आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ

IN THE INCOME TAX APPELLATE TRIBUNAL,
'' C'' BENCH, AHMEDABAD

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
SHRI TR SENTHIL KUMAR, JUDICIAL MEMBER

आयकर अपील सं**./ITA No. 368/AHD/2020**

निर्धारण वर्ष/Asstt. Year: 2010-2011

The D.C.I.T, Central Circle-1(4), Ahmedabad.	Vs.	M/s Awas Developers, "Agam Buglows" Opp. Subhash Society, Sanand-Kalol Road, Ahmedabad. **PAN: AARFA2587K**

(Applicant)		(Respondent)

Revenue by	:	Shri Ashok Kumar Suthar, Sr. DR
Assessee by	:	Shri Aseem L Thakkar, AR

सुनवाई की तारीख**/Date of Hearing : 24/01/2024**
घोषणा की तारीख **/Date of Pronouncement: 13/03/2024**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Revenue against the order of the Learned Commissioner of Income Tax (Appeals)-5, Ahmedabad, arising in the matter of assessment order passed under s.143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2010-2011.

2. The Revenue has raised following grounds of appeal:

1. On the facts and in the circumstances of the case and in law, the Ld CIT(A) has erred in not treating the status of the assessee as AOP, on the basis of the facts narrated by the AO in the Assessment Order.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs 3,60,00,000/- being unaccounted income on the basis of statement of Shri Ganshyamsinh Vaghela recorded during the course of Survey.

3. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance of Rs.44,06,950/- made u/s 40A (3) of the Act.

4. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs 50,48,500/- being under-statement of closing stock.

5. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs 55,41,000/-being unexplained cash credit u/s 68 of the Act.

6. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) ought to have upheld the order of the A.O.

7. It is, therefore, prayed that the order of the Ld. C IT(A) be set aside and that of the A.O. be restored to the above extent.

3. The Ld. DR at the outset brought to our notice that there is a delay in filing the appeal by the Revenue for 41 days which is falling during the covid-19 period, therefore, the same should be condoned. On the other hand, the Ld. AR did not raise any objection on the condonation of delay in filing the appeal by the Revenue. Accordingly, we condone the delay in filing the appeal by the Revenue in pursuance to the judgment of Hon'ble SC in the case of **Cognizance for Extension of Limitation, In** reported in 125 taxmann.com 151 where it was held as under:

> *2. In cases where the limitation would have expired during the period between 15-3-2020 till 14-3-2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 15-3-2021. In the event the actual balance period of limitation remaining, with effect from 15-3-2021, is greater than 90 days, that longer period shall apply.*

3.1 In view of the above, we condone the delay in filing the appeal by the Revenue and proceed to adjudicate the issue on merit.

4. **The first** issue raised by the Revenue is that the learned CIT(A) erred in not treating the assessee's status as AOP.

5. The facts in brief are that the assessee claimed itself a partnership firm which came into existence as on 1st September 2008 by executing the partnership deed consisting of 4 partners namely Shri Bhanubhai R Vaghela, Shri Ganshayamsingh R Vaghela, Shri Harshadbhai P Udani and Shri Paresh P Udani. During the assessment proceedings in the immediately preceding AY 2009-10, the status of the assessee was held by the AO as AOP instead of partnership as claimed by the assessee. Accordingly, the AO following the finding of the previous year held the status of the assessee as AOP for the year under consideration i.e. AY 2010-11.

6. On appeal by the assessee the learned CIT(A) restored the status of the assessee as a partnership firm by observing as under:

> *The AO has refused registration on various grounds narrated in the assessment order completed for A.Y 2009-10. I have already adjudicated appeal for A.Y 2009-10 cide order dated 12/03/2020 wherein registration to the firm has been granted. In view of the same and also the conditions has stipulated in section 184 of the Act having been complied with. Registration is also granted in the year under appeal, the ground of the appeal stands allowed.*

7. Being aggrieved by the order of the learned CIT(A), the Revenue is in appeal before us.

8. The learned DR before us reiterated the findings contained in the assessment order and accordingly supported the view of the AO.

9. On the other hand, the learned AR submitted that there was valid partnership deed among the partners containing the profit-sharing ratios. As such all the conditions relating to the formation of a partnership deed were duly complied with. The ld. AR vehemently supported the order of the learned CIT-A.

10. We have heard the rival contentions of both the parties and perused the materials available on record. At the time of hearing the Ld. DR has not brought anything contrary to the findings of the Ld. CIT(A). Accordingly, we hold that the

status of the assesee before us is of partnership and not the AOP as alleged by the AO. As such, we uphold the finding of the Ld. CIT(A). Hence, the ground of appeal of the revenue is hereby dismissed.

11. **The next** issue raised by the Revenue is that the learned CIT(A) erred in deleting the addition made by the AO on account of unaccounted income of Rs. 3.60 crores, admitted by Shri Ganshayam Vaghela during survey operation.

12. The assessee was subject to survey proceedings under section 133A of the Act dated 04-03-2010. During the survey, the statement of Shri Ganshayamsingh Vaghela, a partner of the firm was recorded. In the statement, Shri Ganshayamsingh Vaghela in response to question No. 6 explained that the assessee has undertaken a project namely "Agam Bungalows" consisting of 40 Bungalows. 37 Bungalows out of 40 have already been sold on or before the date of the survey and remaining 3 have also been booked. The sale value of a bungalow is Rs. 21.5 Lacs only. Subsequently vide question No. 13, he was confronted with impounded loose paper page No. 21 of annexure A wherein the value of bungalow was shown at Rs. 30.50 lacs. In reply to question No. 13, he admitted that the bungalow has been sold at Rs. 30.50 Lacs but recorded at Rs. 21.5 Lacs only. As such, the balance amount of Rs. 9 Lacs represents on-money. Accordingly, he admitted that total unaccounted income on account of on-money is Rs. 3.6 crore (9 Lacs x 40 bungalow) and he further admitted that the due installment of advance tax on the unaccounted income will be paid by 31st March 2010. However, no such income was offered in the return filed by the assessee as Shri Ganshayamsingh Vaghela has retracted from his statement. However, the AO rejected the contention of the assessee by observing as under:

> *8.1 Subsequently, these admissions during the statements were retracted and in the return of income, no additional income of Rs.3,60,00,000/- has been offered. In this connection, it is pertinent to note that, such retraction is not substantiated by the assessee. On the contrary, the loose papers found showing true value of the property, the sale position as admitted, elearly shows the on-money income earned and offered by the assessee. In order to retract the same, the recourse to has assessee show unsubstantiated cash credits in disguise of booking money, suppressed the value of land and investment therein and also suppressed the construction expenses and thereby closing stock. All these facts have*

duly been discussed in the assessment orders of A.Y.2009-10 and A.Y.2010-11 i.e. the present assessment order. Therefore, I reject the contention of Shri Bhanubhai Vaghela retracting the disclosure as afterthought and unsubstantiated. I also hold that, the disclosure of Rs.3,60,00,000/- made by Shri Ghanshyamsingh Vaghela, was not merely a statement made during the course of survey, but was supported by impounded papers, admitted sale position, etc. Further, as discussed in Par of the order, the assessee's books of accounts have been treated as not correctly maintained, and therefore, true income cannot be deduced therefrom. Under the circumstances, the Assessing Officer is empowered to estimate the income of the assessee on the basis of the material available on the record.

8.2 Thus, considering the overall facts and circumstances of the case as well as material available on the record, I hold that the assessee has earned on money income as admitted in his statement and supported by impounded material to the tune of Rs.3,60,00,000/- during the financial year relevant to assessment year under consideration and add the same to the total income of the assessee.

13. The aggrieved assessee preferred an appeal before the learned CIT(A) who deleted the addition made by the AO by observing as under:

I have considered the observations in the assessment order and the submissions filed by the appellant. The AO has made an addition on the basis of seized loose paper page 21 of Annexure A impounded during the course of survey proceedings. The same is placed on page 17 of the PB. It has been presumed that the sale price of the residential bungalow is Rs.21.50lacs as against which Rs.30.50lacs has been recovered from the client. The difference of Rs.9,00,000/- is the unaccounted receipt members each bungalow. Since there are 40 bungalows in the aforesaid scheme there is an undisclosed income of to the extent of Rs.3.60 lacs. The AO has also placed reliance on the statement of Shri Ghanshyamsinh Vaghela recorded on 04.03.2010, it has been placed on page 18 to 24 of the PB. The AR also drew attention to question no. 12 and 13 of the statement recorded u/s 133A of the Act. The same are appearing on page 21 & 22 of the PB. The appellant further submitted that Shri Ghanshyamsinh Vaghela was not fully conversant with the account and financial matters, Shri Bhanubhai Vaghela, brother of the Ghanshyamsinh Vaghela and partner of Avas Developers was looking after the accounts of the firm. In his statement recorded u/s 131 of the Act on 24.05.2010 he has clarified the misunderstanding. The copy of his statement has been placed on page 25 to 45 of the PB. Particular attention was drawn to reply to question no. 23 & 24 of his statement. The relevant replies appearing on page 39 & 40 of the PB. Shri Bhanubhai Vaghela in reply to question no.24 had stated that he was not agreeable to the disclosure made by Shri Ghanshyambhai Vaghela with reference to page 21 of Annexure A/1. He had clarified that we have not taken any on money if Rs.9,00,000/- for residential unit, he had also clarified that the amount of Rs.7.50 lacs as appearing in the loose papers is In fact the schedule of payment which comprises of the total consideration of Rs.22.50 lacs of residential unit. This fact was also intimated to the AO vide letter dated 24.02.2013 furnished during the course of assessment proceedings. The copy of the reply dated 24.02.2013 has been placed on page 73 to 99 of the PB. Particular attention is drawn to page 88 & 89 of the PB where specific reply to this query was furnished during the course of assessment proceedings. The AR also drew attention to the written submissions dated 25.01.2013 furnished during the course of assessment proceedings which have been placed on page 66 to 72 of the PB. He drew particular attention to page 68 of the PB. The AR also drew attention to the fact that the AO in order to verify the fact of any on money having been collected correspondence directly with the members of the scheme was undertaken by direct inquiry by issuing letter u/s 133(6) of the Act. However, it was contended that the

outcome of such inquiry was not noted in the assessment order and therefore it could be safely presumed that the inquiry had not resulted in any finding which was an adverse to the assessee firm. The AR again referred to the written submissions filed on 25.08.2014 which referred to the letters replied by various persons to whose letters u/s 133(6) of the Act had been issued. The AR also referred to the digital data which was in the form of excel sheets. He found during the course of survey proceedings which indicated the project receipt of the entire scheme. This was also in agreement with the receipt of Rs.22.5lacs and not 31.50 lacs including Rs.9 lac alleged to have been received by way of on money. The AR drew attention to the submissions furnished during the course of assessment hearing vide letter dated 25.01.2013 which is placed on page 66 to 72 of the PB. Particular attention was drawn to Para 2 of the aforesaid submissions which is available on page 67 of the PB. Therefore, it was contended that the sales shown by the assessee firm was also in agreement with the project receipts as found from the excel sheet during the course of survey proceedings. This fact has also been clarified in the letter dated 24.02.2013 furnished during the course of assessment proceedings and placed on page 73 to 91 of the PB. Particular reference has been drawn to page 78 & 79 of the PB. It was therefore extensively argued that the statement recorded y/s 133A of the Act of Shri Ghanshyambhai Vaghela had no evidentiary value in light of the various decisions cited supra. Furthermore, Shri Ghanshyambhai Vaghela, brother and partner of assessee firm had retracted the statement of Shri Ghanshyambhai Vaghela and explained the complete facts in his subsequent statement recorded u/s 131 of the Act. Thereafter the department had not cross examined Shri Ghanshyambhai Vaghela either in the post survey proceedings or during the course of assessment proceedings and therefore it could be safely presumed that the deposition of Shri Bhanubhai Vaghela was acceptable. This apart the project receipts found from the statement impounded during the course of survey proceedings matched with the actual receipts declared by the assessee firm. Even the inquiries conducted by the AO did not reveal any information by which it could be inferred that the assessee firm had taken on money of Rs. 9 lacs. It was therefore submitted that the entire additions have come to be made only on the basis of the statement recorded of Shri Ghanshyambhai Vaghela u/s 133A of the Act. Merely making additions on the basis of the statement recorded u/s 133A is not legally permissible. The AO has to bring something on record to disprove the contentions made by the assessee firm during the course of assessment/appellant proceedings. The AO has not done brought material facts on record to contradict the contentions made by the appellant firm. It is a trite and settled position of law that additions merely on the basis of the statement without any material or evidence would not be tenable. This view is fortified by the following decisions.

i.CIT v S.Khader Khan & Sons (2012) 210 Taxmann 248 (SC)
ii.CIT v P.Balasubramaniam (2013) 354 ITR 116 (Mad.)
iii. CIT V Dhingra Metal Works (2010) 328 ITR 384 (Del.)
iv.ITO v Vijay Kumar Kesar (2010) 327 ITR 497 (Chattisgarh)
V.Ashok Manilal Thakkar v ACIT (2005) 97 ITD 361 (Ahd.)

In view of the above facts and ratio laid down in case laws (supra), the addition made by the AO is hereby deleted. The ground no.4 of appeal is allowed.

14. Being aggrieved by the order of the learned CIT(A), the Revenue is in appeal before us.

15. The learned DR before us reiterated the findings contained in the assessment order and accordingly supported the view of the AO.

16. On the other hand, the learned AR before us filed a paper book running from pages 1 to 64 and vehemently supported the order of the learned CIT-A.

17. We have heard the rival contentions of both the parties and perused the materials available on record. From the finding of the AO and learned CIT(A), we note that the assessee was subject to survey proceedings under section 133A of the Act dated 04-03-2010. During the survey proceedings, certain loose papers being page 21 of annexure A was impounded and the same was confronted to one of the partners namely Shri Ghanshayamsinh Vaghela while recording his statement under section 133A of the Act. Shri Ghanshyamsinh Vaghela, based on impugned loose paper admitted the receipt of Rs. 3.60 crore, being on money received against the sale of bungalow. Subsequently, the statement of another partner namely Shri Bhanubhai Vaghela was recorded under section 131 of the Act dated 24-05-2010 in post survey proceedings. Shri Bhanubhai Vaghela who claimed to be looking after the accounts and financial matters of the firm vide question number 23 and 24 retracted from the disclosure made by Shri Ghnashayam Vaghela and explained that amount shown in impounded loose paper represent payment schedule and as such the amount of Rs. 7.5 Lakh noted on the impounded sheet is part of consideration of Rs. 22.5 lakh disclosed in the books. The AO in the assessment order without mentioning the explanation of the Shri Bhanubhai Vaghela or without finding any defect in the explanation given by Shri Bhanubhai Vaghela proceeded to make addition based on disclosure made by Shri Ghnashayam Vaghela during the survey proceedings. As such, the AO as per his convenience picked up the statement of Shri Ghnashayam Vaghela recorded during the course of survey but ignored the statement of another partner Shri Bhanubhai Vaghela recorded under section 131(1) of the Act in which he has explained the noting of impounded loose sheet. It is also pertinent to note that it has been settled by various case law that the statement recorded during the

course of survey under the provision of section 133A of the Act does not carry any evidentiary value. However, the AO chose to rely on the statement recorded under section 133A of the Act and at the same time ignored the statement recorded under section 131(1) of the Act which cannot be said to be justified.

17.1 Moving ahead, there was loose sheet found during the course of the survey, but question arise can the assessee be made subject to tax liability merely on the basis of loose sheet/paper impounded during the course of survey. The provisions of section 292C of the Act provide a presumption that the documents impounded during survey from the premises of the assessee belongs to the assessee and the contents of the same are true. However, such presumption is rebuttable and assessee on basis of evidence can rebut the same. Even though the provision of section 292C of the Act provides to the assessing authority to presume that the documents belong to the assessee and contents in the documents found from the possession of the assessee are true but that does not mean that such documents shall be brought under the tax net. To tax income based on loose sheets, it is necessary to bring finding on record that noting made in such documents are actual transactions which has been materialized leading to income in the hand of the assessee and such income has been unaccounted or unexplained by the assessee. In the case of the present assessee, no such material or finding is available on record even the AO has made external verification from the buyers of the bungalow by issuing notices under section 133(6) of the Act. As such, the AO has not brought any corroborative material to hold that the assessee has received on money except the statement of Shri Ghansyam Vaghel recorded under section 133A of the Act which does not carry evidentiary value. At this point of time, it is important to mention that the Higher Judicial forum has time and again held that no addition merely on the basis of noting in diary/loose paper etc. can be made unless other corroborative materials brought on record by the revenue to hold that the assessee earned unaccounted income. In this regard reference can be made

to judgment of Hon'ble Gujarat High Court in the case of CIT vs. Maulikkumar K Shah reported in 307 ITR 137 wherein it was held that:

> *"Notings in the seized diary found from the premises were the only material on the basis of which the Assessing Officer had made the impugned additions. The Assessing Officer had not brought any corroborative material on record to prove that such sales were made and 'on-money' was received by the assessee outside the books of account. The Assessing Officer had not examined any purchaser to whom the sales of shops were effected. Onus heavily lay on the revenue to prove with corroborative evidence that the entries in the seized diary actually represented the sales made by the assessee. Such onus had not been discharged by the revenue. Mere entries in the seized material were not sufficient to prove that the assessee had indulged in such a transaction.*
> *The inference of the Assessing Officer that the assessee has received 'on-money', was merely based on suspicion and surmises and there was no material whatsoever to support the conclusion of the Assessing Officer that the assessee had in fact received any 'on-money'. The addition as made by the Assessing Officer being based on mere presumptions and assumptions and without any corroborative evidence, could not be sustained.*

17.2 We also draw support and guidance from the order of Mumbai ITAT in case of DCIT vs. Padmasree DR D.Y. Patil University in ITA No. 3264 to 3668/Mum/2022 where with respect to evidentiary value of loose paper found in the course of search was held as under:

> *30. In the decision rendered by Hon'ble Supreme Court in the case of Common Cause (a registered society) reported in 394 ITR 220, it was held that the documents recovered by the authorities will have no evidentiary value unless it is corroborated with any other independent evidence, i.e., uncorroborated loose papers found in the search cannot be taken as sole basis for determination of undisclosed income. The Hon'ble Supreme Court has held in the case of CBI vs. V C Shukla (supra) that even correct and authentic entries in books of account cannot fix a liability upon a person without independent evidence of their trustworthiness. We notice that the Hon'ble Supreme Court has dealt with the entries made in a diary which was considered to be regular books of account and held that it cannot be relied upon. However, in the instant case, the evidences relied upon by the AO are certain abstract statements maintained by the employees in their respective laptops. Hence, in our view, it cannot be said that those uncorroborated materials have any evidentiary value viz-a-vis the assessee unless any other independent material is brought on record to prove the trustworthiness of those abstract information.*

17.3 In view of the above elaborated discussion, we do not find any infirmity in the finding of the learned CIT(A), therefore we uphold the same. Hence the ground of appeal raised by the revenue is hereby dismissed.

18. **The other** issues raised by the Revenue in ground Nos. 5 & 6 are that the learned CIT(A) erred in deleting the addition of Rs. 44,06,950/- and Rs. 50,48,500

made under section 40A(3) of the Act and on account of understatement of closing stock.

19. The AO during the assessment proceedings found that the capital account of one of the partners namely Shri Ganshayamsingh Vaghela was showing debit balance in the books of the assessee as on 31st March 2010 at ₹ 16,68,174.00 only. On perusal of the capital account, the AO found that there were shown various drawings by the partner. However, the AO disbelieved the drawings shown by the partner of the firm. The reason for the disbelief was that there was a cash book seized during the survey bearing as annexure A6 containing the financial transactions for the period from 27 November 2009 to 18 February 2010. Such cash book was containing various transactions which are classified as under:

S. No.	Particulars	Amount (Rs.)
1.	Withdrawal by Bhanu bhai A/c	8,50,000.00
2.	Expenses for Awas Construction	50,48,500.00
3.	Awas Loan (UPAD) A/c	25,30,400.00

19.1 As per the AO, the expenses shown in the seized cash book about ₹ 50,48,500.00 classified under the head expenses for Awas Construction are the actual expenditure incurred by the assessee firm in cash, but the assessee has shown the same as withdrawal by the partner of the firm. According to the AO, the assessee by doing so has reduced the work in progress by diverting the expenses discussed above. Accordingly, the AO enhanced the work in progress by the amount of ₹ 50,48,500.00 which eventually has resulted increase in the income of the assessee. Thus, the AO added the sum of ₹ 50,18,500.00 to the total income of the assessee.

19.2 The AO further found that out of such expenses of ₹ 50,18,500.00, a sum of Rs. 44,06,950.00 represents the cash expenses incurred in contravention of the provisions of section 40A(3) of the Act and therefore the same needs to be

disallowed. As such, the AO made the addition of Rs. 44,06,950.00 to the total income of the assessee.

20. Aggrieved Assessee preferred an appeal to the ld. CIT-A.

21. The assessee before the learned CIT-A submitted that the amount of ₹ 50,48,500 is the withdrawal of money by the partner which has been duly recorded in the accounts and therefore there is no question for treating the same as the expenditure of the assessee. As such, the partner of the firm was carrying out the activity for the project of the firm and therefore the expenditure incurred by such partner on behalf of the firm has been shown as withdrawal in the capital account of the partner. As such the invoices were raised by the partner of the firm in the year under consideration in the name of the firm which were duly recorded in the books of accounts. Therefore, no further addition can be made in the hands of the assessee on the presumption that the firm has incurred expenses which were not disclosed in the accounts.

21.1 Likewise, the assessee submitted that once it is established that there was no expenditure incurred by the assessee as alleged by the AO for ₹ 50,48,500.00, the question of making the disallowance in the hands of the firm for the expenses incurred in contravention to the provisions of section 40A(3) of the Act does not arise.

22. The ld. CIT-A after considering the submission of the assessee and the assessment order has deleted the addition made by the AO by observing as under:

> **Deletion of the addition of the expenditure disallowed under section 40A(3) of the Act.**
>
> *I have considered the observations of the assessing officer submissions filed by the assessee firm. The AO has proceeded to make a disallowance u/s 40A(3) with respect to cash payments in violation of section 40A(3) of the Act amounting Rs.44,06,950/-, The AO has referred to the cash expenses of construction not reflected in the books of accounts amounting to Rs.50,48,560/-. The details of such expenditure in violation of section 40A(3) of the Act has been provided In page 9 to 11 of the assessment order. The assessee firm*

has contended that the amount of Rs.50,48,560/- is indicating the withdrawals made by the partner of Shri Ghanshyambhai Vaghela in his capital account. These are not cash expenses incurred by the assessee firm and this fact has also been noted by the AO in page 9 of the assessment order itself. I agree with the contention of the AR that disallowance of income expenditure can be made only if deduction of the same claimed. Where the expenditure itself has not been claimed by way of deduction the question of making any disallowance of the same would not arise. The AR also drew attention to the fact that in fact out of these withdrawals made by Shri Ghanshyambhai Vaghela, the same had been utilized by him for making cash payments in his Proprietary concern M/s Avas Construction. The copy of the tax audit report of Avas Construction has been placed on page 51 to 65 of the PB. The AR also drew attention to page 58 of the PB which indicated the disallowance made u/s 40A(3) in the case Shri of Ghanshyambhai Vaghela. Attention was also drawn to page 47 & 48 which included acknowledgement of the return of income and computation of income of Shri Ghanshyambhai Vaghela for A.Y.2010-11. The perusal of the same reveal on disallowance of Rs.47,65,449/- u/s 40A(3) of the Act had been made while filing his return of income. Furthermore, various payments was noted in the assessment order were also identified as cash payments in violation of section 40A(3) of the Act in the case of Shri Ghanshyambhai Vaghela. The facts need to be corroborated so as to avoid over lapping to the disadvantage of appellant. In view of the above facts that no deduction has been claimed with respect to the payment of Rs.50,48,560/- by the assessee firm and also the same expenditure claimed by Shri Ghanshyambhai Vaghela, the addition so made by the AO is hereby deleted. Ground no.5 is allowed.

Deletion of the addition to WIP.

I have perused the various documents placed before me and convinced by the explanation furnished by the AR. It has been contended that the amount of Rs.50,48,500/- is only a withdrawal of Shri Ghanshyambhai Vaghela, Proprietor of Avas Construction and duly reflected in his capital account which is placed on pg.14 of the PB. There is a total withdrawal of Rs.54,70,847/- which includes the amount of Rs.50,48,500/- which is the subject matter of addition. Therefore, I am convinced that no such expenditure has been incurred by the firm and the same is withdrawals made from the firm. Therefore, the question of unaccounted expenditure as alleged by the AO would not arise. Further, the AR has also demonstrated that out of suchwithdrawals which constitute receipt in the hands of Shri Ghanshyambhai Vaghela, business related expenditure has been made by him in his individual capacity and such cash payments have already come to be disallowed in his personal hands. In support of this contention he has also placed on record the acknowledgement of the return of income and computation of income on page 47 to 50 of the PB. The perusal of the same would reveal the disallowance of Rs.47,65,449/- u/s. 40A(3) which is the cash payment made by Shri Ghanshyambhai Vaghela out of Rs.50,48,500/- received by him from the appellant firm. The holistic approach to the case is desirable to dispense justice in this case. Under such circumstances, the impugned addition made by the AO is hereby deleted. Ground no.6 is allowed.

23. Being aggrieved by the order of the ld. CIT-A, the Revenue is in appeal before us.

24. The learned DR before us reiterated the findings contained in the assessment order and accordingly supported the view of the AO.

25. On the other hand, the learned AR before us vehemently supported the order of the learned CIT-A.

26. We have heard the rival contentions of both the parties and perused the materials available on record. The 1st issue before us arises for our consideration whether the expenses recorded in the seized cash book amounting to ₹ 50,48,500.00 represents the expenditure incurred by the assessee. From the preceding discussion, we note that the source of expenditure in the seized cash book for ₹ 50,48,500.00 has nowhere been doubted by the assessing officer. As such, the issue before us revolves whether such expenditure had been incurred by the assessee or it has been incurred by the partner of the firm in his proprietary concern. As per the AO, the impugned expenditures were incurred by the assessee which were not disclosed in the books of accounts whereas the assessee claims that these expenditures were incurred by M/s Awas construction, a proprietary concern of partner namely Shri Ghansyam Vaghela to whom work contract has been given by the assessee. According to the revenue, if such expenditure had been incurred by the firm, then the value of the closing stock should have been enhanced by the amount of impugned expenditure discussed above. However, we find certain fallacy in the observation of the AO as detailed below:

i. The value of the closing work in progress becomes the opening value of the work in progress in the next year. Admittedly, the profit for the year under consideration will enhance by the amount of ₹ 50,48,500 but at the same time the profit of the next year will come down by the same amount. Therefore, the entire exercise carried out by the AO is going to be tax neutral except shifting the profit from one year to another year. As such, there is no ambiguity or effect as far as the income of the assessee is concerned, if seen for the overall period.

ii. The partner of the firm has raised the invoice for the sum of ₹ 72 lakhs which has been duly admitted by the revenue. Certainly, the amount of invoice raised by the partner of the firm exceeds the amount withdrawn from the firm. Therefore, apparently it appears that the partner has incurred the expenses while executing the work contract given by the assessee firm after withdrawing the money from the firm. This aspect has also not been doubted by the AO.

26.1 If we go by the version of the AO, it is the onus upon the revenue to demonstrate that the expenditure in dispute has been incurred over and above the expenditure already shown by the assessee for ₹72 lakhs. But such onus has not been discharged by the revenue. Accordingly, we are not inclined to interfere in the finding of the ld. CIT-A.

26.2 Moving further, once it is established that the expenditure has been incurred by the partner of the firm and the assessee has not claimed such expenditure in its books of accounts, the question of making the disallowance under the provisions of section 40A(3) of the Act does not arise. Accordingly, we hold that no disallowance can be made under section 40(A3) of the Act in the given facts and circumstances. Hence, both the grounds of appeal of the Revenue are hereby dismissed.

27. The last issue raised by the revenue in ground No. 5 is that the Ld. CIT(A) erred in deleting the addition made by the AO for Rs. 55,41,000/- under the provisions of section 68 of the Act.

27.1 The assessee in its balance-sheet as on 31/03/2010 has shown certain booking amount against the name of certain parties amounting to Rs. 54,41,000/- only. The necessary details of the parties along with the amount is appearing on page 15 of the assessment order. However, the AO found that the assessee vide letter dated 24/02/2013 has furnished the list of the members to whom the

bungalows were allocated. The AO further found that the list furnished by the assessee dated 24/02/2013, is not matching with the names appearing in the balance-sheet as on 31/03/2010 under the head banking amount. Accordingly, the AO opined that such booking amount shown in the balance sheet represents the unexplained cash credit u/s 68 of the Act. The AO in holding so also drew the strength from the fact as narrated below.

I. There was an investment in the land amounting to Rs. 2,12,43,435/- by various persons which came on the surface during the survey operation. As per the AO, the assessee to justify the investment in land to the tune of Rs. 55,41,000/- has shown bogus booking amount in the name of bogus parties.

II. The approval to the assessee for Agam Bunglow was granted in February 2010 which evidences that there was no possibility for having booking amount from members as on 31/03/2010.

27.2 In view of the above, the AO believed that such banking amount is nothing but unaccounted cash credit u/s 68 of the Act. Furthermore, the assesee has also not filed necessary documents justifying the identity, genuineness of transaction and credit worthiness of the parties. Thus, the AO treated the sum of Rs. 55,51,000/- as unaccounted cash credit u/s 68 of the Act and added to the total income of the assessee.

28. Aggrieved assessee preferred an appeal to the Ld. CIT(A). The assessee before the Ld. CIT(A) submitted that there was a detailed and complete reconciliation statement furnished explaining the mismatch in the name of the members to whom bungalows were allocated in the Annexure 'B'.

28.1 The assesee also contented that during the survey proceedings the document were impounded wherein the name of the member of the bungalows

were appearing which was matching with the names appearing in the balance-sheet. Such impounded documents cannot be alleged as fabricated names.

28.2 The assessee further submitted there were certain members whose bookings were cancelled and therefore the situation of mismatch in the names of the party arose as observed by the AO. But the AO did not raise any query to the assesee about mismatch of the names and therefore such discrepancy was not explained. Further, the assessee in support of its contention has filed the affidavit of the retiring members explaining that the money received from these members were returned. The assesee further submitted that all the necessary details about the members were furnished to the AO which was also confirmed by the AO by issuing notice u/s 133(6) of the Act. The Ld. CIT(A), after considering the submission of the assesee has deleted the addition made by the AO by observing as under:

> *I have perused the written submissions filed by the AR. It has been contended that the difference of names as appearing on the table which has been annexed as "Annexure B ^ prime prime to the order is on account of the modification recommended by the original member with regards the booking made or such other reasons as indicated in the statement placed on pg.92 to 94 of the PB. This fact remains undisputed. It is also a fact that the AO had neither proposed nor expressed his intention to make any additions on account of such name modifications during the course of assessment proceedings. In case where there is a cancelation of booking subsequent to 31.12.2009 i.e. the records with which the comparison is made appropriate documentary evidences such as affidavit of the concerned members have also been placed on record. Therefore, detailed explanation with regards each individual member has been furnished which is verifiable.*
>
> *Further the fact can also not be ignored that such credits have ultimately been transferred to the sales account and already offered to tax by the appellant during the currency of the scheme. Therefore, to treat these amounts which have ultimately been translated as sales receipts and which have been offered to tax as unexplained cash credits would tantamount to double taxation of the same amounts which would not be legally justifiable proposition.*
>
> *During the course of appellate proceedings, the appellant vide letter dated 25.08.2014 has stated that direct inquiries were also conducted by the AO with the members of the scheme by issuance of letter u/s. 133(6) of the Act. The outcome ofsuch inquiry has not been taken into cognizance while completing the assessment. Response of the members to the inquiry u/s 133(6) of the Act has also been placed on record wherein they have affirmed the placing of booking money with the appellant which is in agreement with the books of accounts/seized records. This clearly clinches the issue in favor of the appellant that booking money received by the appellant has been duly confirmed by the respective members in the course of inquires conducted during the course of assessment proceedings*

and recorded in the books of accounts. Furthermore, profits on such receipts have also been offered as income. The reason for change of name has been explained and the same is uncontroverted. In view of the same I agree with the contention of the AR and thereby direct the addition to be deleted. Ground no.7 is allowed.

29. Being aggrieved by the order of the Ld. CIT(A), the Revenue is in appeal before us.

29.1 Both the Ld. DR and the Ld. AR before us vehemently supported the order of the authorities below.

30. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, we note certain undisputed facts as detailed below:

i. The discrepancy observed by the AO with respect to the name of the members of the society was duly explained in the statement placed on pages 19 to 294 of the paper book filed before the ld. CIT-A.

ii. There were also found loose papers during the survey operation wherein the name of the members was matching with the names appearing in the balance-sheet as on 31/03/2010. Furthermore, such mismatch in the name of the members as observed by the AO was not confronted to the assessee for the explanation.

iii. There were certain deals which got cancelled and the assessee has returned money to those parties. The assessee has furnished affidavit of such parties. There was no show-cause notice issued to the members where mismatch was observed by the AO in the name of the members.

iv. There were inquiries conducted from the new members u/s 133(6) of the Act, and no discrepancy was pointed out in the booking amount which has been offered to tax by the assessee in the later years and therefore if such amount is treated as unexplained cash credit u/s 68 of the

Act, the same will amount to double addition which is not desirable under the provision of law until and unless the situation warrants so.

30.1 All the above facts narrated about can be verified from the findings of the Ld. CIT(A) against which the Ld. DR has not brought any contrary argument. Therefore, we do not find any infirmity in the order of the Ld. CIT(A). Accordingly, the ground of appeal raised by the Revenue is hereby dismissed.

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

Order pronounced in the Court on 13/03/2024 at Ahmedabad.

Sd/-	**Sd/-**
(T R SENTHIL KUMAR)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 13/03/2024

Manish