

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No.2451/Del/2015
(Assessment Year: 2010-11)

Late Harbhajan Singh Makkar, (Through L/H Gurinder Singh Makkar), 486, Model Town Karnal, Haryana PAN: AAVPM1569K	Vs.	ACIT, Central Karnal, Haryana
(Appellant)		(Respondent)

Assessee by :	Shri Raj Kumar, CA Shri Sumeet Goel, CA
Revenue by:	Shri Surnder Pal, Sr. DR
Date of Hearing	17/07/2019
Date of pronouncement	16/10/2019

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This appeal is filed by the assessee against the order of the Id CIT(A), Rohtak dated 30.03.2015 for the Assessment Year 2010-11, wherein, the order of the Id AO passed u/s 143(3) of the Act dated 07.03.2013 was confirmed. The only issue in dispute is the addition of Rs. 1,70,00,000/- , being alleged on money received on sale of property, made by the Id AO confirmed by the Id CIT (A) .
2. The assessee has raised the following grounds of appeal:-
 - “1A. *That under the facts and circumstances, both the lower authorities erred in law as well as 011 merits in making and sustaining the addition of Rs. 1,70,00,000/- as alleged undisclosed / un accounted sales consideration received against sale of property at 1st floor of BB - 17, G K, Part - II, New Delhi, over and above the apparent and declared sales consideration of Rs. 1,40,00,000/- which is as per registered sale deed.*
 - B. *That without prejudice, the adverse inference taken in the absence of providing complete material collected on the back of the assessee, and without allowing opportunity of cross - examining such persons whose statements have been recorded on the back and have been used in Asstt., is not permissible and no such material can be used against the assessee.*

- C. *That without prejudice, under the facts and circumstances, under no circumstance, the alleged receipts can be considered to be in A.Y. 2010-11.*
2. *That without prejudice, the complete proceedings are illegal and un-sustainable for not initiating and not issuing the notices for these proceedings to all the legal heirs and thus for not allowing the participation of all legal heirs.”*
3. The brief facts of the case is that the assessee is an individual who filed his return of income on 29.11.2010 declaring income of Rs. 33,41,166/-. The assessee has shown a consideration of Rs. 1,40,00,000/- on sale of his residential property at Greater Kailash, Part-II, New Delhi on which long term capital gain of Rs. 30,13,119/- has been declared.
4. The ld AO dealt with the above issue as per Para No. 4 to 11 of his order as under:-

4. *As per the information received from the office of Asstt. Director of Income Tax (Investigation)-Unit 111(3), New Delhi, during the course of post search proceeding in the case of Triveni Group, summons u/s 131(A) were issued to Shri Honey Gupta and Smt. Santosh Rani Gupta. Shri Honey Gupta, while deposing his statement with regard to purchase of 1st Floor of House property at BB-17, G.K. Part II, Delhi, has admitted that his mother has made part payment in cash of Rs.1.70 Crores, over and above the amount as shown in the sale deed during the F.Y. 2009-10. Copy of statement of Shri Honey Gupta recorded on oath on 12.11.2010 by ADI (Investigation)-Unit-III(3), New Delhi, is annexed at page 11 to 12 as Annexure-L In the statement Shri Honey Gupta has deposed that first floor of the property BB-17, G.K. Enclave-II, New Delhi was purchased by his mother Smt. Santosh Rani Gupta for Rs.3.10 crores. The registry value of first floor of this property was Rs.1.4 crores. He has further admitted to have made part payment for this property in cash and voluntarily surrendered the difference of Rs.1.70 crore on account of payment made in cash to the seller of property i.e., Sh. Harbhajan Singh Makkar paid by his mother. Statement of Sh. Naveen Nangia, Property Dealer who had arranged the deal, residence of Flat No. 14B, Pocket, A-11, Surya Apartments, Kaikaji Extension, New Delhi was also recorded on oath on 24.01.2011 by ADI (Investigation) Unit-III (3), New Delhi, to corroborate the statement given by Sh. Honey Gupta and he has also admitted that he had arranged sale of property BB:17, G.K. Enclave-11, New Delhi and first floor of the said property was sold for Rs.3.10 crores. He has also deposed that cash component over and above sale consideration shown in the sale deed was received by Sh. Harbhajan Singh on the date when sale deed was executed. He has even deposed that he had seen that handing over the cash component received by Sh. Harbhajan Singh and actually he had even assisted in counting and handing over the*

cash component to the respective parties as a part of his profession and service. He has further stated that the entire deal was arranged by him and Sh. Avdhesh Mittal had nothing to do with the said deal. Statement of Sh. Naveen Nangia is annexed at page 13 to 16 as Annexure-H. Photocopies of above statements of Sh. Honey Gupta, Son of Smt. Santosh Rani Gupta and Sh. Naveen Nangia, the property dealer who had arranged the deal, were also supplied to the assessee.

5. Vide order sheet entry dated 29.10.2012, assessee was asked to explain as to why the unaccounted sale proceeds of immovable property amounting to Rs. 1,70,00,000/- paid in cash over and above the registered sale consideration to him by Smt. Santosh Gupta, should not be added to the income of the assessee by treating the same as undisclosed income of the assessee, as-per information received from the ADI(Inv.) Unit-III(3), New Delhi, where the excess undisclosed amount paid by the purchaser has been surrendered for taxation.

6. In response to this show cause, assessee furnished written reply on 26.11.2012 relevant portion of which is reproduced below:-

“Your Worthyself have issued show cause notice for addition of Rs.170 lacs relying on the statement of Sh. Honey Gupta and Sh. Naveen Nangia recorded by Hon’ble ADI, Unit -III, New Delhi.

The statement of Sh. Honey Gupta and Sh. Naveen nagia cannot be relied upon in the case, as they have concealed a major fact, that property BB-17 G.K. Enclave II, New Delhi 1st floor was purchased by Sh. Avdhesh Mittal S/o Sh. B.L. Mittal R/o 91 Greater Kailash, New Delhi for an agreed sum of Rs.140 lacs from Sh. Harbhajan Singh Makkar. Sh. Avdhesh'Mittal made the toted payment of Rs.140 lacs for the sale of property to Sh. Elarbhajcin Singh Makkar. Sh. Avdhesh Mittal purchased his property in the month of Sep. 2009 and issued two cheques from his personal SB A/c with HDFC Bank, New Delhi for Rs. 10 lacs bearing cheque no. 344021 and 20 lac bearing cheque no. 344022 dt. 23.09.2009. and 30.09.2009 respectively. (Photocopies of cheques are enclosed). These cheques were credited in the PNB, New Delhi Account of Sh. Harbhajan Singh Makkar on 25.09.2009 and 03.10.2009. The copy of PNB, New Delhi Account of Sh. Harbhajan Singh Makkar have already been submitted with your Worthyself with reply dt. 29.10.2012. Sh. Avdesh Mittal further handed over two pay orders for Rs.50 lac each bearing nos. 085716 and 085717 respectively and one pay order of Rs.10 lac bearing no. 085718 of HDFC'Bank Ltd., New Delhi on dt. 27.11.2009. These pay orders were encashed in PNB, New Delhi Account of Sh. Harbhajan Singh Makkar on dt. 01.12.2009. Sh. Avdesh Mittal got the property registered ip the name of Smt. Santosh Rani Gupta on 26.11.2009.

Sh. Harbhajan Singh Makkar did not know Smt. Santosh Rani Gupta at all, this properly was transferred in her name at

instance of Sh. Avdhesh Mittal who was purchaser of the property from Sh. Harbhajan Singh Makkar. ”

7. *Statement of Sh. Honey Gupta, son . of Smt. Santosh Rani Gupta, purchaser of the property was also recorded on 27.12.2012 by this office by issuing summons u/s 131 of the I.T. Act. In the statement he admitted that-statement had been given by him before ADIT (Investigation) Unit-III(3), New Delhi on 12.11.2010 on behalf of his mother: Copy of the statement of Sh. Honey Gupta was also provided to the assessee on his request.*

8. *Assessee vide reply received on this office on 28.01.2013 further submitted as under:-*

“ The show cause have been issued on the basis of statement of Sh. Honey Gupta recorded by learned ADI, New Delhi. The statement of Sh. Honey Gupta was given on. behalf of her mother Smt. Santosh Rami Gupta who was the purchaser of property from the assessee. It is not. clear why the statement of 'Sh Honey Gupta, was recorded on behalf of her mother when the mother is alive and having good health and more so independent income tax assessee having PAN N&. AAEPG7465K. The statement of Sh. Honey Gupta cannot be relied upon in this case, as he is not purchaser •of the property in question.

Even in his statement recorded before learned. ADI (Unit III). New Delhi., Sh. Honey Gupta stated thatjhe payment of Rs. 170 Lacs are being paid during the current financial year i.e. 2010-2011. It is. pointed out here that sale deed was entered on dt. 30.11.2009 i.e. during financial year 2009-10, how a payment of the sale f property can be made one year after the sale agreement, registered before the registrar of property New Delhi. The statement of Sh. Honey Gupta cannot be relied upon for this reason also for making addition during financial year 2009-2010.

In the statement of Sh. Honey Gupta recorded by your worthy self on dated 27.12.2012, he has denied any cash payment having been made by his mother or himself to Sh. Harbhajan Singh Makkar.

He has further stated that statement given before the ADI (Unit-III), New Delhi was under-Pressure and at that time he was a patient of sleep disorder also for which he was under treatment from a doctor, the prescription of which was also submitted by him to your Worthyself.

The assessee was not given an opportunity to cross examine the witness that is Sh. Honey Gupta neither by learned ADI nor by your worthyself. The assessee had put in a written request on 27.12.2012 in this regard before the statement of Sh. Honey Gupta was recorded by your worthyself.

The only reliable evidence of sale of 1st floor of property No. BB-17, G.K. Enclave, New Delhi is the Sale Deed registered before the sub Registrar V, New Delhi. It is requested that Sub Registrar may be summoned as witness for which the assessee is ready to deposit the requisite charges.

In the light of above facts the Show Cause issued for addition of Rs. 170 Lacs in this case is bad in law as well as on the 'given facts of the case. It is requested that Show Cause notice may be filed and assessment may be framed accordingly. "

9. Reply of the assessee has been considered. Assessee has mainly raised following three contentions

i) Sh. Honey Gupta has given statement on- behalf of his mother Smt. Santosh Rani Gupta who is alive and having good health and also independent income-tax assessee.

ii) In the statement recorded before ADI(Iny.) Unit-III(3), New Delhi Sh. .Honey Gupta stated that payment of Rs.1.70 crores is being paid during the current financial year i.e. 2010-11 whereas sale deed was entered on 30.11.2009J.e. during financial year 2009- 10.As such statement of Sh. .Honey Gupta cannot be relied upon for making addition during financial year 2009 -10.

iii) In the statement of Sh. Honey Gupta recorded on 27.12.2012 by this office, he has denied any cash payment having been made by his mother or himself to Sh. flarbhajan Singh Makkar.'

10. Contentions raised by the assessee have been considered and found not tenable for the following reasons:-

i) In the statement recorded on oath on 12.11.2010 by ADIT (Inv.) Unit-HI(3), New Delhi, Sh. Honey Gupta has clearly stated that he is competent to give statement on behalf of his mother Smt. Santosh Rani.

ii) He has voluntarily surrendered the difference on account of payment made in cash to the seller of the property to the tune of Rs. 1.70 crores paid by his mother.

iii) Sh. Naveen Nangia, property dealer who had arranged the deal, whose statement was also recorded on oath on 24.01.2011 has also clearly stated that amount of Rs.1.70 crores for the 1st floor over and above the sale consideration was made in cash to the seller in the morning of date of execution of sale deed. He has further stated that the 1st floor was sold by Sh. Harbhajan Singh and cash of Rs.1.70 crores was taken by him over and above the sale price shown in the sale deed.

iv) Sh. Naveen Nangia has also denied in the statement that buyers were brought to them by Sh. Avdhesh Mittal and further stated that entire deal was arranged; by him and Sh. Avdhesh Mittal has nothing to do with the said deal.

v) In the statement given on 27.12.2012 on oath in this office (Annexure-III to this order at page 17 to 21) Sh. Honey Gupta has not

been able to corroborate and prove as correct his version that statement given on 12.11.2010 before ADI (Inv.) Unit-III(3), New Delhi, on behalf of his mother Smt. Santosh Rani Gupta was given under pressure and under the influence of medicine. On being pointedly and repeatedly asked by this office to explain as to what kind of pressure was there upon him, as claimed by him, under which he admitted the true facts before the ADIT, he could not give any satisfactory reply. It can be clearly seen from his statement that he is just trying to deny the true facts of the case as already confessed by him before the ADIT but he has completely failed in his attempt to do so as he could not give any satisfactory explanation/reply in response to pointed questions put to him by this office. He also admitted in his statement given before this office that he had given his statement before the ADIT to avoid further action by the Department which clearly proves that he had surrendered the unaccounted/undisclosed cash payment made by his mother and himself, voluntarily, in order to avoid penal and prosecution action by the department.

vi) The sale deed of aforesaid property has been registered in the office of the Sub- Registrar V, New Delhi on 30.11.2009 and, therefore, the entire sale consideration,, including the undisclosed/unaccounted cash component of Rs. 1.70 crores, must have been paid/received on or before 30.11.2009 and hence, the same is assessable in the hands of the assessee as his income of financial year 2009-10 relevant to A.Y. 2010- 11. This fact has also been confirmed by the ADIT(Inv.) Unit-III(3), New Delhi vide his office letter No. As.stt. DIT (Inv.)/Unit III(3)/2010-11/117 dated 25.01.2011 and further vide his office letter No. ADIT(Inv.)/Unit III(3)/2012-13/253 dated 19.12.2012.

vii) It is a common knowledge that as per practice generally prevalent in the real estate .market, a substantial part of the sale consideration is paid/received in cash, in order to avoid the correct payment of taxes. While giving his statement on oath before the ADIT(Inv.) Unit-XII(3). New Delhi on 12.11.2010, Sh. Honey Gupta was confronted .by the ADIT in question number .9 of the statement, to furnish the details of cash/unaccounted payment made by him and his mother for the purchase of first and second floor of the aforesaid property, in the light of fact that ground floor and basement of the same property was purchased by Sh. Avdhesh Mittal for consideration of Rs. 4.25 crores and' Rs.2.75 crores respectively. On being confronted with this information, Sh. Honey Gupta admitted to have paid unaccounted cash payment of Rs.1.70 crores by his mother and Rs.1.40 crores by himself to the sellers of the first floor and second floor of the aforesaid property respectively and surrendered the unaccounted payment made by his mother and himself for taxation and further requested that no penal/prosecution proceedings may be initiated against them as the undisclosed amount was being surrendered voluntarily by them./ ' .

11. From the above discussion, it is clear that the assessee has received cash payment of Rs.1.70 crores over and above that sale consideration

amount mentioned in - the sale deed i.e. Rs.1.40 crores against sale of first floor residential property BB-17, G.K. Enclave, New Delhi. In the computation, assessee has taken Rs. 1.40 crores as sale price for computation of capital gains arising on sale of this property. Thus, assessee has shown less long term capital gain to the tune of Rs.1.70 crores which is now added to the returned income of the assessee shown under the head 'Income from Capital Gains'. I have reason to believe that assessee has concealed his income and furnished inaccurate particulars of his income in respect of long term capital gain of Rs. 1.70 crores, therefore, penalty proceedings u/s 271(1)(c) are being initiated separately.”

5. Thus, the assessment order u/s 143(3) was passed where in the addition of Rs 1.70 crore was made towards the sale consideration of the property over and above the declared sales consideration. The assessee preferred an appeal before the Id CIT(A) who dealt with the whole issue vide para No. 4 onwards as under:-

“4. I have perused the facts 'of the case as well as the submissions made by the assessee. The addition in the assessment order is based on the findings of the AO as mentioned hereunder:-

“As per the information received from the office of Asstt. Director of Income Tax (Investigation)-Unit 111(3), New Delhi, during the course of post search proceeding in the case of Triveni Group, summons u/s 131(A) were issued to Shri Honey Gupta and Smt. Santosh Rani Gupta. Shri Honey Gupta, while deposing his statement with regard to purchase of 1st Floor of Housp property at BB-17, G.K. Part II, Delhi, has admitted that his mother has made part payment in cash of Rs. 1.70 crores, over and above the amount as shown in the sale deed during the F.Y. 2009-10. Copy of statement of Shri Honey Gupta recorded on oath on 12.11.2010 by ADI (Investigation)-Unit-III(3), New Delhi, is annexed at page 11 to 12 as Annexure-I. In the statement Shri Honey Gupta has deposed that first floor of the property BB-17, G.K. Enclave-II, New Delhi was purchased by his mother Smt. Santosh Rani Gupta for Rs.3.10 crores. The registry value of first floor of this property was Rs.1.4 crores. He has further admitted to have made part payment for this property in cash and voluntarily surrendered the difference of Rs. 1.70 crore on account of payment made in cash to the seller of property i.e., Sh. Harbhajan Singh Makkar paid by his mother. Statement of Sh. Naveen Nangia, Property Dealer who had arranged the deal, residence of Flat No. 14B, Pocket, A-II, Surya Apartments, Kalkaji Extension, New Delhi was also recorded on oath on 24.01.2011 by ADI (Investigation) Unit-III (3), New Delhi, to corroborate the statement given by Sh. Honey Gupta and he has also admitted that he had arranged sale of property BB-17, G.K. Enclave-II, New Delhi and first floor of the said property was sold for Rs.3.10 crores. He has also deposed that cash component over and above sale consideration shown

in the sale deed was received by Shri Harbhajan Singh on the date when sale deed was executed.

He has even deposed that he had seen that handing over the cash component received by Sh. Harbhajan Singh and actually he had even assisted in counting and handing over the cash component to the respective parties as a part of his profession and service. He has further stated that the entire deal was arranged by him and Sh. Avdhesh Mittal had nothing to do with the said deal. Statement of Sh. Naveen Nangia is annexed at page 13. to 16 as Annexure-II. JPhotocopies of above statements of Sh. Honey Gupta, Son of Smt. Santosh Rani Gupta and Sh. Naveen Nangia, the property dealer who had arranged the deal, were also supplied to the assessee.

5. *Vide order sheet entry dated 29.10.2012, assessee was asked to explain as to why the unaccounted sale proceeds of immovable property amounting to Rs. 1,70,00,000/- paid in cash over and above the registered sale consideration to him by Smt. Santosh Gupta, should not be added to the income of the assessee by treating the same as undisposed income of the assessee, as per information received from the ADI(Inv.) Unit-III(3), New Delhi, where the excess undisclosed amount paid by the purchaser has been surrendered, for taxation.*
6. *In response to this show cause, assessee furnished written reply on 26.11.2012 relevant portion of which is reproduced below:-*

“Your Worthy self have issued show cause notice for addition of Rs. 170 lacs relying on the statement of Sh. Honey Gupta and Sh. Naveen Nangia recorded by Hon 'ble ADI Unit-III, New Delhi.

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on dt. 01.12.2009. Sh.- Avdesh Mittal got the property registered in the name of Smt. Santosh Rani Gupta on 26.11.2009.

Sh. Harbhajan Singh Makkar did not know Smt. Santosh Rani Gupta at all, this property was transferred in her name at instance of Sh. Avdhesh Mittal who was purchaser of the property from Sh. Harbhajan Singh Makkar. ”

7. Statement of Sh. Honey Gupta, son of Smt. Santosh Rani Gupta, purchaser of the property was also recorded on 27.12.2012 by this office by issuing summons u/s 131 of the I.T. Act. In the statement he admitted that statement had been given by him before ADIT (Investigation) Unit-III(3), New Delhi on 12.11.2010 on behalf of his mother. Copy of the statement of Sh. Honey Gupta was also provided to the assessee on his request.

8. Assessee vide reply s received on this office on 28.01.2013 further submitted as under:-

“The show cause have been issued on the basis of statement of Sh. Honey Gupta recorded by learned ADI, New Delhi. The statement of Sh. Honey Gupta was given on behalf of her mother Smt. Santosh Rani Gupta who was the purchaser of property from the assessee. It is not clear why the statement of Sh. Honey Gupta was recorded on behalf of her mother when the mother is alive and having good health and more so independent income tax assessee having PAN No. AAEPG7465K. The statement of Sh. Honey Gupta cannot be relied upon in this case as he is not purchaser of the property in question.

Even in his statement recorded before learned ADI (Unit III), New Delhi, Sh. Hortey Gupta stated that the payment of Rs. 170 Lacs are being paid during the current financial year i.e. 2010-2011. It is pointed out here that sale deed was entered on dt. 30.12.2009 i.e. during financial year 2009-10, how a payment of the sale fproperty can be made one year after the sale agreement registered before the registrar of property New Delhi. The statement' of Sh. Honey Gupta cannot be relied upon for this reason also for making addition during financial year 2009-2010.

In the statement of Sh. Honey Gupta recorded by your worthyself on dated 27.12.2012, he has denied any cash payment having been made by his mother or himself to Sh. Harbhajan Singh Makkar.

He has further stated that statement given before the ADI (Unit-III), New Delhi was under Pressure and at that time he was a patient of sleep disorder also for which he was under treatment from a doctor, the prescription of which} was also submitted by him to your Worthyself.

The assessee was not given an opportunity to cross examine the witness that is Sh. Honey Gupta neither by learned ADI nor by your worthyself. The assessee had put in a written request on 27.12.2012 in this regard before the statement of Sh. Honey Gupta was recorded by your worthyself.

The only reliable evidence of sale of 1st floor of property No. BB-17, G.K. Enclave, New Delhi is the Sale Deed registered before the sub Registrar V, New Delhi. It is requested that Sub Registrar may be summoned as witness for which the assessee is ready to deposit the requisite charges.

In the light of above facts the Show Cause issued for addition of Rs. 170 Lacs in this case is bad in law as well as on the given facts of the case. It- is requested that Show Cause notice may be filed and assessment may be framed accordingly. ”

9. *Reply of the assessee has been considered. Assessee has mainly raised following three contentions:-*

i) *Sh. Honey Gupta has given statement on behalf of his mother Smt. Santosh Rani Gupta who is alive and having good health and also independent income-tax assessee.*

ii) *In the statement recorded before ADI(Inv.) Unit-III(3), New Delhi Sh. Honey Gupta stated that payment of Rs. 1.70 crores is being paid during the current financial year i.e. 2010-11 whereas sale deed was entered on 30.11.2009 i.e. during financial year 2009-10. As such statement of Sh. Honey Gupta cannot be relied upon for making addition during financial year 2009-10.*

iii) *In the statement of Sh. Honey Gupta recorded on 27.12.2012 by this office, he has denied any cash payment having been made by his mother or himself to Sh. Harbhajan Singh Makkar.*

10. *Contentions raised by the assessee have been considered and found not tenable for the following reasons*

i) *In the statement recorded on oath on 12.11.2010 by ADIT (Inv.) Unit-III(3), New Delhi, Sh. Honey Gupta has clearly stated that he is competent to give statement on behalf of his mother Smt. Santosh Rani.*

ii) *He has voluntarily surrendered the difference on account of payment made in cash to the seller of the property to the tune of Rs. 1.70 crores paid by his mother.*

iii) *Sh. Naveen Nangia, property dealer who had arranged the deal, whose statement was also recorded on oath on 24.01.2011 has also clearly stated that amount of Rs. 1.70 crores for the 1st floor over and above the sale consideration was made in cash to the seller in the morning of date of execution of sale deed. He has further stated that the 1st floor was sold by Sh. Harbhajan Singh and cash of Rs. 1.70 crores was taken by him over and above the sale price shown in the sale deed.*

iv) *Sh. Naveen Nangia has also denied in the statement that buyers were brought to them by Sh. Avdhesh Mittal and further stated that entire deal was arranged by him and Sh. Avdhesh Mittal has nothing to do with the said deal.*

v) *In the statement given on 27.12.2012 on oath in this office (Annexure-III to this order at page 17 to 21) Sh. Honey Gupta has not been able to corroborate and prove as correct his version that statement given on*

12.11.2010 before ADI (Inv.) Unit-III(3), New Delhi, on behalf of his mother Smt. Santosh Rani Gupta was given under pressure and under the influence of medicine. On being pointedly and repeatedly asked by this office to explain as to what kind of pressure was there upon him, as claimed by him, under which he admitted the true facts before the ADIT, he could not give any satisfactory reply. It can be clearly seen from his statement that he is just trying to deny the true facts of the case as already confessed by him before the ADIT but he has completely failed in his attempt to do so as he could not give any satisfactory explanation/reply in response to pointed office that he had given his statement before the ADIT to avoid further action by the Department which clearly proves that he had surrendered the unaccounted/undisclosed cash payment made by his mother and himself, voluntarily, in order to avoid penal and prosecution action by the department.

vi) The sale deed of aforesaid property has been registered in the office of the Sub- Registrar V, New Delhi on 30.11.2009 and, therefore, the entire sale consideration, including the undisclosed/unaccounted cash component of Rs.1.70 crores, must have been paid/received on or before 30.11.2009 and hence, the same is assessable in the hands of the assessee as his income of financial year 2009-10 relevant to A.Y. 2013-14. This fact has also been confirmed by the ADIT(Inv.) Unit-III(3), New Delhi vide his office letter No. Asstt. DIT (Inv.)/Unit III(3)/2010-11/117 dated 25.01.2011 and further vide his office letter No. ADIT(Inv.)/Unit III(3)/2012-13/253 dated 19.12.2012.

vii) It is a common knowledge that as per practice generally prevalent in the real estate market, a substantial part of the sale consideration is paid/received in cash, in order to avoid the correct payment of taxes. While giving his statement on oath before the , ADIT(Inv.) Unit-III(3), New Delhi on 12.11.2010, Sh. Honey Gupta was confronted by the ADIT in question number 9 of the statement, to furnish the details of cash/unaccounted payment/made by him and his mother for the purchase of first and second floor of the aforesaid property, in the light of fact that ground floor and basement of the same property was purchased by Sh. Avdhesh Mittal for consideration of Rs. 4.25 crores and Rs.2.75 crores respectively. On being confronted with this information, Sh. Honey Gupta admitted to have paid unaccounted cash payment of Rs.1.70 crores by his mother and Rs.1.40 crores by himself to the sellers of the first floor and second floor of the aforesaid property respectively and surrendered the unaccounted payment made by his mother and himself for taxation and further requested that no penal/prosecution proceedings may be initiated, against them as the undisclosed amount was being surrendered voluntarily by them.

11. From the above discussion, it is clear that the assessee has received cash payment of Rs.1.70 crores over and above that sale consideration amount mentioned in the sale deed i.e. Rs.1.40 crores against sale of first floor residential property BB-17, G.K. Enclave, New Delhi. In the computation, assessee has taken Rs.1.40 crores as sale price for computation of capital gains arising on sale of this property. Thus, assessee has shown less long term capital gain to the tune of Rs.1.70 crores which is now added to the returned income of the assessee shown under the head 'Income from Capital

Gains'. I have reason to believe that assessee has concealed his income and furnished inaccurate particulars of his income in respect of long term capital gain.

From the statement of Shri Naveen Nangia before the ADIT unit III (3) Delhi recorded on 24.01.2011, a property at BB17, GK Part-II, New Delhi had the following levels which were sold to various parties in the FY 2009-10 as under:-

S. No.	Floor	Seller	Purchaser
1.	Basement	Smt. Deepa Gupta	A.vdesh Mittal
2.	Ground floor	-do-	-do-
3.	1st floor	,Shri Harbhajan Singh	Santosh Rani Gupta
4.	2 nd floor	M / s Ankusb Builders Pvt. Ltd.	Honey Gupta
5.	Terrace right of 2 nd floor	-do-	Avdesh Mittal

The appellant has sought relief on the grounds that there was no documentary evidence in making the said addition, that Shri Honey Gupta had retracted his' statement made before the ADIT (Unit-III), New' Delhi on 12.11.2010 admitting to such payment" and the statement before the ADIT Karnal dated 27.12.2012.

However, the case of the appellant suffers from certain flaws. The fact remains that Shri Honey Gupta did make a surrender of Rs 1.4 crores for the flat on the 2nd floor purchased by him and Rs 1.7 crores in respect of payment made by his mother, Smt. Santosh Rani Gupta for the flat on the 1st floor sold by the appellant. The retraction by Shri Honey Kumar is on the basis that he was suffering from a sleep disorder and was hence, under pressure at the time- of recording of the statement by the ^-DIT. An examination of the statement dated 12.11.2010 reveals that it was recorded at 11.45 AM which if, looked at objectively, is a regular '.business hour and Shri Gupta was, as per his statement, involved in the day to day activities of running his family business of export of fasteners. Therefore, a person who of his own admission ran his own business would not lose his wits in responding to queries, which were not of a coercive nature.

What is also crucial to the argument of the AO is the fact that Shri Naveen Nangia, the property dealer - whose statement; was recorded on 24.01.2011 was also a witness to the agreement of sale (agreement dated 27.11.2009). His statement that the cash component was paid on the date of agreement cannot be disregarded. The fact that Shri Avdesh Mittal paid the cheque component to the appellant does not have any significance except for the fact that he, the former, had an interest in the said property and purchased the basement and ground floor that year. It is possible that he could have been Interested in the floor owned -by the appellant and later backed out of the-said transaction. It is also a known fact that a cash transaction will never appear in the form of any evidence. The assessment order in the case of Shri Honey Gupta and his mother, Smt. Santosh Rani Gupta are inherently flawed because there is a discussion on the disclosure but none on the retraction or on how their AO have treated the said disclosure. This is a case where the

assessee has not been able to discharge his onus of proving that no cash was paid for the said transaction. Merely stating that, he sold it to Avdesh Mittal but at the last moment it was registered in the name of Santosh Rani Gupta is no explanation at all. The fact that Shri Honey Gupta, Santosh Rani Gupta's son brought the 2nd floor of the building shows that they were interested in the said property i.e. the building; It is possible that Shri Avdesh Mittal who purchased the basement, ground floor and the terrace right of the 2nd floor of the said building had been engaged in the initial stages of trying to buy the first and second floor; which deal, as is apparent fell through.

In the circumstances, the AO's order was justified."

6. Thus, Assessee aggrieved with the order of the 1d CIT (A) has preferred this appeal before us.
7. The 1d Authorized Representative submitted that assessee sold the property to one Mrs. Santosh Rani Gupta. The information was received from Investigating Wing that Rs. 1.70 cores was given in cash over and above appellants consideration to the Assessee by the purchaser based on the statement recorded of the son of the buyer. This information was based upon the statement of Mr. Honey Gupta, son of the buyer and Mr. Naveen Nangia the broker. The addition has been made solely on the basis of statement of these two persons. He submitted that no statement of the purchaser was recorded by the Investigation Wing but relative of the purchaser was examined and his statement was recorded. He submitted that even the statement of Mr. Honey Gupta was recorded at the back of the Assessee and cross examination was asked but it was not allowed. The assessee stated that when the cross-examination of the witnesses has not been allowed to the assessee the addition cannot be sustained. He relied upon the decision of the Hon'ble Supreme Court in 281 CTR 241. He further submitted that during the assessment proceedings the AO again recorded the statement of Mr. Honey Gupta on 27/12/2012 wherein, he denied any cash payment over and above the apparent consideration recorded in the documents. Therefore, he submitted that the addition has been made in the hands of the assessee on the basis of the retracted statement of the person. Even otherwise he stated that the addition has been made purely on the basis of a statement which is not sustainable in law. He further submitted that the sale deed was registered on 27 -

30/11/2009 and possession was also given on 27/11/2009. It was stated that when the sale deed took place in assessment year 2010-11 and possession also given in assessment year 2010-11 there is no question of making any payment of Rs. 1.70 crores and that too in assessment year 2011-12 as per the statement of Mr. Honey Gupta. Therefore, he submitted that the statement of Mr. Honey Gupta cannot be relied upon. He further submitted that the statement of the broker was recorded by the Additional Director of Income Tax. As he was not the broker of the assessee therefore no brokerage was paid by the assessee. He submitted that even from any of the parties no brokerage was taken by him for this deal. His statement was also recorded on the back of the assessee and no cross-examination was allowed even when specifically asked by the assessee. Therefore, he submitted that in absence of cross-examination the statement cannot be used adversely. He submitted that the statement of Mr. Honey Gupta before the Additional Director Of Income Tax as well as the statement of the broker is contradictory to the each other. He stated that Mr. Gupta submitted that the cash payment has been made in financial year 2010-11 whereas the broker is saying that cash payment has been made on the date of registration of the document i.e. on 30/11/2009. He stated that as per Mr. Gupta who is the giver of the money says that he paid money in financial year 2010-11 whereas the broker says that it is paid in financial year 2009-10. Thus the statements of both the persons are contradictory to each other and therefore are not reliable. He further submitted that Mr. Honey Gupta has retracted his statement and therefore same cannot be used. He further stated that in case of the buyer there is no addition on account of alleged cash payment for purchase of the property but the addition has been made in the hands of the seller. Even otherwise he submitted that assessee has agreed to sell the said property to Shri. Avdhesh Mittal for Rs.1.40 crores and not to Mrs. Santosh Rani Gupta. He submitted that the complete payment of Rs. 14,000,000/- received from Mr. Mittal and not from Santosh Rani Gupta. It is only on the instruction of Mr. Mittal that property was registered in the name of Santosh Rani Gupta. In

view of the assessee submitted that no addition can be sustained in the hands of the assessee.

8. The learned departmental representative vehemently relied upon the order of the lower authorities and submitted that when the buyer has confessed that she has paid money to the assessee for the purchase of property out of the books, therefore the addition is required to be made in the hands of the assessee. The learned Departmental Representative extensively referred the orders of the lower authorities.
9. We have carefully considered the rival contention and perused the orders of the lower authorities. The fact shows that assessee has sold the property at 1st floor, BB – 17 greater Kailash part – 2, New Delhi for a consideration of INR 14,000,000 to Mrs. Santhosh Rani Gupta. The sale deed was registered on 26/11/2009 wherein the agreed consideration paid by the assessee was INR 14,000,000 . Sale consideration stated in Para number 6 of the sale deed shows various cheques issued on various dates in the favour of the assessee. The contention of the assessee is that this amount of money has been paid by Mr. Mittal and not Mrs. Gupta. Learned Assessing Officer noted that Mr. Honey Gupta, son of the buyer made a statement on oath on 12/11/2010 before the Assistant Director Of Income Tax (Investigation), New Delhi wherein in response to question No. 3 and Question Number 9 , he submitted that part payment for the purchase of property was made in cash and therefore he voluntarily surrendered the difference on account of payment made in cash to the seller (assessee) of property to the tune of Rs. 1.70 crores as paid by mother of the Mr. Honey Gupta for 1st floor during financial year 2010-11 and Rs. 1.40 crores paid by him for 2nd floor during financial year 2000-11. The statement of the broker Mr. Naveen was also recorded in case of Mr. Mittal on 24/1/2011 by the Additional Director Of Income Tax (Investigation) New Delhi wherein in response to Question No 4 he stated that sale of the property at the 1st floor belonging to the assessee was sold to Mr. Santhosh Rani Gupta for Rs. 31,000,000/-. In response to Question No. 6 he submitted that the above payment was made in cash to the sellers (assessee) in the morning of the date of execution of sale deed. Further the statement of Mr. Honey Gupta was also recorded on

27/12/2012 by the Assistant Commissioner of Income Tax (AO) wherein he denied that he has not made any cash payment. He further stated that he has only made cheque payment for purchase of this property and source of which has already been explained. He further submitted that the original statement given by him is because of his illness and therefore there cannot be relied upon. Therefore, it is apparent that the buyer has not given any statement to the investigation wing or to the Assessing Officer. It is the statement of the son of the buyer which was used against the assessee for making the addition. The son of the buyer has retracted the same statement when called upon by the learned assessing officer. Further, the statement of the broker was also recorded who has not received any brokerage on the transaction from either of the parties. It is further apparent that no opportunity was given to the assessee to cross-examine as Mr. Honey Gupta or Shri Naveen, broker. Further with respect to the amount of cash paid allegedly by the buyer of the property to the assessee there is a contradictory statement with respect to the timing between the buyer and this broker on the period in which the above cash was paid. Furthermore, the learned Authorized Representative produced before us the order passed u/s 143 (3) read with section 148 of the income tax act dated 31/1/2014 wherein the total income of the buyer was assessed at Rs. 492380/- as originally assessed u/s 143 (3) that the returned income and no addition with respect to Rs. 1.40 crores alleged cash paid by her to the assessee was made. Therefore, when the addition has not been made in the hands of the buyer, who is the source of the cash payment to the seller (assessee), no addition can be made in the hands of the assessee. In fact the addition should have been made in the hands of the buyer on account of cash paid to the seller and in the hands of the seller as unaccounted sale consideration subject to capital gains tax. Even otherwise the assessee has requested for the cross-examination of Sri Honey Gupta as well as the broker during the assessment proceedings however same has been denied. The only evidence available with the Assessing Officer is the statement of Mr. Honey Gupta and the broker which has been used against the assessee for making the addition. When the assessee had specifically asked for the

cross-examination and if same was not given to the assessee, the addition cannot be made in the hands of the assessee, as denial of opportunity to the assessee to cross-examine the witness whose statements were made the sole basis of the assessment is a serious flaw rendering the order as nullity in as much as it amounted to violation of the principles of the natural justice as held by Honourable Supreme Court in 281 CTR 241. In view of this we do not have any other alternative but to direct the learned assessing officer to delete the addition of INR 17,000,000 made in the hands of the assessee over and above the declared sales consideration of INR 14,000,000 towards the sale of the property for the computation of the capital gain. Accordingly we reverse the finding of the lower authorities. Accordingly ground number 1 of the appeal of the assessee is allowed.

10. In the result the appeal filed by the assessee is allowed.

Order pronounced in the open court on 16/10/2019.

-Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 16/10/2019
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi