

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'SMC', NEW DELHI**

BEFORE SH. R.K PANDA, ACCOUNTANT MEMBER

ITA No.6304/Del/2016
Assessment Year: 2012-13

M/s. Magic Buildtech Pvt. Ltd. 50, 1 st Floor, Sant Nagar, New Delhi-110065 PAN No.AAECM8064H (APPELLANT)	Vs	ITO Ward – 16 (1) New Delhi (RESPONDENT)
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Appellant by	Sh. Sandeep Sapra, Advocate
Respondent by	Sh. S. L. Anuragi, Sr. DR

Date of hearing:	19/02/2019
Date of Pronouncement:	20/03/2019

ORDER

PER R.K. PANDA, AM:

1. This appeal filed by the assessee is directed against the order dated 05.10.2016 of the CIT(A)-33, New Delhi relating to A. Y. 2012-13.
2. The facts of the case, in brief, are that the assessee is a private limited company engaged in the business development/ construction of commercial complex. It filed its return of income on 23.09.2012 declaring total income of Rs.5,04,570/-. The Assessing Officer during the course of assessment proceedings noted that the assessee during the year has declared that it has sold two units F-101, and F-102, of its commercial complex situated at Magic Square C Bacha Park to Eve Crossing, Meerut, for a consideration of Rs.30 lacs. The assessee also filed the registered sale deed in its support. On perusal of the sale deed,

the AO noted that the assessee has sold the above property, whose market value is Rs.58,19,000/-, at a price of Rs.30,00,000/-. However, the stamp duty on this transaction was paid of Rs.4,07,000/-. The said sale deed was signed by Shri Vivek Garg (on behalf of assessee company) and Dr. Ajay Sharma (Purchaser of the property). The said property is situated on main road and is for commercial purpose. As per property document the rental value of the property is fixed at Rs.285/- per sq. mtr. There is only one witness who put his signature on the registered deed named Shri Sanjay Sharma resident of Meerut. He, therefore, asked the assessee to explain as to why the difference in market value and sale value of Rs.28,19,000/- should not be treated as unexplained income of the assessee company.

3. It was explained by the assessee that the above two units were sold for Rs. 30 lacs as per registered sale deed which can be verified from the purchasers Dr. Ajay Sharma if so required. Moreover the onus is on the revenue to prove that the assessee company received money over and above the sale price of Rs. 30 lacs. Various decisions were also brought to the notice of the Assessing Officer.

4. However, the Assessing Officer was not satisfied with the explanation given by the assessee. He noted that the summons issued to Dr. Ajay Sharma remained uncomplied with. Since he did not appear before the department but merely filed certain papers, therefore, the contents of these papers cannot be verified in absence of getting any answer from Dr. Ajay Sharma about the nature of transaction, who introduced him to the assessee company and what were the circumstances in which he got the

commercial property at below the market rate in which he is running a successful clinic. Moreover the party did not file the copy of the bank statement and therefore, the source of money to assessee remained unverified. So far as the various decisions relied by the assessee to the proposition that over and above Rs.30 lacs, the addition cannot be made on the basis of suspicion and presumption is concerned, he noted that although the assessee is right that addition cannot be made on the basis of presumption and suspicion, however the assessee failed to that extent that income tax proceedings are civil in nature. According to the Assessing Officer, this suspicion and presumption, if supported by the circumstantial evidences, then the same can be considered for the purpose of addition. He observed that in response to notice u/s 133 (6) was issued to the Registrar, Meerut who provided two sale instances in the nearby area which prove that the market rate as well as sale price around the area were same. Since the buyer did not furnish the bank account nor appeared before the Assessing Officer in response to notice 131, the Assessing Officer, rejecting the various explanation given by the assessee estimated the market value of two properties at Rs.60 lacs. After deducting the amount of Rs.30 lacs already declared the Assessing Officer made addition of Rs.30 lacs.

5. The Assessing Officer further disbelieved the amount of commission paid totaling to Rs.3 lacs i.e. Rs. 1.5 lacs to Sh. Vashisht Garg and another Rs.1.50 lacs to Sh. Rajit Garg as commission towards the sale of above two properties in absence of any justification given by the assessee for the commission paid to its related parties and failure of the above two parties to appear before the Assessing Officer in response to the summons issued

u/s 131. The Assessing Officer accordingly made addition of Rs. 3 lacs being the commission. While doing so he further held that the commission does not have any basis and is paid to reduce tax liability. According to him, even provisions of section 40 A (2) (b) debars such payments which are excessive in nature. He accordingly made addition of Rs.33 lacs to the total income of the assessee and determined the total income of Rs.38,04,570/-.

6. In appeal, the Ld. CIT(A) upheld the action of the AO by observing as under :-

“4.3 I have carefully considered the various enquiries carried out by the A.O. in this regard, the manner in which the A.O. has gathered & analyzed the documents & information and the judicious conclusions he has arrived at. I have also carefully considered and examined the submissions and judicial pronouncement submitted by the appellant. The A.O. observed that the appellant had sold the property below the Stamp Duty price. Following up his observation, the A.O. issued Summons to the relevant parties with a view to examine them on oath, made enquiries from the Registrar Meerut, carried out enquiries in the property market and gathered details of other similar transactions, summoned the alleged commission agents, carried out inspectorial enquiries from the purchaser of the property and confronted the assessee company with all the evidences collected through the departmental enquiries. The A.O. also considered and weighed other registries of the area submitted to him by the assessee company before arriving at his conclusions. The manner of the investigation carried out by A.O. is indeed praiseworthy.

4.4 The disclosed sale price by the assessee company is Rs. 30Lacs. The two receipts for commission are in respect of one flat each and total up to a sale considering of Rs.60 lacs in respect of two units sold. The Stamp Duty value is

Rs.58,19,000/- . The A.O. has made an addition of Rs. 30 Lacs.

4.5 After carefully considering the entire circumstances, I direct the A.O. to adopt the market value for Stamp Duty valuation viz. 58,19,000/- for working out the disallowance.”

7. So far as the commission of Rs.3 lacs is concerned the Ld. CIT(A) also upheld the action of the Assessing Officer by observing as under :-

“5.3 I have considered, the reasoning of the AO and the submissions of the appellant. The factual matrix viz. the two propped up commission agents being sons of the Director who avoided to depose before the department in effect in avoid answering questions such as services provided by them in lieu of commission receives, basis of arriving at the value of the property, details of their interactions with the purchaser and why they got no commission from the purchaser etc. undoubtedly establish that the said transactions have been artificially conceived for the purpose of tax evasion.”

5.4 Under the circumstances, I do not find any need to interfere with the decision of the A. O. Ground No.2 is rejected.”

8. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal by raising following grounds of appeal :-

1. That the Ld. CIT(A) has erred in law in sustaining the addition of Rs.28,19,000/- out of addition of Rs.30,00,000/- on account of undisclosed income on sale of property by estimating the sale at Rs.58,19,000/- on the basis of stamp duty value. At any rate, without prejudice, the addition of Rs.28,19,000/- as sustained is very excessive.

2. That the Ld. CIT(A) has erred in law in confirming the disallowance of Rs.3,00,000/- u/s 40 A (2) (b) of IT Act on account of

commission paid on sale of property. At any rate, without prejudice, the disallowance as confirmed is very excessive.

3. That the Appellant Co. reserves its right to add, amend/ modify the grounds of appeal.”

9. So far as addition of Rs.28,19,000/- sustained by the CIT(A) is concerned, the Ld. Counsel for the assessee submitted that the assessee is a company engaged in the business of development/ construction of commercial complex. The above two units which were sold by the assessee in the commercial complex were its stock in trade. He submitted that there is no evidence whatsoever to suggest that the assessee has received any extra money as consideration over and above what has been declared in the registered sale deed. He submitted that the provision of section 50C is not applicable to the instant case since these are stock in trade and not capital asset. He submitted that the provision of section 43 CA are also not applicable to the instant case since those provisions were introduced in the statute book by the Finance Act 2013 w.e.f. 01.04.2014 and the assessment year involved in the instant case is assessment year 2012-13. Further, the two sale instances given by the AO are also not applicable since in one case the property sold was ground floor, 1st floor, 2nd floor i.e. 3 storeyed shop including land and roof rights whereas in the instant case, the assessee has sold the property in the first floor flat without roof right. Similarly the second sale instance given by the AO is a partly constructed land with all rights whereas the property sold by the assessee is a first floor flat without roof right. Therefore, the sale instances of the two properties considered by the AO cannot be compared with that of the two flats sold by the assessee.

10. Referring to the decision of Mumbai Bench of the Tribunal in the case of M/s. Neel Kamal Realtors and Erectors India Pvt. Ltd. Vs. DCIT in ITA No.1143/Mum/2013 order dated 16.08.2013 for A. Y. 2009-10 and the decision of the Delhi Bench of the Tribunal in the case of Sh. Satish Arora Vs. ITO vide ITA No. 1958/Del/2015 order dated 25.07.2016, he submitted that under identical circumstances the Tribunal has deleted the addition where the addition was made by the Assessing Officer on the basis of difference in the sale price and the circle rate adopted by the stamp valuation authority. He accordingly submitted that this being a covered matter in favour of the assessee by the decisions cited (surpa) the additions sustained by the CIT(A) should be deleted.

11. The Ld. DR on the other hand heavily relied on the orders of the Assessing Officer and CIT (A).

12. I have considered the rival arguments made by both the sides and perused the material available on record. I have also considered the various decisions cited before me. I find in the instant case the AO made addition of Rs. 30 lacs to the total income of the assessee as unexplained income on the ground that the assessee has declared the sale proceeds of the two units at Rs.30 lacs whereas the estimated market value of the two units are Rs.60 lacs. I find the Ld. CIT(A) directed the AO to adopt the sale consideration of Rs.58,19,000/- which is the value adopted by the stamp valuation authority and thereby gave relief of Rs.1,81,000/- to the assessee. It is the submission of the Ld. Counsel for the assessee that the two units sold by the assessee are its stock in trade and are not capital asset and therefore, the provisions of section 50C are not applicable to the assessee. Similarly the provision of section 43 CA which were inserted by the Finance Act 2013 w.e.f. 01.04.2013 are also not applicable to

the assessee since the assessment year involved in the instant case is A. Y.2012-13. It is also the submission of the Ld. Counsel for the assessee that the addition made by the Assessing Officer merely on the basis of presumption and suspicion cannot be sustained.

13. I find merit in the above arguments advanced by the Ld. Counsel for the assessee. There is no evidence on record to prove that the assessee has received any extra amount over and above the sale consideration mentioned in the sale deeds. The Assessing Officer has neither pointed out any defects in the books of account nor rejected the same. Since the property sold are not capital asset and are stock in trade, therefore, the provisions of section 50C are not applicable. Further provisions of section 43CA were inserted by the Finance Act 2013 w.e.f. 01.04.2014 and therefore, these provisions are also not applicable to the assessee since the assessment year involved is assessment year 2012-13.

14. I find identical issue had come up before the coordinate bench of the Tribunal in the case of Shri Sastish Arora (supra) where in the Tribunal has deleted the addition made by the Assessing Officer and sustained by the CIT(A) by observing as under :-

8. *“Admittedly in the relevant assessment year the provisions of section 50C were not applicable in case a property was held as stock-in-trade, because section 43CA has been inserted by the Finance Act, 2013, w.e.f. 1.4.2014. The AO has not pointed out any defect in the books of account and has merely rejected the books of account on the basis of lower sale consideration being received for the ground floor property as compared to first floor property. This is not permissible in law, because there has to be some concrete evidence to come to the conclusion that assessee has not declared his full sale consideration. Reliance placed by Id. counsel for the assessee on the decision of Hon'ble Supreme Court in the case of A. Raman & Co. (supra) clearly*

support the assessee's contention. The Hon'ble Delhi High Court in the case of *Discovery Estates Pvt. Ltd.* has noted the Tribunal's findings in its judgment at page 4 in para 8, which are reproduced hereunder:

- "(a) The assessee is maintaining proper books of accounts and the Assessing Officer has not pointed out any specific defects therein.
- (b) The view of the Assessing Officer that there can be no loss in real estate business and the assessee cannot sell the shops below cost price is not correct, having regard to the facts.
- (c) The assessee has given reasons as to why it booked sales at the initial stage at a lower price. It was found that the assessee could not book a single shop for sale in the year 2004 and during the period from May 2003 to December 2004, it could book only five shops for sale. These factors suggest that in the beginning of the business, the assessee is forced to offer some concession in the price to draw custom.
- (d) The Assessing Officer could have brought evidence on record to show that any purchaser had actually paid a price higher than the price shown in the books. No such evidence was forthcoming. There was not even material to doubt the sale transactions.
- (e) It is not permissible for the Assessing Officer to rely on the perceived general market conditions; the price shown by an assessee cannot be doubted for the reason that in the opinion of the Assessing Officer, the real estate prices did not show any downward trend.
- (f) The market prices can at best be a starting point for further inquiry but they cannot be substituted for the price shown by the assessee in the books of accounts".

9. In view of above discussion, the assessee's appeal is allowed.

10. In the result, assessee's appeal stands allowed. Order

pronouncement in open court on, ____ /07/2016.”

15. Further the two sale instances given by the Assessing Officer are also distinguishable since in one case the property sold was of a three storeyed shop including land and roof rights and the other property is a partly constructed land with all rights whereas the property sold in question is first floor flat without roof rights. The various decisions relied on by the Ld. Counsel for the assessee also supports his case. In this view of the matter I am of the considered opinion that the sale consideration at Rs.58,19,000/- adopted by the CIT(A) being stamp duty value as against actual sale consideration of Rs.30 lacs shown by the assessee is not sustainable I, therefore, set aside the order of CIT(A) on this issue and direct the AO delete the addition of Rs.28,19,000/-. The ground No. 1 of the assessee is accordingly allowed.

16. Now, coming to the 2nd ground of appeal, i.e. the addition of Rs.3 lacs made by the AO on account of commission paid to two related parties is concerned, it is an admitted fact that the above two persons are related parties as per provision of section 40 A (2)(b) of the IT Act, 1961. Despite summons issued u/s 131 they never appeared before the AO to substantiate the nature of service rendered by them for getting commission. Merely because tax has been deducted and payment has been made by account payee cheque will not absolve the assessee from the onus cast on it. It is the settled proposition of law that for any expenditure claimed to be an allowable deduction, the onus is always on the assessee to substantiate with evidence to the satisfaction of the AO regarding the incurring of such expenditure wholly and exclusively for the purpose of business. However, in the

instant case the assessee could not prove the same since the two persons were never produced before the AO. As mentioned earlier apart from paying the amount through banking channel and deduction of tax from the same is not sufficient. Considering the totality of the facts of the case and in the interest of justice I deem it proper to restore this issue back to the file of the AO with a direction to give one more opportunity to the assessee to substantiate its case by producing the two persons for his verification. Needless to say the AO shall decide the issue as per fact and law after giving due opportunity of being heard to the assessee. I hold and direct accordingly. The second ground raised by the assessee is allowed for statistical purpose.

17.. In the result, ground No. 1 of appeal by the assessee is allowed and ground No.2 by the appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on 20.03.2019.

Sd/-
(R.K PANDA)
ACCOUNTANT MEMBER

Neha

Date:- 20.03.2019

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	18.03.2019
Date on which the typed draft is placed before the dictating Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for Pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	20.03.2019
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	