

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C", MUMBAI

BEFORE SHRI PRASHANT MAHARSHI (ACCOUNTANT MEMBER) &
KAVITHA RAJAGOPAL (JUDICIAL MEMBER)

ITA No. 1318/MUM/2019 (A.Y.2010-11)

Paramjit Singh Seehra C-17/403, Bakul Off, 2 nd Pokhran Road, Vasant Vihar, Thane (West) Maharashtra-400 610 PAN : AADPS4447A	vs	ACIT-10(3)(1), Mumbai Aayakar Bhavan, Mumbai-400 020
APPELLANT		RESPONDENT

Assessee represented by	Shri Bhupendra Jain
Department represented by	Shri Nihar Ranjan Samal, Sr.AR

Date of hearing	22/06/2022
Date of pronouncement	16/09/2022

ORDER

Per Kavitha Rajagopal (JM):

This appeal has been filed by the assessee as against the order of Ld. Commissioner of Income-tax (Appeals)-17, Mumbai dated 28/01/2010 passed under section 250 of the I.T. Act, 1961 pertaining to assessment year 2010-11.

2. The grounds of appeal are as follows:-

"1. In the facts and the circumstances of the case and in law, the learned A.O. erred in reopening of assessment that was completed u/s 143(1) of the Income Tax Act, 1961, merely on the basis of statements recorded U/s. 132(4) by the DDIT(Inv) Unit (4) of Mr. Manish Mehta & Mrs. Meenal Patil of Cosmos group without giving the appellant change of cross examining the above mentioned two person and without considering the submission made by the assessee vide letter dated December 26, 2016.

2. In the facts and the circumstances of the case and in law, the learned A.O. erred in holding that the purchase of residential flat at Phase 2, Block-C, Flat

10, in Cosmos Hawaii Project of Cosmos Group, payment made towards purchase of mentioned flat was Rs.52,76,414/- and merely on the information received from Investigation unit DDIT(Inv) Unit I(4), Mumbai it was derived that appellant has made payment of Rs.70,00,000/- over and above the agreement value as mentioned in Page 2 Para 3 of the assessment order.

a) Merely on the basis of statement recorded by DDIT(Inv) Unit I(4), at the time of search operation at Cosmos group of Mr. Manish Mehta, Director, Mrs. Meenal Patil, accounts department head & other concerned persons addition of Rs.70,00,000/- was made to the appellants assessment year.

b) While recording the statement of appellant u/s 131 of Income tax Act, 1961, he was shown photo copies of the recorded statement of Mr. Manish Mehta & Mrs Meenal Patil, he could not see anywhere his name or his reference in any of the statements. Appellant has denied to have ever heard or met any of the above mentioned person on the basis of whose statement addition of Rs.70,00,000/- is made.

c) Without giving the appellant any opportunity for cross-examination with the persons on the bases of whose statement addition is made.

d) In common law parlance, an admission made by one party is evidence against the maker of the statement but not against any other party implicated by it.

e) Addition made by the Ld.AO is merely a borrowed satisfaction and not his own satisfaction.

f) Without considering the submission made vide letter dated December 26, 2016.

g) Alleging that addition in the total income of the appellant by placing sole reliance merely on basis of the statement recorded by the investigation unit is not acceptable.

3. The Assessing Officer wrongly initiated penalty u/s 271(1)(c) and also wrongly charged interest u/s 234A, B & C.

4. In the facts and the circumstances of the case and in law, the Commissioner of Income Tax [A] erred in dismissing all the grounds of appeal on merits by overlooking the fact that the Address of the Appellant had been shifted from Kolkata to Mumbai."

3. The brief facts of the case are that the assessee is an individual and has filed his return of income for the impugned assessment year on 27/07/2010 declaring total income of Rs.8,79,516/-. The return was processed under section 143(1) of the Act. Subsequent to the information received from the Investigation Wing of the department based on the search and seizure operation conducted in the case of Cosmos group on 24/09/2014, the

