IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, AHMEDABAD

BEFORE SHRI DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER &
Ms. MADHUMITA ROY, JUDICIAL MEMBER

I.T(SS).A. Nos. 182,184,185&187/Ahd/2019
(Assessment Years: 2009-10, 2011-12, 2012-13 & 2014-15)

JCIT(OSD) Central Circle-1, 607, 6th Floor, Aaykar Bhavan, Race Course Circle, Vadodara-390007	Vs.	M/s. Narayan Land Estate "Narayan Chambers" B/H Indian Petrol Pump, Station Road-Bharuch, Gujarat-392001
[PAN No. AACFN0406B]		
(**Appellant**)	..	(**Respondent**)

I.T.A. No. 704/Ahd/2019
(Assessment Year: 2015-16)

JCIT(OSD) Central Circle-1, 607, 6th Floor, Aaykar Bhavan, Race Cource Circle, Vadodara-390007	Vs.	M/s. Narayan Land Estate "Narayan Chambers" B/H Indian Petrol Pump, Station Road-Bharuch, Gujarat-392001
[PAN No. AACFN0406B]		
(**Appellant**)	..	(**Respondent**)

I.T.A. No. 1836/Ahd/2019
(Assessment Year: 2016-17)

DCIT Central Circle-1, 607, 6th Floor, Aaykar Bhavan, Race Cource Circle, Vadodara-390007	Vs.	M/s. Narayan Land Estate "Narayan Chambers" B/H Indian Petrol Pump, Station Road-Bharuch, Gujarat-392001
[PAN No. AACFN0406B]		
(**Appellant**)	..	(**Respondent**)

Appellant by :	Shri A.P. Singh, CIT DR & Shri V. K. Singh, Sr. DR
Respondent by:	Shri Mukund Bakshi, C.A.

Date of Hearing	21.04.2022
Date of Pronouncement	10.06.2022

O R D E R

PER BENCH:

The bunch appeals preferred by the Revenue are directed against the orders dated 24.01.2019 & 15.09.2019 passed by the Ld. CIT(A)-12, Ahmedabad arising out of the orders passed by the DCIT, Central Circle-1, Vadodara dated 30.05.2017 & 20.12.2018 under Section 153C r.w.s. 143(3) of the Income Tax Act, 1961(hereinafter referred to as "the Act") for A.Ys. 2009-10, 2011-12, 2012-13, 2014-15, under Section 147 r.w.s. 143(3) for A.Y. 2015-16 and under Section 143(3) for A.Y. 2016-17 respectively.

2. Since the entire group of appeals relate to the Revenue circumventing the identical issue, these are heard analogously and are being disposed of by common order.

IT(SS)A No. 182/Ahd/2019 is taken as the lead case.

3. The grounds of appeal raised by the Revenue in IT(SS)A No. 182/Ahd/2019 are read as under:

> *"1. On the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in holding the gross profit @30% on the 'On-money' receipt of Rs.3,67,95,791/- when the assessee miserably failed to produce documents w.r.t. expenses incurred against the above receipts of 'On-money'.*
>
> *2. On the facts and in the circumstances of the case and in law, the ld. CIT(A) should have upheld the addition of entire receipt of 'On-money' of Rs.3,67,95,791/-, as the assessee could not produce any document for expenses incurred against the above receipts of 'On-money' and the onus lies on the assessee to prove the expenses incurred.*
>
> *3. It is, therefore, prayed that the order the Ld. CIT(A)-12, Ahmedabad may be set aside and that of the AO may be restored to the above extent.*

4. The appellant craves leave to add, alter, amend and/or withdraw any ground(s) of appeal either before or during the course of hearing of the appeal."

4. The brief facts leading to the case is this that the appellant, engaged in the business of real estate and construction, filed its return of income on 25.09.2009 under Section 139(1) of the Act declaring total income at Rs. 3,29,340/-. Subsequently, a search under Section 132 of the Act was carried out in the Narayan Realty Group of cases on 13.11.2014 and survey under Section 133A of the Act was carried out at the business premises of the appellant and seizure of various documents as per Annexure-A1 and A6 and back-up of Tally data of M/s. Narayan Land Estate for the period from 01.04.2007 to 31.03.2014, various incriminating material pertaining to the appellant firm was found and impounded. Those documents showed that the appellant had accepted sale consideration of various schemes such as Narayan Square, Narayan Residency, Narayan Shrushti in cash which were not recorded in the regulars books of accounts of the appellant firm. The AO has reason to believe that the books of accounts including back-up and server seized pertained to the appellant and had bearing on determination of its total income and accordingly, proceeding under Section 153C of the Act was initiated on 28.10.2016. The notice under Section 153C was issued whereupon the appellant filed return of income on 14.11.2016 showing total income at Rs. 3,29,340/-. On 21.11.2016 notice under Section 143(2) followed by notice under Section 142(1) alongwith questionnaire was duly served upon the appellant.

5. The on-money receipt on sale of flat in different project of the assessee on the basis of the search/survey and the disclosed income in respect of such receipt is the subject matter before us.

6. The Ld. AO made addition of Rs. 3,67,95,791/- as undisclosed income from Narayan Shrushti Project for the year under consideration. The addition of the gross amount of on-money receipt was challenged before the Ld. CIT(A) who ultimately estimated profit @30% of the gross amount of on-money receipt and accordingly restricted addition to Rs. 1,10,38,738/- being 30% of Rs. 3,67,95,791/- as undisclosed income for. A.Y. 2009-10 which is in appeal before us by the Revenue.

7. At the time of hearing of the instant appeal the Ld. Counsel appearing for the Revenue submitted before us that the order passed by the Ld. CIT(A) is erroneous in restricting addition upon estimating profit at 30% of the gross on-money receipt by the assessee in the absence of documents produced by the assessee incurring expenses of the above receipts of on-money. He ultimately relies upon the order passed by the Ld. AO.

8. On the other hand, the Ld. Representative appearing for the assessee supports the order passed by the First Appellant Authority. According to him estimated profit of on-money/premium collected from the customers can be said to be justified instead of adding the gross amount of on-money/premium to the total income. He also relies upon the order passed by the Hon'ble Jurisdictional High Court in the matter of CIT vs. President Industries, reported in (2002) 124 Taxman 654 (Guj.) in support of his argument.

9. We have heard the rival submissions made by the respective parties and we have also perused the relevant materials available on record.

10. The brief facts leading to the case is that during the course of survey at the Head Office of the appellant at Narayan Chambers, Bharuch on 13.11.2014 various incriminating documents were found and impounded proving that the firm was involved in the practice of receiving a part of the sales consideration of such apartments and shops in cash, which is not recorded in the books of accounts of the company. Documents impounded and inventoried as Annexure A-2 shows price list of various units of Narayan Square Project wherein the minimum rate/price of a flat in the scheme "Narayan Square" was shown as Rs. 13,61,000/- and the maximum price was at Rs. 14,40,000/-.

11. Similarly price list of various other units of the schemes namely "Narayan Shrushti", "Narayan Shrushti Duplex", "Narayan Square" were also impounded. Furthermore, one of the partners of the firm Mr. Hemant Prajapati, in his statement on oath under Section 131(1A) of the Act has accepted the page contained the price working of units in Narayan Square. However, from the books of accounts seized, it is observed that the sale consideration from these flats and shops are in the range of Rs. 5,00,000/- to Rs. 7,00,000/- which is much lower than the prices mentioned in the impounded pages. The same fact of mentioning of rate of the flats in the scheme more than the price mentioned in the books of accounts seized and the statement on oath made by the partner Mr. Hemant Prajapati was also recorded in the case of Narayan Residency, Narayan Shrushti, Narayan

Luxuria. It is also a fact that during the pendency of the proceeding under Section 153C of the Act for A.Y. 2009-10 to 2015-16 the appellant approached the Hon'ble Income Tax Settlement Commission, Mumbai by filing an application dated 22.12.2016 for A.Y. 2009-10 to 2016-17 which stood rejected on 02.01.2017 due to technical ground whereupon on 31.01.2017 the appellant once again filed application before the said commission disclosing the additional income as under:

Assessment Year	***Additional Income disclosed before the Settlement Commission (in Rs.)***
2009-10	*2,75,000*
2010-11	*3,67,460*
2011-12	*21,47,930*
2012-13	*1,38,34,116*
2013-14	*8,14,336*
2014-15	*13,48,530*
2015-16	*18,71,450*
2016-17	*36,35,797*
Total	*2,42,94,585*

Project Name	***On-money receipt declared by the applicant before the Settlement Commission (in Rs.)***
Narayan Luxuria Flats	*2,68,02,000*
Narayan Residency	*2,78,81,955*
Narayan Square	*1,10,55,050*
*Narayan Shrusti Duplex**	*2,06,42,009*
*Narayan Shrusti Tenament**	*4,88,61,167*
Narayan Garden (Shopping)	*31,50,000*
Total	*13,83,92,181*
**In the schemes, the amount of Rs. 3,23,822/- has been offered for taxation in A.Y. 2016-17 without claiming deduction u/s.80IB(10)*	

12. It is relevant to mention that the above disclosure of additional income was on the basis of the seized/impounded materials found during the course of search/survey action, statement of the partners/employees of the firm and extrapolation of on-money receipts of the property sold in the same

construction projects. The Ld. Principal CIT Central, Surat also objected to the estimation of income @ 15% of the undisclosed on-money receipts and further reported understatement of income for the different construction projects/land. Considering the report under Section 245D(2B) of the Ld. PCIT Central Surat dated 08.03.2017, seized/impounded documents and detailed discussion before the Hon'ble Settlement Commission, Mumbai, the appellant's application was rejected by and under the order dated 29.03.2017 under Section 245D(2C) of the Act. The Hon'ble Settlement Commission was of the view that there is substantial understatement in the three projects namely Narayan Luxuria, Narayan Square and Narayan Residency and the application does not contain a full and true disclosure of the income which was further not disclosed before the Ld. AO.

13. Statements of some customers of Narayan Residency Projects were recorded under Section 131(1) where they have accepted the actual sale price of their flats and actual selling price accepted by them were in conformity with the selling price appearing in the sheets impounded from the Head Office of Narayan Land Estate Co. at Bharuch on 13.11.2014. Show-cause was issued on 15.12.2016. The assessee replied to the same. Subsequently, a second/final show-cause was issued on 04.05.2017 directing the assessee to explain with all the evidences as to why the undisclosed on-money receipts in different construction projects/investment in land should not be assessed as undisclosed income in different years in the year of booking of the profit.

14. In this regard, the assessee was further directed to furnish all the necessary proof of deductions from the undisclosed on-money receipts, if any. It is relevant to mention that copies of statement of the customer namely Smt. Urmilaben Pratapsinh Chavda of Unit No. 33 and Shri Raj Alex Asockia of Unit No. 35 and Shri Ravi Walia of Unit No. 59 were also provided to the appellant along with the copy of the second show-cause notice dated 04.05.2017. The assessee replied to the said show-cause by way of an explanation dated 17.05.2017; the gist of the contents whereof are as follows:

(i) The assessee challenged the maintainability of the proceeding by issuance of notice under Section 153C of the Act dated 28.10.2016 for A.Y. 2009-10 to 2014-15. The contention of the assessee is this that a concluded assessment would not be disturbed without there being any basis for doing so which is impermissible in law. Even in a case of searched person the same reason would hold good as in case of any other person but there must be satisfaction that

(a) during the search some incriminating documents is found which belong to other person,
(b) the AO records satisfaction that such incriminating papers must indicate undisclosed income of other person.

(ii) The AO should record a valid satisfaction about incriminating material belonging to the person other than the person who is subjected to search under Section 132.

(iii) The seized Tally data from Narayan Realty Ltd. reflects regular books of account maintained in regular course of business and therefore, the seized data cannot be said as incriminating. Moreso, the provisions of Section 153C of the Act do not contemplate requirement of seized data being incriminating.

(iv) The assessee has further requested to restrict investigation with the evidences found during the search only and no reliance to be placed on the order of Settlement Commission.

(v) In continuation thereto it was contended by the assessee that in the event the Department is intending to use the Settlement Commission application as a sole base as assessment of income, then, the department should accept the declaration of profit at 15% of on-money receipt. In fact it is one of the main contention of the assessee that the department has completely relied on the application petition filed by the assessee before the Hon'ble Settlement Commission. However, the settlement application was filed by the assessee purely in the spirit of settlement and with the intention to avoid litigation and buy mental peace and therefore, the additional income offered before the Hon'ble Settlement Commission was without prejudice to right to contest the issue on merits of the case if the case is not settled for any reason whatsoever and the same should not be construed as admission of guilt or concealment of assessee. In this regard, the assessee also relied upon the provision of Section 245HA(2) which explicitly provided that in case where the application filed before the Settlement Commission get abated the AO shall proceed with the assessment in

accordance with the provision of the Act as if no application has been filed meaning thereby that the assessment under Section 153C must be carried out in accordance with the framework of law only.

(vi) The assessee has asked for cross-examination of the customers who accepted actual selling price of their unit in the scheme of "Narayan Residency".

(vii) Applying the evidence of expenses found in the case of Narayan Villa scheme the assessee has suggested to estimate the profit in the case of the schemes.

15. The Ld. AO did not find the explanation rendered by the assessee as acceptable and ultimately the Ld. AO made addition of Rs. 3,67,95,791/- as undisclosed income from Narayan Shrushti Project for the year under consideration. The addition of the gross amount of on-money receipt was challenged before the Ld. CIT(A) who ultimately estimated profit @30% of the gross amount of on-money receipt and accordingly restricted addition to Rs. 1,10,38,738/- being 30% of Rs. 3,67,95,791/- as undisclosed income for. A.Y. 2009-10 which is in appeal before us by the Revenue.

16. We have carefully considered the order passed by the Ld. CIT(A). It appears that while restricting addition to 30% of the total addition made by the Ld. AO, the Ld. CIT(A) observed as follows:

> *"8. **Third set of grounds** (Grounds No.6, 7 & 8) relates to addition of Rs.3,67,95,791/- for the A.Y. 2009-10. From various pages of the assessment order and especially Page No.69, it is seen that Rs.3,67,95,791/- has been worked out as total on-money received by the appellant in the scheme, Narayan Shrusti and that the same was not disclosed in the return of income and was required to be added as*

undisclosed income earned from the said project. The appellant has contended that because of the various defects in the papers found the impounded/seized papers could not have been considered as incriminating material and therefore, no addition could have been made in the assessment u/s.153C. However, at para-44 of its submission dated 03.10.2018, the appellant itself had admitted that "the Let AO has made addition in the present case on the basis of loose papers found during the course of survey" and that "the Ld. AO has heavily relied upon the settlement petition u/s.145C (1) and consequent order passed by the JTSC u/s.245D (2C)". But, these contentions of the appellant are not entirely true because if there were no incriminating material found during the course of search and also during the course of survey, there was no requirement for the appellant to file the application for settlement that too twice and there would have been no reason for the Hon'ble Settlement Commission to reject the application holding that there was no true and full disclosure of additional income by the appellant. It is true that as per Section 245HA, in case of abatement of proceedings before the Settlement Commission, the AO has to dispose the case in accordance with the provisions of the Act as if no application u/s.245D has been made.

8.1 From the perusal of the assessment order, it is abundantly clear that the AO has painstakingly examined the incriminating materials in connection with various construction projects of the appellant (which are dealt at pages 18 to 69 of the assessment order) and has worked out the unaccounted income for various assessment years and from various projects. Nowhere in the assessment order, the AO has picked up the additional/undisclosed income merely on the basis of SoF filed along with the application before the Settlement Commission. With due respect to the appellant's contentions and reliance on various case laws by the appellant, I am of the considered view that the report required to be submitted by the Pr.CIT for the purpose of proceedings before the Settlement Commission which were based on various incriminating materials were the results of analysis and investigation by the Income Tax Department and the reasons for objecting to the admission of the settlement application were so overwhelming that the settlement commission rejected the second application also. The working of undisclosed income for the purpose of reports required to be submitted by the Pr.CIT were of the Department and therefore, the AO has to rely upon them. It was for the appellant to rebut the presumptions in favour of the Department u/s.132(4A) & 292C and to disprove the finding and computation of the Department. Neither during the assessment proceedings nor during the appellate proceedings, is the appellant appearing to be discharging its onus. The crux of appellant's submission repeatedly is that there was no incriminating material found during the course of search in the Narayan Realty Group of cases which could have led the AO to assume the jurisdiction u/s.153C and to make the impugned assessment orders with those additions. However, it has already been held before that there is no merit in these arguments of the appellant.

8.2 It is seen from the submission which is already reproduced before that the appellant has not made out a case as to how the working of undisclosed income by the Department is incorrect or excessive and has not even given any working of undisclosed/excess income earned by it from various projects undertaken by it. The

appellant has not brought forward any factual details to substantiate that the on-money was not charged and received by it on booking/sale of units in its various projects and has not also given the details of such on-money actually received during the year from its customers. Accordingly, I find no basis to interfere in the computation of Rs.3,67,95,791/- as on-money received by the appellant during the assessment year under consideration on booking/sale of units in the project Narayan Shrusti made by the AO.

8.3 The issue now is whether the gross amount of on-money received should be added as unaccounted/undisclosed income of the appellant during the respective assessment years or whether the gross/net profit related to such on-money receipt should only be treated as unaccounted/undisclosed income of the appellant liable to be added while computing the total income for the respective assessment year.

8.4 In this regard, at para-73 of the submission dated 13.10.2018 for the A.Y. it has been contended by the appellant that "we request your kind office to restrict the addition to 15% of the alleged on-money being the rate of net profit It is a settled law that when an addition in respect of on-money is made, the entire receipt cannot be charged to tax, but only the profit element is to be charged." For the purpose, reliance has been placed on various judgements of jurisdictional ITAT of Ahmedabad (Abhishek Corporation v/s. DCIT, ACIT v/s. Jignesh Koralwala) and jurisdictional High Court of Gujarat (CIT v/s. President Industries). In these cases, it has been held that where it was found that assessee had been charging on-money/premium in respect of booking of flats, the entire receipts on account of on-money /premium charged would not be the undisclosed income of the assessee, but only net profit rate could be applied on unaccounted sales/receipts for the purpose of making addition.

8.5 The decisions of the jurisdictional ITAT and High Court are binding on the CIT (A). However, the appellant in its submission has not given the working of profit on such on-money and has not given the justification as to how the profit of 15% (as mentioned in the submission during the appeal proceedings) is adequate and fair. No doubt, one approach is that where the seized/impounded document bear the testimony of on-money being charged and collected and the same pages or similar group pages also contain entries related to unaccounted expenses on in relation to the projects undertaken and in such a case, such expenses are to be necessary allowed for the holistic interpretation of the documents seized/impounded. The other approach is to take cognizance of the market / realty sector that while it is the practice of the real estate market that whereas cash (over and above the consideration in cheque) are collected from the customers, the developers have to incur various unaccounted expenses also in relation to procurement of land and approval of the projects by various authorities & etc and therefore, there is rational/justification in charging/bringing to tax only an estimated profit on on-money/premium amount collected from the customers instead of adding the gross amount of on-money/premium to the total income.

8.6 I am of the considered view that addition of the gross amount of on-money received would be unfair as well as violation of the decisions of the jurisdictional

ITAT and High Court. It appears fair that profit @30% on the gross amount of on-money received should only be treated as unaccounted income and added in the computation of total income. Accordingly, ***Rs.1,10,38,738/- being 30% of Rs.3,67,95,791/- is upheld as undisclosed income for the A.Y. 2009-10****. AO is directed to substitute the addition of Rs.3,67,95,791/- with Rs.1,10,38,738/-. The appellants gets partial but substantial relief. The ground succeeds partly."*

17. Considering the entire aspect of the matter and particularly the case made out by the assessee, the order of rejection passed by the Settlement Commission, the order passed by the Ld. AO making addition, the further submission made by the appellant before the First Appellate Authority and the impugned order before us, we find that the assessee has failed to point out the deficiency of Revenue and the working of undisclosed income. Neither it was claimed to be excessive as because the assessee was also not been able to give any proper working of undisclosed/excess income earned by it from various projects undertaken by it. The assessee has further failed to give any factual details so as to substantiate that on-money was not charged and received by it on booking/sale of units in its various project. Neither the actual figure of on-money receipt during the year under consideration from customers has been placed before the authorities below by the appellant. On this premise we do not find any irregularities and/or wrong in not interfering by the Ld. CIT(A) with the computation of Rs. 3,67,95,791/- as on-money receipt by the appellant during the year under consideration on booking to sale of units in the project Narayan Shrushti made by the Ld. AO. So far as the other aspect of addition on gross amount of on-money receipt or gross/net profit related to such on-money receipt to be treated as unaccounted/undisclosed income of the appellant is concerned we find that the assessee made a request before the First Appellate

Authority for restricting addition to 15% of the alleged on-money being the rate of net profit.

18. It is a settled principle of law that where it is found that the assessee is charging on-money/premium in respect of booking of flats, the entire receipts on account of on-money/premium charged would not to be treated as the undisclosed income of the assessee but only net profit rate could be applied on unaccounted sales/receipt for the purpose of making addition. It is also the ratio decided by the Jurisdictional High Court in the case of CIT vs. President Industries (supra) as also relied upon by the Ld. A.R. before us. It is a practice of the real estate market that cash over and above the consideration in cheques are collected from the customers but the developers have to incur various unaccounted expenses in regard to the procurement of land and approval of the projects by various authorities too and therefore, the estimated profit of on-money/premium amount collected from the customers is to be brought to tax instead of adding the gross amount of on-money/premium to the total income.

In fact, the Ld. CIT(A) also carefully took into consideration this particular aspect of the matter and profit at 30% of the gross amount of on-money receipt has been treated as unaccounted income by him and the same was rightly added in the computation of total income of the assessee which in our considered opinion is just and proper and also at par with the ratio laid down by the Jurisdictional High Court as discussed hereinabove. We do not find any ambiguity in such order passed by the Ld. CIT(A) so as to warrant interference. Hence, the order passed by the Ld. CIT(A) is hereby

upheld. The appeal filed by the Revenue is, therefore, found to be devoid of any merit and thus, dismissed.

IT(SS)A Nos. 184, 185 & 187/Ahd/2019, ITA No. 704/A/19 & ITA No. 1836/A/2019:-

19. The identical issue involved in the case has already been dealt with by us in IT(SS)A No. 182/Ahd/2019 for A.Y. 200-10 and in the absence of any changed circumstances the same shall apply mutatis mutandis. Hence, the appeals preferred by the Revenue are dismissed.

20. In the combined results, all the appeals preferred by the Revenue are dismissed.

This Order pronounced in Open Court on	**10/06/2022**

Sd/-
(DR. ARJUN LAL SAINI)
ACCOUNTANT MEMBER

Sd/-
(Ms. MADHUMITA ROY)
JUDICIAL MEMBER

Ahmedabad; Dated 10/06/2022
TANMAY, Sr. PS ***TRUE COPY***

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad