

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "F", MUMBAI

Before Justice (Retd.) C V Bhadang, Hon'ble President &
Shri B R Baskaran, Hon'ble Accountant Member

ITA No.963/Mum/2024 for Assessment Year : 2018-19

ACIT, Thane	Vs.	Jagdale Infrastructure Pvt. Ltd. Ground Floor, Tamana CHS, Pada No.2, Lokmanya Nagar, Thane 400 606.
(Appellant)		PAN AAACJ0653K (Respondent)

Appellant By : Shri Subodh Ratnaparkhi
Respondent By : Ms. Rajeshwari Menon, Sr. DR

Date of Hearing : 03.06.2024	Date of Pronouncement: 16.08.2024
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ORDER

Per B R Baskaran, Accountant Member :

The revenue has filed this appeal challenging the decision of Ld CIT(A) in deleting the addition of Rs.3.49 crores made by the AO to the total income of the assessee.

2. The facts relating to the issue agitated before us are discussed in brief. The assessee is a builder. It was developing a real estate project under the name "Amizra" at Thane, Maharashtra. The assessee followed "Percentage Completion Method" for declaring profits from the above said project.

Accordingly, the assessee had ascertained profit for the year at Rs. 4,36,95,168/- as per following computation:

	FY 2017-18	FY 2016-17	FY 2015-16
Cumulative WIP as on last date of the year	75,29,60,429	39,76,82,561	18,39,74,080
Estimated Project Cost	154,74,40,311	154,74,40,311	154,74,40,311
Percentage of Work completed (B)	48.66%	25.70%	12.90%
Total Confirmed sale value based on registered agreements (A)	76,30,78,770	31,12,96,054	11,11,13,076
Percentage of cost to confirmed sale (C = A*B)	37,13,02,282	8,00,01,155	1,43,33,587
Cumulative Profit (D = 15% of C)	5,56,95,342	1,20,00,173	21,50,723
Cumulative profit already shown in previous years (E)	1,20,00,173	21,50,723	0
Balance Profit for the financial year (E-D)	4,36,95,169	98,49,450	21,50,723

3. The assessing officer noticed that the assessee has recognized money received from those prospective buyers with whom the Agreement for Sale has been registered. It was noticed that the assessee has also received advances from prospective buyers who have not yet registered the

Agreement for sale, i.e., the assessee might have received advances by issuing Letter of allotment and such receipts were not taken into consideration by the assessee for the purpose of estimating income. The AO took the view that the letter of allotment would also give the buyers a legally enforceable right. Accordingly, the AO took the view that the assessee should have considered all advances received by it irrespective of registration of Agreement for sale, for the purpose of computation of profit. The case of the AO has been captured well by Ld CIT(A) as under:-

“17. The assessing officer noticed that the assessee had computed profit by applying an estimated profit rate of 15% on the revenue to be recognized on the basis of percentage of work completion. The assessing officer further noticed that for the purposes of revenue to be recognized, the assessee has considered only those flats for which sale agreements have been registered. The Assessing officer is of the view that the assessee has received higher advances amounting to Rs. 60,45,13,235/- and therefore, the estimated profit rate of 15% should be applied to the total amount of advances received till the end of the financial year. The assessing officer has given following reasons for above methodology:-

- i) Issue of allotment letter and receipt of booking advance amounts to ‘agreement’ with the prospective buyer.*
- ii) The argument of the assessee that unless an agreement is registered, same should not be considered for computation of profit as per ‘percentage of completion method’ is not acceptable because even a registered agreement can be cancelled.*
- iii) The assessee did not file complete details of construction and sales in prescribe format.*
- iv) ‘Letter of allotment’ is required to be treated as a binding contract. As per RERA, an agreement can be registered after payment of 10% of the sale consideration. Registration of agreement can be derailed by a buyer.*
- v) As per ‘Guidance Note issued by ICAI for Percentage of Completion Method’ when the outcome of a real estate project can be*

estimated reliably and the conditions stipulated in paragraphs 5.2 and 5.3 of guidance note are satisfied, project revenue should be recognized. Since, the guidance note provides that where 10% of the total revenue as per agreement of sale or any other legally enforceable document is realized, the revenue for same needs to be recognized. Since, the letter of allotment is a legally enforceable document, all the flats for which the appellant has received advances should be considered for revenue recognition.”

4. The assessing officer noticed that the aggregate amount of advances received by the assessee was Rs.60,45,13,235/-. The AO noticed that the assessee has adopted profit rate of 15%. Accordingly, he computed profit applying the profit rate of 15% on the above said advance amount. Accordingly, the AO computed the profit at Rs.9,06,76,985/-. The cumulative profit computed by the assessee (as shown in the table above) was Rs.5,56,95,342/- only. Accordingly, the AO added the difference amount of Rs.3,49,81,643/- (Rs.9,06,76,985/- (-) Rs.5,56,95,342/-) to the total income of the assessee.

5. In the appellate proceedings, the Ld CIT(A) deleted the above said amount added by the AO and hence the revenue has filed this appeal.

6. It may be pertinent to note that, in the appellate proceedings, the Ld CIT(A) found fault with the workings made both by the AO and the assessing officer. Accordingly, he proceeded to compute the profit as per his own method and found that the profit declared by the assessee was more than that worked out by him. Accordingly, he deleted the addition made by the AO. However, we notice that the dispute in the present appeal revolves around the action of the AO in considering the entire advance amount received by the assessee from prospective buyers for the purpose of

estimating the profit. If that is addressed, then the impugned addition would get deleted.

7. One more contention raised by the assessee before the Ld CIT(A) is that the AO could not have estimated the profit without rejecting the book results. In this regard, the assessee also relied upon certain case laws. The Ld CIT(A) agreed with the above said proposition and accordingly held that the AO could not have estimated the profit without rejecting the book results. The relevant discussions made by the Ld CIT(A) are extracted below:-

“26.1 *One of the contentions of the appellant is that the assessing officer has estimated the profit in his own way without rejecting the books of accounts. The appellant has contended that it is a well settled law that the profit cannot be estimated by the assessing officer without rejecting the books of accounts. For this proposition, the appellant has relied on following case-laws:-*

- *Hon'ble Calcutta High Court in M/s. Swadeshi Commercial Co. Ltd. vs. CIT [ITA No. 219 of 2001].*
- *CIT vs. Anil Kumar & Co. (2016) 386 ITR 702 (Kar.).*
- *Sanjay Agrawal Vs DCIT (ITAT Raipur) (2021) (ITA No. 339/RPR/2016).*
- *ITO v. Girish M Mehta [2008] 296 ITR (AT) 125 (Rajkot),*
- *ACIT vs. Intermedia Cable Communication P. Ltd. (2012) 146 TTJ (Pune) 476.*
- *Arup Kumar Hazra vs. ITO - Ward 39(2) (ITA No. 385/Kol/2017).*

26.2 *I have considered the above contention of the appellant. A perusal of the assessment order suggests that the assessing officer has not rejected the books of accounts of the assessee. A perusal of section 145 of the Act suggests that if the assessing officer is not satisfied about the correctness of the books of accounts or income has not been computed in accordance to the notified accounting*

standards, the AO may make assessment u/s 144 of the Act. I have also perused the case-laws relied upon by the appellant which suggests that the business profit cannot be estimated without rejecting the audited books of accounts. In the present case, the assessing officer had reservations about the point of recognition of revenue for flats, but as such no other defect has been pointed out in the books of the appellant. Neither, the assessing officer has rejected the books of accounts. Accordingly, the action of the assessing officer by estimating the profit by applying an estimated net profit rate, without rejecting the books of accounts, is erroneous.”

Since the assessing officer has estimated the profits from the project without rejecting the book results, his estimation is liable to be rejected as per the ratio laid down in the decisions referred above.

