

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

Before Shri Chandra Poojari, AM & Shri George George K, JM

ITA No.473/Coch/2016 : Asst.Year 2011-2012

M/s.Alhind Builders C/o.M/s.Warrier & Warrier Chartered Accountants "Chandni", Parayanchery Calicut – 673 016. PAN : AAOFA4788M.	Vs.	The Dy.Commissioner of Income-tax, Cen.Cir.1 Kozhikode.
(Appellant)		(Respondent)

Appellant by : Sri.C.B.M.Warrier, CA
Respondent by : Sri. A.Dhanaraj, Sr.DR

Date of Hearing : 26.02.2018	Date of Pronouncement : 02.03.2018
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ORDER

Per George George K., JM

This appeal at the instance of the assessee is directed against the Commissioner of Income-tax (Appeals)'s order dated 10.06.2016. The relevant assessment year is 2011-2012

2. There is a delay of 22 days in filing this appeal. The assessee has filed a petition for condonation of delay in filing the appeal. On perusal of the petition for condonation of delay, we are of the view that the delay in filing the appeal cannot be attributed to any latches on part of the assessee, hence, we condone the delay of 22 days and proceed to dispose of the case on merits.

3. Two additions are assailed in this appeal, viz., (i) Undisclosed income of Rs.54,21,847 and (ii) Income not disclosed on account of deviation from the regular method of accounting Rs.32,95,805.

Undisclosed income of Rs.54,21,847:

4. Brief facts in relation to the above addition are as follows:-

4.1 The assessee is a firm engaged in the construction of commercial buildings, flats and villas. There was a search u/s 132 of the Income-tax Act, 1961 in the premises of the assessee on 10.11.2010. The statement u/s 132(4) of the I.T.Act was recorded from the Managing Partner of the firm Sri. M.V.Vazeerudheen. In the statement recorded, the Managing partner had admitted that the entire sale proceeds were not accounted and offered to tax a sum of Rs.2.5 crore. However, the assessee filed return of income on 09.07.2012 for A.Ys 2008-2009 to 2011-2012 disclosing Rs.1,95,78,153 instead of Rs.2.5 crore. The details of the income disclosed by assessee in its return of income for A.Ys 2008-2009 to 2011-2012 are as follows:-

A.Y. 2008-2009	Rs. 6,73,145
A.Y. 2009-2010	Rs. 3,32,551
A.Y. 2010-2011	Rs. 42,20,907
A.Y. 2011-2012	Rs.1,43,51,550

	Rs.1,95,78,153
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4.2 The Assessing Officer held that in the course of search the assessee had offered Rs.2.5 crore as its income, therefore, the balance of Rs.54,21,847 (Rs.2.5 crore – Rs.1,95,78,153) should be brought to tax for the relevant assessment year.

5. Aggrieved by the assessment order, the assessee preferred an appeal to the first appellate authority. Before the CIT(A), it was submitted that statement u/s 132(4) was recorded in the early morning of 11.11.2010 and the amount of Rs.2.5 crore was offered on adhoc basis without any details of books of account and computation of income and expenditure. Therefore, it was submitted that the adoption of Rs.2.5 crore as undisclosed income for the A.Ys 2008-2009 to 2011-2012 is not justified. In other words, the addition of Rs.54,21,847 is uncalled. The CIT(A) rejected the contention of the assessee and dismissed the plea of the assessee. The relevant finding of the CIT(A) reads as follow:-

“2.3. It is seen that the appellant had made disclosure during the course of search u/s 132 dated 10-11-2010 wherein in response to Q.No.7 the two facts have been admitted

(i) that the correct amount of sale proceeds have not been recorded in the books and, to this extent the sale value of the commercial and residential flats constructed have not been recorded correctly,

(ii) the lapse on the part of the appellant for having not recorded the correct amount of sale considerations further gets strengthened with the

fact that such sale considerations received admittedly, over and above the sale value recorded in the books of account, have been invested in purchasing 18 cents of land near Medical College, 47.9 Cents of land for Cyber World and 4.88 Cents of land where additional payments have been made over and above the purchase price accounted.

2.4 In view of such specific admission of such lapses in accounting the correct amount on sale as well as the purchase consideration, the appellant disclosed a sum of Rs. 2.50 crores. However, while filing the return of income, the income has been offered to the extent of Rs. 1,95,78,153/-. Since the admission is based on specific facts, the assessing officer added the difference between the amount offered as undisclosed income of Rs. 2.50 crores and that of the total income returned of Rs. 1,95,768,153/-, which works out to Rs. 54,21,847/-.

2.5. The appellant during the course of appeal proceedings has raised that the over all income of Rs.2.50 crores is made in the statements taken in the early morning on 11.11.2010 which was continued from 10.11.2010. The amount of Rs. 2.50 crores was disclosed on adhoc basis without any details of books of accounts and computation in the hands of the managing partner Shri. M.V. Vazeerudheen. In these circumstances the adoption of Rs. 2.50 crores as the income to be disclosed is not justified.

2.6 On detailed analysis of the facts it is found that the submissions made by the appellant during the course of appeal proceedings is not based on any factual or logical arguments. By raising the ground that the statement was made in the: early morning of 11.11.2010 where search was started on 10.11.2010; the appellant has tried to raise the issue of coercion applied on them while recording the statement. Had it been so, the letter for retraction

should have been filed during the course of assessment proceedings; which has not been mentioned in this reply.

2.7 As regards the issue that the disclosure was made on adhoc basis is also devoid of merits when the actual statement recorded in para 7 as mentioned in the assessing officer's order, which has mentioned specific facts of the undisclosed income earned and the investments of the amount in purchasing different property. It means that the undisclosed income earned in cash has been utilized for purchasing the various lands, where cash have been paid over and above the amount, which have been booked as purchase considerations. In view of this, it is held that there is perfect match between the undisclosed income earned and its utilization, which have clearly been recorded in the statement of admission of the assessee during the course of search proceedings and as such, such statements recorded u/s 132(4) has got an independent evidentiary value in itself. Unless the appellant establish the same on the strength of the evidence that coercion were applied while recording the statements or the admission was made on adhoc basis; declining on a later stage by returning lesser amount of income under the plea of coercion applied or adhoc of the facts, are not sustainable. Accordingly, it is held that the assessing officer has rightly considered the undisclosed income of Rs. 54,21,847/- and added to the total income. The same is upheld and the appeal on this ground is dismissed.

6. Aggrieved by the order of the CIT(A), the assessee has raised this issue in appeal before us. The learned Counsel for the assessee reiterated the submissions made before the Income-tax authorities.

6.1 On the other hand, the learned Departmental Representative supported the assessment order and the order of the CIT(A).

7. We have heard the rival submissions and perused the material on record. The undisputed fact is that in the course of search, a statement was recorded u/s 132(4) of the I.T.Act from the Managing Partner of the assessee-firm, Sri. M.V.VAzeerudheen. It was admitted in the statement recorded that the sale proceeds of flat and villas were not correctly accounted. The Managing Partner had admitted that the firm had made profits outside the books of account with regard to various building projects and the total of such undisclosed profits is to the tune of Rs.2.5 crore. It was further admitted in the statement that the undisclosed income earned was utilized for purchase of land in various places. This statement recorded during the course of search from the Managing Partner of the assessee-firm was never retracted at any point of time. While filing the return of income on 09.07.2012 (i.e. about two years from the date of search) instead of disclosing profit of Rs.2.5 crore as promised by the Managing Partner in the statement recorded u/s 132(4) of the I.T.Act, the firm had disclosed only a sum of Rs.1,95,78,153. The assessee's contention is that the correct figure of undisclosed income is only Rs.1,95,78,153. If the assessee's claim was true, the assessee ought to have retracted the statement made u/s 132(4) within a reasonable time, by providing necessary evidence / material to prove that the undisclosed income

earned for various projects undertaken by the assessee from its inception was only Rs.1,95,78,153 instead of Rs.2.5 crore offered to tax in the course of statement recorded u/s 132(4) of the I.T.Act by the Managing Partner of the assessee-firm. The Managing Partner of the assessee-firm having offered Rs.2.5 crore for taxation would have prevented the Revenue from conducting further investigation / enquiries. The assessee-firm having not retracted the statement of the Managing Partner, it was bound by the same and the shortfall of undisclosed income by Rs.54,21,847 has been correctly added by the Assessing Officer and the same was confirmed by the CIT(A). Therefore, we uphold the order of the CIT(A) on this issue.

Income not disclosed on account of deviation from the regular method of accounting Rs.32,95,805 :

8. The Assessing Officer had made addition of Rs.32,95,805. The Assessing Officer stated that the assessee unlike the past years had not disclosed gross profit at the rate of 15% of the total receipts. The relevant observation of the Assessing Officer in making addition of Rs.32,95,805 reads as follow :-

"As per the accounting pattern adopted by the assessee gross profit @ 15% is offered on the payments received till the completion of the project. For the accounting year 2010-11 (A. Y. 2011-12) the gross receipts are Rs.9,51,49,542/-. The assessee has calculated the gross profit on these receipts and has arrived at Rs. 1,09,76,626/- as against the correct

figure of Rs. 1,42,72,431/-. When this was pointed out the assessee filed a reworking in which he has arrived at the figure of Rs. 9,51,49, 542/-. The accounting method adopted by the assessee in the calculation filed on 21/3/2013 is different from the one it had been consistently following for earlier years i.e. calculating profits @ 15% on receipts. The assessee now claims that since it had incurred loss on the two completed projects no income is offered for this year on these projects. The assessee's version is not acceptable as it has shifted from its regular methods of accounting and also because the claim raised by the assessee is not verifiable".

9. Aggrieved by the assessment order, the assessee preferred an appeal to the first appellate authority. The CIT(A) confirmed the view taken by the Assessing Officer. The relevant finding of the CIT(A) reads as follow:-

"3.3. It is seen that the assessee has been consistently following an accounting pattern whereby 15% of the sale considerations received were recorded as gross profit, over the years. If the same method were followed consistently, the gross profit should have been worked on a gross receipt of Rs. 9,51,49,542/- @ 15% at Rs. 1,42,72,431/-. But, the assessee has shown gross profit of Rs. 1,09,76,626/- only.

3.4. The assessee explained before the assessing officer that since they have incurred loss on two completed projects no income was offered on these projects for this year. The assessing officer has treated the same as deviation from regular methods of accounting. Moreover, the claim of the assessee that there have been loss on completed projects were not verifiable. It has been explained by the appellant during the course of appellate proceedings that in respect of project Burj and project Avenue there have

been deficiency of Rs. 2,16,61,616 and Rs. 39,84,7501-, respectively. The projects have actually incurred loss till 31.03.2011. But, in the said explanation it has not been explained that whether the projects stand as completed project or the project is still ongoing. The assessing officer's observation that "the claim of the assessee is not verifiable", has not been replied or explained during the appeal proceedings and if, the projects are not completed then the assessee should have followed past methods of accounting i.e. the gross profit @ 15% of the gross receipts. Since the assessee has failed to establish the facts that the loss was incurred on account of completion of project, this is an issue of facts and thus, it is held that there is nothing on record to verify the claim of the appellant, and at the same time, the appellant has also not substantiated their claim of having completion of project; it is held that the assessing officer has rightly considered the working of profit by application of gross profit @ 15% on gross receipts, which were applied consistently in the past and the same method not adopted during the year for having arrived at the gross profit; as deviation from the regular methods of accounting. Thus, the gross profit estimated @ 15% by following the consistent method applied by the assessee, the addition of Rs. 32,95,805/- on this account, is upheld and the appeal is dismissed."

10. Aggrieved by the order of the CIT(A), the assessee has raised the issue in appeal preferred before us. The learned Counsel for the assessee submitted that the receipts from the projects, viz., Avenue and Burj, are not reckoned / included for calculating 15% of G.P. since these projects had incurred losses as on 31.03.2011. The learned Counsel for the assessee submitted that the project-wise accounts are maintained and it can be easily proved that in these two projects, the assessee

has incurred losses and even today the projects are incomplete.

10.1 The learned Departmental Representative, on the other hand, supported the orders of the Income-tax authorities.

11. We have heard the rival submissions and perused the material on record. The assessee, while arriving at 15% of gross profit of the total receipts, had not taken the receipts from project Avenue and project Burj. According to the assessee, these projects undertaken by the assessee had incurred losses. It was further submitted that these projects due to losses could not be completed even as on date. It is stated by the learned AR that the accounts are maintained project-wise and losses incurred for these two projects, viz., Avenue and Burj could be easily discernible provided an opportunity is given to the assessee to prove the same. In the interest of justice and equity, we are of the view that the assessee should be granted one more opportunity to prove that it had incurred losses on Avenue and Burj projects. For the examination of the said issue, the matter is remitted to the files of the Assessing Officer. On examination by the A.O., if it is found that the assessee had actually incurred losses upto 31.03.2011 for Avenue and Burj projects, receipts for these projects should be excluded while arriving at the gross profit at the rate of 15%. It is ordered accordingly.

12. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced on this 02nd day of March, 2018.

Sd/-
(Chandra Poojari)
ACCOUNTANT MEMBER

Sd/-
(George George K.)
JUDICIAL MEMBER

Cochin ; Dated : 02nd March, 2018.
Devdas*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT (Central) Kochi.
4. The CIT(A) – IV, Kochi.
5. DR, ITAT, Cochin
6. Guard file.

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin