

IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A" BENCH: HYDERABAD

BEFORE SHRI D. MANMOHAN, VICE PRESIDENT AND
SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER

ITA. No.336/Hyd/2016 (Assessment Year: 2012-2013)
ITA No.1595/Hyd/2016 (Assessment Year 2013-2014)

Income Tax Officer, Ward-2, Ongole.	vs.	M/s. Satya Parvathi Constructions, Pr. Sri M Hari Premnath, GF-4, Datta Sai Towers, Lawyerpet, Ongole. PAN: AAPFS 8349 R
(Appellant)		(Respondent)

C.O. No.22/Hyd/2016
(Arising out of ITA. No.336/Hyd/2016) (Assessment Year: 2012-2013)

Income Tax Officer, Ward-2, Ongole.	vs.	M/s. Satya Parvathi Constructions, Pr. Sri M Hari Premnath, GF-4, Datta Sai Towers, Lawyerpet, Ongole. PAN: AAPFS 8349 R
(Appellant in appeal)		(Respondent / Cross Objector)

For Assessee:	Shri K.A. Sai Prasad
For Revenue :	Shri D. Prasad Rao, DR

Date of Hearing :	28.05.2018
Date of Pronouncement :	05.07.2018

ORDER

PER D. MANMOHAN, **VP.**

These appeals are filed at the instance of the Revenue, against the orders passed by CIT (A)-1, Guntur, and they pertain to Assessment Years 2012-13 and 2013-14. Assessee filed a cross objection for the A.Y. 2012-13 wherein the firm raised the following objections:-

- “1. Without prejudice to the decision of the Learned First Appellate Authority in respect of the disallowance of Rs. 2,94,633/- u/s 40(a)(ia), the appellant contents that since the income is estimated the provisions of section 40(a)(ia) are not applicable and the disallowance is not justified.
2. The Ld. CIT(A) is not justified in directing the Assessing Officer to initiate penalty proceedings u/s 271A(2)(f).”

Facts necessary for the disposal of the appeal are stated in brief.

2. The assessee is a firm engaged in construction of apartments. In respect of Assessment Year 2012-13 the assessee declared total income of Rs. 13,62,270/- on 20.12.2012. For the Assessment Year 2013-14 the assessee declared total income of Rs. 29,53,880/- on 20.12.2013. Survey action u/s 133A took place on 21.12.2012. During the course of survey operations the authorities found certain incriminating material relating to Sai Soudha Towers wherein certain receipts have not passed through books of account. The partner of the firm Sri M. Hari Premnath admitted during the course of survey, that the receipts were not recorded in the books of account. He also offered a sum of Rs. 50 lakhs as undisclosed income for the A.Y. 2012-13 and Rs. 1 Cr for the A.Y. 2013-14, apart from regular income. Question No.13 and Answer to the said question are extracted for immediate reference:-

Q. 13. I am showing you classmate note book S No. 17 containing the accounts of various buyers, on a random check up of three accounts namely P. Lakshmi Kumari, J V Rama Krishna and L. Sreedhar Reddy, the cash receipts amounting to Rs. 7,00,000/-, Rs. 2,00,000/- and Rs. 6,14,000/- are not found in the accounts available in your system. What is your explanation?

Ans. The note book shown by you relates to the receipts of advances made from the buyers of the plots during the FY 2011-12 & 2012-13. I admit that the amounts referred above are not recorded in our books. In view of these omissions and also in the case of B. Mohan Reddy, N. Vinodh Kumar Reddy and other buyers and any other discrepancies, I offer a sum of Rs. 50,00,000/- as our firms undisclosed income for the FY 2011-12 relevant to ATY 2012-13 and above the income already declared in the return of income filed and another sum of Rs. 1,00,00,000/- as our firms undisclosed income for the FY 2012-13 relevant to A.Y. 2013-14. I promise to pay the taxes on these income declared now and to file revised return for the A.Y. 2012-13 and regular income for the A.Y. 2013-14.”

3. During the course of assessment, the Assessing Officer noticed that certain receipts have not passed through bill books and hence not shown in the ledger accounts. As per the Development Agreement, entered into with the land owners, the builder is entitled to 17 flats. However, as per the information available from the material, the builder has sold only 14 flats during the previous years relevant to the assessment years 2012-13 & 2013-14. The Assessing Officer tabulated the difference in receipts; According to him difference is of Rs. 61,59,000/- for the A.Y. 2012-13. In respect of the A.Y. 2013-14, difference in receipts worked out to Rs. 1,32,33,000/-.

4. For the A.Y. 2012-13, the assessee declared total receipts of Rs. 3,59,14,612/- on which he admitted income of Rs. 13,62,270/-. The receipts are the accumulated figures of Sri Sai Kamalakar Residency and Sai Soudha Towers. Consequent to the survey that took place on 21.12.2012, the assessee filed revised return, for the A.Y. 2012-2013,

wherein the firm admitted total income of Rs. 32,66,828/- wherein receipts from Sri Sai Soudha Towers was shown at Rs. 1,86,56,000/- as against the receipts declared in the original return to the tune of Rs. 1,51,72,000/-. When called upon by the AO, vide letter dated 19.12.2014, to explain the difference and the consequent undisclosed income of Rs. 50 lakhs as declared during the survey, the assessee replied that receipts were not passed through books and matching expenditure was also not passed through books.

5. The A.O. observed that the assessee having not filed the revised return on his own, but only after survey u/s 133A, the same cannot be accepted. He accordingly did not take into consideration the revised return and proceeded to make the impugned addition on the basis of original return of income.

6. Vide letter dated 13.03.2015 the assessee submitted that the difference is only in construction of Sai Soudha Towers, Ongole. The assessee undertook construction during the year 2011-2012 relevant to the A.Y. 2012-13. In the original return, gross receipts of Rs. 1.51 Crs was admitted. On account of discrepancies, a revised return was filed declaring full consideration of Rs. 1,86,56,000/-, thus the difference is only Rs. 34,84,000/- in sale consideration. It was contended that for understatement of sales to the extent of Rs. 34,84,000/- for the A.Y. 2012-2013, income cannot be earned to the tune of Rs. 50 lakhs. Further, it was contended that the entire sales, which was not admitted,

will not become income since expenditure has to be incurred against such sales. In respect of A.Y. 2013-14, the assessee contended that the full consideration received in that year was only to the tune of Rs. 2,60,83,000/- and in the subsequent year ie., A.Y. 2014-15 the total sale consideration was Rs. 86,63,893/-. Thus, the total receipts for the project are Rs. 5,34,02,893/-. It was contended that against such total receipts, the assessee could not have earned additional income of Rs. 1.50 Crs since the assessee is merely a developer. To arrive at the cost of construction assessee placed before the Assessing Officer a valuation report of the registered valuer. It was thus contended that the estimated profit declared by the assessee is reasonable.

7. In respect of the previous year relevant to the A.Y. 2012-2013, the gross receipts of the assessee from three ventures were as under:

1. Sai Kamalakar Residency	-	Rs. 1,22,00,000/-
2. Sai Durga Residency	-	Rs. 93,10,000/-
3. Sai Soudha Towers	-	<u>Rs. 1,86,56,000/-</u>
Total	-	<u>Rs. 4,01,66,000/-</u>

08. The main contention of the assessee is that the project continued for three years and hence each years income has to be estimated and it declared 8% of income on the entire turnover.

09. The A.O. was however of the view that gross receipts of the assessee having exceeded Rs. 1 Cr, the assessee is bound to maintain

books of account which has to be duly audited. In his opinion the difference works out to Rs. 61,59,000/- which was added to the income declared in the original return. It may be noticed that the assessee-firm has declared Rs. 34,84,000/- as additional turnover for the A.Y. 2012-13 and Rs. 26,75,000/- for the A.Y. 2013-14 which totals upto Rs. 61,59,000/- which, according to him, reflects the consideration of gross bills and has to be separately added. He also observed that the assessee-firm could not adduce any evidence for additional expenditure claimed to have been incurred as against under reporting of gross receipts. He also observed that the assessee is bound to maintain books of account and thus it has no right to resort to estimation of income as shown in the alleged return. He also observed that A.O. need not allow any expenditure not recorded in the books of account for which bills were not maintained. With regard to the registered valuer's report, the A.O. observed that it was on estimation basis and nothing has been shown with regard to the additional expenditure. There is no such practice of obtaining valuation report in respect of the flats or assets which are in the nature of stock-in-trade. He was therefore of the view that the entire additional receipts have to be separately taxed.

10. It was also noticed that the assessee did not deduct tax at source from the interest paid to certain parties, to the tune of Rs. 2,94,633/- as per sub-Rule 3 of Rule 29C of the IT Rules read with the provisions of section 197A (1A) of the Act. The assessee should not only obtain

Form 15G but it should be forwarded to the CCIT or CIT whereas in the instant case the assessee having not forwarded the same to the CCIT or CIT A.O. invoked the provisions of section 40(a)(ia) of the Act and disallowed an amount of Rs. 2,94,633/- for the A.Y. 2012-13.

11. Similarly, for the A.Y. 2013-14, the case of the assessee was that the total gross bills for the assessment years under consideration from Sai Soudha Towers is Rs. 2,60,83,000/-, and hence there is no suppression in admission of gross bills. The A.O. on the other hand observed that the consideration from the buyers was received by the assessee and all the expenditure was incurred by the said date and the assessee could not produce any cash receipt book in support of its claim that the cash was received during the period 1.12.2012 to 31.03.2013 for additional work done. A.O. observed that the assessee-firm did not produce any evidence for expenditure. He therefore determined an amount of Rs. 1,32,33,000/- as unexplained receipts, received before the registration of the flats.

12. The A.O also disallowed a sum of Rs. 21,33,022/- referable to cash expenditure exceeding Rs. 20,000/-, by invoking the provisions of section 40A(3) of the Act.

13. Aggrieved, assessee preferred appeals before the CIT (A) wherein it was contended that actual undisclosed turnover is Rs. 34,84,000/- only referable to Sai Soudha Towers in respect of the previous year relevant

to the A.Y. 2012-13. It was also contended that the impounded material itself indicate that a sum of Rs. 26,75,000/- is the amount received in the subsequent years. Since the total flat cost considered by the A.O. in the show cause notice and the flat cost taken by the assessee in the reconciliation statement are tallying it was contended that a sum of Rs. 26,75,000/- deserves to be reduced from the sum of Rs. 61,59,000/-. Thus the actual variance in turnover is Rs. 34,84,000/- (Rs. 61,59,000 – Rs. 26,75,000). It was strongly contended by the assessee that the entire gross receipts over the period of construction of the venture Sai Soudha Towers having not been disputed, the A.O. erred in taking a part of the turnover as undisclosed income. It was also contended that revised return was filed within the stipulated time i.e., within a year from the end of the relevant assessment year or completion of the assessment and hence A.O. ought to have taken the same into consideration.

14. With regard to the remarks of the Assessing Officer that the “the assessee, with a malafide intention to evade tax, has not shown the receipts of Rs. 61,59,000/- during the FY 2011-12 in respect of the prospective buyers”, the case of the assessee is that there was an increase in the turnover of Sai Soudha Towers to the tune of Rs. 34,84,000/- referable to the venture consisting of 16 flats of assessee’s share whose total value is Rs. 5,16,48,000/- spread over three years and it is the case of the Assessing Officer that some more money is left unreported. A chart was provided to submit that he miscalculated the

difference. Hence the addition, if any, for the A.Y. 2012-13, can be only to the extent of Rs. 34,84,000/- and this figure refers to the difference in turnover and not profits since the assessee cannot make such huge profit from construction of flats as a developer. It was also contended that the amount received from the customers was recorded in a separate sheet which was impounded during the course of survey. The customers accounts to be cross-verified and they need to be produced to the customers wherein the amount receivable or received will be recorded whereas the bills of expenditure not recorded in the books of accounts need not be maintained by the assessee as they are not liable to be shown to anybody but that fact should not imply that the entire additional expenditure should be disallowed on the ground of non-availability of the bills. In fact to overcome this deficiency, the registered valuer's report was placed on record wherein the cost of construction was estimated and on this the A.O. has not made any comments and there was also no reference to DVO. It was also stated that the profit made from this venture works out to 3.72% of the turnover whereas the assessee had taken into consideration additional turnover and admitted income at 8% and filed the return of income which is reasonable.

15. With regard to the disallowance made u/s 40(a)(ia) of the Act, Learned Counsel for the Assessee submitted that in order to make the payment to the parties without deduction of tax at source, the assessee has to mandatorily obtain a declaration in Form 15G but it is not

necessary for the assessee to show that Form 15G is submitted to the Commissioner within the stipulated time. In this regard, he relied upon the decision of the ITAT Delhi Bench in the case of Vijaya Bank vs. ITO (31 ITR (Trib.) 427). It was thus contended that both the disallowances made by the A.O. are bad in law.

16. Ld. CIT(A) observed that the Assessing Officer ought to have taken into consideration the original return of income and further observed that the notings found in the impounded material are rough calculations made by the accountant of the assessee and such notings are not supported by any material evidence. It was also stated that the A.O. should have conducted enquiry to know the exact receipts from the buyers of the flat and purely based on the notings addition ought not have been made. Moreover the total sale value of the flats admitted by the assessee in the revised return and the total value adopted by the Assessing Officer in his remand report are same. The only difference is on account of receipts in the year under consideration for two or three years clubbed together and recorded on the last day of those vouchers whereas the accounting principles demand that the expenditure should be recorded on the same day on which the amount was incurred.

17. In respect of A.Y. 2013-14, Ld. CIT(A) further observed that section 40A(3) can be invoked when assessee incurs an expenditure otherwise than by an account payee cheque, exceeding Rs. 20,000/- and the purpose was to prevent or to check evasion of tax or flow of unaccounted

money. It was further observed that though a reasonable opportunity was given to the assessee during the appeal proceedings to furnish the details in support of the assessee's claim, with regard to unavoidable or exceptional circumstances or business expediency, no such details could be furnished. Thus the addition made by the A.O, by invoking the provisions of section 40A(3) of the Act, was upheld.

18. Aggrieved by the orders passed by the CIT (A), Revenue preferred appeals before the Tribunal. For the A.Y. 2012-13 the assessee filed cross objection on the limited ground that the income having been estimated, provisions of section 40(a)(ia) are not applicable and further submitted that the Commissioner of Income Tax is not justified in directing the A.O. to initiate penalty proceedings u/s 271A(2)(f) of the Act.

19. In the appeal for the A.Y. 2012-2013, the Revenue mainly contends that the Ld. CIT(A) failed to appreciate the provisions of section 197A(1A) of the Act and further contended that the assessee having admitted additional income of Rs. 50 lakhs during survey proceedings towards under-reporting of gross receipts, the finding that the Assessing Officer has not given sufficient opportunity is not correct and in fact there was no evidence in respect of alleged expenditure related to unrecorded gross bills. Similarly, for the A.Y. 2013-14, the contention of the Revenue is that the assessee having admitted unaccounted gross receipts there cannot be any estimate of income and the A.O. was

justified in treating the same as additional income, which was not passed through the books of account and in the absence of proof that some additional expenditure was incurred, Ld. CIT(A) erred in deleting the addition. It was further contended that the Ld. CIT(A) estimated the income on one hand and sustained the addition u/s 40A(3) of the Act, which is not in accordance with law.

20. Learned Counsel appearing on behalf of the assessee made detailed submissions challenging the addition made towards excess sale proceeds received by the assessee for the years under consideration. By submitting that in the case of estimation of income even if there is any receipt which is not recorded in the books of account the same has to be taken as forming part of the total turnover for the purpose of estimating the income and it cannot be separately added.

21. Learned Departmental Representative strongly relied upon the orders passed by the Assessing Officer and contended that the CIT (A) was not justified in holding that separate addition referable to receipts not routed through regular books of account, should not be made. He also submitted that the disallowance made u/s 40(a)(ia) of the Act, for the A.Y. 2012-13 ought to have been confirmed since the assessee has not placed Form 15G before the CIT / CCIT within the stipulated time and in fact there is nothing on record to suggest that it was placed before the Assessing Officer at any point of time. In other words, procedure prescribed therein is mandatory.

22. Similarly, for the A.Y. 2013-14 it was contended that the income which did not pass through books of account should be added separately; In the absence of any expenditure shown to have been incurred against such income there cannot be any separate deduction. In that regard, it was also submitted that on the same reasoning the CIT (A) confirmed the disallowance u/s 40A(3) of the Act and hence a separate yard stick should not be applied in respect of receipts not passed through the books of account.

23. On the other hand, Learned Counsel appearing for the assessee submitted that in respect of A.Y. 2012-13 the Revenue made separate addition of Rs. 61,59,000/- and thus the issue of estimation of Rs. 50 lakhs was raised for the first time before the Tribunal which is not permissible in law. In other words, the Assessing Officer did not make a separate addition based on the admission as per the survey proceedings and he merely made an addition by taking into consideration the total sale consideration declared by the assessee. Even otherwise, after appropriate reconciliation, the actual difference in turnover was shown at Rs. 34,84,000/- only and no prudent person could have given any declaration to admit an additional income of Rs. 50 lakhs. It was also submitted that in the case of estimation of income, only profit element can be taxed on the finally quantified and disclosed turnover. He relied upon the decision of the Hon'ble A.P. High Court in the case of CIT vs. Ravi Foods (P) Ltd in ITA No.35/15, dated 16.06.2015 wherein the

Hon'ble Court estimated the net profit at 3.91% of the finally quantified undisclosed turnover. Learned Counsel for the Assessee also submitted that in fact the assessee, in the revised return, declared 8% income on the total turnover whereas the percentage of profit declared in the original return was much less. It was also submitted that though the variance in turnover, as indicated in the impounded material, is with regard to one venture only i.e., Sai Soudha Towers but the appellant had made higher estimate of 8% in respect of the turnover related to other ventures also and hence separate addition cannot be made in the absence of any allegation of overall suppression of turnover. It was also contended that in the remand report, the Assessing Officer has not disputed the total sale value of the flats and hence separate addition is not maintainable.

24. With regard to the issue u/s 40(a)(ia) of the Act, it was contended that though the assessee has not deducted tax at source on the interest payments, provisions of section 40(a)(ia) of the Act cannot be applied since the assessee obtained Form 15G and there is no obligation on the part of the assessee to file the same before the CIT within the stipulated time. With regard to addition made in the A.Y. 2013-14, the assessee advanced the same argument by contending that in the remand report the A.O. having not disputed the total turnover and in fact the assessee having declared the total turnover, which is spread over three years, separate addition cannot be made on the ground that some receipts were

not passed through the books of account overlooking the fact that the percentage of turnover estimated by the assessee having been accepted there cannot be any separate addition towards undisclosed turnover.

25. With regard to the applicability of provisions of section 40(a)(ia) of the Act, the assessee has also filed Cross Objections wherein it was contended that once income is estimated no disallowance is warranted.

26. On the main issue, Learned Counsel for the Assessee relied upon several decisions along with the brief note on each case-law, which is extracted for immediate reference:-

"CIT v. President Industries - 258 ITR 0654(Gujarat-HC):

"The facts giving rise to the present case are that during the course of survey conducted on the premises of the assessee on 1-12-1994, from the excise records found, inference was drawn by the assessing officer from the movement of finished goods from the premises of the assessee to godowns that sales amounting to Rs. ' 29,01,300 have not been disclosed in the books of account. The assessing officer made the addition of the entire sum of the said undisclosed sales as income of the assessee for the assessment year 1994-95. The additions on account of undisclosed sales was affirmed by the Commissioner of Income-tax (Appeals) to the reduced sum of Rs. 28,35,883. On further appeal the Tribunal found that the entire sales could not have been added as income of the assessee for the assessment year in question but only to the extent the estimated profits embedded in the sales for which the net profit rate was adopted entailing addition of income on the suppressed amount of sales. The Tribunal also found that there is no material on the record to suggest that the assessee made any investment outside the books of account to make alleged unaccounted sales in respect of the aforesaid appellate order. The applicant made an application under section 256(1) for referring the aforesaid two questions said to be arising out of the Tribunal's order. (Emphasis Supplied)

Having perused the assessment order made by the assessing officer, the order made by the Commissioner of Income-tax (Appeals) and the Income-tax Appellate Tribunal, we are satisfied that the Tribunal was justified in rejecting the application under section 256(1). It cannot be matter of an argument that the amount of sales by itself cannot represent the income of the assessee who has not disclosed the sales. The sales only represented the price received by the seller of the goods for the acquisition of which it has already incurred the cost. It is the realisation

of excess over the cost incurred that only forms part of the profit included in the consideration of sales. Therefore, unless there is a finding to the effect that investment by way of incurring the cost in acquiring the goods which have been sold has been made by the assessee and that has also not been disclosed. In the absence of such finding of fact the question whether the entire sum of undisclosed sale proceeds can be treated as income of the relevant assessment year answers by itself in the negative. The record goes to show that there is no finding nor any material has been referred about the suppression of investment in acquiring the goods which have been found subject of undisclosed sales. (Emphasis Supplied)

We are, therefore, of the opinion that no question of law which requires to be referred to this court arises out of the Tribunal's appellate order. The order of the Tribunal under section 256(1) is not erroneous in reaching such conclusion. The application is rejected"

CIT v. Gurubachhan Singh J. Juneja - 215 CTR 0509(Gujarat-HC):

Head note from Tax publishers is reproduced as under.

"Addition under section 69--Alleged unaccounted sales--During search proceedings under section 132 various books of accounts and documents were seized from the residential and business premises of assessee. It was found that the amount of certain sales was not accounted for in books of accounts. AO made addition being the value of unaccounted sales. However, the finding of Tribunal was that assessee could not be taxed the entire amount but was liable to be taxed only on earned on the said sales, thereby deleted addition. Revenue had not proved by bringing any material on record that assessee had made any investment to make alleged unaccounted sales. Held: In the absence of any material on record to show that there was any unexplained investment made by assessee which was reflected by alleged unaccounted sales, the finding of Tribunal that only GP on the said amount could be brought to tax did not call for any interference. "

CIT v. Sharda Real Estate (P.) Ltd. - 099 OTR 0100(MP-HC):

Income from undisclosed sources--Addition under section 69A Sale proceeds on purchase and sale of real estate and flats--During the search carried out some loose papers were found from the residence of one of the directors of assessee company. AO initiated proceedings under sections 153C and 153A and made addition in respect of cash entries noted on the loose sheets. The assessee submitted that ownership over those documents was that of the plot owners and not of it. The seized papers did not carry any signatures of directors or of its staff but they were typed pages. AO held that the amount received by the assessee from the purchasers, which had not been recorded in the books of account of the assessee was the total income of unrecorded sales consideration. Held: According to the nature of the assessee's business of purchase and sale of real estate and flats, Tribunal was justified in treating 25 per cent of sale proceeds received in cash as income of the assessee, instead of making addition of the entire amount of sale proceeds received in cash.

The learned Tribunal considered the matter in detail and allowed the appeal in part. Paras 10 and 11 are relevant, which read as under:

"10. So far as merit of addition is concerned, we found that the assessing officer has added the entire amount of sale proceeds of plots received in cash in the income of the assessee. Honble jurisdictional High Court in case of CIT v. Balchand Ajit Kumar (2003) 263 ITR 610 (MP), held that entire amount of sale proceeds cannot be regarded as profit of the assessee, the net profit rate had to be adopted for the purpose of addition.

Accordingly, Honble Madhya Pradesh High Court confirmed the action of the Tribunal for conclusion that entire sale proceeds could not be included in the total income of the assessee and only the amount of net profit should be added.

Similarly, Honble Gujarat High Court in the case of *CIT v. Saint Synthetics Mill* (2010) 3261TR 410 (Guj), held that addition was to be made not in respect of sale consideration but only in respect of the profits. In case of *CIT v. President Industries* (2002) 258 ITR 654 (Guj), Honble Gujarat High Court held that where unaccounted sales were revealed during course of survey, entire sale proceeds cannot be added as undisclosed income of the assessee, but addition could only be to the extent of profit embedded in sales. It was further observed by Honble High Court that entire amount of sales could not represent the income of the assessee, who had not disclosed the sales.

11. Honble Gujarat High Court in the case of *Dy. CIT v. Panna Corporation* (2012) 74 DTR (Guj) 89, where assessee was engaged in business of construction offlats and during course of search, it was observed that the loose papers found at the premises of partners indicated that assessee was collecting unaccounted cash from the purchasers of the flats. Accordingly, the assessing officer made addition in respect of on-money of Rs. 62 lacs received. In an appeal filed before the High Court, the Hon'ble High Court observed that: It can thus, be seen that consistently, this Court and some other Courts have been following the principle that even upon detection of on-money receipts or unaccounted cash receipts, what can be brought to tax is the profit embedded in such receipts and not the entire receipts, themselves. If that be the legal position, what should be estimated as a reasonable profit out of such receipt must bear an element of estimation.

In view of the legal position that not the entire receipts, but the profit element embedded in such receipts, can be brought to tax, in our view, no interference is called for in the decision of the Tribunal accepting such element of profit at Rs 26 lacs out of total undisclosed receipts of Rs. 62 lacs.

In the instant case before us, the assessee was engaged in the business of real estate, wherein part of the amount of sale consideration was received through cheque and balance in cash and only cheque amount was entered in the regular books. The assessing officer added entire amount of sales received in cash in assessee's income.

The crux of the arguments of the learned Authorized Representative was that only profit element embedded in the sale proceeds received in cash, should be added in the assessee's income and not the entire sale proceeds. As per our considered opinion adding entire amount of sale consideration received in cash will not serve the end of justice. Sale proceeds comprise of cost, expenses and profits. Out of

entire sale proceeds, only profit element is liable to tax. When the assessee is found to have not incorporated entire sale proceeds in the regular books of account and the assessing officer is not satisfied about the correctness and completeness of the accounts of assessee, the same are liable to be rejected. Under these circumstances estimation of profit is to be made in respect of sale proceeds not accounted for. Accordingly, profit element in the unaccounted sale proceeds received in cash is to be brought to tax net. Keeping in view the proposition laid down by the jurisdictional High Court as well as other High Courts as discussed hereinabove and totality of facts and circumstances of the case, more particularly, keeping in view the nature of the assessee's business of purchase and sale of real estate and flats, we direct the assessing officer

to take 25 per cent of sale proceeds received in cash as assessee's income rather than making addition of entire amount of sale proceeds received in cash. We direct accordingly. "

DCII Vs M/s. Hyderabad House Pvt. Ltd. - I.T.A No. 727/Hyd/2010 - Date of Pronouncement 29.02.2012:

"Thus, from the decisions of Hon'ble ITA T, Hyderabad W Bench, as above, it is evident that the undisclosed income on suppressed turnover cannot be based on the gross profit rate adopted for the year concerned. In the appeal under consideration, the AO has adopted the gross profit rate on the suppressed turnover and has given a deduction of 10% towards indirect cost. In terms of the definition of Hon'ble ITA T, Hyd. referred to above the method adopted by the AO is erroneous. What the AO should have adopted is the net profit rate being disclosed. "(Para.33)

Jyotichand Bhaichand Saraf & Sons (P.) Ltd Vs DelT -139 ITO 010 {ITAT-Pune):

Head note from Taxmann is reproduced as under.

"Section 158BB, read with section 158BC, of the Income-tax Act, 1961 - Block assessment in search cases - Undisclosed income, computation of Block Period 1996-97 to 2002-03 Assessing Officer, while computing undisclosed income, made addition of entire unaccounted/suppressed sale as income of assessee - Whether addition could be made only to extent of gross profit earned on unaccounted/suppressed sales -Held, yes-[Paras 14 to 20J [In favour of assessee). "

ACIT, Cir1 v. M/s Archana Trading Co -ITA No.351 & 3521Coah/2011 -Order Dt.28.02 2013

There was a survey in the premises of the taxpayer u/s 133A of the Act and it was found that the taxpayer was suppressing the turnover. The taxpayer was accounting sales at 14% of the cost price of the liquor whereas the sale took place at much higher percentage.

The assessing officer made addition in respect of difference in sales as accounted and that found during the course of survey operation as undisclosed income. However, on appeal by the taxpayer, the CIT(A) deleted the addition after estimating the gross profit on the suppressed sales turnover. According to the Id DR, the entire difference ought to have been taken as profit of the taxpayer.

The CIT(A) after placing reliance on the judgment of the Gujarat High Court in CIT vs President Industries 258 ITR 654 (Guj) and CIT vs Abhishek Corporation 158 CTR (Guj) 374 found that the assessing officer estimated the profit excessively.

In this case also it is not in dispute that the purchase made by the taxpayer was recorded in the books of account. It is not the case of the revenue that the taxpayer has purchased any IMFL outside the books of account. Therefore, there is no investment outside the books of account. As found by the Gujarat High Court what is to be taken is only the profit element embedded in such suppressed turnover. The CIT(A) has rightly found that what is to be added is only the profit element embedded in such transaction and not the entire turnover. Therefore, this Tribunal do not find any infirmity in the order of the lower authority. Accordingly, the same is confirmed.

DCIT Vs Havc Systems (P) Ltd. - 006 ITR (Trib) 0346- (Bangalore-Trib):

In such circumstances, the Commissioner (Appeals) is justified in accepting the alternate contention advanced before him that if at all there could be a case of turnover suppression, the profit element alone could be taxed. In the given facts and circumstances of the case, the Commissioner (Appeals) has rightly estimated the profit element and limited the quantum addition. We do not find much force in the arguments advanced by the revenue. " (Para. 11)

Jaiprakash H.Pande, Pune Vs DC IT -ITA No. 759/PN/10-OTAT-Pune)-Date of pronouncement 15.12.2011:

"Nevertheless, in so far as action of the Commissioner of Income-tax (Appeals) in restricting the addition to the amount of gross profit earned on understated sales is concerned, herein also, we find no infirmity in the same. The Commissioner of Income-tax (Appeals) has fairly analysed that if the Assessing Officer's proposition of adding the entire amount of sales to the income is taken, it would result in absurd result of a high gross profit rate which would be inconsistent with the results of earlier years and which stand accepted by the Department. Moreover, we find that there is no material brought out by the Assessing Officer to establish that any investment other than that depicted in the Profit & Loss account has been made to carry out the impugned suppressed sales. In this view of the matter, the judgment of the Hon'ble Gujarat High Court in the case of President Industries (supra) supports the conclusion arrived at by the Commissioner of Income-tax (Appeals) which we hereby affirm" (Para. 7)

ITO Vs M/s. Karthik Poultry Farm - ITA No.11 06(8)/2004 - Date of Pronouncement 06.11.2015:

"It is well settled law that the entire amount of sale does not represent income of the assessee. It is only a price received by the seller of the goods and only the realization over cost that can be the profit. In coming to the aforesaid conclusion, the learned CIT(A) has relied upon by the judgments of the ITO Vs Guruba han Singh Juneja (216 ITR 99 (ITAT Ahmedabad) CIT Vs S.M.Omar (201 ITR 608) (Cal.) Anis Ahmed & Sons Vs CIT (297 ITR 441) (SC) and CIT Vs President Industries (258 ITR 654) (Guj.), which has been approved by the Hon'ble Madhya Pradesh High Court in the case of CIT Vs Balchand Ajit Kumar (2631TR 610) (MP) and which, in our view, are applicable to the facts of the case on hand. " (Para. 5. 3. 2)

"In the case on hand, the grievance of the revenue is that the assessee has not shown that it has incurred expenditure in respect of undisclosed/suppressed sales. The learned CIT(A) has proceeded to estimate the assessee's profit @18% of the turnover after recording that entities in the same line of business, as that of the assessee in the case on hand, have shown lesser profits in the region of 9% to 12% of turnover. Merely because the expenditure incurred by the assessee in respect of this turnover has not been proved does not mean that there was no expenditure incurred at all and such a plea cannot be accepted. In such circumstances, an estimate of the probable profit has to be made having regard to the surrounding circumstances, ground realities, corroborative evidence in the form of profits shown in comparative cases and other factors that are relevant to determine the real income of the assessee. We are of the view, that in the facts and circumstances of the case as laid out above, the learned CIT(A) has followed the correct and reasonable approach in estimating the profit on the suppressed turnover worked out by the AO which has not been questioned by the assessee. " (Para. 5.3.3) (Emphasis Supplied)."

27. It was also contended that profit declared by the assessee originally was much less whereas in the revised return the assessee declared gross profit @ 8% on the gross receipts and in fact the Ld. CIT(A) has rightly accepted the revised return since even the Assessing Officer has admitted that the assessee has offered income on estimated basis but added additional amount merely on the ground that such amount did not pass through the books of account.

28. With regard to the provisions of section 40(a)(ia) also he advanced independent arguments based on the decision of the Hon'ble A.P. High Court in the case of Indwell Constructions vs. CIT (232 ITR 776) to submit that once income is estimated the embargo placed in section 40(a)(ia) is also deemed to have been taken into account and hence separate disallowance is not warranted.

29. We have carefully considered the rival submissions and perused the record. The total turnover from each project was shown in the revised return and the same was accepted by the Assessing Officer in his remand report. It is also not in dispute that the assessee estimated income @ 8% of the total turnover, including the turnover which was not routed through the books of account. As rightly pointed out by the Learned Counsel for the Assessee the Hon'ble Gujarat High Court as well as the decisions of the Tribunal categorically stated that once the A.O. estimates the income, separate addition on the suppressed

turnover is not maintainable and at best the suppressed turnover has to be taken into consideration for the purpose of estimating the profit. No contrary decision was placed on record by the Revenue. Under these circumstances, we are of the view that the Ld. CIT(A) was justified in holding that the separate addition towards suppressed sales is not maintainable. We therefore uphold the order passed by the Ld. CIT(A) on this issue.

30. In the result, Grounds No. 5 to 8 in the appeal for the A.Y. 2012-13 and Grounds No.1 to 9 in the appeal for the A.Y. 2013-14 of the Revenue are hereby rejected.

31. The only other ground of the Revenue in the appeal for the A.Y. 2012-13 is with regard to the applicability of provisions of section 197A(IA) of the Act and consequent disallowance made by the Assessing Officer u/s 40(a)(ia) of the Act. The case of the assessee, vide Cross Objections, was that in the case of estimate of income, all other disallowances are deemed to have been taken care and hence no separate addition is maintainable in the light of the decision of A.P. High Court in the case of Indwell Constructions (supra). It may be noticed that the Revenue preferred appeal against the order passed by CIT (A) on the ground that mere obtaining Form 15G is not a sufficient compliance u/s 194A read with section 197A(1A) of the Act and it is a duty of the assessee to submit the declarations to the CIT within the stipulated time.

32. Ld. CIT(A) observed that there is a sufficient compliance if the declarations are obtained in Form 15G from the payees and even though the assessee has not forwarded the same to the CIT.

33. In our considered opinion, the Ld. CIT(A) has committed an error in appreciating the provisions of section 197A(1A) of the Act. The Legislature in its wisdom thought it fit to enforce deduction of tax at source by the payer who is an income tax assessee and in exceptional circumstances, where the recipients are not income tax assesseees, a procedure is prescribed whereby the parties have to state in Form 15G that the income earned by them does not exceed maximum limit which is not chargeable to income tax. The declarant has to furnish PAN, complete address and other details. As a matter of abundant caution it also prescribed the procedure to be followed by the assessee who has to give the unique identification number and other details and the same has to be forwarded to the Commissioner. This is to ensure that the Departmental Authorities can cross verify as to whether the payees are income tax assessee or not. In otherwords, it is mandatory on the part of the assessee to furnish the details to the Commissioner, though not within the stipulated time but atleast before the completion of assessment of the assessee. In the instant case, no details were furnished to indicate that the assessee has forwarded Form 15G to the CIT. Under these circumstances, we are of the view that the assessee committed an error in making the payment without deducting the tax at

source and consequently the provisions of section 40(a)(ia) are applicable. The case of the assessee is that in the case of estimate of income after rejecting the book results, there cannot be any independent disallowance u/s 40(a)(ia) of the Act. This issue was discussed by the ITAT Visakhapatnam Bench in the case of K. Venkataraju Vemagiri vs. Add. CIT (ITA No. 312/Visakha/2018, dated 03.05.2018) wherein (one of the Members is a party) the Bench observed that a disallowance is a technical disallowance and more precisely deferment of allowance, which is linked with the compliance of TDS provisions and hence even if the business income is estimated disallowance can be made u/s 40(a)(ia) of the Act independently. This view was taken after considering the decision of the Hon'ble Andhra Pradesh High Court in the case of Indwell Constructions (supra). Consistent with the view taken therein we hold that the A.O. has correctly applied the provisions of section 40(a)(ia) of the Act. However, if the assessee is able to prove that the declaration in Form 15G was submitted before the CIT before completion of assessment for the year under consideration, the A.O. may reconsider the issue in accordance with law. We also set-aside the direction of the CIT (A) with regard to initiation of 272A proceedings since the main issue is set-aside to the file of A.O.

34. With these observations, grounds raised by the Revenue and Cross Objection of the assessee for AYs 2012-13 are treated as allowed for statistical purposes.

35. In the result, the appeal filed by the Revenue for the A.Y. 2012-13 is treated as partly allowed and the Cross Objection of the assessee is treated as partly allowed. In respect of the A.Y. 2013-14, the appeal filed by the Revenue is dismissed. Pronounced accordingly in the open court on 05th July, 2018.

Sd/-

(B. RAMAKOTIAH)
ACCOUNTANT MEMBER

Sd/-

(D. MANMOHAN)
VICE PRESIDENT

Hyderabad, Dated: 05th July, 2018.

OKK, Sr.PS

Copy to

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2.	Income Tax Officer, Ward-2, Nehru Street, Near Ranga Bhavan, Santhapet, Ongole-523001.
3.	CIT (A)-1, Guntur.
4.	Pr. Commissioner of Income Tax, Guntur.
5.	DR, ITAT, Hyderabad.
6.	Guard File