

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

**BEFORE SHRI BR BASKARAN, AM AND SHRI ABY T. VARKEY, JM**

आयकर अपील सं/ I.T.A. No.3436/Mum/2023

(निर्धारण वर्ष / Assessment Year: 2021-22)

Greenworld Construction Pvt. Ltd. Shop No. 101, 1 <sup>st</sup> Floor, Raja Ram Mohan Roy Road, Orion Bldg, Girgaon, Grant Road, Mumbai	<b>बनाम/</b> Vs.	DCIT, Central Circle-4(2) 19 <sup>th</sup> Floor, Air India Building, Nariman Point, Mumbai-400021.
<b>स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAFCG4251K</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Mani Jain, FCA
Revenue by:	Smt Sanyogita Nagpal, CIT

सुनवाई की तारीख / Date of Hearing: 08/04/2024

घोषणा की तारीख /Date of Pronouncement: 07/06/2024

**आदेश / ORDER**

**PER ABY T. VARKEY, JM:**

This is an appeal preferred by the assessee company against the order of the Learned Commissioner of Income Tax (Appeals) -52, Mumbai [ in short 'ld. CIT(A)'] dated 31.07.2023 for AY. 2021-22.

2. The only grievance of the assessee in this appeal is against the addition of Rs.95,38,000/- on account of on-monies received during the year. The facts relating to this issue are that, in the course of search, a whatsapp chat between Mr. Anuj Sabhlok and Mr. Ashwin Salian was found. It was noted that Mr. Anuj Sabhlok belonged to the sales and marketing team of M/s Rubberwala Housing and Infrastructure Ltd. The relevant screenshot of the chat, is noted to have been reproduced by the AO at Para 5.5 (Page 5) of the assessment



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order. The relevant information contained in the said whatsapp chat as taken note of by the AO is noted to be as under :-

Relevant information reproduced in text form
Flat No. B-2104
Source – Direct (reference existing customer)
Tc – 21825000/-
Furniture – 9536838/-
Time – in 3 days from today
Agreement cost – 12288162/-
Within 15 days maximum from today

3. According to the AO, Mr. Anuj Sabhlok had stated that the word '*furniture*' used in the above chat denoted cash taken by the Rubberwala group as on-money. Mr. Sabhlok had explained that, he was asking for cash component against sale of flat No. B-2104 of 'Nakoda Heights' to which Mr. Salian had responded with the figure of 95.38 which meant Rs.95.38 lacs. Mr. Sabhlok is noted to have confirmed that the said flat had been sold to Mr. Gal Singh. The AO noted that, the statement of Shri Anuj Sabhlok had been confronted to Mr. Shaikh who had stated that, the project 'Nakoda Heights' was not owned by the Rubberwala Group but they were working in capacity of a contractor. Mr. Shaikh is noted to have explained that, initially, there was an understanding with the owner of the project, M/s Royal Developers that the assessee would get some constructed units in lieu of the construction work done by it for M/s Royal Developers but later on such understanding had changed and that the assessee only acted as



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a contractor and did not sell any units in the said project. However, according to AO, Mr. Shaikh was unable to substantiate his averments. In the course of assessment, the AO however is noted to have made enquiry u/s 133(6) from the Owner & Developer, M/s Royal Developers of the project 'Nakoda Heights' to which this noting pertained. It is noted that M/s Royal Developers had confirmed the sale of unit B-2104 to Mr. Gal Singh. The AO was of the view that, this material fact corroborated the noting found in the chat and hence show caused the assessee to explain as to why the on-monies of Rs.95,38,000/- found mentioned in the chat should not be assessed to tax in its hands. The assessee, in response explained that, the chat which related to project namely 'Nakoda Heights' had been developed, marketed and sold by M/s Royal Developers and that the assessee was only a contractor for the development of 18<sup>th</sup> to 22<sup>nd</sup> floor of the said project. According to assessee therefore, the purported notings of on-monies could only relate to the owner of the project i.e. M/s Royal Developers who had sold the unit and not the assessee which was only a contractor. The assessee also submitted the retraction affidavit of Mr. Sabhlok. The AO however rejected the explanation put forth by the assessee and held the retraction of Mr. Sabhlok to be an after-thought. Accordingly, the AO added the impugned sum of Rs.95,38,000/- by way of unaccounted income of the assessee. On appeal, the Ld. CIT(A) confirmed the action of the AO. Being aggrieved by the orders of lower authorities, the assessee is now in appeal before us.



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4. We have heard both the parties and perused the material placed before us. The main thrust of the Revenue's case was that the addition made by the AO on account of on-monies was justified as it was made on the basis of statement of Mr. Anuj Sabhlok, employee of Rubberwala Group recorded in the course of search u/s 132(4) of the Act, which is an important piece of evidence in itself and that their subsequent retraction, being an afterthought, was of no relevance. In order to adjudicate this contention, it is first relevant to examine the extant provisions of Section 132(4) of the Act, which reads as follows:

“(4) The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act.

Explanation.—For the removal of doubts, it is hereby declared that the examination of any person under this sub-section may be not merely in respect of any books of account, other documents or assets found as a result of the search, but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act.”



5. From a bare reading of the aforesaid provision, it is noted that Section 132(4) of the Act empowers the authorized officer to examine on oath any person who is found to be in possession or control of any books of account, documents, money etc. Such a statement made by that person may thereafter be used in *evidence* in any proceedings under the Act. *Evidence* is a mode or means to prove a fact-in-issue. Statement is an oral testimony of relevant fact; and an admission of a fact- in-issue is an important piece of evidence, provided it has been voluntarily given without any inducement, promise, threat or coercion. Once a statement recorded of a person who is in possession of any valuable thing or control of books found during search then it can be used as evidence in any proceedings under the Act and the presumption would be that it has been given by that person voluntarily. The burden to prove that the statement was not correct or that it was not voluntarily obtained, but due to threat, coercion, promise etc, is upon the maker of statement. In this context, the Hon'ble Apex Court in the case of **Pullengole Rubber Produce Co. Ltd. v. State of Kerala (91 ITR 18)** has held that although an admission is an extremely important piece of evidence but it cannot be said that it is conclusive. It was held that, it is open to the assessee who made the admission to show that it is incorrect. A statement is only a piece of evidence, and the weight to be attached to it must depend on the circumstances in which it is made. It is open for the assessee to show it to be erroneous or untrue. Hence, the position which emerges is that a statement u/s 132(4) of the Act by itself cannot be reason enough to



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justify an addition. If the assessee is able to show that the facts admitted by him was purely based on wrong assumption of facts and able to adduce evidence/material to show that he was wrong on the facts he admitted. So when an admission u/s 132(4) of the Act has been retracted on the aforesaid reasons, then the AO should cross-examine the person again to ascertain the correct facts. The AO ought to conduct proper investigation into the affairs of the assessee and gather corroborative material which would negate such retraction and prove that the facts admitted originally is correct and thus retraction can be discarded.

6. In view of the above position of law, we now proceed to examine the facts on the present case. It is noted that the impugned addition on account of on-monies emanated from the statement of Mr. Anuj Sabhlok. He is noted to have admitted in his statement that the Flat No. B-2104 at Project 'Nakoda Heights' was sold to Mr. Gal Singh and in connection therewith on-monies of Rs.95,38,000/- was received by the Rubberwala Group. Based on his statement, the AO is noted to have enquired from M/s Royal Developers who was the Owner & Developer of the said project. As noted from the material placed before us, M/s Royal Developers had confirmed the sale of Flat No. B-2104 at Project 'Nakoda Heights' to Mr. Gal Singh. The Ld.AR has rightly pointed out that, this contemporaneous fact showed that the flat was sold by the Owner of the Project i.e. M/s Royal Developer and not the assessee. From the facts placed before us, it is not in dispute



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that the assessee was only a contractor in the Project 'Nakoda Heights' wherein it was engaged to construct and develop 18<sup>th</sup> to 22<sup>nd</sup> floor. It is nobody's case that the assessee had undertaken the work on area-sharing basis or that M/s Royal Developers had allotted units/spaces to the assessee in lieu of construction inter alia including Flat No. B-2104. Upon query by this Bench, the Ld. AR confirmed that no revenues i.e. the cheque component qua the Flat No. B-2104 had been booked by way of revenues by the assessee contractor and this admitted factual position was not controverted by the Revenue. The Ld. AR explained that, Mr. Anuj Sabhlok was the marketing member of Rubberwala group and that he may have assisted M/s Royal Developers to sell their units and that he has mistakenly named the assessee instead of M/s Royal Developers in his statement. It is also noted by us that, Mr. Shaikh in the post search enquiries had also clarified this position and had clearly averred that the assessee was only the contractor and therefore understandably the units could not have been sold by the assessee but only by the Owner & Developer of Project 'Nakoda Heights' i.e. M/s Royal Developers. The relevant statement of Mr. Shaikh, which is relevant to the impugned issue, is as follows :-

"Q.32.During the course of search proceedings of group companies, the statement u/s 132(4) of the Income Tax Act, 1961 was taken on 20.03.2021 at the premises "Rubberwala House" Dr. A R Nair Road, next to police station, Agripada, Mumbai and in answer to the Q.61 you stated that "Sir, I will be able to



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comment on this statement only after looking into books of account and cash flow of the project. Hence the explanation w.r.t. contents of the statement shall be submitted in due course of the time". Till today no explanation is filed now once again the same is shown to you kindly offer your comment.

