IN THE INCOME TAX APPELLATE TRIBUNAL

"D" BENCH, MUMBAI

BEFORE SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No.2261/MUM/2024

(Assessment Year : 2014–15)

Manjulaben Himmatlal Jain,
1106, Kamal Darshan, Chivda Galli,
Lalbaug, Mumbai – 400012,

PAN : AADPJ7503N ..... Appellant

v/s

ITO – Ward - 20(2)(2)
Mumbai ..... Respondent

Assessee by : Shri Jeetender C. Lala
Revenue by : Smt. Mahita Nair, Sr.DR

Date of Hearing – 22/08/2024	Date of Order - 12/11/2024

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned order dated 29/02/2024, passed under section 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 the following grounds: -

"1. In the facts and circumstances of the case and in law the learned Commissioner of Income-tax (Appeals) National Faceless Appeal Centre erred in confirming the addition of Rs.54,64,000/- under sec.56(2)(b)(vii).

2. In the facts and circumstances of the case and in law the learned Commissioner of Income-Tax (Appeals) National Faceless Appeal Centre erred in not considering the bank statement of the appellant, Ledger copy confirmation of the Builder and letter of allotment issued to the appellant by the builder submitted while disputing the proposed addition during the assessment proceedings.

3. In the facts and circumstances of the case and in law the learned Commissioner of Income-tax (Appeals) National Faceless Appeal Centre erred in not taking into account the provisions of Sec.56(2)(x)."

3. The brief facts of the case pertaining to this issue, as emanating from the record, are: The assessee is an individual and for the year under consideration filed her return of income on 31/07/2014 declaring a total income of INR 3,82,750. The return filed by the assessee was selected for scrutiny through CASS and statutory notices under section 143(2) and section 142(1) of the Act were issued and served on the assessee. During the assessment proceedings, it was observed that the assessee purchased a flat at "Flat No. 504, 5th floor, A-Wing, Veermani Market, Mumbai-400009, through builder "J. Gala Builders" during the relevant financial year. On perusal of the registered agreement dated 25/11/2013, it was observed that the assessee has paid INR 25,62,500, whereas the stamp authority has worked out the market value at INR 80,26,500. Accordingly, the assessee was asked to show cause as to why an amount of INR 54,64,000/-, which is in excess of the stamp duty value from the sale consideration should not be added to the total income of the assessee under the head income from other sources in view of the provisions of section 56(2)(vii)(b) of the Act. In response, the assessee submitted that she purchased the property jointly

with her husband for a total consideration of INR 25,62,500/- as per the letter of allotment dated 29/05/2007. It was further submitted that the assessee paid a major amount to the builder for the purchase of the flat in the financial years 2006-07 to 2008-09, i.e. before the date of registration of the flat. However, the builder defaulted in handing over the position and thus the delay in registration is wholly attributable to the non-fulfilment of the commitment on the part of the builder.

4. The Assessing Officer ("*AO*") vide order dated 16/12/2016 passed under section 143(3) of the Act disagreed with the submissions of the assessee and held that as per the registered agreement, the assessee has received the immovable property in the financial year 2013-14 and therefore the provisions of section 56(2)(vii)(b) of the Act are applicable to the present case. The AO further held that as the date of the agreement in the present case on which the amount of consideration is fixed is 25/11/2013, therefore, the present case is a fit case to invoke the provisions of section 56(2)(vii)(b) of the Act. Accordingly, the difference of INR 54,64,000 (INR 80,26,500 - INR 25,62,500) was added to the total income of the assessee under section 56(2)(vii)(b) of the Act.

5. The learned CIT(A), vide impugned order, held that the assessee though claimed that the said flat was allotted vide letter dated 29/05/2007 and the payments were made during the period from 2007 to 2011, however, in the appellate proceedings, no documents/evidence was furnished to substantiate the grounds of appeal. The learned CIT(A) further held that there is nothing brought on record by which it can be established

that the provisions of section 56(2)(vii)(b) of the Act are not applicable in the instant case. Accordingly, the learned CIT(A) dismissed the appeal filed by the assessee and upheld the addition of INR 54,64,000 made under section 56(2)(vii)(b) of the Act. Being aggrieved, the assessee is in appeal before us.

6. We have considered the submissions of both sides and perused the material available on record. The solitary grievance raised by the assessee is against the addition made under section 56(2)(vii)(b) of the Act.Before proceeding further, it is relevant to analyse the provisions of section 56(2)(vii)(b) of the Act, which reads as follows: -

> *"(b) any immovable property,—*
>
> *(i) without consideration, the stamp duty value of which exceeds fifty thousand rupees, the stamp duty value of such property;*
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> *(ii) for a consideration which is less than the stamp duty value of the property by an amount exceeding fifty thousand rupees, the stamp duty value of such property as exceeds such consideration:*
>
> *Provided that where the date of the agreement fixing the amount of consideration for the transfer of immovable property and the date of registration are not the same, the stamp duty value on the date of the agreement may be taken for the purposes of this sub-clause:*
>
> *Provided further that the said proviso shall apply only in a case where the amount of consideration referred to therein, or a part thereof, has been paid by any mode other than cash on or before the date of the agreement for the transfer of such immovable property;"*

7. Thus, as per the provisions of section 56(2)(vii)(b) of the Act, if any individual or HUF received any immovable property for a consideration which is less than the stamp duty value of the property by an amount exceeding INR 50,000, then the stamp duty value of such property as exceeding such

consideration shall be chargeable to income tax under the head "*income from other sources*". The first proviso to section 56(2)(vii)(b) of the Act provides that where the date of agreement and the date of registration are not the same then the stamp duty value on the date of agreement may be considered for the purpose of this clause. The second proviso to section 56(2)(vii)(b) of the Act further provides that the first proviso shall be applicable where the amount of consideration referred to therein or part thereof is paid by any mode other than cash on or before the date of agreement for the transfer of such immovable property.

8. In the present case, as per the Revenue, the agreement was registered in the financial year 2013-14, therefore the market value of the property as determined by the stamp duty authority during that period shall be considered for the purpose of section 56(2)(vii)(b) of the Act. On the contrary, as per the assessee since the letter of allotment dated 29/05/2007 determining the consideration was issued by the builder in the financial year 2007-08, therefore the market value of the property as per the stamp duty authority during such period should be considered for the purpose of section 56(2)(vii)(b) of the Act. Thus, by relying on the first proviso section 56(2)(vii)(b) of the Act, it is the plea of the assessee that since in the present case the date of allotment letter fixing the amount of consideration for the transfer of property and date of registration are not the same, therefore market value as on the date of allotment letter may be taken for the purpose of section 56(2)(vii)(b) of the Act. In support of the plea that a letter of allotment should be considered equivalent to an agreement for sale,

the assessee placed reliance upon the decision of the coordinate bench of the Tribunal in Salochana Saijan Modi v/s ITO, reported in [2023] 152 taxmann.com 56 (Mumbai - Trib.). From a careful perusal of the aforesaid decision, we find that the coordinate bench held that the allotment letter can be considered as an agreement for sale. The relevant findings of the coordinate bench, in the aforementioned decision, are reproduced as follows: –

> *"11. …… According to the AO and Ld.CIT(A), the allotment letter is not in the nature of the agreement for sale. However, we find that the Tribunal in the case of Parth Dashrath Gandhi v. Addl./Dy./Asstt. CIT [IT Appeal No. 1990 (Mum.) of 2022, dated 31-1-2023 held that "the allotment letter should be considered as agreement for sale." The relevant finding of the Tribunal (supra) is reproduced as under: -*
>
> > *6. 'We heard the parties and perused the record. We notice that the AO has considered the stamp duty value as on the date of registration of the agreement to sell for the purpose of determining the applicability of sec.56(2)(x) of the Act. However, the facts that the assessee had been allotted both the properties by way of allotment letters and further, the assessee has also paid instalments as per that letter are not disputed. Hence, the question that arises is whether the allotment letter can be considered as "agreement to sale" within the meaning of the provisos to sec. 56(2)(x) of the Act, which states that the stamp duty valuation as on the sale of sale agreement should be taken into consideration for the purpose of sec.56(2)(x),provided that amount of consideration or part thereof had been paid as per the mod prescribed on or before the date of agreement for transfer of such immovable property.*
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> > *7. Before us, the Ld A.R placed reliance on the decision rendered by the coordinate bench in the case of Mr. Sajjanraj Mehta vs. ITO (ITANo.56/Mum/2021 dated 5-09-2022), wherein it was held that the date of allotment letter can be taken as date of agreement of sale for the purposes ofsec.56(2)(x) of the Act. On the contrary, the Ld D.R placed his reliance on the decision rendered by another co-ordinate bench, which was relied upon by AO & CIT(A), viz., Sujauddian Kasimsab (supra).*
> >
> > *8. With regard to the decision rendered in the case of Sujauddian Kasimsab (supra), the Ld A.R submitted that the said decision has been rendered on the basis of facts prevailing in that case. The assessee, in the above said case, had paid Rs. 3.00 lakhs before the date of agreement, but the same was described as "earnest money deposit" in the Agreement, meaning thereby, the assessee did not fulfill the condition prescribed in sec.56(2)(x) of the Act. The Ld A.R further submitted that the Tribunal did not consider the effect of second proviso to sec.56(2)(x) of the Act in the above said case. We agree with the submissions of Ld A.R with regard to the distinguishing features pointed out in the decision rendered by the co-ordinate bench in the*

case of Sujauddian Kasimsab (supra). Hence, we are of the view that the above said decision could not lend support to the case of the revenue.

9. On the contrary, we are of the view that the decision rendered by another co-ordinate bench in the case of Mr Sajjanraj Mehta (supra) is applicable to the facts of the present case. The decision rendered in the case of Mr Sajjanraj Mehta by the co-ordinate bench is extracted below, for the sake of convenience:-

"10. We have gone through the order of the A.O, Ld. CIT(A) and various submissions of assessee dated 6-10-2021. Vide pg no-23 to 27 of paperbook we have observed the payment made by the assessee to the developer on 17-102011 amounting to Rs. 14 lacs vide cheque no 906740, Bank of Maharashtra to enter into an agreement cum acknowledgement of payment made and other terms and conditions about the property. This agreement between assessee and developer clearly confirms the amount of consideration along with other terms and conditions relating to levy of stamp duty, service tax and other charges to be paid by the assessee.

11. The finding of the A.O vide pg no-4, para-2.6 wherein he observed that assessee has deposited Rs. 14 lacs with the developer to year mark the said premises for Rs. 70 lacs. Even if for the time being it is assumed that this agreement is merely a letter of intent, still amount mentioned in this so called letter of intent can't be changed by either of the party. At the max the parties involved may opt for exit from the transaction but amount of consideration can't be changed. This transaction of the assessee has to be analysed in commercial parlance, without finalisation of consideration nobody will deposit 20% of the final consideration. The vitality of the agreement further found force from the behaviour of the assessee as confirmed by the A.O also that assessee paid further Rs. 34.5 lacs till financial year 2012-13. Assessee also paid Rs. 1,00,285/- vs VAT, Rs1,35,187/- as service tax, Rs. 5,02,000/-as stamp duty and Rs. 30,000/-as registration charges.

12. The chronology of the events confirms that the finding of the A.O treating the agreement of the assessee as letter of intent is not correct. In this matter treating the said agreement as letter of intent shows an over thinking and hyper technical interpretation at the end of the A.O. assessee's case clearly falls in the proviso to section 56(2)(vii)(b). For sake of clarity we are reproducing herein below the relevant portion of proviso Provided that where the date of the agreement fixing the amount of consideration for the transfer of immovable property and the date of registration are not the same, the stamp duty value on the date of the agreement may be taken for the purposes of this sub-clause:

Provided further that the said proviso shall apply only in a case where the amount of consideration referred to therein, or a part thereof, has been paid by any mode other than cash on or before the date of the agreement for the transfer of such immovable property".

13. We further relied on following judicial pronouncement of coordinated benches of ITAT, Hon'ble High Court and Apex Court as under:

(a) "Siraj Ahmed Jamalbhai Bora vs. ITO Ward-1(3)(1)ITA No. 1886/M/2019 dtd. 28/10/2020, (Mum.) (Trib.):
Date of registration irrelevant for Sec 56(2)(vii)(b) as substantial obligation discharged on date of agreement.

(b) Radha Kishan Kungwani vs. ITO Ward - 1(2) ITA No. 1106/JP/2018dtd. 19/08/2020, [185 ITD 433 (Jaipur - Trib.)]

Where assessee entered into agreement for purchase of flat and had made certain payment at time of booking of flat, stamp duty valuation or fair market value of immovable property was to be considered as on date of payment made by assessee towards booking of flat

(c) Sanjay Dattatraya Dapodikar v/s ITO Ward - 6(2), Pune ITA No. 1747/PN/2018 dtd. 30/04/2019(Pune) (Trib)

Where date of agreement for fixing amount of consideration for purchase of a plot of land and date of registration of sale deed were different but assessee, prior to date of agreement, had paid a part of consideration by cheque, provisos to section 56(2)(vii)(b) being fulfilled, stamp value as on date of agreement should be applied for purpose of said section

(d) Ashutosh Jhavs. ITO Ward-2(5), Ranchi ITA No. 188/Ranchi/2019 dtd.30/04/2021, [190 ITD 450 (Kolkata - Trib.).]

Where assessee purchased a property and made part payment of sale consideration by cheque on very next day of execution of purchase agreement and registry was done after a year, since such part payment made by cheque on very next day of execution of agreement was towards fulfilment of terms of purchase contract itself and there was no mala fide or false claim on part of assessee, no addition could be made on account of difference between amount of sale consideration for property shown in purchase agreement and stamp duty value of said property on date of registry by invoking section 56(2)(vii)(b)

(e) Dy. CIT-5(3)(1) vs. Deepak Shashi Bhusan Roy ITA No. 3204 &3316/M/2016 dtd. 30/07/2018(Mum.) (Trib.)

In order to determine taxability of capital gain arising from sale of property, it is date of allotment of property which is relevant for purpose of computing holding period and not date of registration of conveyance deed

(f) Mohd. Ilyas Ansari v. ITO-23(2)(3), Mumbai [ITA No. 6174/M/2017dtd.06/11/2020, 186 ITD 407 (Mumbai - Trib.)]

Where Assessing Officer mechanically applied provisions of section 56(2)to difference between stamp duty value and actual sale consideration paid by assessee and made additions, without making any efforts to find out actual cost of property, additions made by Assessing Officer were to be set aside."

14. Similar property in the case of assessee's wife with similar transactions has been accepted by the same A.O without any addition for the same A.Y. Here we would like to rely on the decision of Hon'ble Gauhati HC.

"Gulabrai Hanumanbox. vs. Commissioner of Wealth-tax [198 ITR 131 (Gauhati) (HC).]Two different Assessees having similar/identical facts w.r.t valuation of property cannot be assessed with different rates for the same property. Thereby, the order passed by the Assessing officer for co-sharer of property is arbitrary and unjustified in law"

15. Keeping in view the facts of the case, chronology of events and respectfully following the pronouncements of the co-ordinated benches of ITAT, we delete the addition made by A.O and confirms that assessee is entitled to the benefits of proviso to Section 56(2)(vii)(b)."

10. Accordingly, following the above said decision, we hold that the respective allotment letters issued to the assessee should be considered as "Agreement to sell" for the purposes of sec.56(2)(x) of the Act. Since the assessee has paid the parts of consideration as per the terms and conditions of allotment through banking channels prior to the execution of Sale

agreement, we are of the view that the provisos to sec.56(2)(x) shall apply to the facts of the present case. Accordingly, the stamp duty valuation as on the date of respective Allotment letters should be considered for the purposes of sec.56(2)(x) of the Act. Hence the AO was not justified in considering the stamp duty valuation as on the date of execution of agreement to sell.

11. On a perusal of record, we notice that the details of stamp duty value as on the date of respective allotment letters was not brought on record. Since we have held that the stamp duty valuation as on the date of respective allotment letters should be considered for the purpose of sec.56(2)(x) of the Act, it is imperative on the part of the assessee to show that the actual consideration was equal or less than the stamp duty valuation as on the date of issue of respective allotment letters. Accordingly, we are restoring this issue to the file of AO for the limited purpose of comparing the actual sale consideration with the stamp duty valuation as on the date of respective allotment letters. In the limited set aside, the AO shall take appropriate decision in accordance with law after affording adequate opportunity of being heard.'

12. The Ld.CIT(A) has relied on the decision of the Hon'ble Supreme Court in the case of Balbir Singh Maini (supra) but we find that in the said decision, following substantial questions were raised before the Hon'ble High Court:-

"(i) Whether the transactions in hand envisage a "transfer" exigible to tax by reference to section 2(47)(v) of the Income-tax Act, 1961 read with section 53-A of the Transfer of Property Act, 1882?
(ii) Whether the Income-tax Appellate Tribunal, has ignored rights emanating from the JDA, legal effect of non registration of JDA, its alleged repudiation etc.?
(iii) Whether "possession" as envisaged by section 2(47)(v) and section 53-A of the Transfer of Property Act, 1982 was delivered, and if so, its nature and legal effect?
(iv) Whether there was any default on the part of the developers, and if so, its effect on the transactions and on exigibility to tax?
(v) Whether amount yet to be received can be taxed on a hypothetical assumption arising from the amount to be received?"

13. The Hon'ble Supreme Court accordingly, adjudicated on the issue of interpretation of the transfer defined u/s 2(47) of the Act and upheld the order of Hon'ble High Court. Therefore, ratio in the case of Balbir Singh Maini (supra) is not applicable over the facts of the instant case.

14. In view of the above discussion, we are of the opinion that the assessee fulfills the requirement of proviso 1 & 2 of section 56(2)(x)(b) of the Act and therefore, we feel appropriate to restore this issue to the file of the AO for limited purpose of comparing the stamp duty valuation as on the date of the allotment with the transaction value recorded in the registration document. Accordingly, the AO shall give effect to this decision after affording adequate opportunity of being heard to the assessee in terms indicated above. The Grounds raised by the assessee are accordingly, allowed."

9. From the perusal of the letter of allotment dated 29/05/2007 issued by the builder, forming part of the paper book from pages 23-25, we find

that the assessee along with her husband agreed to pay lump-sum consideration of INR 25,62,500 in respect of Flat A-504, 5th floor, A-Wing, Veermani Market, Mumbai-400009, admeasuring 663.50 ft² along with one car parking. Apart from the various other terms and conditions, we find that the parties are also agreed to the schedule of payment of the total consideration of INR 25,62,500. There is no dispute regarding the fact that the terms as agreed vide afore-stated allotment letter were complied with by both parties and payment was made to the builder except an amount of INR 5,20,000 which was only pending to be paid on 31/03/2013, i.e. on the date of registration of the agreement. This fact is evident from page no.36 of the paper book. Thus, the allotment letter was not only duly accepted by the assessee along with her husband but other conditions were also fulfilled. Therefore, respectfully following the aforesaid decision, we are of the considered view that the allotment letter can be considered as an agreement to sell in the present case.

10. Even though the date of agreement fixing the amount of consideration for the transfer of immovable property, in the present case, is not the same as the date of registration, however, for the applicability of the first proviso to section 56(2)(vii)(b) of the Act, it is further relevant that the amount of consideration or part thereof is paid by any mode other than cash on or before the date of agreement in terms of the second proviso to section 56(2)(vii)(b) of the Act. In the paper book, the assessee has furnished a copy of statement of its bank account maintained with the Maharashtra Co-operative Bank Ltd from 11/03/2008 till 02/04/2009 in order to show the

payments made to the builder. However, since the letter of allotment was issued by the builder on 29/05/2007, therefore for the purpose of applicability of the first and second proviso to section 56(2)(vii)(b) of the Act, it is relevant that some evidence is brought on record to show that the consideration or part thereof was paid by the assessee by any mode other than cash on or before the date of the allotment letter, i.e. 29/05/2007. Even in the decision of the coordinate bench of the Tribunal relied upon by the assessee, as noted in the foregoing paragraphs, while directing the AO to compare the stamp duty valuation as on the date of allotment with the transaction value recorded in the registration document, we find that the coordinate bench took into consideration the fact that the taxpayer, in that case, paid an amount of INR 2 lakh at the time of booking prior to the allotment letter. However, in the present case, no such evidence of payment of agreed consideration or part thereof by any mode other than cash on or before the date of the allotment letter has been brought on record. Therefore, in order to grant one more opportunity to the assessee in the interest of justice and fair play, we deem it appropriate to restore this issue to the file of the jurisdictional AO for adjudication in view of our aforesaid findings with a direction to the assessee to furnish the evidence of payment of agreed consideration or part thereof by any mode other than cash on or before the date of allotment letter to prove the applicability of the first and second proviso to section 56(2)(vii)(b) of the Act. We order accordingly. As a result, the impugned order on this issue is set aside and the grounds raised by the assessee are allowed for statistical purposes.

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

Order pronounced in the open Court on 12/11/2024

Sd/-	**Sd/-**
NARENDRA KUMAR BILLAIYA	**SANDEEP SINGH KARHAIL**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 12/11/2024
Prabhat

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.

By Order

Assistant Registrar
ITAT, Mumbai