

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "A", MUMBAI**

**BEFORE SHRI AMIT SHUKLA, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

ITA NO.1101/MUM/2020 (A.Y: 2010-11)

Shri Arvinderpal Satinderpal Ahuja 21/23A, Sunset Heights Pali Hill, Bandra (W) Mumbai – 400050 PAN: ADDPA9627P	v.	ITO (International Taxation) -1(1)(1) Room No. 114, 1 st Floor Scindia House, Ballard Pier Mumbai - 400038
(Appellant)		(Respondent)

Assessee by	:	Shri Pankaj Toprani & Ms. Krupa Toprani
Department by	:	Shri Manoj Sinha
Date of Hearing	:	28.09.2022
Date of Pronouncement	:	20.12.2022

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of Learned Commissioner of Income Tax (Appeals)-55, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 22.11.2019 for the A.Y. 2010-11.

2. Brief facts of the case are, assessee filed its return of income for the A.Y. 2010-11 on 04.08.2010 declaring total income of ₹. 26,28,482/-.

The return of income was processed u/s. 143(1) of Income-tax Act, 1961 (in short "Act"). The case was selected for scrutiny and notices u/s.143(2) and 142(1) of Income-tax Act, 1961 (in short "Act") were issued and served on the assessee. In response authorised representative of the assessee attended and submitted the information as called for. Subsequently the assessment was completed u/s. 143(3) of the Act on 26.12.2012 determining the total income at ₹.27,78,480/-.

3. Subsequently a search and seizure action was carried in the case of M/s. Sheth Developers P. Ltd., During the course of the search, a statement u/s. 132(4) of the Act recorded from Shri Ashwin Natwarlal Sheth, Director of the company. In his statement on 01.12.2012 Shri Ashwin Natwarlal Sheth had admitted that company had taken on-money on account of sale of flats of its four projects over and above the agreement value. This on-money has not been recorded in the regular Books of Accounts of M/s. Sheth Developers P. Ltd. It was also submitted year wise and flat wise details of on-money received from various customers. On the basis of list obtained from M/s. Sheth Developers P. Ltd., information vide letter dated 10.03.2017 was received by the Assessing Officer that assessee had paid an amount of ₹.22,88,000/- during the Financial Year 2009-10 as on-money in cash for

Flat No. 1605 of the project La-Cittade, Mumbai. Considering the status of the assessee being NRI, the aforesaid information was subsequently forwarded to the Assessing Officer.

4. Considering the above facts the Assessing Officer recorded the reasons for reopening and obtained necessary sanction from the competent authority u/s. 148 of the Act on 30.03.2017 and served the same to the assessee. The relevant reasons recorded were reproduced in Page No. 2 and 3 of the Assessment Order.

5. In response assessee filed original return of income and notice u/s.143(2) and 142(1) were issued and served on the assessee. Since no objections was raised the re-assessment proceedings are completed based on the report from Investigation Wing and statement of Shri Ashwin Natwarlal Sheth and M/s. Sheth Developers P. Ltd., also accepted and paid the tax @8% of on-money received by heavily relying on the facts in the case of M/s. Sheth Developers P. Ltd., the case of the assessee was verified and assessee was asked to furnish complete details along with documentary evidences in respect of the reasons recorded u/s. 148 of the Act. In response vide letter dated 07.09.2017 assessee submitted as under: -

"1. From the reading of the assessment order for A.Y. 2010-11 it can be appreciated that the learned assessing officer has already considered compensation of Rs.17,50,000/- disclosed by the assessee in his return of income and hence there is no question of escape of that income.

2. Sheth Developers Pvt. Ltd. and cash payment of Rs.22,88,000/-

So far as the booking of Flat No.1605 in La-Citadel with Sheth Developers is concerned the assessee had agreed to purchase Flat No. 1605 for the lump sum consideration of Rs 1,49,34,800/- and the Letter of Allotment to that effect was issued by Sheth Developers Pvt. Ltd. (copy attached - annexure 1).

Against this agreed consideration the assessee had paid only Rs.44,00,000/- (Rs. Forty four lakh only) as per the statement of account attached annexure II). As the Sheth Developers failed to complete the project, the hard earned money of NRI assessee was stuck up and hence he filed a case in the Bombay City Civil Court at Bombay. (S.C. Suit No. 328 of 2015) to recover the same.

On 30th March, 2016 & CONSENT TERMS were executed between the parties at the Bombay City Civil Court at Dindoshi (Notice of Motion No. 761 of 2015- Annexure I) and Sheth Developers Pvt. Ltd. had agreed to pay Rs. 1,04,83,542/- plus Rs.5,00,000/- towards the consideration Rs.44,00,000/- received.

A statement made by Shri Ashwin Sheth u/s.132(4) of Income tax Act, 1961 before the tax authorities that the assessee had paid on money Rs.22,88,000/- is factually incorrect also it is made without iota of any evidence and no opportunity was granted to the assessee to cross examine the statement Mr. Sheth.

The Supreme Court has held in the matter of Jain Hawala case that any noting in the diary cannot be considered as correct to hold the named person guilty. The conduct of the Sheth Developers Pvt. Ltd. is very clear that if they were genuine they could have completed the project in time, but the same was not completed in time and hence NRI assessee had very hard time in getting the refund of the down payment Rs.44,00,000/- and ultimately had to approach Court to get the refund this must have annoyed the builder and hence unnecessarily has framed the assessee by alleging that the had paid on money.

It may be appreciated that in the CONSENT TERMS agreed between the parties there is no mention of Rs.22,88,000/- paid on money cash by the assessee as it was never paid and hence he did not put up any claim for the same.

The suo-moto statement by the Sheth Developers Pvt. Ltd. is not tenable in law as it is without any evidence to prove that the assessee had paid on money in cash, especially when the assessee is a Non-Resident Indian and has no ostensible reasons to have so much cash on hand available with him in India and hence the statement of Sheth Developers Pvt. Ltd. needs to be rejected and no punitive action be taken against the innocent NRI assessee, any such action against the NRI assessee would be against the principle of equity and justice.

Any action taken against the assessee on the basis of statement made u/s. 132(4) of Income tax Act, 1961 by the Sheth Developers Pvt. Ltd. would be contrary to the ratio of judgement held in Jain Hawala case by the Hon'ble Supreme Court that any entry in the diary without any evidence is not a sufficient proof to take action against the party named in the diary."

6. After considering the submissions, Assessing Officer rejected the contentions of the assessee by invoking decisions of Hon'ble Supreme Court in the case of Sumati Dayal 214 ITR 801 (SC) and the case of Rohini Ramnath Lele [117 CTR 208 (Mum/TM)] wherein the test of human probabilities and preponderance of probability were applied and prevailing practice of paying on-money were considered. Accordingly, an amount of ₹.22,88,000/ was treated as deemed to be the income of the assessee u/s. 69 of the Act.

7. Aggrieved assessee preferred an appeal before the Ld.CIT(A) and filed detailed submissions along with the various case laws and it was also agitated the issue of reopening of assessment. Ld.CIT(A) after considering the detailed submissions rejected the contentions relating the reopening as well as merit and observed as under: -

"Moreover, the appellant has also raised the issue that the reasons recorded by the Assessing Officer as communicated was after gap of six years for initiating proceedings u/s.147 of the Act. I have gone through the assessment order. From the perusal of the same, it is seen that the notice u/s.148 of the Act was issued by the ITO (IT)-1(1)(1) on 5.5.2017 after recording the reasons for reopening the assessment u/s.147 of the Act. The Assessing Officer further issued notices u/s.143(2) and 143(1) of the Act and also provided the reasons for reopening the case. The appellant did not file any objections against the reassessment proceedings before the Assessing Officer. Now before the appellate proceedings, the appellant is raising the issue of validity of the notice which to my mind is not tenable. All procedures have been followed and the Assessing Officer has reopened the case u/s.148 after duly applying his mind and recording reasons for the same and has also taken necessary approvals from the competent authority. Hence, additional ground of appeal is hereby dismissed.

vii. As far as addition of on money of Rs.22,88,000/- is concerned, I find that the appellant could not give any corroborated evidence to prove that the on money was not given. The Director of the company has accepted that on money was received. The documents seized during the search proceedings have specifically mentioned the name of the appellant and the amount of money received from him. Hence, the Assessing Officer had valid information on the basis of which addition has been made. The appellant has not given any other evidence, the case laws relied are not relevant to appellants facts of the case. Hence, this ground of appeal is hereby dismissed."

8. Aggrieved assessee is in appeal before us raising following grounds in its appeal: -

"1. The Ld. Commissioner of Income Tax (Appeals) 55, Mumbai [hereinafter referred to as "the Ld. CIT (A)"] erred in law and on facts in upholding the assessment of total income of the Appellant at Rs.50,65,480/- made by the Assessing Officer (hereinafter referred to as "the Ld. A.O.") as against Rs. 27,78,480/- as originally assessed vide order dated 26.12.2012 passed under section 143 (3) of the I.T. Act, 1961 by adding Rs. 22,88,000/- as alleged undisclosed income under section 69B of the I.T. Act.

2 The Ld. CIT (A) erred in law and on facts in upholding the action of the Ld. A.O. in re-opening the assessment under section 147 of the I.T. Act based on borrowed satisfaction and without applying his mind and his own reason to believe i.e. based on alleged information received from the DDIT (Inv.) Unit - IX (2), Mumbai on the basis of

which search & seizure action was carried out on 04.10.2012 in case of M/s. Sheth Developers Pvt. Ltd. during which statement was recorded under section 132 (4) of the I.T. Act on 01.12.2012 of Shri. Ashwin Natwarlal Sheth, Director stating that during the relevant assessment year the said company had received 'on-money' of Rs. 22,88,000/- in cash from the Appellant for flat no. 1605 in the building project 'La-citadel' Mumbai.

3. The Ld. CIT (A) erred in law and on facts in not giving to the Appellant an opportunity of cross examination of Shri. Ashwin Natwarlal Sheth, the Director of M/s. Sheth Developers Pvt. Ltd., as a result of which the principles of natural justice have been violated.

4. The Ld. CIT (A) erred in law and on facts in not considering the submissions/ details filed by the Appellant before him to prove that the Appellant had not given any 'on-money' of Rs. 22,88,000/- in cash to M/s. Sheth Developers Pvt. Ltd. and the addition of Rs. 22,88,000/- to the total income of the Appellant is factually incorrect and it is made without iota of any evidence.

5. The Ld. CIT (A) erred in law and on facts in not relying on the ratio of the judgement of the Supreme Court in Jain Hawala case holding that any entry in the diary without any evidence is not a sufficient proof to take action against the party named in the diary. This decision squarely applies to the facts of the present case as the addition is made on the basis of noting in loose papers found during search & seizure action which does not have any authenticity."

9. At the time of hearing, Ld. AR of the assessee submitted that reopening of assessee's case was made beyond four years in this regard he brought to our notice Para No. 3 of the Assessment Order and submitted that 148 notice was issued only on 30.03.2017. Therefore it is clearly beyond four years. Further, he submitted that Assessing Officer has merely relied on the statement of Shri Ashwin Natwarlal Sheth and the Assessing Officer never shared the same with the assessee and there is no evidence brought on record by the Assessing Officer that the

name of the assessee was figuring in the list submitted by M/s. Sheth Developers P. Ltd. Further, he submitted that there is no authorization available on record with regard to reopening of assessment. Further, Ld. AR brought to our notice Page No. 11 of the Paper Book which is the ledger copy of the M/s. Sheth Developers P. Ltd., as per which assessee has paid only through bank and in support of that he has also filed bank statement which is placed on record at Page Nos. 14 to 18 of the Paper Book.

10. Further, he submitted that assessee has booked the Flat No. 1605 in La-Cittade with the M/s. Sheth Developers P. Ltd., and agreed to purchase a flat for the lumpsum consideration of ₹.1,49,34,800/- and received a letter of allotment to that effect. Against the agreed consideration assessee had paid only ₹.44 lakhs as per the statement of accounts attached. As the M/s. Sheth Developers P. Ltd., failed to complete the project and assessee was stuck up, being NRI, he filed a case in the Bombay City Civil court at Bombay (S.C. Suit No. 328 of 2015. On 30.03.2016 a consent terms were executed between the parties at Bombay Civil Court and the M/s. Sheth Developers P. Ltd., agreed to pay ₹.1,04,83,542/- plus ₹.5 lakhs towards the consideration. Ld. AR submitted that the consent terms agreed between the parties,

there is no reference of ₹.22,88,000 paid as on-money, therefore it is never paid and the assessee did not put up any claim in the same. It shows that assessee never paid any on-money to the builder.

11. On the other hand, Ld.DR submitted a Paper Book which contain the various details of assessment made in the case of Shri Ashwin Natwarlal Sheth of M/s. Sheth Developers P. Ltd., and details of statement recorded u/s. 132(4) of the Act which contains various details of receipt of on-money and details of names of customers/owners in various projects handled by them. He brought to our notice specifically Page No. 34 of the Paper Book which contain the details of Flat Number and project name and name of the assessee from whom M/s. Sheth Developers P. Ltd., has received ₹. 22,88,000. With regard to proper approval obtained for reopening of assessment Ld.DR brought to our notice Page No. 11 and 12 of the Paper Book in which Assessing Officer has obtained the approval of the CIT(IT)-1, Mumbai.

12. Further, he brought to our notice Page No. 1 of the Paper Book in which assessee has asked for cross examination of the Shri Ashwin Natwarlal Sheth director of the M/s. Sheth Developers P. Ltd., vide letter dated 21.12.2017. However, the above said letter was submitted by the

assessee only on 26.12.2017 before the Assessing Officer. He submitted that since it is a time baring assessment, assessee has deliberately asked for cross examination at the fag end of the assessment. Therefore he objected to the various submissions made by the assessee.

13. Considered the rival submissions and material placed on record, we observe that the case of the assessee was reopened based on the information and findings in search proceedings in the case of M/s. Sheth Developers P. Ltd. It is brought to our notice that director of the M/s.Sheth Developers P. Ltd., has accepted during the search proceedings that they have received on-money which is not disclosed in their Books of Accounts and gave a total on-money receipts project wise, buyer wise and it is brought to our notice that at Page No. 34 of the Paper Book submitted by the Ld.DR it contain the details of the receipt of on-money from the assessee to the extent of ₹.22,88,000/-. It is also fact on record that the builders have accepted to paid the relevant tax in their assessment. However, assessee made submissions before us that no doubt assessee has booked the flat with the builder and due to several reasons the builder could not complete the project in time. Only on the basis of the consent terms executed between the parties before the Bombay City Civil Court and assessee was awarded an

amount of ₹.1,04,83,542/- from the builder and assessee has claimed only the amount of consideration paid through bank and it never considered any other amount for settlement. After considering the submissions of both the parties we observe that it is fact on record M/s. Sheth Developers P. Ltd., has declared an amount of ₹.22,88,000 as on-money received from the assessee. However, Assessing Officer could not bring any cogent material on record except relying on the statement of director of the M/s. Sheth Developers P. Ltd. It is brought to our notice that the assessee by filing a Civil Suit before Bombay City Civil Court and got a compensation for booking the flat. As per the consent terms a copy of which is submitted before us contained no details of the additional money paid as on-money was referred or discussed. Further, we observe that even Assessing Officer has merely applied the principle of human probability and merely relying on the statement of the builder that assessee has paid on-money and no cross examination was offered to the assessee, even though the assessee has asked for cross examination even though at the fag end of the assessment proceedings. We also observe that even Ld.CIT(A) has not offered for cross examination in the appellate proceedings. Considered the overall facts on record we do not see any direct findings of the revenue authorities

that assessee has actually paid any on-money to the builder except the statement contained receipt of the on-money from the various project mentioning the flat and name of the assessee in the above said statement. Merely because it is stated by the builder and without there being any other cogent material on record the assessee cannot be penalized. Accordingly, the addition made by the Assessing Officer is accordingly deleted.

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

Order pronounced in the open court on 20th December, 2022

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER
Mumbai /Dated 20.12.2022
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

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

BY ORDER

(Asstt. Registrar)
ITAT, Mum