IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT)
'G' BENCH, MUMBAI

BEFORE SHRI JUSTICE P P BHATT, PRESIDENT

&

SHRI M.BALAGANESH, AM

ITA No.1886/Mum/2019
(**Assessment Year :2014-15**)

Shri Siraj Ahmed Jamalbhai Bora Flat No.7, Sunswept Bunglow 2nd Cross Lane, Lokhandwala Complex, Andheri (W) Mumbai – 400 053	Vs.	Income Tax Officer Ward – 1(3)(1) Room No.113, Scindia House N.M.Road, Ballard Pier, Mumbai, Maharashtra
PAN/GIR No. APJPB5993F		
(Appellant)	..	**(Respondent**)

Assessee by	Shri Sunil Makhija
Revenue by	Shri V.Vinod Kumar
Date of Hearing	**14/09/2020**
Date of Pronouncement	**28/10/2020**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

This appeal in ITA No.1886/Mum/2019 for A.Y.2014-15 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-55, Mumbai in appeal No.CIT(A)-55/IT-31/ITO(IT) 1(3)(1)/17-18 dated 05/03/2019 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3)of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 29/12/2016 by the ld. Income Tax Officer (IT)-1(3)(1), Mumbai (hereinafter referred to as ld. AO).

2. The only issue to be decided in this appeal is that whether the ld. CIT(A) was justified in restricting the addition made u/s.56(2)(vii)(b) of the Act to the extent of 7,06,720/- as against Rs.1,83,87,700/- made by the ld. AO in the facts and circumstances of the case.

3. We have considered rival submissions and perused the materials available on record. We find that assessee is a non-resident individual deriving income from house property, capital gains and other sources. The return of income for the A.Y.2014-15 was filed by the assessee on 02/03/2015 declaring total income of Rs.12,13,800/-. We find that the ld. AO had observed that the assessee had entered into agreements for purchase of two flats viz., 702 & 703 vide agreements dated 28/02/2014 and 07/03/2014 for consideration of Rs.80 lakhs and Rs.42,99,600/- respectively, the value of which adopted by the stamp duty authority was Rs.177,27,800/- and Rs.129,39,500/- respectively. Accordingly, the ld. AO raised a query as to why the provisions of Section 56(2)(vii)(b) of the Act be not invoked in the hands of the assessee for taxing the differential sums thereon.

3.1. We find that the assessee had replied that the agreement for purchase of flats was entered in F.Y.2007-08 for which the properties were registered in A.Y.2014-15. It was also submitted by the assessee that during the F.Y.2007-08 relevant to A.Y.2008-09, the provisions of Section 56(2)(vii)(b) were not in the statute and hence, no addition could be made for the year under appeal applying such provision as the agreement was entered earlier. We find that the ld. AO completely disregarded this primary contention of the assessee and proceeded to tax

the differential sum of consideration of Rs.183,87,100/- u/s.56(2)(vii)(b) in the assessment. We find that the assessee had actually paid an amount of Rs.42,99,600/- and Rs.80 lakhs for flat No.702 & 703 respectively to M/s. Perfect Constructions (Builder) for flats at ground height building, near new link road, Lokhandwala, Andheri (W), Mumbai – 400 053. It was also submitted that originally the assessee proposed to buy flat Nos.1101 and 1102 in the same property which was later changed to flat Nos. 702 & 703 as per the letter submitted by M/s. Perfect Construction dated 17/12/2016. The assessee had submitted stamped receipts for first payment made to M/s. Perfect Construction for flat No.1101 dated 05/02/2008 and flat No.1102 dated 24/03/2007 for Rs.10,04,128/- and Rs.2,63,808/- respectively. The ld. AO issued summons u/s.131 of the Act dated 15/12/2016 to M/s. Perfect Constructions (builder) to produce copy of agreement for flat No.1101 and 1102. M/s. Perfect Construction (builder) vide their reply dated 17/12/2016 did not submit copy of the agreement but stated that in F.Y.2007-08, the assessee had shown his interest in booking Flat No.1101 and 1102 which was later changed to Flat No.702 & 703 respectively. The ld. AO again issued one more summon u/s.131 of the Act to M/s. Perfect Constructions on 26/12/2016 to produce the receipt of payments against the flats, copy of registration and allotment letter.

3.2. In response to the said summons, M.s Perfect Constructions filed a letter dated 26/12/2016 confirming the transactions made with the assessee. The copy of the said letter is reproduced herein for the sake of convenience:-

> *"With reference to above, we have to submit as under:*
>
> *We hereby confirm that Mr. Sirajahmed Jamalbhai Bora has looked two flats no.1101 and 1102 which were subsequently changed to flat no,703 and 702 as follows:*

Flat Area	*Flats no.*	*Date of Flat Purchased*
985.016 Sq. Ft.	*1101*	*05/02/2008*
718.450 Sq. Ft.	*1102*	*24/03/2007*

Changed to:

Flat Area	*Flats no.*	*Date of Flat Purchased*
985.516 Sq. Ft.	*703*	*05/02/2008*
7 18.450 Sq. Ft	*702*	*24/03/2007*

The first payment for the said flats were made on 24/03/2007 and 05/02/2008 as mentioned above

Kindly have the above information on your record".

3.3. The ld. AO observed that the aforesaid reply from M/s. Perfect Construction did not fulfil the requirements of his notice in full as the builder had not produced original receipts of payment made for purchase of flat with sufficient documentary evidences. Accordingly, the ld. AO proceeded to make the addition u/s.56(2)(vii)(b) in respect of difference in value between the value adopted by the stamp duty authority on the date of registration of the flat (i.e in F.Y. 2013.14) and the actual consideration paid by the assessee.

4. Before the ld. CIT(A), the assessee pleaded that the addition was made by the ld. AO for want of sufficient documentary evidences from the side of the builder. However, the assessee also pleaded that the builder's authorised representative had filed letter dated 28/12/2016 and

29/12/2016 before the ld. AO wherein the copy of allotment letter issued to the assessee by the builder for flat No.1101 dated 20/03/2008 and 1102 dated 12/03/2007 was enclosed. In the said letter, it was also mentioned that in the year 2012 assessee requested the builder to change the flat Nos. 702 & 703 in lieu of 1102 and 1101. Accordingly, a new allotment letter was issued by the builder on 10/01/2012 in lieu of original allotment letter dated 12/03/2007 and 20/03/2008. The entire copies of allotment letter, both old and new one, were filed by the authorised representative before the ld. AO. In the said letter, the market value of the said properties in the year 2007 and in the year 2008 were also furnished by the builder's authorised representative. Accordingly, the assessee pleaded that this letter from the authorised representative of the builder had not been taken due cognizance by the ld. AO while framing the assessment.

4.1. The assessee pleaded that since the provision to purchase the flats being flat Nos.1101 & 1102 were made way back in the year 2007-08 respectively, for which advance payment was indeed made by the assessee by way of booking advance, which is also supported by a stamp receipt from the side of the builder together with letter of allotment given by the builder to the assessee. The said allotment letter duly comprised of the extent of the property that was proposed to be built and the date of possession to be handed over to the assessee in respect of each of the flats. It was submitted that only the flat numbers were changed by the assessee i.e. instead of proceeding with flat Nos.1101 and 1102, the assessee proceeded with flat Nos.702 & 703 in the very same building, for which the payments already made by the assessee for flat Nos.1101 & 1102 were sought to be adjusted by the builder, for which a separate letter of allotment was given by the builder in January 2012 clearly

specifying the extent of the property attributable to assessee together with stamped receipts for all the payments made clearly mentioning the flat Nos.702 & 703. Once the full payments were made for flat Nos. 702 & 703 by the assessee to the builder and possession of the property was handed over by the builder, the properties were registered in the name of the assessee in A.Y.2014-15. Hence, the original proposal to buy the flat remains intact and the applicability of provisions of Section 56(2)(vii)(b) of the Act should be related back to the years 2007 & 2008 and not in the year of actual registration of the property. The assessee also placed reliance on the proviso to Section 56(2)(vii)(b) of the Act which was introduced by the Finance Act 2013 and also argued that the said proviso needs to be construed as retrospective in operation, even if the provisions of Section 56(2)(vii)(b) are made applicable in the instant case. The assessee also drew the attention of the ld. CIT(A) to the letter of the builder's authorised representative dated 28/12/2016 filed before the ld. AO, specifying the market value of the properties for flat Nos. 702 & 703 were at Rs.44,67,090/- and Rs.85,39,230/- respectively to drive home the point that said value is excess by Rs.1,67,490/- (Rs.44,67,090 – Rs.42,99,600) and Rs.5,39,230/- (Rs.85,39,230 – Rs.80,00,000/-) for flat No. 702 and flat No.703 respectively. It was also pleaded before the ld. CIT(A) that the said difference between market value of the property and the actual consideration is very minuscule working out to average 5% variation thereon. The assessee also placed reliance on the Co-ordinate Bench decision in the case of John Flower (India) Pvt. Ltd., vs. DCIT in ITA No.7545/Mum/2014 dated 25/01/2017 for A.Y.2010-11 wherein it was held that if the variation between the value adopted by the stamp valuation authority and value declared by the assessee is less than 10%, then no addition could be made in terms of Section 50C of the Act.

4.2. The ld. CIT(A) taking note of the fact that the entire submissions have not been factually examined by the ld. AO as it was admittedly filed at the fag end of the assessment proceedings, proceeded to seek remand report from the ld. AO on all the aforesaid submissions made by the assessee. The ld. AO submitted the remand report dated 29/12/2017 categorically submitting that these evidences submitted by the assessee should not be appreciated at all as sufficient opportunities were given to the assessee as well as to the builder during the course of assessment proceedings itself and the ld. AO sticked on to the old addition made in the assessment. In rejoinder, the assessee stated before the ld. CIT(A) that it had not filed any additional evidences before the ld. CIT(A) and submitted that what assessee had pleaded before the ld. CIT(A) was only proper appreciation of facts and confirmation given by the builder directly to the ld. AO at the time of the assessment proceedings. Hence, the entire contentions of the ld. AO in the remand report are factually incorrect. Accordingly, assessee pleaded that no fault could be attributed on his part for non-consideration of the replies given by the builder directly to the ld. AO. It was pleaded by the assessee before the ld. CIT(A) in his rejoinder to the remand report that except reproducing the provisions of Section 56(2)(vii)(b) of the Act, the ld. AO in his remand report had not uttered anything regarding the detailed written submissions filed by the assessee vide letter dated 02/11/2017 and the contents available in the paper book which was also duly forwarded to the ld. AO for his comments and no whisper had been made with regard to applicability of the proviso to Section 56(2)(vii)(b) of the fact to the facts of the instant case. The assessee pleaded before the ld. CIT(A) that proviso to Section 56(2)(vii)(b) of the Act need to be definitely considered and that the same clearly supports the view of the assessee that since the assessee had purchased flats much before the date of registration and in

the allotment letter issued by the builders, the entire consideration to be paid by the assessee was duly mentioned thereof and on payment of full consideration, the possession of the properties were duly handed over to the assessee.

4.3. The ld. CIT(A) duly appreciated the fact that the proceedings of cross verification with the builder had been carried out by the ld. AO at the fag end of the assessment proceedings and because of that, the reply furnished by the builder in response to summons could not be considered by the ld. AO as the assessment was getting time barred by 31/12/2016 and that the very same contents of the letters, several annexures were sought to be verified by the ld. AO in the remand proceedings at his behest. The same will not tantamount to filing of additional evidences by the assessee in terms of Rule 46A of the rules and that the remand report was sought from the ld. AO only for better appreciation of the facts in the interest of justice. The ld. CIT(A) also observed that no mistake should be attributed to the assessee in this regard. On going through the remand report of the ld. AO, the ld. CIT(A) proceeded to examine the issue on his own as the same being a legal issue and ultimately held as under:-

(a) The assessee had booked the flats way back in F.Y.2007-08 relevant to A.Y.2008-09 itself for which initial payments were also made which are duly supported by allotment letters given by the builder to the assessee.

(b) The ld. AO had lost sight of proviso to Section 56(2)(vii)(b) of the Act which is very clear that the stamp value as on the date of agreement should be considered provided the said payment has been made by the assessee by account payee cheque or account payee demand draft.

(c) In the case of assessee, the date of allotment letter supported by the details of payment made on that date has to be considered as the date of purchase of flat.

(d)

Flat No.	Market value in F.Y.2007-08 based on the allotment letter given by the builder **(In Rupees)**	Actual consideration as per the registered document **(In Rupees)**	Difference **(In Rupees)**
702	44,67,090/-	42,99,600/-	1,67,490/-
703	85,39,230/-	80,00,000/-	5,39,230/-
	Total		**7,06,720/-**

4.4. With regard to the Co-ordinate Bench decision of this Tribunal in the case of John Flower (India) Pvt. Ltd., relied upon by the assessee before the ld. CIT(A) that the average variation is only 5% between the stamp duty value and the actual consideration and no addition need to be made, is concerned, the ld. CIT(A) observed that the said decision was rendered by Mumbai Tribunal in the context of Section 50C of the Act and not in the context of Section 56(2)(vii)(b) of the Act and hence, he directed the ld. AO to restrict the addition only to the extent of Rs.7,06,720/-.

5. Aggrieved by the aforesaid action of the ld. CIT(A), we find only the assessee is in appeal before us and revenue had not preferred in appeal before us.

6. We find that the issue in dispute had been directly addressed by the Co-ordinate Bench decision of Ranchi Tribunal which had been rightly relied upon by the ld. AR before us in the case of Bajrang Lal Naredi vs ITO in ITA No. 327/Ran/2018 for A.Y.2014-15 dated 20/01/2020, wherein the stamp duty value on the date of registration of the property on 17/06/2013 for Rs.22,60,000/-, whereas the stamp duty value at the time of agreement entered into in FY 2011-12 was Rs.18,89,350/- as against the actual consideration paid of Rs.9,10,000/-. The ld. AO in that case made an addition u/s. 56(2)(vii)(b) of the Act in the hands of that assessee being a purchaser to the extent of Rs.9,79,350/- (18,89,350 – Rs.9,10,000/-) by applying the proviso to section 56(2)(vii)(b) of the Act. When the matter travelled to Ranchi Tribunal, the Tribunal held as under:-

> *"6. We have carefully considered the rival submissions on the issue. In the instant appeal, the applicability of Section 56(2)(vii)(b) of the Act as amended by Finance Act, 2013 and applicable to AY 2014-15 in question. On a perusal of pre-amended provisions of Section 56(2)(vii)(b) of the Act, we gather that where an individual or HUF receives from any person any immovable property without consideration, the provisions of pre- amended Section 56(2)(vii)(b) of the Act would apply. The aforesaid provisions was however substituted by Finance Act, 2013 and made applicable to AY 2014-15 onwards. As per the amended provisions, the scope of substituted provision was expanded to cover purchase of immovable property for inadequate consideration as well. It is alleged on behalf of the Revenue that the amended provision will apply in view of the fact that registration has been carried out during the FY 2013-14 concerning AY 2014-15 where the amended law came into force. The assessee, on the other hand, seeks to claim that his case would be covered by pre-amended provision in view of the fact that agreement for purchase of the property was entered into with the prospective seller in FY 2011-12 relevant to AY 2012-13 at which time the new law did not come into play. It was claimed that the purchase consideration was duly paid at the time of agreement in FY 2011-12 and the purchase was de facto completed except for the formality of registration. It was thus submitted that the transactions entered prior to the FY 2013-14 would be governed by the pre-amended provision which triggers the applicability of such provision only where there is a total lack*

of consideration and does not cover a case of inadequacy in purchase consideration.

7. We find merit in such plea advanced on behalf of the assessee. It is not in dispute that purchase transactions of immovable property were carried out in FY 2011-12 for which full consideration was also parted with the seller. Mere registration at later date would not cover a transaction already executed in the earlier years and substantial obligations have already been discharged and a substantive right has accrued to the assessee therefrom. The pre-amended provisions will thus apply and therefore the Revenue is debarred to cover the transactions where inadequacy in purchase consideration is alleged. We thus find merit in the issue raised on behalf of the assessee. The order of the CIT(A) is accordingly set aside and the AO is directed to delete the additions made under s. 56(2)(vii)(b) of the Act and restore the position claimed by the assessee."

6.1. We find that this Ranchi Tribunal's decision was confronted with the ld. DR, he could not rebut the same and could not provide any other contrary decision before us at the time of hearing. We find that the facts prevailing in Ranchi's Tribunal's case are exactly the same with that of the facts of the instant appeal before us. Hence, the decision rendered thereon would apply mutatis mutandis to the issue in dispute before us. Hence, we have no hesitation to hold that provisions of Section 56(2)(vii)(b) of the Act could not be made applicable in the hands of the assessee for the assessment year under appeal in the peculiar facts and circumstances of the case before us. Accordingly, the ground Nos. 1 & 2 raised by the assessee are allowed.

7. In view of our decision on ground No.1 & 2 raised by the assessee supra, the adjudication of ground No.3 raised by the assessee on without prejudice basis becomes infructuous and we refrain to give our opinion on the same and are keeping it open.

8. The ground Nos. 4 & 5 raised by the assessee are general in nature and does not require specific adjudication.

9. In the result, appeal of the assessee is allowed.

Order pronounced on 28/10/2020 by way of proper mentioning in the notice board.

Sd/-	**Sd/-**
(JUSTICE P P BHATT)	**(M.BALAGANESH)**
PRESIDENT	**ACCOUNTANT MEMBER**

Mumbai; Dated 28/10/2020
KARUNA, *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.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai