

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH “F”, MUMBAI**

**BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.3078/M/2022
Assessment Year: 2011-12**

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| Income Tax Officer, Ward 20(2)(1), Room No.216, 2 nd Floor, Piramal Chambers, Lalbaug, Mumbai - 400020 | Vs. | Shri Jayesh Kewalchand Jain, Flat No.401, Shanti Kunj Co.Op. Sty., Naigaon Cross Rd., Dadar (E), Mumbai – 400 014 PAN: AACPJ4527B |
| (Appellant) | | (Respondent) |

Present for:

Assessee by : Shri Suresh Patni, A.R.
Revenue by : Ms. Vrunda U. Matkari, D.R.

Date of Hearing : 30 . 01 . 2023
Date of Pronouncement : 24 . 02 . 2023

O R D E R

Per : Kuldip Singh, Judicial Member:

The appellant, Income Tax Officer, Ward 20(2)(1), Mumbai (hereinafter referred to as ‘the Revenue’) by filing the present appeal, sought to set aside the impugned order dated 08.10.2022 passed by the National Faceless Appeal Centre(NFAC) [Commissioner of Income Tax (Appeals), Delhi] (hereinafter referred to as CIT(A)) qua the assessment year 2011-12 on the grounds inter-alia that :-

“1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition made on account of cash

payments of Rs.3.50 crores made by the assessee to M/s. Nish Developers Pvt. Ltd. as income u/s 69B being investment made in property for the amount not recorded in books of account.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating the fact that the statement recorded u/s 132(4) of the Income Tax Act, 1961 was based on the evidences recorded and found during the search in the case of M/s. Nish Developers Pvt. Ltd.

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating the fact that the decision of Hon'ble ITAT in assessee's own case for AY 2013-14 was not accepted by the Department on merits, and the Department has not filed appeal before Hon'ble Bombay High Court, only for the reason of tax effect being below monetary limit which is prescribed by the CBDT for filing appeal u/s. 260A of the Act."

2. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : the assessee filed return of income at Rs.13,10,017/- for the year under consideration. The case was reopened on the basis of information received from Director General of Income Tax (DGIT) (Investigation), Mumbai "that the assessee has made huge cash payment of Rs.350,00,000/- to M/s. Nish Developers Pvt. Ltd. against booking of flat at "One Avighna Park" a premium project of the developer at Currey Road". Statement of Mr. Kailash Agarwal, CEO of concern and Mr. Praveen Mishra trusted employees were recorded on oath wherein they have admitted that the cash is received from the assessee. Pen drive and other documents seized from the residence of Mr. Praveen Mishra has the noting that the assessee has made payment and received cash periodically. On the basis of material on record notice under section 148 of the Income Tax Act, 1961 (for short 'the Act') was issued after getting necessary approvals. In response thereto the assessee opted original return filed as reply to the notice under section 148 of the Act. By virtue of the notice

under section 142(1) the assessee was called upon to explain the source of cash given to M/s. Nish Developers Pvt. Ltd. to the tune of Rs.50,00,000/-, Rs.1,65,00,000/-, Rs.50,00,000/-, Rs.50,00,000/- and Rs.50,00,000/- on 16.12.2010, 20.09.2020, 21.09.2010, 12.10.2010 & 29.10.2010 respectively. In response to the notice issued under section 142(1) the assessee stated that he has not made any cash payment to M/s. Nish Developers Pvt. Ltd. against the purchase of flat in question and he has also made a demand for copy of statement of Mr. Praveen Mishra and Mr. Kailash Agarwal. Vide common letter the assessee has also submitted a letter dated 14.12.2016 issued by M/s. Nish Developers Pvt. Ltd. stating therein that they have not received any cash payment amounting to Rs.500 lakhs from the assessee nor they have paid back any cash payment amounting to Rs.70.40 lakhs. They have also confirmed that till date they have received an amount of Rs.1,90,75,002/- being part consideration towards the total cost of flat of Rs.2,75,00,000/- by way of cheque/RTGS from the assessee for purchase of flat No.A/1702 measuring 1350 sq. ft. area vide agreement dated 24.12.2013. They have also given the detail of making payment of Rs.1,90,75,002/- by way of banking channel. The AO declined the submissions/contentions made by the assessee and after relying upon the statement of Mr. Praveen Mishra and Mr. Kailash Agarwal proceeded to treat the cash payment of Rs.350,00,000/- made by the assessee to M/s. Nish Developers Pvt. Ltd. as income under section 69B of the Act being investment made in the property for the amount not recorded in the books of accounts and thereby framed the assessment under section 143(3) read with section 147 of the Act.

3. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has deleted the addition by partly allowing the appeal filed by the assessee. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the Revenue has come up before the Tribunal by way of filing present appeal.

4. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

5. The Ld. D.R. for the Revenue challenging the impugned order passed by the Ld. CIT(A) relied upon the order passed by the AO but failed to controvert the facts brought on record by the assessee that the Ld. CIT(A) has deleted the addition by following the order passed by the Tribunal in case of assessee for A.Y. 2013-14 which is on identical ground.

6. We have perused the order passed by the Ld. CIT(A) who has deleted the addition by relying upon the order passed by the Tribunal in assessee's own case in ITA No.5640/M/2017 A.Y. 2013-14 order dated 31.07.2019 and returned the following findings:

"7.1 I have considered the facts of the case, grounds of appeal and written submissions made on ITBA Portal. In this case addition Rs.3,50,00,000/- was made by the AO on the basis of information received from DGIT (Inv). Mumbai. The information was forwarded by the DGIT (Inv.), Mumbai that in this case appellant was alleged to cash payment of Rs.3,50,00,000/- for purchase of flats at "One Avighna Park". On the basis of statement recorded of Mr. Kailash Agarwal, the CEO of M/s Nish Developers and Mr. Pravin Mishra, a house keeping employee of the builder. The appellant also submitted that on identical

fact the Ld. CIT(A)-32, Mumbai for AY 2013-14 decided the issue in favour of the appellant. It is further submitted that the Hon'ble ITAT, Mumbai has confirmed the order of the CIT(A) for AY 2013-14 and department has not filed any appeal before Hon'ble High Court of Bombay. The copy of the order of the CIT(A) and ITAT is submitted.

7.2 I have carefully perused the appellate order of the CIT(A)-32, Mumbai for AY 2013-14 dated 27.06.2017. The conclusive finding of the CIT(A) is reproduced as under :-

"I have considered the facts of the case, grounds of appeal, oral & written submissions made before me. After a careful consideration of the same as well as the assessment order, I proceed to rule as under.

5.1 In this case addition Rs. 1,00,00,000/- U/S 69A of the IT Act was made by the A.O. on the basis of information received from DDIT (Inv), Mumbai. The information was forwarded by the DDIT (Inv.), Mumbai that in this case appellant was alleged to cash payment of Rs. 1,00,00,000/- for purchase of flats at "One Avighna Park". On the basis of statement recorded of Mr. Kailash Agarwal, the CEO of M/s Nish Developers and Mr. Pravin Mishra, a house keeping employee of the builder.

5.2 The appellant has booked flat in a under construction building in the project name "One Avighna Park" being constructed by M/S Nish Developers Pvt. Ltd. at agreed purchase price of Rs. 2,75,00,000/- at the time of booking. The appellant made payment of Rs. 5,00,000/- being booking amount by cheque no. 438420 dated 31/10/2010 drawn on Dena Bank. The appellant made further payment of Rs. 20,00,000/- by cheque no. 237228 dated 30/12/2011 drawn on Dena Bank and further payment of Rs. 12,50,000/- by cheque no. 242130 dated 25/04/2012 drawn on Dena Bank. In all the appellant had made a total payment of Rs. 37,50,000/- up to 31/03/2013 against the booking and allotment of the said flat. The appellant's wife, who is a joint owner, also contributed the same amount. The agreement for purchase of the said flat was executed on 24/12/2013 and market value of the said flat has been determined by the registrar at Rs. 2,72,20,000/- for the purpose of stamp duty. When the market value of a flat which was agreed to be purchased in 2010 for a purchase price of Rs. 2,75,00,000/- is determined after more than 3 years by the sub-registrar at Rs. 2,72,20,000/-, there is no reason of making any cash payment or on money as alleged by the AO. The appellant also furnished the copy of correspondence letter with builder wherein builder clearly denied receiving any "on money". The market value determined by the Sub-Registrar for stamp-duty purposes is less than the purchase consideration which proves that there is absolutely no scope for on-money in this

transaction of purchase of flat. The A.O. has made addition of Rs. 100 Lakhs without any evidence except the alleged submission of one Mr. Pravin Mishra, which has subsequently been withdrawn by the builder.

5.3 In support of his claim the appellant filed copy of agreement and details of payment made regarding purchase of flat. The agreement for purchase of the flat was executed on 24/12/2013 for a total agreed purchase consideration of Rs. 2,75,00,000/- from the registration receipt dated 26/12/2013 of the said flat I find that the market value determined by the sub-registrar for stamp duty purpose was Rs. 2,72,20,000/- which is less than purchase price and payment was made through banking channel. Therefore, question to pay cash for on money does not arise.

5.4 Mr. Kailash Agarwal, the CEO of M/s Nish Developers has retracted the statements recorded by the search party by filing a sworn "Affidavit" which is kept on record. Mr. Pravin Mishra, the alleged employee has also filed a sworn "Affidavit" to the Dy. CIT, Central Circle 6(3), Mumbai and retracted the statements recorded by the search party.

5.5 I rely on the decision of the Hon'ble Supreme Court in the case of Kishanchand Chellaram V. CIT[1980] 125 ITR 713 (SC). Moreover, the statements so recorded have been retracted by a sworn affidavit and hence the reliance on such statements could not have been made for the purpose of making an addition in the hands of a third party.

5.6 The addition of Rs. 1 Crore was made purely on the basis of suspicion, surmises and conjecture. The addition has been made by the AO without conducting any independent enquiry and solely relying on the information received from DDIT. There is no evidence or material to support the finding of the A.O. that the sum of Rs. 100 Lakhs alleged to have been paid in cash by the appellant. The A.O. relied upon only on the statement of Mr. Pravin Mishra for the purpose of making addition which has also been withdrawn subsequently. Thus there is no evidence for the conclusion that the amount of Rs. 100 Lakhs alleged to have been paid in cash belongs to the appellant. Therefore I has no hesitation to delete the addition of Rs. 1,00 lakhs. Thus, this ground of appeal is allowed.

6. In the result, the appeal is allowed.

7.3 The conclusive finding of the Hon'ble ITAT, Mumbai, ITA No.5640/Mum/2017, AY 2013-14 dated 31.07.2019 in the case of the appellant is reproduced as under :-

"8. We have heard both the parties, perused material available on record and gone through orders of the authorities below. The AO has made additions u/s 69A of the I.T. Act, 1961 towards purported cash payment of Rs. 1 crore to M/s Nish developers P. Ltd. for purchase of flats. The AO has relied upon information received from DDIT (Inv) as per which the CEO and trusted employee of M/s Nish Developers P. Ltd., in the statement recorded during search proceedings have admitted the fact of receiving cash for booking of flats. Except this, the AO has not carried out any independent enquiry to find out the truth in light of statement recorded from CEO of M/s. Nish Developers P. Ltd. towards cash payment made for bookings flats. On the other hand, the assessee has filed an agreement between the parties as per which the agreed price for said flat was at Rs. 2,75,00,000/-. The assessee has also filed copy of purchase deed which was executed on 24/12/2013 and market value of the said flat has been determined by the Registrar at Rs. 2,72,20,000/- for the purpose of stamp duty. When the market value of the flat which was agreed to be purchased in 2010 for a purchase of price Rs. 2,75,00,000/- is determined after more than three years by the Sub Registrar at Rs.

ITA No.5640/Mum/2017 Jayesh Kewalchand Jain 2,72,20,000/-, there is no reason for the AO to make additions towards alleged cash payment only on the basis statement of some persons, more particularly when the persons who gave such statements have been subsequently retracted statement by filing a sworn affidavit. The Ld. CIT(A) after considering relevant facts and also by following the decision of Hon'ble Supreme Court in the case of Shri. Kishanchand Chellaram Vs: CIT (1980) (125 ITR 730) held that the AO has made additions without conducting any independent enquiry and solely on the basis of information received from DDIT (Inv.) without there being any further evidences to support his findings that a sum of Rs. 100 Lacs alleged to have been paid in cash by the assessee. We do not find any error in the findings of CIT(A). Hence, we are inclined to uphold findings of the CIT(A) and dismissed the appeal filed by the revenue.

9. In the result, appeal filed by the revenue is dismissed."

7.4 After careful consideration of the facts of the case in the assessment order, submission of the appellant, finding of the CIT(A) for AY 2013-14 and order of the Hon'ble ITAT in the case of appellant, I find the facts of the case under consideration is identical to the facts of the case decided by Ld. CIT(A) and Hon'ble ITAT for AY 2013-14 in the case of appellant. Respectfully following the decision of the Hon'ble ITAT, the addition made by the AO is deleted. Therefore, the grounds of appeal are allowed."

7. Bare perusal of the order passed by the Ld. CIT(A) goes to prove that when the assessee has come up with complete details as to purchasing a flat No.A/1702 measuring 1350 sq. ft. by virtue of the agreement dated 24.12.2013 by making payment of Rs.1,90,75,002/- through banking channel, there is no question of making payment in cash. Since beginning it was categoric case of the assessee pleaded before the AO vide letter dated 12.12.2016 and 19.12.2016 that he has never made any cash payment to M/s. Nish Developers Pvt. Ltd. The assessee has also brought on record the confirmation made by M/s. Nish Developers Pvt. Ltd. that they have not received any cash payment amounting to Rs.3,50,00,000/- in cash during A.Y. 2011-12 the year under consideration as alleged rather they had received the amount of Rs.1,90,75,002/- through banking channel for purchase of flat No.A/1702 measuring 1350 sq. ft. by virtue of the agreement dated 24.12.2013.

8. The assessee has also made a specific request to supply him the statement of Mr. Praveen Mishra and Mr. Kailash Agarwal and has also sought the opportunity to cross examine them which have not been provided to them. It is proved on record that the entire case has been based by the AO on the alleged statement of Mr. Praveen Mishra and Mr. Kailash Agarwal part of whose statement has been extracted in para 3.5 and 3.6 of the assessment order which have otherwsie not seen the light of the day. Even the Ld. D.R. for the Revenue has not preferred to bring on record any such statements during the course of arguments. The AO has made addition in this case without carrying out any independent inquiry rather blindly relied upon the information supplied by DGIT(Inv.).

8. In view of what has been discussed above, the Ld. CIT(A) has deleted the addition in question by relying upon the findings returned by the Tribunal in case of assessee in A.Y. 2013-14, we find no illegality or perversity in the findings. Hence, appeal filed by the Revenue is hereby dismissed.

Order pronounced in the open court on 24.02.2023.

**Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Mumbai, Dated: 24.02.2023.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.