

IN THE INCOME TAX APPELLATE TRIBUNAL

AHMEDABAD “C” BENCH

**(BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
& SHRI S. S. GODARA, JUDICIAL MEMBER)**

**ITA. No: 1502/AHD/2015
(Assessment Year: 2011-12)**

Nishant Construction Pvt. Ltd. 801-802, Regency Plaza, Anandnagar Road, Satelite, Ahmedabad	V/S	ACIT, Ahmedabad	Circle-5,
(Appellant)		(Respondent)	

PAN: AAACN 3752B

**Appellant by : Shri S. N. Soparkar & Parin Shah, AR
Respondent by : Ms. Vibha Bhalla, CIT/ D.R.**

(आदेश)/ORDER

Date of hearing : 07 -02-2017

Date of Pronouncement : 14 -02-2017

PER N.K. BILLAIYA, ACCOUNTANT MEMBER

1. This appeal by the Assessee is preferred against the order of the Ld. CIT(A)-9, Ahmedabad dated 09.03.2015 pertaining to A.Y. 2011-12.

2. The sole grievance of the assessee relates to the additions made on account of alleged on money receipt of Rs. 25.66 crores in respect of Ratnakar III scheme and Rs. 6.90 crores in respect of Ratnakar IV scheme totaling to Rs. 32.56 crores .

3. The assessee is a company engaged in the business of development of real estate. The Assessing Officer for the assessment year 2011-12 had made additions of Rs. 32.56 crores (rounded off) by way of on money receipts of the assessee relying on the documents impounded during the survey. He had also relied on the prices of property in the locality. The assessee carried the matter in appeal before the Commissioner. Commissioner, while rejecting the appeal of the assessee, placed reliance on her order in appeal in case of one M/s. Sambhav Infrastructure Pvt. Ltd. for the assessment year 2012-13 to conclude that the practice of receiving on money in such business is rampant. She referred to statements of various persons recorded in such assessment proceedings that the flats in the scheme were sold at the price ranging between 1.4 crore and 1.5 crore whereas the value showed in the books of accounts was ranging from Rs. 32 lacs to 44.50 lacs. She, therefore, concluded that facts emerging from the assessment of M/s. Sambhav Infrastructure Pvt. Ltd. would prove that the practice of accepting on money is rampant in the real estate business, in contrast to the contention of the assessee that there is no such practice prevailing in trade.

4. Assessee carried the matter before the Tribunal and the Tribunal after considering materials on record and in particular, the findings of the Id. CIT(A) remanded the proceedings for fresh consideration of Id. CIT(A) by directing the Id. CIT(A) to confront the assessee with the facts of Sambhav Infrastructure Pvt. Ltd. and to allow the assessee a reasonable opportunity to show as to how the observations made in Sambhav Infrastructure Pvt. Ltd would apply to the facts of the assessee.

5. The assessee assailed the order of the Tribunal before the Hon'ble High Court of Gujarat. It was strongly contended that the case before the Tribunal was that the Id. CIT(A) could not have confirmed the order of the assessment with the aid of any material on record in case of another assessment proceedings. The Hon'ble High Court observed as under:-

"To make it clear, the assessee concedes before us that there is no requirement of placing additional materials or seeking cross-examination in connection with the assessment proceedings and the materials of such assessment in case of M/s. Sambhav Infrastructure Pvt. Ltd. and that the assessee would be satisfied, if the Tribunal were to decide all legal contentions of the assessee including that the assessment in case of M/s. Sambhav Infrastructure Pvt. Ltd. and collected materials would not establish the fact of on money receipt in case of the assessee."

8. We notice that the Tribunal had not considered other aspects of the matter. Under the circumstances, in view of the concession made by the counsel for the assessee, we set aside the order of the Tribunal and request the Tribunal to hear the assessee's appeal on the basis of materials on record permitting all legal contentions to both sides. Tax appeal alongwith civil application is disposed of accordingly."

6. Pursuant to the aforementioned order of the Hon'ble High Court, rival submissions were heard at length. Case records were carefully perused and with the assistance of the Id. Senior Counsel, relevant documentary evidences and the judicial decisions relied upon have been considered in the light of Rule 18(6) of the Income Tax Appellate Tribunal Rules.
7. A survey u/s. 133A was carried out by Investigation Wing, Ahmedabad at the various premises of M/s. Nishant Construction Pvt. Ltd. and its related concerns on 19.05.2011. On the basis of the findings given in the survey report, the A.O. issued show cause notice to the assessee which reads as under:-

"2. A Survey was conducted by the Investigation Wing, Ahmedabad on 19/05/2011 wherein your following business premises were covered:

Name	Address
Nishant Construction Pvt.Ltd,	801-802, Regency Plaza, Opp Rahul Tower, Anandnagar Cross Road, Satellite, Ahmedabad
Site Office ofRatnakarIII	Prernatith Derasar Road, Anandnagar Cross Road, Satellite, Ahmedabad
Site Office ofRatnakar IV	Anandnagar Cross Road, Satellite, Ahmedabad
Site Office of Richmond Grand	Behind DNA, Nr. Torrent Power, Makarba Road, Odd S,G. Highway, Prahladnagar, Ahmedabad

3. The Survey Report prepared by DDIT (Investigation), Unit - 1(3) Ahmedabad, was forwarded to this office. Documents impounded during the course of Survey were also forwarded to this office. The Survey Report and the impounded documents have been examined by this office. It is seen from Page 130 of Annexure BF-17 (copy enclosed for your ready reference) which was recovered from your site office of Ratnakar-IV at Anandnagar Cross Road, Satellite, Ahmedabad during the course of Survey, that this paper contains certain notings. These notings clearly describe the area and the rate. The area of 3 Bedroom and 4 Bedroom flats given on this page clearly indicate that the notings pertain to Ratnakar III project as the area of the 3 Bedroom flats and 4 Bedroom flats mentioned on the page are as per the actual area of the said flats in Ratnakar-III. In the fifth line of this page, rate is mentioned at Rs. 4300/- per square ft. The notings on the following lines are "35% on booking" and "65% (21 installments)". It is seen that when these notings are read in conjunction with another sheet of paper impounded from the same premises and inventorised as Page 129 of Annexure - BF17 (copy enclosed), the notings can be clearly understood. Page 129 of BF-17 (As enclosed) refers to the details of transactions in respect of Flat No. C/1 104 of Ratnakar -III project. The sheet carries the names, PAN and addresses of buyers, area of the flat, total consideration and cheque payments. Area of the flat is 2610 sq. ft. The rate mentioned on page no. 130 is Rs. 4300 per sq.ft. The price of the said flat obtained by multiplying its area with the rate comes to Rs. 1,12,23,000/- . Flat C/1104 of Ratnakar-I/f project has been sold to one Mrs. Indrani Roy. This fact is also seen from the details of flat-wise sales submitted by your AR vide submission dated 21/02/2014 received in this office on 24/02/2014. As per the submission made by your AR, the sale deed for the flat is dated 30/12/2011 and you have apportioned part of the revenue to FY 2010-11 i.e. AY 201 f-12. As per the submission of your AR, the rate per sq. ft. is Rs. 1777 for this flat. However, as observed above, the actual rate for the same is Rs, 4300/- as seen from Page 130 of Annexure BF-17 (as enclosed). Thus, clearly you have received the remaining sum of Rs. 65,85,030/- ((4300-1777)*2610 sq. ft.) by way of cash i.e. on-money. This means that as a percentage of total consideration you have received close to 60% as on-money in the instant case. A complete chart of all your sales of flats of Ratnakar-I/f has been worked out by taking the rate of Rs. 4300 per sq. ft. as mentioned on the sheet of paper found from your premises, multiplying it with the area of each flat and comparing it with the value you have booked in your books. The difference between calculated value and the value declared by you is then apportioned across different years in the same ratio as you have apportioned it in your submission dated 21/02/2014.

It is seen that as per the calculation above, an amount of Rs. 25,66,17,425/- is calculated as on-money receipts in the financial year relevant to AY 2011-12 by taking the actual rate of Rs. 4300 per sq. ft, and apportioning the resultant consideration as per the ratio in which you have yourself allocated the receipts to AY 2011-12.

4. Furthermore, it is seen that some of the sale proceeds of your Ratnakar-IV project have also been apportioned to AY 2011-12. Following the same methodology as above, a sum of Rs. 6,90,80,980/- is ascertained to be the on-money receipts in your case for the said year. Chart of the working of the same is enclosed.

5. You are hereby, directed to show-cause why the above mentioned sum of Rs, 25,66,17,425/- in relation to Ratnakar- III and a sum of Rs. 6,90,80,980/- in relation to Ratnakar - IV should not be treated as undisclosed income received by way of cash by you for AY 2011-12."

8. In response to the above show cause, the assessee furnished a detailed reply strongly contending that the sheet of paper being relied upon for calculating the quantum of on money is not correct. The assessee explained that it has not received any on money. It was brought to the notice of the A.O. that no name has been stated on top of the alleged loose sheet found at the time of survey. Therefore, it cannot be said to be pertaining to Ratnakar III scheme. The assessee also denied that the loose sheet belongs to it.
9. The detailed submissions of the assessee along with documentary evidences did not find any favour with the A.O. The A.O. was of the firm belief that the housing projects of the assessee are located in some of the most promising and established Satellite and Anandnagar areas of Ahmedabad. The A.O. observed that the assessee has sold all its flats in Ratnakar III at rates ranging from Rs. 958 sq. ft. to Rs. 2000 per sq. ft. and

- in Ratnakar IV, the rates range between 1400 to Rs. 2600 per sq. ft. Since the rate mentioned on the impounded loose sheet was at Rs. 4300 per sq. ft., the A.O. came to the conclusion that the assessee has received on money over and above the sale consideration shown in the sale deeds.
10. In support of his strong belief, the A.O. took a snap shot of the advertisement of a flat in Ratnakar III from the website 99acres.com wherein the advertisement clearly shows the price of a 3-bedroom flats at Rs. 2.14 crores at Rs. 6300 per sq. ft. The A.O. was of the opinion that the website like 99acres.com and magicbricks.com report the prevailing market prices of various properties.
11. The A.O. further examined the market rates by the trend in property prices shown in the websites of 99acres.com and magicbricks.com. After comparing the trend rates from the websites, the A.O. found that the average market rate was Rs. 4304 per sq. ft. which is almost exactly the amount mentioned on the said loose sheet found at the time of survey.
12. After visiting the afore-stated websites and comparing the prevailing market rates, the A.O. finally came to the conclusion that there is certainly no doubt that the assessee received on money by way of cash in relation to sale of its entire flat in Ratnakar III and Ratnakar IV schemes. Taking the rate of Rs. 4300 per sq. ft., as the base rate, the A.O. made the addition of Rs. 32,56,98,405/- which comprises of Rs. 25.66 crores in relation to Ratnakar III and Rs. 6.90 crores in relation to Ratnakar IV schemes.

13. Assessee carried the matter before the Id. CIT(A) but without any success.
14. As mentioned elsewhere, the Id. CIT(A) confirmed the assessment order on the basis of the findings given in the case of M/s. Sambhav Infrastructure Pvt. Ltd.
15. The bone of contention is the loose sheet found during the course of survey in which the entries are as under:-

*		
<u>3 Bed Room</u>	=	<u>2620 Sq. Ft.</u>
<u>Pent House</u>	=	<u>4100 Sq. Ft.</u>
*		
<u>4 Bed Room</u>	=	<u>3400 Sq. Ft.</u>
<u>Pent House</u>	=	<u>5450 Sq. Ft.</u>
*		
<u>Rate (Regular)</u>		<u>4300 Rs. Per Sq. Ft.</u>
		<u>= 35% on Booking</u>
		<u>= 65% (21 Installments)</u>
*		
<u>(D.P.)</u>	=	<u>10 lacs</u>
<u>Possession By 2 years</u>		
*		
<u>Extra Payment</u>	=	<u>Rs. 12,00,000/-</u>
		<u>Maintenance</u>
		<u>2 Car Parking</u>
		<u>ACC (Auda Charges)</u>
		<u>Stamp Duty</u>

16. It can be seen from the above that there is no mention of any scheme of the assessee, be it Ratnakar III or Ratnakar IV. In the loose sheet, there is a reference to Pent House but there is no Pent House in Ratnakar III scheme. Further in the loose sheet, there is a reference to 4-bedroom flats but there

is no 4-bedroom flat in Ratnakar IV scheme. Further, the area of Pent House mentioned in the loose sheet is 5450 sq. ft. whereas the area of Pent House in Ratnakar IV schemes is only on 2520 sq. ft. The assessee may conceal the consideration but by any stretch of imagination, the assessee cannot conceal the carpet area of the flats.

17.A comparison of the loose sheet with the actual size of flats in Ratnakar III and Ratnakar IV schemes would show that this loose sheet has no relevance with the actual project of the assessee.

18.We find that the assessee has given complete details of the purchasers along with their addresses and PAN numbers. The same are exhibited from pages 2 to 8 of the paper book. None of these purchasers were examined by the A.O. nor by the First Appellate Authority. Except for the loose sheet of paper, there is nothing on record to prove that the assessee has actually received sum on money.

19.At this stage, we would like to refer to the observations of the lower authorities to the effect that no one makes a loss in real estate business and that the market perceptions indicate that the prices of the immovable properties are always on the upward trend. It appears that both the lower authorities have been carried away with the “notorious practice” prevailing in real estate circles that in all property transactions, there is non-disclosure of the full consideration.

20. In Lalchand Bhasat Ambica Ram vs. CIT: (1959) 37 ITR 288, the Supreme Court disapproved the practice of making additions in the assessment on mere suspicion and surmises or by taking note of the "notorious practice" prevailing in trade circles. It was observed as under:

"Adverting to the various probabilities which weighed with the Income-tax Officer we may observe that the notoriety for smuggling food grains and other commodities to Bengal by country boats acquired by Sahibgunj and the notoriety achieved by Dhulian as a great receiving centre for such commodities were merely a background of suspicion and the appellant could not be tarred with the same brush as every arhatdar and grain merchant who might have been indulging in smuggling operations, without an iota of evidence in that behalf."

21. Several decades back the Madras High Court in the case of Shri ramalinga Choodambikai Mills Ltd. vs. CIT: (1955) 28 ITR 952 held that in the absence of any evidence to show either that the sales were sham transactions or that the market price were in fact paid by the purchasers, the mere fact that goods were sold at a concessional rate would not entitle the Income tax Department to assess the difference between the market price and the price paid by the purchaser as profit of the assessee. In CIT vs. A. Raman & Co.: (1968) 67 ITR 11 the Supreme Court held that the law does not oblige a trader to make the maximum profit that he can out of his trading transactions. Income which actually accrues is taxable, but income which the assessee could have, but has not in fact earned, is not made taxable. These two judgments were approvingly noticed and applied by the Supreme Court in CIT vs. Calcutta discount Co. Ltd.: (1973) 91 ITR 8. These judgments apply to the present case in favour of the assessee.

22. In our considered opinion, the assessing authority has no power to disturb the sale price shown except in three cases. The first is under Section 145 of the Act. Where the sale of properties is part of the business of the assessee, the Assessing Officer, if he is of the opinion that the accounts are not correct and complete, may proceed to reject the books of accounts and thereafter make a best judgment assessment of the income in the manner prescribed by Section 144. The second is the case where Section 50C of the Act is invoked on the basis of the prices fixed by the Stamp Valuation Authorities of the State Government. That section, it is pointed out, however, applies only in the computation of capital gains and cannot be availed by the Revenue where the profits of the business are to be computed.
23. The third is the case of section 92BA inserted by the Finance Act, 2012 w. e. f. 01.04.2013. This section gives power to the Assessing Officer to recalculate the profits shown by the assessee in cases of “specified domestic transactions”, where the aggregate of such transactions entered into in the relevant accounting year exceeds a sum of Rs. 5 crores.
24. Except in these three situations, the Act does not permit the enhancement of the profits of the business shown by the assessee.
25. Coming to the evidentiary value of the impounded loose sheet mentioned elsewhere, the Hon’ble Supreme Court in the case of Common Cause (A

Registered Society) and Others vs. Union of India and Others in Writ Petition Civil Appeal No. 505 of 2015 has observed as under:-

16. With respect to the kind of materials which have been placed on record, this Court in V.C. Shukla's case (supra) has dealt with the matter though at the stage of discharge when investigation had been completed but same is relevant for the purpose of decision of this case also. This Court has considered the entries in Jain Hawala diaries, note books and file containing loose sheets of papers not in the form of "Books of Accounts" and has held that such entries in loose papers/sheets are irrelevant and not admissible under Section 34 of the Evidence Act, and that only where the entries are in the books of accounts regularly kept, depending on the nature of occupation, that those are admissible

17. It has further been laid down in V.C. Shukla (Supra) as to the value of entries in the books of account, that such statement shall not alone be sufficient evidence to charge any person with liability, even if they are relevant and admissible, and that they are only corroborative evidence. It has been held even then independent evidence is necessary as to trustworthiness of those entries which is a requirement to fasten the liability.

26. The Hon'ble Supreme Court further observed:-

17. From a plain reading of the Section it is manifest that to make an entry relevant thereunder it must be shown that it has been made in a book, that book is a book of account and that book of account has been regularly kept in the course of business. From the above Section it is also manifest that even if the above requirements are fulfilled and the entry becomes admissible as/ relevant evidence, still, the statement made therein shall not alone be sufficient evidence to charge any person with liability. It is thus seen that while the first part of the section speaks of the relevancy of the entry as evidence, the second part speaks, in a negative way, of its evidentiary value for charging a person with a liability. It will, therefore, be necessary for us to first ascertain whether the entries in the

documents, with which we are concerned, fulfill the requirements of the above section so as to be admissible in evidence and if this question is answered in the affirmative then only its probative value need be assessed.

27. With respect to evidentiary value of regular account book, the Hon'ble Supreme Court in the case of V.C. Shukla 1998 (3) SCC 410 has laid down :-

*" 37. In Beni v. Bisan Dayal it was observed that entries in books of account are not by themselves sufficient to charge any person with liability, the reason being that a man cannot be allowed to make evidence for himself by what he chooses to write in his own books behind the back of the parties. There must be independent evidence of the transaction to which the entries relate and in absence of such evidence no relief can be given to the party who relies upon such entries to support his claim against another. In Hira Lal v. Ram Rakha the High Court, while negating a contention that it having been proved that the books of account were regularly kept in the ordinary course of business and that, therefore, all entries therein should be considered to be relevant and to have been proved, said, that the rule as laid down in Section 34 of Tie Act that entries in the books of account regularly kept in the course of business are relevant whenever they refer to a matter in which **the** Court has to enquire was subject to the salient proviso that such entries shall not alone be sufficient evidence to charge any person with liability. It is not, therefore, enough merely to prove that the books have been regularly kept in the course of business and the entries therein are **correct**. It is further incumbent upon the person relying upon those entries to prove that they were in accordance with facts."*

28. It is apparent from the aforesaid discussion that the loose sheet of papers are wholly irrelevant as evidence being not admissible u/s. 34 so as to

constitute evidence with respect to the transactions mentioned therein being of no evidentiary value.

29. Moreover, the Assessing Office did not make any inquiry from buyers of flat in respect of actual prices paid by them. He also did not make any other inquiry in order to corroborate his conclusion. There is no incriminating evidence to show that the assessee has sold the flats at a higher rate.

30. In our understanding of the facts, the impounded loose sheet can at the most be termed as “dumb document” which did not contain full details about the dates, and its contents were not corroborated by any material and could not be relied upon and made the basis of addition.

31. In the case of CIT vs. Kulwant Rai 291 ITR 36 the ruling given in the case of Dhakeswari Cotton Mills Ltd. 26 ITR 775 by the Hon’ble Supreme Court has been relied upon wherein the Hon’ble Supreme Court has held “ *even though Income Tax Authorities including the Assessing Officer has unfettered discretion and not strictly bound by the rules and pleadings as well as materials on record and is legitimately entitled to act on the material which may not be accepted as evidence, nevertheless such discretion does not entitle them to make a pure guess and base an assessment entirely upon it without reference to any material or evidence at all*”.

32. Considering the facts of the case in hand in totality and in the light of the judicial decisions referred to hereinabove, we do not find any merit in the impugned additions. We, therefore, set aside the findings of the Id. CIT(A) and direct the A.O. to delete the addition of Rs. 32.56 crores.

33. In the result, the appeal filed by the Assessee is accordingly allowed.

Order pronounced in Open Court on 14 - 02- 2017

Sd/-

(S. S. GODARA)
JUDICIAL MEMBER True Copy
Ahmedabad: Dated 14 /02/2017

Sd/-

(N. K. BILLAIYA)
ACCOUNTANT MEMBER

Rajesh

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.
3. The CIT (Appeals) –
4. The CIT concerned.
5. The DR., ITAT, Ahmedabad.
6. Guard File.

By ORDER

Deputy/Asstt.Registrar
ITAT,Ahmedabad