

आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

BEFORE SHRI R.K. PANDA, VICE PRESIDENT
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.264/PUN/2024
निर्धारण वर्ष / Assessment Year : 2016-17

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| Hamaja Mohammed Malpekar, 1 st Floor, Ratnadeep Corner, Opp. Congress Bhavan, Tilak Ali, Maharashtra Pin Code - 415612 PAN : ABSPM9624K | Vs. | Income Tax Officer, Ratnagiri Ward, Ratnagiri |
| अपीलार्थी / Appellant | | प्रत्यर्थी / Respondent |

आयकर अपील सं. / ITA No.23/PUN/2024
निर्धारण वर्ष / Assessment Year : 2016-17

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| Assistant Commissioner of Income Tax, Circle – 1, Kolhapur | Vs. | Hamaja Mohammed Malpekar, 1 st Floor, Ratnadeep Corner, Opp. Congress Bhavan, Tilak Ali, Maharashtra Pin Code - 415612 PAN : ABSPM9624K |
| अपीलार्थी / Appellant | | प्रत्यर्थी / Respondent |

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| Assessee by : | Shri Pramod S. Shingte |
| Department by : | Shri Ramnath P. Murkunde |
| Date of hearing : | 05-11-2024 |
| Date of Pronouncement : | 27-11-2024 |

आदेश / ORDER

PER ASTHA CHANDRA, JM :

These cross appeals filed by the assessee and Revenue are directed against the order dated 06.11.2023 of the Ld. Commissioner of Income Tax (Appeals)/NFAC, Delhi ["CIT(A)"] pertaining to Assessment Year ("AY") 2026-17. These were heard together and are being disposed of by this common order.

ITA No. 264/PUN/2024, AY 2016-17 by the Assessee

2. Briefly stated, the facts of the case are that the assessee is engaged in the business as builders and developers under the name and style as

“A1 Ameen Construction Co.” For the AY 2016-17, the assessee filed his return of income electronically on 13.10.2016 declaring total income at Rs.94,37,319/-. The case was selected for scrutiny under CASS for the reasons - (i) High interest expenses relatable to exempt income (u/s 14A)(Investment in balance sheet, interest expense in P&L account and exempt income in schedule EI of ITR); (ii) High interest expenditure and low turnover (Part A – P&L of ITR); (iii) Large squared up loans during the year; (iv) Large increase in Sundry creditors and reduction in business income as compared to preceding year (Sundry creditors in Balance Sheet and business Income in Part B- TI of ITR); (v) Receipts u/s 194C and 194J (as per 26AS) are more than the receipts shown in ITR 4/5/6 (service receipts as per 26AS and Total revenue from operations in P&L account). Statutory notice(s) u/s 143(2) and 142(1) of the Income Tax Act, 1961 (**the “Act”**) along with a detailed questionnaire were issued and duly served upon the assessee. In response thereto, the assessee submitted its reply online. Due to the high volume of submissions, all the documents could not be uploaded in online mode and hence the submissions were made in tapal. During the course of assessment proceedings, the Ld. Assessing Officer (**“AO”**) found that the assessee was engaged in the construction of project named A1 Hamd Park & Consom residency. After perusing the return of income, audit report and submissions of the assessee, the Ld. AO made the following additions to the income returned by the assessee :-

(i) Wrong offering of business income under the head capital gains amounting to Rs.82,35,603/- by observing as under :

“6. It was further seen in the computation of income that, sale of flat (Ratndeeep corner) made at Rs.1,39,23000/- had been treated as capital gain while treating the property as a capital asset, whereas the assessee being in the business of builder and developer should have offered the income arising out of the transaction as business expenses. The assessee submitted that the flat was held by the assessee as a capital asset since 1999-2000. It was given on rent by assessee to District Agricultural officer, Ratnagiri, since the year 01/02/2000 to 31/12/2005. The assessee submitted a purported letter showing that it was given on rent. Thus, the assessee contested that the flat was held as investment for giving on rent and not stock in trade.

6.1 The contentions put forth by the assessee are perused but are not found to be acceptable. On perusal of the sale deed, it is seen that the flat has been sold to Shri. Gauresh Rajendra Phadke by the assessee in capacity of Al ameen construction Company as developer of property along with Shri. Suresh Yashwant Pansule Desai & Ramesh Yashwant Pansule Desai i.e. the former owner of property. On perusal of sale deed, it is seen that the assessee had entered into development agreement of property with the original owners of property Shri. Suresh Yashwant Pansule Desai & Ramesh Yashwant Pansule Desai on 07.05.1997. It is clear that the assessee had not bought the property for individual use or investment purpose. Instead he had, entered into development agreement in the capacity of developer to develop the property. However, long the period of holding be, the asset is stock in trade of business of Al ameen construction company (prop. Concern of assessee). Moreover, in the audit report also, the property finds mention as

stock in trade and considered for provision of Section 43CA. Thus it is held that the assessee has wrongly offered the income as capital gain. This is nothing but a device to evade tax by offering income under a head where tax liability is lower. Thus capital gain worked out by the assessee at Rs.82,35,603/- is disallowed and added to business income of assessee. Penal proceedings u/s. 271(1)(c) are initiated separately for furnishing inaccurate particulars of income.

(ii) Addition of Rs.2,00,000/- on account of unsecured loan as unexplained cash credits u/s 68 of the Act by observing as under :

“7. Further on perusal, the assessee was seen to have shown an opening balance in loans/ liability to the tune of Rs.2,66,36,192/-. Out of which 1,77,96,343/- was seen to be secured loans from banks and Rs.88,39,849/- out of the unsecured loans. The assessee is seen to have repaid most of the loans, however, availed a new loan of Rs.2,00,000/- from Mr. Hanif H. Malpekar. Thus showing the closing balance for unsecured loan outstanding at Rs.2,00,000/-. The assessee was requested to furnish ledgers of all parties from/to which unsecured loans were availed/ repaid during the year. But the assessee could not establish the identity & genuineness of transaction of loan availed from Hanif H. Malpekar to the extent of Rs.2,00,000/-. The assessee was requested to provide, income tax returns filed by all parties, bank statements, copy of PAN to enable this office to ascertain the worthiness of above transactions. In view of the above, it is found that the assessee has failed to produce and prove the identity and creditworthiness of the persons and has also failed to discharge the onus on him to prove the genuineness of the transaction, identity and creditworthiness of the persons. It would be appropriate to quote pertinent judgments to throw some clarifying light. “In a recent Judgment, Honorable Delhi High Court in the case of CIT v/s Dwarkadhish Investment Pvt. Ltd. ITA 9011/2010 dated August 2, 2010 (2010) 6 84 (delhi) held that though in Section 68 proceedings, the initial burden of proof lies on the assessee, yet he once proves the identity of the creditors/share applicants by either furnishing their PAN or Income Tax assessment no./ITR and shows the genuineness of transaction by showing money in his books either by way of account payee cheque or by draft or by any other mode than the onus of proof would shift to the revenue.

7.1 However, in the present case, neither the assessee could establish the identity of the creditor i.e. Mr. Hanif A Malpekar, nor the genuineness of transaction, by not providing PAN, ITR, Bank Statements in both cases, complete address, nor he had produced before this office documents which could verify that the loans have been paid in subsequent years. Therefore, the transactions seem to be fishy and parties from whom loan has been availed as bogus in the absence of tenable documentary evidences.

7.2 Conclusion:

The assessee has failed to establish all three conditions :

- (a) Identity of parties from which unsecured loan is stated to be received;
- (b) Genuineness of transaction; and
- (c) Credit worthiness of parties from which unsecured loan is stated to be received.

Section 68 of the Income Tax Act, 1961 ('Act' in short), empowers the Assessing Officer to treat the income credited in the books of accounts of the assessee for any previous year if there is no plausible explanation by the assessee about the nature and source of such income or if the explanation given is not satisfactory. Once it is explained, it is for the Assessing Officer to consider the same and form an opinion about the genuineness of the whole transactions. Such an opinion must be based on cogent evidence i.e. material produced by the assessee. In A.Govinda Rajulu Mudaliar Vs. CIT, [1958] 34 ITR 807 (SC), it was held that it is not necessary for the department to adduce evidence to show from which sources the income was derived and as

to why it should be treated as undisclosed income. If the assessee fails to prove satisfactorily the source and nature of certain amount of cash received through the accounting year, the AO is entitled to draw an inference that the receipts are of an assessable nature. Therefore, the burden of proving the source of such income is on the assessee. The assessee besides given ample time and opportunity, has failed to establish the credentials of the parties. Further the assessee could not produce any details of income and bank account statements of these parties. In view of the above, it is found that the assessee has failed to produce and prove the identity and creditworthiness of the persons and has also failed to discharge the onus on him to prove the genuineness of the transaction, identity and creditworthiness of the persons. Therefore, the undersigned is compelled to treat the same as bogus and adds the same amount as unexplained cash credits u/s 68 of the I.T. Act 1961. Penalty proceedings u/s. 271(1)(c) are hereby initiated for concealment of income to the tune of Rs.2,00,000/-

(iii) Addition of Rs.6,45,95,500/- comprising of Rs.1,65,66,500/-, Rs.4,60,57,000/- and Rs.19,72,000/- on account of unexplained/unsubstantiated sundry creditors/booking advance/unexplained liability by observing in paras 8.4, 9.2 and 10.3 as under :

“8.4 From the above all facts, verification of the case, above discussion and considering the sufficient time and opportunity given to the assessee it is proved that the assessee has failed to prove the entries. Further, in the light of absence of any satisfactory evidence produced by the assessee the liabilities of Rs.2,08,50,837/- shown as sundry creditors were not actually existed as on 31/03/2016. The same is verified to the extent of Rs.42,84,437/- only. Therefore, an amount of Rs.1,65,66,500/- is hereby disallowed and added to the total income of the assessee being cessation of liability under the provisions of section 41(1) of the Income Tax Act, 1961.

9.2 It is noticed that the assessee has failed to furnish the details in the form of confirmation or in the form of agreement to sale in respect of the certain cases. The assessee has just shown the name of the persons with the amount. Therefore it is apprehended that the sundry creditors/ advance payers are bogus and the transactions fishy. No further, submission has been made by assessee or his authorized representative. From the above all facts, verification made, and discussion during the process of giving sufficient detail and opportunity to the assessee, the following inference can be made.

i) All the above said creditors are just name creditor since, they are not having source of income as copy of respective returns of income proving the creditworthiness of the above is not produced. These creditors are non filers of income tax.

ii) The story of bringing these creditors in the books of a/c is totally afterthought and concocted story, since no bank account statements, valid identity establishment and respective returns of income were produced.

iii) These creditors are also proved as bogus since, all three criteria of identity, genuineness of transaction & closing balance and credit worthiness have not been proved.

Therefore, in the light of absence of any satisfactory evidence produced by the assessee, an amount of Rs.4,60,57,000/- shown as sundry creditors / advances against flat sales by the assessee is treated as unexplained credits within the meaning of provisions of section 68 of the Income-tax Act, 1961. Since the assessee has furnished inaccurate particulars of income, therefore, penal proceedings under section 274 read with Explanation-1 to section 271(1)(c) of the Income-tax Act, 1961 are initiated separately.

10.3 From the above all facts, verification of the case, above discussion and considering the sufficient time and opportunity given to the assessee it is proved that the assessee has failed to prove the entries. Further, in the light of absence of any satisfactory evidence produced by the assessee the liabilities of Rs.19,72,000/- shown as sundry creditors were not actually existed as on 31/03/2016. These are bogus liabilities created out of thin air by the assessee of which he has no documentary evidences. The assessee is making concocted afterthought stories which are not supported by any rationale or evidences. Therefore, an amount of Rs.19,72,000/- is hereby disallowed and added to the total income of the assessee being cessation of liability under the provisions of section 41(1) of the Income Tax Act, 1961.

(iv) Addition of Rs.18,00,800/- comprising of Rs.3,21,700/- and Rs.14,79,100/- u/s 43CA of the Act by observing in para 11.4, 11.5 and 11.6 as under :

“11.4 In this case the assessee accepted that in the certain cases an amount of Rs.1,75,35,000/- is received during the scrutiny year only and the agreement to sale has also been completed during the scrutiny year only, whereas the value adopted by the State Government Authority for the purpose of stamp duty is at Rs.1,97,79,700/-. However, property mentioned at Serial no.8, Ratndeeep corner has already been considered for taxation purpose in PARA 6, the same is not brought to consideration here. Further remaining properties have been sold at Rs.55,35,000/-, & value adopted by the state government authority for purpose of stamp duty is 58,56,700/-. Hence it is crystal clear that the provision of the subsection (1) of the section 43CA is squarely applicable in this case to the amount of Rs.3.21,700/-. Considering the above facts, amount of Rs.3,21,700/- is hereby added to the total income of the assessee under the provisions of section 43CA of the Income Tax Act, 1961.

11.5 The assessee has further claimed that certain amount out of above properties at Rs.30,50,000/- is received in the earlier years as advances, whereas the value adopted by the Statement Government Authority for the purpose of stamp duty is at Rs.45,29,100/-. In this regard it is mentioned that agreement to sale in respect of these properties have been made in the year under scrutiny only. The assessee was requested vide this office questionnaire letter dated 12/07/2018 regarding the addition. However, the assessee has furnished the list & ledgers of persons only who have given the advances against booking and also furnished a copy of the index – II. The assessee has not furnished any other details for advance booking made, payment made or mode of payment in the earlier years.

11.6 It is seen that the assessee want to take shelter of advance booking, whereas as per the provision of the sub section (3) of section 43CA the value referred or to be taken as specified in the agreement to the sale. There is no provision regarding the advance booking or advance amount receipt. In the instance case there is difference in the value of Consideration received or accrued and value adopted by the Statement Government Authority for the purpose of stamp duty in the agreement to sale. In view of the above discussion the provision of the section 43CA is also applicable for rest amount of Rs.14,79,100/-. Moreover, on perusal of the Audit Report it is noticed that the auditor has disallowed/reported the transactions where the provision of the section 43CA is applicable to the tune of Rs.37,23,800/-, but in the return of income the same amount has not been offered for taxation. As the assessee was duty bound to include the truly and correctly income in the original return of income, but the assessee has not included intentionally to avoid burden of tax. Since the assessee firm is duly guided by the learned chartered accountant but failed to offer its correct income. Considering the above facts, amount of Rs.14,79,100/- is hereby added to the total income of the assessee under the provisions of section 43CA of the Income Tax Act, 1961.”

2.1 The Ld. AO, therefore, completed the assessment on total income of Rs.7,60,29,960/- u/s 143(3) of the Act on 26.12.2018 by making the above additions to the income of Rs.94,33,660/- declared by the assessee.

3. Aggrieved, the assessee carried the matter before the Ld. CIT(A) challenging the above additions made by the Ld. AO.

3.1 As regards taxing the gain on sale of flats held as investment by the assessee as business income as against capital gains offered by the assessee, the Ld. CIT(A) upheld the findings of the Ld. AO by observing that burden of proof lies on the assessee to prove that the facts and findings of the Ld. AO are incorrect which has not been done during the appellate proceedings. The relevant observations and findings of the Ld. CIT(A) in para 4.3 of his order is reproduced below :

“4.3 I have gone through the grounds of appeal, assessment order and the submissions made by the appellant. The appellant is a builder and developer. It was submitted by the appellant that it had developed the land and sold all the flat except the flat, which was sold during the year under consideration for Rs. 1,39,23,000/- and offered for taxation under capital gains. However, the AO considered the sale consideration under the head ‘business income’ as the flat has shown in stock in trade. In the appellate proceedings, burden of proof lies on the assessee to prove that facts and findings of the AO are incorrect. If the appellant intend to kept the same for his personal use, the flat would have been registered in his name. Being developer, the share of the flat was kept as it is in its books of accounts as stock in trade. It is evident from the audit report as well as the sale deed executed in the name of Sri Gauresh Rajendra Phadke. It was rightly pointed out by the AO that the said flat was sold by the assessee in the capacity of developer but not as a owner. In view of the above reasons, I have not find any reason to interfere with the decision of the Assessing Officer. Accordingly, the ground No. 1 is dismissed.”

3.2 As regards the addition of Rs.2,00,000/- u/s 68 of the Act the Ld. CIT(A) observed that the assessee has failed to prove the creditworthiness of Shri Hanif H. Malpekar by bringing on record any new evidence. The relevant observations and findings of the Ld. CIT(A) is reproduced as under

“5.2 The appellant has submitted that Hanif H Malpekar is son of the appellant having his explained source of income from salary. The appellant submits that since identity and creditworthiness of the creditors and genuineness of the transactions has been established, the addition is not warranted.

5.3 I have gone through the submissions made by the appellant. By way of confirmation letter, the appellant can prove the identity of the person and by way of copies of bank statement, the genuineness of the transaction can be proved. But in order to prove the creditworthiness of the money lender, the appellant needs to file the ITR or copy of the bank account of Mr. Hanif H Malpekar. The appellant has failed to prove the creditworthiness of Sri Hanif. In fact Mr. Hanif is the son of the appellant. Appellant has not brought on record any new evidences in support of the grounds of appeal raised in this regard. Therefore, I confirm the addition made by the AO. Ground No. 2 of appeal is dismissed.”

3.3 As regards addition of Rs.1,65,66,500/- being balance of sundry creditors appearing in his books as on 31.03.2016, the Ld. CIT(A) upheld the findings of Ld. AO and directed the Ld. AO to verify the confirmations in comparison with the ledger extracts of the creditors and allow the credit thereof if found in order and genuine. The relevant extract of the observations of the Ld. CIT(A) is reproduced as under :

“6.2 During the course of appellate proceedings, the appellant submitted that all the creditors in the list have been duly paid for in the subsequent period for which the necessary ledger accounts are enclosed. Confirmations of the creditors are enclosed as obtained from the respective parties. In view of the factual position, it was incorrect on the part of the ITO to assume that there is cessation of liability in respect of such creditors and therefore addition made by him u/s. 41(1) is incorrect, inasmuch as there actually was due settlement of the creditors by payment in the subsequent years.

6.3 I have gone through the grounds of appeal, assessment order and the submissions made by the appellant. It is observed from the assessment order that during the course of assessment proceedings, the appellant had not filed the confirmations and ledger extracts for all sundry creditors. Only 6 confirmations have been filed to an extent of Rs. 42,84,437/- out of Rs. 2,08,50,837/-. Though the AO specifically requested to submit the copy of ITR, balance sheet and copy of relevant portion of the bank account statement, the appellant had not filed the same before the AO. The appellant was required to produce documents which could establish identity as well as credit worthiness of creditor and genuineness of the transaction. During the course of appellate proceedings, list of sundry creditors as on 31.3.2016 is filed along with confirmations and ledger extract of the creditors. The AO is directed to verify the confirmations in comparison with the ledger extracts and if it is found in order and genuine, the credits may be allowed accordingly. The ground of appeal raised by the appellant is allowed for statistical purpose. Ground No. 3 of appeal is allowed.”

3.4 So far as the addition of Rs.4,60,57,000/- representing flat booking advances as unexplained credit, the Ld. CIT(A) directed the Ld. AO to verify the confirmations, allotment letters in comparison with the ledger extracts and allow the credits thereof if it is found in order and genuine. The relevant extract of the observations and findings of the Ld. CIT(A) in this regard reads as under :

“7.2 The appellant submitted that the advances having not been received in this year the addition of these advances u/s. 68 in the year under appeal cannot be made. Further, all flat booking advances are either against registered agreement to sales or flat allotment letters most of which have duly been got converted into sales in the subsequent period. This fact is duly confirmed by the ITO while making addition u/s. 43CA.

7.3 I have gone through the submissions of the appellant. During the course of appellate proceedings, allotment letters and ledger extract of the persons who have made payments towards bookings. The AO is directed to verify the confirmations, allotment letters in comparison with the ledger extracts and if it is found in order and genuine, the credits may be allowed accordingly. The ground of appeal raised by the appellant is allowed for statistical purpose. Ground No. 4 of appeal is allowed.”

3.5 As regards addition of Rs.19,72,000/- being balance of other payables appearing in the books, the Ld. CIT(A) confirmed the addition made by the Ld. AO u/s 41(1) of the Act for the reason that the assessee failed to establish the genuineness of the transactions by filing the supporting evidences/information in respect thereof. The relevant extract of the observations and findings of the Ld. CIT(A) is reproduced as under :

“8.2 During the course of appellate proceedings, it is submitted that the addition is u/s. 41(1) with the assumption that the amounts are not actually payable. The facts are contrary as are evident from the ledger accounts enclosed. These amounts stand duly paid for /settled in the subsequent period meaning thereby that there was no cessation of liability as on the year end.

8.3 I have gone through the assessment order and submissions made by the appellant. The appellant should bring on record the documentary evidence to prove that the addition made by the AO was wrong. If the assessee fails to prove or rebut with cogent evidence against such facts and findings, no interference is required with assessment order. Even during course of present proceedings also, the appellant failed to furnish the name and addresses of the persons who were appeared in the other payables of Rs. 19,72,000/- and the nature of the receipt. The onus always lies on the appellant to prove the genuineness of the transactions. Since the appellant did not come forward with any supporting evidences/information responding to the notices issued, I am not convinced with the contentions/ arguments of the appellant in this regard. Therefore, the additions made by the AO are confirmed under sec. 41(1) of the I T Act as the appellant failed to establish the genuineness of the transaction. Ground No. 5 is dismissed.”

3.6 As regards addition of Rs.18,00,800/- u/s 43CA of the Act made by the Ld. AO, the Ld. CIT(A) granted partial relief to the assessee in respect of five creditors viz. Flat No. A-15; A-19; C-03; C-04 and E-06 relying on the decision of the Pune ITAT in the case of Rahul Constructions Vs. DIT wherein it was held that the difference upto 10% can be ignored. In respect of other two properties i.e. A-11 and B-02 the Ld. CIT(A) sustained the addition made by the Ld. AO on the ground that the assessee failed to prove or rebut the facts and findings of the Ld. AO with cogent evidence. The relevant observations and finding of the Ld. CIT(A) are reproduced as under :

“9.1 The AO observed from the audit report that the auditor has disallowed / reported the transactions where the provision of the sec. 43CA is applicable to the tune of Rs. 37,23,800/- but in the return of income the same amount has not been offered for taxation. As the assessee was duty bound to include the truly and correctly income in the original return of income, but the assessee has not included intentionally to avoid burden of tax. Since the assessee firm is duly guided by the ld. CA but failed to offer its correct income. Further in this case, the provisions of sec. 43CA are squarely applicable to the amount of Rs. 3,21,700/-.

9.2 I have considered the assessment order, facts of the case, grounds of appeal, statement of facts and the submissions made by the appellant during the appeal proceedings. The threshold for the difference between the consideration and the stamp duty value is 10%. The appellant had quoted the decision of the Hon’ble Pune ITAT in the case of Rahul Constructions Vs.

DIT wherein it was held that the difference upto 10% can be ignored. Respectfully following the decisions as cited above, the addition made by the AO on the five properties viz. Flat No. A-15; A-19; C-03; C-04 and E06 cannot be sustained in appeal and is directed to grant the deduction. Assessee gets partial relief.

9.2.1 The provisions of sec. 43CA have been inserted by the Finance Act, 2013 w.e.f. 1.4.2014 relevant to A.Y. 2014-15 and if we look at the provisions of subsection (3) and sub section (4), it emphasizes a scenario where the date of agreement fixing value of consideration for transfer of the assets and date of registration are not the same and provides that the value as on the date of agreement would be considered provided the amount of consideration or part thereof has been received by any mode other than cash on or before the date of agreement for transfer of the assets. Therefore, the provisions of sec. 43CA(3) shall apply only in a case where the amount of consideration or a part thereof has been received by way of account payee cheque or an account payee bank draft or by use of electronic clearing system through a bank account or through such other electronic mode as maybe prescribed on or before the date of agreement for transfer of the asset.

9.2.2 If the following conditions are satisfied, the AO may refer the valuation of the relevant asset to a Valuation Officer in accordance with section 55A of the I T Act –

(i) where the assessee claims before the AO that the value adopted or assessed or assessable by the stamp valuation authority exceeds the fair market value of the property as on the date of transfer; and

(ii) the value so adopted or assessed or assessable by stamp valuation authority has not been disputed, in any appeal or revision or no reference has been made before any authority or court or High Court is made applicable under section 43CA also.

In the instant case, the assessee has not made any claim before the AO to refer the case to the DVO. Therefore, the AO passed the assessment order by invoking the provisions of sec. 43CA of the I T Act.

9.2.3 In this case, the AO held that no agreement / agreement to sale was executed between purchaser and seller for any of the property mentioned above. It is also necessary here that as per information furnished by the assessee, the assessee had accepted cash for advance payment in respect of the properties mentioned above. Therefore, the provisions of subsection (3) of sec. 43CA are not applicable in this case.

9.2.4 The submissions of the appellant are not convincing. In the appellate proceedings, burden of proof lies on the assessee to prove that facts and findings of the AO are incorrect. If the assessee fails to prove or rebut with cogent evidence against such facts and findings, no interference is required with assessment order. Therefore, the addition made by the AO in respect of the properties units at A-11 and B-02 are sustained and the grounds raised in this regard is partly allowed.”

4. Dissatisfied, the assessee is in appeal before the Tribunal by raising the following grounds of appeal :-

- “1. On the facts and circumstances of the case and in law the Ld. CIT(A), NFAC, erred in confirming the decision of the Income Tax Officer, Ward 1, Ratnagiri (hereinafter referred to as the ITO) of taxing the gains on sale of flat held as investment by the appellant as business income as against capital gains as claimed by the appellant.*
- 2. On the facts and circumstances of the case and in law the Ld. CIT(A), NFAC, erred in confirming the addition made by the AO of Rs. 2,00,000/- u/s 68*

being loan taken by the appellant from his son Mr. Hanif M. Malpekar as unexplained credit in books of accounts.

3. On the facts and circumstances of the case and in law the Ld. CIT(A), NFAC, erred in confirming the addition made by the AO of Rs.19,72,000/- being balance of other payables appearing in appellant's books as on 31.03.2016.
4. On the facts and circumstances of the case and in law the Ld. CIT(A), NFAC, erred in confirming additions made by the AO u/s 43CA of Rs.13,68,100 out of the total addition of Rs.18,00,800 ignoring the submissions of the appellant inasmuch as:
 - a. Stamp Duty Value need to be taken of the year of booking and not of the year of Registered Agreement.
 - b. The appellant having been following POCM (Percentage of Completion Method) addition if any u/s 43CA ought to have been restricted to the percentage of income applied.
 - c. The addition made by AO without reference to the DVO is invalid, particularly when the appellant having objected to adoption.

The appellant craves leave to add to, amend, alter, delete or modify all or any of the above ground of appeal or raise a new ground of appeal before or at the time of hearing.”

ITA No. 23/PUN/2024, AY 2016-17 by the Revenue

5. The Department is also aggrieved by the order of Ld. CIT(A) and has raised the following grounds of appeal :-

- “1. On the facts and circumstances of the case and in law, the Ld.CIT(A) erred in allowing assessee's ground of appeal challenging addition of Rs.1,65,66,500/- made u/s 41(1) of the Act, being balance of sundry creditors and genuineness of which were not established by the assessee during the assessment proceeding.
2. On the facts and circumstances of the case and in law, the Ld.CIT(A) erred in allowing assessee's ground of appeal challenging the addition of Rs.4,60,57,000/- made u/s 68 of the Act, on account of unexplained credits.
3. On the facts and circumstances of the case and in law, the Ld.CIT(A) erred, by setting aside the matters pertaining to Ground No. 1 & 2 (supra) to the A.O. for verification without granting the opportunity to the A.O. to submit the remand report.
4. On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in deleting the addition amounting to Rs.4,32,700/- made u/s 43CA of the Act.
5. On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in not appreciating the fact that the first provision to Section 43CA about, “The threshold limit for the difference between the consideration and the stamp duty value of the properties full within 10%” has been inserted by Finance Act, 2018 w.e.f. 01.04.2019 hence is not applicable for the assessment year under consideration i.e. 2016-17.”

6. The Ld. AR submitted that all the grounds of appeal raised by the assessee requires verification of the facts in light of the supporting documentary evidence filed by the assessee during the course of appellate proceedings. He, therefore, pleaded that the matter may be sent back to the file of the Ld. AO for verification thereof in respect of all the issues/ grounds raised by the assessee afresh. The Ld. DR had no objection to the said proposition of the Ld. AR.

7. The Ld. DR in support of the grounds raised by the Department contended that the Ld. CIT(A) has erred in setting aside the impugned issues to the file of the Ld. AO for verification without granting an opportunity to the Ld. AO to submit his remand report and hence the provision of Rule 46A of the Income Tax Rules, 1962 has been violated. He, therefore, prayed that the issue pertaining to the addition of Rs.1,65,66,500/- made u/s 41(1) of the Act being balance of sundry creditors, genuineness of which has not been established by the assessee during the assessment proceedings and addition of Rs.4,60,57,000/- made u/s 68 of the Act on account of unexplained credits be set aside to the file of Ld. AO for adjudication afresh in the light of the new evidences filed by the assessee during the appellate proceedings before the Ld. CIT(A).

8. We have heard the Ld. Representatives of the parties and perused the records. Perusal of the Ld. CIT(A)'s order reveals that the Ld. CIT(A) has confirmed the additions made by the Ld AO as the assessee failed to discharge the burden of proof on him that the facts and findings of the Ld. AO are incorrect by filing additional/new evidence(s) before him in support of his claim. So far as the grievance of the Department is concerned, we notice that the Ld. CIT(A) has directed the Ld. AO to verify the impugned issues in light of the new evidences/additional evidences filed by the assessee before him during the appellate proceedings without calling for remand report from the Ld. AO. We, therefore, find force in the arguments of the Ld. DR that the provisions of Rule 46A has been violated.

9. Considering the totality of the facts and on the facts and circumstances of the case set out above and in the interest of justice and fair play, we deem it proper to restore the matter back to the file of Ld. AO with a direction to verify all the issues raised by the assessee as well as by the Revenue in its respective ITA No. 264/PUN/2024 and ITA No. 23/PUN/2024 in light of the supporting documentary evidence(s) filed by

the assessee during the appellate proceedings and also any other fresh documentary evidence(s) that may be filed by the assessee in support of his claim. The Ld. AO shall make the assessment afresh after due verification on merits as per the facts and law. The assessee is hereby directed to produce all the details/documents that were filed before the Ld. CIT(A) and any further details/documents as may be called upon by the Ld. AO on the appointed date without seeking any adjournment under any pretext failing which the Ld. AO is at liberty to pass appropriate order as per law. We hold and direct accordingly. Consequently, the grounds raised by the assessee in ITA No. 264/PUN/2024 and by the Revenue in ITA No. 23/PUN/2024 are allowed for statistical purposes.

9. To sum up, the appeal of the assessee in ITA No. 264/PUN/2024 and appeal of the Revenue in ITA No. 23/PUN/2024 are allowed for statistical purposes.

Order pronounced in the open court on 27th November, 2024.

Sd/-
(R.K. Panda)
VICE PRESIDENT

Sd/-
(Astha Chandra)
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 27th November, 2024.
रवि

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The Pr. CIT concerned.
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच,
पुणे / DR, ITAT, "A" Bench, Pune.
5. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति// True Copy//

आदेशानुसार / BY ORDER,

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune