IN THE INCOME TAX APPELLATE TRIBUNAL

NAGPUR BENCH, NAGPUR

BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER AND

SHRI K.M. ROY, ACCOUNTANT, MEMBER

ITA no.227/Nag./2022
(Assessment Year : 2017–18)

ITA no.228/Nag./2022
(Assessment Year : 2019–20)

Shree Maya Real Estate Pvt. Ltd.
25, Red Cross Road, Sadar, Nagpur 440 001 ……. Appellant
PAN – AAJCS1078E

v/s

Dy. Commissioner of Income Tax
Circle–2(1), Nagpur ……. Respondent

Assessee by : Shri Naresh Jakhotia
Revenue by : Shri Abhay Y. Marathe

Date of Hearing – 07/08/2024	Date of Order – 02/09/2024

O R D E R

PER K.M. ROY, A.M.

The present appeal has been filed by the assessee challenging the impugned order dated 31/05/2022, passed by the learned Commissioner of Income Tax (Appeals)–3, Nagpur, [*"learned CIT(A)"*], for the assessment year 2017–18 and 2019–20.

ITA no.227/Nag./2022
Assessee's Appeal – A.Y. 2017–18

2. In its appeal, the assessee has raised following grounds:–

"1. Reopening of the assessment and resultant assessment proceeding as completed is illegal, invalid violative of the principal of natural justice and deserve to be quashed as per law.

2. On the facts and circumstances of the case & in law, the learned AO has grossly erred and CIT (A) has grossly erred in confirming the addition of Rs. 57,68,020 as Income U/s 43CA of the Income Tax Act-1961 which is illegal and which deserves to be deleted in the interest of justice.

3. Assessee pray to kindly allow to add, amend, modify, alter, revise, substitute, delete any or all grounds of appeal, if deemed necessary at the time of hearing of the appeal."

3. Insofar as the issue of re–opening of assessment under section 147 of the Income Tax Act, 1961 *("the Act")* is concerned, before us, the learned Authorised Representative (*"the A.R."*) did not make any argument. Consequently, the issue of re–opening of assessment in ground no.1, is dismissed.

4. Ground no.2, relates to addition of ₹ 57,68,020, on account of income under section 43CA of the Act.

5. Facts in brief:– The assessee filed its return of income for the year under consideration on 30/10/2017, declaring a total loss of ₹ (-) 1,06,13,791. A survey under section 133A of the Income Tax Act, 1961 (*"the Act"*) was conducted at the premises of M/s. Tirupati Developers. Based on certain incriminating documents found and impounded during the survey operation, the case of the assessee was re–opened under section 147 of the Act after recording the reasons as required by section 148(2) of the Act and obtaining necessary sanction under section 151 of the Act. Accordingly, a notice under section 148 dated 12/02/2021, was issued and duly served upon the assessee through e-mail requiring it to furnish the

return of income. In response to notice under section 148 of the Act, the assessee, vide its reply dated 12/03/2021, stated that to treat his return of income filed under section 139(1) on 05/10/2017, as return filed in compliance of the notice under section 148 of the Act. Accordingly, notice under section 143(2) was issued on 16/12/2021, and notices under section 142(1) of the Act were issued, calling for information to the assessee from time to time and served upon assessee. The Assessing Officer examined the impounded documents and found that page no.6 to 24 of Annexure A–2/35 is copy of sale deed dated 31/05/2016 of land at Khasra no.83, Mouza Dongargaon, P.S.K. 73, having area of 2.63 hectares, Nagpur between the assessee and M/s. Tirupati Developers. As per the sale deed, value of the immovable property adopted by the stamp duty authority is ₹ 7.20 crore whereas the sale consideration paid by the assessee is only ₹ 3.50 crore, and thus there was a difference of ₹ 3.70 crore between the market value of the property adopted by Stamp Duty Authority and the actual sale consideration attracted the provision of section 43CA of the Act. Thus, the Assessing Officer completed the assessment vide order dated 24/03/2022, and has made the addition of ₹ 57,68,020, under section 43CA of the Act. The Assessing Officer has thus determined the total loss as ₹ (–) 48,45,771. Aggrieved by the assessment order, the assessee filed appeal before the first appellate authority. Aggrieved, the assessee carried the matter in appeal before the first appellate authority.

6. The learned CIT(A) confirmed the order passed by the Assessing Officer by observing as follows:–

"During the appellate proceedings, the appellant's AR has filed a detailed written submission. I have carefully gone through the submission filed by the AR, the assessment order and material available on record. It is noted that the appellant's AR has filed the same submission before the AO. It is seen that the appellant's case clearly comes under the purview of section 43CA of the Act. The market value of the immovable property as per the DVO's report is Rs. 4,07,68,020 whereas the value as per the actual sale consideration mentioned in the Sale Deed is Rs.3,50,00,000/-. The difference between the two, i.e., Rs.57,68,020/– is more than 10% of the actual sale consideration and therefore the appellant's case clearly falls under the purview of section 43CA of the Act. In the written submission filed by the appellant's AR, it has been argued that section 43CA cannot be applied in the appellant's case since the property has certain disadvantages. All these facts have been carefully considered by the DVO while determining the market value and therefore, no further relief can be given on this account. The appellant's AR has also referred to certain judicial decisions in support of the arguments. It is seen that the facts and circumstances involved in the cited cases are totally different from the facts involved in the appellant's case. Therefore, the appellant cannot get relief.

Hence, having considered the facts and circumstances of the case, I am of the firm belief that the AO was correct in making the addition of Rs. 67,68,020/- u/s. 43CA of the Act. Therefore, the addition made by the AO is upheld.

Hence this ground of appeal raised by the appellant is hereby "dismissed".”

The assessee being once gain aggrieved, is in appeal before the Tribunal.

7. Before us, the learned A.R. furnished his brief synopsis, which read as under:–

"1. Assessee has sold an immoveable property for Rs. 825,00,000/- against its stamp duty valuation of Rs. 13,49,20,000/-. The fair market value of the property was assessed at Rs. 8,82,68,020/-by the Departmental Valuation Officer (DVO) on a reference made by Assessing Officer.

The detail of the transaction is summarized as under:–

Sr. no.	*Particulars*	*Rupees*
1.	*Actual Sale Price*	*825,00,000*
2.	*Stamp Duty Valuation*	*13,49,20,000*
3.	*Valuation as per DVO*	*8,82,68,020*

2. The immoveable property sold was an agricultural land with following Khasara Number:

a) KH. No. 85/1 & 85/2
b) KH. No. 72
c) KH. No. 83

3. MOU for the sale of the property between the Assessee and the buyer (M/s. Tirupati Developers) was done by single agreement on 20/07/2015. The copy of the same was submitted during assessment proceeding as well as during appellate proceeding before CIT(A).

The MOU between the Assessee and buyer is not in dispute.

4. The property with above Khasara Numbers was purchased by the Assessee from M/s. Grace Realities (India) Pvt Ltd by single sale deed only on 14/08/2013. The copy of the purchase deed was submitted during assessment proceeding as well as during appellate proceeding before CIT(A).

5. The property purchased by the Assessee was litigation and disputes and as a result, Assessee was not able to find the buyer for the property until 2016. The sale by the Assessee was a distress sale as such and the transaction was fully buyer dominated transaction.

6. At the instance of the buyer, the sale deed of above property was executed in 3 parts as under:

a) KH. No. 85/1 & 85/2 - Sale deed done on 29.03.2016.

b) KH. No. 72- Sale deed done on 29.03.2016.

c) KH. No. 83-Sale deed done on 31.05.2016.

7. The DVO has given the valuation reports in 3 parts as the sale deed was done in 3 parts.

8. The details of the valuation given by the DVO vis–a–vis actual sale price and stamp duty valuation is summarized as under:–

Sr. no.	*Sale Deed Date*	*Kh. No.*	*Area Hec.*	*Stamp Duty Value*	*Actual Sale Amount*	*DVO Report*	*Difference*
1.	*29/03/2016*	*85/1 & 85/2*	*0.81 & 0.81*	*40600000*	*32400000*	*32400000*	*0.00*
2.	*29/03/2016*	*72*	*0.73*	*22320000*	*15100000*	*15100000*	*0.00*
3.	*31/05/2016*	*83*	*2.63*	*72000000*	*35000000*	*40768020*	*0.00*
Total			*3.36*	*134920000*	*82500000*	*88268020*	*5768020*

9. Learned AO has taken each sale deeds in isolation and not as part of one complete deal as per MOU executed on 20.07.2015. The sale deed executed on 31/05/2016 was having the FMV of Rs. 407,68,020/-as against actual

sale value of Rs. 350,00,000/-. The difference of Rs. 57,68,020/- was taxed U/s 43CA.

10. While passing the Assessment order, the Learned AO & respected CIT (A) has failed to appreciate the following facts:

a) The sale deed executed was the part of one single sale transactions of MOU on 20.07.2015.

b) The transaction was buyers dominated transactions and the sale deed was required to be done as per the convenience and comfort of the buyer.

c) The property was having lot of litigation and disputes and any denial or rejection could have been fatal to the interest of the Assessee."

8. We have given a thoughtful consideration to the arguments made by the rival parties and perused the material available on record. The sale of three plots must be considered on an aggregate basis as these are contiguous portion of the same piece of land which has been purchased by a common deed. Only at the time of sale, three deeds were executed covering two financial years as per prudent commercial consideration and have also been sold a single purchaser. The transactions are not independent and should be viewed as a whole on an aggregate basis to have a holistic view. The details of transactions of an aggregate basis are summarised as under:–

S.no.	*Particulars*	*Amount (₹)*
1.	*Actual Sale Price*	*₹ 8,25,00,000*
2.	*Stamp Duty Valuation*	*₹ 13,49,20,000*
3.	*Valuation as per DVO*	*₹ 8,82,68,020*

9. In view of the valuation as per DVO being lower than the stamp duty valuation, the comparison has to be made between actual sale price and the valuation as per DVO. The difference is ₹ 57,68,020. Such difference is

6.99% of the actual sale price. The difference within tolerance band of 10% and the application of such band will relate from 01/04/2014. The case of the assessee is covered by the order dated 02/07/2021, passed by the Co–ordinate Bench rendered in Stalwart Impex Pvt. Ltd. v/s ITO, ITA no.5752/ Mum./2019, for the assessment year 2016–17. The relevant part of the order is reproduced below:–

> *"Both sides heard, orders of authorities below examined. The solitary issue assailed by the assessee is addition made u/s 43CA of the Act in respect of difference between agreement value of the flats and market value determined by the DVO. The value of flats as per assessee, Stamp Duty Value and value as determined by the DVO are tabulated herein under:*

Sr. no.	*Flat no.*	*Agreement value (in ₹)*	*Stamp Duty Value (in ₹)*	*Fair Market Value as determined by DVO (in ₹)*	*Difference (in ₹)*
1.	*E–1/404*	*30,92,250*	*34,04,000*	*32,27,000*	*1,34,750*
2.	*D–2/702*	*32,24,750*	*40,40,000*	*37,36,000*	*5,11,250*
3.	*F–1/502*	*33,94,500*	*35,39,000*	*34,30,000*	*35,500*
	Total	*97,11,500*	*1,09,83,000*	*1,03,93,000*	*6,81,500*

> *The difference between agreement value and value determined by DVO is Rs.6,81,500/-. In terms of percentage the difference is 7% approximately. The short contention of the assessee is that where the difference between the agreement value and the market value is less than 10% no addition should be made.*
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> *5. Similar issue had come up before the Tribunal in the case of Radhika Sales Corporation (supra). The Tribunal deleted the addition by observing as under:*
>
> > *"5. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. The solitary issue raised in the appeal by the assessee is against the addition of Rs.10,38,000/- on account of difference in Long Term Capital Gain declared by the assessee and computed by the Assessing Officer after considering the DVO's valuation report. It is an undisputed fact that the assessee has disclosed sale consideration of the land as Rs.1,10,00,000/-. During the scrutiny assessment proceedings reference was made to DVO for the valuation of property. The DVO vide report dated 30-12-2013 determined the fair market value of the property as Rs.1,20,38,000/-. The difference between actual sale consideration declared by the assessee and the fair market value determined by the DVO is approximately 9.43%. We find that the Co-ordinate Bench of the Tribunal in the case of Dattatraya Kerba Lonkar Vs. Deputy Commissioner of Income Tax (supra) after considering various*

decisions including the decision rendered in the case of Rahul Constructions Vs. Deputy Commissioner of Income Tax (supra) and the judgment of Hon'ble Patna High Court in the case of Bimla Singh Vs. Commissioner of Income Tax (supra) has held as under:

> *"8. We find merit in the submission of Ld. A.R. The difference between the fair market value determined by the DVO and actual sale consideration is Rs.7,14,530/- i.e slightly more than 2 per cent of the sale consideration. The co-ordinate Bench of the Tribunal in the case of Rahul Construction V/s. DCIT (supra) has held that where difference between the sale consideration declared by the assessee and fair market value as determined by the DVO u/s 50C is less than 10 percent, the Assessing Officer was not justified in substituting the value determined for sale consideration disclosed by the assessee. The Co-ordinate Bench after considering the provisions of Section 50C of the Act and the provision of section 23A and 24(5) of the Wealth Tax Act held as under :-*
>
> > *"13. A combined reading of the above provisions shows that the valuation adopted by the DVO is subject to appeal and the same is not final. In the instant case we find that as Aagainst the value of Rs. 28,73,000/- adopted by the stamp valuation authorities, the DVO has determined the FMV on the date of transfer at Rs. 20,55,000/- . This itself shows that there is wide variation between the two values. Further, the value adopted by the DVO is also based on some estimate. We find that the difference between sale consideration shown by the assessee at Rs.19,00,000/- and the FMV determined by the DVO at Rs.20,55,000/- is only Rs. 1,55,000 which is less than 10 per cent. The Courts and Tribunals are consistently taking a liberal approach in favour of the assessee where the difference between the value adopted by the assessee and the value adopted by the DVO is less than 10 per cent.*
> >
> > *14. We find that the Pune Bench of the Tribunal in the case of Asstt. CIT V/s. Harpreet Hotels (p) Ltd. vide ITA Nos. 1156-1160/pn/2000 and relied on by the learned counsel for the assessee had dismissed the appeal filed by the Revenue where the CIT(A) had deleted the unexplained investment in house construction on the ground that the difference between the figure shown by the assessee and the figure of the DVO is hardly 10 percent.*
> >
> > *15. Similarly, we find that the Pune Bench of the Tribunal in the case of ITO V/s. Kaaddu Jayghosh Appasaheb, vide ITA No.441/PN/2004 for the asst. yr 1992-1993 and relied on by the learned counsel for the assessee following the decision of the J&K High Court in the case of Honest Group of Hotels (P) Ltd. V/s CIT (2002) 177 CTR (J&K) 232 had held that when the margin between the value as given by the assessee and the Departmental valuer was less than 10 per cent , the different is liable to be ignored and the addition made by the A.O cannot be sustained.*
> >
> > *16. Since in the instant case such difference is less than 10 per cent and considering the fact that valuation is always a matter of estimation where some degree of difference bound to occur, we are of the considered opinion that the A.O. in the instant case is not justified in substituting the sale*

> *consideration at Rs.20,55,000 as Against the actual sale consideration of Rs.19,00,000/- disclosed by the assessee. We, therefore, set aside the order of the CIT(A) and direct the A.O. to take Rs.19,00,000/- only as the sale consideration of the property. The grounds raised by the assessee are accordingly allowed."*
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> *9. The ld. A.R of the assessee has further placed reliance on the decision of Hon'ble Patna High Court in the case of Bimla Singh V/s. CIT (supra) wherein Hon'ble High Court has held that difference between the cost of construction shown by the assessee and as determined by the Assessing Officer being less than 15 per cent, the same is to be ignored for the purposes of addition. The Hon'ble Delhi High Court in the case of CIT V/s. Sadna Gupta 352 ITA 595 held that unless and until there was some other evidence to indicate that extra consideration had flowed in transaction for purchase of property, report of DVO could not form basis of any addition on part of revenue. In absence of any evidence no reliance could be placed on the report of DVO for making addition.*
>
> *10. Thus, in view of the fact that the difference between sale consideration and the market value determined by the DVO is not substantial and is approximately little over 2 per cent of the actual sale consideration, we find no reason for rejecting actual sale consideration mentioned in the Sale Deed for determining long term capital gain. Accordingly, the ground No.1 raised in appeal by the assessee is allowed. The Assessing Officer is directed to adopt actual sale consideration as mentioned in the Sale Deed as a fair market value for determining the long term capital gain."*
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> *6. In the light of the facts of the case and the decisions discussed above, we find merit in the submissions of assessee. In the present case, since difference between the value declared by the assessee and the value determined by the DVO is less than 10%, no addition in respect of Long Term Capital Gains is warranted. The findings of Commissioner of Income Tax (Appeals) on this issue are accordingly, set aside and the appeal of assessee is allowed."*

It would be relevant to mention here that the aforementioned decision was rendered with reference to provisions of Section 50C of the Act. The addition in the instant case is made u/s 43CA of the Act. I find that the provisions of both the sections are pari materia, except that the provisions of section 43CA operate in respect of consideration received on transfer of an asset (other than capital asset) being land or building or both and provisions of section 50C are attracted on transfer of capital assest being land or building or both. Hence, the decision rendered u/s.50C of the Act giving leverage of minor variation, in the value declared by the assessee and the stamp duty value would equally hold good for variation in the value u/s 43CA of the Act. Thus, from the above decision it can be safely deduced that where the difference between sale consideration declared by the assessee and stamp duty value of an asset (other than capital asset) being land or building or both is less than 10%, no addition under section 43CA of the Act is warranted.

6. Here, it would be relevant to mention that the Finance Act 2018 has inserted a proviso to sub-section (1) of section 43CA providing 5% tolerance limit in variation between declared sale consideration vis-a-vis

stamp duty value for making no addition. Similar proviso was inserted by the Finance Act 2018 to sub-section (1) to section 50C of the Act. The said tolerance limit band was enhanced from 5% to 10% by the Finance Act 2020 w.e.f. 01/4/2021. The Tribunal in the case of Maria Fernandes Cheryl vs. ITO (International Taxation) reported as 123 taxmann.com 252 (Mumbai) after considering various decision and the CBDT Circular No. 8 of 2018 dated 26-12-2018 held, that the amendment is retrospective in nature and relates back to the date of insertion of statutory section to the Act. The relevant extract of the observations made by the Bench reads as under:

> *" 7. …… The insertion of the third proviso to Section 50C(1) provides for this tolerance band with respect to a certain degree of variations between the stamp duty valuation and the stated consideration of an immovable property. In other words, as long as the variations are within the permissible limits, the anti-avoidance provisions of Section 50C do not come into play. As we have noted earlier, the CBDT itself accepts that there could be various bonafide reasons explaining the small variations between the sale consideration of immovable property as disclosed by the assessee vis-à-vis the stamp duty valuation for the said immovable property. Obviously, therefore, disturbing the actual sale consideration, for the purpose of computing capital gains, and adopting a notional figure, for that purpose, will not be justified in such cases. On a conceptual note, an estimation of market price is an estimation nevertheless, even if by a statutory authority like the stamp duty valuation authority, and such a valuation can never be elevated to the status of such a precise computation which admits no variations. The rigour of Section 50C(1) was thus relaxed, and very thoughtfully so, to take these bonafide cases of small variations between the stated sale consideration vis-à-vis stamp duty valuation, out of the scope of adjustments contemplated in the computation of capital gains under this anti-avoidance provision. In our humble understanding, it is a case of a curative amendment to take care of unintended consequences of the scheme of Section 50C. It makes perfect sense, and truly reflects a very pragmatic approach full of compassion and fairness, that just because there is a small variation between the stated sale consideration of a property and stamp duty valuation of the same property, one cannot proceed to draw an inference against the assessee, and subject the assessee to practically prove his being truthful in stating the sale consideration. Clearly, therefore, this insertion of the third proviso to Section 50C(1) is in the nature of a remedial measure to address a bonafide situation where there is little justification for invoking an anti-avoidance provision. Similarly, so far as enhancement of tolerance band to 10% by the Finance Act 2020, is concerned, as noted in the CBDT circular itself, it was done in response to the representations of the stakeholders for enhancement in the tolerance band. Once the Government acknowledged this genuine hardship to the taxpayer and addressed the issue by a suitable amendment in law, the next question was what should be a fair tolerance band for variations in these values. As a responsive Government, which is truly the hallmark of the present Government, even though the initial tolerance band level was taken at 5%, in response to the representations by the stakeholders, this tolerance band, or safe harbour provision, was increased to 10%. There is no particular reason to justify any particular time frame for implementing this enhancement of tolerance band or safe harbour provision. The reasons assigned by the CBDT, i.e., "the variation between stamp duty value and actual consideration received can occur in respect of similar properties in the same area because of a variety of factors, including the shape of the plot or location," was as much valid in 2003 as it is in 2021. There is no variation in the material facts in this respect in 2021 vis-à-vis the material facts in 2003. What holds good in 2021 was also good in 2003. If variations up to 10%*

need to be tolerated and need not be probed further, under section 50C, in 2021, there were no good reasons to probe such variations, under section 50C, in the earlier periods as well. We are, therefore, satisfied that the amendment in the scheme of Section 50 C(1), by inserting the third proviso thereto and by enhancing the tolerance band for variations between the stated sale consideration vis-à-vis stamp duty valuation to 10%, are curative in nature, and, therefore, these provisions, even though stated to be prospective, must be held to relate back to the date when the related statutory provision of Section 50C, i.e. 1st April 2003. In plain words, what is means is that even if the valuation of a property, for the purpose of stamp duty valuation, is 10% more than the stated sale consideration, the stated sale consideration will be accepted at the face value and the anti-avoidance provisions under section 50C will not be invoked.

8. Once legislature very graciously accepts, by introducing the legal amendments in question, that there were lacunas in the provisions of section 50C in the sense that even in the cases of genuine variations between the stated consideration and the stamp duty valuation, anti-avoidance provisions under section 50C could be pressed into service, and thus remedied the law, there is no escape from holding that these amendments are effective with effect from the date on which the related provision, i.e., Section 50C, itself was introduced. These amendments are thus held to be retrospective in effect. In our considered view, therefore, the provisions of the third proviso to Section 50C (1), as they stand now, must be held to be effective with effect from 1st April 2003. We order accordingly. Learned Departmental Representative, however, does not give up. Learned Departmental Representative has suggested that we may mention in our order that "relief is being provided as a special case and this decision may not be considered as a precedent". Nothing can be farther from a judicious approach to the process of dispensation of justice, and such an approach, as is prayed for, is an antithesis of the principle of "equality before the law," which is one of our most cherished constitutional values. Our judicial functioning has to be even-handed, transparent, and predictable, and what we decide for one litigant must hold good for all other similarly placed litigants as well. We, therefore, decline to entertain this plea of the assessee." [Emphasis added now]

As has been aptly explained above, the rational for holding newly inserted proviso to sub-section (1) to section 50C of the Act as curative in nature, hence, having retrospective application, the same analogy would apply to the provisions of Section 43CA of the Act. Both the sections are similarly worded except that both the sections have application on different sets of assessee. As has been pointed earlier, Section 43CA gets attracted where the consideration received or accrues as a result of transfer of an asset (other than a capital asset) being land or building or both. Whereas, provisions of section 50C operates where the consideration received or accrues as a result of transfer of a capital asset being land or building or both. Both the sections induce deeming fiction to substitute actual sale consideration with notional value of asset based on Stamp Duty valuation. Further, a perusal of Circular 8 of 2018 (supra) would show that identical reasons have been given in Para 16 for 'Rationalization of Sections 43CA and 50C'. The proviso has been inserted and subsequently tolerance band limit has been enhanced to mitigate hardship of genuine transactions in the real estate sector. Ergo, in the light of reasoning given for insertion of the proviso and exposition by the Tribunal for retrospective application of the said proviso, I have no hesitation in holding that the proviso to sub-section

(1) to section 43CA and the subsequent amendment thereto relates back to the date on which the said section was made effective i.e. 01/4/2014.

7. In light of above findings, the Assessing Officer is directed to delete the addition of Rs.6,81,500/- under section 43CA of the Act. The impugned order is quashed and appeal of the assessee is allowed."

10. The learned Departmental Representative only submitted that during the assessment year 2017–18, the tolerance band was up to 5%, however, we reject his argument in view of the decision of the Co–ordinate Bench cited supra since the difference is below tolerance band, the entire addition of ₹ 57,68,020, is directed to be deleted. Accordingly, all the ground no.2, raised by the assessee in its appeal for the assessment year 2017–18 is allowed.

11. Grounds no.3, is general in nature hence no separate adjudication is required. However, the assessee has succeded in ground no.2.

12. In the result, appeal filed by the assessee is partly allowed.

ITA no.228/Nag./2022
Assessee's Appeal – A.Y. 2019–20

13. In its appeal, the assessee has raised following grounds:–

"1. Reopening of the assessment and the resultant assessment proceeding as completed is illegal invalid violative of the principal of natural justice and deserve to be quashed as per law.

2. The assessment was completed without giving the appellant the opportunity of cross examination which makes the assessment violative of the principle of Natural Justice & consequently illegal?

3. On the facts and circumstances of the case & in law, the AO has grossly erred in making and CIT (A) has erred in confirming the amount of Rs. 50,00,000 as income U/s 69A, which is illegal and which deserved to be deleted as per law.

4. On the facts and circumstances of the case & in law, the transaction in relation to which the addition of Rs. 50 Lakh is done is not pertaining to the impugned Assessment Year, the addition made by the AO and confirmed by the CIT (A)) is illegal and deserved to be deleted as per law.

5. Assessee pray to kindly allow to add, amend, modify, alter, revise, substitute, delete any or all grounds of appeal, if deemed necessary at the time of hearing of the appeal."

14. Insofar as the issue of re–opening of assessment under section 147 of the Income Tax Act, 1961 *("the Act")* is concerned, before us, the learned Authorised Representative (*"the A.R."*) did not make any argument. Consequently, the issue of re–opening of assessment in ground no.1, is dismissed.

15. Grounds no.2 and 5, are general in nature, hence no separate adjudication is required.

16. The sole dispute raised in grounds no.3 and 4, is whether the addition of ₹ 50 lakh is at all sustainable in the hands of the assessee based upon the seized documents from Tirupati Developers, found and impounded at the time of survey at its place during the financial year 2018–19 relevant to the assessment year 2019–20.

17. The details of documents seized have been reproduced in the assessment order in Para–3, the cheque payments were made from 29/01/2018 to 15/02/2018 to Maya Real Estate Pvt. Ltd. No addition was made as these were reflected in the regular books of account. There is also a cash payment from 18/01/2019 to 21/02/2019, aggregating to ₹ 50 lakh. However, the name against ₹ 50 lakh is mentioned as *"Lashare Sir"*. The Assessing Officer did not make any enquiry whatsoever as to how payee is

related to the assessee, no recording of statement was made of the payee as well as Tirupati Developers to unearth the correct facts. He relied on some imaginary story to sustain the addition. Further, it is very surprising as to how the assessee can be brought on picture when its name is not appearing as a payee. The learned Departmental Representative, at this point, submitted that payee is the Director of the company. In the absence of any recording in the assessment order, we are not inclined to accept his submissions. Moreover, it has been informed by the learned A.R. since the learned D.R. cannot enlarge the colour and contour of assessment order that no action was initiated against the payee in his independent capacity. He has further submitted meticulously as follows:–

> *"1. Assessee has sold an immoveable property for Rs. 825,00,000/- Pursuant to MOU dated 20.07.2015. At the instance of the buyer, the sale deed of property covered by MOU was executed in 3 parts as under:*
>
> *a) Two sale deed was done on 29.03.2016.*
>
> *b) One sale Deed was done on 31.05.2016.*
>
> *2. In short, the transaction of sale was completed in the FY 2015-16 & FY 2016-17. The transactions were duly recorded in the books of accounts and were duly offered for taxation.*
>
> *3. Pursuant to survey conducted at the premises of M/s. Tirupati Developers, it is alleged that an incriminating document is found and impounded which revealed that the appellant company has received Rs. 50 Lakh from the said party. Based on those document, an addition of Rs. 50 Lakh was done in the hands of the Appellant Company.*
>
> *4. <u>DUMB documents</u>:*
>
> *The document on the basis of which addition is done is merely a DUMB, non-speaking documents which is not backed by any other corroborative evidence. It may not have any evidentiary value & may not constitute adequate evidence without any cogent material & solid corroborative evidence. It's merely an entry in third party records and could not fasten the liability on the Appellant. Validity of addition on the basis of Dumb Documents is well discussed by Hon'ble Chennai ITAT in the case of DCIT Vs. Shri Karuppagounder Palaniswami [213/Chny/2023].*

5. Appellant name not mentioned against Cash Entry:

It is a trite law that no addition could be made merely on the basis of presumption, assumption, conjectures or surmises. The name of mentioned in the seized material was "Laskare sir" whereas at all other transactions, "Shree Maya Real Estate Pvt Ltd" was explicitly and clearly mentioned. The ratio laid down by Hon'ble Apex Court in the case of Common Cause Vs. UOI (77 Taxmann.com 432) would also apply here wherein it has been held that the third party entry could not be basis of any addition without any other cogent material.

6. Sale Deed executed in 2016 & Cash Receipt mentioned in 2019:

Learned AO in its Assessment order observed at Page No. 3/7 has observed the logic for addition as under: "There is a huge difference in sale consideration received and Market Stamp duty value of the properties. Therefore the cash of Rs. 50 Lakh received from M/s. Tirpuati Developers in an on money received against sale of these land and the same were out of its books of accounts and has escaped assessment".

The sale deed of M/s. Tirupati Developers was executed on 31.05.2016. Who will execute the sale deed without receipt of cash components prior to sale deed?

7. Theory of human Probability:

Who will receive the cash after a period of 3 years of executing of the sale deed? The theory of human probability as laid down in Supreme Court in Sumati Dayal Vs. CIT [C.A. No.-001344- 001345/1977, Dated 28/03/1995] has been out rightly ignored while making the addition.

8. No Corroborative Evidence or records:

There was no other documents or records except the sale deeds & MOU of sale which has been recovered by the income tax department. In absence of any other documents or agreement or other corroborative evidence, the addition is not at all justifiable.

9. Addition without any opportunity of Cross Examination:

Appellant has categorically denied the cash transaction & has strongly demanded the opportunity of cross - examination at numerous occasion during assessment proceeding as well as before CIT (A). The same was never provided in gross violation of the principle laid down by Hon'ble SC in Kishancahdn Chellaram Vs. CIT (1980) 125 ITR 0713.

10. Allegation on the basis of assumption, presumption, surmise and conjectures without any evidence of Appellant having received any cash:

The seized material neither contains the signature of Appellant nor any agreement or receipts were provided to the Appellant to prove its receipt by appellant. The allegation is one sided allegation without statement of the Appellant or specific admission of M/s. Tirupati Developers.

11. Non Examination of the M/s. Tirpuati Developers by Assessing Officer:

Appellant having categorically denied of having received any cash, no examination or specific confrontation was done from M/s. Tirupati Developers. It was not examined further if any cash is given, nature and purpose of payment, details of the recipient, in which capacity amount was given if any, other corroborative evidence, documents / records in possession of them, etc. Without any such exercise, AO simply concluded it as income of assessee on its own assumption and presumption. In short, no positive evidence has been brought on record before making addition in the hands of the Appellant. AO didn't carry out any enquiry to substantiate the allegation placed on Appellant.

12. Onus of establishing income of Appellant not discharged by the learned AO:

Appellant having categorically denied of having received any receipt, the onus was on the Learned AO to establish the same with stronger, cogent and corporative evidence in view of SC ruling in K.P. Varghese Vs. ITO 131 ITR 597. Asking Appellant to prove non receipt of cash is an almost impossible burden.

13. Presumption under Section 292C:

Presumption U/s 292C is only with reference to the person searched and it could not be extended to another person."

18. In the absence of the nexus between the seized documents and the company, the addition of ₹ 50 lakh is unjustified and unsustainable. Accordingly, we set aside the impugned order passed by the learned CIT(A) on this issue and allow grounds raised by the assessee.

19. We need to mention that both, the Assessing Officer and the learned CIT(A), have passed a cryptic order in perfunctory manner and did not care to make any enquiry to come to a logical conclusion. The entire survey operation has been infructuous since the investigation has been performed in a slip shod manner. The assessee is benefitted by the inaction of the entrusted officials.

20. In the result, appeal filed by the assessee is allowed.

21. To sum up, both the appeals filed by the assessee are allowed.

Order pronounced in the open Court on 02/09/2024

Sd/-	**Sd/-**
V. DURGA RAO	**K.M. ROY**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

NAGPUR, DATED: 02/09/2024

Copy of the order forwarded to:

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

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Sr. Private Secretary
ITAT, Nagpur