

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

**BEFORE SHRI BASKARAN BR, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.1553/M/2021
Assessment Year: 2011-12**

Mrs. Mamta Sharad Gupta, 7D, Twilite Cosmos Horizen, Near Blue Star Compound, Pokhran Road, Thane W, Maharashtra – 400 601 PAN: AJDPG8764H	Vs.	Income Tax Office, Ward 1(2), Mohan Plaza, 1 st Floor, Wayle Nagar, Kalyan (W), Maharashtra-421301
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Pranav Phadke, A.R.
Revenue by : Shri Kanhiya Lal Kanak, D.R.

Date of Hearing : 18 . 05 . 2022
Date of Pronouncement : 16 . 06 . 2022

ORDER

Per : Kuldip Singh, Judicial Member:

The appellant, Mrs. Mamta Sharad Gupta (hereinafter referred to as ‘the assessee’) by filing the present appeal, sought to set aside the impugned order dated 14.09.2018 passed by Commissioner of Income Tax (Appeals)-2, Pune [hereinafter referred to as the CIT(A)] qua the assessment year 2011-12 on the grounds inter alia that :-

“1) The Ld. CIT (A) erred in not considering the fact that the impugned notice u/s. 148 was illegal since the reasons recorded

before issuing the same were baseless, and as such, the reassessment proceedings in pursuance thereof is vitiated.

2) The Ld. CIT (A) also failed to consider that the impugned order is passed mechanically by the Ld. Assessing Officer without affording an opportunity to the appellant to defend her case, and as such, the same is liable to be annulled on account of non application of mind and violation of principles of natural justice.

3) The Ld. CIT (A) also failed to consider that the appellant was never given any opportunity to cross-examine the person who made the statement against the appellant, much less, the alleged material was never provided to her, and as such, the same is violation of principle of natural justice.

4) The Ld. CIT (A) lost sight of the fact that any statement made by and person u/s. 132 [4] cannot be used against any third person and therefore the impugned addition based thereon made by the Ld, Assessing Officer is illegal.

5) It is therefore prayed that the Hon'ble Members may be pleased to delete the impugned addition amounting to Rs.10,52,400/- in A.Y. 2011-12 or in alternative the Hon'ble Members may be pleased to pass any such other order or orders in favor of the appellant in the interest of justice.”

2. Briefly stated facts necessary for adjudication of the controversy at hand are : on the basis of information received from the Investigation Wing, Mumbai that during the course of search carried out in the Cosmos Group, statement of Shri Suraj Kumar Parmar, one of the key promoters of the Cosmos Group was recorded wherein he has accepted the cash transactions in sale of flat/shops and office and one such transaction of the assessee was qua payment of Rs.8 lakhs on 23.02.2011 and Rs.13,04,800/- on 28.03.2011 (half share of the joint transaction of Rs.21,04,800/-) of the assessee was escaped assessment, assessment was reopened by recording reasons and issuance of notice.

3. Declining the contentions raised by the assessee the Assessing Officer (AO) proceeded to make addition of Rs.10,52,400/- to the total income of the assessee and thereby framed the assessment under section 143(3) read with section 147 of the Income Tax Act, 1961 (for short 'the Act').

4. Assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has confirmed the addition by dismissing the appeal. Feeling aggrieved the assessee has come up before the Tribunal by way of filing present appeal.

5. At the very outset, it is brought to the notice of the Bench that there is a delay of 3 years in filing the appeal for which the assessee has filed an application for condonation of delay on the ground that the impugned order has never been served upon by the assessee through post or through mail but she came to know about the same by perusing the portal of the Income Tax Department. Application for condonation of delay is supported with an affidavit. Keeping in view the fact that the reasons pleaded by the assessee in its application for condonation of delay has not been controverted by the Revenue that the impugned order was duly served upon him and keeping in view the mandate of law that a party should be given a fair opportunity to argue its case on merit, there is a reasonable cause to condone the delay and as such the delay in filing the present appeal is hereby condoned and aforesaid appeal is ordered to be registered.

6. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower

Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

7. The Ld. A.R. for the assessee contended that the sole issue raised in this appeal as to making alleged payment of Rs.10,52,400/- in cash to the Cosmos Group as part sale consideration of the flat purchased has already been decided by the Tribunal in one of the group cases in the case of Monika Anand Gupta vs. ITO in ITA No.5561/M/2018 vide order dated 21.04.2022 in favour of the assessee. However, on the other hand, the Ld. D.R. for the Revenue to repel the argument addressed by the Ld. A.R. for the assessee contended that every case is to be decided on the basis of facts of its own and addition in this case has been made on the basis of evidence collected during the search operation at the premises of Cosmos Group and its group company.

8. We have perused the order passed by the co-ordinate Bench of the Tribunal in group case arising out of same search conducted at the Cosmos Group where on money of Rs.8 lakhs against the purchase of flat in building Horizon/Twilight, developed by Cosmos Group was paid as in the instant case which was decided in favour of the assessee by returning following findings:

“3. Brief facts of the case are that information was received from the Dy. Director of Income Tax (Inv), Unit 1(4), Mumbai that assessee along with her husband, had paid on-money of Rs 8,00,000/-, against purchase of flat in building Horizon /Twilight, developed by Cosoms Group. In view of the above information the AO had reason to believe that income to the extent of Rs 4,00,000/- (appellant's share being 1/2) had escaped assessment, in the hands of the appellant in A Yr 2011 - 12. The AO, after recording the necessary reasons for reopening/satisfaction, as per provisions of Section 147 of the Act, issued the notice u/s 148 of the Act which was duly served upon the

assessee. The Assessing Officer made the addition by observing as under :-

6. The reasons for reopening the assessment was provided to the assessee. This office has received concrete information on the above issue. As stated earlier, during the course of the search conducted in the Cosmos group, statement of related persons including Shri Suraj Parmar, one of the three Chief Promoters of the Cosmos Group was recorded, wherein he has accepted that cash transactions are being made in sale of flats/shops/offices. Moreover, from the excel sheet/tally data found during the course of search, it was found that Mrs. Monika Sharad Gupta purchased a flat no.8 in Horizop/Twilight building jointly with her husband for a total consideration of Rs.76,67,471/- and the assessee Mrs. Monika Sharad Gupta has paid in cash Rs.8,00,000/- on 23/2/2011, 1/2 share of the joint transaction of Rs.8.00,000/- comes to Rs.,4,00,000/-.

7. Further, as per the provisions of section 132(4A) of the Act, which is reproduced as under:

"Where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the possession or control of any person in the course of a search, it may be presumed-

(i) That such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person;

(ii) That the contents of such books of account and other documents are true; and

(iii) That the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person's handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested.

8. In the instant case, as stated earlier, Shri Suraj Pannar, one of the three chief promoters has given a statement during the course of search u/s. 132(4) of the I.T. Act 1961, which is

admissible as an evidence in the Court of Law. The contents found and seized during the course of search are also true as per the provisions of section 132(4) of the IT Act 1961.

9. Thus, there is relevant material for forming a reasonable belief that income has escaped assessment and, therefore, the initiation of reassessment proceedings by issue of notice under section 148 of the Act is in order.

10. In view of the above Rs. 4,00,000/- is added to the total income of the assessee. Penalty proceedings u/s 274 r.w.s. 271(1)(c) are separately initiated for furnishing inaccurate particulars of Income.”

4. Upon assessee’s appeal learned CIT(A) confirmed the addition.

5. Against the above order assessee is in appeal before ITAT.

6. I have heard both the parties and perused the record. I find that the addition for on-money payment has been done in this case without any corroborative material found from assessee. The addition is solely based upon some statement of the builder. Such additions are not sustainable on the touchstone of Hon'ble Supreme Court decision in the case of CIT vs P.V Kalyanasundasram 164 Taxman 78 (SC). Moreover there is nothing on record to suggest that so called electronic evidence collected by revenue at the builder’s office is compliant with the requirement of section 65B of Evidence Act regarding admissibility of electronic evidence. Hence, I set aside the orders of the authority below and direct that the addition be deleted.

7. In the result, appeal is allowed.”

9. Since the sole issue raised in this appeal is covered by the order (supra) passed by the co-ordinate Bench of the Tribunal addition made in this case is not sustainable. Because the addition is made merely on the basis of statement made by one Mr. Suraj Parmar, one of the promoters of Cosmos Group under section 132(4) of the Act without any corroboration. Moreover, statement or any material seized during the course of search under section 132(4) of the Act can only be used against Mr. Suraj Parmar of Cosmos Group and not against the assessee without any

corroboration. Excel sheet alleged to have been recovered from the office of builders is also not admissible being not proved under section 65 of the Evidence Act. So in view of the matter, addition made by the AO and sustained by the Ld. CIT(A) is not sustainable in the eyes of law, hence ordered to be deleted. Consequently, appeal filed by the assessee is allowed.

Order pronounced in the open court on 16.06.2022.

**Sd/-
(BASKARAN BR)
ACCOUNTANT MEMBER**

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Mumbai, Dated: 16.06.2022.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.