

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT

BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND

DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER

ITA No. 222/SRT/2022 (AY: 2018-19)

(Virtual Hearing)

A.C.I.T., Central Circle-4, Surat.	Vs.	M/s Dianco, C-210, Prasad Chambers, Opera House, Mumbai. PAN No. AAAFD 2501 R
Appellant/ assessee		Respondent/ revenue

Assessee represented by	Shri Vartik Choksi, A.R.
Department represented by	Shri Ashok B. Koli, CIT-DR
Date of hearing	31/07/2023
Date of pronouncement	03/08/2023

Order under Section 254(1) of Income Tax Act

PER: PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by the Revenue is directed against the order of learned Commissioner of Income Tax (Appeals)-4, Surat (in short, the Id. CIT(A)) dated 20/05/2022 for the Assessment Year (AY) 2018-19. The Revenue has raised following grounds of appeal:

“(i) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.85,72,204/- made by the Assessing Officer on account of inflated cost of properties purchased by observing that the addition was made totally on wrong footing and the same was not warranted by adopting the basic price and without considering the extra amounts for water connection, electricity connection, society charges, etc., ignoring the fact that the value of property was fixed as per the allotment and the assessee has not furnished any details or evidences to substantiate the extra charges incurred/inflated cost.

(ii) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.2,61,47,515/- made by the Assessing Officer under Sec.56(2)(x) of the Act without appreciating the fact that the

agreement for sale was entered only on 31st March 2017 for both the properties and hence the valuation as on the said date is applicable.

(iii) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.2,61,47,515/- made by the Assessing Officer under Sec.56(2)(x) of the Act without appreciating the fact that mere an application for booking dated 23rd May, 2011 cannot be treated as "agreement fixing the amount of consideration for the transfer of immovable property." which has no legal sanctity or cannot be enforced by law.

(iv) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in taking contradictory views while deleting the addition made by the Assessing Officer of Rs.85,72,204/- on account of inflated cost of properties and also addition of Rs.2,61,45,515/- under Sec.56(2)(x) of the Act in respect of the same properties, without appreciating the overall facts of the case, and on one hand by considering the value @ Rs.11,000/- per Sq. Ft. adopted by the AO for making the addition of Rs.85,72,204/- as inappropriate and on the other hand, taking the jantri value of Rs. 11,036/- per Sq. Ft. for giving relief for addition made of Rs.2,61,45,515/-.

(v) It is, therefore, prayed that the order the Ld. CIT(A)-4, Surat may be set aside and that of the AO may be restored to the above extent.

(vi) The appellant craves leave to add, alter, amend and/or withdraw any ground(s) of appeal either before or during the course of hearing of the appeal."

2. Brief facts of the case are that the assessee is a firm, engaged in the business of buying and selling of real estate properties. The assessee filed its return of income for A.Y. 2018-19 on 24/09/2018 declaring NIL income. The case was selected for scrutiny. During the assessment, the Assessing Officer noted that the assessee has purchased two flats i.e. flat No. 103 and 307 in Sunstone Project at Shastri Nagar, Bandra (E), Mumbai. The Assessing Officer asked certain details about such flats i.e. area, date of purchase, rate of purchase and other details. The assessee filed its reply dated 22/03/2021 and submitted that they have made booking @ Rs. 11,000/- per square feet in May 2011. The Assessing

Officer on the basis of area of flats worked out the cost and was of the view that the assessee has made excess payment against both the flats in the following manner:

Sr. No.	Flat No.	Actual payment made (Rs)	Amount @ rate of 11000/- per square feet	Excess payment made (Rs.)
1.	103	2,46,40,000	1,96,02,966	50,37,034
2.	307	1,76,88,000	1,41,52,830	35,35,170
Total		4,23,28,000	3,37,55,796	85,72,204

The Assessing Officer worked out the difference of alleged excess payment of Rs. 85,72,204/-.

3. The Assessing Officer further noted that at the time of execution of transfer deed, there was a difference in the value adopted by Stamp Valuation Officer and the value declared by the assessee with regard to both the flats in the following manner:

Sr. No.	Flat No.	Stamp Value/Market Value (Rs.)	Purchased value Rs.	Difference Rs.
1.	103	4,18,82,500	2,66,37,226	1,52,45,274
2.	307	3,05,87,000	1,96,84,759	1,09,02,241
Total		7,24,69,500	4,63,21,985	2,61,47,515

4. On the basis of aforesaid observation, the Assessing Officer issued detailed show cause notice as to why additions of Rs. 85,72,204/- and of Rs. 2,61,47,515/- be not made in the income of assessee. In response to show cause notice, the assessee filed its detailed reply dated 16/04/2021. Some of the contents of reply of assessee is recorded in para 3.4 of assessment order. The assessee in its reply, submitted that they have paid purchased consideration after discussing floor plan,

construction period and other facilities and agreed to pay Rs. 11,000/- per square feet based on super built up area. Such terms and conditions were finalized in May, 2011, in the allotment letter and total sale consideration of Rs. 1,96,84,754/- was paid for flat No. 307 and Rs. 2,66,37,266/- for flat No. 107. Final agreement was entered after passing of substantial period of time. The assessee submitted that the Assessing Officer has applied flat rate of Rs. 11,000/- per square feet on built up area and as a result thereof, a difference of Rs. 35,35,170/- and Rs. 50,37,034/- was calculated. Final consideration is based on super built up area. The assessee has paid consideration as per super built up area. Consideration paid by assessee is also corroborative with the stamp duty valuation which is on higher side.

5. The reply of assessee was not accepted by Assessing Officer by taking a view that the assessee has contended that the payment was made for super built up area whereas the difference was worked out on built up area as mentioned in the purchase deed. Such fact is not true as built up area is taken into consideration at the time of registration of document with Sub-Registrar and that the assessee has made extra payments of Rs. 85,72,204/-. On the other proposed addition under Section 56(2)(x) of the Income Tax Act, 1961 (in short, the Act), the assessee submitted that they have made booking prior to insertion of clause (x) in Section 56(2) and the First Proviso thereto states that the

date of original agreement fixing the date of consideration and the date of registration are not same, the stamp valuation as on the date of agreement shall be considered. The assessee had agreed to purchase the flat No. 103 and 307 vide allotment letter dated May, 2011 and based on mutual understanding, the payment of consideration was made in accordance with mode prescribed in allotment letter. Thus, the date of allotment letter shall be considered for the purpose of this Section and not otherwise. The reply of assessee was not accepted by the Assessing Officer by taking a view that in the month of May, land was in the possession of Akruti Niranman Ltd. who entered into joint venture with Sunstone Developers in December, 2011 as reflected in the sale deed dated 21/04/2017 (sale deed executed in favour of assessee about such flats). The project was started on 11/07/2011 and on that date Sunstone Developers was not in picture. The assessee has produced allotment letter but no proof of payment was furnished. Thus, the plea of assessee was not accepted and the Assessing Officer brought the difference of Rs. 2.61 crore *vis a vis* the value determined by Stamp Valuation Officer with regard to both the flats.

6. Aggrieved by the additions in the assessment order, the assessee filed appeal before the Id. CIT(A). Before the Id. CIT(A), the assessee filed detailed written submission. Submission of assessee with regard to addition of Rs. 85,72,204/- is recoded in para 6.1 of order of Id. CIT(A)

and on the addition under Section 56(2)(x) of the Act of Rs. 2.61 crores, the submission of assessee is recorded in para 7.1 of order of Id. CIT(A). The assessee against addition of Rs. 85,72,204/- submitted that the assessee firm is engaged in the business of buying and selling of real estate properties. In the F.Y. 2011-12, the assessee agreed to purchase 17 flats at Shastri Nagar, Bandra East, Mumbai in one of the project developed by Sunstone Developers as the project was at the initial construction stage, the assessee was required to make the payment in a phase manner based on stages of work completion as per allotment/other letter. As per mutual understanding, the assessee made booking of 17 flats and made payment of all 17 flats was made in a phase manner. When, the project was still under construction, the assessee sold rights in 8 flats by way of tripartite agreement and offered the gained income on such transaction as business income in different assessment years. Two flats i.e. flat No. 103 and 307 were registered in F.Y. 2017-18 i.e. A.Y. 2018-19. The assessee agreed to purchase the flats @ Rs. 11,000/- per square feet and the payments were made in F.Y. 2011-12 and 2012-13 respectively. The assessee also furnished complete details of all 17 flats including of their area. The assessee explained that flat No. 103 was purchased for Rs. 2.66 crore and flat No. 307 at Rs. 1.96 crore, such fact can be verified from the allotment letters. Details of such consideration was exclusive of other charges as

mentioned in the allotment letter. The Assessing Officer without giving regard to the real estate norms and regulations, applied the rate of Rs. 11,000/- per square feet to built up area and determined cost of both the flats at Rs. 3.37 crores. The assessee explained that there are three types of area in case of real estate property namely; carpet area, built up area and super built up area. Carpet area is the wall to wall distance which is usually floor area of the house, built up area is carpet area and the area covered by thickness of walls of housing unit, balcony and terrace etc. Further in the housing project, various amenities like, gym, garden, club house, elevator, lobby, open space are provided. Such amenities assessment order developed by developer for using of flat owners. The area occupied by these amenities assessment order aggregated and allotted to each flat which is considered as super built up area. Based on aforesaid factors, super built up area is calculated by multiplying built up area with a loading factor.

7. The Id. CIT(A) after considering the assessment order, submission of assessee held that the assessee purchased 17 flats from builder, out of 17, 8 flats were sold by way of tripartite agreement in earlier years. Out of remaining nine flats, 7 flats were sold in A.Y. 2017-18 and 2 flats bearing No. 103 and 307 were sold during the year under consideration. The assessee has paid total cost of these two flats to builder aggregating of Rs. 4.23 crores. The payment was made as per allotment

letter and other charges charged by builder and the stamp duty paid. The addition made by Assessing Officer is totally on wrong footing and was not warranted. The Assessing Officer applied Rs. 11,000/- per square feet as a sacrosanct cost and treated the amount paid in addition to Rs. 11,000/- per square feet as excess amount and made addition. During the assessment, the assessee explained basic cost of flat and the other many extra amount for water connection, electricity connection, society charges, club house charges which are in addition to basic cost. The Assessing Officer has not gone into such basic details and made addition in a casual manner without understanding the nature whether such addition could really be made and deleted the addition.

8. On the addition under Section 56(2)(x) of the Act, the assessee submitted that they made booking of flats in F.Y. 2011-12 and made payment through cheques. The provisions of Section 56(2)(x) were inserted w.e.f. 01/04/2017 and have prospective effect. Further as per first Proviso to such Section, make it clear that where the date of agreement fixing the amount of consideration for the transfer of immovable property and date of registration are not same, the value on date of agreement may be taken for the purpose of this sub-clause. Further as per second proviso, it is made clear that first proviso shall apply only in case where the amount of consideration referred therein or part thereof has been paid by way of account payee cheque or

account payee cheque/draft or electronic mode on or before the date of agreement for transfer of such immovable property. The assessee agreed to purchase the flats by way of allotment letter dated may, 2011 and made payment by way of banking channel, thus the condition laid down in Section 56(2)(x) of the Act and the proviso attached thereto, no addition is to be made.

9. The Id. CIT(A) after considering the contents of assessment order and the submission of assessee held that the assessee entered into agreement for purchase of these two flats in May, 2011 which is evident from the allotment letter issued by the builder and the payment made by assessee was through banking channel. Thus, the assessee entered into agreement fixing the amount of consideration for transfer of immovable property. In the present case, the first proviso to Section 56(2)(x) would apply. As per the said proviso, where the date of agreement fixing the amount of consideration for transfer of immovable property and the date of registration are not same, the stamp duty value on the date of agreement may be taken for the purpose of said sub-clause. The Id. CIT(A) examined the ready reckoner rate applicable for the CTS where the property situated were examined. As per such rates, the value of property in question comes to Rs. 2,82,19,052/- against which the assessee has made payment of Rs. 4,63,21,985/- which is more than the ready reckoner rates. Thus, the addition under Section

56(2)(x) of the Act is not warranted. Aggrieved by the order of Id. CIT(A), the revenue has filed present appeal before the Tribunal.

10. We have heard the rival contentions of the learned Commissioner of Income Tax-Departmental Representative (Id. CIT-DR) for the revenue and the learned Authorised Representative (Id. AR) of the assessee and the and have perused the orders of the lower authorities carefully. Ground No. 1 of the appeal relates to deleting the addition of Rs. 85,72,204/-. The Id. CIT-DR for the revenue submits that the assessee simply took the plea that they made payment on super built up area whereas the payment of difference was worked out on built up area mentioned in the purchase deed. On the basis of agreed rate of Rs. 11,000/- per square feet, the difference in the sale consideration worked out on the basis of agreed rate and the actual payment is nothing but an extra payment besides the agreed upon the consideration.
11. On the other hand, the Id. AR of the assessee supported the order of Id. CIT(A). The Id. AR of the assessee submit that the Assessing Officer failed to appreciate that final cost comprise of various amenities and the ultimate cost incurred by the developer. Admittedly, the assessee has made payment of consideration of more than the prevalent ready reckoner rate/jantri rate at the time of making payment. The Assessing

Officer made addition on illogical basis which was appreciated by the Id. CIT(A) while deleting the addition.

12. We have considered the rival submissions of both the parties and perused the orders of the lower authorities carefully. As recorded above, the Assessing Officer made addition of Rs. 85,72,204/- by taking a view that the assessee has disclosed the rates of flat @ Rs. 11,000/- per square feet, however, the assessee has actually made much more payment than the agreed amount. The Assessing Officer worked out the difference as recorded in para- 3 of the assessment order. Before the Id. CIT(A), the assessee filed detailed written submission. The Id. CIT(A) after considering the submissions of assessee held that that the assessee purchased 17 flats from builder, out of 17, 8 flats were sold by way of tripartite agreement in earlier years. Out of remaining nine flats, 7 flats in A.Y. 2017-18 and 2 flats bearing No. 103 and 307 were sold during the year under consideration. The assessee has paid total cost of these two flats to builder aggregating of Rs. 4.23 crores. The payment was made as per allotment letter and other charges charged by builder and the stamp duty paid. The addition made by Assessing Officer is totally on wrong footing and was not warranted. The Assessing Officer applied Rs. 11,000/- per square feet as a sacrosanct cost and treated the amount paid in addition to Rs. 11,000/- per square feet as excess amount and made addition. During the assessment, the

assessee explained basic cost of flat and the other many extra amount for water connection, electricity connection, society charges, club house charges which are in addition to basic cost. The Assessing Officer has not gone into such basic details and made addition in a casual manner without understanding the nature whether such addition could really be made and deleted the addition. We find that the Id. CIT(A) appreciated the facts of the case in a proper perspective. The Assessing Officer while making the addition has not considered the payments made on account of various amenities like electricity connection, water connection, common facilities of various amenities provider by the builder/developer.

13. We find that the Id. CIT(A) deleted the addition by appreciating the facts in proper way and by taking a correct view, therefore, we do not find any illegality or infirmity in the order passed by the Id. CIT(A) and we uphold the same qua ground No. 1 of appeal. In the result, ground No. 1 of the appeal is dismissed.

14. Ground No. 2 of the appeal relates to addition of Rs. 2.61 crores under Section 56(2)(x) of the Act. The Id. CIT-DR for the revenue submits that the Id. CIT(A) granted relief to the assessee on the basis of first and second proviso to Section 56(2)(x) of the Act. The benefit of first and second proviso can only be extended on the basis of agreement. There is no agreement between the assessee and developer. The

assessee merely relied on allotment letter cannot be considered as agreement. In the submission before the Id. CIT(A), the assessee itself prayed to the Id. CIT(A) to refer the matter to the DVO for estimation of fair market value on the date of registration. The matter should have been referred to the DVO instead of granting relief to the assessee on the basis of allotment letter. The Id. CIT(A) has not examined the basic cost of flats. The Id. CIT-DR prayed to restore this ground of appeal to the file of Assessing Officer to consider the issue afresh in view of various submissions of assessee filed before the Id. CIT(A).

15. On the other hand, the Id. AR of the assessee supported the order of Id. CIT(A). The Id. AR of the assessee submits that there is no dispute that the assessee was allotted flat in the year 2011 i.e. at the time of initial stage of project. The assessee made substantial payment of consideration through banking channel. The Id. CIT(A) while granting relief to the assessee on the basis of first and second proviso of Section 56(2)(x) of the Act. Clause (x) was inserted in the Income Tax Act w.e.f. 01/04/2017 and applicable from assessment year 2018-19. However, the assessee made payment of consideration much prior to insertion of clause (x). The Id. CIT(A) appreciated the fact and held that the assessee is eligible for the benefit of first proviso to Section 56(2)(x) of the Act as the date of agreement for fixing the amount of consideration for transfer of property and the date of registration is not

same, the stamp duty value on the date of agreement may be considered for the purpose of said sub-clause. The Id. AR of the assessee submits that the allotment letter itself content the condition between the assessee and the developer which is nothing but a contract/agreement and the assessee made payment in accordance with said agreement. To support his submissions, the Id AR for the assessee relied on the decision of Tribunal in Aura Securities Vs DCIT in ITA No. 218, 247 & 248/Ahd/2016 dated 3/12/2018.

16. We have considered the submissions of both the parties and perused the record carefully. We have also perused the orders of the lower authorities. The Assessing Officer made addition of Rs. 2.61 crore under Section 56(2)(x) by taking a view that there is a difference between the value declared by assessee in the sale deed and the value determined by Stamp Valuation Authority for the purpose of registration. The Assessing Officer worked out the difference of Rs. 2.61 crores. Before the Id. CIT(A), the assessee besides other pleas, stated that the assessee entered into agreement for purchase of both the flats in May, 2011. The payments were made through banking channel. The condition of purchases were as per conditions mentioned in allotment letter. The assessee is eligible for the benefit of first and second proviso of Section 56(2)(x) of the Act. We find that the Id. CIT(A) on consideration of such fact, accepted that both the flats in

question were allotted by the builder in May, 2011. The assessee made payment through banking channel. The condition of allotment letter were agreed wherein payment of consideration was made. In such cases, the first proviso to Section 56(2)(x) is applicable. The Id. CIT(A) on examination of ready reckoner rates find that value of both the flats in question were Rs. 2.82 crores and the assessee has made payment of Rs. 4.63 crores which is more than the ready reckoner rates, at the time of allotment of flats, therefore, the addition under Section 56(2)(x) is not sustainable. We find that the date allotment of flat is not disputed by the Assessing Officer. The Assessing Officer also not disputed that the payment on the basis of allotment letter was made through banking channel. Before us, the Id. CIT-DR for the revenue objected on the ground that there is no separate agreement except the allotment letter and/or allotment letter cannot be considered as agreement. We are not agreeing with such contention of Id. CIT-DR for the revenue, if the allotment letter contained substantial condition about the area of flat, mode of payment and the other requisite condition, if accepted by both the parties, is nothing but a short contract of sale of flats. Thus, in view of the above facts and circumstances of the case, we find that the Id. CIT(A) deleted the addition by taking a correct view, therefore, we do not find any illegality or infirmity in the order passed by the Id. CIT(A) and we uphold the

same qua ground No. 2 of appeal. No contrary facts or law is brought to our notice to take other view. In the result, ground No. 2 of the appeal is dismissed.

17. The other grounds raised by the revenue i.e. grounds No. 3 and 4 of the appeal, these are interlinked with grounds No. 1 and 2 of the appeal which we have already decided. Therefore, there is no need to adjudicate the same separately.

18. In the result, this appeal of revenue is dismissed.

Order announced in open court on 03rd August, 2023.

Sd/-
(Dr. ARJUN LAL SAINI)
ACCOUNTANT MEMBER

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Surat, Dated: 03/08/2023

**Ranjan*

Copy to:

1. Assessee
2. Revenue
3. CIT
4. DR
5. Guard File

By order

Sr. Private Secretary, ITAT, Surat