

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A', NEW DELHI**

Before Sh. J. S. Reddy, AM And Sh. George George K., JM

ITA No. 4779/Del/2013 : Asstt. Year : 2007-08

Dy. Commissioner of Income Tax, Central Circle-7 New Delhi	Vs	M/s Amrapali Homes, 307, 3 rd Floor, Nipun Tower, Community Centre, Karkardooma, Delhi-110092
(APPELLANT)		(RESPONDENT)
PAN No. AALFA5526F		

Assessee by : Amit Goel, CA

Revenue by : Sh. Parvinder Kaur, DR

Date of Hearing : 14.7.2014	Date of Pronouncement : 18.7.2014
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ORDER

Per George George K., JM:

This appeal at the instance of the Revenue is directed against CIT(A) order dated 9.5.2013. The relevant assessment year is 2007-08.

2. The solitary issue that arises for a consideration is whether the CIT(A) is justified in deleting the addition of Rs. 71,91,658/- made by the Assessing Officer, being the difference between the declared income as per the statement given during the course of survey and income as per the income tax return.

3. Briefly stated the facts of the case are as follows:

The assessee is a firm engaged in the business of Real Estate Development. There was a survey u/s 133A of the Act on 1.12.2006.

The statement u/s 131 was recorded from the partner of assessee firm Shri Anil Kumar Sharma. In the statement recorded from Shri Anil Kumar Sharma, he had declared an estimated income of Rs. 12.25 crores from the group concern, namely, M/s AHS Joint Venture and assessee firm. However, the return of income of both AHS Joint Venture and assessee firm disclosed only an income of Rs. 11,53,08,342/-. Therefore, the A.O made an addition of Rs. 71,91,658/- being the difference between estimated income declared during course of survey and the returned income as the income of the assessee firm. The reasoning of the A.O for making the addition read as follows:

“3.2 The submissions of the assessee have been duly considered. Survey operation was conducted at the business premises of the assessee on 1/12/2006 and the assessee declared an income of Rs. 12.25 crores, in the hands of M/s AHS Joint Venture and M/s Amrapali Homes, on 5/12/2006. The assessee had deposited tax after survey operation, during the period Dec 2006 to March 2007, on the declared income, only in the hands of M/s AHS Joint Venture and M/s Amrapali Homes, and not in the hands of Shri Anil Kumar Sharma. Had the assessee declared income in the hands of Shri Anil Kumar Sharma also, then it would have deposited tax on the declared income in the hands of Shri Anil Kumar Sharma also.

3.2.1 Further, in various correspondence/letters dated 19/12/2006, 2/1/2007, 4/1/2007, 2/2/2007 and 23/2/2007, the assessee had mentioned about depositing tax and declaration of income in the hands of M/s AHS Joint Venture and M/s Amrapali Homes and it had nowhere mentioned about the declaration of income and depositing of tax in the hands of Shri Anil Kumar Sharma.

3.2.2 Further, all the survey cases of A.Y 2007-08 had to be compulsorily scrutinized u/s 143(3) of the IT Act. Had the assessee also declared income in the hands of Shri Anil Kumar Sharma then his case would have also been taken by the then A.O under

compulsory scrutiny. The fact that the ten A.O had taken cases of only M/s AHS Joint Venture and M/s Amrapali Homes in compulsory scrutiny and not the case of Shri Anil Kumar Sharma, again points towards the fact that the assessee had declared income only in the hands of M/s AHS Joint Venture and M/s Amrapali Homes and not in the hands of Shri Anil Kumar Sharma.

3.2.3 In the light of the facts stated above, the submission of the assessee that vide letter dated 19/12/2006, it had declared income of Rs. 12.25 crores in the hands of M/s AHS Joint Venture; M/s Amrapali Homes and Mr. Anil Kumar Sharms instead of in the hands of only M/s AHS Joint Venture and M/s Amrapali Homes, is nothing but an after thought and is not accepted.

3.3 As the assessee had declared an income of Rs. 12.25 crores in the hands of M/s AHS Joint Venture and M/s Amrapali Homes in the F.Y 2006-07 in its statement before the then DCIT, Cir. 35(1) on 5/12/2006 and has admitted the difference in returned income and the surrendered income, therefore, the difference of Rs. 71,91,658/- [12,25,00,000 – 11,53,08,342/- (7,10,53,492/- + 4,42,54,850/-)] in the declared income of Rs. 12,25,00,000/- and returned income of M/s AHS Joint Venture (Rs. 7,10,53,492/-) and M/s Amrapali Homes (Rs. 4,42,54,850/-) in total amounting to Rs. 11,53,08,342/-, is added to the income of the assessee.”

4. The assessee being aggrieved by the assessment, filed an appeal before the First Appellate Authority. The CIT(A) allowed the appeal of the assessee. The findings of the CIT(A) is reproduced below:

“4. I have perused the assessment order, grounds of appeal, written submission and discussed the matter with the appellant very carefully. The A.O had made following additions in the main assessment order which are in dispute in appeal:-

i) On a/c of Estimated excess Declared income : 71,91,658/-

A survey u/s 133A was conducted on the assessee’s business premises on 1.12.2006. The statement u/s 131 was recorded from Partner Shri Anil Kumar Sharma by the A.O. Thus clearly 4 months of the previous year was still there before completion of previous year, but A.O got disclosure from appellant’s partner in advance to surrender income and

pay taxes. The partner admitted to pay advance tax on 4 installments on an income of Rs. 12.25 crores as mentioned above. But while finalizing the accounts, the firm found that the income as per its books of a/cs was deficient by Rs. 71,91,658/- from the two firms from disclosure given in survey. As per AR, this deficiency was 5.87% only. The A.O should have pointed out defects from books of a/cs before making any addition. Any addition on estimate basis in a slip shod manner without rejection of books of a/cs cannot stand the test of appeal.

4.1 The AR had given his final submission dated 16.4.2013 explaining the justification in variance between declared income as per the statement given during the survey proceeding u/s 133A and income returned. I have verified and am satisfied that the practice followed in Real Estate. In the middle of year; it is a tedious task to estimate the income or profit in advance. Further, variation up to 6% is acceptable between the estimation and actual income. Addition of income on the basis of statement given during the survey proceeding u/s 133A is not reasonable and fair as statement shall not have evidentiary value and there shall always be difference between the estimation and actuals. Variation in estimation (%): 5.87% is acceptable. It is found that the presentation of the appellant's AR is satisfactory. For the addition of Rs. 71,91,658/-, the A.O had not considered the complexity involved in making exact estimation of income in the middle of the year where in case of Construction of residential projects whose duration of completion is minimum three to four years so they could not ascertain exact amount of Income in advance. It was only an estimation of income which was given at that time of survey was conducted. The appellant's case is covered by the decision of Supreme Court in the case of CIT, Salem Vs S. Khader Khan Son [2012] 25 taxmann.com 413 (Supreme Court). The power to examine on oath u/s 133A does not empower any ITO to examine any person on oath.

Head Note:- "Section 133A of the Income Tax Act, 1961 – Survey – Whether Section 133A does not empower any ITO to examine any person on oath; so statement recorded under section 133A has no evidentiary value and any admission made during such statement cannot be made basis of addition – Held, year [in favour of assessee].

The addition of Rs. 71,91,658/- was not justified. Therefore, this addition of dispute of Rs. 71,91,658/- is hereby deleted."

5. The Revenue being aggrieved is an appeal before us. The DR supported the order of assessment, whereas the Id. AR reiterated the submissions made before the income tax authorities and supported the findings of the CIT(A).

6. We have heard the rival submissions and perused the material on record. A survey proceedings was carried out in the middle of the accounting year (on 1.12.2006) in the case of AHS Joint Venture, the sister concerns of the assessee firm. During the course of survey there was no incriminating material nor undisclosed income found in the hands of the assessee or its sister concern. A statement was recorded from the assessee partner, wherein he estimated the income of the group concern at 12.25 crores of rupees as under:

<i>AHS Joint Venture</i>	<i>Rs. 6,25,00,000</i>
<i>Amrapali Homes</i>	<i>Rs. 6,00,00,000</i>

	<i>Rs. 12,25,00,000</i>

6.1 However, after finalization and audit of accounts, the income declared by the respective concerns whereas as follows:

<i>AHS Joint Venture</i>	<i>Rs. 7,10,53,492</i>
<i>Amrapali Homes</i>	<i>Rs. 4,42,54,580</i>

	<i>Rs. 11,53,08,072</i>

6.2 In the case of AHS Joint Ventures, the actual income worked out was more than the estimated declared income, whereas in the case

of the assessee, the income worked out was lower than what was declared during the course of survey proceedings. The Assessing Officer accepted the income declared in the case of AHS Joint Venture. However, in the case of assessee, he made an addition Rs. 71,91,658/- being the difference between the estimate given at the time of survey (Rs. 12.25 crores of the group) and the income declared as per the return of income (Rs. 11.53 crores of the group).

6.3 The estimated declaration of income during the course of survey was given in December 2006 for the period 1.4.2006 to 31.3.2007 i.e. much prior to close of the accounting year. No person can tell in advance in the month of December 2006 as to what exactly would be the income for the entire period of 1.4.2006 to 31.3.2007. The return of income filed by the assessee is on the basis of audited statement of accounts and not on the basis of any surrender. The books of accounts has not been rejected nor any incriminating material or evidence of undisclosed income was unearthed either during the course survey or assessment proceedings. The Assessing Officer has himself recognized that the declaration made by the assessee was not based on any surrender. The Assessing Officer has not assessed the income at Rs. 6 crores which was the estimated declaration of income during the course survey, but he has completed the assessment at Rs. 5,14,46,510/-.

6.4 It is trite position of law that statement recorded during the course of survey cannot be the sole basis for making an addition especially when there is nothing incriminating material or any undisclosed income unearthed during the course of survey proceedings u/s 133A of the Act.

6.5 In view of the aforesaid reasoning we are of view that the order of the CIT(A) is correct and in accordance with law and no interference is called for. It is order accordingly.

7. In the result, the appeal filed by the Revenue is dismissed.
Order pronounced in the open Court on 18/7/2014

Sd/-
(J. S. Reddy)
ACCOUNTANT MEMBER
Dated: 18/7/2014

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-
(George George K.)
JUDICIAL MEMBER

ASSISTANT REGISTRAR