**In the Income Tax Appellate Tribunal**
**Delhi Bench : B : New Delhi**

**Before Shri G.D. Agrawal, Vice President**
**And**
**Shri K. Narasimha Chary, Judicial Member**

ITA No.4318/Del/2017
Assessment Year: 2012-2013

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| Deepa Kapoor,<br>5, Arjun Marg, DLF<br>Phase-1,<br>Gurgaon (Haryana).<br>PAN: ABGPK6496F | Vs. | ACIT,<br>Circle-50(1),<br>New Delhi. |

ITA No.6035/Del/2018
Assessment Year: 2012-2013

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| ACIT,<br>Circle-50(1),<br>New Delhi. | Vs. | Deepa Kapoor,<br>5, Arjun Marg, DLF<br>Phase-1,<br>Gurgaon (Haryana).<br>PAN: ABGPK6496F |
| (Appellant) | | (Respondent) |

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| Assessee by : | Shri Raj Kumar Gupta, CA<br>Shri P. Roy Chaudhary, Advocate |
| Revenue by : | Ms Ashima Neb, Sr.DR |

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| Date of Hearing | : | 31.10.2018 |
| Date of Pronouncement | : | 13.11.2018 |

ORDER

**PER BENCH:**

Challenging the order dated 22.05.2017 passed in A.No.198/2016-17 by the CIT(A)-17, New Delhi, both the assessee and the Revenue preferred ITA Nos.4318/Del/2017 and 6035/Del/2018, respectively.

2. Briefly stated, the relevant facts are that the assessee is an individual deriving her income from 'Salary', 'Capital gain' and 'Income from other sources.' She was the co-owners of tower-1, flat No. 601, Vipul Belmont, golf course road, sector-53, Gurugram along with her husband. Assessee claims to have entered into an agreement of sale, along with her husband, on 10.07.2011with one M/s Pranav Sports Academy Pvt. Ltd., in respect of the said property for a sum of Rs.4.22 crore and received Rs.2.5 crore as advance. She says that M/s Pranav Sports Academy Pvt. Ltd. failed to pay the balance sale consideration, resulting in the assessee and her husband forfeiting the advance amount and appropriating Rs.1.25 crore each. Subsequently under sale deed dated 21st of March 2012, the property was sold to Mr Anuj Ahuja, Rita Ahuja and Vinod Ahuja (for short "Ahujas") for a sale consideration of Rs. 1.72 Crs.

3. Assessee filed her return of income on 30.03.2013, for the assessment year 2012-13, declaring an income of Rs.38,71,122/-. She had declared her share of total amount of sale consideration received as Rs. 4.22 crore which includes Rs. 2.5 crores forfeited advance sale consideration received from M/s Pranav Sports Academy Pvt. Ltd. and the sale consideration of Rs. 1.72 crores received from Ahujas. By way of order dated 18.12.2014 u/s 143(3) of the Act, the ld. Assessing Officer accepted the same.

4. Subsequently, the Pr. Commissioner of Income-tax (PCIT), vide order dated 23.06.2015, observed, *inter alia*, that there was no

verification on the part of the ld. A.O. as to the genuineness, credit worthiness and identity of M/s Pranav Sports Academy Pvt. Ltd. whose money was said to have been forfeited by the assessee and her huband. Further, the ld. PCIT observed that though the ld. A.O. sought the documentary evidence for Rs.2.5 crore forfeited by the assessee, but, the documents were not submitted and the source of Rs.2.5 crore remained unexplained. The ld. PCIT directed the Assessing Officer to take action accordingly.

5. Pursuant to the directions of the PCIT in the order passed u/s 263 of the Act, the ld. A.O. conducted inquiry by issuing notice u/s 133 (6) of the Act to M/s Pranav Sports Academy. Said company, by way of reply, confirmed that the payment of 2.5 crores was made as an advance jointly to the assessee and her husband to purchase the property, but the same was forfeited by the assessee and her husband. However, in order to have the confirmation of the same, Ld. assessing officer deputed the income tax inspector to make an enquiry and submit report. The Inspector, after verifying the details, submitted a report stating that in the given address of the company, there is an employee by name Sunil, sitting on behalf of the company, entrusted with the work of receiving letters only regarding company and there was no signboard of M/s Pranav Sports Academy. Basing on that the Ld. Assessing officer opined that M/s Pranav Sports is a bogus company. Thereafter the ld. A.O. concluded the assessment proceedings u/s 263/143(3) of the Act by order dated 19.05.2016 by adding the entire sum of Rs.1.25 crore of the advance money that had fallen to the share of the assessee u/s 68 of the Act treating it as unexplained money of the assessee herself.

6. When the assessee preferred appeal before the ld.CIT(A), ld.CIT(A), by way of the impugned order, returned a finding that out of the sale consideration of Rs.4.22 crore, a sum of Rs.2.5 crore was nothing, but, the unaccounted income of the assessee along with her husband, as such, the ld. A.O. had rightly made the impugned addition u/s 68 of the Act being the 50% of the so-called advance amount that was forfeited. Hence, the assessee is before us in this appeal No.4318/Del/2017 stating that the ld. A.O. violated the principles of natural justice in relying upon the evidence collected behind the back of the assessee either from the Income-tax Inspector or by way of confirmation from M/s Pranav Sports Academy and without confronting such evidence to the assessee.

7. It has come on record that when the matter was argued in the Stay Petition, the assessee contended that section 68 had no application to the facts of the case inasmuch as the sustained addition does not emanate from the books of account of the assessee. Revenue, taking note of the same, had preferred cross appeal in ITA No.6035/Del/2018 contending that the addition of Rs. 1.25 Cr made u/s 68 of the Act cannot be challenged merely on technical ground that it shouldnot have been made u/s 69 of the Act, instead.

8. Contention of the ld. AR before us is four-fold. Firstly, he contends that there is no doubt as to the quantum of sale consideration being Rs.4.22 crore as has been found by the authorities below and, since the assessee has offered the entire Rs.4.22 crore to tax, there is no justification to make any addition in the hands of the assessee.

9. Secondly, Section 68 of the Act has no application to the facts of the case because the income of the assessee is from salary and house property, and there is no income from business for which any books of account are maintained, therefore, no question of Rs.1.25 crore being found credited in any books of account of the assessee. It is further contended that the bank passbook in relation to the account of the assessee is not maintained by the assessee and, therefore, section 68 cannot be applied to the entries in the bank passbook as has been held in *Mayawati vs. DCIT 113 TTJ (Del.) 178, CIT vs. Bhaichand H. Gandhi 141 ITR 67 (Bom.), ITO vs. Kamal Kumar Mishra 33 taxmann.com 610 (Lucknow-Trib.) and Roopak Jain vs. ITO (Del ITAT, ITA No.5592/D/2015, dated 30.08.2016).*

10. Third limb of the argument of the ld. AR is that the only provision available in the Income-tax Act to deal with the advances received for sale of property is section 51 which says that where any capital asset was, on any previous occasion, the subject of negotiations for its transfer, any advance or other money received and retained by the assessee in respect of such negotiations shall be deducted from the cost for which the asset was acquired. Inasmuch as the assessee had accounted for the advance amount forfeited, there is sufficient compliance with section 51 of the Act and, therefore, no addition could have been made by the ld. A.O u/s 68 of the Act. On this premise, it is the argument of the ld. AR that when section 68 has no application to the facts of the case, the question of proof of the identity, credit worthiness or the genuineness of the transaction does not arise.

11. Lastly, it is contended by the ld. AR that the forfeited amount was received from M/s Pranav Sports Academy. Pursuant to the directions of the ld. PCIT u/s 263 of the Act, the ld. Assessing Officer during the conduct of inquiry issued notice u/s 133 (6) of the Act to M/s Pranav Sports Academy, to which said entity replied confirming that the payment of Rs.2.5 crore was made as an advance jointly to the assessee and her husband in respect of the proposed purchase of property, but, the same was forfeited by the assessee and her husband. In spite of this confirmation, the ld. A.O. proceeded to depute the Income-tax Inspector for verification and basing on the report of Income-tax Inspector, without confronting the same to the assessee, the Assessing Officer reached a conclusion that M/s Pranav Sports Academy is a bogus company. On this aspect, the ld. AR submits that whatever the evidence that the ld. A.O. had at his command to reach such a conclusion, in all fairness, the ld. A.O. should have supplied the copies of the material to the assessee by affording an opportunity of being heard to the assessee on such aspects and, then, should have decided the issue. For violation of this principle of natural justice, the ld. AR contends that the assessment order is bad in law.

12. In respect of the comment of the authorities below that M/s Pranav Sports Academy had only a meager income and with such income how and by such company allowed the assessee to forfeit Rs. 2.5 crores, ld. AR firstly contended that the financials of M/s Pranav Sports Academy were not supplied to them and such details are collected behind the back of the assessee and they cannot be used against the assessee without confronting the same to the assessee.

Secondly he contends that the proviso to section 68 has been introduced by the Finance Act, 2012 w.e.f. 01.04.2013 and it has been held so by the Hon'ble Bombay High Court in CIT vs. Gagandeep Infrastructure (P) Ltd., 394 ITR 680 (Bom.) and it has no application to the assessment year under consideration. On this premise, the ld. AR submitted that since M/s Pranav Sports Academy is also an assessee and has been filing returns of income as is evident from page Nos.21 and 22 of the paper book, the identity of such an entity is beyond reasonable doubt and, in such a situation, it is for the A.O. to take steps against the said M/s Pranav Sports Academy as to the taxability of Rs.2.5 crore said to have been paid to the assessee and her husband and without doing so, the ld. A.O. misguided himself in reaching the conclusion that the assessee brought his unaccounted money through this colourable device.

13. *Per contra*, it is the argument of the ld. DR that a mere wrong reference to a provision of law does not take away the jurisdiction of the ld. A.O. to make an addition of the amounts which were found to be the unaccounted money of the assessee and brought back to his accounts by devising a mechanism. Ld. DR submitted that M/s Pranav Sports Academy is only a paper entity as is established by the report of the Income-tax Inspector. As a matter of fact, section 69 of the Act is applicable to the facts of this case instead of section 68. However, it is always open for the appellate authorities not to take cognizance of such mistakes and to sustain the addition.

14. We have gone through the record. At the outset a reading of section 68 of the Act shows that such section is applicable where any

sum is found credited in the books of the assessee maintained for the previous year and, in this case, no such question of maintaining books by the assessee arises inasmuch as the source of income of the assessee is only salary and income from house property. At the same time, section 69 also has no application to the facts of the case inasmuch as section 69 is applicable where in the previous year, the assessee made investments which are not recorded in the books of account maintained for any source of income. This section also fails for want of ingredients mentioned therein for applicability thereof. We find strength in the argument of the ld. AR that section 51 alone is applicable to the receipts of advance against the sale of property and retained by the assessee. Section 51 is complied with by the assessee.

15. However, from the contentions of the Revenue, it is very clear that in so far as the value of the property is concerned, it is Rs.4.22 crore and there is no dispute about it. The entire dispute revolves around Rs.2.5 crore that is said to have been forfeited by the assessee and her husband which was paid by M/s Pranav Sports Academy towards the advance under agreement of sale dated 10.07.2011. There is no dispute in respect of the quantum of total sale consideration, or in respect of the sum that was received by the assessee and her husband in the above stated transaction. Assessee declared the entire sale consideration that was received from Mr. Anuj Ahuja and others as well as the forfeited amount of Rs. 2.5 crores in the computation of her income. Whereas the sale consideration that was agreed between the assessee and M/s Pranav Sports was Rs. 4.22 crores, on the 2nd occasion the assessee sold the property to Ahujas only Rs.1.72 crore

on 21.03.2012. Unless and until the forfeited amount of Rs. 2.5 crores was taken into consideration at the time of sale and 21/03/2012, it was not possible for the assessee to sell the property at Rs. 1.72 cross thereby making the sum total of the sale consideration and the forfeited amount exactly at Rs. 4.22 crores which matches the value of the property as decided by the parties in the 1st instance. Otherwise, is not possible to conclude a sale price at an amount which was almost ½ of the advance amount that was forfeited. There is no wonder that this anomalous situation caused the authorities to raise their eyebrows.

16. The authorities below doubted the theory of forfeiture of advance amount on two grounds. One is that as was found from the Profit & Loss Account of M/s. Pranav Sports Academy, their income was only Rs.13,448/- during the year which improbablises their deal with the assessee to purchase their property at Rs.4.22 crore. Secondly, the Income-tax Inspector who was deputed to make inquiry, submitted a report stating that the first floor of the premises was occupied by M/s AFMG that is an academy for foreign medical graduation and at the given address of M/s Pranav Sports Academy, there was one employee by name Sunil sitting on behalf of M/s Pranav Sports Academy entrusted with the work of receiving letters only, and also that there were no sign board of M/s Pranav Sports Academy. Basing on these two aspects the authorities concluded that M/s Pranav Sports Academy was a bogus company.

17. It is explained before us that the circle rate of the property is even less than 1.72 crore, as such, the assessee is justified in selling the same at Rs.1.72 crore to Ahujas, more particularly, in view of the

fact that the assessee and her husband had Rs.2.5 crores in their hands having forfeited this from M/s Pranav Sports Academy. It is further submitted that neither the financials of M/s Pranav Sports Academy nor the report of the Income-tax Inspector was furnished to the assessee nor the explanation of the assessee was sought on that aspect thereby the assessee is denied an opportunity to test the veracity of such financials or the circumstance of the company by taking recourse either to cross-examine or to explain the assessee’s version on that aspect. According to the assessee, all this material was gathered behind their back and conclusions are drawn without bringing such material to the notice of the assessee. There is no denial on this aspect. As a matter of fact, during the assessment proceedings, the assessee sought for the copy of the ITI’s report. It is, therefore, clear that the material basing on which the ld. Assessing Officer drew his conclusions was gathered by the ld. A.O. behind the back of the assessee and the assessee had no opportunity to explain his version on the same.

18. In these circumstances, we are of the considered opinion that since the assessee had declared the total amount that was said to have been received from M/s Pranav sports and also from Ahuja’s while computing the taxable income, it cannot be said that the assessee stood to gain in this transaction. However at the same time we find it difficult to brush aside the apprehension of the revenue that the assessee routed her own unaccounted money through this transaction or accommodated either M/s Pranav sports or Ahuja’s to bring a unaccounted money to circulation through this transaction. It is

because all does not appear to be well. Generally without there being any premeditation between the parties, a person who knows the value of their property as Rs. 4.22 crores and as a matter of fact offered the same at such price will not sell it to the strangers at a price which is almost one 3rd of such value. Further the financial status of M/s Pranav sports as discussed by the authorities below also does not inspire confidence in our mind to believe that M/s Pranav stores parted with such use amount as Rs. 2.50 crores and allowed it to be forfeited without rising hue and cry. The total amount received by the assessee under these 2 transactions, namely, the forfeiture of the advance amount and the sale consideration received from Ahujas is exactly the same as the value of the property that was originally agreed by the parties. This situation justifies the stand taken by the revenue. However we are unable to agree with the revenue that this amount of Rs. 2.5 crores has to be taxed in the hands of the assessee or her husband. There is no denial of the fact that out of this Rs. 2.5 crores assessee got Rs. 1.25 crores and her husband got the balance of Rs. 1.25 crores. However at no point of time the revenue thought it fit to look into the inconsistency that having accepted the same transaction in the hands of the husband, they're disputing it in the case of the wife. If we accept the contention of the assessee, it would lead to the inference that either M/s Pranav sports are Ahuja's that have brought the unaccounted money into circulation. In any event it cannot be said that the assessee had no clue about it.

19. Further, the conclusions drawn by the authorities below, however, are basing on the material that was collected behind the back

of the assessee and it is not the case of the Revenue that copies thereof was furnished to the assessee and the assessee was given an opportunity of being heard. There appears violation of principle of natural justice. In these circumstances we find it difficult to either to sustain the findings of the authorities below or to brush them aside. We are of the considered opinion that the matter requires verification at the end of the Ld. Assessing Officer after providing the copies of the material which they want to make a basis for their conclusions to the assessee and the assessee is at liberty put forth all have contentions, and, therefore, it is a fit case to set aside the impugned order and to remand the matter to the file of the Assessing Officer to furnish the material that was collected by them and intended to be the basis for any conclusions to be reached to the assessee and to pass orders after affording a reasonable opportunity to the assessee to put forth her case effectively. We, accordingly, remand the matter to the file of A.O. for complying with this direction.

20. In the result, both the appeals are allowed for statistical purposes.

The decision was pronounced in the open court on this the 13th day of November, 2018.

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| (G.D. AGRAWAL)<br>VICE PRESIDENT | (K. NARASIMHA CHARY)<br>JUDICIAL MEMFBER |

Dated: 13th November, 2018
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1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi