

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

**BEFORE SHRI ABY T VARKEY, JM &
MS PADMAVATHY S, AM**

**I.T.A. No. 3629/Mum/2023
(Assessment Year: 2018-19)**

Pinki Chetan Shah “B” Wing 1504, Matoshree Pride, 15 th Floor, G D Ambekar Marg, Parel (East), Mumbai- 400012 PAN : CCHPS6796L	Vs.	Additional/Joint/Deputy/ Assistant Commissioner of Income Tax/ITO-20(2)(1), Piramal Chamber, Mumbai-400013
Appellant)	:	Respondent)

Appellant/Assessee by : Shri Govind Prasad, CA
Revenue/Respondent by : Dr. Yogendra T. Wakare, DR

Date of Hearing : 22.02.2024
Date of Pronouncement : 27.02.2024

ORDER

Per Padmavathy S, AM:

This appeal is against the order of the Commissioner of Income Tax (Appeals)/National Faceless Appeal Centre (NFAC) [for short 'the CIT(A)] dated 16.08.2023 for the AY 2018-19.

2. The only issue contended in this appeal is the addition to the extent of Rs. 17,12,962/- made by the AO under section 56(2)(x) of the Income Tax Act (the Act) considering the date of acquisition of immovable property as the date of agreement and not the date of allotment letter.

3. The assessee is an individual and filed the return of income for AY 2018-19 on 09.07.2018 declaring a total income of Rs. 2,75,120/-. The case was selected for scrutiny and statutory notices were duly served on the assessee. The AO during the course of hearing noticed that the assessee had purchased a flat no. 1504 at Parel, Mumbai for a consideration of Rs. 2,47,66,875/- on 23.06.2017 along with the other co-owner Shri Prakash Keshrimal Shah. The AO further noticed that the stamp duty valued on the date of sale was Rs. 2,81,92,800/- and accordingly the AO invoked the provisions of section 56(2)(x) of the Act. The assessee submitted before the AO that the advance amount of Rs. 11,00,000/- towards purchase of flat was given to the builder M/s Matoshree Properties on 18.02.2015 by Account Payee cheque and that the letter of allotment was issued by the builder on 02.03.2015. The assessee further submitted that the letter of allotment issued by the builder should be considered as agreement between the builder and the assessee and therefore as per the proviso to section 56(2)(x) of the Act no addition can be made towards the difference between the market value on the date of sale and the date on which the agreement was entered into. The AO however did not agree with the submissions of the assessee and proceeded to make the addition of Rs. 17,12,962/- (1/2 share of the assessee on Rs. 34,25,925/- (i.e. Rs. 2,81,92,800/- less Rs. 2,47,66,875/-)) the relevant observations of the AO in this regard are extracted below:

“7.6 Section 56(2)(x) clearly stipulates that where any immovable property is received for a consideration which is less than the stamp duty value of the property by an amount exceeding Rs. 50000/-, the stamp duty value of such property as exceeds such consideration, shall be chargeable to tax in the hands of the individual or HUF as income from other sources. It is applicable from A.Y. 2018-19.

7.7 On perusal of the provisions of the Act, it is loud and clear that the following conditions should be fulfilled by the assessee before taking the benefit of the provisions of the Act:

- (1) There should be an agreement for fixing the terms and conditions and total consideration
- (2) The payments should be through account payee cheque/account payee bank draft/electronic clearing system.
- (3) The part payments should be made on or before the date of agreement.

7.8 Now, coming to the facts of the case, it is seen that the assessee has furnished a copy of allotment letter claimed to be issued by the Seller i.e. Matoshree properties on 02.03, 2015 in its letter head. It contains the details of buyers and the terms and conditions of the transactions. On perusal of the same, it is seen that the buyers of the property are the assessee and her father in law Shri Prakash Keshrimal Shah. As per the allotment letter, the assessee has to pay a total amount of Rs 2,47,66,865/- as consideration and first payment of the transaction of Rs. 11,00,000/- has been received on the date of allotment by the Seller. On this basis, the assessee has claimed the benefit proviso the Section 56(2)(x) of the Act.

Now, the first question arises is that whether an allotment letter issued by the builder can be treated as an "agreement for the purposes of the provisions of Sec. 56(2)(x) of the Act. As per Section 2(c) of the RERA Act, 2016, agreement for sale is an agreement to sell a property in future which contains the terms and conditions of any prospective contract for sale and any violations of terms of any agreement to sell can result only in a suit for damages. Further, the execution of an agreement for sale needs to be witnessed by two persons capable of entering into a contract. In view of the above, the allotment letter produced by the assessee cannot be treated as an agreement and the benefit of the proviso to Section 56(2)(x) cannot be allowed to the assessee. Moreover, the allotment and claim of the assessee also lacks credibility for the following reasons

1. Allotment letter claimed to be issued by the Seller i.e. Matoshree properties on 02.03.2015 in its letter head and it was not registered or notarized.
2. The allotment letter does not bear the signature of the buyers i. e. the assessee or her father in law, Shri Prakash Shah.
3. No person has witnessed to this agreement.

1. As per the terms and conditions of this agreement, the assessee has to make a payment of Rs 49,53,375/- on or before 28/02/2015 which itself is contrary to the date of agreement i.e. 02.03.2015.

Therefore, the credibility of this allotment itself is not fully verifiable. Further, the assessee has finally executed the Sale Deed on 23.06.2017 wherein the schedule of payments made were given. On perusal of the same, it is seen that a payment of Rs. 11,00,000/- has been made on 06.02.2015 vide Cheque No. 000013 of HDFC Bank. However, on perusal of the details of this transactions, it is seen that this cheque was issued from the account of one Chetan Shah in the name of one Smt Prabhadev M. Both the parties are no longer either a party in the letter of allotment or in final Sale Deed executed.

All these facts lead to one conclusion that there is no proper agreement for fixing the sale consideration or no payments were made as required by the proviso to Sec. 56(2)(x) of the Act. Hence, the assessee's claim that the Circle Rate as on the date of letter of allotment may be taken for computation of sale consideration cannot be acceded to. Accordingly, the Circle rate as on the date of execution registered sale deed is taken.

7.9 Therefore, as per provision of section 56(2) (vii) in case of buyer the difference between sale price and circle rate would be determined to be the income of purchaser and taxed under head income from other sources. There is a deeming provision in the Income-tax Act under Section 56 (2)(x), which states that if the market value of a property is lower than the circle rate, then the difference is taxed as other income. Therefore, the undersigned left with no other alternative but to consider as total consideration an amount of Rs. 2,81,92,800/- as calculated by the Stamp Valuation Authority. In view of the above the difference amount of Rs. 17,12,962/- (1½ share of the assessee of Rs34,25,925/-) as discussed above is treated as income from other source U/s 56(2)(x) of the Income tax Act and added to the total income of the assessee for the year under consideration. Initiated penalty proceedings U/s. 270A(1) r.w.s. 270A(9)(a) of the Income tax Act for not reporting the facts and having deemed income to this extent.”

4. On further appeal the CIT(A) confirmed the said addition made by the AO. The assessee is in appeal before the Tribunal against the order of the CIT(A).

5. The Id. AR submitted that the addition has been made for the reason that the allotment letter dated 02.03.2015 cannot be considered as agreement for sale. The Id. AR further submitted that the credibility of the said letter is questioned by the Revenue for the reason that in the letter dated 02.03.2015 it is stated that the assessee should pay a sum of Rs. 49,53,375/- on or before 28.02.2015 which is not possible. In this regard the Id. AR submitted that the assessee agreed to pay the above amount on or before 28.02.2015 at the time of making the advance payment on 18.02.2015 and mere mentioning of the said agreement in the letter having a subsequent date cannot be the reason for not treating the letter of allotment as an agreement. The Id. AR also submitted that the other reason as quoted by the Revenue is that the letter of allotment is not signed by the buyer i.e. the assessee which is not correct since the copy submitted by the assessee is assessee's own copy and that the copy submitted to the builder is signed by the assessee. The Id. AR also drew our attention to the details of payments made by the assessee as listed in the agreement of sale (page 78 of the PB) which goes to substantiate that the assessee has made the advance payment on 06.02.2015 and therefore the proviso to section 56(2)(x)(b) is clearly applicable in assessee's case. Accordingly, the Id. AR prayed that the addition made considering the date of sale deed as the date of transfer be deleted.

6. The Id. DR on the other hand submitted that the letter of allotment given by the builder to the assessee cannot be treated as agreement since the same is having discrepancies as has been stated by the AO. Therefore, the Id. DR argued that the AO has correctly made the addition invoking provisions of section 56(2)(x) of the Act.

7. We have heard the parties and perused the material on record. The assessee has purchased a flat along with Shri Prakash Keshrimal Shah and in this regard made a payment of Rs.11 lakhs on 06.02.2015. The builder has issued a letter of allotment dated 02.03.2015 acknowledging the receipt of the said amount and also mentioning the other terms and conditions of further payments along with delivery schedule of the flat etc. The said letter also mentions that the assessee has agreed to pay a sum of Rs.49,53,375/- on or before 28.02.2015 which according to the AO was not possible since the letter is dated 02.03.2015. The AO further found certain other discrepancies such as assessee's signature not found in the allotment letter etc., and accordingly held that the letter of allotment cannot be held as agreement to sell. The AO therefore made addition considering the market value on the date of sale and the agreement value by applying the provisions of section 56(2)(x)(b) of the Act. Before proceeding further we will look at the provisions of the said section as extracted below -

“(2) In particular, and without prejudice to the generality of the provisions of subsection (1), the following incomes, shall be chargeable to income-tax under the head "Income from other sources", namely :—

(x) where any person receives, in any previous year, from any person or persons on or after the 1st day of April, 2017,—

*(a) ****

(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 ten 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 prescribed²⁸, 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:

²⁹[**Provided also** that in case of property being referred to in the second proviso to sub-section (1) of [section 43CA](#), the provisions of sub-item (ii) of item (B) shall have effect as if for the words "ten per cent", the words "twenty per cent" had been substituted;]

8. From the plain reading of the above section it is clear that when a person receives an immovable property where the stamp duty value of such property as exceeds consideration received, then the amount in excess is to be taxed under section 56(2)(x)(b). However the proviso to the above section contains an exception to the effect 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 and said proviso to be applied only where the amount of consideration or a part thereof is paid by an account payee cheque or bank draft or through online clearing system of a bank or through any other electronic mode. In assessee's case it is an undisputed fact that the assessee has

made part payment towards purchase consideration on 06.02.2015 and therefore the first proviso to section 56(2)(x)(b) is applicable in assessee's case. However the dispute is whether the exception under the first proviso is applicable since the same mentions the date of agreement to be considered and that in assessee's case whether the letter of allotment is the agreement to sell in order to consider the stamp duty value on that date and not the date of sale. In this regard we notice that the coordinate bench in the case of Parth Dashrath Gandhi vs ACIT (ITA No.1990/Mum/2022 dated 31.01.2023) has considered a similar issue where it is held that -

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 coordinate 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 paperbook we have observed the payment made by the assessee to the developer on 17-10-2011 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.

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 Assesseees 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.”

9. In assessee's case the advance payment is made through account payee check and the allotment letter with the terms of balance payment and other conditions of delivery of flat etc is issued. Therefore in our considered view, the above decision of the Hon'ble Tribunal is applicable to assessee's case also. Accordingly respectfully following the above case, we hold that the addition made by the AO is not sustainable and be deleted.

10. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 27-02-2024.

Sd/-
(ABY T VARKEY)
Judicial Member

*SK, Sr. PS

Sd/-
(MS. PADMAVATHY S)
Accountant Member

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. Guard File
5. CIT

BY ORDER,
(Dy./Asstt. Registrar)
ITAT, Mumbai