

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "D" BENCH

**Before: Shri Waseem Ahmed, Accountant Member
And Shri T.R. Senthil Kumar, Judicial Member**

**ITA No. 1125/Ahd/2019
Assessment Year 2014-15**

The ITO, Patan, Ward-5, Mehsana (Appellant)	Vs	M/s. Shubh Developers F-1/2, Supath Shopping Centre, Opp. Hotel Matel Kheralu Road, Visnagar, Distt. Mehsana-384315 PAN: ABNFS8954M (Respondent)
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**Revenue Represented: Shri Ashok Natha Bhalekar, Sr.D.R.
Assessee Represented: Shri M.J. Shah & Shri Jimi
Patel, A.Rs.**

Date of hearing : 03-01-2024
Date of pronouncement : 05-01-2024

आदेश/ORDER

PER : T.R. SENTHIL KUMAR, JUDICIAL MEMBER:-

This appeal is filed by the Revenue as against the appellate order dated 23.01.2017 passed by the Commissioner of Income Tax (Appeals), Gandhingar, Ahmedabad arising out of the assessment order passed under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') relating to the Assessment Year 2014-15.

2. The brief facts of the case is that the assessee is a Partnership Firm engaged in the business of Construction Work and undertaking development of residential flats and shops. For the Assessment Year 2014-15, the assessee filed its Return of Income declaring total income of Rs.10,53,339/-. There was a survey action u/s. 133A of the Act conducted in the business premises of the assessee on 03.09.2013 during which statement of the two Partners were recorded wherein it was admitted profit element of Rs.3,51,09,500/- in respect of different construction projects carried out by the assessee Firm. It is thereafter a retraction statement was filed by way of an affidavit dated 08.12.2014 by the Partners, describing the loose papers found during the course of survey as a dumb documents. However the Assessing Officer held that the retraction statement is self-serving statement, having no evidentiary value and rejected the same. The assessee further submitted project-wise completion status, income of the firm and also explained many of the projects were already completed at the time of survey action in the premises of the assessee and the assessee is offering presumptive taxation scheme at 8% of the profit and paid appropriate tax thereon. Out of 10 projects, the assessee made construction contract for eight projects and developer only for two projects. However the above submissions of the assessee was not properly appreciated by the A.O. and made an addition of Rs.3,45,09,500/- as the undisclosed income of the assessee.

3. Aggrieved against the assessment order, the assessee filed an appeal before Commissioner of Income Tax (Appeals). The assessee strongly contended that the impugned loose paper did not depict

the real profit of projects developed by the Firm. The assessee submitted the status of each of the projects undertaken by the Firm as follows:

a) Samved-I of Visnagar Town

This project consisted of one storey tenaments and the contract was awarded to the appellant firm by the plot owners and the project was completed in February, 2011 and related profit was already declared in the relevant assessment years The appellant had acted as "contractor only in this project. If the addition of Rs 28,00,000/- is made to the declared profit, it would be increased by Rs.46 lacs and would be about 32% of the consideration received from this contract.

(b) Samved-II of Visnagar Town.

This project consisted of one storey tenaments and the contract was awarded to the appellant firm by the plot owners and the project was completed in F.Y. 2011-12 and related profit was already declared in the relevant assessment year 2012-13 The appellant had acted as "contractor" only in this project. If the addition of Rs.43,20,000/- is made to the declared profit, it would be increased by Rs.75 lacs and would be about 30% of the consideration received from this contract

(c) Samved-III of Visnagar Town

This project consisted of one storey tenaments and the contract was awarded to the appellant firm by the plot owners and the project was started in F.Y.2011-12 and completed in F.Y.2014-15(relevant to A.Y.2015-16) related profit was already declared in respective assessment years. Only 50% of the project was completed when the survey was carried out whereas the A.O. had taken full profit of all the 57 units. The working of profits in respect of this project has been given in the paper book.

(d) Satyam Bungalows, Visnagar

This project consisted of two storey tenaments and the contract was awarded to the appellant firm by the plot owners and the project was started in F.Y.2012-13 (A.Y.2013-14) and completed in F.Y.2014-15 (A.Y.2015-16) and related profit was already declared in the respective assessment years. The appellant had acted as "contractor" only in this project. The project was incomplete as on the date of survey and only 40% of the said project was compinted. Therefore, it was wrong on the part of the A.O. to adopt the profit in respect of all the 50 units. The relevant details are available in the paper book

(e) Supath Shopping Centre at Visnagar Town

This was the project having 48 commercial units developed by the appellant firm and it was already completed in A.Y.2012-13 and the profit was already disclosed in the relevant assessment years. It has been contended that the project was only for 48 commercial units whereas the profit of 72 units had been taken by the A.O on the basis of disclosure made. It has also been mentioned that the Joint CIT has also issued direction u/s 144A of the Act to exclude the profit of 24 units worked out at Rs 6.00.000/-

(f) Samved I & II at Kheralu

These two projects were undertaken by the appellant as "contractor" and the work was awarded by the plot owners. This project was also completed in AY 2012-13 and the related profits had already been offered. It has been contended that if the addition of Rs.9,80,000/- is made to the total profit declared, then it would be about Rs. 16 lacs and the profit would be about 28% of the total consideration received

(g) Shukan-I and Shukan-II at Idar town.

These two projects were undertaken by the appellant as "contractor" and the work was awarded by the plot owners. This project was also completed in A.Y 2012-13 and the related profits had already been offered. It has been contended that if the addition of Rs.54.10,000/- is made to the total profit declared, then it would be about Rs. 80 lacs and the profit would be about 32% of the total consideration received.

(h) Shubh City at Idar town.

The appellant was developer in this project wherein two storeyed residential units had been constructed. There were 87 residential units and 48 open plots. The project started in August, 2012 and was completed in A.Y.2017-18. At the time of survey, only 20% of the project was completed and the disclosure had been considered for all the 87 residential units and 48 plots."

3.1. Thus the assessee contended that the net profit rate at 8% is a reasonable profit under the presumptive scheme to taxation and therefore requested to delete the addition made by the Assessing Officer who made the addition merely relying upon the statement recorded during the course of survey which is held by Hon'ble Supreme Court in the Case of CIT Vs. S. Khader Khan and Sons

that Additions cannot be made based on the statement recorded during the course of survey. Considering the above submissions of the assessee, the Ld. CIT(A) estimated the gross profit at 12.5% and also given direction u/s. 150(1) to telescoping effect to the other Assessment Years 2009-10 to 2016-17 by observing as follows:

“...5.5 Considering all the facts as brought out by the A.O. in his assessment order, facts as appraised on the basis of documents filed during the course of appellate proceedings, the retraction from the disclosure of income of Rs 3,51,09,500/- made on the basis of impounded document as discussed in the assessment order is held to be rightly made as it contained several factual mistakes which had been pointed out through written submissions now made during the course of appellate proceedings and elaborately discussed as above. The mistakes as pointed out by the appellant are:-

(i) It was the profit estimated for the unit which were either completed or under construction.

(ii) The fact that projects of construction lasted for more than one year and the A.O. did not examine this vital fact while making the addition in spite of written submissions made in this regard.

(iii) He ought to have made the addition in the respective assessment years by bifurcating the disclosed amount instead of taxing the same in one assessment year.

(iv) He did not decide the issue of addition by using other corroborative evidences which he had noticed on appraisal of the impounded materials which could have supported his finding for making this addition

(v) The Joint CIT has considered the issue of making the addition in respect of new projects which commenced after the date of survey and directed to delete the addition as per his directions u/s 144A of the Act. Thus, the glaring mistake committed in the disclosure has been corrected by the Joint CIT to some extent.

(vi) The appellant has relied on several decisions which have not been rebutted by the A.O. who unilaterally held that the retraction was invalid.

5.6 However, at the same time, the evidential value of the impounded loose paper cannot be ignored and therefore, the gross profit is estimated @ 12.5% and the total addition of Rs.15,99,787/- has been worked out for the entire period and for the assessment year under consideration, the

same has been worked out at Rs.1,82,818/-. The A.O. is accordingly directed to give the telescopic effect to the AYs 2009-10 to A.Y.2016-17 by taking appropriate action as permissible u/s. 150(1) of the Act by re-opening the assessments.”

4. Aggrieved against the same, the Revenue is in appeal before us raising the following solitary Ground of Appeal:

1. Whether, the Ld. Commissioner of Income-Tax (appeals) CIT(A) has erred in law and on facts in estimating the total addition at Rs.15,99,787/- for entire period i.e A.Y 2009-10 to 2016-17 and Rs.1,82,818/- for the assessment year under consideration as against the total addition of Rs.3,45,09,500/-.

5. Ld. Sr. D.R. Shri Ashok Natha Bhalekar appearing for the Revenue strongly supported the order passed by the Assessing Officer and requested to uphold the same.

6. Per contra, Ld. Counsel Shri Manish J. Shah appearing for the Assessee supported the order passed by the Ld. CIT(A) and also brought to our notice project-wise details were submitted before the Assessing Officer. However the same were not considered by him, but based on the statement recorded during the course of survey proceedings Ld. A.O. made the entire addition for the Assessment Year 2014-15 which is not justifiable. Whereas Ld. CIT(A) considered the above facts judicially and estimated the gross profit at 12.5% and also given direction u/s. 150(1) to reopen the assessment for the Assessment Years 2009-10 to 2016-17. Therefore the above finding does not require any interference.

7. We have given our thoughtful consideration and perused the materials available on record. The entire addition of Rs.3.45 crores is based on the statement recorded during the course of survey in the premises of the assessee. It is well settled principle of law by

the Hon'ble Supreme Court in the case of CIT Vs. S. Khader Khan and Sons reported in (2013) 352 ITR 480 held as follows:

"In contradistinction to the power under section 133A, section 132(4) of the Income- tax Act enables the authorized officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the Income-tax Act. On the other hand, whatever statement is recorded under section 133A of the Income-tax Act is not given any evidentiary value obviously for the reason that the officer is not authorized to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law, vide Paul Mathews and Sons v. CIT [2003] 263 ITR 101 (Ker.)"

8. Further the assessee by way of an Affidavit dated 08.12.2014 retracted the statement recorded u/s. 133A of the Act. The assessee also filed detailed submissions of each Projects undertaken by the assessee firm. However the same was also not considered by the Assessing Officer. Jurisdictional High Court in the case of Glass Line Equipment Co. Ltd. vs. CIT reported in (2002) 253 ITR 454 held as follows:

"In the present case, we find that Commissioner (Appeals) while dealing with the affidavit, has conveniently chosen to accept only one part of the statement which was in favour of the revenue and against the assessee while ignoring the rest of the portion wherein specific averments were made in relation to the balance items of expenditure.

9. In view of the settled legal position, it was not open to either Commissioner (Appeals) or the Tribunal to ignore a part of the contents of the affidavit. We are conscious of the fact that the findings recorded by the Commissioner (Appeals) and the Tribunal are concurrent as regards the facts and evidence on record and but for the averments made in the affidavit which have been ignored, we would not have interfered with the said findings. It is well-settled cannon of interpretation that a document has to be read as a whole: it is not permissible to accept a part and ignore the rest of the document"

Thus, in this view of the legal position, if assessing officer has accepted the falsity of loose paper in part then he has to accept in whole that loose paper does not depict true affairs of the appellat firm."

9. Considering the above judgments, we find that the Assessing Officer is not correct in making the addition of Rs.3.45 crores as

the undisclosed income of the assessee, whereas Ld. CIT(A) has made thorough analysis of the income of the assessee project-wise and estimated the gross profit at 12.5% which does not require any interference. Further the Ld. CIT(A) given direction to the reopen the other Assessment Years and recompute the income for the Assessment Years 2009-10 to 2016-17. Thus the grounds raised by the Revenue is devoid of merits and the same is hereby dismissed.

10. In the result, the appeal filed by the Revenue is hereby dismissed.

Order pronounced in the open court on 05-01-2024

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER True Copy
Ahmedabad : Dated 05/01/2024

Sd/-
(T.R. SENTHIL KUMAR)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद