

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'B' अहमदाबाद ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, AHMEDABAD**

**BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER
& SHRI WASSEM AHMED, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 364/Ahd/2017

(निर्धारण वर्ष / Assessment Year: 2012-13)

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| ITO Ward-5(2)(3) Ahmedabad | बनाम/ Vs. | M/s. Aashna Sushilkumar Agarwal 301, Satkar Complex, Off. C.G. Road, Lal Bungalows, Ahmedaba 380006 |
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ANA PA3 921 F | | |
| (अपीलार्थी /Appellant) | .. | (प्रत्यर्थी / Respondent) |

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| अपीलार्थी ओर से /Appellant by : | S. K. Dev, Sr. DR |
| प्रत्यर्थी की ओर से / Respondent by : | G. C. Pipara, AR |

| | |
|---------------------------------------|------------|
| सुनवाई की तारीख / Date of Hearing | 09/05/2019 |
| घोषणा की तारीख /Date of Pronouncement | 30/05/2019 |

आदेश/ORDER

PER MAHAVIR PRASAD - JM:

This appeal has been preferred by the revenue against the order of Ld. CIT(A) Appeal No. CIT(A)-5/ITO. Wd. 5(2)(3)/128/2015-16 dated 28.11.2016 arising from assessment order dated 27.03.2015 and Revenue has taken following grounds:-

"1. The Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs. 1,40,00,000/- by considering the loss on termination agreement as revenue loss u/s. 28 of the Act without appreciating the fact that the financial position of the assessee was very good on records as she has also made huge investment in various mutual funds in that period.

2. The Ld. CIT(A) has erred in appreciating the fact that the bank accounts of relevant period in F.Y. 2011-12 shows

investment in mutual funds and has also failed to verify that the assessee has made other investments and not paid outstanding amount to seller of subjected property which lead to huge financial loss.

3. On the facts and circumstances of the case, the Ld. CIT(A) ought to have upheld the order of the Assessing Officer.

4. It is, therefore, prayed that the order of the Ld. CIT(A) may be set aside and the order of the Assessing Officer be restored to the above extent.

5. The appellant craves leave to add, alter and/or to amend all or any of the ground before the final hearing of the appeal.”

2. Facts of the case are as emanates from the assessment order page no. 2 to 13 of CIT(A):-

*“1. That during the year under consideration the appellant had bought a property at Kolkata Mr. Chandan Agarwal, Kolkata for Rs. 3,00,00,000/- as part of his main business activity of trading in land and properties. Accordingly an MOU was entered into with the said party on 24.02.2012 at Ahmedabad during the course of visit of Shri Chandan Agarwal at Ahmedabad. A copy of the said MOU is enclosed herewith vide **Annexure-2** (Page No. 23 to 27).*

2. That the following are the main terms and conditions of the above mentioned MOU entered into between the appellant, the purchaser and Shri Chandan Agarwal, the seller, which are reproduced hereunder for immediate reference, the same having an important bearing on the issue in dispute.

Clause-C: The vendor has agreed to transfer and convey the said property at or for a total consideration of Rs.3,00,00,000/- (Rupees Three Crores only) and the PURCHASER has agreed to purchase the same at or for a total consideration of Rs.3,00,00,000/- (Rupees Three Crores only) free from all encumbrances, mortgages, charges, liens, lispendenses, trust, order of acquisition/requisition, execution/attachment proceedings and all other liabilities - whatsoever upon the terms and conditions hereinafter appearing.

Clause-D: The said consideration shall be paid by the PURCHASER herein to the VENDOR herein as per the following schedule:-

By 5th of March 2012- Rs.75,00,000/-(Rupees Seventy Five Lakhs only)

By 15th of March 2012 - Rs. 75,00,000/- (Rupees Seventy Five Lakhs only)

By 20th of March 2012 - Rs.75,00,000/- (Rupees Seventy Five Lakhs only)

By 25th of March 2012 - Rs. 75,00,000/- (Rupees Seventy Five Lakhs only)

Clause-G: Within 30 days of receipt of the entire consideration money, the VENDOR shall take steps to get the Deed of Conveyance registered in favour of the PURCHASER (at the cost of the PURCHASER)

Clause-H: In case the PURCHASER is unable to pay all sums due under this Memorandum of Understanding within the stipulated dates, the VENDOR shall be entitled to forfeit the amounts already received by the Vendor till that time.

3. The appellant accordingly made following payments by RTGS in terms of the above mentioned MOU.

| <i>Date</i> | <i>Amount (Rs.)</i> |
|-------------------|---------------------|
| <i>06/03/2012</i> | <i>40,00,000</i> |
| <i>06/03/2012</i> | <i>35,00,000</i> |
| <i>15/03/2012</i> | <i>35,00,000</i> |
| <i>15/03/2012</i> | <i>30,00,000</i> |
| <i>Total</i> | <i>1,40,00,000</i> |

However, in view of liquidity crunch, the appellant could not make any further payment till 25th March, 2012 as per the terms of the MOU due to shortage of funds in the month of March, 2017 and thus requested the seller to extend the time for making the remaining payment of Rs.1,60,00,000/-.

In the background of the above facts, the appellant would now like to put forth the following arguments and contentions disputing the addition of Rs.1,40,00,000/- made by the AO while treating the part payment to the seller towards purchase of property but subsequently forfeited by the seller.

Contentions:

1. At the outset, it is submitted that the impugned addition has been made entirely on surmises and presumptions and without proper consideration and appreciation of the facts, explanation, details and evidences in support thereof filed before the AO during the course of assessment proceedings.

*2. It is reiterated that the appellant is mainly engaged in the business of trading in land and properties. The particulars of the land transactions during the year are given in Schedule-1 being 'Trading Account' forming part of Balance Sheet as enclosed vide **Annexure-1**, which may please be referred to. It is an undisputed fact that Appellant is engaged in the business of trading in land & property and development of buildings. AO himself in the body of Order has clearly stated that nature of business of the appellant is "trading in land, development of building".*

3. That as stated hereinabove, the appellant as part of his business of trading in land & properties had decided to buy a property at Kolkata from one Mr. Chandan Agarwal, Kolkata for Rs.3,00,00,000/-. Accordingly, an MOU was entered into with the said party on 24/02/2012 at Ahmedabad during the course of visit of the said party at Ahmedabad.

4. On perusal of the above terms and conditions of the MOU entered into by the appellant with the seller of the property i.e. Mr. Chandan Agarwal, the following undisputed facts emerge:

(a) That the entire sale consideration of Rs.3.00 crores was required to be paid by the appellant to the seller of the property i.e. Mr. Chandan Agarwal on or before 25/03/2012.

(b) That, if for any reason, the purchaser i.e. the appellant is unable to pay all sums due under the MOU i.e. Rs.3.00 crore within the stipulated date i.e. on or before 25/03/2012, the seller of the property i.e. Mr. Chandan Agarwal shall be entitled to forfeit the amounts already received by the purchaser till that time.

5. At the outset, it is immediately submitted that actual market price of the said property on the date of agreement is Rs. 3,95,05,000/-, but since time was the essence and the seller wanted immediate payment, it was agreed to be sold for an amount of Rs.3.00 crores with a condition that the entire amount of Rs.3.00 crores was to be paid in 4 equal installments so as to make the payment within a period of one month. A copy of the valuation report from the Government Approved Valuer Shri Prabal Kumar Ray dated 16/02/2012 is enclosed herewith vide **Annexure-3 (Page No. 28 to 30)** as a proof of the fact that valuation of the said property on the date when it was agreed to be purchased amounted to Rs. 3,95,05, 000/-.

6. That prior to discussing the merits of the issue in dispute, it may be worthwhile to mention here that the following comprehensive evidences as furnished by the appellant during the course of assessment proceedings or gathered directly by the AO from the sellers are available on record of the AO.

(a) Copy of Balance Sheet of the appellant for the year under consideration in support of the fact that the appellant is engaged in the business of trading in land and properties. **Refer Annexure-1.**

(b) Copy of MOU dated 24/02/2012 was entered into and executed between the seller viz. Mr. Chandan Agarwal of Kolkata and the purchaser viz. Ms. Aashna Sushilkumar Agarwal, the appellant. **Refer Annexure-2.**

(c) Copy of Deed of Conveyance dated 09/02/2012 in respect of the property in question purchased by the seller Mr. Chandan Agarwal and which was to be sold to the appellant as per the MOU. **Refer Annexure-4 (Page No. 31 to 69)**, in proof of the fact that seller was a genuine owner of the said property which has been taken by appellant on record while entering into agreement, in proof of the fact that the seller is the genuine owner.

(d) Copy of correspondence between the appellant and the seller. **Refer Annexure-5 (Page No. 70 to 96).**

(e) Copy of letter dated 23/03/2015 submitting documents received from the seller Mr. Chandan Agarwal i.e. his confirmation in support of forfeiture of the amount of Rs.1,40,00,000/- and copy of Balance Sheet of Mr. Chandan Agarwal as at 31/03/2012 showing the effect of forfeiture amount made in his books of account. **Refer Annexure-6 (Page No. 97 to 99).**

(f) Copy of bank accounts of the appellant duly reflecting the payments made to the seller aggregating Rs.1,40,00,000/-. **Refer Annexure-7 (Page No.100).**

(g) Statement of the appellant recorded by the AO on 18/03/2015, which is reproduced by the AO in the assessment order and is self-explanatory in itself. **Refer Page No. 3 to 6 of the order.**

(h) Submission dated 19/03/2015 given by the appellant elaborately explaining the facts of the case, which is reproduced by the AO in the assessment order and is self-explanatory in itself. **Refer Page No. 7 to 8 of the order.**

7. In view of the above comprehensive evidences available on record and on perusal of the observations of the AO in the assessment order, your honour would appreciate that there is not an iota of evidence brought on record by the AO to disprove the genuineness of the purchase of property as per MOU, payments made, forfeiture of amount and cancellation of the deal in view of failure on part of the appellant to honour the terms of MOU save and except mere assumptions and presumptions on part of the AO not supported by any concrete material/evidence.

8. That keeping in view the issue in dispute, it would be imperative **to put forth the chronology of series of correspondence through fax and speed post entered into between the appellant and the seller Mr. Chandan Asarwal** apart from telephonic conversations since the date of entering of MOU. Hence, the same are briefly reproduced hereunder for immediate reference and proper appreciation of the facts of the case leading to the situation of claiming of the expenditure of Rs.1,40,00,000/- by the appellant on account of forfeiture of the said amount by the seller and disallowance of the same by the AO:

| Sr. No. | Date | Letter By | Particulars of Brief |
|---------|------------|-----------|--|
| 1 | 05/03/2012 | Seller | Letter reminding payment of 1 st installment of Rs. 75, 00, 000/- as per MOU and giving bank details. |
| 2 | 06/03/2012 | Appellant | Letter intimating details of payment of Rs. 75,00, 000/-by RTGS. |
| 3 | 12/03/2012 | Seller | Letter reminding payment of 2 nd installment Rs. 75, 00, 000/- as per MOU and giving bank details. |
| 4 | 15/03/2012 | Appellant | Letter intimating details of payment of Rs. 65,00,000/-by RTGS. |
| 5 | 16/03/2012 | Seller | Letter informing that there is short payment of Rs.10,00,000/- in 2 nd installment and reminder for payment of the same. |
| 6 | 17/03/2012 | Seller | Letter reminding payment of 3 rd installment of Rs.75,00,000/- along with short payment of Rs.10, 00, 000/- of 2 nd installment. |

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| 7 | 21/03/2012 | Appellant | Letter informing that due to liquidity position in the market she has not been able to arrange balance funds for payment as per MOU and that she will try and settle all outstanding within next week. |
| 8 | 21/03/2012 | Seller | Notice for short payment and default in payment obligation as per MOU and intimating that unless the full payment is not received immediately he will seek recourse measures. Also reminded that a further amount of Rs.75,00,000/- is also due on 25 th March, 2012. |
| 9 | 22/03/2012 | Seller | Letter reminding payment of short payment of Rs.10 lakhs of 2 nd installment and non-payment of 3 rd installment of Rs. 75 lakhs as well as payment of 4 th installment of Rs. 75 lakhs on 25 th March, 2012 totaling Rs.1,60,00,000/-. |
| 10 | 26/03/2012 | Seller | Letter giving notice for overdue payment of Rs.1,60,00,000/- and drawing attention to Clause - H of MOU according to which failure to make payment of entire consideration of Rs.3,00,00,000/- by 25 th March, 2012 would result in forfeiture of the amount already paid till then. Also stated that if the remaining amount is not paid by 30 th March, the entire amount of Rs.1,40,00,000/- paid till date will be forfeited and the deal will be cancelled. |
| 11 | 29/03/2012 | Appellant | Letter accepting default in payment of Rs.1,60,00,000/- due to unavoidable circumstances and offering payment of Rs. 2 0,00, 000/- by 31/03/2012 and balance of Rs.1,40,00,000/- by the end of 1 st quarter of the next financial year i.e. by 30/06/2012. |
| 12 | 29/03/2012 | Seller | Letter bringing on record the failure on part of the appellant in payment of balance consideration of Rs.1,60,00,000/-, his further commitments and inability to grant extension of time for making balance payment as proposed by the appellant and finally giving time till 31/03/2012 for making entire payment failing which the deal will stand cancelled and the amount of Rs. 1,40,00, 000/- paid till date will be forfeited. |
| 13 | 13/04/2012 | Appellant | Letter once again asking for time for payment of balance amount till 31.5.2012. |
| 14 | 24/04/2012 | Seller | Letter reminding the appellant that as already intimated earlier he was forced to sell the property recently acquired by him due to some commitments only on the assurance that the payments would be made immediately as per the terms of the MOU. However, since the appellant has failed to honour the commitment he is invoking the Clause of forfeiture as per MOU and is forfeiting the amount already remitted till date. |
| 15 | 27/04/2012 | Appellant | Letter stating that in view of silence on part of the seller she is assuming that further time is granted till 31/05/2012. |
| 16 | 04/05/2012 | Appellant | Letter stating that forfeiture of amount paid till date would result in unbearable loss and hence the matter may be settled amicably and also showing readiness to meet in person & for payment of interest on the balance payment. |
| 17 | 04/05/2012 | Seller | Letter acknowledging receipt of appellant's letter dated 27/04/2012 but stating that he does not agree with the contents therein and that he stands by the contentions put forth in his letter dated 24/04/2012 and there is no change in his views and reiterates that the amount is already forfeited and the deal stands cancelled. |
| 18 | 08/05/2012 | Seller | Letter acknowledging receipt of appellant's letter dated 04/05/2012 but stating that it has no merits and intimating that this is the last communication in this matter. |

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| 19 | 21/05/2012 | Appellant | Letter once again requesting to conclude the matter amicably with readiness to pay interest. |
| 20 | 26/05/2012 | Seller | Letter intimating that based on appellant's repeated mails he is authorizing the appellant to remit the balance payment on or before 31/05/2012 in which case the deal will be executed fading which no cooperation should be expected henceforth including any further extension of time and no such request will be entertained. |
| 21 | 29/05/2012 | Appellant | Letter stating that granting of 3 days time shows that there is no actual intention of granting time and minimum 15 days time should have been granted for arranging the funds as doing it in 3 days is impossible. |
| 22 | 14/06/2012 | Seller | Letter repeating the earlier facts about commitment and stating that if the appellant would have been serious about payment the funds would have been kept ready. The seller again reiterated about forfeiture of the amount already remitted and cancellation of the deal. |
| 23 | 20/06/2012 | Appellant | Letter stating that if any further amount would have been paid the same would also have been forfeited unless any extension was granted. The circumstances for non-payment or delay in payment reiterated and again requesting time of 15 days to do so and also arrange a personal meeting to discuss the matter. |
| 24 | 04/07/2012 | Appellant | Letter stating that there is no reply to her letter dated 20/06/2012 and awaiting positive response. |
| 25 | 10/07/2012 | Seller | Letter acknowledging receipt of appellant's letters dated 20/06/2012 and 04/07/2012 and reminding that as per his last letter he has already considered the deal as closed and shall not entertain any further communication in this regard and that his position remains unaltered. He has further stated that this is the final reply and requested not to disturb him by writing & calling again and again. |

Refer the copy of above mentioned correspondence made by the appellant with the seller viz. Mr. Chandan Agarwal as enclosed vide Annexure-5 (Page No. 70 to 96) hereinabove.

9. The above exhaustive chronology giving particulars of series of correspondence between the appellant and the seller viz. Mr. Chandan Agarwal, the following facts are amply clear:

(a) That the appellant could not make balance payment of Rs. 1,60,00,000/- in terms of MOU due to liquidity crunch on account of sluggish market conditions.

(b) That the seller was not inclined to grant further time till 30/06/2012 as initially requested by the appellant for making balance payment and when granted further extension, the time granted was not sufficient.

(c) That the seller in view of failure on part of the appellant to honour the payment schedule as decided in MOU had forfeited the amount of Rs. 1,40,00,000/- already remitted till date and also cancelled the deal in terms of MOU.

The above facts coupled with series of correspondence on both sides it is evident that the appellant had no choice but to consider the payment of Rs. 1,40,00,000/- bona fide made to the seller and forfeited by him in terms of MOU as business

loss. In view of forfeiture of such amount, the appellant while treating it as a business loss has debited the same as Loss on termination of Agreement in the books of account in terms of Section 28(1) of the Act.

10. It may be pertinent to note here that the appellant had stated all the above facts in her statement recorded by the AO on 18/03/2015 and reproduced in the assessment order at Page No. 3 to 6. The above facts and the circumstances for non-payment of the balance, amount to the seller were further explained by the appellant vide her letter dated 19/03/2015, which is also reproduced by the AO at Page No. 7 & 8 of the order. That since the statement of the appellant and the contents of letter dated 19/03/2015 are reproduced by the AO in the body of assessment order, the copy of the same is not enclosed herewith.

11. It may be pertinent to note here that as stated by the appellant in letter dated 19/03/2015, the AO has also called for details and confirmation from the seller by issuing notice u/s. 133(6) of the Act in response to which the seller had duly confirmed receipt of money by him from the appellant and had also supplied the details and evidences asked for by the AO from him. The said fact has been conveniently ignored and brushed aside by the AO with a predetermined mindset of making the addition. **This is to emphasize the fact that there is not an iota of evidence to disprove the claim of the appellant and the addition has been made solely on the basis of surmises and AO's own personal presumptions and assumptions not supported by concrete evidence.** The AO appears to have heavily relied upon the fact that the MOU has been entered into at Ahmedabad since according to the AO, the same should have been executed in the city where the property is situated i.e. in Kolkata. Further, the AO is of the view that the same should have been mandatorily registered or notarized. The AO was accordingly of the view that the MOU in question cannot be considered as a valid document and basis of the whole transaction appears to be an afterthought, sham and bogus. It is submitted that no doubt property is situated in Kolkata but agreement was entered and executed in Ahmedabad and therefore, the same was signed in Ahmedabad. This fact was stated clearly before the AO during the course of assessment proceedings in clear terms. Coming to the assertion that the property which is situated in Kolkata, the same was personally visited and inspected by the Government approved Valuer Shri Prabal Kumar ray on 13/02/2012 and informed that the property is in good condition. It was only after the recommendation of the said Valuer and his Valuation Report dated 16/02/2012, the appellant has decided to enter into the MOU with the seller. Moreover, appellant is also fully acquainted with the various localities of Kolkata and this particular property situated at Alipore Road, is a famous locality and therefore, was very well aware about the actual market value of the said property but since the seller wanted immediate payment, the MOU was executed for an agreed amount of Rs. 3.00 crores as against the actual market value of Rs. 3,95,05,000/-.

12. It may also be pertinent to note that **on perusal of the Balance Sheet of the seller Mr. Chandan Agarwal as called for from him and furnished to the AO, your honour would appreciate that the forfeited amount of Rs.1,40,00,000/- has been reduced by him from the cost of the property agreed to be sold to the appellant.** Thus, the observation of the AO that the said amount has not been shown in the P & L A/c. is highly misplaced since firstly, the said forfeited amount not being income of the seller but capital receipt and since the same pertains to the property in question, the seller has rightly deducted the cost of the property by the

said amount. It may be noted that when he will sell the property, the cost of the said property would logically be taken at such reduced cost as shown by him in the Balance Sheet which in turn would result in higher capital gains. Thus, the question of offering the said amount for taxation by the seller in the year under dispute i.e. A.Y.2012-13 does not arise at all and the observation of the AO to that effect is without proper understanding of the facts of the case and the relevant provisions of law.

13. Coming to the various observations of the. AO in the assessment order on the basis of which the addition is made, the appellatant would like to put forth her rebuttal / comments on each of the AO's observations to put the matter in correct perspective.

AO's Observation:

On verification of the details/ information filed by the assessee, it is noticed that a MOU between the assessee and seller Mr. Chandan Agarwal has been entered into at Ahmedabad on a stamp paper of Rs.100/-, while the property is situated at Calcutta. Hence, the agreement is to be executed in the city where the property is situated. Hence, the basis of all transaction appears to be an afterthought, sham and bogus as the assessee could not advance justification for executing MOU in Ahmedabad.

Appellant 's Rebuttal/Comments:

(a) The appellatant is in the business of trading in land and properties not necessarily situated in the city in which she is living but different cities all over India depending upon the business / earning opportunity.

*(b) That after finalizing the deal with the seller after oral discussions, an agreement is prepared which is known as an "Agreement to Sell" or say "Banakhat", which may be on a stamp paper or a simple piece of paper, the purpose of same being merely to put in writing the initial understanding between the parties regarding the purchase/sale of the property. **There is no law saying that such an understanding has to be on stamp paper.***

*(c) That such "Agreement to Sell " or "Banakhat " may or may not be registered or notarized depending upon the mutual trust and consent of both the parties. **Nevertheless, it is a fallacy on part of the AO that such a document mandatorily requires registration. The same is not mandatory in any law as wrongly assumed by the AO.***

*(d) It is further submitted that **such "Agreement to Sell" or "Banakhat" can be entered into in any city as per the mutual convenience of the parties** and is not mandatorily required to be entered into or executed only in the city in which the property is situated as wrongly assumed by the AO. Since the seller has visited Ahmedabad only for the purpose to make the deal with the appellatant as initial discussions have already taken place earlier and since deal was closed in Ahmedabad, naturally, immediately MOU has been executed on a Stamp Paper of Rs. 100/- purchased on 23/02/2012 in the name of the appellatant and executed on 24/02/201 2. There is absolutely nothing wrong in the said MOU and this has been verified by the AO during the course of assessment proceedings.*

(e) *Thereafter, the final conveyance deed is to be executed, which should be executed and registered with the Registrar's office of the city in which the property is situated as per the procedure laid down by each state. In the instant case, if the purchase by the appellant would have gone through, no doubt the conveyance deed would have been registered at Kolkata where the property is situated,*

This, the observations of the AO that the MOU entered into between the appellant and the seller Chandan Agarwal is an afterthought, bogus and sham is nothing more than mere not supported by any concrete material/evidence and thus requires to be ignored.

AO's Observation:

The assessee has also not personally visited the property at Calcutta. The MOU has been entered into by the assessee on 24/02/2012 i.e. barely after 15 days of execution of conveyance deed of the said party to the seller. The assessee could not furnish the fund flow statement to show how funds have been arranged for making the payment to the seller. The reasons given by the assessee for not fulfilling the conditions of the MOU is not acceptable and hence rejected.

Appellant's Rebuttal/Comments:

It was submitted that before entering into MOU, the property was duly physically visited and inspected by the government approved Valuer Shri Prabal Kumar Ray who stays in Kolkata and confirmed that the property is in good condition. Nonetheless, the appellant being aware about the various localities of Kolkata, knew very well that Alipore Road where the said property is situated is a good locality and enjoys good demand with allotted parking space and the title of the same was clear and marketable. The above observation of the AO is thus absurd and without any application of mind. Further, the payments made to the seller are duly confirmed by him and is not disputed by the AO. Nonetheless, the same are also evident from the copy of bank statements furnished to the AO, which is not denied.

AO's Observation:

The assessee vide letter dated 23/03/2012 has also furnished the copy of accounts from the books of Mr. Chandan Agarwal along with copy of P&L A/c. and Balance Sheet for the year ending on 31/03/2012 on perusal of which it is seen that the said accounts are not audited and is merely a print out. Further, Mr. Chandan Agarwal has also not shown the forfeited amount in his P & L A/c. for the year ending on 31/03/2012.

Appellant's Rebuttal/Comments:

(a) *The AO once again has made a very illogical and absurd observation that the accounts are not audited and are merely a printout for the purpose of producing a document.*

(b) *The AO has failed to even verify that looking to the total receipts of the seller, there is no requirement of any Audit and hence the question of the accounts not being audited does not arise.*

(c) *As regards unsigned copy of accounts, it is submitted that the AO was at liberty to call for a signed copy of the accounts from the said party and there was no restriction upon him to exercise his powers in doing so if he was not satisfied with the unsigned copy and disbelieved it.*

In view of above facts, the above observations of the AO requires to be completely ignored.

AO's Observation:

I would like to mention here that the assessee has knowingly and intentionally resorted to a device to reduce the taxable income otherwise taxable in the hands of the assessee. It is the obligation of every assessee to pay the taxes honestly without resorting to subterfuges. This view supported by the decision in the case of McDowell & co. Ltd. vs. Commercial Tax Officer 54 ITR 148 (SC).

Appellant's Rebuttal/Comments:

The above observations / allegations are based solely on surmises, presumptions and assumptions not supported by even an iota of evidence brought on record. The AO has grossly failed to establish that the facts of the case and evidences filed are sham or make believe by bringing on record concrete material/evidence. The said observation/allegation by the AO thus requires to be ignored.

*14. In view of the above facts, it is reiterated that merely because the MOU was entered into in Ahmedabad and not in Kolkata where the property in question is situated and since the appellant did not visit the property personally, **no adverse inference is warranted while ignoring the comprehensive evidences available on record which establishes the genuineness of the transaction in question and the payment given by the appellant to the seller Mr. Chandan Agarwal beyond any reasonable doubt. The fact of forfeiture of Rs.1,40,00,000/- on account of failure on part of the appellant to honour the terms of payment as per MOU is also not disputed or cannot be doubted in view of series of correspondence between the appellant and seller as reproduced hereinabove. It is not the case of the AO that the same are not genuine.***

The impugned addition, pursuant to arbitrary conclusions arrived at by the AO on the basis of his observations in the order which are dealt with hereinabove, is thus wholly unjustified, contrary to facts, non-est in law and nullity not to mention the fact that not an iota of evidence has been brought on record by the AO in support of his observations and the conclusions drawn.

*15. Further, since the entire payments aggregating to Rs.1,40,00,000/- has been made through regular banking channels and the payment having been duly reflected in the bank account of the appellant as well as in the books of account of the receiving party as categorically confirmed by him, **no adverse inference is warranted while doubting the genuineness of the transaction by putting blinkers over his eyes and ignoring the comprehensive evidences available on record***

merely on absurd grounds/reasoning. That apart, the AO has also failed to disprove the averments made by the appellant in the statement recorded by the AO. Not only that, it is reiterated that not an iota of evidence has been brought on record by the AO to disprove the facts of the case as well as evidences furnished.

*Thus, the AO was not justified in ignoring the comprehensive evidences furnished/available on record in support of the transaction in question without bringing on record any contrary material/evidence to discredit the evidences and documents furnished by the appellant without any cogent reasons while choosing to enter into the realm of suspicion. **The AO in the instant case, has miserably failed to disprove the documents and evidences furnished.***

16. Lastly, it is submitted that it is also not clarified or mentioned by the AO as to under which provisions or section of the Act, the impugned addition has been made. Thus, the impugned addition is wholly unjustified on this ground itself.

*17. It is submitted that since the appellant is engaged in the business of trading in land and properties, the property intended to be purchased for which the part payment of Rs. 1,40,00,000/- was given would have formed part of its stock-in-trade. Thus, the forfeiture of the said amount on account of failure on its part to make the full payment in accordance with the terms of payment MOU is a revenue loss incurred in the course of appellant's business activity. It has to be decided whether the loss has occurred in the course of the business activity for acquiring a stock-in-trade in the hands of the appellant. In the instant case, admittedly, the appellant intended to acquire a stock-in-trade for its trading activity of land and properties. **Therefore, the loss, suffered in the course of such acquisition of the stock-in-trade has to be necessarily allowed as a revenue loss and hence it has to be allowed as business loss while computing the total income.***

But Ld. AO was not agree with the contention of the assessee and made addition of Rs. 1,40,00,000/- on account of loss claim on agreements as discussed in Para 3 to 3.8 of the assessment order

3. Thereafter assessee preferred first statutory appeal before the CIT(A) who partly allowed appeal of the assessee.

4. We have gone through the relevant record and impugned order and the grounds raised by the revenue is pertaining to an agreement for purchase of Flat at Kolkata for business purpose and in order to purchase flat assessee made part payment of Rs. 1,40,00,000/- for buying as a flat as assessee is engaged in the business of the trading land and development of building as stated by the AO.

5. Now question before us whether an amount of Rs. 1,40,00,000/- is to be treated as revenue loss as capital expenditure. In this case assessee signed a MOU with Shri Chandan Aggarwal on 24.02.2012 for purchase of a Flat No. 9A on the 9th Floor of the building constructed at 37B, Alipore Road, Kolkata at total consideration of Rs. 3,00,00,000/- (Three Crore) and part payment of Rs. 1,40,00,000/- (One Crore Forty Lakhs) was made and remaining payment was agreed to pay by 25.03.2012. Before signed MOU, assessee got done valuation of the property by the approved valuer on 16.02.2012 who valued the property at the rate of Rs. 3,95,05,000/-. The assessee thought that she will earn profit of Rs. 9,50,00,000/-.

6. Thereafter on account of financial constraint assessee could not make payment on time and requested seller to extend time for payment and made several correspondence in support of its contention assessee filed copies of MOU, Valuation Report, Balance Sheet, Correspondence between seller and assessee. The seller refused to extend the time for balance payment and ultimately assessee's advance payment of Rs. 1,40,00,000/- was forfeited as per terms and conditions of MOU.

7. In support of its contention Ld. AR cited a judgment in the case of B. D. Barucha 65 ITR 403 wherein Hon'ble Supreme Court has held that loss in a transaction in the nature of a financial deed in the course of the assessee's business is of revenue nature and allowable as deductible expenditure.

8. Ld. AR further cited a judgment of Hon'ble Supreme Court in the matter of Ramchandar Shivnaryan III ITR 263 wherein it is held that if there is a direct and proximate nexus between business

operation and loss or it is incidental to it the loss is deductible in the instant case the appellant has suffered loss in the course of acquisition of stock-in-trade, which is revenue loss and same is allowable as deductible expenditure.

9. On the other hand Ld. DR contention is that illegal tax planning is being done by the assessee in order to evade income tax.

10. After going through the afore mentioned we set aside this matter to the file of Ld. AO who will examine the fact whether Rs. 1,40,00,000/- was declared by Shri Chandan Aggarwal in his return or not. If Shri Chandan Aggarwal has declared receipt of Rs. 1,40,00,000/- in his return of income then we think that there is no loss to the revenue. After enquiry if it is found that Shri Chandan Aggarwal has declared the above said amount in his commencing return then CIT(A) order shall be sustained. In the result, this ground of appeal is allowed for statistical purpose.

11. In the result, appeal filed by the Revenue is allowed for statistical purpose.

This Order pronounced in Open Court on 30/05/2019

Sd/-

(WASEEM AHMED)
ACCOUNTANT MEMBER

Ahmedabad: Dated 30/05/2019

TANMAY

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आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

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4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /
DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

Sd/-

(MAHAVIR PRASAD)
JUDICIAL MEMBER

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।