

**IN THE INCOME TAX APPELLATE TRIBUNAL
“E” BENCH, MUMBAI**

**BEFORE SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA No.1880/Mum/2020
(A.Y. 2016-17)**

Income Tax Officer (International Taxation) 4(2)(1), Room No. 1728, 17 th Floor, Air India Building, Nariman Point, Mumbai – 400 021	Vs.	Mrs. Sanika Avadhoot Shilotri, 102, Varun, J.P. Road, Versova, Andheri (W), Mumbai-400061
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AMNPS1767K		
Appellant	..	Respondent

Appellant by :	Jayant Bhatt
Respondent by :	B.K. Bagchi

Date of Hearing	30.03.2022
Date of Pronouncement	09.05.2022

आदेश / O R D E R

PER AMARJIT SINGH, AM:

The present appeal filed by the revenue and directed against the order passed by the CIT(A)-58, Mumbai, which in turn arises from the order passed by the A.O u/s 143(3) of the Income Tax Act, 1961, for A.Y.2016-17 dated 30.12.2018. The revenue has raised the following grounds before us:

- “1. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs.2,42,77,500/- made u/s 56(2)(vii) of the I.T. Act, being difference in market value and agreement value.

2. Whether, on the facts and in the circumstances of the case, the Ld.CIT(A) ignored the difference between the amount invested in 2011 and amount received back in A.Y. 2013-14 i.e. Rs.1.30 cr. (Rs.6.30 cr - 5 cr.) which should have been brought to tax as “Income from other source”.
- 3 The appellant craves leave to amend or alter any ground or add a new ground which may be necessary.”

2. Both these grounds of appeal are based on similar facts, therefore, the same are adjudicated together.

3. The fact in brief is that assessee filed return of income on 04.08.2016 declaring a total income at Rs.1,11,640/-. The case was subject to scrutiny assessment and notice u/s 143(2) of the Act was issued on 29.07.2017. During the course of assessment the A.O noticed that assessee had executed purchase agreement in respect of flat No.A3-3405 for agreement value of Rs.5,62,28,500/- which had stamp duty value of Rs.8,05,06,000/-. The assessee was show caused to explain why the difference between agreement value and stamp duty value should not be added to the total income as income from other sources as per Sec. 56 of the I.T. Act. The assessee explained that above referred Flat A3 – 3405 of India Bull Sky Forest was acquired in lieu of Flat No. 3907 in India Bull Sky Suites. Flat No. 3907 was accepted by the assessee in lieu of original flat No. 4707 which was originally booked by the assessee on 24.09.2010 in India Bull Sky Suites. It is further stated that because of height restriction booking of the original flat No. 4707 was cancelled and shifted to Flat No.3907 in the same project on 14.11.2013. However, the A.O has not accepted the submission of the assessee and he was of the view that assessee had acquired new flat No. A3-3405 in lieu of transfer of right and paid the stamp duty value of Rs.8,05,06,000/- for the agreement value of Rs.5,62,28,600/-. Therefore difference between agreement value and market value of Rs.2,42,77,400/- was added to the

total income of the assessee as income from other sources as per the provisions of Sec.56 of the I.T. Act.

4. Aggrieved the assessee filed the appeal before the ld.CIT(A). The ld. CIT(A) has deleted the addition made by the A.O.

5. During the course of appellate proceedings before us the ld. D.R has supported the order of A.O.

On the other hand, the ld. Counsel filed paper book comprising copies of agreement for the purchase of the impugned flats. The ld. counsel contended that originally assessee had booked flat No. 4707 and the booking was cancelled because of high restriction as permission was not granted for constructing building up to 47th storey. Therefore, the booking was shifted to flat No. 3907 of saleable area of 3341 sq. ft. It is further submitted that construction of the flat could not be materialized, therefore, the assessee was allotted a flat in the other project by the name of Sky Forest without any change in the terms of purchase. However, the formal agreement for finally allotted flat was entered into on 04.05.2015. It is also submitted that there was no change in the purchase price as per the flat allotted in 2010. The ld. Counsel further submitted that the booking of the flat No. A3 – 3405 Sky Forest was dated back to 24.09.2010 when the assessee had made booking of flat No. 4707 for an agreement value of Rs.495,30,000/-. It was the same contract except constructed premises to be replaced and there was no new agreement made by the assessee. The ld. counsel has also contended that if the AO treat the same as transfer of right to receive residential property originally allotted against A3 – 3405 being replaced by new Flat No. 3907 in India Bull Sky Suites, then it falls under the

definition of transfer u/s 2(47) of the Act and assessee is eligible for deduction u/s 54F of the Act.

6. Heard both the side and perused the material on record. During the F.Y. 2010-11 the assessee had made a booking for purchase of residential premises to be constructed by India Bull Sky Forest in the project India Bull Sky Suites against Flat No.4707 admeasuring 3302 sq.ft. and amount of Rs.72,11,834/- was paid by the assessee by way of booking amount. Thereafter the assessee had also made payments on 21.10.2010 of Rs.4,23,18,166/- and on 22.11.2011 of rs.12,75,398/- totaling to Rs.5,08,05,398/-. Subsequently, vide letter dated 14.11.2013 the developer has informed the assessee that flat no. 4707 cannot be constructed due to various reasons, therefore, in lieu of that flat builder has undertaken to provide the assessee flat No. 3907 admeasuring 3341 sq. ft. and the assessee had paid an additional sum of Rs.8,46,232/- on 26.05.2014. Even after this the developer informed the assessee of its inability to construct and provide the alternative residential premises Unit No. 3907 admeasuring 3341 sq.ft. Under such circumstances the assessee had threatened the developer for specific performance to provide the residential premises or assessee will initiate criminal proceedings against them. Thereafter discussion with the builder with a view to avoid litigation both were mutually agreed for alternative residential premises being unit No. A3 – 3405 on 34th Floor to be constructed in India Bulls Sky Forests. From the following facts the assessee has demonstrated that it was the same booking dated back to 24.09.2010 and assessee had not made any extra payment. The assessee has also submitted that as per the stamp duty ready reckoner value of the constructed unit A3-3405 as on 2010 was Rs.2,60,91,806/-. The assessee has also submitted that the agreement so registered was nothing but the ratification of pre existing

agreement dated back to the principal agreement of 2010. The assessee has also submitted that this was merely same contract with only to be constructed premises being replaced and there was no new agreement and the earlier payment form part of the consideration of the registered agreement. The A.O has treated the shifting of flat as transfer and booked the difference in stamp duty valuation and the prices paid by the assessee as income u/s 56 of the I.T. Act. However, the ld. CIT(A) has considered the complete facts of the case and the circumstances under which the assessee was offered alternative flat by the buyers. The relevant part of the decision of ld. CIT(A) is reproduced as under:

- “6.2 *The assessee had made booking for purchase of proposed residential flat to be constructed by India Bulls Group in the project named in India Bulls Sky Suites. The Flat booked was no. 4707 measuring 3302 Square Feet. The assessee paid an amount of Rs. 72.11 lakhs at the time of booking. The assessee further made payments in F.Y. 2010-11 thereby making total payment of Rs. 5.08 Cr.*
- 6.3 *Subsequently, vide letter no. dated 14.11.2013 the developer showed its inability to provide to the appellant flat. The developer in lieu of the said of the said flat offered Flat No. 3907 measuring 3314 sq. Feet. The appellant paid an addition sum of Rs.8.46 lakhs on 26.05.2014.*
- 6.4 *The Assessing Officer treated this shifting of flats as transfer. The Assessing Officer took the difference in Stamp Duty Valuation and the price paid by assessee as income u/s 56 of the Income Tax Act.*
- 6.5 *It is a common fact that many developers failed to honour their commitment and in lieu of original commitment offers alternate flat to the buyers. The assessee when booked the flat the property was not in existence it was a property which was to be constructed in future time. Therefore, the property is at the most considered contingent property.*
- 6.6 *When the developer failed to construct the said property it has offered another flat in building which was also to be constructed and delivered to assessee on a future date. Therefore the second property also at the time of registration was a future property. The agreement entered between assessee and developer was an agreement for purchase of a flat (to be constructed in future) and the same cannot be treated as an agreement for sale of property.*
- 6.7 *Section 2(47) of the Income Tax Act provides that exchanges of asset has to be treated as transfer. However, whether the same route apply on a future contingent asset is the main question. In my opinion, in any contract of this*

type the price payable by the buyer is consideration and the flat which is offered by developer is the counter consideration.

- 6.8 *In some such situation when the developer fails to deliver the counter consideration (the flat promised by him) the buyer has very limited option he may not sue the developer for specific performance as the property is not in existence and would lead to prolonged litigation. The other option is to get his amount back with interest is very difficult to be implemented because it takes long time in litigation. Secondly we are witness to many such cases where buyers are running from pillar to post either to get the property or the amount of refund. In many such cases, the Supreme Court has to intervene to protect the interest of the buyers. The third option to accept alternate consideration (other property offered by the developer).*
- 6.9 *The assessee's case falls in the third category. Wherein the assessee after waiting for a long time accepted the alternate consideration offered by the developer. In fact, the original understanding, which was entered for buying one flat was amended by replacing the counter consideration offered by developer to an alternate consideration.*
- 6.10 *If such transactions are treated as transfer (Where even the property is not in existence) by notionally assigning value to this right, it would put many buyers in a*
- 6.11 *Moreover, even if we treat such transactions as transfer then the benefit of indexation has to be given and benefit of section 54 etc. has to be given as claimed by assessee (sighting many judicial pronouncements).*
- 6.12 *The Assessing Officer has taken the value of transfer equal to stamp duty valuation. However, normally the stamp duty valuation is for the existing property. The same value is taken when the document is registered for booking a future flat also. However in my opinion the value of existing flat and value of a future flat cannot be same. This can be understood with the help of an example:-*
- *A person buys a flat for says Rs. 1Cr.*
 - *Another person books an identical flat.*
 - *In the registration of both the transaction the authorities will take the same stamp duty value. :*
 - *However, the value in first transaction would be different from value in second transaction because in second transaction, the buyer will get possession of flat after laps of time. Whereas, the first buyer would be enjoying his property from the day one.*
 - *Secondly, in the case of first buyer the property is certain and there is no uncertainty in getting possession whereas in the second case the property is a future property and there will be uncertainty in the mind of buyer. Therefore, in my opinion, the valuation of existing property would be much more than the value of a future property. Therefore, normally, when a person books a flat the price is paid in installments over the period of construction. However, if someone pays entire price in advance he usually gets a very heavy discount.*

- 6.13 *The assessee booked the flat in 2010 which was shifted to another flat in 2014 and the possession of second flat was to be obtained in 2018. Therefore, if we give the benefit of indexation on the price paid in advance and also give benefit of discount for paying entire money in advance for second flat, there will be hardly any difference in the price paid by assessee and the registered value of the property. This can be understood with the example.*
- *If a person pays says Rs. 100 in first year the value of this 100 rupees after 4 years would be roughly 132 (assuming rate of interest @ 8 % per annum).*
 - *On the other hand if an assessee pays Rs. 100 in first year of booking where as the property was to be received after 2 years he is likely to get discount of at least 10% per annum. As cost of money for a developer is not likely to be less than 10% per annum.*
- 6.14 *Now, coming to the current case, the assets of sum of Rs. 5 Cr delivered in 2011 if we index it to the current year that is Financial Year 2015-16. The value of this money would be roughly Rs. 6.30 Cr. (the money paid in 2010-11) and the agreement was entered in 2013-14 that is after roughly three years, taking interest rate at 8% per annum.*
- 6.15 *The stamp duty value of flat booked by assessee was 8.05 cr. and the assessee was to get this flat in 2018 that after roughly 4 years taking the discount rate at 10% per annum the value of this property comes to 4.83 cr. only. Therefore even if we accept the Assessing Officer's contention that shifting of one flat tantamount to transfer, even then the value of property shown by assessee is justified.*
- 6.16 *In view of the above, the Assessing Officer is directed to delete addition of Rs.2,42,77,400/-. These grounds of appeal are treated as allowed."*

The Id. CIT(A) has clearly elaborated in his findings that when the developer failed to provide original flat then it had offered another flat in the building which was to be constructed on a future date. When the assessee has booked the flat that property was not in existing and it was a property to be constructed in future time. The Id. CIT(A) had explained in detail that if such transaction are treated as transfer by notionally assigning value then the benefit of indexation and benefit of Sec. 54 etc. to be given to the assessee. In the light of the above facts and circumstances, we don't find any infirmity in the decision of Id. CIT(A). Accordingly, both the grounds of appeal of the Revenue are dismissed.

6. In the result, the appeal of the revenue is dismissed.

Order pronounced in the open court on 09.05.2022

Sd/-

(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Sd/-

(AMARJIT SINGH)
ACCOUNTANT MEMBER

Mumbai, Dated 09.05.2022

PS: Rohit

आदेश की प्रतिलिपि □ ग्रेषित/Copy of the Order forwarded to :

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

आदेशानुसार / BY ORDER,
सत्यापित प्रति // True Copy //

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ITAT, Mumbai

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1	Draft dictated on			Sr.PS/PS
2	Draft Placed before author			Sr.PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			JM/AM
5	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
6	Kept for pronouncement on			Sr.PS/PS
7	File sent to the Bench Clerk			Sr.PS/PS
8	Date on which the file goes to the Head clerk			
9	Date on which file goes to the AR			
10	Date of Dispatch of order			