IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'F' NEW DELHI

SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

ITA No.6621/Del/2015
Assessment Year: 2005-06

M/s. BHA Associates Pvt. Ltd., E-47, 2nd Floor, Greater Kailash-II, Delhi	**Vs.**	DCIT, Central Circle-4, New Delhi
PAN :AABCB4540L		
(Appellant)		**(Respondent)**

With

ITA No.6622/Del/2015
Assessment Year: 2005-06

With

ITA No.2247/Del/2018
Assessment Year: 2005-06

M/s. Pravin Juneja HUF, E-47, 2nd Floor, Greater Kailash-II, Delhi	**Vs.**	DCIT, Central Circle-4, New Delhi
PAN :AACHP7670P		
(Appellant)		**(Respondent)**

Assessee by	Sh. V.K. Agarwal, AR
Department by	Sh. Mukesh Kumar Jha, CIT(DR)

Date of hearing	12.02.2024
Date of pronouncement	14.02.2024

ORDER

PER AMIT SHUKLA, JM

The aforesaid appeals have been filed by the assessee against separate impugned orders passed by CIT(A) dated 29.09.2015 in case of M/s. BHA Associates Pvt. Ltd. and M/s. Pravin Juneja HUF for the quantum of assessment passed under section 153A(b)/254 of the Income-tax Act, 1961 (in short 'the Act') and order dated 30.01.2018 passed by CIT(A) in the case of M/s. Pravin Juneja HUF in relation to the penalty proceedings under section 271(1)(c) of the Act for the assessment year 2005-06.

2. The facts in issue involved in the quantum of appeal in the cases of M/s. BHA Associates Pvt. Ltd. and M/s. Pravin Juneja HUF are identical, therefore, consolidated order is being passed.

3. We will take up the appeal in case of M/s. BHA Associates Pvt. Ltd. and our decision in this very appeal will apply mutatis mutandis in ITA No.6622/Del/2015 (M/s. Pravin Juneja HUF).

4. In the grounds of appeal, the assessee has raised following grounds:

1. The Ld. CIT (A) has grossly erred on facts as well as in law in upholding the assessment order which is ex-facie illegal, arbitrary and without jurisdiction.
2. The Ld. CIT (A) has grossly erred on facts as well as in law in confirming the addition of Rs. 40,03,349/- on account of alleged long term capital gain.

3. The Ld. CIT (A) has grossly erred on facts as well as in law in holding that the sale consideration shown in the sale deed is not the actual sale amount but the suppressed amount.
4. The Ld. CIT (A) has further grossly erred on facts as well as in law in upholding the assessment order on the basis of alleged normal practice in the real estate market.

5. Before us, learned counsel appearing for the assessee submitted that the main legal issue raised by the assessee is that the assessment has been framed under section 153A, despite being no search warrant for the search conducted in case of M/s. BHA Associates Pvt. Ltd. and M/s. Pravin Juneja HUF. This is evident from reading of first paragraph of the assessment order. He further pointed out that this is the second round of appeal and in the first round, the assessee has raised the legal ground about the validity of proceedings under section 153A of the Act. The said ground read as under:

> *"That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in framing the impugned assessment order u/s 153A read with section 153C that too without assuming jurisdiction as per law and without recording requisite satisfaction as per law and without obtaining requisite approval as per law and without complying with the other mandatory conditions as envisaged under the Act."*

6. However, the Tribunal has set aside the entire matter to the file of AO on the ground that no proper opportunity was given and the time provided to the assessee was not sufficient. In the second

round, though the assessee has not challenged the issue before the AO, nor specifically before the CIT(A), however, it has been stated that it is purely jurisdictional issue, which can be raised at any stage. In support, he has relied upon a judgment of Hon'ble Delhi High Court in case of PCIT Vs. SS Con Build Pvt. Ltd., ITA No. 57/2022, judgment dated 22nd March, 2022, wherein, it is held that in similar circumstances, when the first case was remanded back to the AO for fresh adjudication by the Tribunal and Tribunal has not considered the legal issue on the first round, the same can be challenged in second round. Against the said ground, the Department has filed its objections and stated that nowhere this ground has been raised at any stage. The fact that the assessee is not subjected to search, has not been stated anywhere, either in the original ground during the course of proceeding before the AO, or even before learned CIT(A), and now after a lapse of time, such plea cannot be raised.

7. Insofar as the issue on merits i.e. addition of Rs.40,03,349/- on account of alleged long term capital gain, the brief facts are that, the assessee was a co-owner along with M/s. Pravin Juneja HUF (50% each) of the property located at E-2/4, Vasant Vihar,

New Delhi. The search was conducted under section 132 of the Act on 22.09.2005 in case of M/s. OMAXE Group and M/s. Pravin Juneja, who was the Director, Finance, in the company, wherein, his residential premises were also covered. During the search of M/s. Pravin Kumar Juneja, an agreement to sell was found in respect of the same property in favour of Smt. Krishan Dandona, in which, consideration was mentioned as Rs.82,62,500/- for half portion. In the reassessment order, the AO has made the addition on the basis of seized document, which was unregistered agreement to sale between the assessee and Smt. Krishan Dandona. During the course of the assessment proceedings, the assessee has submitted as under:

a) *The property E-2/4, Vasant Vihar, New Delhi was jointly held by Pravin Juneja(HUF) and M/s. BHA Associates (P) Ltd.*
b) *The agreement to sale entered with Smt. Krishna Dandona was never executed and no transactions are entered for sale of property between Smt. Krishna Dandona and assessee.*
c) *The agreement was erroneous in as much as the value of entire first floor was precisely Rs. 82,62,500/- which by mistake was mentioned in the two agreement to sell executed by two co-owners*

d) *The agreement was not executable since, it was to be performed on or before 10-08-2003 whereas; date of agreement was 28-06-2004. Due to this reason, the buyer Smt. Krishna Dandona got skeptical and no further Act was owned upon the agreement.*
e) *The sale was ultimately made to Smt. Neena Chaudhary vide registered sale deed dated 30-06-2004 for a consideration of Rs. 82,62,500/- for the entire first floor in which the assessee had half shares.*
f) *The assessee also submitted additional documents for the registration of similar property as E-12/5, Vasant Vihar, Delhi registered on 25-11-2004 for consideration of Rs. 55,00,000/-. The assessee submitted*

that similar property was sold at a lesser rate, hence, the sale consideration of entire property should be taken at Rs. 82,62,500/-"

8. Learned AO rejected assessee's contention after observing as under:

"5. The submission of the assessee are carefully considered. The contention of assessee is not acceptable as per the following discussion:-

a) The whole contention of the assessee is rooted on the arguments that by mistake the entire sale consideration of Rs. 82,62,500/-was shown for half portion of property as per the agreement of sale executed by two co-owners i.e. the assesse and Pravin Juneja (HUF). and at the time of actual sale, the consideration of Rs. 82,62,500/- was received. The argument of assessee is not correct. As per sale deed dated 30-06-2004 with Smt. Neena chaudhary, the sale consideration of property is Rs. 78,00,000/- and not Rs. 82,62,500/- as claimed by assessee. The submission of assessee that the difference of Rs. 4,62,500/- is received on account of furniture and fixtures is just a afterthought to make its argument genuine. The original return submitted vide Ack. No. 2321002381 by assesse does not contain any information or working of sale of property and consequent capital gain/loss. No other independent document in support of receipt of Rs. 4,62,500/- is produced by the assessee.

b) During the course of original assessment proceedings, the assessee categorically submitted that the property was registered in the name of Smt. Neena Chaudhary and agreemin to sale was made in the name of Smt. Krishna Dandona as properties are purchased by the dealer and agreement to sell are made in their favour. Later on, during the course of finalization of transactions, these properties would be sold to actual buyer at a higher price. Therefore, the agreement was made with Smt. Krishna Dandona and finally the registry was made in favour of actual purchaser Mrs. Neena Chaudhary. This is normal course which are prevailing in property business.

In view of the fact, there is no force in the argument of the assessee that the agreement of sale with Smt. Krishna Dhandona was not executed and property was transferred to other person Smt. Neena Choudhary. The typing mistake I date of execution i.e. 10-08-2003 in place of 10-08-2004 is also of no help to assessee in view of the facts that the

agreement to sale was well drafted and contains all the clauses which were subsequently reproduced in the actual s documents with Smt. Neena Chaudhary.

c) The actual sale documents with Smt. Neena chaudhary were perused. It was observed that in page no. 12 to 16 of said agreement, it is mentioned that the property E12/5, Vasant Vihar, Delhi was purchased by M/s. Ambiance Apartments (P) Ltd from Smt. Usha Sethi by an agreements to sell dated 28-04-1999 for a consideration of Rs. 2,70,00,000/ Ms Ambience Apartments (P) Ltd. Demolished the old building on the property and constructed basement, ground, first and second floor theron The assesse alongwith Pravin Juneja (HUF). purchased the first floor of the property alongwith 30% of plot right from M's. Ambince Apartments (P) Ltd. Vide separate sale deed dated 09-02-2001.

In view of above facts, it is clear that apart from entire first floor, the asseseee also owned 30% of plot right which cost of the owner (previous purchaser) at Rs. 81,00,000/- (30% of Rs. 2.70 crore). Together with the construction, the value of property should not be Rs. 82,62,500/- as claimed by assessee. Therefore, there is no reason to accept the contention of the assessee that the sale price of entire second floor of the property was Rs. 82,62,500/- in the year 2004.

d) However, the assessee was provided an opportunity to produce Smt. Krishna Dandona and Smt. Neena Chaudhary so that they may be examined about the transactions carried out with the assessee. The assessee did not produce them on the date i.e. 16-02-2015.

6. In view of above facts, there is no force in the argument of assessee regarding the sale price of the property E-12/5, Vasant Vihar, Delhi. The sale price as per the register sale deed dated 30-06-2004 with Smt. Neena Chaudhary was Rs. 78,00,000/- and not Rs 82,62,500/- as submitted by assessee. Therefore, there was no typing mistake in the agreements to sale dated 28-06-2004. Both the agreement of sale i.e. executed by assesses and Pravin Janeja (HUF) are genuine and the property was sold as per these documents. This fact is further confirmed by the purchase price of the property by previous owner. Therefore, the sale consideration of the half portion of the property owned by assessee is taken as Rs. 82,62,500/-

9. Learned CIT(A) has confirmed the said addition in the following manner:

"I have carefully considered assessment order, written submission and oral arguments of Ld. AR. The objection/argument of the appellant are discussed as under:-

(i) In the agreement to sale dated 28.6.2004, the time limit for executing is given as 10.8.2013, which was originally mentioned as 20.9.2003. The agreement to sale, cannot be executed in the earlier date and therefore, it is obvious that the correct date is to be taken as 10.8.2004, which is after the date of agreement to sale i.e. 28.6.2004.

(ii) The submission of the appellant that consideration of whole portion of the first floor of the property is Rs. 82,62,500/-. The same amount of sale consideration was also agreed upon with another co-owner Pravin Juneja (HUF), who has also entered similar agreement to sale on 28.6.2004 for the half portion of the property under consideration. Therefore, it is clear that two co-owners, having 50% share in the first floor property, cannot enter into an agreement to sale for whole property of first floor simultaneously. Therefore, the argument of the appellant that consideration of Rs. 82,62,500/-, was for full portion, is not correct and hence not acceptable.

(iii) A cheque was issued on PNB for an amount of Rs. 8,00,000/- dated 28.6.2004. Therefore, as per terms of the agreement to sale, the prospective purchaser has made the constructive payment of advance by handing over cheque, as agreed for total amount of advance Rs. 8,00,000/-. Therefore, the reason advanced by the appellant that due to mistake in the amount of sale consideration, the same was not deposited, is not correct and hence not acceptable.

(iv) Further, the appellant has stated that agreement to sale dated 28.6.2004, was cancelled and the property of first floor was ultimately sold to Mrs. Neena Chaudhari, another buyer, with whom sale deed was executed on 30.6.2004 by both co-owners for a total consideration of Rs. 78,00,000/-for whole portion of first floor of the property. Thus, it is obvious that agreement to sale was signed on 28.6.2004 by the appellant with Mrs. Krishna Dandona and sale deed was executed after 2 days on 30.6.2004 with another buyer Mrs. Neena Chaudhari. However, there was no agreement to sale entered with Mrs. Neena Chaudhari.

(v) The agreement to sale dated 28.6.2004, was recovered from the premises of the appellant during search and seizure action u/s 132 of the Act. This agreement to sale is signed by both the parties i.e. purchaser and seller, in the presence of two witnesses. The appellant is co-owner of half portion of the first floor property with M/s Pravin Juneja HUF, where Shri Pravin Juneja is a Director.

Therefore, Shri Pravin Juneja has signed both the agreement to sale in the capacity as director of the appellant and Karta of M/s Pravin Juneja HUF on 28.6.2004. Therefore, the mistake claimed by the appellant that total sale consideration of Rs. 82,62,500/, is for whole portion of the first floor, is not correct and hence not acceptable. Both the agreement to sale, clearly mentioned the amount of sale consideration for half portion, which by any stretch of imagination, can be considered for full portion, when the appellant is owner of only half portion. Therefore, there is nothing wrong in the agreement to sale dated 28.6.2004, where sale consideration for half portion is Rs. 82,62,500/-, which is nothing but the market price of the half portion of the property of first floor, as agreed upon. The sale deed executed on 30.6.2004, with Mrs. Neena Chaudhari, does not reflect the market price of the property and there is no agreement to sale entered with Mrs. Neena Chaudhari. Therefore, the actual price of the property agreed upon in the agreement to sale dated 28.6.2004, is the market price of the half portion of the property, of which the appellant is the legal owner.

(vi) During the appellate proceedings, the assessee filed a copy of sale deed dated 25.11.2004 of comparable case in favour of Shri Anil Das by 3 co-owners. As per this sale deed this property under consideration was constructed on plot measuring 400 sq. yards, with address E-12, Vasant Vihar, New Delhi. As per the sale deed, the property description is given as: Purchase the entire unfinished second floor including entire terrace floor above the second floor of the new building which has been constructed on the plot. The consideration for sale is declared at Rs. 55,00,000/-. No two properties even if located in the same locality, can be considered for the comparison of market price. It depends upon the quality of construction, year of construction, floor no., carpet area, super built up area, type of fixtures installed etc. and other facilities provided. Similarly, a corner plot of 400 sq. yards, will always fetch higher price than any other plot of 400 sq. yard located in the same locality. Therefore, by simply giving same area of plot, on which two properties are constructed, cannot decide the similarity between two properties.

In view of the above, this sale deed submitted by the appellant for third party, cannot be relied upon for comparison and in the case of the appellant, a direct evidence in the form of agreement to sale was seized from the residential premises of the appellant, in which price of Rs. 82,62,500/-, was agreed upon as total sales consideration, which is nothing but the market price of the half portion of the property.

In view of the above, the submission of the appellant cannot be relied upon and therefore, same is not accepted.

Conclusion:

From the forgoing discussion, it is clear that the alleged sale consideration shown in the sale deed, is not the actual sale amount, but the suppressed amount paid through cheque/payorder. It is a normal practice prevailing in the real estate market that the first seller and purchaser formalise the actual transaction by entering into an agreement to sale, for the market price agreed upon of the property under consideration. However, when the final sale deed is executed, only the suppressed sale consideration is shown, which has been paid from disclosed sources through cheques/ P.O. etc. Therefore, the amount of total sale consideration shown in the agreement to sale is the correct amount, which is taken as market price of the property to be sold. Therefore, it is obvious that the alleged amount of sale consideration shown in the sale deed executed with another purchaser, is not the correct amount. The case laws relied upon by the appellant have also been carefully considered and are not applicable, as same are distinguishable to the facts of the appellant.

In view of the above, I do not find any infirmity in the findings of the assessment order and the A.O. has correctly taken the market price of half portion of the first floor property at Rs. 82,62,500/-, of which the appellant was the legal owner. Accordingly, ground no. 1 to 4, are dismissed."

10. Before us, learned counsel for the assessee submitted that first of all, the agreements cannot be relied upon as there were number of print errors, which is evident from the following facts:

"i) Though the Agreement to Sell is dated 28/06/2004 (Pg 37, PB) yet it is mentioned in the agreement that the sale deed may be executed by 10/08/2003 (Pg 44, PB). In fact, originally this date was typed as 20/09/2003 but it was hand corrected as 10/8/2003 (Pg 44, PB). It is an impossible situation because the agreement itself was dated 28/6/2004. The Ld AO has mentioned that there is a tying mistake in the date of execution but he ignored the fact that the date 10/08/2003 is not typed but hand corrected against the original date of 20/09/2003. This could be an inadvertent error as it happened in mentioning full value of property instead of the value of the half portion owned by the appellant.

ii) The consideration of Rs. 82,62,500/- was meant for the whole property but the person drafting the agreement misunderstood it for half of the property and accordingly mentioned it in the agreement. The very fact that he was confused about the sale consideration is evidenced by the fact that though it is mentioned in the agreement that Rs. 8,00,000/- were received yet (Pg 44, PB) he left the space for the remaining balance amount to be received as blank. This mistake also seems to inadvertent as discussed w.r.t. date of execution in para (i) above.

iii) the above two errors clearly point out that the deed writer was totally confused about the deed, otherwise, he would not have left the space for "balance amount to be paid" as blank.

iv) The agreement becomes effective only when the cheque is realized. If the cheque is dishonored, obviously, the agreement becomes null and void. After signing the agreement in good faith, the buyer noticed the mistake in the figure of sale consideration and accordingly telephoned the appellant the same evening casting aspersions on his bona-fides, alleging that the consideration was wrongly mentioned deliberately and asked him not to present the cheques to the bank and cancelled the deal. Accordingly, the cheque of Rs.8,00,000/- was never encashed. Therefore, the agreement never became effective and accordingly was never acted upon. The cancellation of the Agreement to Sell is further confirmed from page 24 of the subsequent sale deed (Pg 26, PB) wherein it is clearly admitted by the vendors that there is no subsisting Agreement to Sell. Accordingly, Agreement to Sell cannot have any evidentiary value during assessment proceedings in February, 2015 which did not subsist even on 30/06/2004 when sale deed was signed."

11. Apart from that he has submitted that final agreement to sale with Smt. Krishna Dandona was cancelled and immediately thereafter the assessee has made final sale deed with Mrs. Neena Chaudhari, who has given the offer of Rs.78 lakhs and sale deed was executed with her on 30th June, 2004 for the whole property.

12. On the other hand, learned DR strongly relied upon the order of learned CIT(A) and submitted that once the agreement to

sale mentioning the amount of Rs.82,62,500/- for the half of the property, the assessee had received Rs.8 lakhs as advance, the same cannot be said to be any kind of error and therefore, the reasons elaborated by learned CIT(A) in his order has to be sustained.

13. We have heard both the parties and also perused the relevant materials placed on record. The entire addition is based on the agreement to sale, which was unregistered between both the co-owners, i.e., the assessee as well as M/s Pravin Juneja HUF, wherein it mentions the amount of Rs. 82,62,500/- and it has been treated as both the co-owners have received the same amount as per the sale agreement. One very important fact is that the agreement to sale was not converted to final sale deed and the same property has been sold to another person, i.e., Mrs. Neena Chaudhari for sum of Rs.78 lakhs. This is clearly evident from the copy of the sale deed dated 30th June, 2004 placed in the paper-book and also before the AO and CIT (A). Once the same property has been sold to one person, then to take cognizance of agreement to sale for taxing it as long term capital gain, is wholly unwarranted. Though, there is discrepancy in the agreement to

sale, wherein, it is stated that Rs.8 lakhs was received by the assessee, then what happened to that Rs.8 lakhs because same does not find mention in the final sale deed. The agreement to sale was with a different party and that agreement to sale was never fructified and same was cancelled due to various discrepancies. Once the property has been sold as a whole to one person for an amount of Rs.78 lakhs, then we do not find any reason to justify such an addition based on agreement to sale with Smt. Krishna Dandona. Accordingly, the entire basis and reasoning given by learned CIT(A) cannot be sustained. One of the reason given by him that there is no agreement to sale entered with Mrs. Neena Chaudhari is not a reason for disbelieving the registered sale deed over unregistered agreement to sale, which was never acted upon. Thus, draft agreement to sale cannot be believed over the registered sale deed and therefore the addition made by the AO and sustained by the CIT(A), is deleted. Since, M/s. Pravin Juneja HUF was also the co-owner and similar finding has to be given, therefore, in the case of M/s. Pravin Juneja HUF as well, the addition is directed to be deleted.

14. The penalty has been levied in case of M/s. Pravin Juneja HUF for the addition sustained in the quantum appeal. Since, we have already deleted the addition, accordingly the penalty levied under section 271(1)(c) of the Act is also deleted.

15. In the result, all the three appeals of the assessee are allowed.

Order pronounced in the open court on 14th February, 2024

Sd/-	***Sd/-***
(M. BALAGANESH)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 14th February, 2024.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi