

**IN THE INCOME TAX APPELLATE TRIBUNAL**

**"A" BENCH, MUMBAI**

**BEFORE SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER AND**

**SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER**

**ITA no.752/Mum./2024**  
**(Assessment Year : 2014-15)**

**Shree Ajay Bhagwati Chauhan**

2901, 62<sup>nd</sup> Floor, "B" Wing,  
One Avighna Park, Mahadev  
Palav Marg, Currey Road (East)  
Mumbai-400112  
PAN – AAIPC8961A

..... Appellant

v/s

**Deputy Commissioner of Income  
Tax, Circle-5(1)(1)**

Room No. 568, 5<sup>th</sup> Floor Aayakar  
Bhawan, Maharishi Karve Rd,  
New Marine Lines, Churchgate,  
Mumbai-400020

..... Respondent

Assessee by : Shri Gaurav Kabra  
Revenue by : Shri Sunny Kachwaha

Date of Hearing –28/05/2024

Date of Order – 06/06/2024

**ORDER**

**PER SANDEEP SINGH KARHAIL, J.M.**

The present appeal has been filed by the assessee challenging the impugned order dated 28/12/2023, passed u/s 250 of the Income Tax Act, 1961 ("*the Act*") by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, [*learned CIT(A)*], for the assessment year 2014-15.

2. In this appeal, the assessee has raised following grounds:-

*"1. On the facts and circumstances of the case as well as in law, the Learned CIT(A) has erred in confirming the action of Learned Assessing Officer in making an addition of Rs.1,99,90,000/- as alleged undisclosed income on the plea that the appellant has paid on money on the purchase of the flat, without considering the facts and circumstances of the case.*

*2. On the facts and circumstances of the case as well as in law, the Learned CIT(A) has erred in confirming the action of Learned Assessing Officer in making an addition on the basis of third party statement without providing the opportunity of cross-examination and without complying with the provisions of law."*

3. The only grievance raised by the assessee, in the present appeal, pertains to addition of Rs.1,99,90,000/- as undisclosed income u/s 69 of the Act.

4. The brief facts of the case pertaining to this issue, as emanating from the record are: The assessee is an individual and derives income under all the heads except "*Profit & Gains from Business or Profession*". For the year under consideration, the assessee filed its return of income on 25/07/2014 declaring a total income of Rs.53,53,380/-. The return filed by the assessee was initially processed u/s 143(1) of the Act without variation in the income returned. Subsequently, on the basis of the information received from DDIT (Inv.), Unit 8(3), Mumbai, the case was selected for scrutiny after the approval of the Chief Commissioner of Income Tax, in view of the CBDT Instruction No. 8 of 2015. The aforesaid information, received from the DDIT (Inv.), Mumbai revealed that the search and seizure action was conducted in the case of M/s. Nish Developers Pvt. Ltd., who was developing premium residential apartments under the project name "*One Avighna Park*". During the course of the aforesaid search action, a pen drive and loose papers were seized from the residential premises of the main person of the company, Shri Pravin Mishra, an

employee of Shri Kailash Agarwal, the main promoter of M/s. Nish Developers Pvt. Ltd. In his statement recorded under oath, Shri Pravin Mishra accepted that M/s. Nish Developers Pvt. Ltd., generated unaccounted receipts. Further, as per the details in the pen drive seized during the course of aforesaid search action on M/s. Nish Developers Pvt. Ltd., it was noted that Rs.199.90 lakh was paid in cash by the assessee as "on money" to M/s. Nish Developers Pvt. Ltd., during the financial year 2013-14. Accordingly, on the basis of the aforesaid information, the assessee was asked to provide the details of flat booked, area of the flat, copy of the registered agreement, total purchase consideration as per the agreement, details of payment made to M/s. Nish Developers Pvt. Ltd., and source of the same. The assessee was further asked to explain as to why the sum of Rs.199.90 lakh should not be brought to tax u/s 69 of the Act. In response thereto, the assessee provided the requisite details and vehemently objected to the addition as proposed in the notice issued u/s 142(1) of the Act. The Assessing Officer ("AO") vide order dated 16/12/2016 passed u/s 143(3) of the Act did not agree with the submissions of the assessee and held that the same cannot be accepted in view of the statements recorded under oath by the Director and staff of M/s. Nish Developers Pvt. Ltd, and the findings of the Investigation Wing. Accordingly, the sum of Rs.199.90 lakh was added to the total income of the assessee as undisclosed income u/s 69 of the Act.

5. The learned CIT(A), vide impugned order, after taking into consideration the decision of the Co-ordinate Bench of the Tribunal in the case of M/s. Nish Developers Pvt. Ltd, held that the fact of receipt of "on money" has been confirmed by the Tribunal. Accordingly, the learned CIT(A) dismissed the

appeal filed by the assessee on this issue and upheld the addition of Rs.199.90 lakh made by the AO. Being aggrieved, the assessee is in appeal before us.

6. During the hearing, the learned Authorised Representative ("*learned AR*") submitted that the assessee furnished all the details as sought by the AO during the assessment proceedings. It was further submitted that in the case of M/s. Nish Developers Pvt. Ltd., the Tribunal has held that pen drive seized during the course of search action cannot be relied to make any addition on account of "*on money*". The learned AR submitted that the AO has merely relied on the information received from the Investigation Wing and made no independent inquiry.

7. On the other hand, the learned Departmental Representative ("*learned DR*") vehemently relied upon the order passed by the lower authorities and submitted that the statement of Shri Pravin Mishra and Shri Kailash Agarwal, recorded during the course of search action, was provided to the assessee. However, the assessee has not found fault with any of the statement of the above two persons. The learned DR by referring to the decision of the Tribunal in M/s. Nish Developers Pvt. Ltd., submitted that though the Tribunal did not agree with making the addition merely on the basis of the information found in the pen drive, however, directed the AO to determine the quantum of "*on money*" by comparing the average rate of sale of each year with the transaction value.

8. In his short rebuttable, the learned AR submitted that before the learned CIT(A), the assessee has raised an additional ground on the basis that no

addition can be made in the present case, as it has purchased the flat @ Rs.29,310 per sq.ft as compared to the cost inflation indexed rate of Rs.28,975/- during the year, in view of directions of the Tribunal in M/s. Nish Developers Pvt. Ltd.

9. We have considered the submissions of both sides and perused the material available on record. In the present case, it is undisputed that the assessee has booked one flat in the project "One Avighna Park", developed by M/s. Nish Developers Pvt. Ltd., in the year under consideration. The information was received from the Investigation Wing that the search and seizure action was conducted in the case of M/s. Nish Developers Pvt. Ltd., wherein pen drive and loose papers were seized and statements of employee and the promoter of M/s. Nish Developers Pvt. Ltd., was recorded. On the basis of information and statement, it was found that "on money" in cash was received by M/s. Nish Developers Pvt. Ltd., from various buyers, including the assessee who paid Rs.199.90 lakh in cash as "on money" to M/s. Nish Developers Pvt. Ltd., during the financial year 2013-14. From the record, it is evident that the aforesaid information was confronted to the assessee and details regarding the booking of the aforesaid flat were sought from the assessee. Further, the assessee was asked to explain the source of payment made to M/s. Nish Developers Pvt. Ltd. It is further evident from the record that the statement of the employee, i.e. Shri Pravin Mishra, and main promoter, i.e. Shri Kailash Agarwal, was also provided to the assessee during the appellate proceedings before the learned CIT(A), and the assessee did not find fault with any of the statement. Thus, from the above, it is discernible that

the AO made an independent inquiry upon receipt of the information from the Investigation Wing, and in the absence of satisfactorily response from the assessee proceeded to make the addition of Rs.199.90 lakh u/s 69 of the Act. As a result, ground no.2 raised in assessee appeal is dismissed.

10. We find that the search and seizure action in the case of M/s. Nish Developers Pvt. Ltd., culminated into addition on account of receipt of "*on money*" in the hands of the M/s. Nish Developers Pvt. Ltd., for the assessment years 2011-12 to 2015-16. The Co-ordinate Bench of the Tribunal vide order dated 12/03/2021 passed in M/s. Nish Developers Pvt. Ltd. Vs. DCIT, in ITA. No.3131/Mum./2018, etc., for the assessment years 2011-12 to 2015-16, after examining the documents and data found in the pen drive as well as the statements of Shri Pravin Mishra and Shri Kailash Agarwal came to the conclusion that the pen drive cannot be relied to make the "*on money*" addition in the hands of M/s. Nish Developers Pvt. Ltd., as the name of the customers were not matching with the data in the pen drive and also the fact that the amounts mentioned against the various flats purchasers were having glaring and huge variations. Further, the Co-ordinate Bench held that since the pen drive was recovered from the premises of the employee of M/s. Nish Developers Pvt. Ltd., therefore, the onus is on the Revenue to prove that the data in the pen drive related to the affairs of the of M/s. Nish Developers Pvt. Ltd. However, the Co-ordinate Bench noted that the selling rates of the flats are varying from Rs.20,000/- per sq. ft. to Rs.30,000 per sq. ft. and such pattern suggest that there may be some involvement of "*on money*" in these transactions. Accordingly, in order to meet the ends of justice, the Co-ordinate

Bench directed the AO to examine the average rate of sale of flat on yearly basis and to make the addition on account of "on money", if the average rate is found to be higher than the transaction value, to the extent of the difference between the two rates. The relevant finding of the Co-ordinate Bench, in the aforesaid decision, is reproduced as under: -

*"28. In the present case also during cross examination before AO during assessment proceeding, Mr Pravin Mishra admitted that he has prepared all this data on his own imagination which is not related to the assessee. The cross examination being conducted in the presence of the AO, the AO has also not reexamined Mr Pravin Mishra, thus acceding to the same. In case the AO was not convinced of the said statement, he ought to have re-examined or carried out further investigation to gather further evidences for substantiating his stand. Therefore, considering the facts of the case and judicial pronouncements in this regard, the order of CIT(A) on the issue of pen drive cannot be accepted. Considering all these facts of the assessee, we are of the view that the order of Ld. CIT(A) applying a blanket rate of 20% on the on-money calculated on the basis of data in the pen drive wherein the name of the customers were not even matching with the data in the pen drive and also the fact the amounts mentioned against the various flats purchasers having glaring and huge variations and that the pen drive was recovered from the premises of the employee of the assessee, the onus is on the Revenue to prove that data in pen drive are related to affairs of the assessee. Though the AO has not done his duty to determine correct income of the assessee by carrying out proper investigation of the case, yet the Tribunal being highest fact finding body is equally duty bound to determine correct income of the assessee based on the facts available on record. Considering the statement of third parties and sales pattern of the assessee as submitted before us by the assessee as also before the authorities below, we observe that the selling rate of the flats in the assessee's project is varying from Rs.20,000 per sq Ft to Rs.30,000 per sq. ft. during this period. Such variation pattern suggest that there may be some involvement of on-money in these transactions. This fact was also admitted by five buyers in their statement recorded U/s 132(4) of the Act during the course of search. Therefore to meet ends of justice, it would be reasonable to determine on-money by comparing average rate of sale for each year with the transaction to determine on-money for the period upto the date of search for all 71 flats sold during this period, as out of 72 flats one of the flat was cancelled. In other words as per data available on records, average rate for A Y 2011-12 works out to Rs.22,214/- so any flats sold during this year lower than this rate, the difference should be considered as on-money received on account of sale of the said flat. In our considered this aspect needs to be examined at the level of AO to ascertain the amount of on-money. Accordingly, we set aside the order of Ld CIT(A) on this issue and direct the AO to examine working of average sale rate on the basis of sales data on yearly basis and determine on-money for A Y 2011-12 to A Y 2014-15 on the same lines. Needless to mention that the AO will give sufficient opportunity of hearing to the assessee."*

11. Therefore, from the careful perusal of the aforesaid decision of the Co-ordinate Bench rendered in the case of developer itself, i.e. M/s. Nish Developers Pvt. Ltd., it is evident that the Co-ordinate Bench did not quash the entire addition on account of receipt "on money" in the hands of the developer, rather directed the AO to restrict the addition only to the extent of difference between the average rate of sale and the actual transaction value, if the average rate is found to be higher than the transaction value. Thus, we do not find any merit in the submission of the learned AR that merely because the pen drive found during the course of search in the case of M/s. Nish Developers Pvt. Ltd., has been found to be of no evidentiary value by the Tribunal, therefore, the addition in the present case be deleted.

12. We find that in the light of the findings, as noted foregoing paragraph of the Co-ordinate Bench, the assessee raised an additional ground before the learned CIT(A) that the cost inflation index rate for the assessment year 2014-15 comes to Rs.28,975/-, whereas the assessee has purchased the flat @ of Rs.29,310/- per sq.ft., and therefore, applying the ratio of the Co-ordinate Bench rendered in M/s. Nish Developers Pvt. Ltd. (supra), no addition should be made in the hands of the assessee. The learned CIT(A), vide impugned order, dismissed the additional ground raised by the assessee by observing as under: -

*"18. Ground no. 6, being additional ground is now taken up for adjudication. In this the appellant has stated that the rate of Rs.22,214/- adopted by the Hon'ble ITAT in the case M/s. Nish Developers for A.Y. 2011-12 should be taken as the base and should be adjusted with the cost inflation index. According to the appellant, the rate of Rs.22,214 comes to index rate of Rs.28,975/- for A.Y. 2014-15 whereas the appellant has purchased at the rate of Rs.29,310/-. In this manner, the appellant has argued that no addition could be made.*

*18.1 I am unable to agree with this argument of the appellant. As is well known, the property rates keep varying. Sale price of a particular flat depends on location, direction, floor, view available and various other factors. There have been several instances where property prices have appreciated significantly in a short period of time. For instance, between 2009 and 2010, property prices more than doubled. Thus, adoption of cost inflation index is not the most appropriate measure. Had it been so, all the prices would be uniformly increasing which is not the case in real life.*

*18.2 In the case of M/s. Nish Developers, the Hon'ble ITAT had adopted a generalized rate in view of the fact that the said entity was assessed based on real income theory, after excluding reasonable expenses. The same logic does not hold true for the appellant who has a bounden duty to explain the source of cash payment of Rs.199.90 lakhs. Hence, ground no. 6 stands dismissed."*

13. We though agree with the findings of the learned CIT(A) that the property rate keeping varying and cost inflation index is not appropriate measure, however, it is pertinent to note that the aforesaid decision rendered in M/s. Nish Developers Pvt. Ltd. (supra) also covered the year under consideration before us and the Co-ordinate Bench had directed the AO to examine the working of average sale rate on the basis of sale data for each year and make the addition on account of "on money" receipt to the extent of difference between the said average sale rate and the actual sale transaction value. However, it is evident from the record that the learned CIT(A) though has placed reliance upon the aforesaid findings of the Co-ordinate Bench, rendered in para no. 28 of the order, to deny deletion of addition on account of payment of "on money", however, did not proceed to examine the working of average sale rate on the basis of sale data for the assessment year 2014-15. Further, it is evident that the assessee has also compared transaction value with the cost inflation index rate instead of the average sale rate for the year under consideration.

14. Therefore, in view of the facts and circumstances of the present case as noted in the foregoing paragraphs, we deem it appropriate to restore this issue to the file of the Jurisdictional AO for adjudication in terms of the decision rendered in para no. 28 by the Co-ordinate Bench of the Tribunal in M/s. Nish Developers Pvt. Ltd. (supra). We further direct that if the average sale rate for the assessment year 2014-15 of the flat is found to be lower than the actual transaction value in the case of the assessee, then no addition on account of "on money" be made in the hands of the assessee. However, if the average sale rate is found to be higher than the actual transaction value, then the difference should be considered as "on money" paid in cash for the purchase of the flat and added to the total income of the assessee u/s 69 of the Act. Needless to mention no order shall be passed without affording reasonable opportunity of hearing to the assessee, and the assessee be granted the opportunity to respond to any information/documents relied upon by the AO. Accordingly, the impugned order is set aside and ground no.1 raised by the assessee is allowed for statistical purposes.

15. In the result, the appeal by the assessee is partly allowed for statistical purposes.

Order pronounced in the open Court on 06/06/2024

**Sd/-**  
**NARENDRA KUMAR BILLAIYA**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SANDEEP SINGH KARHAIL**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 06/06/2024**  
Vijay Pal Singh, (Sr. PS)

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The PCIT / CIT (Judicial);*
- (4) *The DR, ITAT, Mumbai; and*
- (5) *Guard file.*

True Copy

By Order

Assistant Registrar  
ITAT, Mumbai