assessee's case was reopened under section 147 of the I.T. Act. It is stated that the Cosmos group engaged in the business of building and construction was alleged to have been receiving on-money in cash over and above the registered price for sale of flats, shops or other commercial units on a regular basis. It is alleged that these cash were introduced in the books of Cosmos group as unsecured loan. It was further stated that the promoters of Cosmos group had admitted the modus operandi of receiving on-money in cash by way of statement recorded under section 132(4) of the Act. The same was also said to be admitted by the concerned sales head, head of the account and other chief promoters by way of statements. From the above statements, it is evidenced that the assessee was one of the beneficiary and has paid Rs.70,00,000/- in cash over and above the registered price for a flat acquired at Phase 2, Block-C, Flat No.10 in Cosmos Hawaii Project. In response to notice issued under section 148, the assessee has stated that the original return filed may be treated as return filed in response to notice under section 148 and objected to the reasons for reopening vide letter dated 29/06/2016 and the same was disposed of by the Assessing Officer vide order dated 28/07/2016. It is observed that the assessee has paid Rs.70,00,000/- in cash as on-money on purchase of the said flat. The registered value of which was of Rs.52,76,414/- and the same was added as cash credit under section 68 of the I.T. Act. The assessee preferred appeal against the said order before the Ld.CIT(A). The Ld.CIT(A) confirmed the order of the Assessing Officer. Further aggrieved, the assessee is in appeal before the Tribunal.

4. The Ld.AR for the assessee contended that the reopening of the assessment was merely on the basis of statement recorded under section

132(4) by the DDIT(Inv), Unit-I(4) of Mr. Manish Mehta and Mrs. Meenal Patil of Cosmos group, who, the assessee claims that he is unaware of the specified persons and further to this, the Ld.AR stated that the assessee was not furnished with the copies of the said statement and also that the assessee was not given an opportunity to cross examine the said persons whose statements were relied upon by the department. The Ld.AR further stated that the assessment ought to have completed under section 153C and not under section 147 of the Act. The Ld.AR brought to our attention to the show cause notice dated 21/12/2016 at page 103 of the paper book wherein it is stated that pursuant to the search action conducted on the Cosmos group on 24/09/2014 and the statements recorded under section 132(4) of the I.T., the unaccounted cash of rs.70,00,000/- as total sale consideration was to be added under section 69B of the I.T. Act, 1961 in the hands of the assessee. The Ld.AR submitted that from this, it is evident that the department has completely relied on the statement of the concerned persons of Cosmos group which were not furnished to the assessee nor was the assessee given an opportunity to cross-examine the parties.

5. The Ld.DR, on the other hand, vehemently opposed the claim of the assessee on the ground of reopening and further stated that the statements of the persons recorded are none, but those who are concerned with the business in which the assessee has entered into transaction for purchase of flat. The Ld.DR also stated that the copy of ledger account of the assessee in the books of Cosmos group recovered from the email back-up reveals the description as below:-

“Cosmos 09-10 (Comproj)
B.No.C10 (Ph II) Singh”

This, the Ld.DR states that is a description pertaining to B No.C-10(Ph II), which according to the Ld.DR is identical to the flat booked by the assessee. The Ld.DR further stated that the ledger provided date-wise cash in hand balance in the books of Cosmos group in the name of the assessee. The Ld.DR stated that this piece of evidence corroborates that the statement of the persons linked with the transaction and that the reopening is not based on the borrowed satisfaction as it is evident that the Assessing Officer has given a detailed analysis which was upheld by the Ld.CIT(A). The Ld.DR relied on the orders of the lower authorities.

6. We have heard the rival submissions and perused the materials on record. It is observed that the assessee had filed his return of income and thereafter the assessee's case was reopened on the ground that it was found that the assessee has paid Rs.70,00,000/- as total sale consideration for a flat acquired from the Cosmos Hawaii project of Cosmos group. It is evident that the said information was received pursuant to a search and seizure action conducted in the case of Cosmos group on 24/09/2014 wherein the said amount was paid over and above the agreement value of the flat. The assessee was furnished with the reasons for reopening and thereafter the objections of the assessee were disposed off. It was also observed that statements recorded under section 132(4) of the I.T. Act of Shri Manish Mehta, Director of Cosmos group stating that the details of receiving on-money in the sale consideration of flats / shops / offices and by introducing the same as unaccounted income in its books in the form of bogus unsecured loans were

kept and maintained in gmail and Yahoo mail account of Cosmos group. Further to this, the statement of Ms. Maruna Suresh Khambayat, Sales Head and Smt. Meenal Mahesh Patil, head of account, Shri Suraj Parmar, one of the three chief promoters and Shri Manish Mehta, Director of Cosmos group was recorded under section 132(4) of the I.T. Act wherein it is specified that the said persons have accepted that email data contained the unaccounted income received from sale of flats / shops / offices and that the figures mentioned against the sale of flats represent unaccounted cash in multiples of 100 INR. From these documents, the assessee's name alongwith PAN, assessment year and total amount of Rs.70,00,000/- was specified. The Assessing Officer has corroborated the seized materials alongwith the statements of the director, the sales head, head of accounts and one of the three chief promoters of Cosmos group. The assessee has denied the allegation of the Assessing Officer by stating that the said property was purchased from Cosmos group vide agreement of sale dated 31/08/2012 and that the assessee has paid Rs.11,00,000/- during assessment year 2010-11 through account payee cheque as advance amount for booking of the flat. The Assessing Officer has stated that the advance payment of Rs.11,00,000/- through account payee cheque needs no verification and that the Assessing Officer has reopened the assessee's case only pertaining to information obtained during the search and seizure action carried out at Cosmos group for payment of Rs.70,00,000/- as on-money over and above the consideration of the sale agreement made by the assessee. The assessee's allegation that the reopening of assessment was merely a borrowed satisfaction and not the Assessing Officer's own satisfaction is negated by the Assessing Officer in his detailed order wherein based on the

information received from the Investigation Wing of the department. The Assessing Officer has corroborated the said information with other evidences which includes documentary evidence and the statement recorded under section 132(4) from the concerned persons. It is also pertinent to point out that the statements were not retracted by any of the persons subsequently. From the above observation, we find no error in the action of the Assessing Officer in reopening the assessment of the assessee for the impugned year and the objection of the assessee on this ground, is not sustainable.

7. The assessee in ground 1 has raised the issue that the assessee was not given an opportunity of cross examination of the two persons, viz. Shri Manish Mehta and Mrs. Meenal Patel of Cosmos group, whose statements were recorded under section 132(4) of the I.T. Act. The assessee has further stated that vide letter dated December,16, 2016 where the assessee has requested for an opportunity to cross examine the persons whose statements were relied upon by the department, the assessee was not given an opportunity of cross examination. Though the Ld.DR has contended that the statements of persons relied upon by the department are concerned with the business with whom the assessee has entered into transaction for purchase of the property, we are not convinced with the said explanation. The assessee has relied upon the decision of Andaman Timber Industry vs CCE (2015) 127 DTR 241 (SC) where the Hon'ble Apex Court has held that failure to give the assessee the right to cross examine the witness whose statements were relied upon results in breach of principles of natural justice which results in serious flaw thereby rendering the order a nullity. The present case in hand has identical facts of the above said decision wherein the department has relied upon the

statement of persons, which the department has solely placed reliance on in making the impugned addition. It is also pertinent to point out that the said statements were not retracted and the assessee, as a matter of right, should be given an opportunity to cross examine the said persons. It is observed that the Assessing Officer has failed to provide the opportunity of cross examination despite the assessee's request vide 26/12/2016. Even assuming the fact that the said letter was dated just a few days before passing of the assessment order where the Assessing Officer would not have had the time to give the opportunity to the assessee, we find that the Ld.CIT(A) could have given an opportunity to the assessee to cross examine the parties. The Ld.CIT(A), in his order on page 29 has relied upon the decision of Kusumlata Thakral 327 ITR 424 (P&H) and substantiated that the cross examination given by the Assessing Officer cannot be taken as an undue advantage by the assessee. It is evident from this that the Ld.CIT(A) has also not given opportunity to the assessee to cross examine the parties. It is necessary to specify that the power of CIT(A) is co-terminus with that of the Assessing Officer. No doubt, the Ld.CIT(A), as a principle of natural justice, should have facilitated this opportunity of cross examining the parties by the assessee. We, by respectfully following the decision of the Hon'ble Apex Court in Andaman Timber Industry vs CCE (supra), deem it fit to quash the assessment order on the basis of violation of principles of natural justice.

8. As the assessment order itself is quashed, the other grounds of appeal need no adjudication.

9. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on 16th day of September, 2022.

Sd/-

sd/-

(PRASHANT MAHARSHI)	(KAVITHA RAJAGOPAL)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dated: 16th /09/2022

Pavanan

Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai