

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

**BEFORE SHRI PRASHANT MAHARSHI, ACCOUNTANT MEMBER AND  
SHRI ANIKESH BANERJEE, JUDICIAL MEMBER**

**ITA 4462/Mum/2023  
(Assessment year : 2011-12)**

<b>Income-tax Officer, Mumbai</b> Room No.753, Kautilya Bhavan, G-Block, Bandra Kurla Complex, Bandra East, Mumbai-400 051	<b>vs</b>	<b>Ankit Umakant Agarwal</b> A-102/103, Raghav Building Vasant Valley, Film City Road Malad East, Mumbai-400 067 <b>PAN : AJXPA6367N</b>
<b>APPELLANT</b>		<b>RESPONDENT</b>

Assessee by : Shri Vimal Punmiya  
Respondent by : Shri Manoj Kumar Sinha (SR.DR.)  
Date of hearing : 08/07/2024  
Date of pronouncement : 11/ 07/2024

**ORDER**

**PER ANIKESH BANERJEE, J.M:**

Instant appeal of the revenue is preferred against the order of the National Faceless Appeal Centre, Delhi [for brevity, 'Ld.CIT(A)'] passed under section 250 of the Income-tax Act, 1961 (in short, 'the Act'), for Assessment Year 2011-12, date of order 11.10.2023. The impugned order was emanated from the order of the Id. Income-tax Officer, Ward 30(1)(1), Mumbai (in short, 'the A.O.') passed under section 143(3)r.w.s. 147 of the Act, date of order 23/12/2016.

2. Brief facts of the case are that the assessee, in individual capacity, filed the return of income by declaring total income Rs.2,43,525/-. On receipt of information from the assessee's father's case that the father has paid Rs.6 crores to M/s Nish Developers Pvt Ltd for purchase of two flats for his two sons, viz. Mr. Ankit Agarwal and Mr. Amit Agarwal. Accordingly, the assessee's case was reopened by pursuing notice U/s 148 of the Act. During the course of proceedings, the assessee denied any cash transaction or any on-money payment to the developer. But Ld.AO has not accepted the assessee's plea and added back the entire amount of Rs.3 crores with the total income of the assessee as unexplained investment under section 69 of the Act. Being aggrieved the assessee filed an appeal before the Id. CIT(A). The Ld.CIT(A) has considered the submission of the assessee and the entire cash payment was added back on the basis of the statement of the directors of the company, Mr. Pravin Mishra and Shri Kailash Agarwal of M/s Nish Developers Pvt Ltd. The Ld.CIT(A) quashed the assessment order and deleted the additions. Being aggrieved by the appeal order, the revenue has filed appeal before us.

3. The revenue has taken the following grounds of appeal:-

*"1. Whether in the facts and circumstances of the case and in law, the Hon'ble CIT (A) erred in deleting the addition of Rs. 3,00,00,000/- made u/s 69 of the Act ignoring the fact that the said amount was paid as on money for purchase of residential Flat in the name of the assessee and his sibling though cash belonged to his father.*

*2. Whether in the facts and circumstances of the case and in law, the Hon'ble CIT (A) erred in not considering the weight of incriminating evidence in the form of electronic data In seized pen drive and other physically seized documents*

*pursuant to the scare/? in the case of M/s Nish Developers whose main promoter Sh. Kailash Agarwal also admitted to receiving more than Rs. 178.43 crores as on money In cash on safe of Flats in project "One Avighna Park"? in which the assesses also acquired residential flat for which on money amounting to Rs. 3,00,00,000/- had been paid.*

3. *Whether in the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in deleting the addition made u/s 69 and thereby failed to appreciate that addition u/s 69 being that of unexplained investment can be appropriately made in the hand of the assesses who is legal owner of such investment even though on money was paid by his father.*

4. *The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary."*

4. The Ld.DR argued and relied on the impugned assessment order. The Ld.DR further argued that the entire amount which was paid by the assessee to the developer is duly accepted by his father. So, the addition should be sustained.

5. The Ld.AR filed a written submission (in short APB) which is kept on record. The Ld.AR argued and placed that the assessee has purchased this property with a consideration amount to Rs.3,61,00,000/-.Entire amount was paid through banking channel. The statement recorded from Mr. Kailash Agarwal and Mr. Pravin Mishra regarding alleged receipt of cash from assessee's father without appreciating the fact that nowhere in the said statement of Shri Umakant Agarwal, assessee's father, the name of the assessee is reflecting for payment of cash. The Ld.AR further placed that the Ld. AO had recorded reasons for reopening on 23.12.2016 regarding escapement of income of Rs.3,00,00,000/- in project levels. The date of allotment of respective flat has been regarded as the date of receipt of on

money which is recorded in the reasons as 31.12.2013. The actual date of registration of flat no. 2301, B-wing One Avighna Park, lower Parel issued by Nish Developers Pvt. Ltd. is dated 31.12.2013. The Payment receipts reflecting the bank statements of the assessee was issued in AY 2011-12 and thus the reasons recorded are factually wrong. The alleged document is an unsigned loose sheet of paper which cannot be taken as evidence as it is not books of account of the party. Thus, the alleged document impounded during survey u/s 133A r.w.s. 132(4) is not a reliable document on which the Ld. AO can rely and make additions. Also, the statement of Shri Kailash Agarwal and Mr. Pravin Mishra has not been provided in full, only an extract of the statement has been provided. Thus, the statements cannot be used as evidence against the assessee.

6. The Ld. AR argued and placed that the issue is squarely covered by the order of the co-ordinate bench of ITAT, Mumbai in the case of **Yash Synthetics Pvt Ltd vs AICT13(3)(2), ITA 268/Mum/2024** date of pronouncement **18/06/2024**. The relevant paragraphs 9 & 10 are reproduced as below:-

*“9. In the instant case, the facts are not in better footing at all on account of following reasons:- (a) The impugned document was found during the course of survey operations. (b) The accountant and director has admitted the entries in the statement taken u/s 133A of the Act, which does not have any evidentiary value. (c) The dates mentioned in the document did not match with actual dates of allotment or registration. (d) As observed by the co-ordinate bench in the above said case, the entries made in the document falls short of certain material facts, viz. date and mode of receipt of “on money”,*

*who had paid the money, to whom the money was paid, date of agreement etc.*

*10. In view of the foregoing discussions, we are of the view that the impugned addition of Rs.1.61 crores made by the AO is not sustainable in law. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete the above said addition.”*

7. We heard the rival submission and considered the documents available in the record. The entire addition of Rs.3 crore was made on the basis of the statement recorded by the Id. AO from the developer. The statement of the assessee’s father was duly retracted and filed an affidavit which is annexed in APB pages 37 to 41 duly executed on 17/04/2014. In the affidavit, the assessee’s father has denied for any payment of cash to the developer related to purchase of the said property. The assessee paid Rs.3,61,00,000/- for purchase of the said property and the reflection of payment is in the bank account in HDFC Bank bearing account No.02121000007645 and the copy of the bank account is Annexed in APB pages 16 to 32. Here we reproduce the observation of the Ld.CIT(A) as below: -

*“5. Vide ground no 1 and 2 of the appeal, appellant has challenged that the learned Assessing Officer erred in law and facts in framing the impugned assessment order without complying the mandatory conditions as envisaged u/s. 147 to 151 of the Income Tax Act, 1961. The learned Assessing Officer erred in adding Amounting to*

*Rs.3,00,00,000/- as unaccounted cash u/s, 69 of the income Tax Act, 1961. The addition was solely Made on the basis of third Party statement/ information received from the Investigation wing and disregarding all the vital facts.*

*5.1 During the course of appellate proceedings notices for hearing were issued to the appellant on 15.01.2021, 04.04.2022, 12.04.2022 and 06.10.2023. Appellant filed its submission. Relevant portion of the same is reproduced as under:*

*"With refer&nce to above and on behalf of our above named client, we would like to Humbly Submit your honor the Submission as well as applicable legal judgements which support the appellant's case :-*

- 1. The Appellant filed the return of income on 30.07.2011 declaring total income at Rs. 2,42,525/-. The appellant had three sources of income salary income.*
- 2. Capita! gain and interest income in the captioned year.*
- 3. During the assessment proceedingsthe learned Assessing OfficerhasInquired for various documents and details. AH such documents and supporting details were submitted to the honourable Learned Assessing Officer vide number of submissions filled during the said proceedings.*
- 3. it was alleged against the appellant that Third Party Mr. Praveen Mishra and SM Kaitash Agarwal of Nish Developers Pvt. Ltd. statement was recorded u/s. 132 More the I. T authorities and they were indulged in unaccounted receipt in Nish Developers Pvt, Ltd. Further it was alleged that Cash amounting to R\$. 600 lakh were paid*

*by Mr. Umkant Agrawal (Father of the Appellant) against Booking of flat to M/s. Nish Developers Pvt. Ltd.*

*4. Appellant did not have any cash transaction with the said Mr. Praveen Mishra and/or Mr. Kailash Agarwal. If, for whatever reason, they have named Appellant: and made such baseless and atrocious allegations, Appellant requested the learned Assessing officer to allow Appellant an opportunity to cross examination of statement given by Mr. Praveen Mishra and Shri Kailash Agarwal (Third Party). The request of appellant was not fulfilled by the learned assessing officer. The appellant has personally attended the office of learned assessing officer on 14th December 2016 for cross examination of both parties but it could not happen.*

*5. The Learned Assessing Officer had heavily relied on the Third Party statements. These statements were recorded at the back of the Appellant.*

*Further the teamed assessing officer has not provided Complete statement of Mr.Praveen Mishra and Mr., Kailash Agarwal, the said statements have been made the basis of re-opening of assessment of appellant. The request to provide a statement from the Third Party was not fulfilled by the Learned Assessing officer.*

*6. Both the said Incomplete statements again prove Appellant's claim that ;Appellant never had any sort of cash transactions with Mr. Praveen Mishra and/or Shri Kailash Agarwal. Appellant's name was not appearing anywhere in the said statements as well.*

*7. The reasons recorded by learned assessing officer for reopening the assessment u/s 143(3) r.w.s. 147 was based on no material hence clearly unsustainable. There was no valid reason to reopen the completed assessment for the relevant assessment year and accordingly the jurisdiction u/s. 147/148 of the Act was wrongly assumed by the learned assessing officer and the reopening is void ab initio.*

*8. It is a settled law that it is mandatory for the Assessing Officer to confront the assessee with any material collected by the Assessing Officer at the back of the assessee, and in case of statement of third party recorded at the back of the assessee, opportunity of cross examination has to be offered to the assessee. failing which the said material/statement etc, will be rendered unreliable and additions made on the basis of such material/statement etc. shall be rendered illegal. Reference in this regard can be made from the decisions made in the following judiciary ruling.*

- *R.B, Shreeram Durga Prasad 176ITR 169 (SC),*
- *Kishan ChandChellaram Vs. C.I.T. (1980) 125ITR 713(SC)*
- *Jindal Vegetable (order of Hon'ble Delhi High Court in ITA no. 428 of 2007, 174Taxmann 440 (Raj,)*

*Laxman Bhai Pate/ {order of Hon'able Gujarat High Court dated 22.07.2008 in ITR no. 41/1997).*

*9. Without Prejudice to above Retraction statements of Shri Hal/ash Agarwal and Mr. Praveen Mishra were filed to learned assessing officer on the basis of which re-opening has been made.*

*10. Further, on the basis of actual facts, Appellant further wants to state as under:*

*Appellant has personally purchased / booked one flat with M/s. Nish Developers Pvt. Ltd. All payments made are duly reflecting in the Books of Account since the same have been made through proper banking channels only.*

*11. There is nothing on record to link the baseless a/legations made by learned Assessing officer on the Appellant. Appellant was not a party to the referred proceedings, whose findings have been the basis of addition made by the teamed Assessing officer, it was also not clear as to how the entries in these alleged documents have been corroborated and found to be authentic vis a vis Appellant even without confronting the same for once.*

*12. There were no cash payments made by appellant, there would be no question of withdrawal of the money from the bank for the same.*

*To prove the same, the appellant submitted the bank statement of the bank accounts at the time of Re- Assessment proceeding to show that no cash had been withdrawn during the said period.*

*13. In this regard it would be very much relevant to note your honour various fact and also to appreciate the probability of preponderance looking to the nature of transaction and the documentary evidence submitted before the learned Assessing Officer, copies of which are also submitted with you honour:-*

*Annexure-I*

*14. The Learned Assessing Officer could not controvert the factual material and documentary evidence placed by the appellant during the assessment proceeding and he could not bring anything contrary on record to negate the documentary evidences furnished by the appellant*

*15. Further, following legal position/ Judicial rulings on the subject under consideration must be considered before arriving at any fair conclusion:-*

*1. Recently in a similar case that of the Appellant, the honorable IT AT Delhi in the case of /TO, Ward 15 (2) vs. M/s. Rakam Money Matters P. Ltd. has held that "AO has to bring on record any valid material or evidence to discredit the evidences and the explanation given by the*

*Appellant company and cannot rely only on statement of Third Parties recorded by the investigation wing.*

*II. In the case of CIT v/s. Premsons 37 DTR 150 the Hon'able ITAT, Mumbai, following the above decision, observe as under- ....In order to make an addition on the basis of surrender during search or survey, it is sine qua non that there should be some other material to correlate the undisclosed income with such statement.....”*

*III. It was also held by the Hon'ble High Court of Madras in the case of CIT v. K. Bhuvanendra and others (2008) 303 ITR 235 (Mad.) that, addition of undisclosed income could not be made in the hands of Appellant solely on the basis of statement made by a Third Person at the time of survey or search, more so when the statement was not voluntary statement and has been retracted. A statement made by a third person at the time of survey or search of another concern could not be relied upon as he is not the controlling person of that concern and no corroborative evidence was found in that search.*

*IV. In the year 2008, In the case of Shri Pranab Mukherjee (Former Hon'ble President of India), Hon'ble ITAT held that Third Party statement and/or Diary could not be made basis of formation of belief for re-opening of assessment and the additions. Revenue must have had cogent or sufficient material evidence on record to support the re-opening of assessment and the additions.*

1. *Recently a Pit was filed in the Hon'ble Supreme Court by a NGO supported by teamed Lawyer Shri Prashant Bhusan to order to CBDT/CVC to reveal the name of politician/other persons who were paid illegally by "Sahara Group" and "Aditya Btrla Group" who were supposedly named in the diaries/loose paper found in the Income Tax Raid. The Hon'ble Supreme Court dismissed the plea for a court- monitored independent investigation and held that the voluminous documents seized by the IT department "constituted random loose sheets of paper on the basis of which high public functionaries occupying important offices cannot be subjected to investigation."*

*Thus treating the Diary/loose Papers not credible /reliable enough to proceed.*

16. *With the Facts and Ruling as discussed above. It is therefore submitted to your honour that the addition made by the teamed AO should be deleted."*

7. Considering the submissions of the Ld.AR, there is no evidence found that the payment was made by cash amount of Rs.6 crores for two brothers. No date is properly mentioned to establish the cash trail. We appreciate the observation of the Ld.CIT(A) in impugned appeal order. In our considered view, the entire addition was made on the basis of the statement recorded under section 132(4) by the Ld.AO from the developers. There is no such any concurrent evidence found for on-money transaction in between the assessee or assessee's father with

the developers. Accordingly, we find no reason for intervening in the impugned appeal order. The appeal of the revenue is dismissed.

8. In the result, the appeal of the revenue bearing **ITA No.4462/Mum/2023** is dismissed.

Order pronounced in the open court on 11<sup>th</sup> day of July, 2024.

Sd/-

(PRASHANT MAHARSHI)  
ACCOUNTANT MEMBER

Mumbai, दिनांक/Dated: 11/07/2024  
Pavanan

sd/-

(ANIKESH BANERJEE)  
JUDICIAL MEMBER

**Copy of the Order forwarded to:**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकरआयुक्त CIT
4. विभागीयप्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,  
Mumbai
5. गार्डफाइल/Guard file.

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BY ORDER,

(Asstt. Registrar), **ITAT, Mumbai**