

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI**

**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND
SHRI PAWAN SINGH, JUDICIAL MEMBER**

ITA NO. 795/MUM/2015 : A.Y : 2006-07

Shri Amod Shivilal Shah
302, Nikita Enclave, C/2089,
Off Carter Road, Bandra (W),
Mumbai 400 050.

Vs. ACIT-19(3), Mumbai
(Respondent)

PAN : APIPS8005G (Appellant)

**Appellant by : Dr. K. Shivaram &
Shri Rahul Hakani**

Respondent by : Shri Rajesh Kumar Yadav

Date of Hearing : 29/11/2017

Date of Pronouncement : 23/02/2018

ORDER

PER G.S. PANNU, AM :

The captioned appeal by the assessee is directed against the order of CIT(A)-30, Mumbai dated 11.11.2014, pertaining to the Assessment Year 2006-07, which in turn has arisen from the order passed by the Assessing Officer, Mumbai dated 24.12.2008 under section 143(3) of the Income Tax Act, 1961 (in short 'the Act').

2. In his appeal, the appellant has raised the following Grounds of appeal:-

“1. Addition of Rs.74,63,557/- :

1. *The learned CIT(A) erred in confirming the order of the A.O. estimating the income of the assessee merely on basis of the statement confirming the order of the Assessing Officer recorded during survey of Rs. 1 crore and making the addition of Rs.74,63,557/- (Rs.1 crore less Rs. 25,36,443/- i.e. income declared in the return) without bringing is any material on record or the basis on which the addition was made more so when the statement recorded was immediately retracted by the assessee after survey, therefore, the addition is liable to be deleted.*

2. *The learned CIT(A) erred in sustaining the addition merely on basis of statement recorded during survey without verifying the correctness of the same from the details and submission furnished in the assessment proceeding as well as appellate proceeding and remand proceeding therefore the finding recorded are contrary to the material on record and the action is contrary to the CBDT Instruction No. 286/2/2003 (Inv.) II dt. 10/3/2003, hence the additions may be deleted.*

3. *The learned CIT(A) erred in not appreciating the fact that Expenditure incurred from 1/4/2003 till 21/3/2006 was Rs.45,58,230/- which was duly supported by bills and vouchers submitted in assessment proceeding and remand proceeding, therefore the estimate made by A.O. of the expenditure on adhoc basis at Rs. 6 lacs is arbitrary and without any basis liable to be rejected.*

4. *The learned CIT(A) erred in confirming the Assessment order estimating the sale proceeds of flats at Rs. 3,49,12,5007- as against Rs.3,06,97,827/-disclosed by the assessee which was supported by agreement of sale.”*

3. As a perusal of the aforestated Grounds of appeal reveal, the solitary dispute arises from an addition of Rs.74,63,557/- made by the Assessing Officer to the returned income. In brief, the relevant facts are that the assessee is engaged in the business of builders and developers through a proprietary concern, M/s. Nikita Constructions. It transpires that on 12.03.2007, a survey action u/s 133A of the Act was carried out at the

business premises of the assessee in the course of which a statement of the assessee was also recorded. At the time of survey, it was noted that the return of income for the assessment year under consideration as well as for Assessment Years 2004-05 and 2005-06 were not filed. Be that as it may, it was found that the development work of residential building situated at Bandra, Mumbai was complete in view of the Occupancy Certificate issued by the Municipal Corporation on 31.10.2005. Since no income thereof has been declared by the assessee, in the statement recorded a question was put to the assessee with regard to the same. In response, assessee submitted that no return of income for Assessment Years 2004-05, 2005-06 and 2006-07 were filed and that the income from said project could be computed by estimating it on the basis of the Work-In-Progress (WIP) declared for Assessment Year 2003-04. Therefore, the assessee declared an income of Rs.1,00,00,000/- from the said completed project, and in the answer at the time of survey, the working thereof was also enumerated, which is reproduced hereinafter :-

	<i>“Declared closing WIP as on 31/03/2003</i>	<i>Rs.2,43,36,202/-</i>
<i>Add.</i>	<i>Estimated expenses towards Construction from A.Y. 04/05 To A.Y. 06/07</i>	<i>Rs.6,00,000/-</i>
	<i>Total Closing WIP As on 31/03/2006</i>	<i>Rs.2,49,36,202/-</i>
	<i>B) Sale proceeds from sale of flats</i>	<i>Rs.3,47,12,500/-</i>
	<i>C) Income from project (B-A)</i>	<i>Rs.99,76,298/-</i>

This working gives income from project of Rs.99,76,298/- therefore, I declare income of Rs. One Crore from the completed project for the A.Y 06/07.”

Subsequently, the assessee filed a return of income for Assessment Year 2006-07 on 29.03.2007 declaring an income of Rs.25,36,440/-, which was accompanied by the audited Balance-sheet and the Profit & Loss Account. Since there was a variation between the income offered at the time of survey and that in the return of income declared by the assessee with regard to the earnings from the project, the Assessing Officer required the assessee to explain as to why the income was not declared at the amount of Rs.1,00,00,000/- disclosed at the time of survey. The response of the assessee was that subsequent to the survey, it compiled its accounts, which were got audited and it showed that the estimation made at Rs.1,00,00,000/- was incorrect. During the course of assessment, assessee also furnished the reconciliation between the income estimated at the time of survey and that computed on the basis of audited accounts at the time of filing of the return of income, which is as under :-

<i>Particulars</i>	<i>Amount as per</i>	
	<i>Survey u/s 133A</i>	<i>Audited Accounts</i>
<i>Land Cost</i>	<i>9,20,000</i>	<i>9,20,000</i>
<i>TDR Cost Sharda Patel</i>	<i>10,22,000</i>	<i>10,22,000</i>
<i>Opening Construction WIP 1.4.2002</i>	<i>1,39,55,277</i>	<i>1,39,55,277</i>
<i>Closing WIP 31.3.2003</i>	<i>2,43,36,202</i>	<i>2,43,36,202</i>
<i>Expenditure from 1.4.2003 till 31.3.2006</i>	<i>6,00,000</i>	<i>45,58,230*</i>
<i>Sale Proceeds</i>	<i>3,46,12,500</i>	<i>3,06,97,827**</i>

*Note 1 * The Estimate of expenses between 1998 to 2006 is estimated at Rs. 6 lakhs as against actual expenses of Rs.45.58 lakhs as evidenced by the audited books of accounts. Various details submitted during the course of assessment and documents produced.*

*Note 2 ** The Sale proceeds are supported by agreement to sale with buyers of the flats.”*

4. Before the Assessing Officer, assessee pointed out that immediately after the survey, a communication dated 15.03.2007 was also made in terms of which it was contended that the income declared at the time of survey was a rough financial estimate, which was subject to amendment after finalisation of accounts. In sum and substance, the stand of the assessee was that the income declared at the time of survey was a rough estimate, whereas the return of income was filed on the basis of audited accounts compiled with reference to the corresponding evidences, material, etc. The Assessing Officer did not accept the explanation furnished by the assessee and instead, noted that the declaration of income of Rs.1,00,00,000/- made at the time of survey was binding on the assessee and the same could not be retracted. Further, the Assessing Officer noted that the retraction, if at all permissible, was delayed and, therefore, the same could not be accepted. Thirdly, the Assessing Officer noted that the assessee was called up to produce the books of account and the relevant documents, which were not so produced, therefore, the Assessing Officer concluded that assessee ought to have declared the income from project at Rs.1,00,00,000/- as against Rs.25,36,440/- declared in the return of income and thus, he added back the sum of Rs.74,63,557/- to the returned income. The CIT(A) has also affirmed the addition made by the Assessing Officer, against which the assessee is in further appeal before the Tribunal.

5. Before us, the learned representative for the assessee vehemently pointed out that the addition has been made by the lower authorities solely

on the basis of the statement given at the time of survey, which is impermissible in law. With regard to the fact-situation, it was brought out that the difference between the amount of income declared during the survey vis-a-vis the income declared in the return of income was primarily on account of (i) difference in the amount of sale consideration; and (ii) difference in the amount of expenditure claimed for Assessment Years 2004-05, 2005-06 and 2006-07. The learned representative emphasised that the profit declared in the return of income was based on audited accounts and that the same was very much available before the Assessing Officer even in the remand proceedings and that no infirmity thereof have been pointed out, but the same has been merely disbelieved. It was pointed out that during the survey, no incriminating material was found which could establish that the amount of sales computed in the audited accounts or the expenditure debited in the Profit & Loss Account were incorrect or that assessee was receiving on-money. The learned representative pointed out that the statement recorded u/s 133A of the Act at the time of survey has no evidentiary value as affirmed by the Hon'ble Supreme Court in the case of *CIT vs S. Khader Khan Sons, 352 ITR 480 (SC)*. Furthermore, it is pointed out that the statement made during the survey was duly retracted within a period of one month by way of a communication dated 15.03.2007, a copy of which has been placed in the Paper Book at pages 18-19. Be that as it may, it has been emphasised that the return of income ought to have been accepted, which is based on the audited account books.

6. On the other hand, the Id. DR supported the stand of the lower authorities by pointing out that the statement made at the time of survey

could not be retracted and relied upon the decision of the Tribunal in the case of *Hiralal Maganlal and Co. vs DCIT, (2005) 97 TTJ Mum 377*.

7. We have carefully considered the rival submissions. Insofar as the factual position is concerned, there is no dispute that when the survey action took place on 12.03.2007, the account books of the assessee were incomplete and the returns of income for Assessment Years 2004-05 to 2006-07, i.e. including for the assessment year under consideration, were not filed. It is also not in dispute that the project undertaken by the assessee, namely, "Nikita Enclave" was complete in view of the Occupancy Certificate dated 31.10.2005 issued by the Municipal Corporation. It is also not in dispute between the assessee and the Revenue that the income thereof, on completion of the project, was liable to be declared during the previous year relevant to the assessment year under consideration, i.e. 2006-07. The manner in which assessee proceeded to offer the income at the time of survey, on an estimate basis has already been reproduced by us in the earlier part of this order. Quite clearly, the estimation is based on the value of the WIP as appearing on 31.03.2003, and the expenses have also been estimated for Assessment Years 2004-05 to 2006-07. Assessee adopted the sale proceeds of the project at Rs.3,47,12,500/- and, after computing the total expenditure of Rs.2,49,36,202/- (comprised of WIP as on 31.03.2003 of Rs.2,43,36,202 + expenses for Assessment Years 2004-05 to 2006-07 of Rs.6,00,000), the income of the project was determined at Rs.99,76,298/- and thereby an income of Rs.1,00,00,000/- was declared. Quite clearly, the income offered at the time of survey was on an estimate basis, which cannot be disputed by the Revenue.

8. Now, we may come to the stage when assessee filed his return of income on 29.03.2007, wherein an income of Rs.25,36,440/- was declared. Notably, the return of income was accompanied by the statement of total income, including the audited Balance-sheet and Auditors report prescribed u/s 44AB of the Act. When assessee was show-caused during the assessment proceedings, assessee explained the basis on which the income was drawn-up at the time of filing of return and assessee also explained the reasons for the difference between the income offered at the time of survey and that declared in the return of income. The said reconciliation has been reproduced by us in the earlier part of this order and it clearly reflects that the difference is on two counts, namely, (i) sale proceeds were adopted at Rs.3,47,12,500/- at the time of survey as against Rs.3,06,97,827/- taken in the audited accounts; and (ii) expenditure for Assessment Years 2004-05 to 2006-07 was estimated at the time of survey as Rs.6,00,000/- as against Rs.45,58,230/- adopted in the audited accounts. Broadly speaking, the explanation of the assessee was that the sale proceeds taken in the audited accounts are based on the registered sale agreements executed with the flat buyers and, therefore, the same could not be doubted. So far as the difference in the expenditure was concerned, it was claimed that the amount taken in the audited account was evidenced by vouchers, documents, etc. and, therefore, could not be flawed.

9. In the above background, the first point to be seen is whether the Assessing Officer was justified in making the addition merely for the reason that assessee had offered a higher amount of income at the time of survey, which ostensibly was not based on any account books, but was merely an estimation. The Hon'ble Supreme Court in the case of *Pullangode Rubber*

Produce Co. Ltd. vs State of Kerala & Anr., 91 ITR 18 (SC) recognised the trite law that it was open to the assessee who made the admission to show that it was incorrect. As per the Hon'ble Supreme Court, it was imperative that in such a situation assessee ought to be given a proper opportunity to show the correct state of facts. In fact, in the case before the Hon'ble Supreme Court, assessee was attempting to show that the entries made by it in the account books did not disclose the correct state of facts. The Hon'ble Supreme Court recognised the right of the assessee to do so on the premise that it was open to the assessee who made the admission to show that the same was incorrect. In other words, as per the Hon'ble Supreme Court, the admission made on an anterior date, which was not based on correct state of facts, was not conclusive to hold the issue against the assessee. In our considered opinion, in the present case, the stand of the assessee is much more convincing since the original declaration itself is not based on any books of account or supporting documents, but was merely an estimate, whereas the return of income has been filed on the basis of audited accounts and the principal areas of difference, namely, the amount of sale proceeds and the expenditure are duly supported by relevant documents. The Assessing Officer notes in the assessment order that the books of account and the supporting vouchers were not produced, an aspect which has been contested by the assessee. So, however, even if one is to go along with the said observation of the Assessing Officer, yet, we do not find the same to be of any merit because during the course of remand proceedings directed by the CIT(A), assessee had produced the relevant material, which was thus available to the Assessing Officer for verification. At page 276 of the Paper Book is placed a list of documents which were produced by the assessee during the remand proceedings before the Assessing Officer. In

fact, vide communication dated 24.06.2013, a copy of which is placed at page 278 of the Paper Book, the Assessing Officer required the assessee to furnish the details of expenses claimed in the audited accounts and the amount of sale proceeds claimed in the audited accounts. In response, the assessee furnished the requisite details, copies of which are duly placed at pages 282 to 548 of the Paper Book. At the time of hearing, the learned representative had taken us through the statement of expenditure of various assessment years, which was claimed in the audited accounts. Particularly, we find that a major portion of the expenditure is on account of payment of property taxes, water charges and other payments which are duly effected by means of cheques. Be that as it may, we find that there is no adverse finding on the merits of the claim made by the assessee. Pertinently, at this point we may also state that so far as the sale proceeds adopted in the audited accounts are concerned, the same is based on the agreements of sale entered with the different flat buyers and there is no negation of the same. Therefore, in our considered opinion, the manner in which the declaration was made at the time of survey, which ostensibly was *de hors* any supporting documents, was not something which could be conclusively held against the assessee in the face of the claims made by the assessee in the return of income, which were based on audited accounts and the supporting documents. Thus, on this aspect, we are inclined to uphold the stand of the assessee.

10. So, however, as per the Id. DR, assessee could not retract from his offer in the course of survey, and for that matter, support has been sought from the decision of the Tribunal in the case of *Hiralal Maganlal and Co. (supra)*. In this context, we may note that the Mumbai Bench of the Tribunal

in the case of *Hiralal Maganlal and Co. (supra)* was dealing with a statement recorded u/s 132(4) of the Act at the time of search, whereas presently we are dealing with a statement recorded u/s 133A of the Act at the time of survey. Pertinently, the Hon'ble Supreme Court in the case of *S. Khader Khan Son (supra)* has upheld the judgment of the Hon'ble Madras High Court in the case reported in *300 ITR 157*, wherein the difference between Sec. 133A and 132(4) of the Act was noted and it was held that the statement u/s 133A of the Act would not have any evidentiary value. In fact, as per the Hon'ble Supreme Court, such a statement made at the time of survey could not be the sole basis for assessing income in the hands of the assessee. On this aspect, we may also refer to the Circular of CBDT no. 286/2/2003 (Inv.) II dated 10.03.2003, wherein it has been observed that the assessments ought not to be based merely on the confession obtained at the time of search and seizure and survey operations, but should be based on the evidences/material gathered during the course of search/survey operations or thereafter, while framing the relevant assessments. In the present case, apart from the statement at the time of survey, there is no material referred to, which has been obtained during the survey, which supports the estimation of income from the project at Rs.1,00,00,000/-. In fact, the assessment order does not bring out any material other than the statement of the assessee, which the Assessing Officer gathered during the assessment proceedings which could negate the income deduced by the assessee in its return of income. Therefore, the stand of the Id. DR, in our view, is untenable having regard to the aforesaid legal and fact-position.

11. The CIT(A) has laid much emphasis on the fact that the retraction by the assessee, which was claimed by way of a letter dated 15.03.2007, was

made only on 03.04.2007, and not before. In this context, the CIT(A) also observed that the audit report dated 23.03.2007, which accompanied the return of income, was also "*fabricated*". In our considered opinion, the CIT(A) has not appreciated the facts in their proper perspective. Even if one is to discount the date on which the assessee filed the letter of retraction, it goes without dispute that the return of income itself was filed by the assessee on 29.03.2007, based on the audited account books, and we find no reason to affirm the observation of the CIT(A) that the audit report dated 23.03.2007 was fabricated. Much has been written by the lower authorities on this aspect, but we find that when the entire account books alongwith the supporting documents were available for verification by the Assessing Officer in the remand proceedings, nothing adverse has been brought out. Even the CIT(A) has not found anything amiss with the quality of audited account books or the supporting documents, which were available on record and, therefore, in our view, there was no justification for having rejected the income deduced by the assessee from the project in its return of income. Accordingly, we hereby set-aside the order of CIT(A) and direct the Assessing Officer to delete the addition of Rs. 74,63,557/-.

12. In the result, appeal of the assessee is allowed, as above.

Order pronounced in the open court on 23rd February, 2018.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(G.S. PANNU)
ACCOUNTANT MEMBER

Mumbai, Date : 23rd February, 2018

SSL

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "A" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai