

THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "B" BENCH

**Before: Shri P.M. Jagtap, Vice President
And Shri Siddhartha Nautiyal, Judicial Member**

**ITA No. 1632/Ahd/2017
Assessment Year 2013-14**

The DCIT, Central Circle-2, Vadodara (Appellant)	Vs	Shri Ketan V. Pandya, 13 Jawahar Society, R.V. Desai Road, Baroda PAN: ABFPP5116N (Respondent)
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**ITA No. 1633/Ahd/2017
Assessment Year 2013-14**

The DCIT, Central Circle-2, Vadodara (Appellant)	Vs	Shri Bankim V. Pandya, 13 Jawahar Society, R.V. Desai Road, Baroda PAN: ABFPP5115R (Respondent)
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**Assessee by: Shri S.N. Soparkar, A.R.
Revenue by: Shri James Kurian, CIT-D.R.**

Date of hearing : 16-06-2022
Date of pronouncement : 07-09-2022

आदेश/ORDER

PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-

These two appeals filed by the Department are against the order of the Id. CIT(A)-12 Ahmedabad. in Appeal nos. CIT(A)-12/242/CC 2/Baroda/15-16 & CIT(A)-12/250/CC 2/Baroda/15-16 vide orders dated 22/02/2017 & 23/02/2017 passed for the assessment year 2013-14. Since common issues are involved in both the appeals and both appeals are arising out of additions made in respect of the same property held jointly by the appellants, we are disposing of both the appeals together.

Shri Bankim V. Pandya in ITA No. 1633/Ahd/2017

2. Department has taken the following grounds of appeal:

“[1] On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.2,00,70,257/- out of total addition of Rs.2,40,31,757/- on account of unexplained investment in spite of the fact that addition was made on the basis of the seized Banakhat which clearly portray the schedule of payment to be made through cheque & cash to the seller. The said banakhat was signed & duly notarized and made after T.P. Scheme announcement and the assessee had also taken part possession of the land. Since, the T.P. Scheme announcement was also there, hence the price of land had also increased. It is also to be noted that the notarized banakhat had not been cancelled. The banakhat has the legal force unless the same is cancelled. Hence, details of cash payment as per the Banakhat were erroneously been deleted by the order of Ld.CIT(A)-

12, Ahmedabad which was also rectified vide order u/s.154 of the I. T. Act, 1961 received on 08.05.2017 .

[2] On the facts and in the circumstances of the case, the Ld. CIT (A) ought to have upheld the order of the Assessing Officer.

[3] It is, therefore, prayed that the order of the CIT (A) may be set aside and that of Assessing Officer may be restored to the above extent.

[4] The appellant craves to add, modify or alter any grounds during the course of appellate proceedings.”

Shri Ketan V. Pandya in ITA No. 1632/Ahd/2017

3. Department has taken the following grounds of appeal:

“[1] On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.2,11,40,257/- out of total addition of Rs.2,50,91,757/- on account of unexplained investment in spite of the fact that addition was made on the basis of the seized Banakhat which clearly portray the schedule of payment to be made through cheque & cash to the seller. The said banakhat was signed & duly notarized and made after T.P. Scheme announcement and the assessee had also taken part possession of the land. Since, the T.P. Scheme announcement was also there, hence the price of land had also increased. It is also to be noted that the notarized banakhat had not been cancelled. The banakhat has the legal force unless the same is cancelled. Hence, details of cash payment as per the Banakhat were erroneously been deleted by the order of Ld.CIT(A)-12, Ahmedabad which was also rectified vide order u/s. 154 of the I. T. Act, 1961 received on 08.05.2017.

[2] On the facts and in the circumstances of the case, the Ld. CIT (A) ought to have upheld the order of the Assessing Officer.

[3] It is, therefore, prayed that the order of the CIT (A) may be set aside and that of Assessing Officer may be restored to the above extent.

[4] *The appellant craves to add, modify or alter any grounds during the course of appellate proceedings.”*

4. We shall first discuss the case of Shri Bankim Pandya, which shall serve as the lead case, and the ratio thereof shall also apply the case of Shri Ketan Pandya, since the additions/issues are emanating out of additions made in respect of common property jointly held by the two assesseees.

5. The brief facts of the case are that that the search was conducted on the assessee on 09-01-2013. Accordingly, the case was selected for scrutiny as per provisions of section 153B(2) of the Act and accordingly notice under section 143(2) of the Act was served upon the assessee on 11-11-2014. During the course of search proceedings, various incriminating documents were found from the residential premises of Shri Bankim Pandya /Ketan Pandya. As per the seized documents, the assessee, Shri Bankim Pandya along with his brother Ketan Pandya had purchased a land at Tandalja Village, Atladara. As per the copy of Banakhat obtained during search, the purchase price was finalised at ₹ 9,52,54,515/-, out of which ₹ 4,00,31,000/- was to be paid by way of cheque and the remaining amount of ₹ 5,52,23,515/- was to be paid in cash as per the schedule mentioned in the Banakhat. The AO observed that as per the revenue records, the assessee Bankim Pandya and his brother Ketan Pandya purchased the above land by way of registered Banakhat dated 24-07-2012 for ₹ 4,00,31,000/-. Subsequently, registered sale deed was entered between the assessee and the seller on 05-08-2012. The AO observed that it has not been disputed by the

assessee that the possession of the land has been transferred in favour of the assessee at time of registration of sale deed. Thus, it is a reasonable presumption that the entire amount as mentioned in the registered sale deed (coupled with the fact that the assessee has not disputed that possession of the land was transferred to him and his brother at the time of registration of sale deed) supports the fact that the entire amount as mentioned in the registered sale deed of ₹ 9,52,54,515/- (out of which ₹ 4,00,31,000/- has been paid by way of cheque and balance amount of ₹ 5,52,23,515/- is paid by cash) has already been paid at the time of registration of sale deed itself. Accordingly, the assessee was asked as to why sum of ₹ 5,52,23,515/- should not be treated as unaccounted money of the assessee (and his brother), and the proportionate share in relation to the assessee and his brother be taxed in their respective hands.

6. In response, the assessee submitted that the above registered sale deed which has been referred to by the Ld. Assessing Officer has been recalled/cancelled for the reason that the assessee came to know that 40% of the land area was being considered by the State government for the development reservation by way of TP scheme dated 31-07-2012, and accordingly it was decided between the parties vide agreement dated 28-06-2013, that since the assessee and his brother had paid a total amount of ₹ 90,51,000/- (₹ 30 lakhs by cheque and balance amount of ₹ 60.51 lakhs in cash) till such time the above TP scheme had come to be notified, only the proportionate amount of land in relation to total amount of ₹ 90,51,000/- which had been paid thus far would be transferred to the assessee and his brother, and the seller would not press for any further amount from the

assessee or his brother. This is also for the reason that the seller was not in a financial position to refund the amount of ₹ 90,51,000/- which was received till date of TP notification to the assessee and his brother. The assessee submitted that the return deed was registered on 24-06-2013, as per which the assessee retained land of 2090 square metres (proportionate to the sum of Rs. 90,51,000/- paid to the seller) and the remaining land of 7420 square metres was returned back to the seller. Accordingly, no additional cash payment of ₹ 5,52,23,515/- is made in cash by the assessee, since as per the terms of “return deed” referred to above, the assessee got possession only of the amount of land proportionate to ₹ 90,51,000/- which was the only amount which was paid at the time of registration of sale deed and the balance amount of land was returned back to the seller (and no further payment was made over and beyond the amount mentioned above).

7. The AO, however was not convinced with the arguments of the assessee for the reason that date of passing of resolution of TP scheme for Tandalja village was 31-07-2012. The assessee, Bankim Pandya and his brother Ketan Pandya entered into a registered sale deed with the buyer on 05-08-2012 and possession of the land was transferred to the buyers. This means that at the time of signing of registered sale deed on 05-08-2012, both the assessee and the seller were well aware about the TP scheme and conditions of registered sale deed were drafted taking into consideration that the TP scheme would be implemented. The search operation was conducted at the premises of the assessee on 09-01-2013 in which the evidences regarding unexplained investment of the assessee were found. In the statement recorded on oath of the assessee dated 10-01-2013, during the post

search proceedings, there was no mention of cancellation of sale deed or revising the terms of the agreement. The assessee thereafter entered into “return deed” with the seller on 24-06-2013, in terms of which land of 2090 square metres was retained by the assessee and his brother and the remainder land of 7420 square metres was returned back to the seller. Accordingly, the subsequent return agreement was only an afterthought to account for the unexplained cash paid by the assessee in respect of the above transaction amounting to ₹ 5, 52,23,515/- at the time of entering of registered sale deed. Accordingly, the AO held the above sum of ₹ 5, 52,23,515/- is the unaccounted investment made in the property, and added a sum of ₹ 2,40,31,757/- in the hands of the assessee, in proportion to his share in the property.

8. In appeal, Ld. CIT(Appeals) in principle agreed with the Ld. Assessing Officer to the extent that the “cancellation return deed” dated 28-06-2013 has been executed as an afterthought to avoid being taxed on the whole unaccounted cash of ₹ 5,52,23,515/-. He also agreed with the contention of the AO that there is no reason to believe that the appellant was not aware of the notified TP scheme on 31-07-2012 at the time of entering of sale deed. However, Ld. CIT(Appeals) was of the considered view that the when the Banakhat dated 05-08-2012 is giving a detailed schedule both of payment by cheque and payment by cash and also in the absence of categorical evidence of actual cash payments over and above the amount mentioned in the Banakhat referred to above, it is not possible to conclude in law that the purchasers (Bankim and Ketan Pandya) were in possession of or had made payments of amounts scheduled to be paid in cash after the date of

search. Accordingly, Ld. CIT(Appeals) restricted the addition to cash payments totaling to ₹ 140.23 lakhs which was scheduled to be made as per the registered Banakhat up to the date of search at the premises of the assessee on 09-01-2013. While passing the order, Ld. CIT(Appeals) made the following observations:

*“I firstly note that the Banakhat dated 5/8/2012 is not only a registered document but has also been acted upon by both the parties thereto. Similarly, the other seized documents scanned and printed by the Ld. AO on page nos.17 to 21 of the assessment order undoubtedly and unequivocally evidence that investment by cheque of Rs.30 lakhs and investment by cash of the balance amount of Rs.93,28,500/- has been made jointly by the three co-investors. It is also equally true that neither the Banakhat dated 5/8/2012 nor other seized documents on page no. 17 to 21 of the assessment order **in any way evidence the fact that in all cash payment in excess of Rs.93,28,500/- has been made.** The Ld. AR, therefore, is absolutely right that the conclusion of the Ld. AO in para 6 on page 22 of the assessment order that the purchasers of the land including the appellant "was in possession of cash of Rs. 5.52 crores" is simply conjectural and obviously not based on any sound and credible evidence. As such the very Banakhat dated 5/8/2012 is giving a detailed schedule both of payments by cheque and payments by cash and even as per that schedule, and also in the absence of categorical evidence of actual cash payments beyond that required to be paid till the date of the search as per banakhat, **it is impossible to conclude in law that "the purchasers were in possession of or made payment of amounts scheduled to be paid after the date of the search"**. In other words, the most adverse conclusion that can be drawn on the basis of all the evidences which have been relied upon by the AO would still essentially and necessarily need to be based on Banakhat dated 5/8/2012. As per this Banakhat, up to the date of the search, total cash payment of Rs. 60.51 lakhs + Rs.79.72 lakhs totalling to Rs.140.23 lakhs **is prima facie reasonable** to be inferred to have been made, though it is the A.R's contention that the alleged payment on 30/11/2012 is not made as can be seen from return of cheques dated 30/11/2012 as per*

*"cancellation deed", Therefore, the statement u/s 131 of Shri Meer as further supported by the fact that the corresponding cheques totalling to Rs.62 lakhs scheduled to be cleared as per the said Banakhat- on 30/11/2012 have in fact not been so cleared and further fact that such non-clearance of these cheques is substantiated by the appellant by way of providing copies of the relevant cheques (page no. 41 to 44 of PB), would, in my considered opinion, require such conclusion of payment of further cash of Rs. 79. 72 lakhs to be arrived at, relying on Banakhat, with a certain degree of circumspection. More so, when as per the cancellation deed (page 23 of the PB), the consideration for reduced land area (2090 sq.m.) finally purchased" as recorded therein is only Rs.90,51,000/- including cash of Rs.60,51,000/- and cheques of Rs. 30,00,000/- paid under the original Banakhat dated 5/8/2012. As per this cancellation deed, the transaction now has been reduced to 2090 sq. m in place of the originally agreed 9510 sq. m. also at a reduced rate of only Rs. 4331/- in place of Rs. 10016/- as per Banakhat. Considering all these factors, **I am of the considered opinion that while on one hand, the Banakhat dated 5/8/2012 is firstly a prima facie (and also conclusive, if not cogently and successfully rebutted by appellant) evidence of total cash payment of Rs. 140.23 lakhs till the date of the search, secondly, as rightly observed by the AO, this independent and contemporaneous Banakhat executed by the appellant himself is also an irrefutable evidence of the rate of the underlying land agreed to by transacting parties, which, as per the said document is Rs. 10,016/- per sq. m.** When seen in the totality of facts and circumstances and in the light of the partially acted upon seized Banakhat dated 5/8/2012, the AO's allegation that the cancellation deed dated 28/6/2013 has been executed as an afterthought to avoid being taxed on the whole proposed unaccounted cash payment of Rs.5.42 crores has also some merit. Similarly, the reason canvassed by the appellant before the AO and by the AR before me for cancellation of the Banakhat and replacement thereof by agreement for purchase of lesser area of land, though prima facie appears to be viable, **I am also of the firm opinion that the action of cancellation of Banakhat dated 5/8/2012 and substitution thereof (deed dated 28/6/2013) is indeed an escape route which was validly available in law to the appellant and has been chosen by him as an abundant caution to avoid the adverse conclusion of total unaccounted cash***

the paper book), and there is no evidence with the Department to prove that any amount in cash was paid after the date of search. Accordingly, the additions made by the Ld. Assessing Officer are based only on presumptions.

10. We have heard the rival contentions and perused the material on record. We are in agreement with the observations of Ld. CIT (Appeals) that any additions made after the date of search on 09-01-2013 would be presumptuous, in absence of any tangible evidence with the Department that entire cash was paid by the assessee, at the time of entering into registered sale deed itself, when the original sale deed itself contains a schedule of cash payment. While we are in agreement with the observations made by the AO as well as Ld. CIT(Appeals) that the return deed subsequent to the date of search on 24-06-2013 seems to be an afterthought since no mention thereof was made at time of post search proceedings on 10-01-2013, however at the same time, it cannot be ignored that the original registered sale deed entered into between the assessee and the buyer contained a specific schedule of payment both by way of cheque and cash, and the Department has not been able to bring anything concrete to prove that the entire payment in cash as mentioned in the registered sale deed was made at the time of registration of sale deed itself i.e. entire cash payment was made prior to the scheduled date of cash payments as per the registered sale deed. We are in agreement with the view of the Ld. CIT(Appeals) that reasonably, unaccounted cash component should be restricted to scheduled cash payments (as per registered sale deed) which were supposed to be made up to such date when search was conducted at the premises of the assessee on 09-01-2013.

Accordingly, we find no infirmity in the order of Ld. CIT(Appeals) in restricting the addition on account of unexplained cash payments to the extent of schedule of payments till the date of search conducted at the premises of the assessee on 09-01-2013.

11. In the result, the appeal of the Department is dismissed.

Shri Ketan V. Pandya ITA Number: 1632/Ahd/2017

12. As observed earlier, since the additions made in the hands of Bankim Pandya and Ketan Pandya are emanating out of additions made on account of unaccounted/unexplained cash in respect of same property jointly purchased by both of them together, the observations made in respect of Bankim Pandya would equally apply in case of the assessee (Ketan Pandya) as well.

13. In the result, for the reasons mentioned above, appeal of the Department is dismissed.

14. In the combined result, both the appeals filed by the Department are dismissed.

Order pronounced in the open court on 07-09-2022

Sd/-
(P.M. JAGTAP)
VICE PRESIDENT

Sd/-
(SIDDHARTHA NAUTIYAL)
JUDICIAL MEMBER

Ahmedabad : Dated 07/09/2022

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,
उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद