

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI "B" BENCH : MUMBAI

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
AND
SHRI RAJ KUMAR CHAUHAN, JUDICIAL MEMBER

ITA No. 2214/Mum/2024
Assessment Year : 2011-12

Income Tax Officer, Room No. 413, 4 th Floor, Tower No. 6, Vashi Railway Station Complex, Navi Mumbai	vs.	Mahesh K. Shavdia HUF, 27/28, Kailash Niwas No. 2, R.B.Mehta Marg, Ghatkopar (East), Mumbai PAN : AAHHM1877L
(Appellant)		(Respondent)

Assessee by : Shri Sanjay R. Parikh
Revenue by : Shri Krishna Kumar, Sr. DR

Date of Hearing : 08/11/2024
Date of Pronouncement : 05/12/2024

PER B.R. BASKARAN, A.M :

The Revenue has filed this appeal challenging the order dt.28-02-2024 passed by the Ld. Commissioner of Income Tax (Appeals)-National Faceless Appeal Centre (NFAC), Delhi [‘Ld.CIT(A)'] and it relates to AY. 2011-12. The Revenue is aggrieved by the decision of the Ld.CIT(A) in deleting the addition of Rs. 2.41 crores relating to alleged on-money payment made in purchasing of flat, made by the AO u/s. 69 of the Income Tax Act, 1961 (‘the Act’).

2. The facts relating to the case are stated in brief. The assessee filed his return of income for the year under consideration declaring a total income of Rs. 8,470/-. Subsequently, the AO received information from the Investigation Wing about the search and seizure action conducted

in the business premises of M/s. Nish Developers Pvt. Ltd., and its group. During the course of search action, the residential premises of a trusted employee named Shri Pravin Mishra was also covered. The search team recovered a pen drive and loose papers containing details of cash receipts. When enquired about the same, Shri Pravin Mishra admitted in the statement taken u/s. 132(4) of the Act that the cash receipts were related to sale of flats in the project named, "1 Avighna Park" located at Curry Road, Mumbai. As per the information given by the Investigation wing, the assessee has purchased a flat in the above said project and it had paid on money of Rs. 2.41 crores by way of cash during the financial year relevant to the assessment year under consideration. On the basis of the above said information, the Assessing Officer re-opened the assessment of the year under consideration by issuing notice u/s. 148 of the Act.

3. Before the AO, the assessee submitted that flat No. 2102, A Wing, 1 Avighna Park was purchased by it along with Shri Kantilal Shavadia HUF on 26-05-2010 and the sale agreement was executed on 20-06-2013 for a total consideration of Rs. 2.81 crores only. It was submitted that the above said consideration was financed partly from own savings and partly from loan taken from Kotak Mahindra Bank. The assessee denied payment of any on-money for purchase of the above said flat. With regard to the reliance placed by the AO on the statement given by Shri Pravin Mishra, the assessee submitted he has retracted his statement and in support of the same it filed copies of affidavits give by the Director of the above said company and also by Shri Pravin Mishra, The assessee also requested the AO to provide him an opportunity to cross-examine the persons on whose statements, the AO had placed reliance. However, the AO did not provide any opportunity for cross-examination, as requested by the assessee.

3.1. The AO also called for information u/s. 133(6) of the Act from M/s. Nish Developers Pvt. Ltd, relating purchase of flat and payments made. In response thereto, the above said company (builder) duly replied that the flats have been sold for a consideration of Rs. 2.84 crores as shown in the sale agreement. Thereafter, the AO issued summons to Mr. Mahesh K. Shavdia, Karta of the assessee and a sworn statement was also taken from him. In the statement, Mr. Mahesh K. Shavdia denied payment of any on-money. However, the AO rejected all the submissions of the assessee and proceeded to make an addition of Rs. 2.81 crores u/s. 69 of the Act.

4. The Ld.CIT(A) deleted the addition and hence, the Revenue has filed this appeal.

5. We heard the parties and perused the record. We notice that the Ld.CIT(A) has followed the decision rendered by the Co-ordinate Bench of the Tribunal in the case of ITO vs. Jayesh Kewalchand Jain (ITA No. 5640/Mum/2017), wherein an identical addition relating to on-money payment for purchase of flat M/s. Nish Developers Pvt. Ltd., was deleted by the Tribunal. For the sake of convenience, we extract below the operative portion of the order passed by the Ld.CIT(A) :-

“7.2.1. I have gone through the submissions of the assessee and the findings of the AO in his assessment order. The basis of addition in this case is from the statement of Shri Praveen Mishra u/s 132(4) where he has stated that the loose papers were written by him in his own hand writing and that represents an account of cash receipts received against sale of each flats in the project namely ""1 Avighna Park"" at Curry Road, Mumbai. However statements given by the Mr. Kailash Agarwal and Mr. Praveen Mishra were retracted subsequently. The AO in the course of reassessment proceedings on the basis of copy of agreement dated 28/06/2013 executed between M/s Nish Developers Pvt. Ltd and Kantilal N. Shavadia, HUF and Mahesh K. Shavadia, HUF treated Rs.2,41,40,000/- as unexplained investment u/s 69 of the Act and completed the assessment. However, the assessee during the assessment proceedings as well as in the present appellate proceeding has denied the fact that it has paid on money to M/s Nish Developers

Pvt. Ltd. Considering all facts and circumstances of the case, I am of the view that the AO has not brought any evidence on record which shows that the assessee has paid on money to the developer. Further, Mr. Praveen Mishra has retracted his statement subsequently.

7.2.2. In a similar case involving the same facts and circumstances of the case the Hon'ble ITAT Mumbai in the case of ITO Vs Jayesh Kewalchand Jain (ITA No.5640/Mum/2017) has held-

"8. We have heard both the parties, perused material available on record and gone through orders of the authorities below. The AO has made additions u/s 69A of the I.T. Act, 1961 towards purported cash payment of Rs. 1 crore to M/s Nish developers P.Ltd. for purchase of flats. The AO has relied upon information received from DDIT (Inv.) as per which the CEO and trusted employee of M/s Nish Developers P.Ltd., in the statement recorded during search proceedings have admitted the fact of receiving cash for booking of flats. Except this, the AO has not carried out any independent enquiry to find out the truth in light of statement recorded from CEO of M/s. Nish Developers P.Ltd. towards cash payment made for bookings flats. On the other hand, the assessee has filed an agreement between the parties as per which the agreed price for said flat was at Rs. 2,75,00,000/-, The assessee has also filed copy of purchase deed which was executed on 24/12/2013 and market value of the said flat has been determined by the Registrar at Rs. 2,72,20,000/- for the purpose of stamp duty. When the market value of the flat which was agreed to be purchased in 2010 for a purchase of price Rs. 2, 75,00,000/- is determined after more than three years by the Sub Registrar at Rs. 2,72,20,000/-, there is no reason for the AO to make additions towards alleged cash payment only on the basis statement of some persons, more particularly when the persons who gave such statements have been subsequently retracted statement by filing a sworn affidavit. The Ld.CIT(A) after considering relevant facts and also by following the decision of Hon'ble Supreme Court in the case of Shri. Kishanchand Chellaram Vs. CIT (1980) (125 ITR 730) held that the AO has made additions without conducting any independent enquiry and solely on the basis of information received from DDIT (Inv.) without there being any further evidences to support his findings that a sum of Rs. 100 Lacs alleged to have been paid in cash by the assessee. We do not find any error in the findings of CIT(A). Hence, we are inclined to uphold findings of the CIT(A) and dismissed the appeal filed by the revenue."

7.2.2. The judgment delivered by the Hon'ble ITAT Mumbai (supra) has been studied and examined. I find that the facts and circumstances of the present case is squarely covered in the decision delivered as cited above. I am of the view that the AO has failed to conclusively prove that on money has been paid to M/s Nish Developers Pvt Ltd. In addition, the statement of Mr. Praveen Mishra has been subsequently retracted by him. Therefore, respectfully following the judgment of the Hon'ble ITAT Mumbai(supra) and considering all the facts and circumstances of the case, I am of the view that the AO has made addition without any evidences to support his findings and therefore, the addition of Rs.2,41,40,000/- is liable to be deleted. Accordingly, the AO is directed to delete the addition. The Ground of appeal is hereby allowed."

5.1. We shall analyse the facts prevailing in the instant case. We notice that, in the instant case also, the AO has fully placed reliance on the information received from Investigation Wing, which in turn is based on the statement given by Shri Pravin Mishra and also pen drive/loose documents recovered from him. However, the assessee has denied payment of any on-money. Hence the AO called for details from the builder u/s 133(6) of the Act. We notice that the builder M/s Nish Developers P Ltd has confirmed the payment of consideration as mentioned in the sale agreement. The assessee has also furnished copies of affidavits filed by Shri Pravin Mishra and the director of above said company retracting the statements. Thus, the information given by the Investigation wing could not be proved to be correct by the AO. On the contrary, we notice that the AO has placed his reliance on the information given by the Investigation wing only. He simply ignored the confirmation letter given by the builder, retraction made by the employee and director of M/s Nish Developers P Ltd, statements given by the kartha of the assessee denying payment of any on-money. Thus, we notice that the AO has made the addition without conducting any individual enquiry and also without bringing any material to support the opinion expressed by the Investigation Wing. On the contrary, the assessee has furnished details to contend that the information so given by the Investigation wing was not correct.

5.2. We noticed earlier that the assessee has asked for an opportunity of cross-examination of Shri Pravin Mishra, on whose statement, the investigation wing and the AO had placed reliance. However, the AO has failed to provide the same and it results in violation of principles of natural justice as held by the Hon'ble Supreme Court in the case of M/s. Andaman Timber Industries (Civil Appeal No. 4228/2006,

dt. 02-09-2015). In the above said case, the Hon'ble Supreme Court has held as under:-

“According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause Notice.

We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal.”

Accordingly, on this legal principle also, the impugned addition made by the AO in the instant case is liable to be deleted.

5.3. Under these set of facts, we are of the view that the impugned addition of Rs. 2.41 crores made by the AO is not sustainable and accordingly we are of the view that the Ld.CIT(A) has rightly deleted the above said addition. Accordingly we uphold the order of the Ld.CIT(A).

6. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 05-12-2024

Sd/-
[RAJ KUMAR CHAUHAN]
JUDICIAL MEMBER

Sd/-
[B.R. BASKARAN]
ACCOUNTANT MEMBER

Mumbai,
Dated: 05-12-2024

TNMM

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT concerned
- 4) The D.R, "B" Bench, Mumbai
- 5) Guard file

By Order

Dy./Asst. Registrar
I.T.A.T, Mumbai