o/c

Date: 09/11/2023

From:
Silver Oak Realty,
5-4-187/3 & 4,2nd Floor,
Soham Mansion,
M.G. Road,
Secunderabad – 500 003.

To:
Asst. Commissioner of Income-tax,
Circle 10(1)/Hyd,
I.T. Towers, A.C. Guards,
Masab Tank,
Hyderabad – 500 004.

Sir/Madam

Sub: Refund of Amount paid towards demand – Own Case – Assessment Year 2017-18 – PAN:AAJFM0647C – Reg

Ref:

1. Assessment Order u/s 143(3) of Income Tax Act, 1961 dated 29/12/2019 vide DIN & Order No: ITBA/AST/S/143(3)/2019-20/1023388130(1)
2. Demand Notice u/s 156 of Income Tax Act, 1961 dated 29/12/2019 vide DIN & Notice No: ITBA/AST/S/156/2019-20/1023388164(1) and Demand reference No 20192017370885347 63T
3. Order u/s 250 of Income Tax Act,1961 dated 28/09/2023 vide DIN & Order No: ITBA/NFAC/S/250/2023-24/1056632050(1)

In connection with the above cited subject, we would like to make the following submissions:

1. Our case was selected for Complete Scrutiny and the assessment was completed vide assessment order u/s 143(3) dated 29/12/2019 assessing the total income to Rs 1,58,40,106/- as against income declared of Rs 17,57,820/-.
2. Simultaneously, a demand notice u/s 156 was issued on the same date and an amount of Rs66,66,818 was determined as payable.
3. Aggrieved by the order we have filed appeal with CIT(A) vide appeal No. CIT (A), Hyderabad-6/10504/2019-20. The appeal was originally filed with CIT(A), Hyderabad-6 and was transferred to NFAC on 20.11.2020.
4. We have paid an amount of Rs 13,35,000 on 28/01/2020 vide Challan No *13386* through IDBI Bank Limited being 20% payment for securing stay in terms of CBDT guidelines. The copy of the challan is enclosed as ***Annexure 1.***
5. The CIT(A) vide its order dated 28/09/2023 has deleted all the additions and has allowed the appeal.
6. Since the appeal is allowed and the additions are to be deleted, we would request your good office to refund the amount paid towards the said demand along with interest.
7. The copy of the Assessment Order u/s 143(3) and the order of CIT(A) u/s 250 is enclosed as ***Annexure 2 & 3*** respectively.

Therefore, we humbly request you to grant the refund along with interest.

Yours faithfully,

For Silver Oak Reality

Partner
Enclosures: As above

16/11/23

RECEIVED
O/o. Addl. C.I.T., Range-6
Hyderabad

CYBER RECIEPT

TAX Applicable	TAXES ON INCOME(0021)	CHALLAN NO. / ITNS 280

PAN	AAJFM0647C	**Assessment Year**	2017-18
Full Name	**SILVER OAK REALTY**		
Address	HYDERABAD, TELANGANA. Pin : 500012		
Type of Payment	TAX ON REGULAR ASSESSMENT(400)		
Nature of Payment	N/A		

DETAILS OF PAYMENT	
TAX	1335000
Surcharge	0
Education Cess	0
Interest	0
Penalty	0
Others	0
Fee under sec. 234E	0
Total	1335000

Paid in Cash / Debit to A/c / Cheque No.:	INTERNET
Drawn on	Internet Banking through IDBI

IDBI BANK

IDBI BANK Ltd.

IDBI Building, Sector 11, CBD Belapur, Navi Mumbai

BSR Code:6910333

Date Of Tender	28/01/2020
Realization Date	28/01/2020
Challan Serial No.	13386

Rupees Thirteen Lakh Thirty-Five Thousand Only.

Taxpayers Counterfoil	
PAN	AAJFM0647C
Recieved From	SILVER OAK REALTY
For Rs :	1335000 /-
Drawn on	Internet Banking Through IDBI
On Account Of	CHALLAN NO. / ITNS 280
Type of Payment	TAX ON REGULAR ASSESSMENT(400)
Nature of Payment	N/A
Assessment Year	2017-18

Bank Seal	
Payment Status	SUCCESSFUL

IDBI BANK

IDBI BANK Ltd.

IDBI Building, Sector 11, CBD Belapur, Navi Mumbai

BSR Code:6910333

Date Of Tender	28/01/2020
Realization Date	28/01/2020
Challan Serial No.	13386

(Internet Collection Center)

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
OFFICE OF THE ASSISTANT COMMISSIONER OF INCOME TAX
CIRCLE 10(1),HYDERABAD

To, SILVER OAK REALTY 5-4-187/3 AND 4, IIND FLOOR SOHAM MANSION, M.G ROAD SECUNDERABAD 500003,Telangana India	

PAN: **AAJFM0647C**	AY: **2017-18**	DIN & Order No: **ITBA/AST/S/143(3)/2019-20/1023388130(1)**	Dated: **29/12/2019**

Name of the assessee	**SILVER OAK REALTY**
Address of the assessee	**5-4-187/3 AND 4, IIND FLOOR SOHAM MANSION, M.G ROAD, SECUNDERABAD 500003, Telangana, India**
Status	**FIRMS**
Range/Circle/Ward	**CIRCLE 10(1),HYDERABAD**
Resident/Resident but not Ordinary resident/ Non-resident	
Date of Hearing	**03/09/2018, 04/07/2019, 12/07/2019, 04/10/2019, 05/11/2019, 17/12/2019, 28/12/2019**
Section/Sub-section under which assessment is made	**143(3)**
Date of Order	**29/12/2019**

ASSESSMENT ORDER

The assessee firm filed Return of Income for the Asst. Year 2017-18 on 31.10.2017 admitting a total Income of Rs. 17,57,820/- under the heads, Income from Business or Profession and Income from Other sources . The case was selected for Complete scrutiny under CASS. Notice U/s 143(2) of the Income-tax Act (hereinafter referred to as Act) dated 09.08.2018 was issued and served on the assessee.

In response to the notices u/s. 142(1) of the Act issued from time to time, assessee furnished the requisite information. The assessee's submissions as well as the information available on record are verified and the assessment is completed as under:

The assessee firm is engaged in business of Real estate and has been developing a housing project, Silver Oak Bunglows and Villas at Chariapally. The assessee recognized the revenue, on percentage completion and for the year under consideration, the sales were offered for Phase-II, Phase-III, Phase-VII and Phase-IV. In order to verify the percentage of

profit on each project, the assessee was requested to furnish financial year wise details of profit admitted, phase wise. In response to the notice, assessee furnished the a statement, containing the Value of land, Construction expenses, Sales and Gross profit for each Phase. On perusal of the same, it is noticed that the rate of profit adopted for all the projects was over and above of 15%, whereas, the profit admitted for Phase-VII was 4.16% only. Therefore, a show cause notice dated 27.12.2019 was issued to show cause as to why the profit for Phase-VII should also not be adopted @ 15% as the rate of 15% was adopted on conservative basis.

In response to the show cause notice, it was replied that the land on which the project was developed was not owned by the firm but taken for development in the year 2008 and got 31 Villas as our share. However, due to disturbances in Telangana, demanding the separate state, there were no bookings till 2012-13 despite the construction work in progress. Therefore, the villas had to be sold at a low profit margin. It is also submitted that in the beginning, the profit was estimated @ 10% and since the project has been completed during the year 2016-17, the final profit is estimated @ 4.16%. Since the assessee's books of account were audited and no defects have been found, the estimation of profit @ 15% for Phase-VII is not accepted.

The assessee's submissions are carefully examined. If the assessee's submission that the booking of villas has become difficult because of Telangana agitation is to be accepted, the cost incurred towards construction and the work in progress got set off against the profits under the other projects and ultimately, the business of the assessee firm was not affected. It is observed that, for this project, the assessee admitted gross profit only for the years 2013-14 and 2014-15 on percentage completion basis. For the asst. Year 2015-16, when the sales were recognized the assessee has offered only 6.03% of gross profit and subsequently has shown losses for the years, 2016-17 and 2017-18, resulting in a net profit of 4.17%. In this regard, it is pertinent to mention here that the assessee admitted gross profit margin of 15% and above for the remaining projects, which implies that the assessee has adopted the percentage of 15 as a conservative estimate following the concept of prudence, i.e., it is the minimum gross profit assessee would arrive at factoring in all the possible difficulties in the project. In the instant case, in spite of taking a conservative estimate of 10%, assessee by the end of the project has admitted a gross profit of only 4.16% which is not practically viable for the business. Since, the assessee firm, except the above has not demonstrated any other reasons for short admission of profits for Phase-VII. Hence, assessee's objection for not to estimate the gross profit @ 15% is not considered and the gross profit for Phase-VII is estimated @ 15% and the difference in gross profit is brought to tax.

The sales reported for Phase-VII Rs. 12,99,50,910/-

Profit estimated @ 15% Rs. 1,94,92,637

Less: admitted by the assessee

in the return of income Rs. 54,10,351

Difference in gross profit **Rs. 1,40,82,286**

to be added back

In view of the above, the gross profit of Rs. 1,40,82,286/-, short admitted against Project-VII is added back to the total income of the assessee.

Addition: Rs. 1,40,82,286/-

Total income returned	17,57,820
Add: Additions under the head Business	1,40,82,286
Total income assessed	1,58,40,106

Tax Computation and Demand Notice are enclosed to this Order. Penalty notice u/s 270A(9)(a) of the Act are initiated separately.

PRAVALIKA KINTHADA
CIRCLE 10(1),HYDERABAD

Copy to:

Assessee

PRAVALIKA KINTHADA
CIRCLE 10(1),HYDERABAD

(In case the document is digitally signed please

refer Digital Signature at the bottom of the page)

This document is digitally signed

Signer: PRAVALIKA KI[illegible]HADA
Date: Sunday, D[illegible]29, 2019 7:56 PM

भारत सरकार / GOVERNMENT OF INDIA
वित्त मंत्रालय / MINISTRY OF FINANCE
आयकर विभाग / INCOME TAX DEPARTMENT
राष्ट्रीय पहचानविहीन अपील केन्द्र / NATIONAL FACELESS APPEAL CENTRE (NFAC)
दिल्ली / DELHI

To, SILVER OAK REALTY 5-4-187/3 AND 4, IIND FLOOR SOHAM MANSION , M.G ROAD SECUNDERABAD 500003 ,Telangana India	

PAN: AAJFM0647C	AY: 2017-18	Dated: 28/09/2023	DIN & Order No : ITBA/NFAC/S/250/2023-24/1056632050(1)

Order u/s 250 of Income Tax Act,1961

Instituted on ***24/01/2020*** *from the order of* ***CIRCLE 10(1),HYDERABAD*** *dated 29/12/2019*

Appeal No	CIT (A), Hyderabad- 6/10504/2019-20
Status/Deductor Category	Firm
Residential Status	Resident
Nature of Business	Others
Section under which the order appealed against was passed	143(3)
Date of Order under which the order appealed against was passed	29/12/2019
Income/Loss Assessed (in Rs .)	15840106
Tax/Penalty/Fine/Interest Demanded (in Rs.)	6666818
Present for the appellant	Not Applicable
Present for the Department	Not Applicable

This appeal is filed by **Silver Oak Realty (PAN: AAJFM0647C)** on 24.01.2020 against order u/s 143(3) dated 29.12.2019 passed by ACIT Cir.10(1), Hyderabad for A.Y. 2017-18. The appeal was originally filed with CIT(A), Hyderabad-6 and was transferred to NFAC on 20.11.2020. The return is accompanied by necessary documents and is filed in time.

2. Statement of Facts as per Form 35 is reproduced below:

"1.Theassessee is a partnership firm and e-filed its ITR on 31-10-2017 The total income admitted is Rs.17,57,820/-.

2.The case is selected for scrutiny and the assessment is completed u/s.143(3), vide Order dated 29-12-2019. The income assessed is Rs.1,58,40,106/-. There has been addition ofRs. 1,40,82,286/-.

3.The firm is engaged in the business of real estate developers.

4.The addition is with regard to estimation of gross profits for Phase-VII.

5. The Assessing Officer has resorted to estimation the Gross Profit at 15 percent for one of the real estate projects said as Phase-VII project. The gross profit decaled is worked out to 4 percent.

6. In the course of assessment proceedings, the details, explanations and reasons as to why the gross profit is low has been given in respect of Phase-VII project. The Assessing Officer has not accepted the submissions made.

7. It was further submitted during the assessment proceedings that the firm books of accounts have been audited as required u/s 44AB of the Income Tax Act over past many years including for Asst Year 2017-18 which is under appeal.

8. The Assessing Officer without rejecting the audited Books of account and pointing out any single defect in the audited accounts has resorted to estimating the gross profit for a particular project.

9. Furthermore, the Assessing Officer for arriving at the estimated gross profit has included the turnover of the earlier years also to the turnover of the previous year relevant to Asst year 2017-18.The Sales turnover for the year under appeal in respect of Phase VII project is only Rs.80,00,000/-.Against this sales turnover for the year, the Assessing Officer has adopted the turnover of Rs.12,99,50,910/- which includes the turnover of earlier assessment years.

10. It will be pertinent to note that the assessments of earlier assessment years have been completed u/s 143(3) accepting the turnovers and gross profits as declared for Phase VII project.

11. Due to above reasons, the assessment completed by the Asses sing Officer has resulted into very high-pitched assessment and it is prayed in the appeal to grant the relief by deleting such addition made on an estimate basis."

3. In this case, the return of income for AY 2017-18 was filed by the assessee on 31.10.2017 admitting a total income of Rs. 17,57,820/- under the heads, Income from Business or Profession and Income from Other Sources. The case was selected for complete scrutiny under CASS. The AO after making addition of Rs. 1,40,82,286/- under the head Business assessed the total income at Rs. 1,58,40,106/-. Aggrieved by the same, the appellant filed the present appeal and following grounds of appeal are raised:

"1. The Order of the learned Assessing Officer, in so far as it is prejudicial to the interest of the appellant is against law and the following grounds are without prejudice to each other.

1. *The Assessing Officer on the facts and circumstances of the case, has erred in not accepting the gross profits as per audited books of accounts u/s 44AB of the IT. Act and is therefore b ad in law.*
2. *The Assessing Officer on the facts and circumstances of the case, has erred in resorting to estimation the gross profit at 15 percent for Phase VII project without rejecting the audited books of accounts and not pointing out any single defect in the books of accounts maintained and is therefore bad in law.*
3. *The Assessing Officer on the fact and circumstances of the case, has erred in adopting the sales turnover of Rs.12,99,50,910/- as against the audited sales turnover of Rs.80,00,000/- for the year for the purposes of estimating the gross profits and is therefore bad in law.*
4. *The appellant craves leave to add, amend, alter or delete any or all the grounds of appeal."*

4. Appellant's submission: The appellant has made the following submissions:

"In connection with the above appeal the following submissions are made before YOUR HONOURS for kind consideration.

1. *The assesse is a partnership firm and e-filed its ITR on 31-10-2017. The total income admitted isRs.17,57,820/-.*
2. *The case is selected for scrutiny and the assessment is completed u / s 143(3) vide Order dated 29-12-2019. The income assessed is Rs. 1,58,40,106/-. There has been addition of Rs.1,40,82,286/ by resorting to estimation of gross profit.*
3. *The firm is engaged in the business of real estate developers.*
4. *The learned Assessing Officer has resorted to estimation the Gross Profit @ 15% for one of the real estate projects said as Phase-VII project.*
5. *During the course of Assessment proceedings for the AY 2017-18, the Assessing Officer has called for detailed workings, details and information in relation to the sales, construction cost/ expenses, Gross profit/ profits etc. In response, all information that is asked for including detailed statements of Cost incurred, Work-in-progress, Opening Stock, Closing stock, Sales declared, Profits estimated etc for all the phases undertaken since the inception of the firm has been submitted. The same is submitted once again for ready reference as Annexure -1.*
6. *The submissions made have been examined and accepted by the Learned Assessing Officer andno information/ submission was found to be factually either wrong/incorrect. Not a single defecthas been pointed out during the course of the assessment proceedings. This proves beyonddoubt that the records maintained by the assesse fulfill the requirements of maintenance of thebooks of accounts as envisaged by the provisions of the IT Act*
7. *It is pertinent to note that the accounts for the AY 2017-18 and all previous assessment years from Asst Year 2005-06 onwards have been duly audited as required u/s sec*

44AB of the IT Act.

8. *Based on the submissions made by the assesse, the Assessing Officer raised concerns over low Gross Profit percentage in case of one particular phase i.e Phase VII of the project. The GP percentage for Phase VII stood at 4.16% whereas the average GP ratio of the other phases was about 15%.*
9. *Accordingly, a show cause notice was issued by the learned Assessing Officer seeking why the profit @15% should not be adopted instead of the actual profit of 4.16%. In reply, a detailed submission was made by the assesse laying down reasons as to why the Assessing Officer should not proceed with the adoption of GP @ 15%. The reasons submitted vide letter dated 28-12- 2019 is attached herewith as Annexure-2.*

The Learned Assessing Officer not being satisfied with the submissions made, completed assessment adopting GP @ 15% for Phase VII.

1. *The Assessing Officer based on the facts and circumstances erred in rejecting the submissionsmade in response to the show cause notice and proceeding with the assessment by adopting GPrate of 15% for phase VII.*

***11. Estimation of GP without rejecting the Books of Accounts**:*

11.1 It is submitted that the Assessing Officer has not pointed out any defect what so ever in the accounts and records maintained and submitted. Not a single defect or deficiency has been brought on record indicating that the accounts maintained by the assesse are not correct so as to arrive at the profits/income for tax purposes.

11.2 The Assessing Officer has ignored the fact that the accounts have been duly audited and that too year upon year u/s 44AB of the IT Act.

11.3 The Assessing Officer has at no point of time during the assessment proceedings expressed his intention of rejecting the books of accounts u/s 145(3) of the IT Act.

11.4 The Assessing Officer without first rejecting the books of accounts maintained by the assesse, proceeded with the estimation of profits and GP ratios and therefore has erred in so far as following the due procedure is concerned. Therefore the action of the Assessing Officer is bad in law and is liable to be quashed.

11.5 In support of our above contention reliance is placed on the judgment of Hon'ble Madras High Court in the case of Principal Commissioner of Income Tax vs. Marg Limited wherein vide order dated 20th July, 2017 Hon'ble court had held that without rejection of books of account the Assessing Officer is not entitled to estimate the profits of the assesse. He submitted that it is an undisputed fact that the books of account in this case were never rejected and therefore, it was prayed that the addition sustained by learned CIT(A) be deleted. Hon'ble Court has held that it is sine qua non that while estimating the income the Assessing Officer has to come to a conclusion that the books of account maintained by the assesse are incorrect. The findings of Hon'ble Court, as contained from para 4 onwards, are reproduced below:

"4. We now proceed to merits of the matter under the caption DISCUSSION 4(3) As stated supra,

the Assesse is a Public Limited Company engaged in the business of civil construction and related services.

4(b) AO had made addition to the income returned by the Assessee by estimating gross profit. The power to make such addition on estimate basis is available to the AO under Section 144 of the IT Act. Section 145 enables the AO to Invoke the power under Section 144 when certain conditions adumbrated in Sub-section (3) of Section 145 are satisfied. Therefore, it becomes necessary and useful to extract Section 145(3) of the IT Act, which reads as follows:

145(3) Where the Assessing Officer Is not satisfied about the correctness or completeness of the accounts of the assessee, or where the method of accounting provided in sub-section (1) has not been regularly followed by the assesse, or income has not been computed in accordance with the standards notified under sub-section (2), the Assessing Officer may make an assessment in the manner provided in Section 144H.

4(c) Therefore, it is sine qua non that the AO to come to a conclusion that the Books ofAccounts maintained by the Assesse are incorrect, Incomplete or unreliable and reject the Books of Accounts before the proceeding to make his own assessment. In the instant case, there is no reference in the Assessment Order of the AO regarding rejection of Books of Accounts.

4(d) Therefore, there is nothing on record to show that the AO came to the conclusion that the Books of Accounts maintained by the Assesse are incorrect, Incomplete, unreliable and as a consequence rejected the Books of Accounts.

4(e) Therefore, after setting out the plethora of case laws on this point, CIT (A) held that the accounts of the Assessee cannot be rejected merely based on the perception of the AO that the Assessee has declared low profit margin for certain projects when Books of Accounts have not been rejected. Considering the factual position that there is no reference in the Assessment Order made by the AO regarding the Books of Accounts (this has been fairly admitted by the Revenue before ITAT) we are not, therefore, laboring through the labyrinth of case laws relled on by CIT(A)."

11.6 The Hon'ble Karnataka High Court, recently, in CIT v. Anil Kumar & Co. [2016] 386 ITR 702/67 taxmann.com 278 held that jurisdiction to estimate assessee's income is not available when books of account have not been rejected.

12. Rejection of results of accounts maintained by the assesse :

Without prejudice to the other submissions we submit the following:

12.1 As per the provisions of section 145(3), the books of accounts of the assesse can be rejected only under the following 3 circumstances:

Where the Assessing Officer is not satisfied -

- *About the correctness or completeness of the accounts of the assesse; or*
- *Where the method of accounting provided in has not been regularly followed by the assesse; or*

- *Income has not been computed in accordance with the standards notified.*

12.2 It is not open for the Assessing officer to reject the results as per his whims and fancies for reasons not falling within the scope of 145(3)

12.3 The Assessing Officer without bringing on record the reasons for not accepting the audited accounts cannot reject such records and go on the expedition of estimation of Gross profit.

12.4 In any case, an opportunity of being heard has to be given to the assesse and a speaking order has to be passed indicating that books are proposed to be rejected u / s 145(3) before proceeding with the estimation of profits.

12.5In light of the above the Assessing Officer has erred in proceeding with the estimation of profits.

12.6Reliance is placed on certain judicial pronouncements as under:

In ITO v. Bothra International [2008] 117 TTJ (Jd.) 672 it was held that where the A.O laid no material on record to suggest that there had been any suppression of income nor that the appellant carried any activity outside the books, merely because of decline in GP rate, books of account could not be rejected.

In Delhi Securities Printers v. Dy. CIT [2007] 15 SOT 353 (Delhi) it was held that rejection of books of account merely because appellant has not maintained stock register, without pointing out any specific defects in books of account of any nature whatsoever, could not be said to be justified. Such adhoc addition is also unsustainable in view of the decision of the Hon'ble High Court of Gujarat in CIT Vs. Sanjay OH Cake Industries (2005) 197 CTR (Guj) 520 wherein it was held that the A.O having not pointed out any specific omission or suppression in the assessee's books of account nor the excise or sales tax authorities having found any discrepancy or irregularity in the maintenance of stock and records, addition made on account of suppressed production and sales could not be sustained.

Reliance is also placed on Arup Kumar Hazra v. I.T.O. in I.T.A. No. 2385/Kol/2017 wherein it was held as under:

"4. After hearing rival submission, I find that the Assessing Officer has made the addition on estimate basis, without disturbing the opening stock, purchase and sales and closing stock of High Speed Diesel and Motor Spirit. The books of accounts of the assessee have not been rejected. The fact is that the assessee had maintained books of accounts and these were duly audited u/s 44AB of the Act. The purchases made by the assessee by the assessee of Motor Spirit and High Speed Diesel are only from Indian Oil Corporation Ltd. The lubricants were purchased from Haldia IOC Employees' Welfare Co-operative Credit Society Ltd. All the purchases were made through proper banking channels. The sales were made in cash. The ld. D/R, does not dispute the fact that there would be shortage of stock in this line on account of spillage and evaporation. This fact is also recognized by the Government of India. The Assessing Officer has not found or pointed out any discrepancy in the books of accounts. When the books of accounts are not rejected, the Hon'ble Calcutta High Court in the case of Swadeshi Commercial Co. Ltd. vs. CIT (ITA No. 219 of 2001 dt.18/12/2008) (Cal), held that gross profit cannot be estimated. The Assessing Officer has no

evidence to come to a conclusion that the assessee had earned undisclosed profit. The entire addition was made on surmises and conjectures. Even otherwise, I find that the assessee has explained the issue with facts and figures. Under these facts and circumstances, the addition made by the Assessing Officer as sustained by the ld. CIT(A) is bad in law."

13. It is submitted that merely low Gross Profit ratio cannot be a ground for rejection of Books.

13.1 In support reliance is placed on the following cases:

Hon'ble Allahabad High Court in the case of CIT vs. M / s Ballabh Das & Sons has also observed as under: -

"It may be mentioned that the AO has rejected the books of accounts solely for the reason that the assessee have shown the lower N.P. Rate. During the assessment year under consideration, no other defect was mentioned. It may also be mentioned that the lower profit shown by the assessee by itself cannot be a ground for rejection of the books of accounts results, as per the ratio laid down in the following cases: -

1. NamasiVayamChattior vs. CIT, (1960) 39 ITR 579 SC;

2. Pandit Bros vs. CIT, (1954) 26 ITR 159 (Punj.);

3. VeeriahReddiar (S) vs. CIT, (1960) 38 ITR 152 (Ker.);

4. International Forest Co. vs. CIT, (1975) 101 ITR 721(J&K)"

13.2It is well settled law that merely on the ground and reason of low Gross Profit/Net profit, the Assessing Officer cannot reject the audited results.

13.3 There can be various reasons as to why the business may end up having losses/ lesser profits.

13.4 The Assessing Officer has to bring on record the reasons why he presumes that the actual profits reported are incorrect and cannot be relied upon.

13.5 A mere comparison of profitability of various years/ phases is not a sufficient ground.

13.6Without prejudice, to above submissions in any case if books are rejected and theAssessing Officer has established that GP rate should be 15%, then he should have applied the same rate for all phases including phases where GP % Is as high as 40%. The Assessing Officer cannot apply the GP % inconsistently. In such case the profits should get revised downwards.

13.7The Learner Assessing Officer has failed to appreciate as to what a business man of an ordinary prudence look or aim at. He many a times take a broad view of its overall business (i.e all phases in our case) profits rather than project wise. Out of many projects undertaken some projects may not result in good profits as compared to others. But for the continuity of the business he has to continue and fulfill all its commitment to a particular project.

13.8The appellant firm has also out of many phases, only in respect of Phase VII, the actual

profitability earned is less as compared to others. Nevertheless, each phase is independent and profits of such phases cannot be adopted as yardstick/benchmark to proceed with estimation of profits for the phase which has low profits.

14. Adoption (Admission) of Profit V/s Actual Profit:

14.1 The Assessing Officer has erred in understanding the difference between adoption/ admission/estimation of profits and actual profits.

14.2 In case of real-estate development where the completion of the project takes several years the actual profit can be computed only at the end of the project. At this stage i.e. at completion, the actual costs incurred over the years and actual sales revenue can be CORRECTLY calculated based on ACTUALS from the books of accounts.

14.3 However, in all earlier years i.e. all years other than the year in which the project is completed, actual profits cannot be determined. For determining actual profits one needs to wait till the end of the project. Therefore there arises a need for ESTIMATION of profits during the development period so that income can be declared year upon year and taxes paid rather than pay the taxes only at the end of the project. This principle is laid down under various judicial pronouncements.

14.4 Once the project is complete the need/scope of estimation ceases to exist. At the end of the project the actual profits get determined.

14.5At this point, it is important to note that estimates are only best judgments and are not sacrosanct. The actuals may be different than the estimates. This is because of the fact that these always exists an element of uncertainty while carrying out assessment of estimates. Estimates cannot always take into consideration all possible future uncertain events which may or may not happen.

14.6 It is pertinent to note that in the present case, the assesse has been estimating the Gross Profit for all its phases and declaring profits/losses over the duration of the project and not postponing such declaration till the end of the project. For the running project/phases some element of estimation is involved for declaring year wise profits/losses. Such estimates are subject to revision from time to time based on the changes in circumstances and on happening of various events. However, once the project/phase is completed what gets reported is the actual profits/losses and there is no reason left for such estimation.

14.7 The Assessing Officer has erred in trying to estimate the profits for Phase VII which is a completed phase. The actual results w.r.t to sales revenue and costs incurred are available with the Assessing Officer.

14.8 Just because the profits are low in comparison with other phases the Assessing Officer cannot proceed with the estimation of profits. The Assessing officer is duty bound to assess based on Actual results.

14.9 It is pertinent to note that the longer the period for which estimate is to be made the greater is the uncertainty associated with such estimation. The Joint Development Agreement for phase VII

was executed in the year 2007 and got completed in 2017. 10 years is a very long period of time to be able to assess/estimate accurately.

14.10In respect of the said Phase VII, the assesse had made an initial estimate of profitability @ 10%. This estimate was made keeping in mind the conditions/circumstances that prevailed at the start of the project.

14.11The assesse also started declaring estimated profits @ 10% for initial years. However, as the project proceeded further and reached an advance stage there was no visibility of further profits. Due to the time/cost overruns the phase had become non-visible. In theinterest of completing the project sales were made at lower rates to generate cash flows.

14.12Attention is also invited to clause 41 of the Joint Development Agreement (JDA) which provides for a penalty clause in case of delay in completion of the project @ Rs.5,000/- per month for each residential unit not completed within 36 month plus 6 months grace from the date of receipt of sanction/permission. The permissions were received in December 2008. The assesse was bearing a huge risk of the JDA being cancelled/huge penalties being levied and therefore wanted to sell as soon as possible and avoid heavy losses.

14.13 By the end of the project the actual profits stood at only 4.16%.

14.14Merely because the profits are low, it is not open to the Assessing Officer to proceed for estimation where there exists no further uncertainty and all actual results are available.

14.15 Estimates are required only when there is no actual data or where there are some uncertain future events which are to be factored in.

14.16 If general/casual/routine observations of the AO are to be considered as material evidence for the purpose of framing an assessment, the AO shall have blanket and arbitrary powers to dispose of the scrutiny assessments according to his whims and fancies which is not the spirit of the circulars issued by the Board on scrutiny assessment. An assessment cannot be made arbitrarily and in order that an assessment can be sustained, it must have nexus to the material on record. (CIT v. Mahesh Chand [1983] 199 ITR 247,249 (All).

15. Mechanical manner of estimating Gross Profit % without applying mind:

15.1 Without prejudice to other submission, it is submitted that even if the contention of the Assessing Officer is to be accepted that there is a need for rejecting the book results, the Assessing officer has to proceed with a best judgment assessment as prescribed u/s 144.

15.2 While doing such a best judgment assessment all material facts and data should be considered while completing the assessment.

15.3 The assumptions used by the Assessing Officer shall be consistent, comparable, reliable, fit and appropriate to the facts of the case.

15.4 The Assessing Officer has adopted Gross Profits % as 15% for the purpose of computing the profits of Phase VII. The Assessing Officer has arrived at this 15% Gross profit rate by looking at the

profitability of other phases undertaken by the assesse.

15.5 However, the Assessing Officer has erred in adopting 15% Gross Profit rate as Phase VII is not comparable with the other phases undertaken by the assesse. The Assessing Officer failed to appreciate the differences between the Phase VII and other phases and thus has failed to understand the various phases are not comparable with Phase VII. In this regard following salient points are submitted for your consideration.

***a**. Phase VII has been undertaken by the virtue of a Joint Development Agreement which was executed in 2007. The land of Phase VII does not belong to the assessee. Whereas for all other phases undertaken, the assesse is the owner of the land. The profitability of a pure Developer under JDA cannot be compared with profitability of a land owner cum Developer.*

***b**. Joint Development Agreement for phase VII was entered in 2007 and the permissions for development were received in December 2008. As per the clause 41 of the JDA, the timeline for completion of the project was 36 months plus 6 months grace from receipt of permissions. Such time period lapsed by June 2012. Beyond such time for any delay a penalty of Rs. 5,000/- per month per unit would be leviable.*

***c.** Due to poor economic conditions post 2008 financial meltdown, the assesse was not able to market the project and effect sales. The assesse was able to effect 1st sales only in AY 2012-13. By such time, the time allowed under the Joint Development Agreement was almost nearing completion.*

***d**. Due to paucity of cash flows the assesee had no option to but to sell the units fallingto its share on thin/no margins.*

***e.** The main intention was to generate the funds through sales and complete the project as soon as possible so that the penalties as envisaged in the Joint Development Agreement can be avoided/ minimized.*

***f**. It is pertinent to note that the assesse was in no such compulsion in other phases undertaken by it as the land was owned by the assesse. The assesse could wait and hold the inventory till it could realize decent sales prices.*

***g**. Thus the profitability of other phases cannot be compared with that of Phase VII. The Assessing Officer therefore has failed to identify a comparable/similar like project for arriving at the estimate of profitability.*

15.6In the case of Commissioner of Income-tax vs. Paradise Holidays (Del.) (HC) [2010], 325ITR 13 (Del.). In this case, the Hon'ble Delhi High Court has held as under:

"The accounts which are regularly maintained in the course of business and are duly audited, free from any qualification by the auditors, should normally be taken as correct unless there are adequate reasons to indicate that they are incorrect or unreliable. The onus is upon the Revenue to show that either the books of account maintained by the assesse were incorrect or incomplete or that the method of accounting adopted by him was such that true profits of the assessee cannot be deducted

therefrom."

16. Estimation of Gross Profit without identifying any short reporting of sales/excess reporting of expenditure.

16.1The Assessing Officer has completed the assessment by adopting the Gross Profit rate @15% for phase VII and disregarding the actual GP rate of 4.16%.

16.2 In essence the view of the Assessing Officer is that the actual profits as shown in the audited books of accounts is under reported by 1,40,82,286/-.

16.3It is pertinent at this point to understand that under reporting of profits could take place only if

a. There was non-recording/short recording/under reporting of sales revenue or,

b. There was excess reporting of expenses.

16.4In the case of the assesse during the course of the assessment proceedings not a single evidence was identified/found by the Assessing Officer which could suggest any short/excess reporting of sales /expenditure.

16.5 During the course of assessment various information such as month-wise expenditure,work-in-progress, closing stock, GP analysis, sundry debtors and creditors confirmation,copy of bank statements, ledger/bills for expenses above 1 lakh, sales details, advancesreceived etc. were called for and verified. Not a single defect/inconsistency wasidentified.

16.6 It is also pertinent to note that during the assessment proceedings of the immediately preceeding year i.e. AY 2016-17, similar information was called for and examined. Details of submission were made with regards to low GP for Phase VII and the loss reported. The assessment was completed by accepting the income returned by the assesse. No additions were made. The fact that the profitability is low for Phase VII was examined and accepted by the Assessing Officer. Based on the same set of facts the Assessing Officer is expected to form same opinion and not change the opinion.

16.7 Without bringing on record any evidence of indicating how the profits are under reported, the Assessing Officer cannot proceed to estimate Gross profit just because the Gross Profit in the opinion of the Assessing officer appears to be low. Therefore the assessment is bad in law.

16.8In a case where the transactions of the appellant have been accounted, documented and supported by the material evidences for deriving logical conclusions, without proving falsity of the same, adhoc additions/disallowances should not be made by the AO in a routine manner merely on presumption, probabilities, suspicion and surmises since the same action of the AO degenerates the spirit for which the quality assessments were emphasized by the Board. (Mukesh R Marolia v. Addl. CIT [2006] 6 SOT 247 Mumbai).

17. Assessing Officer trying to disturb the previously completed assessments by re-estimating Gross Profit on entire sales proceeds since inception of Phase VII.

17.1 During the Asst Year 2017-18, the sales revenue of Rs. 80,00,000/- was reported. This fact is accepted by the Assessing Officer and there is no dispute as to sales revenue.

17.2 A Show cause notice was issued seeking reply why the profits for the project should not be re-estimated @ 15% instead of 4%.

17.3 A detailed reply was submitted but the reasons were not considered by Assessing Officer.

17.4The assessment was completed by the re-estimating the profits @ 15% instead of actual profit of 4%. While completing the assessment the Assessing Officer applied the rate of 15% on the entire sales proceeds of Phase VII since inception.

17.5Without prejudice to other submissions, it is submitted that the Assessing Officer has erred in applying Gross Profit rate of 15% on entire lifetime sales proceeds of Rs 112,99,50,910/-. By doing so the Assessing Officer has completely disregarded the assessments carried out for previous Asst Years and where the claims of the assesee have been accepted with regards to cost information, sales information, low Gross Profit etc. It is not open for the Assessing Officer to carry out in a way re-assessment for previous Asst Years in guise of trying to re-estimate Gross profit for a completed project.

17.6 It is pertinent to note that during the Asst Year 2016-17, the Assessing Officer has assessed our claim of Loss of Rs 10,10,320/- of Phase VII and after due examination our claim was allowed.

17.7 The Assessing Officer is duty bound to consider the previously completed assessments especially where the cost and sales are not restricted to one Asst Year instead they are spread over multiple years.

18. Submissions in response to Show cause notice is not accepted by the Assessing Officer as in his view the doing business @ Gross profit of 4.16% is not practically possible.

18.1 It is submitted that the view of the Assessing Officer is not tenable. One phase out of several phases cannot be isolated and looked at for determining the commercial viability of the business. A holistic view of the entire business has to be taken into consideration. For example, in order to promote sales of the tooth paste a tooth brush is given free of cost. It does not mean it is not viable to give the toothbrush for free.

18.2The Assessing officer has no jurisdiction in determining the viability of the commercial decisions of the assesse.

18.3 Some business decisions would go in favor of the entity while some may not.

18.4If it was a guarantee that all projects will give minimum 15% profit everyone would start doing only real-estate development.

18.5 There is inherent risk in any business. It is not necessary that since profits are made in a particular phase, profits are guaranteed in all other phases or vice-versa.

Reliance is placed on the following case laws :-

1. *CIT v SmtPoonam Rani (Delhi High Court) 326 ITR 223 (2010)*

2. *CIT v Jacksons House (Delhi High Court) 198 Taxman 385 (Delhi)(2011)*

3. *DCIT v Hanuman Sugar Mills (P) Ltd (Allahabad High Court) (2013) 221 Taxman 156*

4. *Madnani Construction Corp. Ltd. v CIT (2008) 296 ITR 45 (Gauhati High Court)*

5. *CIT v UP State Food & Essential Commodities(2013) 39 Taxmann.com 106 (Allahabad)*

6. *ACIT v Hitech Grain processing Pvt. Ltd. (ITAT, Delhi) ITA No. 2885/De1/2011*

7. *ACIT v Ercon Composites (2014) ITAT Jodhpur 49 taxmann.com 489*

8. *Century Tiles Ltd v JCIT (2014) 51 taxman.com 515 (Ahd. ITAT)*

9. *ITO v Sani Trade Agency (Ahd. ITAT) ITA No. 3524/Ahd/2007*

10. *ACIT v. RushabhVatika (Rajkot Bench) ITA No. 51 (RJK) O[2013]*

Your HONOURS, it is pleaded to allow the appeal granting the relief prayed for.

5. Decision: I have considered the submission, assessment order and proceed to adjudicate various grounds.

5.1 Ground No.1 is general and does not need any specific adjudication.

5.2 Ground Nos. 2 to 4 pertain to addition of Rs. 1,40,82,286/- made by estimating profit @ 15% of sales.

5.3 The appellant is in the business of real estate and recognized the revenue on percentage completion basis. During the year, it offered sales from Phase –II, Phase-III, Phase-VII and Phase-IV of its project. The AO called for financial year wise details of profit admitted phase wise and noted that rate of profit adopted for all projects was 15% whereas profit admitted for Phase-VII was 4.16%. Therefore, the AO sought to adopt profit rate of 15% for Phase-VII and issued a show cause notice. The appellant explained that the Villas were sold at low profit margin due to lack of bookings due to disturbances in Telangana. Although initially the profits were estimated at 10%, final profit estimate was reduced to 4.16% by the time project was completed in the year 2016-17. It was also claimed that the assessee's books were audited. The AO did not accept the explanation. It was noted that GP was admitted on percentage completion basis only for years 2013-14 and 2014-15 and thereafter the appellant showed losses. It was concluded by the AO that the assessee did not demonstrate any reason for short admission for Phase –VII and proceeded to estimate GP @15% and made addition of Rs. 1,40,82,286/- to the total income.

5.4 The submission of the appellant is reproduced above. Along with the submission, the appellant has enclosed details of cost incurred, WIP, Opening Stock, Closing Stock, sales

declared, profits estimated etc. for all the cases. It is contended that no defect has been found in the said details by the AO and that the addition has been made without rejecting books of accounts. It is stated that the assessee has duly audited its books of accounts over the years. The appellant has relied on the decision of the Madras High Court in the cse of Pr.CIT vs. Marg Limited dated 20.07.2017 and Karnataka High Court decision in the case of CIT v. Anil Kumar & Co. (2016) 386 ITR 702. It has also submitted that low GP ratio cannot be ground of rejection of books of the assessee. The appellant has also questioned the adoption of profit as against the actual profit. It has also contended that the GP has been estimated in a mechanical manner without applying mind and without identifying any short reporting of income or excess reporting of expenditure. The only reason for not accepting the submission of the appellant by the AO was that doing business @ 4.16% GP was not practically possible as per the AO. The appellant has stated that the AO has no jurisdiction to question the commercial viability of the decisions of the assessee.

The appellant has also pointed out that the AO has applied GP rate of 15% on lifetime sale proceeds of Rs. 12,99,50,910/- which disregards the assessments carried out in earlier years. It is also stated that the AO accepted claim of loss of Rs. 10,10,320/- for Phase-VII in AY 2016-17.

5.5 I have considered the submissions of the appellant. The AO has adopted GP of 15% in respect of sales of Phase-VII, noting that the profit shown at 4.16% was less as compared to other phases of the project. While computing the new profit, the AO has adopted sales of Phase-VII at Rs. 12,99,50,910/- whereas as per the appellant, the sales during the year was Rs. 80,00,000/- only and that the AO adopted lifetime sales of that phase and taxed GP on the same during one assessment year i.e. A.Y.2017-18. The appellant has objected to estimation of profit without pointing out any discrepancies and rejecting the books.

It is seen that the AO has not accepted the reasoning of the appellant for low profit. At the same time, it is proved that the books of the appellant are audited and no defects have been found. I am in agreement with the contention of the appellant that in the absence of any substantial defect in the books, the AO cannot reject the results as per audited books and resort to estimation of profit, simply because the profit is low.

It is also noted that the sales of Phase-VII during the year were only Rs. 80,00,000/- whereas the AO has estimated profits on sales of Rs. 12,99,50,910/-. No reason for the same i.e. for taxing entire profit in one year has been given in the assessment order. This approach of the AO overlooks earlier concluded assessments.

In view of the above and after careful consideration of the submission of the appellant, it is held that the addition made by the AO is not sustainable and it is accordingly directed to be deleted. Ground Nos. 2 to 4 are accordingly allowed.

6. In the result, the appeal is allowed.

Commissioner of Income-tax (Appeals)
Income Tax Department