Ans. Sir I have gone through the statement given by Mr. Anuj Sabhlok and would like to clarify here that the project "Nakoda Heights" is being built by us in the capacity of contractor. In addition to the same I would like to clarify here that initially we had understanding with the owner of the project that we will get some constructed units in lieu of construction work done by us on contractor basis but due to some business constraint the understanding was changed and agreed by both the parties that they will pay as per agreed value between us.

Q.33. During the course of search proceedings of group companies, the statement u/s 132(4) of the Income Tax Act, 1961 was taken on 17.03.2021 and in answer to the Q.30 and Q.33 you stated that "Ma'am, although the project "Nakoda Heights" is being built in the capacity of contractor by M/s Green Wall Constructions Pvt Ltd, I will have to look into the Books of Accounts and cash flows of my various entities to comment on the pen drive in question". Till today you have not furnished any reply in this respect therefore it is treated that you have no explanation to furnish in this respect and cash amounting to Rs.82,33,285/- mentioned in the excel sheet for sale of flat to 'PRADANYAKISHOREKAKADE- Flat no.1902' should not be treated as your unaccounted income in the case of M/s Green World Constructions Pvt Ltd? Please comment.



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Ans. Sir, in reply to answers above I have already elaborated the circumstances for noncompliance from my side and request you to treat the reasons listed above as reasonable cause for the delay in replying and condones the delay on my part.

Further I would like to state that we are doing work as contractor for 'Nakoda heights' building and in lieu of the work initially as per understanding in the said deal in consideration of our construction activity we would have to receive some flats and on the same understanding we plan to start selling our share but alter some time the understanding for receiving flats were got cancelled. Now after cancellation of the understanding we cannot sale the flats in the project called "Nakoda Heights" therefore the deal which is mentioned at the excel sheet annexed as Annexure 3 to my statement dated 17.03.2021 is got cancelled and never materialised and amount mentioned in the said sheet were never received by us.

In view of the submission, I request you to not to add any unaccounted income in the case of M/s Green World Constructions Pvt Ltd as the deal mentioned in the Annexure 3 of my statement.”

**7.** Having regard to the above discussed facts and evidences brought on record, we find force in the submissions of the Ld. AR that, the statement given by Mr. Anuj Sabhlok that on-monies on sale of unit B-2104 belonged to the assessee, was based on mistaken understanding of fact and that his testimony was factually incorrect.



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Hence, the retraction affidavit of Mr. Anuj Sabhlok is found to have been corroborated. The contemporaneous facts showed that assessee was only the contractor in the project 'Nakoda Heights' and not the owner of the said project. We find merit in the Ld. AR's plea that, if the notings of on-monies relating to this project was found, then the only possible inference is that it belonged to the owner of the project and not the contractor i.e. the assessee. Considering the entire gamut of facts therefore, the original testimony of Mr. Anuj Sabhlok is found to be unreliable and the assessee is noted to have rebutted the same with evidence. Hence, we hold that it was unsafe for the AO to draw adverse inference in the hands of the assessee solely based on an incorrect admission made by Mr. Anuj Sabhlok on mistake of fact.

8. Overall therefore, we find that the premise on which the lower authorities made the addition of Rs.95,38,000/- by way of unaccounted on-monies was fundamentally flawed and is thus held to be unsustainable. We accordingly direct the AO to delete the same.

9. In the result, the appeal of the assessee stands allowed.

Order pronounced in the open court on this 07/06/2024.

Sd/-  
(B R BASKARAN)  
ACCOUNTANT MEMBER

Sd/-  
(ABY T. VARKEY)  
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 07/06/2024.  
Vijay Pal Singh, (Sr. PS)



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**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, मुंबई / DR, ITAT,  
Mumbai
5. गार्ड फाईल / Guard file.

**आदेशानुसार/ BY ORDER,**

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार / (Dy./Asstt. Registrar)**  
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