8. With regard to the merits of addition, we noticed earlier that the assessee had considered the amount received from prospective buyers with whom Agreement for sale has been executed. According to the assessee and also as per Accounting Standards, the profit could be estimated only when the risk and rewards attached to a flat is transferred and such a transfer shall take place only when Agreement for sale is registered. While the AO's view was that the letter of allotment would give enforceable right to the buyer and hence the advances received against issuing letter of allotment should also be taken into consideration.

9. We notice that the above said issue came to be considered by the coordinate benches of Tribunal and it has been held that the profit has to be estimated only in the cases where risk and reward has been transferred. The Ld CIT(A) first examined the terms of "Allotment Letter" issued by the assessee. The discussions made by him in this regard are extracted below:-

31. *On the other hand, the appellant has submitted that Accounting*

Standard AS-7 is to be read along with Accounting Standard AS-9 because para 3.3 of AS-7 clearly provides that revenue is to be recognized when the conditions specified in paragraph 10 & 11 of AS-9 are fulfilled. As per AS-9, one of the most important requirements is 'transfer of all significant risks and reward of ownership' which is required to be determined on the basis of terms and conditions of the Agreement for Sale. As per para 3.3 of AS-7, this agreement for sale is considered of having the effect of transferring all significant risk and reward of ownership to the buyer, provided the agreement is legally enforceable. The AS-7 further provides that once such legally enforceable agreement is entered with the buyer, the revenue is to be recognized subject to fulfillment of other conditions, irrespective of the fact whether legal title is transferred or not or possession is given or not. So, one of the important conditions is presence of a legally enforceable agreement to sell.

32.1 *The appellant has contended that Assessing Officer has erroneously considered the allotment letter as an enforceable contract/agreement to sell. Accordingly, the appellant was asked to file a copy of 'allotment letter' on sample basis. The allotment letter (for flat no. B-1905) as filed by the appellant is as under:*

ALLOTMENT/ RESERVATION LETTER

To,

Mr.Akshay Chandrakant Patil &Mrs.Tanuja Murlidhar
Chaudhari,

Flat No: B-1905 *comprised in on the Nineteenth floor Floor, approximately admeasuring about 54.76 Sq Mt Carpet area , in the proposed Complex namely ' Amizra', situated on land Thane, Survey No. 170/1, Thane (W), Maharashtra, is allotted to you, subject to you/ all of you, in addition to paying Consideration of Rs.83,00,000,-(Rupees Eighty Three Lakh Only) more particularly mentioned in the 'Schedule of Payment' annexed hereunder, also complying with and/or accepting all the terms and conditions mentioned herein and/or laid down*

by concerned Government/semi Government Authority/ies Body/ies. The Consideration mentioned herein excludes contribution towards the Maintenance Charges, Government Stamp Duty, Registration Charges, Administration Charges, Legal Charges, Service Tax, Value Added Tax (VAT, Gst) and/or any taxes applicable with respect to the proposed transfer of the said Apartment/Flat).

As per the approved Sanctioned Plans, we as 'Developer/ Promoter/ Builder' are entitled to develop the 'Said Land', thereby constructing multistoried buildings thereon and being entitled to sell Flats/Units comprised in the proposed Complex namely 'Amizra' to be developed/ constructed by us, on the 'Said Land' and to also enter into 'Articles of Agreement'/ 'Sale Deed 'etc. to and in favor of the Applicant/s i.e. proposed Purchasers/ Buyers of the said Flats/Units and to also receive/ collect/ accept money towards the total Sale Price and other charges, in respect of the said respective Flats/Units thereof.

Timely Payment as per the 'Schedule of Payment' annexed hereunder shall be the essence of this provisional allotment/ reservation, whether you are availing the loan facilities from any financial institution or not, you are liable to pay all the installments due within 7 days from the date of the respective demand letter, failing which the you shall have to pay interest at the rate of 21% p.a. till the payment of the installments. In case you (or) any one of you, commits a default in payment on the respective due date/s of any amount/s due and payable by you (or) any one of you, to us, under this 'Allotment/ Reservation Letter' (including your proportionate share of taxes levied by the Concerned Authority and other outgoings) and on you committing any breach of any of the terms and conditions herein contained, we as 'Developer/ Promoter/ Builder' shall at our sole option, be entitled to terminate/cancel this 'Allotment/ Reservation Letter' and subsequently refund the amount received from you (or) all of you, without any interest thereon, albeit, subject to deduction there from a sum of 2% of agreement value along with brokerage charges,-administrative charges and other charges and towards all or any loss, compensation and damages caused to us as the 'Developer/ Promoter/ Builder' or suffered by us as the 'Developer/ Promoter/ Builder', on account of the said breach committed by you (or) any one of you. In case of cancellation by "you, 2% of the agreement value will be deducted as administration charges. Service tax / any

other taxes and brokerage, if already paid will be recovered from the customer additionally. The balance amount shall be refunded, one month after the resale of the flat.

This provisional allotment' reservation is made subject to the following terms and conditions:-

If for any reason, any changes in the plans of the proposed building are made by the sanctioning Authorities or by the Architects or by us as the "Developer/ Promoter/ Builder", resulting in reduction or an "increase in the above mentioned area or change in its location, no claim monetary or otherwise will be raised or accepted except that the above mentioned lump sum price will be reduced or increased on pro-rata basis. In case of absolute deletion of a Flat/Unit no claim, monetary or otherwise, will be raised or accepted except that the amount received will be refunded in full;

In the event you do not execute an Agreement for sale on payment of 20% of the Agreement value as required under MOFA (Maharashtra Ownership of flats Act) in respect of the above referred flat premises and there is an increase in the market value of the said flat premises i.e. the ready reckoner rate then in such event you shall be solely liable to pay for the incidental taxation or penalties ,if any, that shall become payable by us in relation thereto i.e. you shall be responsible for additional taxation or penalties that may be levied to us as a consequence of delay in execution of agreement between us. If for any reason whether within or outside our control the whole or part of the said Project is abandoned, no claim will be preferred, except that your money will be refunded without interest and without any damages or compensation in any form whatsoever.

- We acknowledge the payment of Rs.5,00,000/- of (Rupees Five Lakh Only) from you which amount you have paid to us in view of our reserving the above mentioned Flat/Unit in the proposed Complex namely 'Amizra' on the basis of the plans shown to you;*
- In addition to the Lump Sum Sale Price/ Consideration agreed, you shall have to bear and pay the amounts, deposits, charges and expenses etc., as may be applicable towards VAT, Service Tax , Stamp Duty, Registration, Legal fees, Development Fund and/or any other charges payable to the Concerned Authority for transfer of the 'Said Land' in the name of the proposed Association/Society/Apex Body/Corporate Body of which-you will be member/ holder and all other charges, taxes, cesses etc. that may be levied or become leviable by the local authority or by the Government and also such other charges, penalties, escalation, which shall if at any time herein after be*

imposed by the Concerned Authority, Government or local authority as the case may be;

- *In the event the project comes under the purview of THANE (the development authority) then in such event, you shall be liable to pay the Development charges / any other charges that may be levied by THANE or any other competent authority.*
- *As and when called upon by us, you shall have to come to execute/register the relevant 'Articles of Agreement'/ 'Sale Deed'.*
- *Payment will be accepted by Cheque/Demand Draft/ Pay Order, payable at par only in favour of 'JAGDALE INFRASTRUCTURE PVT. LTD.'*
- *In the event you (or) all of you, agree and accept the terms and conditions hereof, please signify/ jointly signify acceptance of the same, as indicated hereunder.*
- *Validity of this Allotment/ Reservation Letter' is subject to realization of Cheque/ Demand Draft/ Pay Order of 20% (Twenty Percent) of Booking amount, failing which this 'Allotment/ Reservation Letter' shall stand automatically canceled.*
- *In case of dishonor of cheque provided by the purchaser, then the Purchaser shall be liable to promptly pay an additional amount of Rs. 1000/- per cheque as Cheque bouncing charges to the promoter without any delay or demur.*
- *we have allotted two car parkings with the said property.*

All other terms and conditions mentioned in the 'Booking Application Form'/ "Quotation" shall be treated as part and parcel of this 'Allotment/ Reservation Letter', unless specifically varied hereunder.

In case any dispute arises between the parties in respect of the signing and execution of the standard format of the 'Articles of Agreement'/ 'Sale Deed' of 'Amizra', this 'Allotment/ Reservation Letter' shall be deemed to be cancelled and you shall not be entitled to claim any right whatsoever in any Court of Law, except for refund of the amounts already paid by you, without interest and after deducting there from 2% of the Agreement value along with administrative charges, brokerage charges and other charges.

We shall refund you amount only after deducting all necessary charges mentioned herein above.

32.2 *A perusal of the above allotment letter suggests the following:*

- *The said flat was 'provisionally allotted' to the customer for a consideration of Rs. 83,00,000/-. Out of this, the appellant received a booking amount of Rs. 5,00,000/- only.*
- *The provisional allotment can be cancelled by the customer by paying 2% of the total consideration as 'cancellation charges'.*
- *The customer is required to execute a separate 'Agreement for Sale' in the standard format after payment of 20% of the consideration.*
- *Validity of 'Allotment letter' is subjected to realization of cheques/Demand draft/Pay order of 20% of booking amount, failing which the 'allotment letter; shall stand automatically cancelled.*
- *In case of dispute arises between the parties in respect of the signing and execution of the 'standard format of Articles of Agreement/Sale Deed', the allotment letter shall be deemed to be cancelled and the customer shall not be entitled to claim any right whatsoever in any Court of Law, except for refund of the amount already paid, without interest and after deducting therefrom 2% of the agreement value.*

32.3 *Thus, the allotment letter clearly provides that this is a provisional allotment and same is liable to be cancelled by the customer on payment of cancellation charges. It has also been specifically provided that the 'Agreement to Sell' shall be separately signed after payment of 20% of agreed consideration. Further, it is provided that in case of any dispute regarding signing and execution of Sale Deed, the allotment letter shall be automatically cancelled and in case of cancellation, the customer does not have any right whatsoever in any 'Court of Law' except the refund of amount paid minus cancellation charges. Thus, the allotment letter cannot be considered as agreement for sale because all significant risk and reward of ownership have not been transferred to the buyer through this 'Allotment Letter'.*

We notice that the Ld CIT(A) has examined the terms and conditions mentioned in the Letter of Allotment and came to the conclusion that all

the significant risks and rewards are not getting transferred through the allotment letter.

10. The Id CIT(A) also referred to the decisions rendered by the coordinate benches and his discussions on this point are extracted below:-

*“ 34. It may also be mentioned that a similar issue has been considered by the Hon’ble ITAT Mumbai in the case of **M/s Shankala Realtors Pvt Ltd Vs. ITO ITA No.3827/MUM/2017** dated 28/8/2019. M/s Shankala Realtors was in the business of real estate development and was following the **percentage completion method** and offered the income only in respect of those flats for which agreements were registered. The Assessing Officer observed that in many cases, the assessee had received considerable portion of advance, still it had not offered the income for taxation on the pretext that no agreement has been made with the prospective buyer. The Assessing Officer after considering the AS-9 noted that when a prospective buyer approached the appellant, allotment letter is issued on receipt of advance money and in some cases, the assessee has taken almost 90% of the total value. Accordingly, the Assessing Officer held that entering into an agreement and its registration is not necessary for recognition of revenue on advances and worked out the profit. The Ld. CIT(A), agreed with the reasons given by the Assessing Officer and upheld the addition. When matter reached to Hon’ble ITAT Mumbai, the Bench observed as under:-*

“7.3 In the instant case as recorded by the AO when a prospective buyer approaches the assessee for booking the flat, allotment letter is issued to the buyer on receipt of the advance money.

The appellant filed a written submission dated 26.03.2015 before the AO stating that the degree of work completed and certified by architect till 31.03.2009 is 73% and the assessee-company has recognized the revenue by applying 73% to the value of agreements executed till 31.03.2009. It was further stated before the AO that the revenue in respect of balance advances could not be recognized as passing of risks and rewards by virtue of ownership is an essential condition

for revenue recognition as per AS-9, which has not been fulfilled in the instant case, as no agreement is executed and no possession have been given to the buyer.

The case laws relied on by the Ld. counsel and Ld. DR have been narrated at length hereinbefore. One principle which emerges from the above case laws is the role of agreement executed. Immovable property is not conveyed by delivery of possession, but by a duly registered deed. Further, it is the date of execution of registered document, not the date of delivery of possession or the date of registration of document which is relevant. Once the executed documents are registered, the transfer will take place on the date of execution of documents and not on the date of documents as held in Alapati Venkararamaiah vs. CIT (1965) 57 ITR 185 (SC).

As per the ingredients of AS-7 and AS-9, ‘revenue’ be recognized even though legal title of the property is not transferred and possession is not given. Once seller transfers significant risks and rewards of ownership to buyer, seller thereafter acts like a contractor. Accordingly, revenue recognition will have to be as in ‘Percentage Completion Method’ (AS-7).

We are concerned here with the execution of agreements and not with the registration of agreements.

Having considered the application of principles of AS-9 in respect of sale of goods to a real estate project and the case laws relied on by both sides in the back drop of the facts of the case, we set aside the order of the Ld. CIT(A) and restore the matter to the file of the AO to make an addition, bringing to tax by percentage completion method, the revenue out of the remaining executed agreements, if any, during the impugned assessment year. The assessee is directed to file the documents/evidence in respect of agreements executed during the impugned assessment year. Needless to say, the AO would provide reasonable opportunity of being heard to the assessee before finalizing the order.”

35. Thus, in the case of Shankala Realtors (*supra*), the jurisdictional ITAT after considering AS-7 and AS-9 has held that while applying the percentage completion method, **the date of execution of**

‘agreement to sell’ is the point which determines the point of recognition of revenue because passing of risks and rewards by virtue of ownership is an essential condition for revenue recognition. *The Hon’ble ITAT has further held that it is the date of execution of agreement which is important and not the date of registration of agreement, as canvassed by the assessee. Accordingly, the ITAT directed the assessing officer to bring to tax, the revenue out of the remaining executed agreements, if any, during the impugned assessment year, by applying the percentage completion method. It is seen that the facts of the present case are similar to the case of Shankala Realtors (supra).”*

Following the above said decision, the Ld CIT(A) has concluded that the money received from prospective buyers with whom Agreement for sale has been entered should alone be considered for recognizing the revenue under Percentage completion method.

11. We notice that the Ld CIT(A) has followed the decision rendered by co-ordinate bench in the case of Shankala Realtors (P) Ltd (supra), wherein it has been held that the significant risk and reward shall get transferred only when “Agreement for sale” is entered between the parties. Though the Letter of Allotment may give enforceable right to the prospective buyer, yet it does not transfer the significant risk and reward, which is a condition prescribed for recognizing income under the Accounting Principles. Before us, no other contrary decision of higher judicial forum was cited by the revenue. Hence, we do not find any infirmity in the order so passed by Ld CIT(A). Accordingly, we uphold the order passed by Ld CIT(A) on this issue.

12. Since the addition made by the AO would get deleted on the principle of non-rejection of books of accounts and also under the principle that the money received from prospective buyers with whom Agreement for sale has been entered should be considered for recognizing the revenue

under Percentage completion method, other issues discussed by Ld CIT(A) would become academic in nature.

13. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 16th August, 2024.

Sd/-

[Justice (Retd.) C V Bhadang]
PRESIDENT

Sd/-

[B R Baskaran]
ACCOUNTANT MEMBER

Mumbai, Dated :16th August, 2024
SA

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The PCIT,
4. The CIT
5. The DR, 'F' Bench, ITAT, Mumbai

BY ORDER

//True Copy//

(Assistant Registrar)
Income Tax Appellate Tribunal, Mumbai