

**IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH, BANGALORE**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER AND
SHRI SOUNDARARAJAN K, JUDICIAL MEMBER**

ITA Nos. 362 - 365/Bang/2024
Assessment Years: 2014-15 to 2017-18

Ace Developers, Wood Heavan Apartment, Ground Floor, Near Bondel Church, Pacchanady Road, Mangaluru – 575 003. PAN – AAMFA 7843 H	Vs.	The Dy. Commissioner of Income Tax, Central Circle – 1, Mangaluru.
APPELLANT		RESPONDENT

Assessee by	:	Ms. Sheetal Borkar, Advocate
Revenue by	:	Shri Subramanian S, CIT (DR)

Date of hearing	:	12.09.2024
Date of Pronouncement	:	20.09.2024

ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

These appeals filed by the assessee are against the order passed by the CIT(A)-2, Panaji all dated 23/05/2022 in DIN Nos. ITBA/APL/M/250/2022-23/1043118222(1) for the assessment year 2014-15, ITBA/APL/M/250/2022-23/1043118283(1) for the assessment year 2015-16, ITBA/APL/M/250/2022-23/1043118393(1) for the assessment year 2016-17 and ITBA/APL/M/250/2022-23/1043118448(1) for the assessment year 2017-18.

2. First, we take up ITA No. 363/Bang/2024 relevant to A.Y. 2015-16 as a lead case. The first issue raised by the assessee is that the learned CIT(A) erred in confirming the order of the AO by sustaining the disallowance of Rs. 1,29,30,646/- under the provisions of section 40A(3) of the Act.

3. The necessary facts are that the assessee in the present case is a partnership firm consisting of 2 partners namely Shri Greory D'silva and Smt. Premi D'silva who are husband-and-wife. The assessee is engaged in the business of development of residential property. The residential premises of the partner was subject to search under section 132 of the Act dated 24th of June 2016 whereas the premises of the assessee was subject to survey under section 133A of the Act. As a result of survey and search operation, many documents were impounded bearing number as annexure A/133A/AD/1 to 21 containing various information about the payment made by the assessee in cash as well as through bearer cheque to various parties being subcontractor, labour, suppliers and towards commission etc. Based on such documents, the AO found that the assessee has made payments against certain expenses in cash or though bearer cheque which is exceeding the specified limit under the provisions of section 40A(3) of the Act. The details of the same stands as under:

I. Cash payment	
To subcontractor	Rs. 46,05,086/-
Commission Purchase & other exp.	Rs. 43,60,473/-
Total cash payment	Rs. 89,65,559/-

II. Bearer cheque to sub-contractor Rs. 39,65,087/-

3.1 As per the AO, the impugned payment in cash exceeding the specified limit was not allowable as deduction and accordingly the AO disallowed the same under the provisions of section 40A(3) of the Act and added to the total income of the assessee.

4. Aggrieved assessee preferred an appeal to the learned CIT-A who confirmed the same.

5. Being aggrieved by the order of learned CIT-A, the assessee is in appeal before us.

6. The learned AR before us filed a paper book running from pages 1 to 185 along with other charts/ written submission and contended that this tribunal in the own case of the assessee in the earlier assessment years 2011-12 to 2013-14 involving identical facts and circumstances deleted the addition made by the AO in ITA Nos. 74 to 76/Bang/2022 vide order dated 27-07-2023. Accordingly, the learned AR contended that no disallowance can be made under the provisions of section 40A(3) of the Act.

7. On the other hand, the learned DR vehemently supported the order of the authorities below.

8. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset, we note that the Tribunal in the own case of the assessee for the assessment years

cash. On account of business exigency, the subcontractors insisted upon cash payment and accordingly, the assessee paid through bearer cheques. Hence, business exigency of making cash payment on regular basis is also pleaded by the assessee in the instant case. To support this, assessee filed affidavits from Nagesh Poojary, S/o Mr. Gopal Kotian, Raghuvveera, S/o Mr. Venkappa Salian, Manoj Kumar, S/o Mr. Mohan Gowda, which are kept on record in page Nos.63 to 68 of the assessee's paper book. In these affidavits, they have stated that they are sub-contractors of assessee firm and they insisted for cash payments to make payment to workers and confirmed the above payments. In such circumstances, it cannot be said that sub-contractors are not agents of the assessee for providing labours. Hence, on this count, the expenditure claimed on account of payment made to sub-contractors cannot be considered u/s 40A(3) of the Act as held by Hon'ble Karnataka High Court in the case of Balaji Engineering & Construction Works cited (supra) as the Tribunal being subordinate to jurisdictional High Court what matters for the Tribunal is to follow the binding precedent and delete the disallowance in case of cash payments exceeding the stipulated limit coupled with the fact that cash payments are made due to business expediency and being genuine transaction and the parties are identifiable, provisions of section 40A(3) cannot be applied. Accordingly, we are inclined to delete the addition made on this count.

5.3 There are one more payment to the labourers who are migrating labours earning wages and not permanently employed by the assessee, who have no bank accounts and these are payments made in exceptional circumstances as provided under Rule 6DD and these payments cannot fall under the purview of section 40A(3) of the Act and more so, the payments are genuine and parties are identifiable and the expenditure incurred is wholly and exclusively for the purpose of business on account of business exigency. Accordingly, provisions of section 40A(3) of the Act cannot be applied and this addition is also deleted. Thus, the ground relating to additions made u/s 40A(3) of the Act is deleted. This ground of the appeal of the assessee is allowed.

8.1 Before us, no material has been placed on record by the Revenue demonstrating that the decision of the Tribunal in own case of the assessee as discussed above has been set aside/stayed or overruled by the Higher Judicial Authorities. Before us, no material was placed on record pointing out any distinguishing feature in the facts of the case of earlier AY and the year under consideration. Thus, respectfully following the order of the tribunal in the own case of the assessee discussed above, we hereby set aside the finding of the learned CIT(A) and direct the AO to delete the addition made. Hence ground of appeal of the assessee is hereby allowed.

9. The 2nd issue raised by the assessee is that the learned CIT(A) erred in confirming the addition made by the AO amounting to Rs. 4,47,67,800/- on account of receipt of on money on the sale of flats.

10. The AO during the assessment proceedings found that the assessee was in receipt of on money against the sale of flats which was not accounted in the books of accounts. The view of the AO for drawing such inference was based on the facts detailed below:

- i. The assessee was incurring unaccounted cash expenses by way of making payment/advances against the material purchase's subcontractors, labour expenses, the source of which was not explained. Hence, such act of the assessee that the assessee must have incurred such unaccounted cash expenses out on money received on sale of flat.
- ii. As a result of a survey at the business premises of the assessee, there were found certain loose sheets bearing number pages 57-60 of annexure A/133A/AD/16 containing working of sale price of certain flats in assessee's projects namely Wood Haven. The sale price on impugned pages contains the amount of Rs. 2700 per sq. ft. and further Rs. 1100 per sq. ft. thus the further amount of Rs. 1100 per sq. ft. is cash element.
- iii. The receptionist of the assessee firm, namely Merlyn Menezes and manager of the assessee firm, namely Mrs. Savitha Sripathy in their respective statement explained that

the amount of Rs. 1100 per sq. ft. represents cash element which will be received on the occasion of sale of impugned flats.

- iv. Loose sheet being booking matrix of various flats of Wood Haven project was found and impounded. On the top of the impugned sheet actual sale price noted was Rs. 3800 per sq. ft. whereas the value recorded as sales in the books of accounts was ₹ 2600 per sq. ft. Thus, the same suggest that the cash element which is in proportionate to what was explained by manager and receptionist was not recorded in books.
- v. The premises of the partner namely Gregory D'silva was subject to search under section 132 of the Act wherein a document was seized bearing page 38 of annexure A//GD/01 which was containing the information about sale of flats to one Shri Clifford D'silva. As per impugned sheet the flat having area of 1595 sq. ft. was sold for a price of Rs. 56 Lakh. However, the payment received through banking channel only for Rs 46.94 lakh and the remaining amount collected in cash. Thus, the element of cash representing on money was also corroborated from impugned document.

11. Based on the above observation, the AO was of the opinion that the assessee has received an element of cash of ₹ 1100 per sq. ft. on sale of flat. As such the actual area of flats which were sold was 40698 sq ft. Accordingly, the AO worked the amount of on money at Rs. 4,47,67,800/- (40698 sq. ft. X Rs. 1100) and proposed to make the addition to the total income of the assessee.

12. The assessee in response to such notice submitted that the opinion of the AO was based on the loose sheets found during survey which was containing working of sale price of the flats which were not sold in the year under consideration and remained unsold till the date of assessment proceeding. According to the assessee, such working on loose sheet was prepared to propose the sale price of the flats to the prospective customer and the amount of Rs. 1100 represents estimated profit per sq. ft. Therefore, there cannot be any adverse inference against the assessee merely based on certain loose sheets found containing information about the flats which were not actually sold.

13. The statement furnished by the receptionist and the manager at this time of survey was given under pressure, therefore, therefore the same is not reliable. Further, they did not know about the price at which flats were sold as they were never involved in dealing for the sale of flats. As such, the loose sheet was containing the information about the cost of the project and the element of profit which the assessee was envisaging on the sale of the flats. The flats which were sold, their price as per the agreement varied from Rs. 2154 per sq. ft to Rs. 3420 per sq. ft. Therefore, the observation that sale agreement of the flats was entered at Rs. 2600 per sq. ft and remaining amount received in cash is devoid of merit. However, the AO disagreed with the contention of the assessee by observing as under:

"The assessee's submissions are not acceptable. No other evidences have been submitted by the assessee. The findings in the impounded material indicates the modus operandi in which the firm conducts the actual sale transaction. The fact that the computation found pertains to unsold flats only is obvious since no prudent builder will keep documentary evidence in the form of agreement copies reflecting the

on money receipts of flats already sold and registered at a lower price. It forms the base in which potential customers are informed about the actual payments. An extract of the statement of Merlyn Menezes supports the same.

The assessee's contention that the department has not brought out any record for similar properties in the vicinity with a higher rate of booking, is totally absurd since clandestine bookings do not have a fixed guidance value for comparison. The objection is therefore not acceptable.

The total undisclosed income from sale of flats is therefore Rs. 4,47,67,800/-. To further compound these findings is the fact that the assessee firm was also unable to produce evidences in support of accounted sources for cash payments towards purchases and vouchers expenses incurred including subcontractors charges, as discussed in the earlier paras. It is therefore obvious that the sources are attributable to the above undisclosed income from sale of flats. Taking into account the above findings, the amount of Rs. 4,47,67,800/- is brought to tax."

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

"5.3.4 I have perused the materials available on record, gone through the assessment order and submissions and arguments put forth by the AR. The argument of the Ld. AR that the addition is based on no evidence is not correct. The facts are that during the course of survey proceedings it was found that unaccounted income is being generated by the assessee through the sale of apartments. Impounded documents in the loose sheet file A/133A/AD/16 pages 58 to 60 revealed that the appellant was collecting cash/unaccounted consideration at the rate of Rs.1100 per Sq. Ft. In all the notings the value of the flat as per the books of accounts was mentioned as "COP", which as per the appellant is "Cost of Property" (for the buyer). The balance amount that is collected from the purchaser is mentioned below the COP value. Statements of Merlyn Menezes, the receptionist employed at the firm and Mrs. Savitha Sripathy, the manager of the firm were recorded u/s 133A. They both stated that the calculations appearing in these sheets are based on the area of the flat multiplied by the documented amount of the flat per Sq. Ft. Subsequently, Car parking and incidental charges have also been added. Both the employees confirmed that apart from all these, an additional amount of Rs.1100/- per sq.ft had been charged to arrive at final sale value for the buyer. The additional amount of Rs.1100/- per sqft which was added at last was the undisclosed amount. They confirmed that this additional amount was an eye ossees and usually was collected in cash and no cheques were received for this amount. In another impounded document, the actual rate collected per sq.ft is clearly mentioned as Rs.3800 per sq.ft.,However,

the sale deed for the house shows the rate of Rs.2600 per sq.ft. These figures reveal that the actual rate of sale was approximately higher by Rs. 1100/- vis-à-vis the final booking rate shown in the books because Rs.1100/- per sq.ft collected in cash against the flats sold was not at all reflected in the final sale deeds and agreements. Another document being Page 38 in seized document No.A/GD/01 contains the amount of cash that has been collected from Mr. Clifford D Silva, one of the customers at Wood Haven, Bondel. The flat was sold for a total consideration of Rs.56,00,000/-. The total sq.ft of the flat is 1595 sq.ft. Thus, the rate of selling comes to approximately Rs.3510/- per sq.ft which is in line with the evidence that has been found at the premises of the assessee. However, only Rs.46,94,760/- were collected through cheque. The balance amount was collected by way of cash. During the course of assessment proceedings, the assessee objected to the proposal to treat the amount of Rs.1,100/- sq.ft as undisclosed income by submitting that the amount of Rs.1,100/- only indicated the desired profit that the assessee aimed to make on sale of flats and not the excess unrecorded cash to be collected. It was also stated that Mrs Savitha Sripathy was only an Office Manager in the firm and she was not involved in deciding the rate for the flats. The rough workings seized were for flats where no agreements were entered these apartments were still available for sale. It was also contended that the Department had not brought on record any other material by way of documents for similar properties in the vicinity wherein a higher rate of booking was demonstrable for a similar property.

5.3.5 AO, however, found the assessee's submissions not acceptable as the findings in the impounded material indicated the modus operandi in which the firm conducted the actual sale transaction. The fact that the computation found pertained to unsold flats only was held to be natural since no prudent builder will keep documentary evidence in the form of agreement copies reflecting the on-money receipts of flats already sold and registered at a lower price. The assessee's contention that the department had not brought out any record for similar properties in the vicinity with a higher rate of booking was also found as lacking merit since clandestine bookings do not have a fixed guidance value for comparison. The AO also noted that the assessee firm was unable to produce evidences in support of accounted sources for cash payments towards purchases and vouchers expenses incurred including subcontractor's charges as well as the total amount deposited in cash by the assessee firm of Rs.15,08,000/- in Axis Bank and Rs.49,65,000/- in Karnataka Bank. No separate addition was made on this score since such unaccounted cash deposits were held attributable by the AO out of the unaccounted income from sale of flats.

5.3.6 I find no defect in the reasoning propounded by the AO. Documents found revealed that the appellant was collecting on-money in cash @Rs. 1100/sq. ft for sale of flats. This fact was corroborated by the employees of the appellant in their sworn statements. During the course of the hearings, Ld. Authorized Representative of the appellant also raised the plea that evidences unearthed were loose sheets which have no evidentiary value and are legally inadmissible. This supposition is, however, not correct. In the case of Harish Textile Engrs. Ltd. Vs DCIT (2015) 63 Taxmann.com 66 (Bombay)/ (2016) 236 Taxman 420 (Bombay)/ (2015) 379 ITR 160 (Bombay), Hon'ble Bombay High Court held that where loose papers found during search

indicated on money receipt by assessee on sale of stenter machines for part of block period and assessee admitted to have received on money during remaining block period also, additions were correctly made to assessee's income on basis of guess work as being on money received for remaining block period. Thus, this plea of the AR of the appellant is not correct and hence unacceptable. Therefore, grounds of appeal 6,7, 8 and 10 are dismissed."

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

16. The learned AR before us submitted that the information contained in the loose sheet was a projection made about the cost of the project, element of profit with respect to the flats which were not sold till the completion of the assessment. Such loose sheet cannot be used to draw any adverse inference against the assessee. Similarly, the AO has not conducted an enquiry from the corresponding parties so as to find out the involvement of any element of cash in the sale of the property transaction.

16.1 Without prejudice to the above, the learned AR also contended that if at all the loose sheet is used to draw any inference against the assessee, it is only the element of profit which can be brought to tax and not the entire amount.

17. On the other hand, the learned DR before us contended that the information contained in the loose sheet was matching with the actual transaction of sale and therefore the same cannot be treated as dumb document. According to the learned DR, the assessee was in the receipt of on money on the sale of flats which has to be brought to tax on gross basis. It is because the expenses for the project in dispute have already

been claimed by the assessee in its actual books of accounts. The Id. DR vehemently supported the order of the authorities below.

18. We have heard the rival contentions of both the parties and perused the materials available on record. In the present case, the addition has been made by the AO based on the documents seized during the survey proceedings. As such, the AO based on the seized documents found that the assessee collected unaccounted cash @ Rs. 1100 per sq. ft. on sale of flats for its project. The learned CIT-A also confirmed the fining of the AO against which the assessee is in appeal before us.

18.1 After going through the assessment order, finding of learned CIT-A and the arguments advanced by the Id. AR and the Id. DR, which have been elaborated in the preceding paragraph, the 1st controversy arises for our adjudication whether the documents impounded during the survey or search represents the dumb documents and therefore based on the same no addition is warranted in the given facts and circumstances. In this regard, we have perused the documents impounded during the survey or search and note that these documents are loose paper/ sheet on which certain rough calculation has been made in respect of certain flats numbers. However, such flats were not sold till the date of finalization of assessment order. Further some additional seized papers also referred by the AO which are also a loose sheet containing certain rough calculation and notings therein. From the conjoint reading of the above documents, it is transpired that these documents contain certain relevant information which should be meaningful but the same cannot be made basis for drawing inference

against the assessee unless corroborated by the other independent materials and inquiries. The primary contention of the assessee is that these seized documents were dumb documents which were prepared as rough estimate of sale price, estimation of profit element etc.

18.2 The CBDT time to time has discouraged the assessing authorities making addition in arbitrary manner or based on statement or surrender during the course of search/survey. In this regard the instructions issued by the CBDT in F. No. 286/2/2003-IT(Inv.11) dated 10-03-2003 and F. No. 286/98/2013-IT(Inv.11) dated 09-01-2014 would be relevant to be looked into. Further, the Higher Judicial forum has time and again held that the no addition merely on the basis of noting in diary/loose paper etc. can be made unless other corroborative material 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.

18.3 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.

18.5 At this juncture, it is equally important to refer the provisions of section 132(4A) and 292C of the Act which provides a presumption that the documents impounded 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 based on evidence can rebut the same. Even though the provision of section 292C and 132(4A) of the Act provides presumption to the assessing authority to presume that the document belong to the assessee and content are true about the documents found from the possession of the assessee but that does not mean that such documents shall be brought under the tax net. As such, 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 materialized leading to income in the hand of the

assessee and such income has been unaccounted or unexplained by the assessee.

18.6 In the case on hand, there was no finding, based on independent inquiry, brought on record that the assessee has collected on money on sale of flats except relying on the loose sheets/paper found during the survey proceeding at the assessee premises. There was no inquiry made from the person who allegedly bought the flats. Therefore, considering the facts in totality and the discussion made in the preceding paragraph, we are of the opinion that the revenue authority was not justified in making such an addition merely based on certain rough noting made on loose sheets. Hence, the ground of appeal raised by the assessee is hereby allowed.

17. In the result, the appeal of the assessee is hereby allowed.

Coming to ITA Nos. 362, 364 & 365/Bang/2024

18. The facts of the case on hand are identical to the facts of the case discussed above, therefore, respectfully following the same, we are of the opinion that the revenue authority was not justified in making such addition merely based on certain rough noting made on loose sheets towards cash payment under section 40A(3) of the Act and on money receipt regarding the sale of flats. Hence, the ground of appeals raised by the assessee are hereby allowed.

19. In the result, the appeals filed by the assessee are allowed.

20. In the combined result, all the appeals filed by the assessee are hereby allowed.

Order pronounced in court on 20th day of September 2024

Sd/-

(SOUNDARARAJAN K)
Judicial Member

Sd/-

(WASEEM AHMED)
Accountant Member

Bangalore
Dated, 20th September, 2024

/ vms /

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore