

**IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH MUMBAI**  
**BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER**  
**AND**  
**SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No. 453/MUM/2024**  
**Assessment Year: 2017-18**

Dhaval Housing, 401, Centre Point Premises Co-op Soc. Ltd., Junction of S.V. Road & Juhu Tara Road, Santacruz (West), Mumbai – 400 054  (PAN : AAAAD3414A)	Vs.	Deputy Commissioner of Income Tax, Circle 23(1), Mumbai
<b>(Appellant)</b>		<b>(Respondent)</b>

**Present for:**

Assessee : Shri Satish Mody, Advocate  
Revenue : Smt. Mahita Nair, Sr. DR

Date of Hearing : 11.07.2024  
Date of Pronouncement : 27.09.2024

**ORDER**

**PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:**

This appeal filed by the assessee is against the order of Ld. CIT(A), National Faceless Appeal Centre (NFAC), Delhi, vide order no. ITBA/NFAC/S/250/2023-24/1058485956(1), dated 05.12.2023, against the assessment order passed by the Assistant Commissioner of Income Tax, Circle 23(1), Mumbai, u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”), dated 30.12.2019 for Assessment Year 2017-18.

2. Grounds taken by the assessee are reproduced as under:

“1. The Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, has erred in confirming the Order passed by the Tax Officer u/s. 143(3) of the I.T.Act, 1961, which was erroneously passed estimating income at 8% of Sales without rejecting the books of accounts of the Appellant.

2. The Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, has erred in confirming the order of The Learned Tax Officer who has erred in stating facts in his order and erred in working out the closing stocks that is work in progress at Rs. 16,04,59,170/- as against Rs. 30,29,80,761/- declared by Appellant.

3. The Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, has erred in confirming the order of the Learned Tax Officer not appreciating understanding the Accounts of the Appellant as the sales in case of Builders are accounted as sales only upon the completion of project and handing over possession upon receipt of occupation/completion certificate.

4. The Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, has erred in confirming the order of the Tax Officer who has passed the order u/s. 143(3) of the I.T.Act, 1961 on surmises, suspicion and conjecture.

5. The Learned Tax Officer erred in not following the system of accounting which was accepted by the department for A.Y. 2014-15, A.Y. 2015-16, A.Y. 2016-17 having regard to the fact that there was no change in the method of accounting or any material change to take a different view of the matter following the Supreme Court Judgment in case of Radhasoami Satsang V. CIT (1992) 193 ITR 329 (SC). Reliance is also placed on CIT v. Nirmal Commercial Ltd. (1995) 213 ITR 361, 368 (Bom).”

3. Before us, vide ground no.1, assessee has vehemently contested on estimation of income @ 8% of sales made by the ld. Assessing Officer and confirmed by ld. CIT(A) which is without rejecting the books of accounts of the assessee by not complying with the provisions contained in Section 145 of the Act.

4. Brief facts of the case are that assessee is in the business as builder and developer. Assessee had taken a project of development of land and construction of building and sale of flats on ownership basis. In the year under consideration, assessee undertook project of construction of buildings on plots of land at Village Vannai, Malad West, Mumbai, for residential purpose which include Tower-2A, SRA Building MR Wing and Tower-2B. Assessee accounted for profit by following the

method of accounting on the basis of percentage of completion method. It calculated profits from the Tower-2A based on computing proportionate estimated cost on area sold by deducting it from sales realisation of actual area sold. Assessee furnished details of computing the profits accrued for the year for Tower-2A which is extracted below:

**DHAVAL HOUSING**  
**AY-2017-2018**  
Details Working of Profits accrued till 31-3-2017 for Tower 2A as 39% Work Completed on the Basis of Percentage Completion of Project

Project Address:		440, 442, 443, 443/1, 443/2, 443/3, 444, 445/1, 445/2 and 446, village Valnai of Malad (West), Mumbai			
Project Details:	Tower 2A - Residential Tower				
Composition of Floors:	Gr. + 1 <sup>st</sup> Podium + 2 <sup>nd</sup> to 6 <sup>th</sup> Podium (part) + 2 <sup>nd</sup> to 6 <sup>th</sup> Residential Flats (part) + 7 <sup>th</sup> to 22 <sup>nd</sup> Residential Habitable floors				
Composition of Flats	33 (3-BHK) Residential flats + 2 Duplex Residential Flats				
Percentage Completed upto 31-3-2019	39% work Completed as per Architects Certificate				

  

Tower 2A		
A) Total Sellable Carpet Area for Tower 2A		39,609
B) Total Area Sold till date of reporting period		11,458
C) Total Sale Consideration for Flats Booked on Allotment		171,316,419
D) Amount Realised till the end of the reporting period		30,196,899
E) Cost of Work completed till end of reporting period		225,769,147
F) Percentage of Completion of work	39%	
G) Revenue Recognised [C* 39/100][Rs.17,13,16,419*39/100]		66,813,403
H) Proportionate Cost[E*B/A][Rs.22,57,69,147/*11,458/39,609]		65,309,977
I) Proportionate Net Profit Till 31-3-2017		1,503,426

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4.1. Further, ld. Assessing Officer observed from the balance sheet of the assessee that closing stock was reported at Rs.30,29,80,761/- whereas as per the submissions made by the assessee, it is stated at Rs.16,04,59,170/-. A show cause notice was issued.

4.2. Assessee submitted the following in response to said show cause notice.

a) Details of Closing WIP as on 31/03/2017 at Rs. 30,29,80,761/-.

- b) Details of Advance from Customers for all projects carried on bifurcating between Tower wise Advance received totalling to Rs. 4,78,10,029/-.
- c) Profit working as upto 31/03/2017 Taxed for Tower A @ 39% work completed of Tower A at Rs. 15,03,426/-.
- d) Details of Flat sold for Tower - A upto 31/03/2017 at Rs. 3,01,96,899/-.
- e) Architect Certificate as on 31/03/2017 for work completed for Tower 2A upto 31/03/2017 @ 39%.

4.3. Owing to this difference, ld. Assessing Officer observed that assessee has artificially reduced the net profit margin by manipulating the value of closing stock/work in progress (WIP). He, thus completed the assessment by holding that assessee failed to furnish the details and in view of the receipt of booking of the flats, the net profit was determined @8% of the gross receipts declared by the assessee. Ld. Assessing Officer thus computed the profit by applying the 8% of revenue recognised as under:

i)	Sales as per agreement	-	Rs. 17,13,16,419/-
ii)	Revenue recognised		
	(39% of Rs.17,13,16,419)	-	Rs. 6,68,13,403/-
iii)	Profit (8% of Rs.6,68,13,403)-		Rs. 53,45,072/-

4.4. Thus, an addition of Rs.53,45,072/- was made to the total income of the assessee. Aggrieved, assessee went in appeal before the ld. CIT(A), who sustained the said addition. However, he directed the ld. Assessing Officer to consider the income already admitted in the return of income,

filed u/s. 139(4) so that the assessee gets a part relief. Aggrieved, assessee is in appeal before the Tribunal.

5. We have heard both the parties and perused the material on record. Before us, the sole emphasis of the ld. Counsel of the assessee has been that estimation of profit has been done by the ld. Assessing Officer and up held by the ld. CIT(A) in absence of rejection of Book accounts for which no discrepancy has been pointed out. The difference in closing stock as computed by the ld. Assessing Officer and as reported by the assessee in its balance sheet is based on certain incorrect facts. Assessee furnished before the ld. CIT(A) that closing stock of only one building i.e., Tower-2A was taken into account whereas closing stock of other two buildings, i.e., Tower 2B and SRA Building MR Wing was not considered. According to the assessee, if closing stock of WIP for all the three buildings are taken into consideration, there is no difference in the same. In this respect, the details furnished by the assessee to reconcile the difference is as under:

<u>Wing</u>	
2A	22,57,69,147
2B	5,56,56,975
MR	10,58,330
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	28,24,84,452
Add: Other common expenses , depreciation & profits accrued till 31.3.2017	2,04,96,309
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Total closing stock as on 31.3.2017	30,29,80,761
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6. Further, it is contended by the assessee that it has regularly followed the mercantile system of accounting which has been accepted by the Department in earlier years. According to the assessee, by following the Accounting Standard (AS) prescribed for the builders and developers in accordance with provisions of Section 145, as per AS-9, issued by the Institute of Chartered Accountants of India, the revenue is recognised by the assessee on percentage completion method by relating the revenue with work completed and consideration received.

6.1. It is not in dispute that 39% of the work was completed in Tower-2A for which the profit accrued for year under consideration was worked out as under:

3) Accordingly the working is as under:-

Total carpet are of Wing 2A to be constructed	39609 (carpet)	
Total estimated cost of Total construction	76152 (carpet)	
Total estimated cost of construction		1,03,6184,397
Construction cost of 39609 area		57,71,43,032
Cost actually incurred till 31.3.2017		Rs. 22,57,69,147
Area sold till 31.3.2017		11458
Total sales consideration as per agreements for Wing 2A		17,13,16,419
Amount realized till 31.3.2017		3,01,96,899
Average rate		Rs. 14,952
Proportionate sales @ 39% of 17,13,16,419		6,68,13,403
Proportionate cost of construction		
(Rs.22,57,69,147 X 11458 sq.ft./39609 sq.ft.)		6,53,00,977
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		15,03,426
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Profit accrued for A.Y. 2017-18

7. On the above stated facts, we perused the order of Id. Assessing Officer to note the contention of the assessee in respect of rejection of books of accounts about compliance made by the Id. Assessing Officer

with the provisions of Section 145 of the Act. From the perusal of the said impugned order, we note that in the entire order, there is no whisper by the ld. Assessing Officer about rejection of book of accounts. Section 145 requires the ld. Assessing Officer to make a recording about he being not satisfied on the correctness and completeness of the accounts of the assessee or that the assessee has not regularly followed the method of accounting as prescribed under the said Section or that the income has not been computed in accordance with the Accounting Standards notified in the said Section. Only when such a satisfaction is recorded by the ld. Assessing Officer, he derives a jurisdiction to make an assessment in the manner provided in Section 144, i.e., to the best of his judgment.

7.1. In the given set of facts and from the perusal of the impugned order, there is no such recording of satisfaction by the ld. Assessing Officer on either of three aspects as contemplated in Section 145(3) of the Act noted above. Ld. Assessing Officer has arrived at a difference between the value of closing stock of WIP which is specific to Tower-2A and compared it with closing stock of WIP from the balance sheet which comprises of WIP for all the three buildings. Thus, the difference arrived at by ld. Assessing Officer, to state that there is inconsistencies in the value of closing stock reported by the assessee is without proper basis and grossly incorrect.

7.2. We note that it is *sin qua non* that the ld. Assessing Officer has to come to a conclusion that the books of accounts maintained by the assessee are incorrect, incomplete or unreliable and reject the same before proceeding to make his own best assessment. Rejection of books of accounts should precede the best judgment assessment. Provisions contained in Section 144 r.w.s. 145 amply suggest that ld. Assessing

Officer derives authority to make additions on the basis of estimation of income only upon fulfilment of the conditions mentioned in Section 145(3) of the Act. Such a requirement is contemplated in the aforesaid section to meet the standard of correct computation of accounts for the purpose of transparent and precise assessment of income. Any kind of pick and choose of certain entries from the books of accounts while accepting few and rejecting the other without proper and appropriate justification is arbitrary in nature and leads to erroneous computation of the income of the assessee. Accordingly, the estimation made by the ld. Assessing Officer by considering 8% profit margin which in itself is also without any basis is liable to be rejected. The addition so made by Ld. Assessing Officer of Rs. 53,45,072/- by taking 8% of the profit margin in the business of real estate development is not sustainable.

7.3. To buttress our contention on the above observations and findings, we draw our force from the decision of Hon'ble High Court of Delhi in the case of PCIT vs. Forum Sales Pvt. Ltd., (2024) 298 Taxman 533 (Delhi)(HC), which has dealt with similar issue. While holding the decision in favour of the assessee, Hon'ble High Court placed reliance on the decisions of other Hon'ble High Courts which include Hon'ble Jurisdictional High Court of Bombay in the case of PCIT vs. Swanand Properties Pvt. Ltd. (2019) 267 Taxman 429 (Bom.)(HC), Hon'ble High Court of Karnataka in the case of CIT vs. Anil Kumar and Company [2016] 386 ITR 702, Hon'ble High Court of Madras in the case of PCIT vs. Marg Ltd. [2017] 84 taxmann.com 52 (Madras) and Hon'ble High Court of Punjab and Haryana in the case of CIT vs. Gian Chand Labour Contractors 316 ITR 127 (P&H). After considering these plethora of decisions, Hon'ble High Court arrived at and its conclusion in para no.24 to hold in favour of the assessee, which is extracted below:

*“24. The series of judgments referred to hereinabove clearly allude to the settled position of law that the books of account have to be necessarily rejected before the AO proceeds to the best judgment assessment upon fulfilment of conditions mentioned in the Act. The underlying rationale behind such an action is to meet the standards of correct computation of accounts for the purpose of a more transparent and precise assessment of income. Therefore, any pick and choose method of rejecting certain entries from the books of account while 16:54:38 accepting other, without an appropriate justification, is arbitrary and may lead to an incomplete, unreasonable and erroneous computation of income of an assessee.”*

8. Accordingly, considering the facts on record and judicial precedents referred above and detailed factual submissions made by the assessee, we delete the addition so made by the ld. Assessing Officer and allow the ground taken by the assessee in this respect.

9. In the result appeal of the assessee is allowed.

Order pronounced on day of 27 September, 2024 under Rule 34 of  
The Income Tax (Appellate Tribunal) Rules, 1963

Sd/-  
(Satbeer Singh Godara)  
Judicial Member

Sd/-  
(Girish Agrawal)  
Accountant Member

***Dated: 27 September, 2024***

*MP, Sr.P.S.*

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BY ORDER,

(Dy./Asstt.Registrar)  
ITAT, Mumbai