bookings of flats then ostensibly he could have been justified for making an estimate. This is also not a case of estimating any income or sale after rejection of books of account, but a case of search where assessment has to be based on material found and gathered and not make addition on guesswork and extrapolation without any corroborative evidence. Thus, the entire premise and the basis of making the addition by extrapolation is unjustified and same is directed to be deleted. In the result the addition of Rs.41,64,28,242/- is deleted.

14. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 22.11.2023

Sd/-
(B.R. Baskaran)
Accountant Member
Place: VARANASI
Date 22.11.2023

Sd/-
(Amit Shukla)
Judicial Member

Rohit: PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT,
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench,