

आयकर अपीलीय अधिकरण “डी” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“D” BENCH, MUMBAI

माननीय श्री महावीर सिंह, उपाध्यक्ष एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON’BLE SHRI MAHAVIR SINGH, VP AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM
(Hearing Through Video Conferencing Mode)

आयकर अपील सं./ I.T.A. No. 839/Mum/2019
 (निर्धारण वर्ष / Assessment Year: 2015-16)

M/s Riddhi Siddhi Developers Pvt. Ltd. 45, Maker Chambers-III 223, Nariman Point Mumbai-400 021	बनाम/ Vs.	DCIT Cen Cir. 6(4) R. No. 1925, 19 th floor Air India Building, Nariman Point Mumbai-400 021
स्थायीलेखासं. /जीआइआरसं. /PAN/GIR No. AAACR-0426-N		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	Ms. Hema Sharma, Ld. AR
Revenue by	:	Shri Bharat Andhle, Ld. Sr. DR

सुनवाई की तारीख/ Date of Hearing	:	31/08/2021
घोषणा की तारीख / Date of Pronouncement	:	06/10/2021

आदेश / ORDER

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by assessee for Assessment Year (AY) 2015-16 arises out of the order of learned Commissioner of Income-Tax (Appeals)-54, Mumbai [CIT(A)], dated 30/11/2018 in the matter of assessment framed by Ld. Assessing Officer (AO) u/s 143(3) r.w.s. 147 of the Act on 29/12/2016 on following grounds of appeal:-

1. On the facts and the circumstances of the appellant's case and in law the Ld. CIT(A) erred in confirming AO's action of reopening the assessment u/s. 147 by issue of notice dated 25.11.2016 u/s. 148 of the Income Tax Act, 1961, which is illegal, bad-in-law or otherwise void for want of jurisdiction.
2. On the facts and the circumstances of the appellant's case and in law the Ld. CIT(A) erred in confirming AO's action of not providing the back up / soft copy of the unaccounted tally data seized from the premises of Cosmos Group.
3. On the facts and the circumstances of the appellant's case and in law the Ld. CIT(A) erred in confirming AO's action of passing the impugned order in great haste by violating the principles of natural justice and fair play.
4. On the facts and the circumstances of the appellant's case and in law the Ld. CIT(A) erred in confirming AO's action of making addition of Rs.1,05,97,720/- on account alleged on-money received from Suraj Parmar or Cosmos Group,

As evident, the sole grievance of the assessee is confirmation of certain addition for Rs.105.97 Lacs. The Ld. AR has not pressed ground nos. 1 & 2 and therefore, these grounds stand dismissed as being not pressed.

2. Having heard rival submissions and upon perusal of material on record, our adjudication to the subject matter of appeal would be as given in succeeding paragraphs.

Assessment Proceedings

3.1 The material facts of the case are that the assessee being resident corporate assessee is stated to be engaged as builders & developer. The case was reopened pursuant to search and seizure action on Cosmos group of cases on 24/09/2014. Accordingly, an assessment was framed on 29/12/2016 wherein the assessee was saddled with impugned additions of Rs.105.97 Lacs.

3.2 The impugned addition stem from the fact that during search operations on Cosmos group, it transpired that the details of its unaccounted cash transactions were kept by creating a buffer in two duplicate e-mail accounts i.e rbpt2013@gmail.com and rbptthane@yahoo.co.in. No physical copy of such data was maintained. The said e-mails had certain attachment files comprising of tally files/tally

backup files and excel sheets containing details of all unaccounted transactions. In statement recorded under Sec. 132(4) of the Act on 26/09/2014, Shri Suraj Parmar, promoter of Cosmos group, elaborately narrated the modus operandi that was adopted for maintaining the records of unaccounted cash transactions of its group. Initially the cash transactions were recorded in a pocket diary and thereafter, the transactions would be entered into the Tally system which was maintained and run on various computer systems mostly at office. As further stated by him, the Tally would be first loaded by him into a pen drive and then run on the computer system. Thereafter, the transactions recorded in the pocket diary would be entered into the Tally system and MS-excel sheets would be created on the pen-drive. The entire data including Tally backup and MS-excel sheets would then be uploaded from the pen-drive to the e-mail address rbpt2013@gmail.com and sent to rbptthane@yahoo.co.in and rbpt2013@gmail.com. The pen-drive would thereafter be discarded and the entire data only remained in the e-mail system. The contents of the MS-excel sheets being attachments of e-mails found from the e-mail id rbpt2013@gmail.com were printed and seized by the department. Similarly, the contents of the e-mails found from the e-mail id rbptthane@yahoo.co.in were printed and seized

3.3 During the course of the search proceedings, Shri. Suraj Parmar, (promoter of Cosmos group) was asked to explain one of the attachment file viz. "Jewels wrkng up to 31.08.14.xls" appearing in the email rbpt2013@gmail.com that formed part of the seized document. In reply, it was stated that the aforesaid attachment file contained information as regards the unaccounted cash sales in a project viz. "Cosmos Jewels" having various buildings viz. Sapphire I, Sapphire II, Solitaire I, Solitaire

II, Ruby I and Ruby II that were being constructed by the Cosmos group in Joint venture with the assessee company viz. M/s Riddhi Siddhi Developers Pvt. Ltd. The assessee was stated to be the owner of the plot on which the aforesaid buildings were constructed. Shri Suraj Parmar further stated that as per the terms of the Joint Venture agreement, the Cosmos group was to give 40% of the sale component, both cash and cheque, to the assessee and none of the cash component of the project formed part of the regular books of accounts or was offered to tax. The relevant extract of the statement has been extracted on para 8.1 of the order. The copy of date wise cash receipt as found was provided to the assessee and the same has also been extracted in para 8.3 of the order.

3.4 Accordingly, the assessee's case was reopened and notice u/s148 was issued on 25/11/2016 wherein the assessee was show caused as to why the 40% of cash component, which worked out to be Rs.105.97 Lacs, may not be added to its income as unaccounted cash receipts. The director of the assessee company i.e. Shri Ravi Jhunjunwala attended the proceedings and filed requisite details but denied having received any cash component from the Cosmos Group on sale transactions.

3.5 The director of assessee entity refuted the allegations of Ld.AO, inter-alia by submitting that there was not even a single piece of evidence which would show that the assessee received any cash from Shri Suraj Parmar or any other person of the cosmos group. The assessee also pointed out various discrepancies in the excel sheet for the submission that the data was not at all reliable and needed to be discarded. Shri Suraj Parmar, in his statement, never made any

reference to the director of the assessee company Shri Ravi Jhunjhunwala and therefore, the abbreviations 'RJ' as used in the excel sheet could not be interpreted to mean the director of the assessee company. It was also pointed out that as per the statement, Shri Bharat Jhunjhunwala was stated to be the key person of the assessee group and stated to be the recipient of cash component. However, Shri Bharat Jhunjhunwala, in statement on oath u/s 131 recorded on 12/10/2015, denied having received any cash component from the cosmos group.

3.6 It was further submitted by the assessee that as per the terms of Joint Venture, the assessee was entitled for 40% of gross revenue as credited to joint bank account to be opened under the name and style of 'Cosmos Riddhi Siddhi Developers' and there was no provision for payment of 40% of on-money which might have been received by Shri Suraj Parmar from his customers. The assessee or its directors were not aware about receipt of any such on-money and the assessee denied having received any cash component from Cosmos Group. It was also submitted that in the absence of cross-examination of Shri Suraj Parmar, the additions could not be sustained. The assessee also pointed out glaring inconsistencies in the different evidences being relied upon by Ld.AO and submitted that the said evidences could not be relied upon. These have already been enumerated in assessee's submissions as extracted in the impugned order.

3.7 However, the submissions put forth by the assessee were not acceptable to Ld.AO in view of the fact that the assessee was 40% partner in the Joint Venture and entitled for gross revenues, whether in cash or in cheque despite the fact the joint development agreement did not mention anything about sharing of cash revenue. Finally, relying

upon the seized data and statement made by Shri Suraj Parmar, 40% of on-money was added to assessee's income as unaccounted income.

Appellate Proceedings

4.1 During appellate proceedings, the assessee reiterating the submissions made during assessment proceedings, also pointed out that in reply to question no.13, it was categorically stated by Shri Suraj Parmar that the cash generated from the project is distributed to the partners in the respective projects and it is mainly utilized for purchase of land. Therefore, whatever cash was generated by the cosmos group or Shri Suraj Parmar on account of on-money towards sale of shops / flats was distributed among the partners of M/s Cosmos Lifestyle whereas the assessee was not a partner in that entity. The assessee also submitted that addition made on the basis of confessional statement would not be sustainable in law in the absence of cross-examination as well in the absence of any corroborative evidence on record. Reliance was placed on various judicial pronouncements holding the field.

4.2 The Ld. CIT(A), inter-alia, noted that though in the statement Shri Bharat Jhunjunwala was stated to be the main person of the assessee group, however the cash payments were supposed to have been made to one 'RJ'. The assessee has overlooked the fact that 'RJ' stands for Shri Ravi Jhunjunwala, director of the Assessee Company and not Ranka Jewellers which happens to belong to father-in-law of Shri Suraj Parmar. However, Cosmos group did not have any agreement of revenue sharing with Ranka Jewellers and the agreement was with assessee only. Any word or sentence should not be taken out of context but has to be seen in the whole prospective. In the overall conspectus of facts, it is the assessee who has business dealing with the Cosmos

group and not Ranka Jewellers. As per the terms of agreement, the assessee was entitled for 40% revenue in the project. When on-money is not accounted in the books then it would not form part of the registered agreement but it is understood by any person with a reasonable common sense and for somebody in the business of real estate and construction like the assessee, it need not be explained. It was beyond any reasonable comprehension that the assessee was not aware of the fact of receipt of on-money by Cosmos group. Therefore, the arguments were to be rejected. Finally, rejecting various other submissions, the additions were confirmed. Aggrieved, the assessee is in further appeal before us.

Our findings and Adjudication

5. Upon careful consideration of factual matrix, it could be gathered that the assessee being owner of a land has entered into Joint Development Agreement with the Cosmos group. As per the terms of the agreement, the assessee was entitled for 40% of gross revenue as credited to joint bank account to be opened under the name and style of 'Cosmos Riddhi Siddhi Developers' and there was no provision for payment of 40% of on-money which might have been received by Shri Suraj Parmar from his customers. It could be seen that the prime reason to make the addition of on-money in the hands of the assessee is the statement of Shri Suraj Parmar. However, in reply to question no.13, Shri Parmar categorically stated that cash generated from the project was distributed to the partners in the respective projects and it is mainly utilized in purchase of land. Therefore, whatever cash was generated by the cosmos group or Shri Suraj Parmar on account of on-money towards sale of shops / flats that was distributed among the partners of M/s

Cosmos Lifestyle and the assessee is not a partner of that entity. Further, in the statement of Shri Suraj Parmar, Shri Bharat Jhunjunwala was stated to be the key person of the assessee group and stated to be the recipient of cash component. However, Shri Bharat Jhunjunwala, in statement on oath u/s 131 recorded on 12/10/2015, denied having received any cash component from the cosmos group. The assessee has also denied having received cash component in the project. In such a case, the onus would be on revenue to prove the fact of exchange of cash between the Cosmos group and the assessee entity. We find that except for statement of Shri Suraj Parmar, there is no other corroborative evidence on record to substantiate this fact.

6. Another point to be noted is that the name of assessee entity nowhere figures in the seized data and there is no material on record which would suggest that any cash was paid to the assessee out of on-money received by Cosmos Group. The data only mentions abbreviations 'RJ' which is amenable to several interpretations and could not go on to conclusively prove that the same would represent director of the assessee company. Therefore, no concrete belief could be made on the basis of these abbreviations. It is trite law that no additions could be made merely on the basis of presumption, conjectures and surmises. The assessee has all along denied having received any cash component from the cosmos group. In such a situation, the onus was on revenue to prove with corroborative material the fact of exchange of cash between the assessee and the cosmos group. However, except for statement of Shri Suraj Parmar, there is nothing in the armory of Ld. AO to prove this fact.

7. Lastly, it could be noted that the opportunity to cross-examine the person making adverse statements against the assessee has never been provided to the assessee. Since the statement formed the very basis of making additions in the hands of the assessee, not providing such an opportunity of cross-examination would make the additions unsustainable in the eyes of law as held by Hon'ble Apex Court in **M/s Andaman Timber Industries V/s CCE (CA No.4228 of 2006 dated 02/09/2015)** wherein it has been held that not allowing the assessee to cross-examine the witnesses by the adjudicating authority though the statement of those witnesses were made the basis of the impugned order, is a serious flaw which makes the order nullity in as much as it amounts to violation of principle of natural justice because of which the assessee was adversely affected.

8. Therefore, the facts of the case do not inspire us to confirm the impugned additions. By deleting the same, we allow ground nos. 3 & 4 of the appeal.

9. The appeal stand partly allowed in terms of our above order.

Order pronounced on 6th October, 2021.

Sd/-

(Mahavir Singh)

उपाध्यक्ष / Vice President

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 06/10/2021
Sr.PS, Dhananjay

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.