

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

Before Shri Mahavir Singh (JUDICIAL MEMBER)

AND

Shri G Manjunatha (ACCOUNTANT MEMBER)

I.T.A No.1566/Mum/2017  
(Assessment year: 2011-12)

ACIT, Cir.28(3), Navi Mumbai	vs	Shri Subhash V Kanekar B-606, Kalyan Tower, Plot No.20 Sector 17, Vashi, Navi Mumbai-400 703 PAN : ADOPK3710A
<b>APPELLANT</b>		<b>RESPONDEDNT</b>

I.T.A No.1749/Mum/2017  
(Assessment year: 2011-12)

Shri Subhash V Kanekar B-606, Kalyan Tower, Plot No.20 Sector 17, Vashi, Navi Mumbai-400 703	vs	Addl. CIT-22(3), Mumbai
<b>APPELLANT</b>		<b>RESPONDEDNT</b>

Assessee by	Shri Devendra Jain
Revenue by	Shri Rajat Mittal

Date of hearing	16-11 -2017
Date of pronouncement	22-11-2017

**ORDER**

Per G Manjunatha, AM :

These cross appeals filed by the revenue and the assessee are directed against order of the CIT(A)-26, Mumbai dated 27-12-2016 and they pertain to

assessment year 2011-12. Since facts are identical and issues are common, for the sake of convenience, these appeals were heard together and are disposed of by this common order.

2. The brief facts of the case are that the assessee, proprietor of M/s Kapil Industries engaged in the business of printing and supply of offset printed baners, has filed his return of income for AY 2011-12 declaring total income of Rs.1,03,33,651. The case has been selected for scrutiny and notices u/s 143(2) and 142(1) of the Act were issued. In response to notices, authorized representative of the assessee appeared from time to time and furnished the details, as called for. The assessment was completed u/s 143(3) on 20<sup>th</sup> March, 2014 determining total income at Rs.2,05,39,404 by making addition towards income from house property, income from capital gain and disallowance of purchases from bogus suppliers u/s 69C of the Income-tax Act, 1961. Aggrieved by the assessment order, assessee preferred appeal before the CIT(A). Before CIT(A), assessee has filed elaborate written submissions. The CIT(A), for the detailed discussion made in his order dated 27-12-2016 partly allowed the appeal filed by the assessee wherein the CIT(A) confirmed addition made by the AO towards Income from house property and deleted addition made by the AO towards re-working of capital gain by taking into account deemed consideration u/s 50C of the Income-tax Act, 1961. The

CIT(A) also allowed partial relief to the addition made by the AO towards bogus purchases u/s 69C by directing the AO to estimate net profit of 15% on bogus purchases. Aggrieved by the order of CIT(A), assessee as well as the revenue are in appeal before us.

**3.** The first issue that came up for our consideration from grounds 1 & 2 of assessee's appeal and ground 1 of revenue's appeal is addition made by the AO towards bogus purchases u/s 69C of the Income-tax Act, 1961. The AO made additions of Rs.94,69,753 u/s 69C of the Act, on the ground that purchases from 19 parties as listed in the assessment order at paragraph 3 are bogus in nature as the parties are appearing in the list of suspicious hawala dealers posted by the sales-tax department in their website. According to the AO, the assessee failed to justify purchases from the above parties with necessary evidence. The AO further observed that one party, viz. M/s Moksh Trading replied that no transaction had been entered into with the assessee. Thereafter, the AO asked the assessee to produce the parties in person along with their accounts for examination. But the assessee failed to produce the parties before the AO. The assessee also failed to file any kind of evidence to establish genuineness of purchases. Therefore, the AO opined that purchases from the above parties are bogus in nature and hence made addition of Rs.94,69,753 u/s 69C of the Act.

**4.** The Ld.AR for the assessee ,at the time of hearing submitted that the issue is covered by the decision of ITAT, Mumbai Bench "D" in assessee's own case for the assessment year 2010-11 in ITA No.1748/Mum/2017 dated 31-10-2017 wherein for similar reasons, the AO has made addition towards bogus purchases. However, the Tribunal has set aside the issue to the file of the AO on the ground that the addition cannot be made without affording opportunity of being heard and also allowing cross examination to the assessee to rebut the allegations made on the basis of information received from third party source.

**5.** Having heard both the sides, we find that similar issue has been considered by the co-ordinate bench for the assessment year 2010-11 in assessee's own case in ITA No.1748/Mum/2017. The ITAT, after discussing the issue and also by following various decisions including the decision of Hon'ble Supreme Court in the case of State of Kerala vs K.T. Shaduli Grocery Dealer AIR 1997 SC 1627 and the decision of Hon'ble Bombay High Court in the case of Om Vinyals Pvt Ltd vs ITO (WP (I) No.31/4 of 2014) set aside the issue to the AO and directed him to make fresh assessment in the light of the claim of the assessee that no cross-examination was allowed to testimony the evidence used against the assessee. The relevant portion of the order is extracted below:-

*"7.1 Now we come to the 1 ground of appeal of the Revenue and the 2nd and <sup>3rd</sup> ground of appeal of the assessee. The fact remains that after the notice u/s 133(6) issued by the AO came back unserved by the postal authorities, he had requested the assessee to produce the above parties for examination. The assessee failed to produce the above*

*parties before the AO.*

*We are of the considered view that the contentious issues in the instant case could be resolved by examining the above parties. It is the duty of the AO to enforce attendance of a witness if his evidence is material. At the same time the assessee must furnish the complete address of such person.*

*A proper hearing must always include a fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view. Cross-examination is allowed by procedural rules and evidently also by the rules of natural justice. Any witness who has been sworn on behalf of any party is liable to be cross-examined on behalf of the other party to the proceedings.*

*The Hon'ble Supreme Court in State of Kerala vs. K.T. Shaduli Grocery Dealer AIR 1977 SC 1627, 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 witnesses and that includes equally the right to cross-examine witnesses.*

*In ITO vs. M. Pirai Choodi (2012) 20 [taxmann.com](http://taxmann.com) 733 (SC), the Hon'ble Supreme Court has held that "Order of assessment passed without granting an opportunity to assessee to cross-examine, should not have been set aside by High Court; at most, High Court should have directed Assessing Officer to grant an opportunity to assessee to cross-examine concerned witness."*

*The importance of cross-examination has been emphasized by the Hon'ble Bombay High Court in the case of Om Vinyls P. Ltd. vs. ITO [WP(L) No. 3114 of 2014].*

*In view of the above, we set aside the order of the Ld. CIT(A) and restore the matter to the file of the AO to make a fresh assessment in the light of our observation hereinbefore after giving opportunity to the assessee to cross-examine the concerned parties. We also direct the assessee to file the relevant documents/evidence before the AO. Needless to say the AO would give reasonable opportunity of being heard*

*to the assessee before finalizing the assessment order.*

*As the above issues have been restored to the file of the AU to make a fresh assessment, we are not adverting to the case laws relied on by the Ld. counsels.*

*Thus the <sup>1st</sup> ground of appeal of the Revenue and the 2nd and 3rd ground of appeal of the assessee are allowed for statistical purposes.”*

**6.** In this case, admittedly notice issued u/s 133(6) to the parties were returned unserved. One of the parties, M/s Moksh Trading denied having been done any transaction with the assessee. The assessee also failed to produce the parties in person alongwith evidences. The assessee has relied upon the decision of Hon'ble Supreme Court in the case of Kishanchand Chellaram vs CIT 125 ITR 713 and Andaman Timber Industries vs Commissioner of Central Excise (Civil Appeal No.4228 of 2006) to argue that the AO has erred in making additions without providing any opportunity of cross examination of the witness or documents relied upon to make addition. We find that the assessee failed to furnish any evidences except stating that purchases are supported by bills and vouchers and payment has been made by cheques. When the notices issued u/s 133(6) were returned unanswered, it is on the obligation of the assessee to furnish complete names and addresses of the parties and also produce them in person if the AO desires so. In this case, though the AO has asked the assessee to produce the parties before

him for examination, the assessee has not done so. Therefore, we are of the view that there is no merit in the arguments of the assessee that the AO has violated principles of natural justice by not allowing opportunity of cross examination. However, we find that the assessee has sought for cross examination of the witness or evidences relied upon by the AO and hence, by following the decision of co-ordinate bench referred to above, we deem it appropriate to set aside the issue to the file of the AO and direct him to consider the issue afresh after giving opportunity to the assessee to cross examine the evidence used against the assessee to make addition u/s 69C. As a result, ground raised by the assessee in grounds 1 & 2 and ground of the revenue in ground 1 are allowed, for statistical purpose.

**7.** The next issue that came up for our consideration is addition made by the AO under the head 'Income from house property'.

**8.** The Ld.AR for the assessee submitted that the issue is covered by the decision of ITAT, Mumbai Bench "D" in assessee's own case for the assessment year 2010-11 in ITA No.1758/um/2017 dated 31-10-2017. We find that the co-ordinate bench has considered a similar issue in the earlier financial year and after considering relevant facts has deleted addition made by the AO of Rs.2,52,000 under the head 'Income from house property'. The relevant portion of the order is extracted below:-

*"8. We now turn to the 4th, 5th and 6th ground of appeal of the assessee and deal them together as they address a common issue. The AO found that the assessee was owner two flats. The assessee had treated the one flat as self occupied. On the basis*

*of market enquiry the AO estimated the rent of the second flat at Rs.25,000/- per month and determined the income from house property at Rs.2,52,000/- after allowing deduction u/s 24(b). In appeal the Ld. CIT(A) agreed with the reasons given by the AO and dismissed the appeal filed by the assessee.*

*8.1 We have perused the relevant materials on record. We find that the AO has estimated the rent of the second flat at Rs.25,000/- per month without any basis. He has not mentioned in the assessment order the sort of market enquiry conducted by him. As the rate arrived at by the AO is based on conjectures, we delete the addition of Rs.2,52,000/made by the AU as income from house property. Thus we allow the 4th, 5th and 6<sup>th</sup> ground of appeal of the assessee.*

**9.** Facts remain unchanged. The revenue failed to bring on record any evidence to disprove the finding of facts recorded by the CIT(A). In this view of the matter, and consistent with the view taken by the co-ordinate bench in assessee's own case for the assessment year 2010-11, we direct the AO to delete addition made towards Income from house property.

**10.** The next issue that came up for our consideration from revenue's appeal is addition made by the AO for Rs.2,95,000 under the head short term capital gain as per provisions of section 50C of the Income-tax Act, 1961. During the financial year relevant to assessment year under consideration, the assessee has sold an industrial plot admeasuring 10,500 sq.mtrs for a consideration of Rs.27,50,000 while the ready recknor value is taken at Rs.30,45,000. The AO has adopted section 50C value for the purpose of computation of short term capital gain and accordingly, made addition of Rs.2,95,000 under the head 'Income from short term capital gain'. The assessee contends that he has transferred

lease right in MIDC land and the provisions of section 50C is not applicable for transfer of leasehold rights. The assessee further submitted that section specifies land and building, which does not cover right in land. The legislature is very clear and no extension of meaning should be called for otherwise. The assessee further contended that he was requested to refer the matter to the valuation officer by exercising right given in section 50C(2). In this regard he relied upon the decision of ITAT, Mumbai Bench in the case of Atul G Puranik vs ITO in ITA No.3051/Mum/2010 dated 13-05-2011. The assessee also relied upon the decision of Hon'ble Bombay High Court in the case of CIT vs M/s Green Field Hotels & Estates (P) Ltd in ITA No.735/Mum/2014 dated 24-10-2016 wherein the Hon'ble Court has confirmed the decision in the case of Atul G Puranik.

**11.** Having heard and considered material on record, we find that the AO has computed short term capital gain on the basis of deemed consideration as per the provisions of section 50C in respect of transfer of leasehold rights in MIDC land. We further notice that a similar issue has been considered by the co-ordinate bench of ITAT Mumbai in the case of Atul G Puranik (supra) wherein it was observed that provisions of section 50C applies only to a capital asset, being land or building or both it cannot be made applicable to lease rights in a land. As the assessee transferred lease right for 60 years in the land and not land itself, the provisions of section 50C cannot be invoked. The CIT(A), after considering the decision of ITAT in Atul G Puranik (supra) and the decision

of Hon'ble Bombay High Court in the case of CIT vs Gree Field Hotels & Estates (P) Ltd has deleted the addition made by the AO. Relevant portion of the order is extracted below:-

*7.2. I have considered the impugned assessment order and written submission of the appellant. It is clear from the assessment order that AO has not appreciated the fact that asset in question is lease right for specific period and not "Land and/or Building". This issue has been decided by the jurisdictional ITAT in the case of Atul G. Puranik vs ITO (ITA No.3051/Mum/2010) decided on 13.05.2011, relevant para is as under-*

*...11.4 In view of the aforementioned judgments rendered by the Hon'ble Apex Court and that of the Hon 'ble jurisdictional High Court, it is clear that a deeming provision can be applied only in respect of the situation specifically given and hence cannot go beyond the explicit mandate of the section. Turning to sec. 50C, it is seen that the deeming fiction of substituting adopted or assessed or assessable value by the stamp valuation authority as full value of consideration is <http://www.itatonline.org> ITA No.3051/M110 Atul G. Puranik applicable only in respect of "land or building or both. If the capital asset under transfer cannot be described as 'land or building or both', then sec. 50C will cease to apply. From the facts of this case narrated above, it is seen that the assessee was allotted lease right in the Plot for a period of sixty years, which right was further assigned to M/s. Path/k Construction in the year in question. It is axiomatic that the lease right in a plot of land are neither 'land or building or both' as such nor can be included within the scope of 'land or building or both'. The distinction between a capital asset being 'land or building or both' and any 'right in land or building or both' is well recognized under the I. T. Act. Sec. 540 deals with certain cases in which capital gain on compulsory acquisition of land and building is charged. Sub-sec. (1) of sec. 540 opens with: "Subject to the provisions of subsection (2), where the capital gain arises from the*

*transfer by way of compulsory acquisition under any law of a capital asset, being land or building or any right in land or building, forming part of an industrial undertaking..... It is palpable from sec. 540 that 'land or building' is distinct from 'any right in land or building'. Similar position prevails under the W. T. Act, 1957 also. Section 5(1) at the material time provided for exemption in respect of certain assets. Clause (xxxii) of sec. 5(1) provided that "the value, as determined in the prescribed manner, of the interest of the assessee in the assets (not being any land or building or any rights in land or building or any asset referred to in any other clauses of this sub-section) forming part of an industrial undertaking" shall be exempt from tax. Here also it/s worth noting that a distinction has been drawn between 'land or building' on one hand and 'or any rights in land or building' on the other. Considering the fact that we are dealing with special provision for full value of consideration in certain cases u/s.50C, which is a deeming provision, the fiction created in this section cannot be extended to any asset other than those specifically provided therein. As sec. 50C applies only to a <http://www.itatonline.org> ITA No.3051/M110 Atul O. Puranik capital asst, being land or building or both, it cannot be made applicable to lease rights in a land. As the assessee transferred lease right for sixty years in the Plot and not land itself, the provisions of sec. 50C cannot be invoked. We, therefore, hold that the full value of consideration in the instant case be taken as Rs.2.50 crores....."*

**7.2.1. This issue has also been decided by the Hon'ble Bombay High Court in the case of Commissioner of Income Tax Central, Mumbai v/s. M/s. Greenfield Hotels & Estates Pvt. Ltd. in ITA NO.735 OF 2014, dated 24.10.2016, wherein the Hon'ble court has confirmed the decision in the case of ITA No.3051/M/10 Atul G. Puranik supra. Therefore, by respectfully following above case laws, AO is directed to delete the addition. The ground of appeal is allowed."**

**12.** Facts remain unchanged. The revenue failed to bring on record any contrary contrary decision to prove the finding of fact recorded by the CIT(A) in

the light of the decision of Hon'ble Bombay High Court and co-ordinate bench of ITAT, Mumbai. Therefore, considering the facts and circumstances of the case and also respectfully following the decision of Hon'ble Bombay High Court in the case of CIT vs Greenfield Hotels & Estates (P) Ltd, we are of the view that provisions of section 50C has no application to transfer of leasehold rights in the land. The CIT(A) has rightly considered the issue. Therefore, we do not find any error or infirmity in the order of CIT(A). Hence, we are inclined to uphold the findings of the CIT(A) and reject ground raised by the revenue.

**13.** In the result, appeals filed by the assessee and the revenue are partly allowed, for statistical purpose.

Order pronounced in the open court on 22<sup>nd</sup> November, 2017.

Sd/-

sd/-

(Mahavir Singh)	(G Manjunatha)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 22<sup>nd</sup> November, 2017

Pk/-

Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

/True copy/

By order

Asstt. Registrar, ITAT, Mumbai