**IN THE INCOME TAX APPELLATE TRIBUNAL**
**"A" BENCH, MUMBAI**

**BEFORE SHRI VIKAS AWASTHY, JM &**
**MS PADMAVATHY S, AM**

**I.T.A. No. 2949/Mum/2023**
(Assessment Year: 2013-14)

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| **Abalabba Developers Pvt. Ltd.**<br>18, Sapt Building, J.N. Herdia Marg, Ballard Estate, Mumbai-400001<br>**PAN : AAKCA5415A** | Vs. | **ITO Range-12(1)(1)**<br>Room No. 226/262, 2nd floor, Aayakar Bhawan, M.K. Road, Mumbai-400020 |
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| **Appellant)** | : | **Respondent)** |

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| **Appellant/Assessee by** | : | Shri M M Golvala, CA |
| **Revenue/Respondent by** | : | Shri Manoj Kumar Sinha, Sr. DR |
| **Date of Hearing** | : | 05.04.2024 |
| **Date of Pronouncement** | : | 12.04.2024 |

O R D E R

**Per Padmavathy S, AM:**

This appeal is against the order of the Commissioner of Income Tax (Appeals)/National Faceless Appeal Centre, Delhi [for short 'the CIT(A)] dated 11.08.2023 for the AY 2013-14. The assessee raised the following grounds:

*1) The learned Commissioner of Income Tax (Appeals) erred in confirming the addition made under section 69 or under section 698 amounting to Rs. 2,38,99,000/-*

*2) Both the lower authorities erred in assuming jurisdiction under section 69 or under section 69B, when jurisdictional conditions were not fulfilled.*

*3) Both the lower authorities erred in making an addition under Section 69 or under section 69B without giving any finding as to how the said Sections were applicable to the facts of the Appellant's case.*

*4) Both the lower authorities erred in ignoring decisions of the High Courts led before them.*

*5) Both the lower authorities erred in ignoring the fact that under a Family Settlement, there is no transfer of property.*

*6) Having regard to the facts and circumstances of the case and the provisions of law, the Appellant submits that the addition of Rs.2,38,99,000/- is unjustified and requires to be deleted.*

*(7) The Commissioner of Income Tax (Appeals) erred in sustaining an addition of Rs. 2,24,000/- under the head Income from House Property. The Appellant submits that the addition is unjustified and the same is required to be deleted.*

*8) Without prejudice to Ground No. 7, and in any event, the addition is highly excessive and arbitrary and the same requires to be reduced substantially.*

*9) The Assessing Officer/ Commissioner of Income Tax(Appeals) erred in levying interest under section 234B amounting to Rs. 28,12,284/-.*

2. The assessee is a company and engaged in the business of builders and construction. During the Assessment Year (AY) 2013-14 the assessee did not carry out any business activity and field the return of income on 12.09.2014 declaring income from House Property for Rs. 21,340/-. The return was selected for scrutiny and the statutory notices were duly served on the assessee. The AO noticed that the assessee company has purchased immovable property in Flat No. 301 measuring 700 sq.ft. at Simla House situated at Napean sea Road, Mumbai (impugned property) from M/s N. Jamnadas & Co. for a consideration of Rs. 9,00,000/- and paid stamp duty of Rs. 14,92,100/-. The AO further noticed that the stamp duty value of the said property to be at Rs.2,50,39,000/- and called on the assessee to show-cause why the difference between the stamp duty value and the actual consideration cannot be treated as undisclosed investment in the hands of the assessee. The assessee filed a detailed reply stating that the property was obtained

as part of a family settlement and therefore it does not amount to "transfer". The assessee also submitted that the difference cannot be added since such transaction does not fall within the definition of income under section 2(24) of the Income Tax Act (the Act). The AO did not accept the submissions of the assessee and proceeded to make an addition of Rs. 2,38,99,000/- being difference between stamp duty valuation and the amount disclosed by the assessee in the books of accounts under section 69/69B of the Act. With regard to the income of Rs. 21,340/- disclosed by the assessee under the head "Income from House Property" the AO held that as per information collected by issue of notice under section 133(6) of the Act from the society the actual rent of the property is Rs. 33,000/- per month. Since the assessee has disclosed only Rs.40,000/- i.e. Rs. 5000/- per moth for eight months as income, the AO made an addition of towards the difference amounting to Rs. 2,24,000/- to the Income from House Property.

3. Aggrieved the assessee filed further appeal before the CIT(A). Before the CIT(A), the assessee contended that family settlement does not amount to transfer and that the addition cannot be made under section 69/69B of the Act. The assessee further submitted that the addition cannot be made under section 2(24) since the impugned transaction is not covered under the definition of "income". The assessee also contended that the provisions of section 57(2)(vii(b) which brings to tax the difference between the stamp duty value and the actual consideration is not applicable to the assessee since the said section is applicable only for individuals and HUF. Therefore, the assessee submitted that the addition made by the AO is not sustainable. The CIT(A) however, did not accept the submissions of the assessee and sustained both the additions made by the AO by holding that –

*"5.2 During the appellate proceedings, the assessee has uploaded copy of family settlement deed dated 17.05.2012 alongwith copy of purchase deed of the property under reference. The assessee has also referred several case laws wherein undisputedly it has been held that transfer of property under family settlement is not a 'transfer' for capital gain purposes. I have perused carefully the family settlement deed, purchase deed and other details and documents filed by the assessee. As per schedule 2C to the family settlement, at S.No. 12, the property under reference has been described as owned by KK (Krishna Kotak)/KK Entities to be transferred to NK (Naresh Kotak)/NK Entities. From this much information, it transpires that the assessee company (buyer entity) was owned by NK/NK Entities and M/s N. Jamnadas & Co. (Seller Entity) was owned by KK/KK Entities. Nothing else has been filed by the assessee company to substantiate its claim. Moreover, M/s Aballaba Developers Pvt. Ltd. (the assessee company) and M/s N. Jamnadas & Co. are -separate & independent entities for taxation purposes. The ownership of the property has been transferred from M/s N. Jamnadas & Co. to M/s Aballaba Developers Pvt. Ltd. not between to family members. Thus, I am of considered opinion that the purchase of the said property by the assessee company cannot be termed as transfer of property under family settlement. Had it been transfer of property between two or more coparceners of a family, even stamp duty would not be required to be paid. Thus, the addition made by the Ld. AO u/s 69/69B stands sustained.*

***Accordingly, the appeal of the assessee company on this issue is dismissed."***

The assessee is in appeal before the Tribunal against the order of the CIT(A).

**Addition made u/s. 69/69B of the Act - Ground No. 1 to 6**

4. Brief facts pertaining to the issue is that Shri Naresh Kotak together with his brother's son Shri Krishna Kotak was running a group of businesses and companies under the umbrella of M/s J.M. Baxi & Co. As there were serious differences of opinion between Shri Naresh Kotak and Shri Krishna Kotak it was decided to ultimately have a family separation and a Deed of Family Settlement dated 17.05.2012 was entered into. Pursuant to the family settlement the assessee purchased the impugned property from M/s N. Jamnadas & Co. for a consideration of Rs. 9,00,000/-. The market value of the said property was Rs. 2,50,39,000/- and

the assessee paid various charges including stamp duty totaling to Rs. 14,92,100/-. The assessee in the books of accounts capitalized the impugned property for a value of Rs. 23,92,100/- (Rs. 9,00,000 + Rs. 14,92,100) as addition to fixed assets. The AO treated the difference between the stamp duty value and the consideration accounted by the assessee as addition under section 69/69B of the Act and the CIT(A) confirmed the said addition.

5. The ld. AR submitted that purchase of property as part of family settlement does not amount to "transfer" and in this regard drew our attention to Schedule 2C of the agreement in which the impugned property is part of the list of assets (page 48 of PB serial no.12) to substantiate that the impugned transaction is carried out as part of family settlement. The ld. AR relied on the decision of Hon'ble Madras High Court in the case of CIT Vs. Kay ARR Enterprises and Ors (299 ITR 348) and CIT Vs. R. Ponnammal (164 ITR 706) in this regard and submitted the SLP against which are dismissed by Hon'ble Supreme Court (306 ITR 5). The ld. AR further submitted that the definition of "income" under section 2(24) of the Act does not cover the transaction where immovable property is purchased at a price lower than the market value fixed for stamp duty purposes. The ld. AR also submitted that there is no provision in law during the year under consideration to tax the difference between the market value for stamp duty purposes and the actual purchase price paid by the assessee as deemed income. In this regard, the ld. AR drew our attention to the provisions of section 56(2)(vii)(b) of the Act which provides for taxation of such deemed income to submit that the said section is applicable only in the case of individual and HUF and that the assessee being a company the deemed income could have been added in the hands of the assessee. The ld. AR submitted that section 56(2)(x) which was brought into legislature to pluck the loophole by including all classes of assessees is effective from AY 2017-

18 only and therefore not applicable for the year under consideration. The ld. AR placed reliance on CBDT Circular No.2/2018 dated 05.02.2018 in this regard.

6. The ld. AR also made an alternate submission that the addition in assessee's case is made under two sections namely section 69 and section 69B by the AO and that the provisions of both these sections are not applicable. In this regard the ld. AR submitted that section 69 applies to an investment that is not recorded in the books of accounts. In assesee's case it is submitted that the investment made in the impugned asset has already been recorded in the books of accounts of assessee and therefore, no addition could be made under section 69. With regard to applicability of section 69B the ld. AR submitted that the AO before making the addition, has to "find" that the assessee has actually "expended" an amount which is not been recorded in the books and only in that situation does the burden shifts to the assessee to furnish the satisfactory explanation. The ld AR further submitted that in assessee's case, the AO has made the addition without any evidence that the assessee has expended the amount beyond what is recorded in the books of accounts and has merely relied on the valuation for stamp duty purposes to make the addition under section 69B which is not correct. In this regard the ld AR placed reliance on decision of the Hon'ble Delhi High Court in the case of CIT Vs. Dinesh Jain HUF (352 ITR 629). The ld. AR therefore, summarized that on this count also the addition made by the AO is not tenable. The ld. AR further brought to our attention that in the case of M/s Tanirika Infrastructure Pvt. Ltd. a company that has obtained one of the properties as part of the same family settlement no addition has been made by the revenue and the explanation provided in that case on similar grounds has been accepted.

7. The ld. DR on the other hand, submitted that in the family settlement agreement where the lists of entities are part (page 41 of PB) the name of the assessee company is not there. Therefore, the ld. DR argued that the submission of the assessee that the purchase happened as part of the family settlement is not acceptable. The ld. DR further relied on the decision of the Bombay High Court in the case of B.A. Mohota Textiles Traders (P) Ltd. Vs. DCIT (2017) 82 taxmann.com 397 (Bom.) wherein it is held that artificial judicial person cannot be part of family settlement. Accordingly the ld DR submitted that the assessee being a company cannot be held to be part of the family settlement which can happen only between individuals. With regard to reliance placed by the ld. AR in the case of Dinesh Jain HUF (supra) towards addition made under section 69B the ld. DR submitted that the assessee's case distinguishable for the reason that the decision was rendered in the context of addition made based on wealth tax valuation and not valuation for the purpose of stamp duty. Therefore, the ld. DR submitted that the AO has correctly applied section 69B for the purpose of making addition.

8. We heard the parties and perused the material on record. The assessee is contending the addition made by the AO towards the difference between the stamp duty value and the sale consideration under section 69/69B of the Act with respect to purchase of property. The assessee's arguments against the addition are multi fold – (i) The addition cannot be made under section 69 or 69B, (ii) Section 56(2)(vii)(b) which brings to tax the difference between the stamp duty value and the sale consideration is not applicable to assessee being a company and that section 56(2)(x) inserted to make all assessee liable to tax towards such transaction is applicable only from AY 2017-18 and (iii) The impugned transaction which is part of a family settlement does not amount to "transfer". Revenue is contending on the ground that the corporate veil cannot be lifted for the purpose of transactions

entered into as part of family settlement entered into between individual members of the family. Therefore it is submitted that the purchase transaction entered into by the assessee is independent of the family settlement. The revenue is also making an alternate contention that assessee's name is not mentioned in family settlement Agreement and hence the submission of the assessee that the purchase as of family settlement is not a "transfer" is not correct.

9. With regard to whether the addition is sustainable under section 69 or 69B of the Act, we will first look at the relevant provisions which read as under

> ***Section 69 - Unexplained investments.***
> *Where in the financial year immediately preceding the assessment year the assessee has made investments which are not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of the investments or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year.*
>
> ***Section 69B - Amount of investments, etc., not fully disclosed in books of account.***
> *Where in any financial year the assessee has made investments or is found to be the owner of any bullion, jewellery or other valuable article, and the Assessing Officer finds that the amount expended on making such investments or in acquiring such bullion, jewellery or other valuable article exceeds the amount recorded in this behalf in the books of account maintained by the assessee for any source of income, and the assessee offers no explanation about such excess amount or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the excess amount may be deemed to be the income of the assessee for such financial year.*

10. The provisions of section 69 is clear that the addition under the said section can be made only towards those investments which are not recorded in the books accounts. In assessee's case it is an admitted fact that the purchase of the impugned property is recorded in the books of the assessee and therefore there is merit in the

contention that the addition could not have been made under section 69. Now coming to the question of whether addition could be made under section 69B, a careful reading of the section leads us to the interpretation that the AO has to "find" that the assessee has "expended" an amount which is more than the amount recorded in the books of accounts for the purpose of invoking section 69B of the Act. In this regard we notice that the Hon'ble Delhi High Court in the case of Dinesh Jain HUF (supra) has considered a similar issue of addition under section 69B of the Act where it has been held that the burden of providing satisfactory explanation to the AO by the assessee regarding the amount in excess of what is recorded in the books of accounts would arise after the AO first finds that the assessee has expended more that what is recorded in the books of accounts. From the perusal of the materials, we notice that the AO has not brought on record any evidence to support that the assessee has expended more than what is recorded in the books and has made the addition based on the valuation for stamp duty purposes. Therefore, we are inclined to agree with the contention of the assessee that addition towards the impugned transaction under section 69B of the Act could not have been made without the AO recording a finding that the assessee has spent more amount towards purchases than what is recorded in the books of accounts.

11. Even if the argument that the addition cannot be deleted merely for the reason that a wrong section is mentioned for making the addition, the only other sections as applicable to the relevant assessment year for making such addition is section 56(2)(vii)(b). Therefore before proceeding further we will look at the relevant provisions that read as under:

> ***Income from other sources.***
> ***56.*** *(1) Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income-tax under the head "Income from other*

*sources", if it is not chargeable to income-tax under any of the heads specified in section 14, items A to E.*

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

*(i) to (vi) ******

*(vii) where an individual or a Hindu undivided family receives, in any previous year, from any person or persons on or after the 1st day of October, 2009,—*

*(a) ****

*(b) any immovable property, without consideration, the stamp duty value of which exceeds fifty thousand rupees, the stamp duty value of such property;]*

12. From the above it is clear that the section is applicable to individuals and HUF and the assessee being a company the said section is not applicable. The legislature by subsequent amendment in Finance Act, 2017 introduced section 56(2)(x) to bridge this lacuna in the statute covering all types of assessees. However, it is relevant to notice that section 56(2)(x) is applicable only from AY 2017-18 and therefore, the addition towards the impugned transaction which happened during the year under consideration could not have been taxed under section 56(2)(x) of the Act.

13. With regard to the revenue's contention that the assessee's name is not appearing in the family settlement agreement our attention was drawn to sub-clause (iv) of clause 4 of the agreement to submit that is that the said clause also covers those entities which are majorly/solely owned by Shri Naresh Kotak. The relevant clause is extracted as under:

*"(iv) ensure that the immovable properties described in Schedule 2C, free from all encumbrances shall be transferred for a consideration of Rs. 1,00,00,000/- (Rupees One Crore only) by KK Entities owning these*

*immovable properties to such entities which are majority owned and solely controlled by NK and as may be designated by NK in this regard."*

14. It is also brought to our attention that the assessee company was incorporated prior to Family Settlement Agreement with 99.99% of the shareholding held by Shri Naresh Kotak. It is further noticed that the list of immovable properties described in schedule-2C contains the impugned property (page 48 of PB). Considering these facts, there is merit in the submission the assessee company is part of the settlement agreement though not specifically mentioned in the agreement and that the impugned transaction took place consequent to the family agreement. It is also relevant to notice that the Hon'ble Madras High Court in the case of Kay ARR Enterprises & Ors. (supra) while considering a similar issue has held that the transaction under a family settlement agreement do not amount to transfer and that the SLP filed by the Department against the said case has been dismissed by the Hon'ble Supreme Court. Therefore, in our considered view on this count also the addition made towards the impugned transaction is not tenable. In view of above discussion, we hold that the addition made by the AO towards difference between the stamp duty value and the sale consideration paid by the assessee towards purchase of the impugned property is to be deleted. Ground No. 1 to 6 raised by the assessee is allowed.

**Addition towards Income from House Property – Ground No. 7 & 8**

15. The assessee in the return of income has offered to tax the amount of Rs. 40,000/- i.e. Rs. 5000/- per month for eight months as Income from House Property. Though the property was vacant the assessee offered the income based on the deemed annual value of the property. The AO held that the deemed value is to be taken at Rs. 33,000/- per month based on the information received from the

Building Society under section 133(6) and held that Rs. 2,64,000/- is the correct deemed annual value of the property. Accordingly, the AO made an addition of Rs. 2,24,000/- towards the difference under the head "Income from House Property".

16. The ld. AR submitted that the municipal ratable value is the one that needs to be applied since the assessee has not let out the house and has not received any rent. In this regard the ld. AR placed reliance on the decision of the Co-ordinate Bench of the Tribunal in the case of Abhijit Rajan, Mumbai vs. ACIT (ITA No. 2483/Mum/2009 dated 27.04.2011). The ld. AR submitted additional evidences in support of the valuation fixed by Mumbai Municipal Corporation towards the ratable value of the impugned property. The ld. AR submitted that as per the additional evidence the municipal ratable value of the entire building of Simla House including the impugned flat is only Rs. 1,25,995/- and that the value adopted for the purpose of offering Income from House Property by the assessee is much more than the said value. Therefore, the ld. AR prayed for the admission of additional evidence and deletion of the addition considering the evidences.

17. The ld. DR vehemently opposed the admission of additional evidence and supported the order of the lower authority.

18. We have heard the parties and perused the material on record. The AO has not disputed the fact that the property remained vacant and that the assessee has not received any actual rent during the year under consideration. The AO made the addition based on the information received from the society in response to notice under section 133(6) of the Act stating that the impugned property could fetch a rent of Rs. 33,000/- per month. The contention of the assessee is that for the purpose of deemed income from House Property it is the Municipal Ratable Value

that needs to be considered and not the rent which the property is expected to receive by letting out. The additional evidence now submitted by the assessee in terms of ratable value fixed by Mumbai Municipal Corporation goes to the root of the issue. For a proper adjudication of the issue and for substantial cause, the additional evidence is admitted and taken on record. Since the lower authority did not have an opportunity to examine the additional evidence now submitted by the assessee we deem it fit to remit the issue back to the AO for fresh consideration. The AO is directed to examine the evidence submitted by the assessee and decide in accordance with law keeping in mind the decision of the Co-ordinate Bench in the case of Abhijit Rajan (supra). Needless to say that the assessee be given a proper opportunity of being heard. Ground No. 7 & 8 raised by the assessee are allowed for statistical purposes.

19. Ground No.9 with regard to levy of interest under section 234B is consequential and does not require separate adjudication.

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

*Order pronounced in the open court on 12-04-2024.*

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| ***Sd/-*** | ***Sd/-*** |
| **(VIKAS AWASTHY)** | **(PADMAVATHY S)** |
| **Judicial Member** | **Accountant Member** |

**SK, Sr. PS*

**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**