

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "B" MUMBAI**

**BEFORE SHRI JOGINDER SINGH (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 4794/MUM/2014
Assessment Year 2011-12**

Madhusudan B. Gilda (Prop of Madhu Developers) 3 rd Floor, 312, Kalbadevi Road, Mumbai 400002	Vs.	JCIT, Range-14(2), Earnest House, 3 rd Floor, Nariman Point, Mumbai- 400021
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PANNo. ADEPG 1626 K

Appellant)	..	Respondent)
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Appellant by:	Dr. K. Shivaram Sr. Advocate
Respondent by:	Shri Sushil Kumar Poddar, Sr.DR

Date of Hearing: 16/11/2016
Date of Pronouncement: 13/02/2017

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2011-12. It is directed against the order of the Commissioner of Income Tax (Appeals)-25, Mumbai and arises out of the assessment u/s 143(3) of the Income Tax Act 1961 (the 'Act').

2. The grounds of appeal filed by the assessee read as under:

"1. Learned CIT(A) 25 erred on facts and in law in confirming the addition of Rs.11346464/- made by JCIT 14(2) as undisclosed income of the appellant.

2. That the learned CIT(A)25 erred in confirming the said addition made by AO without bringing on records any evidence to show that the assessee received cash or otherwise, being consideration money more than the

amount as per agreements produced, and failed to confront with the flat buyers as prayed by the appellant.

3. The learned CIT(A) erred in confirming, the addition made by AO without discharging burden to prove charge made on the appellant, and also erred in relying on the case laws which are different on facts and in law from that of the assessee and ignoring the case laws relied by appellant.
4. That the learned CIT(A) 25 erred in confirming the addition made by AO contrary to the facts and circumstances of the appellant without any corroborative evidence to substantiate additions made by AO.
5. That the learned CIT(A) 25 erred in confirming the said addition of Rs.11346464/- which is made by AO neither as business income nor as income from other sources and without quoting the section under which the said addition is made.”

3. Briefly stated, the facts are that the assessee filed his return of income for the impugned assessment year on 28.09.2011 showing a total income at Rs. 1,08,95,999/-. The assessee was engaged in the business of real estate development i.e. construction of building under the propriety concern 'M/s. Madhu Developers' on project completion method. During the year the assessee completed its project "Madhu Kutir" at CTS No. 121, 121/1, 121/2, 121/3 of village Pahadi, Goregaon (W), Mumbai. In the said project the assessee constructed one building consisting of 7 floors .Two flats on each floor upto 6th floor (2 BHK & 3 BHK) and one flat on 7th floor . Thus there were 13 total flats. The carpet area of 2 BHK flat was shown at 573 sq. ft.; that of 3 BHK flat at 726 sq. ft. The carpet area of 7th floor flat was shown at 848 sq. ft. The Assessing Officer (AO), after mentioning the details of constructed flats and its purchasers worked out the declared and adopted value of the same. He observed from the data regarding sale consideration on account of sale of different flats adjacently located and sold at short interval that there was a big difference between the sale considerations. The AO then asked the assessee to show cause as to why the highest sale consideration

received by the assessee based on the rate per sq. ft. should not be adopted based on the fact that sale was effected within a short period and the business prudence demands that the assessee must have negotiated at the highest price in order to get maximum gains. The assessee filed a reply before the AO. However, the AO was not convinced with the same. As per him, 2 BHK and 3 BHK are located on the same floor adjacently and there cannot be any reason for sharp variation in the sale consideration as these are having same quality of construction and kind of facility. The AO found it peculiar that the rate for flat no 101 worked out to Rs. 8722/- per sq. ft. (2 BHK) whereas the rate of flat no 102 was Rs.11019/- (3 BHK) approximately, which are located on the same floor and sold within a interval of 2 days. Similar is the case in other flats such as 301 & 302, 601 & 602. The AO considered the normal practice prevailing in property market in Mumbai during the impugned assessment year i.e. (i) higher rate is charged as the floor gets higher, (ii) the rate charged in July will be higher than that in May since in that period there was rising trend in the property prices. The AO adopted the average saleable rate @ Rs. 10,431/- and worked out the difference which comes to Rs. 1,13,46,464/-. He made an addition of the above sum treating it as undisclosed income for the year under consideration.

4. The assessee preferred an appeal against the order of the AO before the learned CIT(A). The assessee filed a written submission before the learned CIT(A) which has been extracted at page 4 – 13 of the appellate order. The learned CIT(A) observed that the difference between the 1st slab and 7th slab stage was only of 5 months (February to July, 2010) between which the prices were increased by the assessee from Rs. 7710/- to Rs. 9945/- i.e. an increase in rates of around 29%, which seems highly unlikely in reality.

As regards the contention of the assessee that he charged higher rate for lower booking amount and slower payment schedule, the learned CIT(A) found that the assessee had sold flat no 301 & 101 in May 2010 @ Rs. 10,470/- per sq. ft. and June 2010 @ Rs. 11,020/- per sq. ft. with booking amount of 3% and 5% respectively and balance by bank finance. At the same time, in May 2010, the flat no 501 was booked @ Rs. 8,725/- per sq. ft. for fast payment i.e. 25% on booking and 60% within 2 months. He found that the assessee had not given full details as to the schedule of payment in case of bank finance to be long enough to justify the vast variations in rates. In any case, no prudent businessman would sell the property at such huge discount just for faster payment by few months. The learned CIT(A) observed that the assessee failed to prove his contention by giving complete details in this respect.

The assessee submitted that there was no taker for flat no 101 (2 BHK) at 1st floor, which was booked @ Rs. 8,725/- per sq. ft. on 29.07.2010. However the learned CIT(A) found that the adjoining flat no 102 (3 BHK) at the very same floor was already booked @ Rs. 11,020/- on 10.06.2010. Hence the assessee's contention seems to be an attempt to somehow justify the sale at discounted rate.

As regards the sale of flat no 502 @ Rs. 7990/- in August 2010, the assessee stated that the flat was originally sold in May 2010 and advance payment of Rs. 23.50 lakhs was received, which booking was cancelled by the buyer and to return the advance payment received, it was necessary to sale the flat to the other party at discounted rate. The learned CIT(A) was not convinced with the above explanation of the assessee since this was the last flat sold at very discounted price. The assessee having sold all other flats would not be in such financial

difficulty that just for returning a sum of Rs. 23.50 lakhs, it would sell the flat at such a discounted rate.

In view of the above, the learned CIT(A) did not find any infirmity in the order of the AO in bringing to tax the undisclosed income of Rs. 1,13,46,464/- and thus dismissed the appeal filed by the assessee.

5. Before us, the learned counsel of the assessee submits that “Madhu Kutir” (the impugned project) is the first project of the assessee. It is stated that the assessee sold 13 flats during the year at different stages of construction and on different payment terms to different unrelated buyers. Therefore, the consideration agreed with each of them was different. It is stated that the AO observed that there was difference in prices at which flats were sold and conjectured that the assessee would have received unaccounted cash. It is stated by him that the AO admitted that he was not having any evidence to support his contention but invoked the “preponderance of probability” theory. The AO has applied the price per sq. ft. of flat no 301 to all flats and computed notional sale consideration and made an addition of Rs. 1,13,46,464/-.

5.1 The learned counsel submits that the consideration offered by the assessee is the actual one, and no amount over and above the same has been received in respect of any flat. The impugned project was assessee’s first project and the price at which a flat was actually sold depended on negotiations, payment terms, stage of construction, liquidity position of the assessee at that time etc. It is stated that the justifications / reasons for difference in sale consideration had been given before the AO and CIT(A). The consideration received by the assessee is higher than the government approved stamp value in all

cases. Therefore, there cannot be any allegation of on-money in absence of any evidence whatsoever when the sale consideration is higher than government approved valuation. It is stated that the AO did not issue summons to buyers to confirm the sale consideration in spite of the assessee's specific request. No evidence has been reduced by the AO and CIT(A) and all their observations are based on conjectures. The learned counsel refers to the relevant pages of the paper book filed by him in support of his above contentions. Thus it is submitted that the addition of Rs. 1,13,46,464/- confirmed by the learned CIT(A) be deleted.

6. *Per contra*, the learned DR refers to page 13 of the order of the learned CIT(A), wherein the contention as regards the slab stage of building *vis-a-vis* the rates charged have been tabulated in ascending order

Flat sold at slab stage	Date of Booking	Flat No.	Rate per sq. ft.
Plinth stage	02-Feb-10	201	8900
1 st slab stage	20-Feb-10	602	7710
2 nd -3 rd slab stage	15-Mar-10	702	8020
3 rd slab stage	31-Mar-10	401	9250
4 th slab stage	13-Apr-10	302	8950
5 th -6 th slab stage	3-Jun-10	402	9640
5 th -6 th slab stage	14-Jun-10	202	9640
7 th slab stage	23-Jun-10	601	9945

Referring to the above table, the learned DR strongly supports the order passed by the learned CIT(A).

7. We have heard the rival submissions and perused the relevant material on record. We find that the assessee in response to the show cause notice issued by the AO has submitted that he has given the address of the parties earlier and the AO may confirm with the parties by using the power vested in the Act. This has been

mentioned by the AO at para 9.3 (page 4-5) of the assessment order. It is also found that the assessee vide written submission dated 29.04.2014 has submitted before the learned CIT(A) that the name and address of the flat buyers were given to the AO as required [page 5 of the order of the CIT(A)] and at the repeated request of the assessee, the AO did not confront with the flat buyers that they had paid cash to the assessee, over and above the agreement value [page 11 of the order of the CIT(A)]. Before us, the learned counsel of the assessee submitted that specific request was made to the AO to issue summons to the purchasers.

7.1 In ***State of Kerala vs. K.T. Shaduli Grocery Dealer* AIR 1977 SC 1627**, the Hon'ble Supreme Court recognised the importance of oral evidence by holding that the opportunity to prove the correctness or completeness of the return necessarily carry with it the right to examine the witnesses and that includes equally the right to cross – examine witnesses. In the case of ***ITO vs. M. Pirai Choodi* [2012] 20 taxmann.com 733 (SC)**, the Hon'ble High Court has set aside the order of assessment on the ground that no opportunity to cross – examine was granted, as sought by the assessee. The Hon'ble Supreme Court held :

“We are of the view that the High Court should not have set aside the entire assessment order. At the highest, the High Court should have directed the Assessing Officer to grant an opportunity to the assessee to cross-examine the concerned witness.”

7.2 The contentious issues in the instant appeal as delineated at para 3 to 6 here-in-above can be resolved by examining the flat buyers and granting an opportunity to the assessee to cross – examine them. Therefore, we set aside the order of the learned CIT(A) and restore the same to the file of the AO to make a fresh

assessment as per the provisions of the Act after examining the flat buyers and granting an opportunity to the assessee to cross – examine them. Needless to say, the AO is directed to give reasonable opportunity of being heard to the assessee before finalising the assessment order. The assessee is directed to file the relevant details before the AO.

7.3 In view of the above facts, we have not adverted to the case laws cited by the learned counsel of the assessee and the learned DR.

8. In the result, the appeal is allowed for statistical purpose.

Order pronounced in the open court on 13/02/2017

Sd/-
(JOGINDER SINGH)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;
Dated: 13/02/2017
Biswajit, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai