

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

**BEFORE: SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
&
SHRI RAJ KUMAR CHAUHAN, JUDICIAL MEMBER**

**ITA No.1018/Mum/2024
(Assessment Year :2018-19)**

M/s.BKS Galaxy Realtors LLP (Erstwhile BKS Galaxy Private Limited) 1301/1302, Bhumiraj Costarica Sector-18, Sanpada Navi Mumbai	Vs.	Deputy Commissioner of Income Tax Central Circle 3(2) Mumbai 1913, 19 th FLOOR Air India Building Nariman Point Mumbai Maharashtra- 400 021
PAN/GIR No.ABBFB0621Q (Erstwhile PAN: AACCB8390D)		
(Appellant)	..	(Respondent)

**ITA No.2276/Mum/2024
(Assessment Year :2018-19)**

Deputy Commissioner of Income Tax Central Circle 3(2) Mumbai 1913, 19 th FLOOR Air India Building Nariman Point Mumbai Maharashtra- 400 021	Vs.	M/s.BKS Galaxy Realtors LLP (Erstwhile BKS Galaxy Private Limited) 1301/1302, Bhumiraj Costarica Sector-18, Sanpada Navi Mumbai
PAN/GIR No.ABBFB0621Q (Erstwhile PAN: AACCB8390D)		
(Appellant)	..	(Respondent)

Assessee by	Ms. Ritika Agarwal
Revenue by	Shri Ashok Kumar Ambastha
Date of Hearing	03/07/2024
Date of Pronouncement	31/07/2024

आदेश / O R D E R

PER B.R. BASKARAN (A.M):

These cross appeals are directed against the order dated 23-02-2024 passed by Ld CIT(A)-51, Mumbai and they relate to the assessment years 2018-19. Both the parties are in appeal in respect of addition relating to alleged unaccounted receipts. The assessee is contending one more addition relating to disallowance of professional fees.

2. The facts relating to the case are stated in brief. The assessee is engaged in the business of construction of commercial and residential buildings. A survey operation u/s 133A of the Act was conducted in the hands of the assessee on 26.11.2019. During the course of survey, a piece of paper containing the details of sale of five flats was found and impounded. Based on the information found in the above said piece of paper, the AO made additions of unaccounted income. Further, the AO also disallowed the expenditure claimed towards payment of professional fees. The Ld CIT(A) granted partial relief in respect of unaccounted income and confirmed the addition relating to professional fees. Hence, both the parties are in appeal before the Tribunal on the issues decided against each of them.

3. We shall first deal with the issue relating to the addition of undisclosed income. During the course of survey operation, a piece of paper was found in the office drawer of one of the directors named Shri Sanjay Gawande. It contained details of sale of following five flats:-

Flat No.	Name of Purchaser
A-803	Shri Sajjan Garg
A-1001 & 1002	Smt Preetika Goyal
B-1001 & 1002	Smt Meenu Garg

It also contained the details of sale consideration in the form cheque payment and cash payment. The AO verified the ledger account copies of these parties and noticed that the cheque payment alone has been accounted in the books. Accordingly, he took the view that the cash payments noted down in the paper represents undisclosed income of the assessee. The assessee stated that the above said persons did not ultimately buy the flats mentioned above. The AO noticed that the Flat no. A-803 was subsequently purchased by another person named Shri Naveen Sharma for a consideration of Rs.1,26,92,982/- on 23.9.2018. However, the sale agreement was found to have been entered on 01-12-2019 for an amount of Rs.91.92 lakhs only, which was lesser than the amount of Rs.98.48 lakhs mentioned against Shri Sajjan Garg. On the basis of these information, the AO concluded that the assessee is involved in suppression of its sale receipts, by receiving part of sale consideration in cash and not offering the same for taxation.

4. When enquired about the same, the director of the company Shri Sanjay Gawande expressed his ignorance about the entries made in the piece of paper. Further, as noticed earlier, the assessee submitted that all these parties have cancelled the bookings, i.e., these five flats have not been ultimately purchased by the above said persons. The AO did not accept the same. He noticed that

- (a) the assessee has sold the flats at different rates to various persons.
- (b) there was difference between the agreement value and the ready reckoner rates.

The AO also issued notices u/s 133(6) of the Act to various buyers, but most of them did not reply. Even though two buyers named Shri Pandurangaiah Dontu and Shri Maneesh Vemula had replied to the AO, the assessing officer did not discuss anything about the reply given by the above said two persons. The AO also issued notices to HDFC Bank and SBI, but they also did not respond to the notices.

5. Under these circumstances, the AO took the view that the assessee would have received unaccounted receipts on sale of all flats. Accordingly, he proceeded to estimate the unaccounted receipts that could have been received by the assessee on a particular basis, i.e., the AO noticed that the difference between the Actual consideration noted down in the piece of paper and the Ready Reckoner value in respect of five flats, viz., A-803, A-1001 & 1002 and B-1001 & 1002 worked out to "55.25% on the Ready reckoner value". Accordingly, the AO grossed up the ready reckoner value of each of the flat and compared the same with the agreement value. If the

agreement value was lower than the computed value, the AO treated the same as unaccounted receipts. For example

(a) In respect of Flat No.1003, the Ready reckoner value was Rs.82,40,500/-. The Grossed up value computed by the AO was Rs.1,27,89,256/-. The agreement value was Rs.1,17,28,070/-. Hence the difference amount of Rs.10,61,186/- (Rs.1,27,89,256/- (-) Rs.1,17,28,070/-) was treated as unaccounted receipts.

(b) In respect of Flat No.902, the Ready reckoner value was Rs.59,28,500/-. The Grossed up value computed by the AO was Rs.92,01,032/-. The agreement value was Rs.1,00,00,000/-. Since the agreement value was more than the grossed up value computed by the AO, no addition would arise.

In the above said manner, the AO computed the unaccounted receipts for 40 flats. The aggregate amount of probable unaccounted receipts computed by the AO worked out to Rs.7,73,15,067/- and the AO added the same to the total income of the assessee.

6. In the appellate proceedings, the Ld CIT(A) took the view that the profit element involved in the unaccounted sale consideration should alone can be assessed. Accordingly, he held that the assessing officer was not right in assessing the entire amount of unaccounted sale consideration. The Ld CIT(A) estimated the profit rate at 25.04% and applied the same to the above worked out unaccounted receipts, which worked out to Rs.1,93,59,693/-. Accordingly, the Ld CIT(A) directed the AO to restrict the addition to the above said amount.

7. The revenue is aggrieved by the relief granted by Ld CIT(A) and the assessee is aggrieved by the decision of Ld CIT(A) in partially sustaining the addition.

8. We heard the parties on this issue and perused the record. We noticed that the AO has made this addition entirely on the basis of a piece of paper found from the drawer of the table of one of the directors of the assessee. The said paper contained details relating to sale price, cheque amount, cash amount of five flats viz., A-803, A-1001 & 1002 and B-1001 & 1002. Since the cheque amount alone was found to be recorded in the books of accounts, the AO presumed that the cash component mentioned in the paper represents unaccounted receipts.

9. Hence the moot question that arises is whether the above said piece of paper can be considered to be a credible evidence in the eyes of law in order to prove the receipt of unaccounted money by the assessee in respect of all the flats sold by it. In our view, it cannot be considered to be a credible evidence for the following reasons:-

(a) First of all, we notice that neither the assessee nor its directors has accepted the contents of the piece of paper.

(b) The director Shri SanjayGawande has stated that he has scribbled something in the paper and it has nothing to do with the contents of the page, meaning thereby, it is the contention of the assessee that it cannot be presumed that cash has been received over and above the cheque amount. When the assessee disowns the contents of the paper, it would be imperative for the AO to bring some other corroborative and credible material on record to prove the

contents of the paper. We notice that the AO did not bring any material on record.

(c) It is pertinent to note that the persons, against whose names the entries have been noted down, have not ultimately purchased the flats. When the concerned sale of flats has not taken place, then we are of the view that the AO could not have given credence to the piece of paper at all. The reason is explained in the next point.

(d) When the assessee is constructing and selling many flats, the agreement for sale is entered with each of the buyers on the basis of negotiation done with each of the buyers. Hence each of the sales is a separate contract and the price for which the flat is sold would depend upon the price finalized between the assessee and each of the buyer upon negotiation. Hence, there is no basis to presume that the assessee would have received cash component in each of the sale.

(e) We notice that the assessing officer has made enquiries with some of the buyers of the flat. He has stated that the reply was received from two of the buyers, but the AO has not discussed anything about them, meaning thereby, it should be presumed that those two buyers did not give any adverse reply. The Ld A.R submitted that the buyers listed in serial numbers 21 to 35 at pages 26 and 27 of the assessment order have sent replies stating that they have received flats in "shell" condition only, meaning thereby, these buyers have carried out finishing works at their own cost. There is no evidence to show that any of these buyers have stated that they have paid cash over and above the agreement value.

(f) Since the transaction involves sale of flats, the assessee would be receiving cash, only if it is paid by the buyers. If none of the buyers have paid the cash, then there will be no question of receiving cash by the assessee.

(g) In any case, it is settled proposition that the question of extrapolation of unaccounted income shall arise only if

(i) the seized material shows that there was a definite pattern in generating unaccounted income;

(ii) the said material is a credible and reliable one and

(iii) the assessee has either accepted the contents of the seized material or there are material to show that the contents cannot be disregarded.

We notice that none of the above ingredients is present in the facts of the present case.

10. We may refer to some of the judicial decisions relied upon by Ld A.R in this regard, which support our view:-

(a) In the case of CIT vs. Dolphin Builders (P) Ltd (2013)(356 ITR 420), the Hon'ble Madhya Pradesh High Court held that though there may be some doubt about the price of the flats, but until and unless it could have been proved by some evidence, aforesaid doubt cannot take place of proof. Until and unless such noting is corroborated by some material evidence, the Assessing Officer erred in making addition in the income.

(b) In the case of CIT vs. Discovery Estates (P) Ltd (2013)(356 ITR 159)(Delhi), the Hon'ble Delhi High Court has

laid down following principles for making additions towards unaccounted sale receipts:-

“The power of the assessing officer to raise valid queries on the basis of the facts or unusual features noticed by him must be conceded. The features noticed by him in the assessee's business certainly constitute a starting point of inquiry. They are, however, not to be taken as evidence or material showing any suppression or understatement of the sale price. If on further probe, the assessing officer was able to unearth any evidence or material on the basis of which actual suppression of the sale price could be found, then the additions made on that basis would be valid. Even if the evidence does not show the precise amount of suppressed sale price, but shows clearly and categorically that there was understatement of sale consideration, that would be sufficient to empower the assessing officer to reject the account books as being incorrect and incomplete. He may thereafter make an estimate of the profits of the business to the best of his judgment, on the basis of the evidence unearthed by him revealing suppression of sale price. But it is not open to him, merely on the basis of what he perceives to be the market conditions, to make additions to the sale price or the profits, without any evidence of understatement.”

In the instant case, the noting made in the piece of paper did not fructify into sale of flats. Apart from the above said material, the assessing officer did not have any other material

in his possession to show that the assessee has received sale consideration over and above the agreed price. The enquiries made by the AO with some of the buyers did not also show that the assessee was suppressing sale receipts.

(c) In the case of CIT vs. Metro Construction Company (Income tax Appeal No.2339 of 2013 dated 6th January, 2016)(Bom), the Hon'ble Bombay High Court observed as under with regard to extrapolation of income:-

“7. We are of the view that the decision of the Apex Court in Esufali, H M Abdulali (supra), would have not application to the present facts. It was a case of the regular books, i.e., bills etc being disowned by the assessee and the Authority resorting to best judgement assessment. This is not a case of (not)(sic.) a best judgment assessment and wherever documents indicate that there was some additional consideration received by the respondent assessee, the same was offered to tax. However, in the absence of any evidence merely on the basis of suspicion, it is not open to add any amount as income. It is pertinent to note that the Counsel for the Revenue, was unable to explain the basis on which only the consideration received in respect of 37 flats was added to the extent of Rs.500/- per sq.ft and not in respect of certain other flats when there was no evidence in both the above class of cases. No explanation is forthcoming nor found in the orders.”

The jurisdictional High Court has observed that the addition relating to additional consideration should be restricted to the evidences found and should not be extrapolated.

11. In view of the foregoing discussions, we are of the view that the AO did not have any credible material with him to support the impugned addition of Rs.7,73,15,067/-. Further, as held by the Hon'ble jurisdictional Bombay High Court, the AO could not have resorted to extrapolation on the basis of assumptions and presumptions, in the facts of the present case. Hence the entire addition of Rs.7,73,15,067/- is liable to be deleted. Since we have deleted the entire addition, the question of estimation of the profit on the above said amount does not arise. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete the addition of Rs.7,73,15,067/- made by him.

12. The remaining issue relates to the disallowance of professional fee of Rs.27,25,000/- made by the AO on the reasoning that the assessee did not prove the nature of services rendered by the persons to whom the above said amount was paid.

13. The AO noticed that the assessee has paid professional fees to two persons named Mohammed Arif and Naseem Bano. In support of the same, the assessee produced the bills raised by them upon the assessee. The bills mentioned the description of services as "Professional fees for arranging debt funding for Greenwoods at Kharghar for PNB HFL Project". The assessee had deducted TDS from the above said

payments. The AO issued notices to the above said two persons, but they did not respond to them. The AO also noticed that the recipients have not filed any return of income. The assessee also did not furnish details of their professional qualification and their ability to render the stated professional services. Hence, the AO took the view that the assessee has failed to prove incurring of the professional fees and accordingly disallowed the claim of Rs.27,25,000/-. The Ld CIT(A) also confirmed the same.

14. The Ld A.R reiterated the submissions made before the tax authorities. She submitted that the assessee has furnished the copies of bills raised by both of them. She said that these payments were made in connection with arranging debts for the assessee from PNB Housing finance, since these persons could negotiate the debt for the assessee from the above said finance company. Further, TDS has also been deducted from the above said payments. She further submitted that the failure of the recipients to respond to the notices issued by the AO and their failure to file return of income cannot be basis to reject the claim. She submitted that the assessee has incurred the professional fees wholly for the purpose of business and hence, the tax authorities are not justified in disallowing the same.

15. The Ld D.R, on the contrary, supported the orders passed by the tax authorities on this issue.

16. We heard the parties on this issue and perused the record. The assessee has paid the professional fees to two

persons mentioned above. Both of them have raised bills upon the assessee and the payments have been made to them through banking channels. The reason for the payment of professional fee is stated to be for the purposes of arranging debt funds from PNB Housing Finance. We notice that the assessee has furnished financial statements in pages 7 to 40 of the paper book. The details of Long term borrowings are given in Note no.4 placed at page 24 of the paper book. A perusal of the same would show that the assessee has obtained additional loans from PNB Housing Finance during the year under consideration. The opening balance of the loan from the above said finance company was Rs.5.17 crores, while the closing balance was Rs.44.36 crores. It is further stated that the assessee has obtained loan of Rs.43 crores during the current year from PNB Housing Finance. It is the submission of the assessee that the professional charges of Rs.27.25 lakhs was paid to the above said two persons in connection with arranging above said loan of Rs.43 crores. Considering the quantum of loan, the above mentioned professional charges appear to be at reasonable rates.

17. We notice that the AO has disbelieved the payment of professional fee only for the reason that the recipients did not respond to the notices issued by him u/s 133(6) of the Act to them. Further, the AO has found that these two persons have not filed their return of income. Admittedly, the professional fees have been claimed by the assessee u/s 37(1) of the Act. As per the provisions of sec.37(1), Any expenditure (not being

expenditure of nature described in section 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee, laid out or expended wholly and exclusively for the purposes of business or profession shall be allowed in computing the income chargeable under the head 'Profits and gains of business or profession'. There cannot be any dispute that the initial onus to prove the expenditure claimed by the assessee is placed upon the assessee. In the instant case, in our view, the onus has been discharged by the assessee by showing that the professional fee has been paid for a purpose, which is also corroborated from the financial statements. Further the payments have been made through banking channels and TDS has also been deducted. On the contrary, the AO has disbelieved, as stated earlier, for the failure of the recipients to file return of income or to respond to the notices issued by the AO. In our view, in the facts and circumstances of the case, the assessee cannot be penalized for the failure, if any, of the recipients mentioned above. It is well settled proposition that the assessing officer cannot sit upon the arm chair of the business man and dictate the manner of conducting business. If the recipients of professional fees are able to arrange loan funds for the assessee, then a business man would necessarily pay fees. In the instant case, we notice that loan of Rs.43 crores was obtained by the assessee from PNB Housing finance and the professional fees has been paid for negotiating the above said loan. Accordingly, we are of the view that the AO was not justified in disallowing the claim of payment of professional

we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete the disallowance of professional fees.

18. In the result, the appeal of the assessee is allowed and the appeal of the revenue is dismissed.

Order pronounced on 31/07/2024 by way of proper mentioning in the notice board.

Sd/-
(RAJ KUMAR CHAUHAN)
JUDICIAL MEMBER

Sd/-
(B.R. BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated 31/07/2024
KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai