

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E", MUMBAI**

**BEFORE SHRI G.S. PANNU, HON'BLE ACCOUNTANT MEMBER &
SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER**

ITA.No.5135/MUM/2015 (A.Y: 2011-12)

Asst. Commissioner of Income Tax
Circle 28(3), R.No.313,
3rd Floor, Tower No. 6,
Vashi Railway Station Complex, Vashi
Navi Mumbai-400 705

v. M/s. Sai Shirdi Constructions
429, Arneja Corner, Sector – 17,
Vashi, Navi Mumbai – 400 705

PAN NO: ABFFS 1404 G

(Appellant)

(Respondent)

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| Assessee by | : | Shri S.C. Tiwari Ms. Rutuja Pawar |
| Revenue by | : | Shri V. Justin |
| Date of Hearing | : | 06.12.2017 |
| Date of Pronouncement | : | 05.03.2018 |

ORDER

PER C.N. PRASAD (JM)

1. This appeal is filed by the Revenue against the order of the Ld.CIT(A)-26, Mumbai dated 05.08.2015 for the Assessment Year 2011-12.

2. The Revenue in its appeal raised the following grounds: -

(1) *"On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in stating that the rejection of the books of account u/s 145 of the Act and framing the assessment u/s 144 of the Act by the AO on the basis of the information, data and analysis was not adequate enough to come to the conclusion that the book results were not reliable.*

(2) *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in stating that the action of the Assessing Officer in bringing to tax a sum of ₹.8,83,43,028/- cannot be justified without appreciating the fact that the reasons given by the assessee for the large variation in sale of flats was not justified.*

(3) *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the disallowance made on account of bogus purchase to the tune of ₹.4,35,881/- by the Assessing Officer without considering the fact that the notices issued u/s. 133(6) of the Income Tax Act, 1961, to the parties could not be served and the assessee had failed to produce the parties from whom the purchase were claimed to have been made and also any evidence with regard to delivery of material and authentic address of any place or premises from where the material was purchased despite the fact that onus lies on the assessee to prove the purchase of material.*

(4) *The appellant prays that the order of CIT (A) on the above grounds be reversed and that of the Assessing officer be restored."*

3. Briefly stated the facts are that, the assessee is a builder and developer filed its return of income on 21.09.2011 declaring income of ₹.1,02,15,870/-. The assessment was completed u/s. 144 r.w.s. 145 of the Act on 27.03.2014 determining the income at ₹.9,89,94,780/-. While completing the assessment the Assessing Officer made addition of ₹.8,83,43,028/- towards unaccounted sale receipts on certain flats and addition of ₹.4,35,881/- u/s. 69C of the Act treating certain purchases as bogus purchases. The assessee constructed a housing project named "Sai Saakshat" in sector -6, Kharghar, Navi Mumbai having four wings with 15 floors each and the total number of flats are 232. In the course of Assessment Proceedings, the assessee was required to give name and particulars of the customers, Flat No, Area, agreement value, booking

dates, advances received on different dates etc., in respect of the sale of flats and the assessee submitted its reply on 30.01.2014. On the basis of the information furnished by the assessee, Assessing Officer prepared charts which are annexed as 1 & 2 to the Assessment Order. The graph drawn by Assessing Officer is extracted in Page No.2 of the Assessment Order and based on this chart the Assessing Officer was of the view that there is a huge variation in the sale prices of different flats. The Assessing Officer also took a printout from Website www.magicbricks.com showing the price trend in the Kharghar locality from the period October 2007 to December 2013 and this was provided to the assessee. In view of this the assessee was called upon to show cause as to why its Books of Accounts should not be rejected u/s. 145 of the Act as according to him book results are not reliable. The assessee submitted its reply stating that the alleged graph purporting to display sale price trends in Kharghar drawn from www.magicbricks.com should not be considered as the material and evidence for ascertaining the actual price received by the assessee as there is complete documentation supporting the price accounted for in the Books of Accounts by the assessee. It was contended that the said graph is based on unknown material gathered by unknown people of unknown qualification and credibility. It was also contended that there are no particulars of record, the actual data that has gone into in making of the said graph. Therefore, it was contended that

in the absence of the complete details of the material utilized for preparation of the said graph it is not possible to furnish cogent explanation. It was also submitted before the Assessing Officer and requested to obtain the complete information from the website and forward the same to the assessee to offer its comments. It was also contended that the said graph is cryptic display purporting to cover the big locality of Kharghar over a long span of time from October 2007 to December 2013 and the graph is webpage of a commercial website and the information disseminated on a commercial website is prepared and displayed on the basis of the vested interest of the website owners and paid clients. Therefore, it was contended the said graph takes a macro view and for that reason fails to provide any credible comparable instances for any specific property in Kharghar. It was further contended and denied that the aforesaid website information strengthens the argument that assessee has taken large portion of sale proceeds in cash. It was reiterated that assessee never accepted a single rupee in cash not accounted for in the Books of Accounts and therefore it was submitted to the Assessing Officer not to entertain such views merely on the basis of the unreliable information and merely on the basis of alleged price trends.

4. However, the Assessing Officer not convinced with the replies and based on the chart and graph which is prepared by him came to the

conclusion that there is a large variation in the prices between flats which were booked in the period from 10.12.2009 to 12.07.2010. The total flats booked in this period were 88 and price varies from ₹.2,627/- per sq.ft to ₹.5,100/- per sq.ft. and according to him since assessee did not give any reason for variation in the prices despite several opportunities instead gave only a general reply, he concluded that the price variation is highly illogical and without any basis and indicates that the portion of sale proceeds in unaccounted form i.e. in cash. Assessing Officer also observed that the price trend in Kharghar is reflected by a reputed website and similar price trend is shown by almost all websites and the price trend give upper range of value, average range of value and lower range of value of the flats in different quarters in last six years which have consistently increased in the past six years where the prices have consistently increased and the price variant in different localities of Kharghar at a particular point of time was almost 5 to 15% and therefore he was of the view that since assessee has only one project at one plot there should not be much price variation in a short span of time. Assessing Officer further observing that assessee has not charged any extra prices for each floor rise and instances where flats at higher floors are sold at considerable low prices than the flats at lower floors and within the same floor flats were sold with substantial different rates, the flats have similar direction and orientation were sold in different wings for different

prices, he finally concluded that assessee took large portion of sale proceeds in cash which remained unaccounted and therefore the Books of Accounts of assessee are not reliable and they does not give true and correct and complete picture of business affairs, he rejected the Books of Accounts and he estimated the unaccounted sale receipts at ₹.8,83,43,028/-.

5. On appeal, the Ld.CIT(A) considered the detailed submissions made by the assessee with various evidences furnished before him deleted the addition observing that the Assessing Officer failed to make proper enquiries and there were no enquires made from the purchasers of the flats and the exercise was done merely on a guess work and based on an unreliable information displayed in the website www.magicbricks.com.

6. Before us, Ld.DR submitted that the assessee has not given any proper explanation, replies in the course of the Assessment Proceedings and the assessee provided various information and explanation before the Ld.CIT(A) to justify the huge variation in sale prices and therefore since all these information was not available before the Assessing Officer the matter may be restored to the file Assessing Officer for denovo assessment.

7. Learned Counsel for the assessee submitted that whatever information is called for by the Assessing Officer is provided in the course of Assessment Proceedings. The Assessing Officer is mainly harping on the information in the website www.magicbricks.com to come to the conclusion that there is a huge variation in sale prices for which the assessee submitted that the information in the website is unreliable and the website itself displayed disclaimer stating that it is not responsible for the accuracy of data displayed on the website and the data is not on actual transactions and that it does not give any guarantee and the data should be verified independently. Therefore, the Learned Counsel for the assessee submitted that based on this information which is appearing in the website the Assessing Officer tried to compare the sale prices which were reflected in the website and that of the actual sale prices and came to the conclusion that there is a huge variation in sale prices which is factually not correct.

8. Ld. Counsel for the assessee further referring to Page No.67 to 72 of Paper Book submitted that detail explanation was given for each and every flat before the Ld.CIT(A) why there is a difference in sale prices as per the information submitted by the assessee on various flats. Ld. Counsel for the assessee referring to Page No.68 of the Paper Book submitted that additions were made by the Assessing Officer in respect of

the 59 flats out of 123 flats and out of 59 flats 49 flats have been sold by the assessee on shell basis only. It was submitted that these 49 flats cover the alleged difference of ₹.8,06,52,498/- out of total alleged difference of ₹.8,83,43,028/-. Learned Counsel for the assessee submitted that these flats were sold only with structure leaving considerable amount of remaining work like flooring, sanitary fittings, plastering, plumbing, Kitchen platform, air conditioning, wood work etc., to be carried out by the buyer himself. Therefore, Learned Counsel for the assessee submitted that since the flats were sold on Shell basis sale price is much less than the other flats which were sold with all these amenities.

9. Ld. Counsel for the assessee referring to Page No.116 of the Paper Book which is the copy of sample agreement for sale and particularly clause (X) at Page No.121, submitted that through this agreement the assessee sold "Shell Flat No. 304" admeasuring 953 sq.ft for ₹.60,17,200/- in "D" wing on 3rd floor on a shell basis. Learned Counsel for the assessee submitted that in clause (X) of the agreement it is clearly mentioned that the purchaser agreed to purchase the shell flat. Similarly Ld. Counsel for the assessee referring to Page No.176 of the Paper Book which is the copy of agreement for sale and referring to clause (X) at Page No.181, submitted that through this agreement assessee sold "flat No.504" in "D" wing on 5th floor admeasuring 953 sq.ft for ₹.78,03,000/-

with amenities and therefore clause (X) refers to purchase of “flat No.504’ which is with amenities. Therefore, Learned Counsel for the assessee submitted that the price for which the shell flats were sold is different and the prices for which the flats sold with amenities is different. The Learned Counsel for the assessee further referring to the Page No.206 of the Paper Book submitted that these are the list of amenities to be provided by the assessee and these amenities will not be provided in the flats sold on shell basis.

10. Ld. Counsel for the assessee further placed reliance on the decision of the Hon'ble Supreme Court in the case of K.P. Varghese v. ITO [131 ITR 597] and submitted that the burden lies on the Revenue to show that there is understatement of consideration. Learned Counsel for the assessee submitted that in this case the Revenue has not discharged its burden by proving that there is understatement of consideration by bringing in cogent materials and the comparable instances or the statements from the buyers to prove that the assessee has understated its sale value.

11. Ld. Counsel for the assessee further referring to Page No.87 of the Paper Book particularly the disclaimer shown by the website submitted that the website itself has stated that they cannot be held responsible for the accuracy of the data displayed on the site and the information has

been compiled from the asking price of the database of properties listed on the site for the period and since the data is not of the actual transaction, the website does not give any guarantee and it is stated that the same should be verified independently. Ld. Counsel for the assessee therefore submitted that the data fed into the website www.magicbricks.com is not at all reliable and they themselves stated that the data fed into are not actual transactions. He submits that if the data is not of actual transactions it is merely on an assumption/guess work and price trends which are reflected are not based on any reliable data. Therefore, the Learned Counsel for the assessee submitted that the data in the website cannot be relied on to come to the conclusion that there is a huge difference in the sale prices between the actual sale consideration received by the assessee when compared to the sale prices reported in the website.

12. We have heard the rival submissions, perused the orders of the authorities below. In this case the Assessing Officer noticed from the information submitted by the assessee, as well as from the information obtained by him from the website www.magicbricks.com that there is a huge variation in sale prices of the flats constructed by the assessee within the wing and also within the floor of the residential project constructed by assessee. The Assessing Officer after making his own analysis and

relying on the data furnished in the website concluded that there is a huge variation in sale prices. On a query by the Assessing Officer that there is a huge variation of sale prices of different flats, the assessee submitted that it had always tried to sell at the maximum prices that it can be able to get and its transactions are at arm's length and assessee has accounted what it had received from the buyers. Assessee requested the Assessing Officer to specify the transactions where there is a price variation at almost 100% within the gap of its sale, so that assessee could submit its reply. It was also contended that unless there is evidence and receiving cash other than the actual sale price, addition cannot be made on a guess work. It was also contended that the website www.magicbricks.com cannot be relied at all as the data shown in the website is not authentic and without any basis. The assessee also contended that the Books of Accounts of the assessee cannot be rejected under provisions of section 145(3) of the Act and should not be attracted to the assessee as it had disclosed correct sale prices and sale proceeds and not a paisa received by it over and above what is disclosed in its Books of Accounts. It was contended that transactions are at the market value prevailing at the material at that point of time, and on opinion basis, on mere guess work, recording market prices is not adequate material in the absence of evidence to the fact that the actually assessee received more than consideration that of record in its Books of Accounts. The submissions of the assessee were ignored by

the Assessing Officer and he proceeded to reject the Books of Accounts based on his own analysis and also relying on the data in the website www.magicbricks.com.

13. We find that the Assessing Officer did not ask for variation in sale prices with regard to any particular flat though the assessee requested that the explanation can be furnished once it is known in respect to a particular flat the information is to be submitted. The Assessing Officer made general statement that there is a variation in sale prices in sale of flats. The information relied on by the Assessing Officer in the website www.magicbricks.com is also cannot be an authentic information which can be used against the assessee as the disclaimer of the website makes very clear that the data in the website is not actual transaction based and the website does not give any guarantee and it should be verified independently. When the website itself makes it clear that the data fed is not on the basis of actual transactions and should be verified independently, we are unable to understand how the Assessing Officer placed reliance on this data. We are also at loss to understand why the Assessing Officer has not made any efforts to issue notices to the purchasers and find out from them whether any on-money was paid and what is the actual sale consideration paid in these transactions. No such enquiries have been made by the Assessing Officer. The conclusions

arrived at in the Assessment Order that there is huge difference in sale price is merely on a guess work. We also find from the information furnished before us and also the finding of the Ld.CIT(A) that many of the flats sold were in "Shell condition" and only few flats were sold after completion of the flat with amenities and in which case, it is bound to be a variation in sale prices. The Assessing Officer rejected the Books of Accounts of the assessee on a mere guess work and surmises without any cogent material to show that there is real variation in sale prices. We also find that the conclusions drawn by the Assessing Officer in the Assessment Order were never put to the assessee for its rebuttal.

14. In the case of K.P. Varghese v. ITO (supra) the Hon'ble Supreme Court held that it is a well settled rule of law that the onus of establishing that the conditions of taxability are fulfilled is always on the Revenue and the burden lies on the Revenue to show that there is an understatement of the consideration. It was also held that, to throw the burden of showing that there is no understatement of the consideration on the assessee would be to cast an almost impossible burden upon the assessee to establish the negative that the assessee did not receive any consideration beyond that declared by him.

15. In the case on hand the Revenue could not discharge its burden to show that there is an understatement of consideration by bringing

adequate material on record. The Assessing Officer did not make any enquiries with the purchasers of the flats owners regarding the actual sale prices of the flats. The Assessing Officer merely came to the conclusion that there is variation in sale prices only on mere guess work which is not permissible in law. In the circumstances in principle we uphold the order of the Ld.CIT(A) in holding that the informed data and analysis which the Assessing Officer had done was not adequate enough to come to the conclusion that the book results were not reliable and rejection of Books of Accounts was done casually and based on guess work. However, assessee did not submit any reply to the Assessing Officer that out of 59 flats 49 flats were sold on shell basis due to which there was difference in sale price when compared to the completed flats with amenities, for the limited purpose we restore the issue to Assessing Officer who shall verify the contentions of the assessee with reference to the agreements for sale of all the 59 flats and decide the issue accordingly. The assessee shall produce all the 59 sale agreements before Assessing Officer for verification. The Assessing Officer shall provide adequate opportunity of being heard to the assessee. The grounds raised by the Revenue on this issue are partly allowed for statistical purposes.

16. Coming to the addition made u/s. 69C of the Act in respect of bogus purchases. We observe that the Assessing Officer issued notice

u/s.133(6) of the Act to the seller Linux Sales Agency Pvt Ltd. and the notice returned unserved. The notice server informed that the party does not exist and the inspector deputed also reported that the party is not residing at the given address. Assessing Officer also observed that the name of the seller from whom the assessee purchased the goods also appeared in the list of parties highlighted by the Sales Tax Department that they are providing bogus bills without any actual delivery. Thus, Assessing Officer treated the purchases of ₹.4,35,881/- made by the assessee as bogus purchases and brought to tax.

17. On appeal the Ld.CIT(A) deleted the addition observing that as per the assessment records and the order sheet noting notice u/s. 133(6) was issued on 05.03.2014, inspector gave a report on 06.03.2014. However, in the notice and questioner issued to the assessee on 13.03.2014 the issue of genuineness of the purchases was not brought to the notice of the assessee. Therefore, since the addition was made without giving any opportunity to the assessee violating the principles of natural justice, Ld.CIT(A) deleted the addition.

18. Ld.DR vehemently supported the orders of the Assessing Officer and the Ld. Counsel for the assessee relied on the order of the Ld.CIT(A).

19. On hearing both the parties and pursuing the order of the Assessing Officer as well as the Ld.CIT(A), we do not see any infirmity in deleting the addition made u/s. 69C of the Act as the genuineness of the purchases was neither put to the assessee nor called for any explanation which is in violation of principles of natural justice. The findings of the Ld.CIT(A) have not been rebutted by the Revenue with evidences. Hence, we sustain the order of the Ld.CIT(A) on this issue. The ground raised by the Revenue on this issue is dismissed.

20. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on the 05th March, 2018.

Sd/-
(G.S. PANNU)
ACCOUNTANT MEMBER

Mumbai / Dated 05/03/2018
Giridhar, SPS

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai