

**आयकर अपीलीय अधिकरण "B" न्यायपीठ मुंबई में।**

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

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, JM AND SRI MANOJ KUMAR AGGARWAL, AM

**आयकर अपील सं./ ITA No. 7524/Mum/2012**

(निर्धारण वर्ष / Assessment Year 2009-10)

The Income Tax Officer Ward 5(1)(2), Bhavan, M.K. Road, Mumbai-400 020	बनाम/ Vs.	Balee Plastics Pvt. Ltd., Peninsula Business Park B Wing, 13 Floor, Senapati Bapat Marg, Lower Parel (West), Mumbai-400 013
<b>(अपीलार्थी / Appellant)</b>		<b>(प्रत्यर्थी/ Respondent)</b>
<b>स्थायी लेखा सं./ PAN No. AAACB5172D</b>		

**प्रत्याक्षेप सं./ CO No. 16/Mum/2014**

(Arising in ITA No. 7524/Mum/2012 for AY 2009-10)

Balee Plastics Pvt. Ltd., Peninsula Business Park B Wing, 13 Floor, Senapati Bapat Marg, Lower Parel (West), Mumbai-400 013	बनाम/ Vs.	The Income Tax Officer Ward 5(1)(2), Bhavan, M.K. Road, Mumbai-400 020
<b>(आपत्ति करनेवाला / Cross Objector)</b>		<b>(प्रत्यर्थी/ मूल अपीलार्थी / Respondent/Orig. Appellant)</b>

अपीलार्थी की ओर से / <b>Appellant by</b>	:	Ms. Kavita P. Kaushik, DR
प्रत्यर्थी की ओर से / <b>Respondent by</b>	:	Shri Nitesh Joshi, AR

सुनवाई की तारीख / <b>Date of hearing:</b>	28.11.19
घोषणा की तारीख / <b>Date of pronouncement:</b>	28.11.19



## आदेश / ORDER

महावीर सिंह, न्यायिक सदस्य/

PER MAHAVIR SINGH, JM:

These cross appeals are arising out of the order of Commissioner of Income Tax (Appeals)-9, Mumbai in Appeal Nos. CIT(A)-9/ITO-5(1)(2)/329/2011-12 dated 04.10.2012. The Assessment was framed by the Income Tax Officer, Ward-5(1)(2) Mumbai (in short ITO/ AO) for AY 2009-10 vide dated 14.12.2011, under section 143(3) of the Income-tax Act, 1961 (hereinafter 'the Act').

2. The only issue in this appeal of Revenue is against the order of CIT(A) deleting the addition made by AO of unexplained investment under section 69B of the Act amounting to ₹1.50 crores. For this, Revenue has raised the following two grounds: -

"1. *Whether on the facts, circumstances and in the law, the Ld. CIT(A) has erred in reducing the addition of unexplained investment u/s 69B from Rs. 4.50 crores to Rs. 3.00 crores, thereby allowing a relief of Rs. 1.50 crores to the assessee without appreciating the fact discussed in detail in the assessment order as well as reliance placed on the decision in the case of Sumati Dayal Vs. CIT 214 ITR 801 (SC) wherein Hon'ble Supreme Court has held that*

*in these type of transaction direct evidence is not possible?*

*2. Whether on the facts, circumstances and in the law, the Ld. CIT(A) has erred in appreciating the fact that no coercion or threat was used while recording the statement and it was only an afterthought by the assessee to retract the statement recorded on oath u/s 131 of the I.T. Act, 1961?"*

3. Briefly stated facts are that the assessee company engaged in manufacturing and marketing of plastic products. During the year under consideration, the assessee purchase land along with house at Hyderabad from (i) Mrs. N. Prabha Rao (ii) Miss ND Dhana Lakshmi (iii) Shri Narendra Kumar Sankla and (iv) Shri Premchand Sankla for a total consideration of ₹ 10.50 crores as per sale deed registered dated 10.06.2008. The AO received information from DIT (Inv.) Hyderabad, Andhra Pradesh, vide No. F. No. DIT(Inv.)/Hyd/2008-09 dated 29.07.2008 by DIT (Inv.)-II, Mumbai in regard to purchase of property by Balee Plastic Pvt. Ltd. The DIT (Inv.), Hyderabad communicated that the seller, Smt. Dhanalakshmi & family had received cash component of Rs.3 crores for selling their property bearing No.471, Pood No., 36 Jubilee Hills, Hyderabad to Balee Plastic Pvt. Ltd. On the basis of above information, a survey under section 133 A of the Act was conducted to confirm the facts and to bring to tax any unaccounted cash payment made for purchase of the said property by Balee Plastic Pvt. Ltd.



immediately. Hence, survey was conducted immediately on 29.07.2008. During the course of survey proceedings conducted under section 133A of the Act at the assessee's premises on 29.07.2008 one Shri Sanjay D Shah was confronted on the information received from Income Tax Department, Hyderabad. The relevant question no.23 and answer is being reproduced as under: -

*Q.23 On the basis of information received from the Income Tax Dept., Hyderabad, it is seen that the sellers have shown sale value of the property mentioned above at Rs.15 crores which consists of cheque component of Rs.10.50 crores and cash component of Rs.4.50 crores. Please clarify as to the amount of cash component paid for the above property in light of the above information?*

*Ans. The deed has been made for Rs.10.50 crores. However, the entire dealing in the transaction has been conducted by my father, Shri Damji Lalji Shah and my uncle, Shri Jadavji Lalji Shah. However, on the basis of the cash component of Rs.4.50 crores shown by the sellers, I on behalf of u/s. Balee Plastics Pvt. Ltd offer Ps.4.50 crores as the additional income of the company for*

*A.Y.2009-10. This income is offered to buy peace of mind and to avoid further litigation in the matter.*

*34. Subsequently, statement of Shri Jodavji LaIji Shah, director was recorded u/s.131 of the Act on 8/9/2008. The relevant question no.7 & 8 and answers thereto may be reproduced as under: -*

*"Q.7. Please confirm what has been stated by Sanjay Shah in answer to Q.23 about the payment of Rs.4.5 crores in cash for the above said purchase of property.*

*Ans. The deed has been made for Rs. 10.50 crores. However, please note that the sellers have confirmed only cash component of Rs.3 crores. The other Rs.1.5 crores is not firmed by the sellers to the best of my knowledge. This income is offered strictly to buy peace of mind and to avoid litigation in the mater.*

*8. Do you confirm the answer to Shri Sanjay Shah to Q.No.23?*

*Ans. Yes, I confirm but subject to answer No.7 above.*



4. Immediately thereafter on 09.09.2008 the previously mentioned director Shri Jadavji Lalji Shah furnished a sworn affidavit before the Department retracting the previously mentioned statement given by him on 08.09.2008 to the extent of excess declaration of ₹1.5 crores obtained from him by wrong representation by the Department. The relevant part of the sworn affidavit may be extracted as under: -

*As I was not in town, interrogation of the person presents viz. Mr. Sanjay Damji Shah, my nephew, was done, after a prolonged survey of the premises. During the interrogation, the said Mr. Sanjay Damji Shah was informed that on the basis of formation received from Income tax Department, Hyderabad the sellers have shown sale value at Rs.15 crores as against Rs.10.5 crores shown by Balee Plastics Pvt. Ltd as per Deed for sale of the property situated at Road No. 36, Jubilee Hills, Hyderabad As ,44r. Sanjay Damji Shah was not aware of the details of the transaction for purchase of property by Balee Plastics Pvt. Ltd. under force and pressure from Income Tax Authorities and on the basis of information given by Income Tax Authorities with regard to cash components shown by the sellers, he*

*declared a sum of ₹4.5 crores as undisclosed income for the assessment year 2009-10.*

*Subsequently, I being the Director of Balee Plastics Pvt. Ltd., was summoned by the Income Tax authorities and at the time of interrogation, I was informed that the seller of the property have declared receipt of undisclosed income of ₹4.5 crores in this transaction. I stated that only one party viz. Ms. Nererukonda Dhana Lakshmi had declared a sum of ₹ 3 crores as undisclosed income in this transaction as against the claim of the Income tax authorities of declaration of Rs.4.50 crores by the sellers of the property. I was threaten of stringent action and was pressurized to declare the some amount of Ps.4.5 crores as undisclosed income of Balee Plastics Pvt. Ltd Income tax authorities insisted that I declare a sum of Rs. 45 crores only and no thing less Under the circumstances under force threat of stringent action, in my statement dated 08-09-2008, I on firm the statement given on 29-7-2008 by Shri Sanjay D Shah, but subject to the*

*fact that only one party viz. Ms. Nererukonda Dhana Lakshmi had declared a sum of Rs.3 crores as undisclosed income in this / transaction, and, the other parties have not declared any undisclosed income.*

*I hereby withdraw the said statement given by me under section 131 on 08-09-2008 to the extent of excess declaration of Rs.1.5 crores obtained from me by wrong representation by the Income-tax authorities As regards balance declaration of Rs.3 crores, I stick to my statement and confirm the declaration of Rs3 crores to buy peace of mind and avoid litigation.*

*I again state that declaration of Rs. 4.5 crores given in my statement dated 08-09-2008 should be restricted to Rs. 3 crores and declaration of balance undisclosed income of Rs.1.5 crore is withdrawn.*

5. The AO disbelieved the retraction of the director of the assessee company and has relied on the statement given earlier. The AO has commented upon the retracted statement of Shri Jadavji Lalji Shah and he has argued that non-receipt of money by Shri Narendra Kumar Sankla and Shri Premchand



Sankla are not relevant because nobody will accept the cash components received by them unless it is detected. He also noted that retraction of the statement was not valid. He also noted that the case laws relied upon by the assessee were distinguishable on the facts and circumstances of the case. Hence, the AO made addition of this additional amount of ₹1.50 crores, even though the learned Counsel for the assessee also argued that the assessee requested for copy of declaration/statement of Shri Narendra Kumar Sankla and Shri Premchand Sankla was not to be granted. Similarly, cross examination of Shri Narendra Kumar Sankla and Shri Premchond Sankla was not granted by the AO because the addition of Rs.1.5 crore was made on the strength of the statement made by Shri Sanjay D Shah and Shri Jadavji Lalji Shah on 29.07.2008 and on 08.09.2008 respectively. The AO further noted that the transaction takes place in secret and direct evidence about such payment would be rarely available. He considered the theory of human probabilities propounded by Hon'ble Supreme Court in the case of Sumati Dayal Vs. CIT (1995) 214 ITR 801 (SC) and therefore added Rs.1.50 crores in addition to Rs.3 crores which was already declared by the assessee in the return of income and taxes paid there upon. Aggrieved, assessee preferred appeal before CIT(A).

6. The CIT(A) deleted the addition after considering the detail submission of the assessee by observing as under: -

*"5.1 I have carefully and dispassionately considered the facts and circumstances of the*

case, assessment order, appellant's submissions and the case laws cited upon by the LAR. The undisputed facts are that in this case information was received from DIT (Inv.), Hyderabad, Andhra Pradesh vide No. F. No. DIT (Inv.)/Hyd/2008-09 dated 29/3/2008 by DIT (Inv.) IT, Mumbai on fax regarding purchase of property by the appellant and consequent cash transaction of Rs.3 crores between The appellant (purchaser) and the seller. Smt. Dhanalakshmi & Family, resident of Hyderabad. Neither any incriminating material nor any other transaction of cash was reported from Hyderabad regarding receipt of cash of Rs. 1.50 crores from the appellant. The ADIT (Inv.) Unit-VII (4), Mumbai carried out a survey on 39/7/2008 at the Lower Parel (W), Mumbai premises of the appellant. It is reported that neither any incriminating material nor any unexplained cash was found/ impounded during the course/of survey proceedings. The LAO has relied on the statements given by one Shri Sanjay D Shah who was neither the director nor office bearer of the appellant company. During the course of survey the said Shri Sanjay Shah was told by the ADIT concerned vide Q. No.23 that the ADIT has received information from the Income Tax Department,

Hyderabad that the impugned transaction of property consisted of cheque component of Rs.10.50 crores and cash component of Rs.4.50 crore. The said Shri Sanjay D Shah admitted that the previously mentioned deal was made for Rs.10.50 crore and that the entire dealing in the transaction was conducted by Shri Dhamji L Shah and Shri Jadavji L Shah. However, on the basis of cash component of ₹4.50 crores shown by the sellers at Hyderabad, as narrated by the ADIT, he offered the same amount to buy peace of mind and to avoid further litigation in the matter. Subsequently, in his statement Shri Jadavji Shah while answering Q.No.7. reiterated that the previously mentioned deal was made for Rs.10,50 crores. He further stated that the sellers had confirmed only cash components of ₹3 crores. The other 1.5 crores was not confirmed by the sellers. However, he offered the said income subject to answer given to Q.No 7. The LAO has relied on the statement given by Shri Sanjay D Shah, who is not a director nor an office bearer and the statement of Shri Jadavji L Shah which was retracted on the next day i.e. on 9/9/2009.

5.2 There is an age old maxim known as "ALLEGANS CONTRARIA NON", which means a

*person alleging contradictory facts should not be heard; such retracted statements have lost their evidentiary values. Mr. Jadavji L Shah alleged contradictory things and hence not to be heard. It is a trite law that a man shall not be permitted to \*blow hot and cold" with reference to the same transaction; or insist, at different times, on the truth of each of two conflicting allegations, according to the prompting of his private interest [Nagubai Ammal & Others vs. B Sharma Rao & Others - AIR 1956 SC 593 601].*

*5.3 The LAR has strongly contended that the LAO has not rejected the books of accounts of the appellant and that the ADIT has told incorrect facts about receipt of Rs.1.50 crores by Shri Narendra Kumar Sankla and Shri Prem Kumar Sankla from the appellant to Shri Sanjay D Shah and to Shri Jadavji Lalji Shah. Such incorrect facts were never received by him from DIT(Inv.) Hyderabad. Such incorrect facts were never stated by Shri Narendra Kumar Sankla and Shri Prem Kumor Sankla As a matter of fact, the said Shri Narendra Kumar Sankla had furnished his return of income for the relevant A.Y 2009-10 on 31/7/2009 declaring a total income of Rs.15,12,860/- under the head*

*capital gains. His case was selected for scrutiny and after detailed enquiry and 22/12/2011, no addition with reference to the disputed cash transaction of Rs.1.50 crore was made by the jurisdictional ITO-8(3), Hyderabad vide assessment order doted 26/12/2011. Similarly, no addition of the disputed cash transaction was made in the hands of Shri Prem Kumar Sankla while completing scrutiny assessment u/s.143(3) of the Act dtd: 29/8/2011 for AN 2009-10 by jurisdictional ACIT, Circle-8(1), Hyderabad. During the course of appellate proceedings, the matter was referred to the present LAO for verification of disputed cash transaction of Rs.1.50 crore between the appellant and the said Shri Narendra Kumar Sankla and Shri Prem Kumar Sankla. The LAO had taken up the matter with the corresponding jurisdictional assessing officers of Shri Narendro Kumar Sankla and Shri Prem Kumar Sankla. Their respective assessing officers have submitted their reports, the relevant part of which may be extracted as under: -*

*2. With regard to the information passed on in the case of Mr. Narendra Kumar Sankla (PAN-BMUP54469N) in connection with the survey conducted in the case of*



*M/s. Balee Plastics (P) Ltd., Mumbai it is Jinform you that Mr. Narendra Kumar Sank/a has filed his POI for the A Y 2009-10 on 31/07/2009 before the ACIT-8(1), Hyderabad On going through the ROI filed, the then AC felt that the return should be scrutinized as the assessee had claimed huge amount of cost of acquisition of deduction/exemption u/s.54 of the Act to examine both the cost of acquisition of deduction under sec. 54 proposal has been submitted requesting the CCII to accord approval to convert the case into scrutiny. Accordingly, after receipt of approval of CCIT the case was converted into scrutiny. As it was observed by the ACIT that the income returned by the assessee is ₹15,12,860/- which is below than the prescribed limit of Rs.20 lakhs, the records have been transferred to this office for completion of scrutiny assessment.*

*3. Accordingly, the case was scrutinized an assessment order under sec.143(3) was passed on 26-12-2011 determining the total income at Rs. 62,04,080/-. Since the information with*

*regard to the on-money received by the assessee in the transaction in which the income under the head "LTCG" is not in possession to this office, the sale consideration reflected by the assessee at Rs.1,75,00,000/- has not been disturbed. However, the cost of acquisition, cost of improvement, commission paid & exemption claimed under sec.54 of the Act were found to be not genuine fully as claimed by the assessee, additions were made on all the four counts mentioned above.*

*4. On verification of records, it is observed that the assessee did not admit any cash received by him on account of sale of land in Question. As per the sale deed submitted by the assessee during the course of assessment proceedings. The total consideration received is only Rs.10,5000,000/- out of which the share of the assessee (Mr. Narendra Kumar Sankla) is Rs.1,75,00,000/-. The assessee has also computed capital gains taking the sale consideration as Rs. 1,75,00,000/- which was stated to be received by him as per the copy of the*



*sale deed furnished. As stated above, the information with regard to the cash receipt is not in possession to this office, the same was not considered for assessment."*.....

*Sub:- Information in the case of Mr. Prem Kumar Sankla for the A.Y. 2009-10 Regarding.*

*Please refer to the above.*

*The assessee filed his return of income on 31/7/2009 declaring a total income of Rs.16,62,857/-. The assessee is deriving income from long term capital /gains. The case was selected for scrutiny with the prior approval of the CCIT-II, Hyderabad. Subsequently, notices were issued under section 143(2) were issued from time to time.*

*In response, the AR of the assessee Sri Suresh Kumar appeared from time and time and submitted the information that was called for.*

*During the course of scrutiny proceedings, it was observed that the assessee sold a*

*resident plot at Jubilee Hills, Hyderabad for a consideration of Rs.1,75,00,000/- and with the same amount the assessee purchased two houses i.e. 1) Gutala Begumpet, Madhapur for a consideration of Rs.99,25,000/- 2) Anjaiah Nagar, Gachi Bowli for a consideration of Rs.15,05,000/- for which he has claimed exemption u/s 54 for purchase of these two houses. As per section 54, the assessee is entitle for exemption of only one residential house, therefore, the assessee claim for exemption for investment in the 2' house at Anjaiah Nagar, Gachibowli aggregating to Ps. 15,05,000/- was disallowed and added back to the total income of the assessee. Subsequently, the assessment was completed and an amount of Rs. 3,41,031/- is payable by the assessee.*

*However, no information was available on record regarding the cash received by the assessee on the sale of capital asset. The information with regard to cash receipt is not in a possession of this office at the time of passing of order under section*

*143(3) and the same was not considered for the assessment.*

*5.4 The aforesaid remand reports were duly forwarded by the LAO vide their letter No. ITO-5(1)(2)/ Remand Report/2012-13 dated 30<sup>th</sup> August 2012 which was forwarded by the Addl. CIT -5(1) vide No. Addl. CIT /Rg 5(1)/ Remand Report/ 2012-13 dated 31/8/2012. The LAO has also enclosed the copies of relevant assessment orders which are placed on record. Therefore, the alleged cash of ₹1.50 crores neither admitted by Shri Narendra Kumar Sankla nor by Shri Prem Kumar Sankla nor assessed by the ITO/ ACIT at Hyderabad.”*

.....

*5.11. Having regard to the facts and circumstances of the case and in the light of the scrutiny assessment orders passed in the case of Shri Narendra Kumar Sankla and Shri Premchand Sankla it is established that the disputed transactions of ₹1.50 crore has not been established, no material nor any evidences have been found nor impounded nor seized during the course of survey proceedings in Mumbai and Hyderabad. The LAO has failed in bringing any material evidence against the*

*appellant to prove that the appellant has paid the disputed cash transaction of ₹1.50 crore to Shri Narendra Kumar Sankla and Shri Premchand Sankla. Hon'ble Supreme Court in the case of KP Varghese V/s ITO 131 ITR 597 (SC) has categorically declared that in these circumstances no presumption of cash payment can be validly made by the assessing officer."*

Aggrieved, against the order of CIT(A) deleting the addition of ₹1.50 crores, Revenue came in appeal before Tribunal.

7. We have heard the rival contentions and gone through the facts and circumstances of the case. We noted that Shri Sanjay D Shah and Shri Jadavji Lalji Shah are not connected with the transaction or with the assessee. Further, no corresponding addition was made in the hands of Shri Narendra Kumar Sankla and Prem Kumar Sankla, even though the assessments in their cases were framed under section 143(3) of the Act by the ACIT, Hyderabad. Even the CIT(A) has categorically reproduced the remand reports of the respective AO's of Shri Narendra Kumar Sankla and Prem Kumar Sankla. Both, Shri Narendra Kumar Sankla and Prem Kumar Sankla retracted the statement of cash received of ₹1.50 crores on behalf of assessee. We noted that the additional amount received by Smt. Dhanalakshmi and family has been accepted by the assessee and assessee also disclosed the said amount of ₹3 crores in its return of income and paid the taxes accordingly. We noted that the CIT(A) based on submissions and evidences decided the issue in favour of



assessee by deleting the addition of ₹1.50 crores which was made by AO just on conjunctures and surmises. Hence, we find no infirmity in the order of CIT(A) deleting the addition. We confirm the order of CIT(A) and dismiss the appeal of Revenue.

8. Coming to Cross Objection of the assessee in CO No. 16/Mum/2014, the cross objections raised by assessee are supportive of the order of CIT(A) and hence, infructuous as such.

**9. In the result, both, the appeal of Revenue as well as CO of the assessee are dismissed.**

Order pronounced in the open court on 28.11.2019.

Sd/-

(मनोज कुमार अग्रवाल / MANOJ KUMAR AGGARWAL)  
(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह / MAHAVIR SINGH)  
(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 28.11.2019.

सुदीप सरकार, व.निजी सचिव / Sudip Sarkar, Sr.PS

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai