

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH“D” MUMBAI**

**BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 2084/MUM/2006
Assessment Year: 1989-90**

M/s. Shruti Builders
C/o. Surendra Rane, A-2, Shalini
Sadan, 1st D.P. Link Road
Borivli (W)
Mumbai - 400103

Vs. DCIT 25(1)
Pratyakshkar Bhavan
Bandra Kurla Complex
Bandra (E)
Mumbai - 400051

PAN No. AAASF0979E

(Appellant)

(Respondent)

Assessee by: None
Revenue by: Shri Arun Shenoy,DR

Date of Hearing : 09/02/2017
Date of pronouncement: 28/04/2017

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 1989-90. The appeal is directed against the order of the Commissioner of Income Tax (Appeals) – XXV, Mumbai and arises out of order u/s 143(3) r.w.s. 250 of the Income Tax Act, 1961 (the ‘Act’).

The case was fixed for hearing on 09.02.2017. There was no compliance by the assessee on the above date. Therefore, the appeal is disposed off on the basis of the relevant record and after hearing the learned DR.

2. The grounds of appeal filed by the assessee read as under:-

- i. On the facts and circumstances of the case, the CIT(A) erred in rejecting the grounds of appeal taken by him that the A.O. erred in making the fresh assessment without fully complying with the directions of the Hon'ble ITAT vide its order dated 23.12.2003 to furnish the documents referred to in its order.

The appellant submits that the assessment so made by the A.O. without complying with the directions of ITAT is null, void and non est in law and contrary to principles of natural justice. The appellant prays that the assessment may be annulled.

- ii. On the facts and in the circumstances of the case and without prejudice to Ground No. 1 the appellant submits that the CIT(A) erred in confirming the action of the A.O. in taking the net profit at Rs. 3 lakhs on the WIP, being 10% thereof.

The appellant respectfully submits that the estimate of 10% net profit in the case of the appellant who is new to the business and that too in an underdeveloped location is exorbitant and prays that the addition be reduced.

- iii. On the facts and circumstances of the case CIT(A) erred in not appreciating the fact that note book (Annexure A-19) is a common cash book for all the concerns and entries therein do not pertain only to the appellant and the CIT(A) further erred in holding that an amount of Rs. 13,98,380/- pertains to the appellant.

The appellant prays that the addition of Rs. 13,98,380/- to the total income of the appellant be deleted.

- iv. On the facts and in the circumstances of the case, the CIT(A) erred in upholding the addition of an amount of Rs. 3,11,925/- mentioned in Annexure 21, page No. 4. The appellant submits that the said amount is included in the amount of Rs. 9,21,000/- brought to tax in the hands of M/s. R.S. Builders, vide assessment order dated 31.03.1994 and upheld by the CIT(A). It is prayed that the addition be deleted.

- v. On the facts and circumstances of the case, the CIT(A) erred in confirming the addition of an amount of Rs. 69,500/- as per Annexure 21, page 5. The appellant submits that the said amount falls to be taxed in the assessment year 1988-89 and not in the assessment year 1989-90. It is prayed that the said addition be deleted.

- vi. On the facts and in the circumstances of the case, the CIT(A) erred in confirming the addition of an amount of Rs. 2,02,000/- as per Annexure 21 page 18. It is submitted that some confusion has arisen because of similarity of names of two parties, one Shri S. Upadhyah and another Sushila Upadhyay. It is prayed that the addition be deleted.
- vii. On the facts and in the circumstances of the case, the CIT(A) erred in confirming the addition of an amount of Rs. 4 Lakhs (Annexure A-24). The appellant submits that the addition has been made on assumption and that the amount ought to be considered in the hands of Shri Surendra Kumar Goyal. It is prayed that the addition be deleted.
- viii. On the facts and in the circumstances of the case, the CIT(A) erred in holding that the addition on account of declaration of Rs. 37,50,000/- is not deleted. The appellant submits that the declaration having been retracted by the declarant, no amount falls to be taxed.
- ix. On the facts and in the circumstances of the case, the CIT(A) erred in holding that the addition of Rs. 3,00,000/- at 10% is to be treated as addition to the net profit and not part of the gross profit.

Without prejudice to the contention of the appellant that there is no justification for any addition on estimate to the income of the appellant, in any event since "on money" constitutes additional gross profit, it ought to be considered as such and the addition deleted. It is prayed accordingly.

- x. On the facts and in the circumstances of the case, the lower authorities erred in bringing to tax the amounts as per seized material in the hands of the appellant notwithstanding finding recorded in the assessment order u/s 144 dated 31.03.1992 that Shri Surendra Kumar Goyal is the main person doing construction activity and is the controlling authority and the addition is being made without prejudice to action that may be taken in the case of the said Shri S.K. Goyal and to whom notice u/s 148 has already been issued.

The appellant respectfully submits that since the addition has been made in the hands of the appellant apparently as a protective measure, the additions may be deleted. It is prayed accordingly.

3. We begin with the background of the case. The assessee – firm i.e. M/s. Shruti Builders (SB) filed its return of income for the A.Y. 1989-90 (23 months) on 27.03.1991 declaring total income of Rs. 1,80,000/-. The nature of business of the assessee-firm is that of a builder and developer. The Revenue conducted a search u/s 132 of the Act in the case of Shri Surendra Kumar Goyal (partner of the firm) on 31.03.1989. During the course of search, books of accounts of M/s. SB were seized. A statement u/s 132(4) was recorded from Shri Surendra Kumar Goyal who offered an amount of Rs. 37,50,000/- being the on-money received from the sale of flat in the project known as Shalini Sadan in the case of the firm M/s. SB. Subsequently, Shri Goyal retracted from the disclosure under the plea that the same was obtained under force and pressure. The Assessing Officer (A.O.) completed the assessment in the case of M/s. SB u/s 144 at an income of Rs. 1,11,31,505/-. The assessee filed appeal against the order of the A.O. before the learned CIT(A). The learned CIT(A) vide order dated 20.07.1992 set aside the order of the A.O. The A.O. made fresh assessment determining the income at Rs. 42,43,680/-. The assessee again filed appeal before the learned CIT(A) who vide order dated 18.10.1995 directed the A.O. to adopt the income at Rs. 41,16,580/- as against Rs. 42,43,676/-. The assessee filed appeal against the order of the A.O. before the ITAT. The Tribunal vide its order dated 08.05.2002 dismissed the appeal filed by the assessee. The assessee filed miscellaneous application before the Tribunal which was allowed on 28.04.2003. The Tribunal passed fresh order on 23.12.2003 setting aside the order of the learned CIT(A) and restoring the case to the A.O. for fresh adjudication with the direction (i) to furnish copies of statement recorded u/s 132(4) and 131 from

Shri Surendra Kumar Goyal and (ii) copies of seized material. The A.O. then passed an order u/s 143(3) r.w.s. 250 of the Act on 25.02.2005 determining the total income at Rs. 41,16,580/-. Aggrieved by the order of the A.O. the assessee filed an appeal before the learned CIT(A) who confirmed vide order dated 30.01.2006 the addition made by the A.O. to the extent of Rs. 27,71,805/-. The assessee is in appeal before the Tribunal against the above order of the learned CIT(A).

4. Now we take up the grounds of appeal chronologically. We begin with the 1st ground of appeal. We find that the learned CIT(A) wrote a letter to the A.O. to comply with the direction of the ITAT and trace the record wherever it was and submit a report after giving reasonable opportunity to the assessee on all the documents seized at the time of search. The A.O. gave copies of seized document and statement recorded u/s 132(4) to the assessee. The A.O. sought the reply of the assessee on each point of addition proposed to be made by him. After giving proper opportunity to the assessee and going through the seized document again, the A.O. sent the remand report on each point. The said report was forwarded by the Additional CIT, range 25(1) vide letter dated 28.12.2005 to the CIT(A). Therefore, there is no merit in the 1st ground of appeal and the same is dismissed.

4.1 Now we discuss 2nd to 9th ground of appeal. The A.O. vide assessment order dated 25.02.2005 has made the following additions giving brief reasons:

Ground of appeal	Addition	Reasons
2 nd and 9 th	Net profit @ 10% (Rs. 3,00,000/-)	Profit on extra work has to be in line with the normal profit disclosed for the assessment purpose.
3 rd	Rs. 13,98,380/-	Annexure A-19 is a seized notebook and a sort of cashbook written for the period 01.01.1989 to 28.03.1989. As per this book cash of Rs. 14.00 lakhs has been received on sale of flats. This notebook is written in a coded form, which was subsequently broken by the ADI and admitted by the assessee. For example Rs. 14,000/- is written as 140/00. All the receipts found in this book were not recorded in the books of accounts but were received in sale of flats. Therefore, the amount of Rs. 14.00 lakhs is added to the income of the assessee.
4 th	Rs. 3,11,925/-	Item no. 21: Which is a file containing loose papers, page No 4 is in respect of sale of the flat ad measuring 865 sq. ft. It shows that Rs. 2,50,000/- was received by cheque and amount of Rs. 3,11,925/- was received in cash. Therefore, as per noting the unexplained cash receipt is Rs. 3,11,924/-.
5 th	Rs. 69,500/-	Page no. 5: This page gives the details of sale of flat to one Saroj Derasari and total amount received is Rs. 2,80,000/-. The ledger account of Saroj Derasari in the fair books show a total of Rs. 2,10,500/- as received by Shruti Builders. The balance amount of Rs. 69,500/- is not accounted. Therefore, the amount of Rs. 69,500/- is added to the income declared.
6 th	Rs. 2,02,000/-	A-24: As per information contained on this page the flat C-20 of Shalini Sadan was sold for Rs. 2,80,000/- to S. Upadhayay and Rs. 82,000/- was received as loan

		from him in October 1988. Only Rs. 1,60,000/- is shown in the books of accounts. Balance consideration of Rs. 2,02,000/- not accounted is added to the income as unexplained consideration received by the assessee.
7 th	Rs. 4,00,000/-	Annexure 24: An amount of Rs. 5.00 lakhs was received from Shri Mishra on 14.10.88 one lakh by cheque and Rs. 4.00 lakhs in cash as per the explanation given before the ADI Shri Mishra belongs to Kalpana Enterprises. In this account, only receipt of Rs. One lakh is recorded and the balance amount of Rs. 4.00 lakhs is not recorded, hence the unrecorded receipt of Rs. 4.00 lakhs is added in the computation as unexplained receipt.
8 th	Rs. 37,50,000/-	Since addition of Rs. 23,83,425/- is a base for disclosure of Rs. 37,50,000/- made u/s 132(4) only addition of Rs. 37,50,000/- is made.

4.2 Aggrieved against the above order of the A.O., the assessee filed an appeal before the learned CIT(A). We find that the learned CIT(A) has confirmed the addition made by the A.O. to the following extent:

1.	Net profit @ 10% Rs. 3,00,000
2.	As per note book Annexure A-19 (Rs. 90,000/- + Rs. 13,98,380/-)
3.	As per page 4 of Annexure-21 (Rs. 3,11,925/-)
4.	Page 5 of Annexure -21 (Rs. 69,500)
5.	Page 18 of Annexure -24 (Rs. 2,02,000/-)
6.	Page 7 of Annexure -24 (Rs. 4,00,000/-)
	Total Rs. 27,71,805/-

4.3 Having perused the relevant record, we find that reasonable opportunity should have been given to the assessee to substantiate its case with regard to the addition made by the A.O. and sustained by

the learned CIT(A) in respect of 2nd to 9th ground of appeal. This has not been done .

4.4 Now we come back to the 10th ground of appeal. It relates to the addition made by the A.O. in the case of M/s. SB as a protective measure whereas Shri Surendra Kumar Goyal was the main person doing the construction activity. The basic scheme of the Act is to charge all income to tax but only once in the hands of the same person. We may fruitfully refer to the judgement of the Hon'ble Allahabad High Court in the case of *Kamlaker Singh (Maharao Raja) vs. CIT* (1968) 67 ITR 351, 357, 358 (All). Also it is settled law that either the main assessment or the protective assessment alone will finally stand.

4.5 In view of the above, the order of the learned CIT(A) pertaining to the 2nd to 10th ground of appeal is set aside and the same is restored to the file of the A.O. to pass a speaking order as per the provisions of the Act after giving reasonable opportunity of being heard to the assessee. There is a general rule that reasons should be given for decisions, based on the principle of fairness which permeates tax law. The AO would follow the legal principle mentioned at para 4.4. here-in-above. The assessee is directed to file the relevant details before the A.O. Thus the 2nd to 10th ground of appeal are allowed for statistical purposes.

5. In the result, the appeal is partly allowed.

Order pronounced in the open Court on 28/04/2017

Sd/-

(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-

(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai:

Dated: 28/04/2017

*Biswajit, Sr. P.S.***Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai