

IN THE INCOME TAX APPELLATE TRIBUNAL "F", BENCH MUMBAI
BEFORE SHRI PAWAN SINGH, JM
&
SHRI G. MANJUNATHA, AM
ITA No.5640/Mum/2017
(Assessment Year :2013-14)

ITO, Ward-20(2)(1) Room NO.216, Piramal Chamber Llbaug, Mumbai-400 012	Vs.	Jayesh Kewalchand 401, Shanti Kunj Co.Op Soc. Naigaon Cross Road Dadar (E), Mumbai-400 014
PAN/GIR No.AACPJ4527B		
Appellant)	..	Respondent)

Assessee by	Shri Suresh Patni
Revenue by	Shri Rajeev Gubgotra
Date of Hearing	08/07/2019
Date of Pronouncement	31/07/2019

आदेश / ORDER

PER G.MANJUNATHA (A.M):

This is an appeal filed by the revenue is directed against order of the Commissioner of Income Tax Appeals – 32, Mumbai dated 27/06/2017 and it pertains to the Assessment Year 2013-14. The revenue has raised following the grounds of appeal:-

“ On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in the granting relief with regards to the additions made in the hands of third party of the IT Act, 1961 ignoring the facts that the amount of Rs. 1 crore alleged to have been paid in cash belongs to the assessee”

2. The brief facts of the case are that the assessee is an individual filed his return of income for AY 2013-14 on 31/10/2013 declaring total income of Rs. 12,37,820/-. The case was selected for scrutiny and notices u/s.

143(2) and 142(1) of the Act, were issued. In response to the notices, the Authorized Representative for assessee appeared from time to time and filed various dates, as called for. During the course of assessment proceedings, the AO noticed that there was information from DDIT (Inv.) that the assessee has made cash payment of Rs.100 Lacs to M/s Nish Developers P.Ltd against booking of flat. The AO further observed that statements were accorded on oath from Mr. Kailash Agarwal, CEO of Nish Developer and Mr. Praveen Mishra, trusted employee of the concern where they have admitted receipt of cash for booking of flat from the assessee. On the basis of information received from DDIT (Inv.), the AO, called upon the assessee to explain as to why cash payment of Rs. 1 crore paid to M/s Nish Developer for booking flat shall not be treated as unexplained money. In response to show cause notice, the assessee stated that he has neither paid cash nor the builder has admitted that they have received cash for booking flat. Although, one of employe of the builder admitted in statement regarded during search that the company has received cash for booking of flats, but there was no specific mention about the name of the assessee. It was further submitted that a letter from M/s Nish developers has been received where they have categorically stated that no cash has been received for booking flat, therefore, the question of making additions towards cash payment u/s 69A of the Act does not arise.

3. The AO after considering relevant submissions of the assessee and also by relied upon statement recorded from CEO of M/s Nish Developers P.Ltd., came to the conclusion that the assessee has failed to bring on record the source of cash of Rs. 1 crore paid to the M/s Nish Developers P.Ltd. on 02/06/2012,16/06/2012, 22/08/2012 and on 06/09/2012, he therefore, made additions of Rs. 1 crore u/s 69 A of the I.T. Act, 1961.

The relevant findings of the AO are as under:-

4.3 The letter from M/s Nish Developers Pvt. Ltd, is carefully considered. At the letter.

*it can be seen that M/s Nish Developers Pvt. Ltd has not rejected that the cash is received by it. It only says that the it has not recorded any entry for payment of any cash amounting to Rs.1,00,00,000/- from ,the assesses in their books of accounts. It further confirms that it has till date received a sum of Rs.1,47,75,002/- from the assesses towards the booking / purchase of flat-----it further confirms that the **entire proceeds of Rs.1,47,75,002/-** received by them tilt date have been only **through regular banking channels.....***

4.4 From the above, it can be noticed that the concern, M/s Nish Developers Pvt- Ltd, confirms only the legal receipts and did not deny the cash receipts which is the main issue in this proceedings. The receipts of the cash has already been accepted by the concern during the search action by the department Thus the assessee's contention that he has not made any cash payment to M/s Nish Developers Pvt Ltd is nor correct. From the statement which is produced by the assesses during the assessment proceedings, it is not proved that the no cash transaction is involved against the purchase of flat.

4.5. It is therefore, clear that the cash has been given by the assessee to M/s Nish Developers Pvt, Ltd. The assesses has failed to bring on record the source of the cash of Rs, 1,00,00,000/- paid to M/s Nish Developer Pvt. Ltd. on 2/06/2012, 16/6/2012, 22/08/2012 and on 6/9/2012. Therefore, I add Rs.1,00,00,000/- lo the income of the assessee U/S.69A of the Act, Penalty u/s. 271(1)(c) is initiated for concealment of income.

4. Subject to the above, the income of the assessee is assed as below:

<i>Profits from Business</i>	<i>Rs.13,48,560/-</i>
<i>Income from other sources</i>	<i>Rs. 7,751/-</i>
<i>Add: Income of which source is not known</i>	<i><u>Rs.1,00,00,000/-</u></i>
<i>Gross total Income</i>	<i>Rs.1,13,56,311/-</i>
<i>Less Chp. VIA deduction</i>	<i>Rs. 1,18,487/-</i>
<i>Net Taxable Income</i>	<i>Rs.1,12,37,824/-</i>

Assessed u/s 143(3) of the Income-tax Act, 1961. Give credit for prepaid taxes after due verification. Charge Interest u/s 234A, 234B & 234C as applicable. Issue Demand Notice/Challan accordingly. Calculation sheet I.T.N.S.-150 enclosed is made part of this order. Issue notice u/s 274 r.w.s. 271(l)(c) for concealment of income.

4. Aggrieved by the assessment order, the assessee preferred an appeal before the CIT(A). Before the CIT(A), the assessee has filed detailed return submissions on this issue which has been reproduced at Para no.4 of page NO. 3 to 7 of Ld. CIT(A) order. The sum and substance of arguments of the assessee before the Ld. CIT(A) are that he has neither paid cash nor the developer has admitted of having receiving cash for booking flat. Although, there was a statement from one employee, but such statement has been subsequently retracted by filing affidavit. Therefore, the same cannot be taken as conclusive evidence. The assessee further submitted that as per agreement between M/s. Nish Developers Pvt.Ltd. and the assessee, the agreed price for purchase of flat is at Rs. 2,75,00,000/-. The market value of the flat as on the date of agreement was at Rs. 2,72,20,000/- therefore, it is highly incorrect on the part of the AO to hold that cash has been paid for booking flat.

5. The CIT(A) after considering relevant submissions of the assessee and also taken into account additional evidence filed by the assessee came to the conclusion that when the person who gave statement u/s 132(4), retracted from his admission by filing a sworn affidavit, the AO

was erred in reaching to the conclusion that the assessee has paid cash for booking flat. The Ld.CIT(A) further observed that when the assessee has specifically asked for copies of statements, which the AO has heavily relied upon and also sought, cross-examination of the person who gave statement, the AO is duty bound to provide copies of statement and also allows cross examination. Since, the AO has not complied with requirement of principle of nature justice and also fact that the person who gave statement has been subsequently retracted from his statement no adverse inference could be drawn in respect of cash payments for booking flats. Accordingly, deleted additions made with AO towards cash payment to M/s Nish Developers P.Ltd. for booking flats. The relevant findings of the CIT(A) are as under:-

5, DECISION: *DECISION: I have considered the facts of the case, grounds of appeal, oral & written submissions made before me. After a careful consideration of the same as well as the assessment order, I proceed to rule as under.*

5.1 In this case addition Rs. 1,00,00,000/- U/S 69A of the IT Act was made by the AO on the basis of information received from DDIT (Inv), Mumbai. The information was forwarded by the DDIT (Inv), Mumbai that in this case appellant was alleged to cash payment of Rs. 1,00,00,000/- for purchase of flats at "One "Avighna Park", On the basis of statement recorded of Mr, Kailash Agarwal, the CEO of M/s "Nish Developers and Mr, Pravin Mishra, a house keeping employee of the builder,

5,2 The appellant has booked flat in a under construction building in the project name "One Avighna Park" being constructed by M/S Nish Developers Pvt. Ltd, at agreed purchase price of Rs. 2,75,00,000/-at the time of booking. The appellant made payment of Rs. 5,00,000/-being booking amount by cheque no. 438420 dated 31/10/2010 drawn on Dena Bank, The appellant made further payment of Rs, 20,00,000/-by cheque no. 237228 dated 30/12/2011 drawn on Dena Bank and further payment of Rs. 12,50,000/- by cheque no. 242130 dated 25/04/2012 drawn on Dena Bank. In all the appellant had made a total payment of Rs. 37,50,000/- up to 31/03/2013 against the booking and allotment of

the said flat. The appellant's wife, who is a joint owner, also contributed the same amount. The agreement for purchase of the said flat was executed on 24/12/2013 and market value of the said flat has been determined by the registrar at Rs. 2,72,20,000/- for the purpose of stamp duty. When the market value of a flat which was agreed to be purchased in 2010 for a purchase price of Rs. 2,75,00,000/- is determined after more than 3 years by the sub-registrar at Rs. 2,72,20,000/-, there is no reason of making any cash payment or on money as alleged by the AO. The appellant also furnished the copy of correspondence letter with builder wherein builder clearly denied receiving any "on money". The market value determined by the Sub-Registrar for stamp-duty purposes is less than the purchase consideration which proves that there is absolutely no scope for on-money in this transaction of purchase of flat. The AO has made addition of Rs.100 Lakhs without any evidence except the alleged submission of one Mr. Pravin Mishra, which has subsequently been withdrawn by the builder.

5.3 In support of his claim the appellant filed copy of agreement and details of payment made regarding purchase of flat. The agreement for purchase of the flat was executed on 24/12/2013 for a total agreed purchase consideration of Rs. 2,75,00,000/-. from the registration receipt dated 26/12/2013 of the said flat I find that the market value determined by the sub-registrar for stamp duty purpose was Rs. 2,72,20,000/- which is less than purchase price and payment was made through banking channel. Therefore, question to pay cash for on money does not arise,

5.4 Mr. Kailash Agarwal, the CEO of M/s Nish Developers has retracted the statements recorded by the search party by filing a sworn "Affidavit" which is kept on record. Mr. Pravin Mishra, the alleged employee has also filed a sworn "Affidavit" to the Dy.CIT, Central Circle 6(3), Mumbai and retracted the statements recorded by The search party

5.5 I rely on the decision of the Hon'ble Supreme Court in the case of Kishanchand Chellaram V. CIT[1980]125 ITR 713 (SC). Moreover, the statements so recorded have been retracted by a sworn affidavit and hence the reliance on such statements could not have been made for the purpose of making an addition in the hands of a third party.

5.6 The addition of Rs. 1 Crore was made purely on the basis of suspicion, surmises and conjecture. The addition has been made by the AO without conducting any independent enquiry and solely relying on the information received from DDIT. There is no evidence or material to support the finding of the A.O. that a sum of Rs.100 Lakhs alleged to have been paid in cash by the appellant. The A.O. relied upon only on the statement of Mr.Pravin Mishra for the purpose of making addition which has also been withdrawn subsequently. Thus there is no evidence for the conclusion that the amount of Rs.100 Lakhs alleged to have been paid in cash belongs to the appellant. Therefore I have no hesitation to delete the addition of Rs, 100 lakhs. Thus, this ground of appeal is allowed.

6. The Ld. DR submitted that the Ld. CIT(A) was erred in deleting additions made in the hands of the assessee in respect of cash payments for booking flats ignoring the facts that amount of Rs. 1 crore has been paid in cash belongs to the assessee. The Ld. DR further submitted that the AO has brought out clear facts in light of statement recorded from CEO of M/s Nish Developers P.Ltd. and a trusted employee, where they have categorically admitted of having receipt of cash for booking flats. The subsequent retraction statement is only a self serving document and there cannot be any credibility attached to subsequent correspondence, thus, the retraction has no value unless the assessee proves that how it is not a valid statement.

7. The Ld.AR for the assessee, on the other hand, strongly supporting order of the CIT(A) submitted that the CIT(A) has rightly deleted the additions made towards cash payments for booking flat, when the assessee has explained with necessary evidences that no cash has been exchanged between the parties in respect of booking flat. The Ld. AR further submitted that the assessee has filed an agreement between the parties as per which the value of the flat as per market rate is less than the agreement value which is evident from the fact that the sale deed executed on 24/12/2013 is categorically proves that market value of the said flat has been determined by the Registrar at Rs. 2,72,20,000/-. Further, the person who gave statement has been retracted from such statement with sworn affidavit and stated that no cash has been received

for booking flat. Under these facts, the CIT(A) rightly reached to the conclusion that the AO has made additions without conducting any independent enquiry and solely relying on the information received from DDIT (Inv.) and hence, order of the CIT(A) should be confirmed.

8. We have heard both the parties, perused material available on record and gone through orders of the authorities below. The AO has made additions u/s 69A of the I.T. Act, 1961 towards purported cash payment of Rs. 1 crore to M/s Nish developers P.Ltd. for purchase of flats. The AO has relied upon information received from DDIT (Inv.) as per which the CEO and trusted employee of M/s Nish Developers P.Ltd., in the statement recorded during search proceedings have admitted the fact of receiving cash for booking of flats. Except this, the AO has not carried out any independent enquiry to find out the truth in light of statement recorded from CEO of M/s. Nish Developers P.Ltd. towards cash payment made for bookings flats. On the other hand, the assessee has filed an agreement between the parties as per which the agreed price for said flat was at Rs. 2,75,00,000/-. The assessee has also filed copy of purchase deed which was executed on 24/12/2013 and market value of the said flat has been determined by the Registrar at Rs. 2,72,20,000/- for the purpose of stamp duty. When the market value of the flat which was agreed to be purchased in 2010 for a purchase of price Rs. 2, 75,00,000/- is determined after more than three years by the Sub Registrar at Rs.

2,72,20,000/-, there is no reason for the AO to make additions towards alleged cash payment only on the basis statement of some persons, more particularly when the persons who gave such statements have been subsequently retracted statement by filing a sworn affidavit. The Ld.CIT(A) after considering relevant facts and also by following the decision of Hon'ble Supreme Court in the case of Shri. Kishanchand Chellaram Vs. CIT (1980) (125 ITR 730) held that the AO has made additions without conducting any independent enquiry and solely on the basis of information received from DDIT (Inv.) without there being any further evidences to support his findings that a sum of Rs. 100 Lacs alleged to have been paid in cash by the assessee. We do not find any error in the findings of CIT(A). Hence, we are inclined to uphold findings of the CIT(A) and dismissed the appeal filed by the revenue.

9. In the result, appeal filed by the revenue is dismissed.

Order pronounced in the open court on this 31/07/2019

Sd/-

(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-

(G. MANJUNATHA)
ACCOUNTANT MEMBER

Mumbai; Dated 31/07/2019
Thirumalesh Sr.PS

Copy of the Order forwarded to :

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

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai