

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'E' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI RATNESH NANDAN SAHAY, ACCOUNTANT MEMBER**

**ITA No.287/MUM/2024
(Assessment Year :2016-17)**

Kulbirsingh Kirpalsingh Maker Shree Sawan Builders, Office No. 62 and 63, Mahavir Center 4 th Floor, Sector 17 Vashi, Mumbai - 400705	Vs.	Asst. Commissioner of Income Tax Circle 14 (3)(2), Mumbai Aayakar Bhavan, Maharishi Karve Road, Mumbai - 400020
PAN/GIR No.AACPM6760F		
(Appellant)	..	(Respondent)

Assessee by	Shri. Jayant R. Bhatt
Revenue by	Shri. P.D. Chougule
Date of Hearing	15/05/2024
Date of Pronouncement	22/05/2024

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeal has been filed by the assessee against order dated 05/01/2024 passed by NFAC, Delhi for the quantum of assessment passed u/s.143(3) for the A.Y.2016-17.

2. In the grounds of appeal the effective ground raised by the assessee which has been argued before us reads as under:-

3. Under the facts and circumstances of the case and in law the CIT (A) has erred in confirming an addition of Rs. 73,41,357/- against the addition of Rs. 1,19,56,980/- made by the AO by not appreciating the facts and materials on record.

4. Under the facts and circumstances of the case and in law the CIT (A) has erred in not considering the issue relating to disallowance of expenses of Rs. 2,88,086/- made by the AO by not appreciating the facts and materials on record.

3. The brief facts qua the issue are that assessee had acquired the ownership of commercial office in "Lodha Supremus". The assessee had agreed to purchase the said office premises with the builder at an agreed purchase price of Rs.2,60,55,100/- in the F.Y. 2012-13. In the application form dated 29/11/2012, the consideration value agreed was at Rs.2,60,55,100/- for Flat No. 0803. The carpet area of the flat was 1678 sq. ft. On the same date of application, assessee also paid earnest money of Rs.13,02,755/-. Based on this agreed consideration between the builder and the assessee and on payment of earnest money, the flat was allocated to the assessee. Thereafter, assessee made payment as per the schedule.

4. After the entire payment was made, registration of the property was done on 03/11/2015, wherein it was categorically mentioned that total consideration agreed was Rs. 2,60,55,100/- However, at the time of registration the stamp value duty was determined at Rs.3,80,12,000/-.

5. The ld. AO issued a show-cause notice to the assessee as to why the difference between the stamp value and the agreement value should not be added to the income u/s. 56(2)(viib). In

response, assessee submitted that assessee was allotted the property vide agreement dated 29/11/2012, and at that time the stamp value duty value was at Rs.2,28,17,456/- and assessee has brought at a higher value i.e. at Rs.2,66,55,100/-. Since the property was registered late, i.e., after three years, on 09/11/2015, the stamp value had increased to Rs.3,80,12,000/- and therefore, the difference would not be taxable as per the **first proviso** to **Section 50C**. However, the ld. AO rejected the assessee's claim and added difference after observing and holding as under:-

“The submission made by the assessee is considered but not acceptable. The assessee has claimed that agreement was finalized in 2012, however it is seen that assessee had merely submitted an application form. The terms and condition attendant to the application form clearly state that the application merely constitutes an offer by the applicant and does not confer or constitute any rights in favour of the applicant of allotment or acquisition. It also states that the company reserves the right to accept or reject the application at it's sole discretion and without assigning any reason for the same. The application form then mentions of many scenarios including where if the company is not in a position to commence construction not able to make available the unit, the amount of earnest money will be refunded back to the assessee with interest @ 9% pa. Hence it can be concluded that the said application form does not constitute any agreement as assessee has not been awarded the risks and reward associated with the ownership which is integral to consider transfer of any asset and the application form clearly precludes any rights to the assessee. Therefore the contention of the assessee that the stamp value as prevailing at the time of the agreement be considered for the purpose of section 56(2)(vii) is not acceptable. The rights and ownership have only been transferred at the time of registration and hence stamp duty value prevailing at that time will be taken into consideration.

Addition u/s 56(2)(vii) Rs. 1,19,56,980/-”

6. The ld. CIT(A) has decided the issue on entirely different footing and reasoning after incorporating all the details in the following manner:-

“However on perusal of the agreement and registration of the same it is seen that the stamp duty value of the property is Rs 3,80,12,000. This document is not available and was not produced during appeal proceedings. The assessing authority has taken the guideline value as on 2015 where bulk of the payment is made. Out of the total payment of Rs 30670643, only 17.42 % of the payment ie Rs 5345180 is made in Dec 2012/Jan 2013 the remaining payment is made from 3/11/2015 onwards. The registration of the property was done on 3/11/2015 and the assessing officer has taken the value as per the Registered deed, the stamp duty value prevalent on that date. The difference of Rs 7341357 is to be brought to tax instead of Rs 11956780. The taxpayer gets a relief of Rs 4615423. Since the registration of the purchase deed (in 2015) and the dt of agreement (2012-13) is beyond the limitation period as per General Clauses Act, the value as on the date of registration of the Purchase deed has to be reckoned. Considering the facts of the case the addition is upheld restricting it to Rs 7341357.”

7. After hearing both the parties and on perusal of the material placed on record, it is seen that, first of all assessee had made an application for the allotment of flat on 29/11/2022, however, in the application form the total consideration value was agreed to Rs.2,66,55,100/- between the builder and assessee. In the application form itself, flat No.803 was allotted and earnest money was also deposited by the assessee and after the deposit of such earnest money the flat was designated/ allocated to the assessee and in pursuance he had made the payment as per the agreed schedule which fact has also been noted at page No.5 of the appellate order. Once the agreed value was determined and decided by the builder and agreed by the assessee and the

builder and in lieu of that, specific flat was allocated, then it cannot be said that it is merely an application form and there was no such agreement value. The builder may have drafted the agreement / application in its own way, but the substance of the application and the conduct of the parties clearly shows that a particular unit was allotted alongwith agreed consideration and both the parties had acted upon such agreed consideration at the time. The registration 09/11/2015 which has the reference of the agreed consideration as per the application form dated 29/11/2012. Even if it has been treated as application form, but in fact, it is an agreed value as per the agreement. Once that is so, then the **proviso** to Section 56(2)(viib) squarely applicable which reads as under:-

(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 [but before the 1st day of April, 2017]-

(a)

(b) any immovable property,_____

(i) without consideration, the stamp duty value of which exceeds fifty thousand rupees, stamp duty value if such property;

(ii) for a consideration which is less than the stamp duty value of the property by an amount exceeding fifty thousand rupees, the value of such property as exceeds such consideration:

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;

8. Thus, the **proviso** clearly carves out exception 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, i.e., they are on different dates, then the stamp duty value on the date of agreement has to be taken for the purpose of this sub-clause. As noted above, the agreed value between the builder and the assessee as on 29/11/2012 which was Rs. 2,60,55,100/- and that time the stamp duty value was far less, i.e., Rs.2.28 Crores. Thus, at the time of agreement the agreed value was much higher than the stamp value. Once the builder gets the Occupation Certificate and hands over the possession over the flat after three years and if by that time, the stamp value on the date of registration has increased, then it does not mean that the stamp value on the date of registration alone should be taken. Thus, the difference which has been taken by the ld. AO between the agreed value and the stamp duty value on the date of registration is deleted. Accordingly, the ground raised by the assessee are allowed.

9. In so far as the other ground relating to disallowance of expenses of Rs. 2,88,086/-, the same has not been pressed by the ld. Counsel at the time of hearing, therefore, the same is dismissed as not pressed.

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

Order pronounced on 22nd May, 2024.

Sd/-
(RATNESH NANDAN SAHAY)
ACCOUNTANT MEMBER

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Mumbai; Dated 22/05/2024

KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai