

**आयकर अपीलीय अधिकरण "A" न्यायपीठ मुंबई में।**

**IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI  
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER  
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.1038/Mum/2016

(निर्धारण वर्ष / Assessment Year : 2011-12)

Ashish Waman Gole Gole Wadi, MIDC Road, Kulgaon (East)- 421503, District Thane	<b>बनाम/</b>  v.	DCIT CIR 2 2 <sup>nd</sup> Floor, Mohan Plaza, Khadakpada Wayale Nagar, Kalyan (W)-421301
स्थायी लेखा सं./ PAN : ADOPG4721F		
(अपीलार्थी / <b>Appellant</b> )	..	(प्रत्यर्थी / <b>Respondent</b> )
Assessee by:		Shri. Devdata Mainkar
Revenue by :		Shri. Rajesh Kumar Yadav

सुनवाई की तारीख /**Date of Hearing** : 29.05.2018

घोषणा की तारीख /**Date of Pronouncement** : 01.06.2018

आदेश / ORDER

**PER RAMIT KOCHAR, Accountant Member**

This appeal, filed by the assessee, being ITA No. 1038/Mum/2016, is directed against appellate order dated 17.11.2015 passed by learned Commissioner of Income Tax (Appeals)-3, Thane (hereinafter called "the CIT(A)"), for assessment year 2011-12, the appellate proceedings had arisen before learned CIT(A) from assessment order dated 25-03-2014 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income-tax Act, 1961 (hereinafter called "the Act") for AY 2011-12.

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

*"Being aggrieved by the order dated 17.11.2015 passed by the learned Commissioner of Income Tax (Appeals)-3, Thane ["CIT(A)\*"] u/s 250 of the Income-tax Act,1961 ("Act"), your appellant prefers this appeal, among others, on the following grounds of appeal, each of which is without prejudice to, and independent of, the other:*

1. *Addition u/s.50C: Rs.5,03,000/-*

1.1 *On the facts and in the circumstances of the case, and also in law, the Ld. CIT(A) erred in confirming the addition of Rs.5,03,000/- made by the Ld. AO u/s.50C of the Act in assessing the capital gains on sale of land at Shirgaon, Taluka Ambernath, Dist. Thane.*

1.2 *The Ld. CIT(A) failed to appreciate, and ought to have held, that the Ld. AO could not have made addition u/s.50C of the Act without first making a reference to the Valuation Officer, whether or not a specific request for the same was made by the appellant during the assessment proceedings.*

*In view of above, the appellant prays that the addition of Rs.5,03,000/- be deleted.*

2. *Addition of alleged bogus purchases: Rs.19,92,426/-*

2.1 *On the facts and in the circumstances of the case, and also in law, the Ld. CIT(A) erred in confirming the addition of Rs. 19,92,426/- made by the Ld. AO on account of alleged bogus purchases made from five parties.*

2.2 *The Ld. CIT(A) erred in not appreciating the documentary evidence placed on record, and thereby drawing inference based on mere suspicion, surmises and conjectures.*

2.3 *The Ld. CIT(A) also erred in not appreciating that the addition is patently illegal having been made in violation of principles of natural justice because the evidence relied upon by the Ld. AO was not given to the appellant for rebuttal, nor any opportunity was provided to cross examine the parties whose statements were relied upon by the Ld. AO while holding the purchases as bogus.*

*In view of above, the appellant prays that the addition of Rs. 19,92,426/- be deleted.*

*Your appellant craves leave to alter, modify, amend or delete any of the above grounds of appeal, or to add one or more new ground(s), as may be necessary.”*

3. The brief facts are that the assessee is engaged in business of Builders & Developers . During the previous year relevant to impugned assessment year, the assessee had sold plot of land at Serial no. 8 Shirgaon for consideration of Rs. 4,00,000/- vide sale deed dated 20.08.2010 while the market value adopted by office of Sub-Registrar, Ulhasnagar-2 for the purposes of stamp duty was Rs. 9,03,000/- . The assessee adopted actual value of consideration of Rs. 4,00,000/- for computing long term capital gains while the AO adopted Rs. 9,03,000/- as full value of consideration of afore-said plot of land for the purpose of computing long term capital gains

u/s 48 keeping in view provisions and mandate of section 50C, vide assessment order dated 25-03-2014 passed by the AO u/s 143(3). The AO also observed that when confronted with the provisions of Section 50C, the assessee agreed for enhancement of long term capital gains by an amount of Rs. 5,03,000/-.

4. Aggrieved by assessment order dated 25-03-2014 passed by the AO u/s 143(3), the assessee filed an appeal before learned CIT(A). One of the dispute before learned CIT(A) was that the assessee surrendered this amount before the AO which is emanating from the assessment order to which the assessee denied. The learned CIT(A) called for remand report from the AO and this issue was settled in favour of assessee as it emerged from remand report submitted by the AO that the assessee never surrendered this amount of Rs. 5,03,000/- in the course of assessment proceedings before the AO. However, the assessee could not satisfy learned CIT(A) on merits and learned CIT(A) accordingly adjudicated the issue against the assessee. The assessee pleaded before learned CIT(A) that AO should have referred the matter to Departmental Valuation Officer(DVO) and sought the valuation done from DVO but learned CIT(A) held that no purpose will be served by sending the matter to DVO for valuation as the assessee never raised this issue in assessment proceedings and by referring the same to DVO at appellate stage would only delay the proceedings. The assessee cited before learned CIT(A) decision of Hon'ble High Court of Calcutta in the case of Sunil Kumar Agarwal v. CIT reported in (2014) 47 taxmann.com 158(Cal.) but the matter was adjudicated against assessee by learned CIT(A) vide appellate order dated 17-11-2015 passed by learned CIT(A).

5. Now the assessee has come in an appeal before tribunal. It is contended by ld. Counsel for the assessee that the actual consideration as per sale deed of the plot of land sold was of Rs. 4,00,000/- while the value for payment of stamp duty adopted by Sub-Registrar, Ulhasnagar was Rs. 9,03,000/- and keeping in view provision of section 50C, the AO adopted value of Rs. 9,03,000/- as full value of consideration u/s. 48. It is fairly submitted by learned counsel for the assessee that the assessee never sought before AO to refer the matter for valuation to DVO, but it is contended that AO should have referred the matter for valuation of the plot

sold to DVO in view of principles of natural justice . It was submitted that learned CIT(A) was duly requested to refer the matter to DVO for valuation of the said plot of land but the request was turned down by learned CIT(A). The Ld. Counsel submitted that in view of ratio of decision of Hon'ble Calcutta High Court in case of Sunil Kumar Agarwal (supra) , the matter should have been referred by authorities below to DVO for valuation to compute full value of consideration for the purposes of Section 48. The Ld. DR on the other hand relied upon the appellate order of learned CIT(A) and submitted that in view of provision of section 50C assessee should have asked for the reference to DVO before the AO but the assessee never requested AO to refer the matter to DVO for valuation.

6. We have considered rival contentions and have perused the material on record . We have observed that assessee had sold its plot of land at Serial no. 8 , Shirgaon for consideration of Rs. 4,00,000/- against which stamp duty valuation was Rs. 9,03,000/- as adopted by Sub-Registrar, Ulhasnagar. The AO adopted valuation of Rs. 9,03,000/- as full value of consideration for the purposes of Section 48 for computing long term capital gains keeping in view provision of section 50C. The assessee did not ask for the reference to DVO before the AO for undertaking valuation of the said plot of land for the purposes of computing full value of the consideration on sale of said plot of land u/s 48. However, before CIT(A) the assessee sought reference to DVO for valuation and has also referred to the decision of Hon'ble Calcutta High Court in the case of Sh. Sunil Kumar Agarwal (supra) but to no avail . The Ld. CIT(A) did not refer the matter to DVO citing two reasons:- (a) It will delay the proceedings, (b) assessee has not sought the reference to DVO for valuation before the AO during assessment proceedings. In our considered view , power of learned CIT(A) is co-terminus with the power of the AO . The learned CIT(A) in view of principles of natural justice and in all fairness of the matter to render substantial justice should have referred the matter to DVO for determining full value of consideration of the plot of land sold for computing long term capital gains u/s 48. Hon'ble Calcutta High Court vide its decision in the case of Sh. Sunil Kumar Agarwal (supra) has clearly laid down that it is AO's duty to have given an option to assessee to have the valuation undertaken by DVO as is contemplated u/s 50C . The

aforesaid decision of the Hon'ble Calcutta High Court is reproduced here under:-

*“6. We have considered the rival submissions advanced by the learned advocates appearing for the parties. The submission of Ms. Ghulghutia that the requirement of clauses a) and (b) of sub-Section (2) of Section 50C has not been met by the assessee, can hardly be accepted. The requirement of clause (b) of sub-Section (2) of Section 50C was evidently met, The only question is whether the requirement of clause (a) of sub-Section (2) of Section 50C was met by the assessee.*

*7. We have already set out hereinabove the recital appearing in the Deeds of Conveyance upon which the assessee was relying. Presumably, the case of the assessee was that price offered by the buyer was the highest prevailing price in the market. If this is his case then it is difficult to accept the proposition that the assessee had accepted that the price fixed by the District Sub Registrar was the fair market value of the property. No such inference can be made as against the assessee because he had nothing to do in the matter. Stamp duty was payable by the purchaser. It was for the purchaser to either accept it or dispute it. The assessee could not, on the basis of the price fixed by the Sub-Registrar, have claimed anything more than the agreed consideration of a sum of Rs.10 lakhs which, according to the assessee was the highest prevailing market price. It would follow automatically that his case was that the fair market value of the property could not be Rs.35 lakhs as assessed by the District Sub Registrar. **In a case of this nature the assessing officer should, in fairness, have given an option to the assessee to have the valuation made by the departmental valuation officer contemplated under Section 50C. As a matter of course, in all such cases the assessing officer should give an option to the assessee to have the valuation made by the departmental valuation officer.***

*8. For the aforesaid reasons, we are of the opinion that the valuation by the departmental valuation officer contemplated under Section 50C, is required to avoid miscarriage of justice. The legislature did not intend that the capital gain should be fixed merely on the basis of the valuation to be made by the District Sub Registrar for the purpose of stamp duty. **The legislature has taken care to provide adequate machinery to give a fair treatment to the citizen/taxpayer. There is no reason why the machinery provided by the legislature should not be used and the benefit thereof should be refused. Even in a case where no such prayer is made by the learned advocate representing the assessee, who may not have been properly instructed in law, the assessing officer, discharging a quasi judicial function, has the bounden duty to act fairly and to give a fair treatment by giving him an option to follow the course provided by law.”***

The Hon'ble Mumbai tribunal in the case of Dilip V Mohindra v ITO in ITA no. 5846/Mum/2014 vide order dated 14.12.2016 had followed the decision

of Hon'ble High Court of Calcutta in the case of Sh. Sunil Kumar Agarwal (supra) and set aside and restored the matter to file of the AO for referring to DVO for valuation and fresh adjudication thereafter, the said decision of tribunal is re-produced here under:-

*“ 7. We have carefully considered the rival contentions and perused the material placed before us including the orders of authorities below and case law relied upon by the assessee. We find that the assessee has sold plot of land at Bandra in which he owned 1/3 share for a total consideration of Rs.3,00,00,000/- and accordingly calculated capital gain and his share in the long term capital gain worked out to Rs.84,01,050/-. The assessee after claiming deduction u/s 54 of the Act to the tune of Rs.,82,87,600/-, offered the balance long term capital gains of Rs.1,33,450/- to tax. The AO upon finding that the actual consideration received was much lower than the value of stamp duty valuation substituted the same as FMV u/s 50C for the purpose of calculating the capital gains and accordingly framed the assessment. We further find from the order of the ld. CIT(A) that the assessee raked up the issue stating that he never agreed with the value of plot as determined by the stamp valuation authority in place of actual sale consideration as stated by the AO and even filed sworn affidavit before the ld. CIT(A) to this effect. Under these facts and circumstances of the case, as narrated hereinabove, we find that authorities below have erred in not referring the matter to the DVO specially when the assessee had claimed the FMV was much below the valuation as per the stamp valuation authority. The case of the assessee is also supported by a decision in which identical issue has been decided by the Hon'ble Calcutta High Court in the case of Sunil Kumar Agarwal (supra), wherein it has been held that in order to ascertain the value of consideration in the case of transfer of capital asset, I value of consideration of capital gain is to be taken on the basis of valuation adopted by the stamp valuation authorities under section 50C(1) of the Act or capital asset is to be referred to the valuation officer for determination of FMV of the property for assessing the capital gain. In terms of decision of Hon'ble Calcutta High Court in the case of Sunil Kumar Agarwal, the Hon'ble High Court has held as under :*

*"We have considered the rival submissions advanced by the learned advocates appearing for the parties. The submission of Ms. Ghutghutia that the requirement of clauses a) and (b) of sub-Section (2) of Section 50C has not been met by the assessee can hardly be accepted. The requirement of clause (b) of sub-Section (2) of Section 50C was evidently met. The only question is whether the requirement of clause (a) of sub-Section (2) of Section 50C was met by the assessee.*

*We have already set out hereinabove the recital appearing in the Deeds of Conveyance upon which the assessee was relying. Presumably, the case of the assessee was that price offered by the buyer was the highest prevailing price in the market. If this is his case then it is difficult to accept the proposition that the assessee had accepted that the price fixed by the District Sub*

*Registrar was the fair market value of the property. No such inference can be made as against the assessee because he had nothing to do in the matter. Stamp duty was payable by the purchaser. It was for the purchaser to either accept it or dispute it. The assessee could not, on the basis of the price fixed by the Sub-Registrar, have claimed anything more than the agreed consideration of a sum of Rs.10 lakhs which, according to the assessee, was the highest prevailing market price. It would follow automatically that his case was that the fair market value of the property could not be Rs.35 lakhs as assessed by the District Sub Registrar. In a case of this nature the assessing officer should, in fairness, have given an option to the assessee to have the valuation made by the departmental valuation officer contemplated under Section 50C. As a matter of course, in all such cases the assessing officer should give an option to the assessee to have the valuation made by the departmental valuation officer.*

*For the aforesaid reasons, we are of the opinion that the valuation by the departmental valuation officer, contemplated under Section 50C, is required to avoid miscarriage of justice. The legislature did not intend that the capital gain should be fixed merely on the basis of the valuation to be made by the District Sub Registrar for the purpose of stamp duty. The legislature has taken care to provide adequate machinery to give a fair treatment to the citizen/taxpayer. There is no reason why the machinery provided by the legislature should not be used and the benefit thereof should be refused. Even in a case where no such prayer is made by the learned advocate representing the assessee, who may not have been properly instructed in law, the assessing officer, discharging a quasi judicial function, has the bounden duty to act fairly and to give a fair treatment by giving him an option to follow the course provided by law.”*

*8. From the above facts and ratio laid down by Hon'ble High Court in the case of Sunil Kumar Agarwal, supra, if the assessee disputes the value as per stamp valuation authority to be substituted in place of sales consideration for the purpose of calculation of capital gain, then the AO should refer the capital asset to valuation Officer to determine the full value of the consideration received or accruing as a result of transfer of capital asset u/s 50C(2) of the Act. In the instant case before us the assessee is disputing the substitution of stamp valuation as per stamp valuation authority as FMV for the purpose of calculation of capital gain and the matter of determining the FMV should be referred to the DVO. Hence, in the present case, we are inclined to set aside the order of the CIT(A) and restore the issue back to the file of the AO for fresh adjudication of the issue of long term capital gain arising out of sale of plot after referring the matter to DVO and hearing the assessee by affording a fair and reasonable opportunity. The appeal of the assessee is allowed for statistical purposes.*

*9. In the result, appeal of assessee is allowed for statistical purpose.”*

Thus keeping in view ratio of above decisions and in all fairness to both the rival parties in order to render substantial justice , we set aside the order of learned CIT(A) and restore the matter back to the file of the AO for fresh adjudication of the entire issue on merits after referring the matter to DVO for valuation. The AO/DVO shall give proper and adequate opportunity of being heard to the assessee in accordance of principles of natural justice in accordance with law. The AO/DVO shall admit all necessary evidence submitted by the assessee in its defence which shall then be adjudicated on merits in accordance with law. We order accordingly.

7. The second issue is with regards to purchases made by the assessee from the following five parties which were treated as bogus purchases by authorities below and additions to the tune of 100% were made, detailed as hereunder:-

S.No.	Name of the Party	Claimed Purchase Amount
1	Ami Traders	Rs. 3, 39,470/-
2	Impex Sales Corporation	Rs. 5, 01, 132/-
3	Shivraj Traders	Rs. 3, 37,500/-
4	Riddhi Siddhi Enterprises	Rs. 5,00,000/-
5	Nilofar Trade Pvt. Ltd.	Rs.3, 14,324/-
	Total	Rs. 19, 92,426/-

The above purchases were held to be bogus as the information was received by Revenue from Maharashtra VAT authorities that these firms/concerns are hawala dealers and were issuing bogus bills without supplying any material. The assessee was asked to submit the details such as purchases bills , confirmations from these parties , transport receipts, stock register, utilisation/consumption details . The assessee only submitted purchase bills and submitted that the payments were made by cheque. The copies of ledger accounts of these parties as is appearing in the books of accounts of the assessee were also submitted by assessee before the AO but however, stock

register, transport receipts, evidences to prove movement of material, utilisation/ consumption details could not be submitted . Notices u/s. 133(6) were issued by the AO which returned back in 4 out of 5 cases as parties were not existing on the respective addresses. Inspector was deputed by the AO to make field enquires and it was found that these parties are not existing or they are not engaged in the business of supplying material. The affidavit of these parties which were submitted by these parties before Sales Tax Department were given by the AO to the assessee as being annexed to assessment order . An additions were made by AO to the tune of Rs. 19,92,426/- in the hands of the assessee being 100% of the purchases which were held to be bogus purchases. The assessee undisputedly surrendered this amount before the authorities below and learned CIT(A) also confirmed the additions.

8. The assessee has now come in an appeal before the tribunal . The learned counsel for the assessee fairly submitted that the assessee surrendered this amount before the authorities below and assessee does not have any record to prove movement of goods such as transport receipt , octroi receipts etc are not available nor consumption/utilisation of goods/ material for the purposes of its business could be proved as no stock records are maintained. It is submitted that no stock register was maintained by the assessee . Only invoices are available along with the ledger account and payments were made by cheque. The Ld. DR strongly contended that the appellate order of learned CIT(A) be confirmed.

9. We have considered rival contentions and perused the material on record . We have observed that the assessee is engaged in business of Builders & Developers . The assessee allegedly made purchases from the following five parties to the tune of Rs. 19,92,426/- as detailed hereunder:-

S.No.	Name of the Party	Claimed Purchase Amount
1	Ami Traders	Rs. 3, 39,470/-
2	Impex Sales Corporation	Rs. 5, 01, 132/-
3	Shivraj Traders	Rs. 3, 37,500/-

4	Riddhi Siddhi Enterprises	Rs. 5,00,000/-
5	Nilofar Trade Pvt. Ltd.	Rs.3, 14,324/-
T h	Total	Rs. 19, 92,426/-

Revenue received information from Maharashtra VAT department that these five parties are hawala dealers engaged in providing only accommodation bills without supplying any material . Affidavits has been given by these parties before the Sales Tax Authorities that there are indulging in bogus transactions of sales / purchases of material wherein only bogus bills are issued without supplying any material physically . The AO made enquiries by issuing notices u/s. 133(6) which returned un-served. Field enquiries were made by Inspector deputed by AO , who reported that these are bogus parties and are not existing on the given addresses and they are not doing any genuine business of sales and purchases of material. The assessee was asked by AO to submit all details such as transport receipts, challans , invoices, bank statements, consumption/utilisation records of material for business purposes, stock register etc. to prove genuineness of the purchases and its consumption/utilisation for business purposes. The assessee only gave invoices and ledger accounts of these parties. The assessee contended that payments were made through cheques . the assessee did not produced stock records, utilisation/consumption records to prove consumption of material for business purposes nor transport receipts, stock register, challans etc were produced to evidence movement of material. The assessee surrendered this amount before the authorities below . Before us also nothing concrete is brought on record to justify that these purchases are genuine purchases and the material was consumed/utilised for business purposes. We have gone through the ledger account of the parties produced before us and we have observed that unusually long credits were given by these parties and payments vis-a-vis purchases do not reveal normal purchase transactions happening in normal course of business . The onus was on the assessee to have proved genuineness of purchases and consumption/utilisation of material for business purposes. The assessee could not discharge primary burden and the amount was also surrendered during assessment proceedings. Under these circumstances and keeping in view factual matrix of the case we are not inclined to interfere with the order

of learned CIT(A) which we confirm. The assessee fails on this ground. We order accordingly.

10. The appeal of the assessee is partly allowed for statistical purposes as indicated above.

Order pronounced in the open court on 01.06.2018

आदेश की घोषणा खुले न्यायालय में दिनांक: 01.06.2018 को की गई ।

Sd/-  
(SAKTIJIT DEY)  
JUDICIAL MEMBER

Sd/-  
(RAMIT KOCHAR)  
ACCOUNTANT MEMBER

Mumbai, dated: 01.6.2018

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

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BY ORDER  
DY/ASSTT. REGISTRAR  
ITAT, MUMBAI