

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'SMC' BENCH
MUMBAI**

**BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER
&
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER**

**ITA No.2178/Mum/2022
(Assessment Year :2014-15)**

Smt. Rama Run Changoiwala C/o. Bombay Petroleum Kohinoor Mills No.3 Shivaji Park Dadar (W), Mumbai-400028	Vs.	ITO-WARD 22(3)(2) Mumbai
PAN/GIR No.ACJPC9221C		
(Appellant)	..	(Respondent)

Assessee by	Shri Bhupendra Shah
Revenue by	Ms. Indira Adakil
Date of Hearing	16/02/2023
Date of Pronouncement	27/02/2023

आदेश / ORDER

PER M. BALAGANESH (A.M):

This appeal in ITA No. 2178/Mum/2022 for A.Y.2014-15 arises out of the order by the Id. Commissioner of Income Tax (Appeals)-National Faceless Appeal Centre (NFAC) in appeal No.05/07/2022 dated 05/07/2022 (Id. CIT(A) in short) against the order of assessment passed u/s.CIT(A)-34, Mumbai/10792/2019-20 of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 28/12/2019 by the Id. Income Tax Officer – 22(3)(2), Mumbai (hereinafter referred to as Id. AO).

2. The only issue to be decided in this appeal is as to whether the Id. CIT(A) was justified in upholding the addition made in the sum of Rs.20,46,000/- u/s.56(2)(vii)(b) of the Act in the facts and circumstances of the instant case.

3. We have heard rival submissions and perused the materials available on record. We find that the following facts are undisputed and indisputable.

(a) The Return of Income was e-filed on 28.08.2015 declaring total income at Rs. 1,43,070. This Return was selected for scrutiny assessment and accordingly order u/s 143(3) of the Act dated 27.02.2014 was passed without making any addition and assessing income at Rs. 1,43,070/-. Thereafter, the case was reviewed u/s 263 of the Act by the Id. PCIT vide order bearing No. Pr. CIT-21/263/2018-19 dated 29.03.2019 wherein the assessment completed by the then Id. A.O. was considered as erroneous and prejudicial to the interest of the Revenue with regard to the issue u/s 56(2)(vii)(b) of the Act.

(b) Against the order passed u/s 263 of the Act by the PCIT, the assessee did not prefer any appeal before this tribunal.

(c) Assessee's husband Shri. Arunkumar Omprakash Changoiwala had booked 3 small residential flats of 306 square feet carpet area each (367 square feet built-up area) in FY 2013-2014, Le. Flat No. 703, 704 and 803 for Rs.70,00,000/- each in "Westeria, Guru Nanak Co-operative Housing Society Limited, Ram Maruti Road, Dadar (West). Mumbai-400028 in which assessee became the co-owner just for the sake of convenience and that all the purchase amounts were made by

assessee's husband only. All these flats were in the same building that were redeveloped in which the original inhabitants of the old tenements were allotted new flats in the newly constructed building in lieu of the old tenements.

(d) The building was under the provisions of the MHADA Act as is evident from the Agreement of Sale for Flat No. 803 placed on record. It is provided in para no. (t) of the said agreement that by virtue of the Agreement for Development dated 28/12/2007, M/s. Buildarch Land Developers Pvt. Ltd. were entitled to redevelop the property in which the flats under consideration are situated. M/s. Buildarch Land Developers Pvt. Ltd. were required to allot Permanent Alternative Accommodation in the redeveloped property to the existing tenants/occupants and thereafter utilize the available FSI to sell flats and receive the price/consideration thereof in their own name. Thereafter, as per the plans sanctioned by the MCGM, the redeveloped property was to be named as "Buildarch Wisteria" and the flats to be allotted to the existing tenants/occupants were identified. However, some of the occupants who were entitled to Permanent Alternative Accommodation in the redeveloped property surrendered their right in favour of the Promoter by executing "Deed of Surrender dated 09.06.2011 as exhibited in para no (nn) of the said agreement. Thus, the flats that could be purchased by assessee's husband could be identified and decided upon only after the flats to be allotted to the existing tenants/occupants who did not wish to surrender their rights in the redeveloped property was finalized.

3.1. Thereafter the assessee's husband after the detailed discussions with the builder in April/May, 2012 purchased 3 1RK flats for Rs.70,00,000/- each on 21/05/2012 and paid the advance/token money

of Rs.5,00,000/-. He had purchased these 3 small 1RK flats in the building being constructed for the old tenants in which the price was comparatively much lesser than that of buildings in the surrounding area. The total payment of Rs.2,07,00,000/- were made to the promoter from 21/05/2012 till 18/11/2013 and that the final amount of Rs.3,00,000/- was made on 09/04/2014 which shows that almost entire money was paid to promoter before the dates of agreements. The details are given as under-

Sr. No.	Flat No.	Sale Agreements Registration Date	Agreement Value	Stamp Duty Value	Diff. in Value (Sec.56)
1	704	11.12.2013	70,00,000/-	69,73,500/-	Nil
2	803	03.03.2014	70,00,000/-	80,23,000/-	10,23,000/-
3	703	26.03.2014	70,00,000/-	80,23,000/-	10,23,000/-

Flat No.	Date of Payment	Amount Paid	Sale Agreements Registration Date
704	28.09.2012	32,00,000/-	11.12.2013 (<i>Full payment done before registration</i>)
	23.01.2013	36,00,000/-	
	01.10.2013	2,00,000/-	
	Total	70,00,000/-	
803	01.10.2013	27,00,000/-	03.03.2014 (<i>So, 3,00,000/= paid on 7.4.14 is the only payment made after date of registration, except all amounts paid much before</i>)
	01.10.2013	10,00,000/-	
	10.10.2013	10,00,000/-	
	30.10.2013	10,00,000/-	
	29.11.2013	10,00,000/-	
	07.04.2014	3,00,000/-	

	Total	70,00,000/-	
703	21.05.2012	5,00,000/-	26.03.2014 (Full payment done before registration)
	28.09.2013	63,00,000/-	
	01.10.2013	2,00,000/-	
	Total	70,00,000/-	

3.2. From the above statement, it can be seen that the entire payments except the sum of Rs.3,00,000/- for all 3 flats have been made before the date of registration. This had occurred mainly because the flats to be allotted to the existing tenants/occupants was to be identified first and only thereafter the flats to be allotted to assessee's husband could be decided upon. As a result, assessee's husband held discussions with M/s. Buildarch Land Developers Pvt. Ltd. and finalized the price at which the flats were to be purchased as well as made a majority of the payments as well but the agreement was not made and the flats were not registered since the floor and the flat numbers could not be finalized until the flats to be allotted to the existing tenants/occupants were decided upon and thus the dates for fixing the price of the flat and the date of its registrations are different.

3.3. Since the entire consideration except Rs 3,00,000/- was paid to the promoter much before the date of registration of the 3 flats, these payments could obviously be made pursuant to oral understanding and agreement between the assessee/assessee's husband and the promoter.

3.4. Since the building was a redevelopment project wherein the flats were to be allotted to the old tenants in lieu of their tenement holding there were no system of "Agreement of Sale" or "Memorandum of

Understanding" or any "Letter of Allotment" because they were allotted flats "lot wise" as decided in their AGM/SGM meeting.

3.5. It is not in dispute that the assessee furnished the 3 purchase agreements before the Id. AO during the course of assessment proceedings. The Id. AO disbelieved the existence of an oral agreement between the assessee/assessee's husband and the promoter, ignoring the fact that pursuant to the said agreement, the assessee had paid Rs 2,07,00,000/- for 3 flats much prior to the date of registration of 3 flats. Since there has been no such agreements or letter of allotments before the date of final registration as explained above, assessee requested the Promoter M/s. Buildarch Land Developers Private Limited to issue a confirmation letter stating the facts of the above flat purchases so that the same can be submitted before Ld. A.O and accordingly the promoter was kind enough to issue the confirmation letter dated 20.08.2019 which clearly states that these Flat No.703, 704 & 803 were agreed to purchase in April/May, 2012 for the agreed price of Rs. 70,00,000/- each and that the same were registered on 04.12.2013, 19.10.2013 and 28.11.2013. The said confirmation letter also state that the difference in market has arisen due to change in ready reckoner rate in the intervening period from May 2012 and March 2014. All these factors clearly state the very fact that the date for fixing the price is much before to its registration date.

3.6. The Id. AO however did not take the said confirmation issued by the promoter into cognizance on the ground that the said confirmation was signed by the promoter on the date which was much after the dates of registration of the 3 flats. Accordingly, the Id. AO concluded that there was no agreement entered into with the promoter by the assessee/ assessee's husband.

3.7. From the 3 purchase agreements submitted by the assessee, the Id. AO observed that the stamp duty value for Flat Nos. 803 and 703 were higher than the consideration paid by the assessee by Rs 10,23,000/- each totaling to Rs 20,46,000/-. Accordingly, he made an addition of Rs 20,46,000/- by applying the provisions of section 56(2)(vii)(b) of the Act.

3.8. We find that the Id. CIT(A) had merely dismissed the appeal of the assessee on the ground that since no appeal was preferred by the assessee against the revision order passed u/s 263 of the Act before this tribunal, the Id. AO would be bound to follow the directions of the Id. PCIT in making an addition u/s 56(2)(vii)(b) of the Act, which was correctly done by the Id. AO. Accordingly, the Id. CIT(A) held that the order of the Id. AO does not warrant any interference.

3.9. We are unable to persuade ourselves to accept to the aforesaid findings of the Id. CIT(A), in as much as the Id. PCIT in section 263 order had merely directed the Id. AO to examine the applicability of provisions of section 56(2)(vii)(b) of the Act for the difference in consideration amount in the light of his directions and reframe the assessment in accordance with law, after giving an opportunity of being heard. This fact is also reproduced in page 2 para 4 of the assessment order. If the version of the Id. CIT(A) is to be accepted, then there is no need for the Id. AO to even afford an opportunity to the assessee in the giving effect proceedings to section 263 of the Act. In that scenario, the Id. AO could directly proceed to make an addition u/s 56(2)(vii)(b) of the Act without even calling the assessee. Hence the manner in which the appeal has been dismissed by the Id. CIT(A) is illegal and unwarranted.

3.10. Since the entire facts and materials are already on record before the lower authorities, we proceed to examine the same and address the issue in dispute before us. The Id. AR before us pleaded that assessee has only joined the property as a co-owner with assessee's husband only for sentimental reasons and administrative convenience and that the entire payments for purchase of properties were made only by the assessee's husband including the stamp duty and registration charges as is evident from the receipts issued by the Sub-Registrar, forming part of the sale deed. This fact was categorically denied by the Id. DR before us, as the assessee before the Id. AO had stated that the payments were made by her and had even submitted the details of payments made thereon. The Id. DR pleaded that there was no denial by the assessee that she was the owner of the 3 flats. We find from the perusal of the registered sale deeds, the assessee's name is included only as a co-owner as the properties were purchased in the joint name of assessee's husband and assessee. In any case, we hold that there is no need to address this dispute as it would be academic in nature, in view of the foregoing discussions.

3.11. As stated earlier, the payments for the purchase of 3 flats had been made by the assessee's family commencing from 21.05.2012 onwards. Total payments made upto 31.03.2014 was Rs 2,07,00,000/-. The remaining consideration of Rs 3,00,000/- was paid on 09/04/2014. Obviously there should be an oral understanding/agreement between the assessee/assessee's husband and the promoter, wherein the entire consideration of 3 flats were fixed, pursuant to which the payments were made to the promoter. No person would come forward to make substantial payments (almost 98.57%) of the agreed consideration without any agreement or understanding. Hence the existence of oral understanding / agreement in the instant case could be reasonably

inferred. This fact is also further fortified by the third party confirmation i.e from the promoter M/s Buildarch Land Developers Private Limited dated 20.08.2019 , which is already on record before the Id. AO, which has been ignored by the Id. AO for an immaterial reason. Obviously the promoter could have dated the confirmation only on the date on which it was sought by the assessee / assessee's husband. Moreover, the assessee wanted to prove the fact of existence of an oral understanding / agreement with the promoter before the Id. AO and hence during the course of assessment proceedings, this confirmation was sought from the promoter. Hence obviously the promoter would date the confirmation on the date on which it was sought by the assessee. In the said confirmation, the promoter had categorically stated that the consideration of Rs 70,00,000/- each for 3 flats had been agreed way back in 2012 and the payments were accepted by it from the assessee/assessee's husband. The said confirmation also stated that the ready reckoner rates had increased drastically between the date of agreement in 2012 and date of registration of flats in 2014. Nothing prevented the Id. AO to make cross verification from the said promoter as to the existence of any oral understanding / agreement entered into by the assessee / assessee's husband, by duly appreciating the fact that payment of 98.57% of agreed consideration was paid to the promoter before the date of registration of 3 flats. It is not in dispute that the payment of Rs 2,07,00,000/- has been made to the promoter by account payee cheques. The assessee had also furnished the bank statements evidencing the aforesaid payments to the promoter before the Id. AO. We find that the confirmation given by the promoter clearly specifies that the 3 flats were agreed to be purchased in April / May 2012 for the agreed price of Rs 70,00,000/- each despite the increase in ready reckoner rates from 2012 to 2014. Hence the fact of oral agreement between the assessee/assessee's husband and the promoter is proved. Oral agreement is also a valid agreement in the eyes

of law. There is no requirement of having only a written agreement in section 56(2)(vii)(b) of the Act. As stated earlier, pursuant to the oral agreement, the assessee/assessee's husband had made payments to the promoter only by account payee cheques to the extent of 98.57% of agreed consideration ($20700000/21000000*100= 98.57\%$).

3.12 Hence the submissions of the Id. AR that the existence of an oral understanding / agreement with the builder needs to be believed in the facts and circumstances of the instant case. Then what remains is the applicability of the provisions of section 56(2)(vii)(b) of the Act. The proviso to section 56(2)(vii)(b) of the Act clearly provides that if the date of agreement and date of registration are not the same, then the stamp duty value prevailing on the date of agreement should be considered. This proviso is squarely applicable to the facts of the instant case. We find that the assessee had even submitted the stamp duty value prevailing on the date of agreement in 2012 before the Id. AO at Rs 66,50,490/-. When this stamp duty value is compared with the consideration paid by the assessee at Rs 70,00,000/-, then no addition would be warranted u/s 56(2)(vii)(b) of the Act. However, the stamp duty valuation workings given in page 18 of the paper book requires to be cross verified with the Sub-Registrar by the Id. AO. Hence in the interest of justice and fair play, we deem it fit and appropriate, to restore this issue to the file of Id. AO for the limited purpose of making verification from the office of the Sub-Registrar regarding the ready reckoner rates prevailing in the year 2012 and 2013 for the subject mentioned flats and compare the same with the consideration paid by the assessee/assessee's husband at Rs 70,00,000/-. The Id. AO is also directed to apply the provisions of section 50C of the Act in total, which are pari materia with section 56(2)(vii)(b) of the Act. The assessee is also at liberty to furnish further evidences, if any, in support of her contentions.

Accordingly, the ground raised by the assessee is allowed for statistical purposes.

4. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced on 27/02/2023 by way of proper mentioning in the notice board.

Sd/-
(SANDEEP SINGH KARHAIL)
JUDICIAL MEMBER

Mumbai; Dated 27/02/2023
KARUNA, *sr.ps*

Sd/-
(M.BALAGANESH)
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, Mumbai