IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'C' BENCH, MUMBAI.

Before Shri B.R. Baskaran (AM) & Shri Pavan Kumar Gadale (JM)

I.T.A. No. 1990/Mum/2022 (A.Y. 2018-19)

Parth Dashrath Gandhi G Wing, Flat No. 79 Gujarati Society Nehru Road, Vile Parle-E Mumbai-400 057. PAN : AABPG0664K	Vs.	Addl./Deputy/Asst. Commissioner of Income Tax NAFC, Delhi
(Appellant)		(Respondent)

Assessee by	Ms. Aarti Visanji
Department by	Shri B. Bagchi
Date of Hearing	30.11.2022
Date of Pronouncement	31.01.2023

O R D E R

Per B.R.Baskaran (AM) :-

The assessee has filed this appeal challenging the order dated 09.06.2022 passed by Ld CIT(A), NFAC, Delhi and it relates to the assessment year 2018-19. The assessee is aggrieved by the decision of Ld CIT(A) in confirming the addition made by the AO u/s 56(2)(x) of the Act.

2. The facts relating to the care are that the AO noticed that the assessee has purchased two properties during the year under consideration, whose stamp duty value was more than the value of consideration shown in the conveyance deed as detailed below:-

Date transaction	Actual transaction amount	Stamp duty value of the property	Differential amount
08.12.2017	2,62,76,122	2,70,93,183	8,17,061
08.12.2017	1,28,48,000	1,46,04,000	17,56,000
Total	3,91,24,122	4,16,97,183	25,73,061

The first property is Flat No.2505 in Tower C of project "Sky City" developed by M/s Incline Realty P Ltd (Oberoi reality). The second property is Flat No.204 in Veronica of Project Oasis developed by M/s Neepa Real Estates P Ltd.

3. (a) In respect of first property, the assessee submitted that he had booked the flat in 2016, vide allotment letter dated 25.01.2016 for a sum of Rs.2,71,42,500/-, which was later reduced to Rs.2,62,76,121/- due to variation in the rate of VAT. The agreement was later executed and registered on 8.12.2017.

(b) In respect of second property, the assessee submitted that he had booked the flat in 2011, vide allotment letter dated 28th December, 2011 for a sum of Rs.1,20,15,000/-. Subsequent to booking of flat, there was a minor increase in the size of the flat and hence the sale consideration was increased to Rs.1,28,48,000/-. The agreement was later executed on 30.11.2017 and registered on 08.12.2017.

4. The assessee submitted that as per the first and second proviso to sec. 56(2)(x) of the Act, the stamp duty value on the date of agreement should be taken for the purpose of sec. 56(2)(x). The provisions of sec. 56(2)(x) are extracted below:-

> **"56.** (1) Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income-tax under the head "Income from other sources", if it is not chargeable to income-tax under any of the heads specified in section 14, items A to E.
>
> (2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head "Income from other sources", namely :—
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> (*i*) dividends
>
> .....
>
> (*x*) where any person receives, in any previous year, from any person or persons on or after the 1st day of April, 2017,—

(*a*) any sum of money, without consideration, the aggregate value of which exceeds fifty thousand rupees, the whole of the aggregate value of such sum;

(*b*) any immovable property,—

(*A*) without consideration, the stamp duty value of which exceeds fifty thousand rupees, the stamp duty value of such property;

[*(B) for a consideration, the stamp duty value of such property as exceeds such consideration, if the amount of such excess is more than the higher of the following amounts, namely:—*

(i) the amount of fifty thousand rupees; and

(ii) the amount equal to five per cent of the consideration.]

Provided that where the date of agreement fixing the amount of consideration for the transfer of immovable property and the date of registration are not the same, the stamp duty value on the date of agreement may be taken for the purposes of this sub-clause :

Provided further that the provisions of the first proviso shall apply only in a case where the amount of consideration referred to therein, or a part thereof, has been paid by way of an account payee cheque or an account payee bank draft or by use of electronic clearing system through a bank account **[***or through such other electronic mode as may be prescribed***]**, on or before the date of agreement for transfer of such immovable property:

Provided also that where the stamp duty value of immovable property is disputed by the assessee on grounds mentioned in sub-section (2) of section 50C, the Assessing Officer may refer the valuation of such property to a Valuation Officer, and the provisions of section 50C and sub-section (15) of section 155 shall, as far as may be, apply in relation to the stamp duty value of such property for the purpose of this sub-clause as they apply for valuation of capital asset under those sections;"

The assessee submitted that the allotment letter should be considered as "date of agreement" referred to in the first and second proviso. He further submitted that the assessee has made part payments in those years. It was submitted that the payment for the first property was made in October and November 2015 to the tune of Rs.56.60 lakhs. The payment of second property was made in November, 2010 itself to the tune of Rs.23.20 lakhs. Accordingly, it was contended that the AO should not consider the stamp duty valuation as on the date of execution of Agreement to sale, for the

purpose of sec.56(2)(x) of the Act and he should have considered the stamp duty valuation as on the date of letter of allotment.

5. The AO did not agree with the submissions of the assessee. By placing reliance on the decision rendered by Mumbai bench of Tribunal in the case of Sujauddian Kasimsab Sayyed vs. ITO (ITA No.5498/Mum/2018 dated 10-06-2019, the AO held that the stamp duty valuation as on the date of execution of agreement to sale should alone be considered for the purposes of sec.56(2)(x) of the Act. Accordingly, the AO added the difference amount of Rs.25,73,061, referred in the table above, to the total income of the assessee. The Ld CIT(A) also confirmed the same.

6. We heard the parties and perused the record. We notice that the AO has considered the stamp duty value as on the date of registration of the agreement to sell for the purpose of determining the applicability of sec.56(2)(x) of the Act. However, the facts that the assessee had been allotted both the properties by way of allotment letters and further, the assessee has also paid instalments as per that letter are not disputed. Hence, the question that arises is whether the allotment letter can be considered as "agreement to sale" within the meaning of the provisos to sec. 56(2)(x) of the Act, which states that the stamp duty valuation as on the sale of sale agreement should be taken into consideration for the purpose of sec.56(2)(x), provided that amount of consideration or part thereof had been paid as per the mod prescribed on or before the date of agreement for transfer of such immovable property.

7. Before us, the Ld A.R placed reliance on the decision rendered by the co-ordinate bench in the case of Mr. Sajjanraj Mehta vs. ITO (ITA No.56/Mum/2021 dated 05-09-2022), wherein it was held that the date of allotment letter can be taken as date of agreement of sale for the purposes of sec.56(2)(x) of the Act. On the contrary, the Ld D.R placed his reliance on the

decision rendered by another co-ordinate bench, which was relied upon by AO & CIT(A), viz., Sujauddian Kasimsab (supra).

8. With regard to the decision rendered in the case of Sujauddian Kasimsab (supra), the Ld A.R submitted that the said decision has been rendered on the basis of facts prevailing in that case. The assessee, in the above said case, had paid Rs.3.00 lakhs before the date of agreement, but the same was described as "earnest money deposit" in the Agreement, meaning thereby, the assessee did not fulfill the condition prescribed in sec.56(2)(x) of the Act. The Ld A.R further submitted that the Tribunal did not consider the effect of second proviso to sec.56(2)(x) of the Act in the above said case. We agree with the submissions of Ld A.R with regard to the distinguishing features pointed out in the decision rendered by the co-ordinate bench in the case of Sujauddian Kasimsab (supra). Hence, we are of the view that the above said decision could not lend support to the case of the revenue.

9. On the contrary, we are of the view that the decision rendered by another co-ordinate bench in the case of Mr Sajjanraj Mehta (supra) is applicable to the facts of the present case. The decision rendered in the case of Mr Sajjanraj Mehta by the co-ordinate bench is extracted below, for the sake of convenience:-

> "10. We have gone through the order of the A.O, Ld. CIT(A) and various submissions of assessee dated 06-10-2021. Vide pg no-23 to 27 of paper-book we have observed the payment made by the assessee to the developer on 17-102011 amounting to Rs 14 lacs vide cheque no 906740, Bank of Maharashtra to enter into an agreement cum acknowledgement of payment made and other terms and conditions about the property. This agreement between assessee and developer clearly confirms the amount of consideration along with other terms and conditions relating to levy of stamp duty, service tax and other charges to be paid by the assessee.
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> 11. The finding of the A.O vide pg no-4, para-2.6 wherein he observed that assessee has deposited Rs 14 lacs with the developer to year mark the said premises for Rs 70 lacs. Even if for the time being it is assumed that this agreement is merely a letter of intent, still amount mentioned in this so called letter of intent can't be changed by either of the party .At the max

the parties involved may opt for exit from the transaction but amount of consideration can't be changed. This transaction of the assessee has to be analysed in commercial parlance, without finalisation of consideration nobody will deposit 20% of the final consideration. The vitality of the agreement further found force from the behaviour of the assessee as confirmed by the A.O also that assessee paid further Rs 34.5 lacs till financial year 2012-13. Assessee also paid Rs 1,00,285/- as VAT, Rs 1,35,187/- as service tax, Rs 5,02,000/- as stamp duty and Rs 30,000/- as registration charges.

12. The chronology of the events confirms that the finding of the A.O treating the agreement of the assessee as letter of intent is not correct. In this matter treating the said agreement as letter of intent shows an over thinking and hyper technical interpretation at the end of the A.O. assessee's case clearly falls in the proviso to Section 56(2)(vii)(b). For sake of clarity we are reproducing herein below the relevant portion of proviso

> "Provided that where the date of the agreement fixing the amount of consideration for the transfer of immovable property and the date of registration are not the same, the stamp duty value on the date of the agreement may be taken for the purposes of this sub-clause:
>
> Provided further that the said proviso shall apply only in a case where the amount of consideration referred to therein, or a part thereof, has been paid by any mode other than cash on or before the date of the agreement for the transfer of such immovable property".

13. We further relied on following judicial pronouncement of coordinated benches of ITAT, Hon'ble High Court and Apex Court as under:

a) "Siraj Ahmed Jamalbhai Bora vs. ITO Ward-1(3)(1)ITA No. 1886/M/ 2019 dtd. 28/10/2020, (Mum.) (Trib.):

Date of registration irrelevant for Sec 56(2)(vii)(b) as substantial obligation discharged on date of agreement.

b) Radha Kishan Kungwani vs. ITO Ward - 1(2) ITA No. 1106/JP/2018 dtd. 19/08/2020, [185 ITD 433 (Jaipur - Trib.)]

Where assessee entered into agreement for purchase of flat and had made certain payment at time of booking of flat, stamp duty valuation or fair market value of immovable property was to be considered as on date of payment made by assessee towards booking of flat

c) Sanjay Dattatraya Dapodikar v/s ITO Ward - 6(2), Pune ITA No. 1747/PN/2018 dtd. 30/04/2019(Pune) (Trib)

Where date of agreement for fixing amount of consideration for purchase of a plot of land and date of registration of sale deed were different but

assessee, prior to date of agreement, had paid a part of consideration by cheque, provisos to section 56(2)(vii)(b) being fulfilled, stamp value as on date of agreement should be applied for purpose of said section

d) Ashutosh Jhavs. ITO Ward-2(5), Ranchi ITA No. 188/Ranchi/2019 dtd. 30/04/2021, [190 ITD 450 (Kolkata - Trib.).]

Where assessee purchased a property and made part payment of sale consideration by cheque on very next day of execution of purchase agreement and registry was done after a year, since such part payment made by cheque on very next day of execution of agreement was towards fulfilment of terms of purchase contract itself and there was no mala fide or false claim on part of assessee, no addition could be made on account of difference between amount of sale consideration for property shown in purchase agreement and stamp duty value of said property on date of registry by invoking section 56(2)(vii)(b)

e) Dy. CIT-5(3)(1) vs. Deepak Shashi Bhusan Roy ITA No. 3204 & 3316/M/2016 dtd. 30/07/2018(Mum.) (Trib.)

In order to determine taxability of capital gain arising from sale of property, it is date of allotment of property which is relevant for purpose of computing holding period and not date of registration of conveyance deed

f) Mohd. Ilyas Ansari v. ITO-23(2)(3),Mumbai [ITA No. 6174/M/2017dtd. 06/11/2020, 186 ITD 407 (Mumbai - Trib.)]

Where Assessing Officer mechanically applied provisions of section 56(2) to difference between stamp duty value and actual sale consideration paid by assessee and made additions, without making any efforts to find out actual cost of property, additions made by Assessing Officer were to be set aside."

14. Similar property in the case of assessee's wife with similar transactions has been accepted by the same A.O without any addition for the same A.Y. Here we would like to rely on the decision of Hon'ble Gauhati HC.

> "Gulabrai Hanumanbox. vs. Commissioner of Wealth-tax [198 ITR 131 (Gauhati) (HC).]
>
> Two different Assessees having similar/identical facts w.r.t valuation of property cannot be assessed with different rates for the same property. Thereby, the order passed by the Assessing officer for co-sharer of property is arbitrary and unjustified in law"

15. Keeping in view the facts of the case, chronology of events and respectfully following the pronouncements of the co-ordinated benches of ITAT, we delete the addition made by A.O and confirms that assessee is entitled to the benefits of proviso to Section 56(2)(vii)(b)."

10. Accordingly, following the above said decision, we hold that the respective allotment letters issued to the assessee should be considered as "Agreement to sell" for the purposes of sec.56(2)(x) of the Act. Since the assessee has paid the parts of consideration as per the terms and conditions of allotment through banking channels prior to the execution of Sale agreement, we are of the view that the provisos to sec.56(2)(x) shall apply to the facts of the present case. Accordingly, the stamp duty valuation as on the date of respective Allotment letters should be considered for the purposes of sec.56(2)(x) of the Act. Hence the AO was not justified in considering the stamp duty valuation as on the date of execution of agreement to sell.

11. On a perusal of record, we notice that the details of stamp duty value as on the date of respective allotment letters was not brought on record. Since we have held that the stamp duty valuation as on the date of respective allotment letters should be considered for the purpose of sec.56(2)(x) of the Act, it is imperative on the part of the assessee to show that the actual consideration was equal or less than the stamp duty valuation as on the date of issue of respective allotment letters. Accordingly, we are restoring this issue to the file of AO for the limited purpose of comparing the actual sale consideration with the stamp duty valuation as on the date of respective allotment letters. In the limited set aside, the AO shall take appropriate decision in accordance with law after affording adequate opportunity of being heard.

12. In the result, the appeal of the assessee is allowed in terms of above.

Pronounced in the open court on 31.1.2023.

Sd/-	Sd/-
(PAVAN KUMAR GADALE)	(B.R. BASAKARAN)
Judicial Member	Accountant Member

Mumbai; Dated : 31/01/2023

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.

BY ORDER,

//True Copy//

(Assistant Registrar)

PS ITAT, Mumbai