

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

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA No.3413/Mum/2023
(A.Y. 2011-12)**

Bharat Laxman Bhiwapurkar, 204, Oxford, Regency Heights, Azad Nagar, Kolshet, Thane - 400602	Vs.	ITO, Ward 1(5), Room No. 14, B Wing, 6 th Floor, Ashar IT Park, Road No. 16Z, Wagle, Ind. Estate, Thane-400604
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No:ABNPB8487A		
Appellant	..	Respondent

Appellant by :	Subodh Ratnaparkhi
Respondent by :	S. Arunkumar

Date of Hearing	26.02.2024
Date of Pronouncement	04.03.2024

आदेश / O R D E R

Per Amarjit Singh (AM):

This appeal filed by the assessee is directed against the order passed by the Id. CIT(A) NFAC, dated 03.08.2023 for A.Y. 2011-12. The assessee has raised the following grounds before us:

- “1. The Hon. CIT (A) erred in upholding re-opening of assessment u/s 147 of the Income Tax Act 1961, inspite of the fact that there was no incriminating material pertaining to the appellant with regards to alleged on-money paid for purchase of flat from Cosmos Group and therefore the re-opening was in absence of any independent and valid belief on the part of the Id AO that any income chargeable to tax had escaped assessment. The re-opening of assessment u/s 147 being bad-in-law, the asst. order flowing therefrom, being the order u/s 143(3) r.w.s 147 is also invalid and bad in law and hence the same may be quashed*
- 2. The Hon CIT (A) erred in upholding the addition of Rs. 31,00,000/-, u/s 69 of the 1.1 Act, 1961, as unexplained investment towards alleged on-money paid towards purchase of flat no. A-07, 7th floor, Twilight, Cosmos Horizon, Ghodbunder Road, Thane (W) to Cosmos Group, ignoring the contentions of the appellant that there was no incriminating*

material pertaining to the appellant with regards to such alleged on-money paid and that as he had not paid any such alleged on-money for purchase of flat, the addition Rs.31,00,000/- was not justified by facts and in law and hence may please be deleted.

3. *The Hon. CIT (A) erred in relying upon the statements of the members of the Cosmos Group and alleged incriminating material, without granting the appellant any real and reasonable opportunity to cross examine the said persons or copy of such incriminating material, thereby breaching the salient principles of equity, fair play and natural justice. The order framed in breach of the principles of natural justice is bad-in-law and void-ab-initio.*
4. *The appellant craves leave to add, alter, amend, and/or vary the grounds of appeal at any time before the decision of the appeal.”*

2. The fact in brief is that return of income declaring total income of Rs.4,40,291/- was filed on 20.06.2011. The return was processed u/s 143(1) of the Act. Subsequently, the assessing officer has received information from the Deputy Director of Investigation (Income Tax), Mumbai vide letter dated 07.03.2016 pertaining to the search and seizure action carried out 24.09.2014 in the case of Cosmos Group which was engaged in the business of building and construction. It was reported that during the course of search action documents relating to on money payments by the assessee Shri Bharat Laxman Bhiwapurkar were found. As per the details in the email account of the Cosmos Group a cash book of the on money received by the Cosmos Group from various persons towards purchase of flats/shops/offices were prepared in excel sheet. During the course of search action statement of sales head of cosmos group Ms. Karuna Khambayat was recorded on 24.09.2014 u/s 131 of the Act in her statement she stated that there was often a cash element involved in the sale of flats/shops etc. Similarly, a statement of Smt. Minal Mahesh head of accounts of Cosmos Group was recorded u/s 132(4) of the Act on 25.09.2014 and 26.09.2014 and in her statement she also accepted that on money was taken and cash transactions was done during the sales of flat by Cosmos group. Therefore, the case of the assessee was reopened u/s 147 of the Act by issuing of notice u/s 148 of the Act on 30.03.2018. During the course

of reassessment proceedings the assessee was asked to submit copy of purchase agreement of flat no. A/07 Harizon/Twilte, source of investment in the said property and sources of cash payment of Rs.31,00,000/- as on money. The AO has issued show cause notice dated 29.10.2018 stating that director of the Cosmos Group has admitted that assessee has paid on money of Rs.31,00,000/- over and above agreement value in cash for purchased of the said flat. In response the assessee submitted vide letter dated 10.12.2018 that he has not paid any amount over and above the agreement price for flat purchased and there was no incriminating document seized showing any payment was made over and above the agreement price. The assessee has made request for cross examination of the director of the Cosmos Group. Regarding cross-examination the AO stated that both the sides were asked to remain present for cross examination, however, no one was present, therefore, cross examination could not be taken place. The assessing officer has not agreed with the submission of the assessee and referred the statements of the key persons stating that from the statement of the key persons of Cosmos Group the following points emerge for consideration:

- i. Cash Sales/on money was involved in the sale of flats of Cosmos Group.*
- ii. There was no fix ratio of cash element and was dependent upon the customer profile.*
- iii. The data pertaining to cash transactions was maintained in the excel sheets and tally, only in specific e-mail addresses only for the knowledge of few in Cosmos group.”*

The assessing officer further stated that these evidences were sufficient to establish that assessee had given on money of Rs.31,00,000/- for purchase of flat. Therefore, the AO has added the amount of Rs.31,00,000/- as unexplained investment deemed to be the income of the assessee for the year under consideration.

3. The assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has dismissed the appeal of the assessee.

4. During the course of appellate proceedings before us the Id. Counsel vehemently contended that no incriminating material showing involvement of the assessee in providing on money to the Cosmos Group was seized from the search action at the Cosmos Group. He further submitted that even the assessing officer has not shared any copy of excel sheet which indicate that assessee has provided on money to the Cosmos Group for purchasing the aforesaid flat. The Id. Counsel referred the copy of agreement for sale placed at page no. 73 of the paper book and also referred page no. 69 of the paper book relating to the submission made before the assessing officer during the course of assessment explaining that no incriminating seized document was brought on record by the assessing officer. The Id. Counsel also referred page no. 71 of the paper book containing a copy of letter addressed to the AO that for cross-examination the authorized representative of the assessee has attended the office of the assessing officer, however, no one from the side of the Cosmos Group was present for cross-examination. He further submitted that no copy of seized document showing any cash payment made by the assessee to Cosmos Group was provided by the assessing officer.

On the other hand, the Id. D.R supported the order of lower authorities.

5. Heard both the sides and perused the material on record. The assessee is an individual deriving income from salary. The assessing officer received information from the investigation wing in respect of search action taken place in the case of Cosmos Group engaged in the business of building and construction and the information relating to on money payment received. The assessing officer stated that for purchasing flat no. A/07 at Harizon Twilte, the assessee had made cash payment of Rs.31,00,000/- over and above the agreement value of the flat. After referring material placed on record the assessee submitted

that AO has merely relied upon the statement recorded u/s 132(4) of the Act key persons of the Cosmos Group without bringing on record any incriminating material seized during search action to establish that assessee had paid alleged on money. After perusal of the material on record it is also noticed that assessing officer has neither shared any incriminating evidence with the assessee nor brought on record to demonstrate that the assessee had actually paid the alleged on money of Rs.31,00,000/- over and above the agreement price of the property. In spite of repeated request made by the assessee the assessing officer has also not provided any copy of the seized material to the assessee. Vide letter dated 17.12.2018 the assessee has also brought to the knowledge of the assessing officer that director of Cosmos Group Mr. Manish Mehta did not turn up for cross examination on the date of 14.12.2018 however the representative of the assessee was present before him. During the course of appellate proceeding before us the Id. Counsel has also referred the decision of ITAT in the case of Mrs. Mamta Sharad Gupta Vs. ITO 1(2) vide ITA No. 1553/Mum/2021 dated 16.06.2022 on the similar issue of on money as per the search action carried out in the case of Cosmos Group wherein the ITAT has held as under:

“9. Since the sole issue raised in this appeal is covered by the order (supra) passed by the co-ordinate Bench of the Tribunal addition made in this case is not sustainable. Because the addition is made merely on the basis of statement made by one Mr. Suraj Parmar, one of the promoters of Cosmos Group under section 132(4) of the Act without any corroboration. Moreover, statement or any material seized during the course of search under section 132(4) of the Act can only be used against Mr. Suraj Parmar of Cosmos Group and not against the assessee without any corroboration. Excel sheet alleged to have been recovered from the office of builders is also not admissible being not proved under section 65 of the Evidence Act. So in view of the matter, addition made by the AO and sustained by the Id. CIT(A) is not sustainable in the eyes of law, hence ordered to be deleted. Consequently, appeal filed by the assessee is allowed.”

The Id. Counsel has also referred the similar kind of addition made on the basis of search action in the case of Cosmos Group in the case of Monika Anand Gupta Vs. ITO, Ward 1(2) vide ITA No.5561/Mum/2018

which was adjudicated by the ITAT, Mumbai dated 21.04.2022 wherein held as under:

“6. I have heard both the parties and perused the record. I find that the addition for on-money payment has been done in this case without any corroborative material found from assessee. The addition is solely based upon some statement of the builder. Such additions are not sustainable on the touchstone of Hon'ble Supreme Court decision in the case of CIT vs P.V Kalyanasundasram 164 Taxman 78 (SC). Moreover, there is nothing on record to suggest that so called electronic evidence collected by revenue at the builder's office is compliant with the requirement of section 65B of Evidence Act regarding admissibility of electronic evidence. Hence, I set aside the orders of the authority below and direct that the addition be deleted.”

After taking income consideration the above facts and finding of the ITAT we find that similar to the aforesaid decision the addition in the case of the assessee was also solely based upon the statement of the builders and assessing officer could not substantiate the same with any incriminating material. Therefore, following the decision of the ITATs on the similar issue as referred above we consider that addition made by the AO is not sustainable, therefore, same is deleted. Accordingly, the grounds of appeal no.2 to 3 of the appeal of the assessee are allowed.

6. During the course of appellate proceedings before us ground of appeal no.1 was not discussed therefore, the same stand dismissed.

7. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 04.03.2024

Sd/-

Sd/-

(Kuldip Singh)
Judicial Member

(Amarjit Singh)
Accountant Member

Place: Mumbai

Date 04.03.2024

Rohit: PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT,
Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench,
Mumbai.