

आयकरअपीलअधिकरण, अहमदाबाद
**IN THE INCOME TAX APPELLATE TRIBUNAL,
" C " BENCH, AHMEDABAD**

**BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER**

आयकरअपीलसं./ITA No. 2351/AHD/2017

निर्धारणवर्ष/Asstt. Year: 2013-2014

M/s Sanvira Holdings, 1108, First Floor, Plot No.231, Haveli Arcade, Sector-11, Gandhinagar-382011. PAN: ABUFS9270M	Vs.	D.C.I.T., Gandhinagar Circle, Gandhinagar.
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आयकरअपीलसं./ITA No.2352/AHD/2017

निर्धारणवर्ष/Asstt. Year: 2013-2014

M/s Sanvira Infrastructure, 171, Shopping Centre, Sector-19, Gandhinagar-382019. PAN: ABIFS9669J	Vs.	D.C.I.T., Gandhinagar Circle, Gandhinagar.
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(Applicant)		(Respondent)
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Assessee by :	Shri Tushar Hemani, with Shri P.B. Parmar, A.Rs
Revenueby :	Shri O.P. Sharma, CIT.D.R with Shri L.P. jain, Sr.D.R

सुनवाईकालाख/Date of Hearing : 22/01/2020

घोषणाकालाख/Date of Pronouncement: 11/03/2020

आदेश / O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeals have been filed at the instance of the different Assessee against the separate order of the Learned Commissioner of Income Tax (Appeals) Gandhinagar, dated 16/08/2017, 17/08/2017 (in short "Ld.CIT(A)") arising in the matter of assessment order passed under s. 143 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") dated 23/03/2016 relevant to the Assessment Year 2013-2014.

First we take ITA No. 2351/Ahd/2017 for A.Y. 2013-14. The assessee has raised the following grounds of appeal.

1. *The learned CIT(A) and AO have erred both in law and on the facts of the case in confirming the addition based on survey statement which was recorded under highly questionable circumstances and not at all reliable.*
2. *The learned CIT(A) and AO have erred both in law and on the facts of the case in not appreciating that the so called incriminating material viz. Diaries impounded as Annexure A-I & A-2 were created during the course of the Survey and at the instances of the Income Tax Department. Ld. CIT(A) further erred in not accepting the request of the Appellant to send the said Diaries for forensic examination to check the veracity of the submissions of the Appellant.*
3. *The learned CIT(A) has erred both in law and on the facts of the case in confirming the rejection of books and addition of Rs. 1,42,58,000/-as unaccounted income of the Appellant for the year under consideration.*
4. *Alternatively and without prejudice, even if the said Diaries are to be used against the Appellant, the quantification of income is factually and legally incorrect and results into excessive income being taxed in the hands of the appellant.*
5. *Alternatively and without prejudice, even if the said Diaries are to be used against the Appellant, the gross receipts of Rs. 1,42,58,000/-cannot be added as income of the Appellant. What can be added, if at all, is only the net profits (NP) embedded in such gross receipts and not the entire receipts.*
6. *Both the lower authorities have passed the orders without properly appreciating the facts and they further erred in grossly ignoring various submissions, explanations and information submitted by the appellant from time to time which ought to have been considered before passing the impugned order. This action of the lower authorities is in clear breach of law and Principles of Natural Justice and therefore deserves to be quashed.*

7. *The learned CIT(A) has erred in law and on facts of the case in confirming action of the Id. AO in levying interest u/s.234A/B/C of the Act.*
8. *The learned CIT(A) has erred in law and on facts of the case in confirming action of the Id. AO in initiating penalty u/s.271(l)(c) of the Act.*

2. All the grounds of appeal are interlinked, hence we have clubbed all of them for the purpose of adjudication. The only issue raised by the assessee is that the learned CIT (A) erred in confirming the rejection of books viz a viz confirming the addition of Rs.1,42,58,000/- based on statement recorded and diaries impounded during survey, without verifying the veracity of the same.

3. The fact in brief is that the assessee is a firm and engaged in the business of property development and construction of buildings. There was the survey for the year under consideration under section 133A dated 27/12/2013 at the business premises of the assessee.

3.1 During course of survey certain dairies were found containing the details of some transaction. When the same was confronted to one of the partner of the firm namely Shri Vikash Purohit at the time of recording statement, he admitted to disclose the unaccounted income of Rs. 2,05,00,000/- on the basis of transaction noted in the diaries. However, the assessee did not offer the same in the return filed for the year under consideration on the reasoning that it does not represent the undisclosed income.

3.2 However the AO disagreed with the submission of the assessee and computed the undisclosed income to the tune of Rs. 1,42,58,000/- after providing benefit of cash accounted in the regular books for Rs. 62,92,000/- on the basis of receipts. Accordingly, he made the addition of Rs. 1,42,58,000.00 to the total income of the assessee.

4. Aggrieved assessee preferred an appeal before learned CIT(A) who confirmed the order of the AO by observing as under:

It is observed that appellant has failed to disclose additional income offered in survey while filing I return of income and retraction is filed after considerable long period and that too without any evidences to substantiate the arguments. The above plea taken by the appellant appears to be tutored and after thought to save himself from tax liability hence addition made by AO for Rs.1,42,58,000/- which is based upon survey statements and incriminating materials found during the survey is upheld and related ground of appeal are dismissed

Being aggrieved by the order of the learned CIT (A), the assessee is in appeal before us.

5. The learned AR before us did not dispute the diary found during the course of survey operation wherein the receipts were noted against the sale of flats but contended such receipts as business receipts. The Id. AR further claimed that there can be addition for the element of profit embedded in such business receipts. The learned AR also contended that part of the business receipts amounting to Rs. 62,92,000/- were duly recorded in the regular books of accounts which signifies that the other receipts not recorded in the books of accounts should be treated only the business receipts. Thus, the learned AR for the assessee was of the view that only the percentage of profit based on the historical performance of the assessee can be added to the total income of the assessee.

5.1 The learned AR also argued that if the entire addition is added to the total income of the assessee then the profit of the assessee would be exorbitant in comparison to the parties having similar line of business. As such, in the similar line of business such exorbitant amount of profit cannot be expected if the entire addition is made to the total income of the assessee.

6. On the other hand the learned DR submitted that there was a diary found during the course of survey having recorded the business receipts which were not disclosed in the books of accounts. This fact is undisputed. Accordingly the learned DR claimed that the question of estimating the profit on such receipts does not arise. As per the Id. DR there was no information available in the diary about the

expenses incurred against such business receipts. The learned DR vehemently supported the order of the authorities below.

7. We have heard the rival contentions of both the parties and perused the materials available on record before us. Admittedly, a diary was found during the course of survey recording the transactions of receipts for Rs. 2,05.50,000/-. Undisputedly, part of the transactions amounting to Rs. 62,92,000/- were disclosed in the regular books of accounts as business receipts. There is no dispute about the fact that the diary found during the course of survey belongs to the assessee in pursuance to the provisions of section 292C of the Act. Similarly the contents of such diary are also true as per the provisions of section 292C of the Act. This fact has not been disputed by the learned AR for the assessee at the time of hearing before us. Thus it is proved beyond doubt that the diary belongs to the assessee and its contents are true.

7.1 The 2nd controversy arises how to determine the income of the assessee based on the contents recorded in such diary. From the preceding discussion we note that an amount of receipt of Rs. 2,05,50,000/- has been shown in such diary. Out of such receipt of Rs. 2,05,50,000/- a sum of Rs. 62,92,000 was shown as business receipts in the regular books of accounts of the assessee as evident from the order of the AO as extracted below:

It is crystal clear from the statement of Shri Vikrant Purohit, one of the partners of the assessee firm taken on oath during the course of survey proceedings that Shri Rakesh Harendra Shah maintains the financial ; of their business and after consulting Shri Rakesh Shah who is one of the partners of M/s, Sanvira Holdings, has admitted the total cash receipt of Rs.6 crores on account of sale of flats in the schemes 'Vinayaka Flours'

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and 'Vinayaka Riverside' constructed by the sister concern M/s. Sanvira Holdings.

7.2 From the above, it is transpired that the transactions shown in the diary are the business receipts and part of it was already admitted by the AO during the assessment proceedings as discussed above. Now coming to question whether the

amount recorded in the diary represents the income in its entirety or percentage of profit embedded in such receipts. In this regard we note that it is the only percentage of profit embedded in such receipts can be added to the total income of the assessee for the reasons as detailed under:

- i. If the entire amount of receipt is added to the total income of the assessee then it would result the amount of exorbitant profit which is not possible in the line of business of the assessee. There is no dispute about the fact of the business in which the assessee is engaged i.e. property development and construction of buildings.
- ii. There was no information gathered during the survey operation suggesting that the assessee has made some investment for the earning of such undisclosed receipts as discussed above.

7.3 In view of the above, we are of the considered opinion that it is the only element of profit embedded in such business receipts which can be added to the total income of the assessee. In holding so, we also draw support and guidance from the judgment of Hon'ble Jurisdictional High Court in the case of CIT vs. Samir Synthetics Mill reported in 326 ITR 410 where it was held as under:

As a result of search by the Excise Department in the business premises of the assessee, various discrepancies were noted in the production of the assessee. The assessee could not even be able to reconcile the production, sales and the closing stock although the specific opportunity was provided by the Assessing Officer. Accordingly addition to the assessee's income was made on account of suppression of sale consideration.

Held that, the addition was justified on account of suppression of sale consideration but only to the extent of profit.

7.4 We further draw support and guidance from the order of the Jurisdictional High Court in the case of CIT vs. Gurubachhan Singh J Juneja reported in 302 ITR 63. The relevant extract of the judgment is reproduced as under:

6. Hence, in absence of any material on record to show that there was any unexplained investment made by the assessee which was reflected by the alleged unaccounted sales the finding of the Tribunal that only the gross profit on the said amount can be brought to tax does not call for any interference. The Tribunal was,

therefore, justified in deleting the addition of Rs. 10,85,003 made on account of unaccounted cash sales.

7.5 We are also conscious to the fact that the assessee during the survey proceedings has admitted the fact that the impugned amount represents its income. Accordingly the assessee surrendered an income of Rs. 2,05,50,000/- during the survey proceedings. However, we note that there cannot be any addition to the total income of the assessee merely on the basis of survey statement recorded under section 133A of the Act until and unless it is based on corroborative evidences. Furthermore, the statement recorded on oath during the survey has no evidentiary value as held by the Hon'ble Madras High Court in the case of CIT vs. S Khader Khan Son reported in 300 ITR 157 which was subsequently confirmed by the Hon'ble Supreme Court reported in 25 Taxmann.com 413 by observing as under:

"Section 133A of the Income 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, yes (in favour of assessee)"

In view of the above and after considering the facts in totality we hold that it is the only element of profit embedded in such business receipts which can be added to the total income of the assessee.

7.6 Now the next controversy arises what rate of profit should be adopted for determining the income in the given facts and circumstances. In this regard we note that the assessee has given a chart showing the amount of profit for the last 3 years along with detail of its sister concern namely Sanvira Infrastructure engaged in similar line of business and there average profit comes at 6.29% and 7.27% respectively. In our considered view average profit of sister concern will be justifiable as the same is showing profit in all 3 year where as the assessee is showing profit in current year only.

In view of the above, we set aside the finding of the learned CIT (A) and direct the AO to tax the element of profit embedded in such business receipts at the rate of 7.21% by treating the same as net profit chargeable to tax. Thus the assessee gets relief in part. Hence, the ground of appeal of the assessee is partly allowed.

In the result, the appeal of the assessee is partly allowed.

8. Coming to the ITA No. 2352/Ahd/2017 for A.Y.2013-14

9. At the outset, we note that the issues raised by the assessee in the aforesaid appeal are identical to the issues raised by the assessee in ITA No. 2351/Ahd/2017 which we have decided in favour of the assessee in part. Please refer to the relevant paragraph bearing number 7 of this order for the detailed discussion. Respectfully following the same, this appeal of the assessee is also partly allowed.

In the result, the appeal of the assessee is partly allowed.

10. In the combined results, the appeal of the different assessee is **partly allowed.**

Order pronounced in the Court on 11/03/2020 at Ahmedabad.

**-Sd-
(RAJPAL YADAV)
VICE PRESIDENT**

**-Sd-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

(True Copy)
Ahmedabad; Dated 11/03/2020
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