आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL INDORE BENCH, INDORE

BEFORE MS. SUCHITRA KAMBLE, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

(Conducted through Virtual Court)

ITA No.8/Ind/2022
Assessment Year: 2012-13

Smt. Jyoti Garg Mandsaur	**बनाम/** Vs.	ACIT, Ratlam
(Appellant / Assessee)		(Respondent / Revenue)
PAN: AGZPG9989M		
Assessee by	Shri S.S. Deshpandey, AR	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	23.08.2022	
Date of Pronouncement	30.08.2022	

आदेश / O R D E R

Per B.M. Biyani, A.M.:

1. This appeal by assessee is directed against the order dated 25.11.2021 of National Faceless Appeal Centre (NFAC) **["Ld. CIT(A)"]** in Appeal No. ITBA/NFAC/S/250/2021-22/1037209384(1), which in turn arises out of the order of assessment dated 10.12.2018 passed by the learned ACIT, Ratlam **["Ld. AO"]** u/s 144 read with section 147 of the Income-tax Act, 1961 **["the Act"]** for Assessment-Year 2012-13, on following grounds:

> ***"1. The Ld. CIT(A) NFAC has erred in passing the order as per record without considering the submissions made before him***

on mail.

2. ***The Ld. CIT(A) NFAC has erred in maintaining the ex-party order under section 144.***

3. ***The Ld. CIT(A) NFAC erred in maintaining the addition of Rs. 1,32,00,294/- u/s 69 of the Act on the ground that the assessee has made the alleged payment of on-money on purchase of the plot.***

4. ***It was proved before the loan authorities that no such on-money payment was made by the assessee. The addition has been made merely on the basis of an entry in the Excel Sheet of the third party.***

5. ***Without giving complete facts and without providing the copy of the Excel Sheet of the Third Party and without providing any opportunity of cross examination, the addition maintained is bad in law and hence be deleted.***

6. ***The addition of Rs. 1,32,00,294/- may please be deleted"***

2. At the time of hearing the Ld. AR did not press Ground No. 1 & 2, therefore these grounds are treated as withdrawn and do not call for adjudication. Other grounds are proceeded with for disposal.

3. The only issue involved in this appeal is the addition of Rs. 1,32,00,294/- by Ld. AO u/s 69 of the Act on account of 'on-money payment' for purchase of plot.

4. The facts of case are such that the original assessment of assessee was made u/s 143(1) of the Act. Later on, during the course of a search u/s 132 conducted on M/s Divya Dev Developers Pvt. Ltd. on 21.09.2012, a hard-disc containing an excel-sheet was seized which revealed that the assessee had purchased a plot No. D-48 on 24.02.2012 from M/s. Divya Dev Developers Pvt. Ltd. for a sum of Rs. 1,78,43,954/-. The authorities further observed that the consideration disclosed in the registry was Rs. 46,43,660/- only and the difference of Rs. 1,32,00,294/- was paid by way of 'on money' out of unexplained sources which had escaped assessment. Based on this, a notice dated 16.03.2018 u/s 148 was served upon the assessee and assessment was framed u/s 147.

5. During assessment-proceeding, Ld. AO made two observations viz. (i) the excel-sheet found in the hard-disc seized during aforesaid search conducted on M/s Divya Dev Developers Pvt. Ltd. had reflected the details of deal made by assessee for purchase of Plot No. D-48 at Rs. 1,78,43,954/- through a broker named Mr. Sachin, and (ii) M/s. Divya Dev Developers Pvt. Ltd had gone to Income-Tax Settlement Commission, where it has accepted in the declaration filed before Settlement commission about the receipt of unaccounted on-money as per Exhibit-23 given below:

Sr. No.	Plot No.	Year of Sales	Area Sq.Ft.	Plt/Duple	Gross Rate	Deal amount after discount	Sales as per Books	Unaccounted Sales
5	D48	2011-12	5663	Plot	3151	1,78,43,954/-	46,43,660/-	1,32,00,294/-

6. Ld. AO confronted the assessee on aforesaid observations. It is worth mentioning that initially in Para No. 6 of the assessment-order, the Ld. AO has mentioned about no reply having been filed by the assessee to his notices, but in the later part of assessment-order, the Ld. AO has not only narrated the submission made by assessee before him but also considered those submissions in arriving at his findings and conclusions. Be that as it may be, the Ld. AO noted that the assessee made a submission that she had no connection with the unaccounted sale of Rs. 1,32,00,294/- as she had purchased plot for Rs. 46,43,660/- only. But, however, the Ld. AO rejected this submission of assessee and relying upon the excel-sheet and the declaration made by M/s. Divya Dev Developers Pvt. Ltd. to Income-Tax Settlement Commission, concluded that the assessee had paid on-money of Rs. 1,32,00,294/-. This way, the Ld. AO made an addition of Rs. 1,32,00,294/- while completing assessment.

7. During appellate-proceeding, the assessee made a detailed submission to Ld. CIT(A). It is worth mentioning that initially in Para No. 4 of the appeal-order, the Ld. CIT(A) has mentioned about no reply having been filed by the

assessee to his notices, but in the later part of appeal-order, the Ld. CIT(A) has not only narrated the submissions made by assessee before him but also considered assessee's submissions in arriving at his findings and conclusions. Be that as it may be, the ld. CIT(A) has finally confirmed the addition made by Ld. AO by holding as under:

> ***"I have carefully considered the finding of the AO and reply of the appellant during appeal proceedings. I do not find force in the contention of the appellant because the payment of on-money of Rs. 1,32,00,294/- is recorded in the excel sheet of the hard copy in the natural course of business alongwith the amount as per sale deed. In such situation it is presumed that if one entry is correct then other entry is also correct unless proved otherwise with evidence. Moreover, the admission of M/s. Divya Dev Developers Pvt. Ltd is also very relevant and corroborates the nature of entry for on money payment. Mere denial on the part of appellant is not sufficient. Moreover, the appellant and M/s. Divya Dev Developers Pvt. Ltd both being in direct relationship purchaser and seller, being known to each other, could have made correspondence with each other regarding the nature of recording of entry of Rs.1,32,00,294/- for which opportunity of cross examination to be given by AO is not required which is required only when the AO has adopted proceedings of 'Examination–in–chief' which has not been done in present case, therefore, I do not agree with the contention of the appellant and this ground is dismissed. The findings and conclusions of the AO has been discussed in para 7 of the assessment order. The addition made by the AO of Rs. 1,32,00,294/- is hereby confirmed."***

8. Before us, the Ld. AR appearing on behalf of assessee made a lengthy submission and raised vital contentions as under:

(i) That the lower authorities are simply alleging the assessee on the basis of entry in the Excel-Sheet found in possession of M/s. Divya Dev Developers Pvt. Ltd and the declaration-made by M/s Divya Dev Developers Pvt. Ltd. to the Income-tax Settlement Commission. Ld. AR submitted that the excel-sheet is made, maintained, owned and found in custody of M/s. Divya Dev Developers Pvt. Ltd. Similarly, the declaration before Income-tax Settlement Commission is also prepared and filed by M/s Divya Dev Developers Pvt. Ltd. Ld. AR submitted that both of these materials, heavily relied upon by the revenue-authorities, were neither made up by assessee, nor owned by assessee and nor even found in possession of assessee. Relying upon certain decisions, the Ld. AR argued that the excel-sheet and declaration before Settlement Commission are the documents of third party, which cannot be used against assessee. Ld. AR also mentioned that neither the excel-sheet nor the declaration filed to Settlement Commission contains the name of assessee.

(ii) The Ld. AO has not given any opportunity of cross-examination of either the seller, M/s Divya Dev Developers Pvt. Ltd. or the broker, Mr. Sachin, although the assessee had made a specific request through letter dated 30.11.2018, a copy of which is placed in the material. Relying upon **Kishan Chand Chelaram 125 ITR 713 (SC) and CIT Vs. Ramesh Shukla 10 ITJ 286**, Ld. AR submitted that no addition can be made without affording opportunity of cross-examination to the assessee.

(iii) The assessee has purchased plot through registered-deed dated 24.02.2012 for sum of Rs. 46,43,660/-. Drawing our attention to the copy of registered-deed placed on record, Ld. AR submitted that the assessee has paid entire consideration through banking channel, the details of payments being mentioned on Page No. 8 of the Deed. Ld. AR submitted that the seller, M/s Divya Dev Developers Pvt. Ltd, clearly admitted having sold the impugned plot for Rs. 46,43,660/-,

which clearly establishes that the assessee has paid that much only. For the sake of completeness of submission, Ld. AR further pointed out that the consideration of Rs. 46,43,660/- declared in the registered-deed is not only a real consideration but also fair since it was equivalent to the market-value fixed by State Govt. and therefore no additional Stamp Duty was paid. Relying upon following decisions, Ld. AR argued that the value declared in the registered-deed must be treated as conclusive:

(a) I.T.A.T., Indore Bench in Lokesh Gadiya vs. ACIT 35 ITJ 301

(b) Paramjeet Singh vs. ITO. order dated 10.02.2020

(iv) The authorities do not have material or evidence, much less cogent material, to prove that any kind of on-money was in fact paid by the assessee.

9. With aforesaid submission, Ld. AR argued strongly that the authorities have made addition in the income of assessee, which is baseless, illegal and unsustainable. Ld. AR, therefore, prayed to delete the addition.

10. Per contra, Ld. DR supported the orders of lower authorities. Ld. DR submitted that the assessee had demanded and obtained reasons of reopening assessment u/s 148 from Ld. AO, but did not raise any objection. According to Ld. DR, the assessee could have submitted all objections very well before the Ld. AO itself at the initial stage. Thereafter, Ld. DR submitted that the excel-sheet found by department during the search was a material maintained by seller in the normal course of business and therefore, much credence has to be given to the excel-sheet. Ld. DR further submitted that the seller has clearly admitted before Settlement Commission about the receipt of on-money in respect of the impugned plot No. D-48. Ld. DR argued that even if the name of assessee is not mentioned in excel-sheet or declaration filed before the Settlement Commission, Plot No. D48 was very clearly mentioned and since this plot was purchased by assessee, the irresistible conclusion would be that it is the assessee who paid on-money.

Opposing the argument of Ld. AR that the registered-deed disclosed the real consideration paid by assessee, Ld. DR made a strong submission that the payment of on-money is never mentioned in the registered-deed. Ld. DR submitted that there would be no single registry in the country, where the payment of on-money would be mentioned in the registered-deed. Ld. DR submitted that the payment of on-money is always unearthed by income-tax authorities on the basis of evidences other than the registered-deed, like excel-sheet and declaration filed by the seller to Income-tax Settlement Commission in this appeal. With these submissions, Ld. DR argued that the department is having sufficient evidence in the form of excel-sheet and declaration filed to Settlement Commission by the seller, which clearly establish that the seller has received on-money and it is the assessee who being purchase of the plot, paid the same. Therefore, the addition made by lower authorities is having a strong basis and the same must be upheld.

11. In rejoinder, Ld. AR re-emphasized that the excel-sheet was seized from the possession of seller and not from assessee, therefore the excel-sheet is binding on the seller but cannot have any evidentiary value against the assessee. Ld. AR further submitted that the declaration before Settlement Commission is also made by seller and the assessee is not a party. Ld. AR submitted that the seller can have hundred and one reasons to make a declaration to the Settlement Commission, suitable to him for the reasons known to him only, but that does not become any basis for alleging assessee.

12. We have considered rival submissions of both sides and perused the relevant record as well as the decisions cited before us. We observe that the revenue is having two materials in support of addition of on-money, viz. (i) excel-sheet found in the search, and (ii) the declaration filed by seller to Settlement Commission. We observe that except these two, the revenue does not have any other evidence whatsoever for the alleged on-money payment. Now, the first issue for our determination is very simple i.e. Can these two-materials which are in the nature of loose-materials made, owned and

controlled by M/s Divya Dev Developers Pvt. Ltd constitute any valid evidence to draw inference against the assessee? To answer this issue, we refer certain decisions relied upon by Ld. AR:

(a) CBI Vs. V.C. Shukla (SC), dated 02.03.1998:

It has been held thus:

"According to Section 34 of the Indian Evidence Act, 1872, entries in books of account regularly kept in the course of business, are relevant whenever they refer to a matter into which the court has to enquire but such statements shall not alone be sufficient evidence to charge any person with liability.

From a plain reading of s.34, it is manifest that to make an entry relevant there under it must be shown that it has been made in a book, that book is a book of account and that book of account has been regularly kept in the course of business.

From the above section at is also manifest that even if the above requirements are fulfilled and the entry becomes admissible as relevant evidence, still, the statement made therein shall not alone be sufficient evidence to charge any person with liability. It is thus seen that while the first part of the section speaks of the relevancy of the entry as evidence, the second part speaks, in a negative way, of its evidentiary value for charging a person with a liability. It will, therefore, be necessary for us to first ascertain whether the entries in the documents, with which we are concerned, fulfil the requirements of the above section so as to be admissible in evidence and if this question is answered in the affirmative then only its probative value need be assessed."

(b) ACIT Vs. Prabhat Oil Mills 52 TTJ (Ahd):

"6. Shri S. N. Soparkar, the learned counsel for the assessee, relied upon the decision of the Tribunal, Ahmedabad Bench B in the case of Patel Oil Mills & Ginning Factory, Kadi (ITA No. 803/Ahd/99) where a similar addition amounting to Rs. 6,87,068 made on identical facts was deleted. He further submitted that reference application filed by the Revenue in the above case has also been rejected by the Tribunal. The learned counsel for the assessee submitted that M/s. Hynoup was a third party. The diary was seized during the course of search at the residential premises of the third party and it was not part of the record of the assessee-firm. The alleged statement of the director of M/s. Hynoup was also not part of the record of the assessee-firm and the Department was not justified in relying upon some entries/documents

found at the premises of a third party. The learned counsel opposed the proposition of the Departmental Representative that the case should be set aside on the ground that all the facts were before the Assessing Officer and the CIT(A) on the basis of which the authorities below have arrived at the definite conclusions. He submitted that under the circumstances giving second inning to the Department will be against the principles of natural justice. In support of this conclusion he relied upon the judgment of the Gujarat High Court in the case of CIT vs. Harikishan Jethamal Patel (1987) 168 ITR 472 (Guj), CIT vs. M. K. Bros. (supra), Chiranji Lal Steel Rolling Mills vs. CIT (1972) 84 ITR 222 (P&H) and the decision of the Tribunal in the case of Rajkumar Jain vs. Asstt. CIT (1994) 49 TTJ (All) (TM) 558 : (1994) 208 ITR 22 (AT) (All). The learned counsel further submitted that reliance by the Departmental Representative on the judgment of the Tribunal in the case of Rajdeep Sales Agency (supra) was of no assistance to the Revenue as the facts were distinguishable. In the case of Rajdeep Sales Agency (supra) the said firm had admitted that the said entries in the seized documents pertained to them, while in the present case the assessee all through denied of having any deals with M/s. Hynoup except those recorded in its books of account.

7. We have considered the rival submissions and perused the facts on record. At the outset we must state that the facts here are identical with those of Patel Oil Mills & Ginning Factory, Kadi (supra) where an addition of Rs. 6,87,068 made by the Assessing Officer to the assessees returned income of allegedly suppressed sale of cotton seed oil to M/s. Hynoup on the basis of entries in the seized diary at the residential premises of one of the directors of the said concern, which was confirmed by the CIT(A), was deleted by this Tribunal to which one of us (Accountant Member) was a party. For the reasons given in the aforesaid decision of the Tribunal we find no ground to sustain the addition of Rs. 7,63,619."

Thus, it is very much clear that the materials of third-party cannot be used as evidence against the assessee.

13. Now, we would turn to another legal aspect involved in the matter. Ld. AR has strongly pointed out that despite a categorical request made to Ld. AO in letter dated 30.11.2018, the Ld. AO has not provided opportunity of cross-examination of seller or broker to the assessee. We find a strong force in this submission of Ld. AR. The approach of the Ld. AO is against the well-settled principle of jurisprudence *"Audi alteram partem"*. Therefore, we fail to understand how the revenue authorities have derived a conclusion against

the assessee without even giving the without giving even opportunity of hearing.

14. We now refer some more cases, where it has been held that the value declared in the registered-deed has to be given full credence. These decisions are:

(a) Paramjeet Singh Vs. ITO 323 ITR 588 (P&H High Court):

"Therefore, it follows that no oral agreement contradicting/varying the terms of a document could be offered. Once the aforesaid principle is clear then ostensible sale consideration disclosed in the sale deed dt. 24th Sept., 2002 (A7) has to be accepted and it cannot be contradicted by adducing any oral evidence. Therefore, the order of the Tribunal does not suffer from any legal infirmity in reaching to the conclusion that the amount shown in the registered sale deed was received by the vendors and deserves to be added to the gross income of the assessee appellant."

(b) ITAT Indore in Lokesh Gadia Vs. ACIT (2019) 35 ITJ 301:

"26. The credibility of the documentary evidences corroborating the fact that sale consideration is only Rs.95,00,000/-and not Rs.2,70,00,000/- is far more than the statement given by the sellers and the Ld. Departmental Representative failed to controvert the submissions as well as documentary evidences placed before us by the Ld. Counsel for the assessee. It is a settled law that documentary evidence has precedence over oral evidence. In the case of Roop Kumar V/s Mohan Thedeni 2003 6 SCC 595 Hon'ble Supreme Court observed that "It is likewise a general and most inflexible rule that wherever written instruments are appointed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy. It is of principle because such instruments are in their own nature and origin, entitled to a much higher degree of credit than parol evidence. It is of policy because it would be attended with great mischief if those instruments, upon which men's rights depended, Lokesh Gadia ITA No.854/Ind/2017 were liable to be impeached by loose collateral evidence. (See Starkie on Evidence p. 648" (Emphasis applied). We therefore on the basis of the facts and documentary evidences placed before us are inclined to hold that the sale consideration for sale of land in question was only Rs.95,00,000/- and revenue authorities failed to bring any credible material on record

to prove that the sale consideration was Rs. 2,70,00,000/- and not Rs.95,00,000/-."

15. In view of foregoing discussion, we come to conclude that the lower authorities have made addition only on the basis of extraneous material and that too without providing the assessee an opportunity of cross-examination while ignoring the value declared in the registered-deed by stamps authority. We find that the authorities do not have any clinching evidence against the assessee for making addition. Therefore, the addition made by lower authorities does not have legs to stand. We are therefore inclined to delete the addition.

16. In the result, this appeal of Assessee is allowed.

Order pronounced as per Rule 34 of I.T.A.T. Rules, 1963 on 30/08/2022.

Sd/- Sd/-

(SUCHITRA KAMBLE) (B.M. BIYANI)
JUDICIAL MEMBER ACCOUNTANT MEMBER

Indore
दिनांक /Dated : 30.08.2022
Patel/Sr. PS

Copies to: *(1) The appellant*
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore

1.	Date of taking dictation	
2.	Date of typing & draft order placed before the Dictating Member	
3.	Date on which the approved draft comes to the Sr. P.S./P.S.	
4.	Date on which the fair order is placed before the Dictating Member for pronouncement	
5.	Date on which the file goes to the Bench Clerk	
6.	Date on which the file goes to the Head Clerk	
7.	Date on which the file goes to the Assistant Registrar for signature on the order	
8.	Date of dispatch of the Order	