आयकर अपीलीय अधिकरण "जी" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI

BEFORE JUSTICE SHRI P. P. BHATT, PRESIDENT AND SHRI MANOJ KUMAR AGGARWAL, AM
(Hearing through Video Conferencing Mode)

आयकरअपील सं./ I.T.A. No.1886/Mum/2019
(**निर्धारण वर्ष /** Assessment Year: 2014-15)

Shri Siraj Ahmed Jamalbhai Bora Flat No. 7, Sunswept Bunglow, 2nd Cross Lane-4, Lokhandwala Complex, Andheri West, Mumbai-400 053	**बनाम**/ Vs.	**ITO Ward – 1(3)(1)** R. No. 113, Scindia House, N. M. Road, Ballard Pier, Mumbai-400 038
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. **APJPB-5993-F**		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

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आयकरअपील सं./ I.T.A. No.3853/Mum/2019
(**निर्धारण वर्ष /** Assessment Year: 2014-15)

ITO Ward – 1(3)(1) R. No. 113, Scindia House N. M. Road, Ballard Pier, Mumbai-400 038	**बनाम**/ Vs.	**Shri Siraj Ahmed Jamalbhai Bora** Flat No. 7, Sunswept Bunglow, 2nd Cross Lane-4, Lokhandwala Complex, Andheri West, Mumbai-400 053
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. **APJPB-5993-F**		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

Assessee by	:	Shri Sunil Makhija, Ld. AR
Revenue by	:	Shri T. S. Khalsa, Ld. DR

सुनवाई की तारीख/ **Date of Hearing**	:	29/06/2021
घोषणा की तारीख / **Date of Pronouncement**	:	29/07/2021

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. The captioned appeal by assessee is a recalled matter since the appeal was earlier disposed-off vide order dated 28/10/2020. However,

the order has been recalled, at revenue's instance, since it was pointed out that revenue had also filed the appeal against the same order which remained to be brought to the notice of the bench during the hearing of assessee's appeal. Accordingly, the order in assessee's appeal was recalled and cross-appeals have been placed before this bench for fresh adjudication.

2. The cross-appeals arises out of the order of learned Commissioner of Income-Tax (Appeals)-55, Mumbai [CIT(A)], dated 05/03/2019 in the matter of assessment framed by Ld. Assessing Officer (AO) u/s 143(3) on 29/12/2016. The only issue in cross-appeals is whether on the facts and circumstances of the case, Ld.CIT(A) was justified in restricting the additions made u/s 56(2)(vii)(b) of the Act to the extent of Rs.7,06,720/- as against Rs.1,83,87,700/- as made by Ld.AO while framing the assessment.

3. We have carefully heard the rival submissions and perused relevant material on record including documents as placed in the paper book. Our adjudication to the subject matter of appeal would be as given in succeeding paragraphs. It is the plea of Ld. AR that the provisions of Sec. 56(2)(vii)(b) would not be applicable to assessee's case as held in earlier order of Tribunal passed in assessee's appeal on 28/10/2020. The Ld. AR submitted that while adjudicating the issue, the bench had relied upon the decision of Ranchi Tribunal in **Bajrang Lal Naredi V/s ITO (ITA No.327/Ran/2018 dated 20/01/2020)** and held that the provisions of Sec. 56(2)(vii)(b) would not be applicable since agreements with respect to purchase of properties were entered into earlier years. The order was recalled only because of the fact that revenue's appeal against the same issue could not be brought to the notice of the bench.

The Ld. DR, on the other hand, pleaded for restoration of assessment as framed by Ld. AO.

Assessment Proceedings

4.1 The material facts are that assessee being non-resident individual purchased two flats viz. 702 & 703, Green Heights, near New Link Road, Lokhandwala, Andheri (West), Mumbai from a builder i.e., M/s Perfect Constructions for consideration of Rs.42.99 Lacs & Rs.80 Lacs respectively. However, the stamp duty value of the flats on the date of registration was Rs.129.39 Lacs & Rs.177.27 Lacs respectively which led Ld. AO to invoke the provisions of Sec. 56(2)(vii)(b) against these transactions.

4.2 The provisions of Sec. 56(2)(vii) were inserted by Finance Act, 2009 w.e.f. 01/10/2009. Clause (b) was inserted in the said Section by Finance Act, 2013 w.e.f. 01/04/2014, which inter-alia, provide that where an individual receives from any person any immoveable property for a consideration which is less than stamp duty value of the property by an amount exceeding Rs.50,000/- then the stamp duty value of such property as it exceeds such consideration shall be chargeable to tax in the hands of the assessee. As per first proviso, where the date of the agreement fixing the amount of consideration for the transfer of immoveable property and the date of registration are not the same, then the stamp duty value prevailing on the date of agreement may be adopted for the purpose of clause (b).

4.3 During the course of assessment proceedings, the facts which emerged were that the assessee had originally booked two flats viz. 1101 & 1102 at certain location which were subsequently changed to flat nos. 702 & 703 as per his request. The initial payment with respect to flat

no.1101 was made on 04/02/2008 whereas initial payment of flat no.1102 was made on 21/04/2007. The assessee also submitted stamped receipts dated 18/01/2012 for Rs.2.63 Lacs for flat No.702 and receipt dated 18/01/2012 for Rs.10.04 Lacs for flat no.703. On the basis of these documents, the assessee asserted that the agreement for purchase of flats was entered during financial year 2007-08 for which the properties were registered in Assessment Year 2014-15. Therefore, since during financial year 2007-08 relevant to Assessment Year 2008-09, the provisions of Section 56(2)(vii)(b) were not in the statute, those provisions would not apply and hence, no addition could be made in this year.

4.4 However, the submissions could not find favour with Ld. AO in view of the fact that summon was issued u/s 131 on 15/12/2016 to M/s. Perfect Constructions (builder) to produce copy of agreement for flat Nos.1101 and 1102. M/s. Perfect Constructions (builder) vide their reply dated 17/12/2016 did not submit copy of the agreement but merely confirmed that during financial year 2007-08, the assessee had shown interest in booking Flat Nos.1101 and 1102. However, after visiting the site, the assessee changed his mind and requested for change the location of flats to flat nos. 702 & 703.

4.5 The Ld. AO again issued one more summon u/s.131 to M/s. Perfect Constructions on 26/12/2016 to produce the receipt of payments against the sale of flats, copy of registration and allotment letter etc. In response to the said summons, M/s Perfect Constructions filed a letter dated 26/12/2016 confirming the transactions made with the assessee but did not file copies of agreement /allotment letter as demanded by Ld. AO. Thus, Ld. AO observed that the reply did not fulfil the requirements of the

notice in full as the builder had not produced original receipts of payment against sale of flat and other documentary evidences.

4.6 Finally, the assessee's submissions were not accepted since the assessee did not furnish allotment letters or agreement for flat nos.1101 & 1102 specifying the area of the flats. Further, no justification or satisfactory reason was given for entering into agreement after six years of making first payment to the builder. The registered agreement remained silent about all the contentions of the assessee and showed only the lump sum payment. Accordingly, invoking the provisions of Sec.56(2)(vii)(b), the difference between the stamp duty value and agreement value was added to the income of the assessee.

Appellate Proceedings

5.1 During appellate proceedings, the assessee pleaded that impugned addition was made by Ld. AO for want of sufficient documentary evidences from the builder. However, Ld. AO overlooked the fact that builder's authorised representative had filed letter dated 28/12/2016 on 29/12/2016. In the said reply, the builder confirmed the fact of change of allotment and filed copies of original allotment letter as well as new allotment letters. The area as well as consideration of the exchanged flat was same. The payment receipts were also filed. Thus, the builder had not only confirmed the transactions but also filed the allotment letters, both old and new, containing total consideration, rate, area of the flat, date of first payment etc. The copy of the said letter was also filed before Ld. CIT(A) along with enclosures. The stamp duty value of both the flats as prevailing during allotment period was also stated to be filed by the builder. Accordingly, the assessee pleaded that this letter filed by authorized representative of the builder had not been taken due

cognizance by Ld. AO while framing the assessment. The assessee also controverted other conclusions drawn by Ld. AR.

5.2 In the background of above fact, the assessee pleaded that since the provision to purchase the flats being flat Nos.1101 & 1102 was made way back in the financial year 2007-08 for which advance payment was also made by the assessee by way of booking advance as supported by stamped receipt issued by builder together with allotment letters, the provisions of Sec. 56(2)(vii)(b) could not be invoked by Ld.AO on these transactions.

5.3 It was the submission of the assessee 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 the same, the earlier payments made by the assessee for flat Nos.1101 & 1102 were adjusted by the builder and a separate letter of allotment was given by the builder in January, 2012. The allotment letter clearly specified 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 remained 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 as introduced by the Finance Act, 2013 to argue 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.

5.4 The assessee also drew attention to builder's letter dated 28/12/2016 filed before Ld. AO which specified the market value of flat Nos. 702 & 703 as Rs.44.67 Lacs & Rs.85.39 Lacs respectively as against agreement value of Rs.42.99 Lacs & Rs.80 Lacs. Thus, the difference in value was only to the extent of Rs.1.68 Lacs & Rs.5.39 Lacs which was very minuscule reflecting average variation of merely 5%. For this, reliance was placed on the Tribunal decision in **John Flower (India) Pvt. Ltd. V/s DCIT (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.

5.5 The Ld. CIT(A), taking note of the fact that the entire submissions were not factually examined by Ld. AO and therefore, sought remand report in the case. The Ld. AO, vide remand report dated 29/12/2017, opposed admission of additional evidences and maintained the position as taken in the assessment order. The assessee, in turn, controverted the observations of Ld. AO by submitting that the letter was filed by the builder during the course of assessment proceedings which remained to be taken note of and thus, there was no additional evidences sought to be filed by the assessee. The 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. The assessee also drew attention to the fact that except for reproducing the provisions of Section 56(2)(vii)(b), Ld. AO has 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. However, no whisper had been made with regard to applicability of the proviso to Section 56(2)(vii)(b) to the facts of the case. The assessee further pleaded before Ld. CIT(A) that proviso to Section 56(2)(vii)(b) of the Act need to be considered and that the same clearly supports the view of the assessee in view of the fact that the flats were purchased much before the date of registration. The same was supported by allotment letter issued by the builders which mentioned the consideration payable by the assessee and the fact of possession of property after receipt of full consideration.

5.6 The Ld. CIT(A) duly appreciated the fact that the proceedings of cross-verification with the builder was carried out by Ld. AO only 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 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 concurred that no mistake should be attributed to the assessee in this regard.

5.7 After going through the remand report, Ld. CIT(A) proceeded to examine the issue on his own 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) The excess stamp duty value of the two flats considering the year of booking was only Rs.1.68 Lacs & Rs.5.39 Lacs as tabulated below: -

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/-**

However, the cited decision of Mumbai Tribunal in John Flower (India) Pvt. Ltd. was held to be not applicable since the said decision was rendered in the context of Section 50C of the Act and not in the context of Section 56(2)(vii)(b) of the Act. Finally, Ld. AO was directed to restrict the addition only to the extent of Rs.7,06,720/-.

5.8 The aforesaid adjudication has given rise to cross-appeals before us. The revenue is aggrieved by relief provided by Ld. CIT(A) whereas the assessee is aggrieved by confirmation of additions of Rs.7.06 Lacs.

Our findings and Adjudication

6. We have carefully gone through the factual matrix as enumerated in preceding paragraphs and perused the orders of lower authorities. The undisputed position that emerges is that the assessee initially booked two flats during financial year 2007-08 and paid booking amount to the builders. The booking was duly supported by the allotment letters and the booking amount was paid through banking channels at the time of booking. Later on during financial year 2011-12, after visiting the site, the assessee requested for change of location of flats having same area and same consideration which was acceded to by the builder. Accordingly, new allotment letters were issued by the builders which bear the requisite particulars viz. flat nos. consideration, area, fact of possession etc. These facts have been confirmed by the builder also in reply to summons issued by Ld. AO.

7. We are of the considered opinion that it was not a case of new booking but a case wherein the assessee had merely exchanged the flats at the same site to have better location. The area as well as sale consideration was the same and the new flats got substituted from the date of initial booking which is evident from the conduct of the parties. This being the case, the provisions of Sec. 56(2)(vii)(b) as applicable from 01/04/2014 could not have been applied by Ld. AO. Another aspect is that the proviso to this sub-section provides that where the date of agreement fixing the amount of consideration for the transfer of immoveable property and the date of registration are not the same then the stamp duty value prevailing on the date of agreement may be taken

for the purpose of this sub-clause. The said proviso would, alternatively, be applicable to the fact of the case since the consideration has been paid by the assessee though banking channels in terms of requirements of second proviso. Nevertheless, since the provisions of Sec. 56(2)(vii)(b) has been held to be not applicable, the additions made by Ld. AO invoking the said provisions would be unsustainable in law as held by Ranchi Tribunal in **Bajrang Lal Naredi Vs ITO (ITA No. 327/Ran/2018 for A.Y.2014-15 dated 20/01/2020)** rendered on similar factual matrix. The facts therein were that the stamp duty value on the date of registration of the property on 17/06/2013 was Rs.22.60 Lacs whereas the stamp duty value at the time of agreement entered into during financial year 2011-12 was Rs.18,89,350/- as against the actual consideration paid by assessee for Rs.9,10,000/-. The Ld. AO made similar addition u/s 56(2)(vii)(b) in the hands of assessee 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."

The ratio of above decision is squarely applicable to the facts of this case. No other contrary decision is on record. Therefore, the additions as made by Ld. AO could not be sustained in law. By deleting the entire addition, we allow ground nos.1 & 2 of assessee's appeal which render ground no.3 as infructuous. The other grounds of assessee's appeal are general in nature. The revenue's appeal stand dismissed.

8. The assessee's appeal stand partly allowed. The revenue's appeal stand dismissed.

Order pronounced on 29th July 2021.

Sd/-	*Sd/-*
(Justice P.P. Bhatt)	**(Manoj Kumar Aggarwal)**
President	**Accountant Member**

मुंबई Mumbai; दिनांक Dated : 29/07/2021
Sr.PS, Jaisy Varghese

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
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आयकरअपीलीयअधिकरण, मुंबई **/ ITAT, Mumbai.**