आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ,G ,मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "G", MUMBAI

श्री अमित शुक्ला, न्यायिक सदस्य **एवं**

श्री अश्वनी तनेजा, लेखा सदस्य**,** के समक्ष

Before Shri Amit Shukla, Judicial Member, and
Shri Ashwani Taneja, Accountant Member

ITA No.957/Mum/2012
Assessment Year: 2008-09
&
ITA No.5682/Mum/2014
Assessment Year: 2010-11

ACIT, CEN CIR 13 Old CGO, Annexe BLE, R.No.1103, 11th Floor, M.K. Marg, Mumbai-20	**बनाम**/ Vs.	Giriraj Developers, Plot No.43 A/B Sector 20 Kharghar Navi Mumbai Mumbai-400010
(Revenue)		(Respondent)
P.A. No.AAFFG4761R		

Revenue by	Shri A. Ramachandran (DR)
Respondent by	Shri Chetan A. Karia (AR)

सुनवाई की तारीख/**Date of Hearing:**	**19/05/2016**
आदेश की तारीख /**Date of Order:**	**27/07/2016**

आदेश / O R D E R

Per Ashwani Taneja (Accountant Member):

These appeals has been filed by the revenue against separate orders of Ld. order of Ld. Commissioner of Income

Tax (Appeals), Mumbai-37, {(in short 'CIT(A)'}, passed against assessment order u/s 143(3) of the Act, for the A.Ys 2008-09 & 2010-11.

2. During the course of hearing, arguments were made by Shri Chetan A. Karia, Authorised Representative (AR) on behalf of the Assessee and by Shri A. Ramachandran, Departmental Representative (DR) on behalf of the Revenue.

First we shall take up appeal of the Revenue in ITA No.957/Mum/2012 for A.Y. 2008-09

The Revenue has filed following grounds of appeal:

> *"1.On the facts and in the circumstances of the case and in Law, the Ld.CIT(A) was not justified in deleting the additions amounting to Rs. 1,05,62,500/- on account of unexplained sales.*
> *2.On the facts and in the circumstances of the case and in Law, the Ld.CIT(A) was not justified in not accepting the fact that there was an unaccounted sale pertaining to A.Y. 2008-09 which was established during the assessment proceedings.*
> *3.On the facts and in the circumstances of the case and in Law, the Ld.CIT(A) was not justified in not accepting the fact that the assessee's submissions also shows that there was sales in A.Y. 2008-09 which was established during the assessment proceedings."*

3. The Solitary issue raised in this appeal by the revenue is that Ld. CIT(A) had wrongly deleted the additions amounting to Rs.1,05,62,500/- made by the assessee on account of unexplained sales made by the assessee on account of sale of

shops on account of cash receipts which was not disclosed in the books of accounts.

3.1. Brief facts and background of this case as culled out from the order of the lower authorities are that on 10.01.2007 survey action was done by the department on the assessee firm and search action was done on its partners including Mr. Haresh Patel group. During the year, the assessee was engaged in the business of development of a project by the name of M/s. Giriraj Horizon at Kharghar, Navi Mumbai. During the course of search in the case of partners some documents were found indicating undisclosed income in the form of cash component involved in the properties sold by the partners and therefore partners offered an aggregate amount of Rs.1.50 crores as undisclosed income and declared the same as such in the return of income filed for A.Y. 2007-08. During the course of survey upon the assessee firm one document was found with regard to sale of ship No.03 wherein the aggregate sales consideration of the shop was shown at Rs.27,62,500/- out of which a sum of Rs.6,50,000/- was shown to have been received by cheque and balance amount of Rs.21,12,500/- was shown to have been received by cash. On the basis of this document addition was made by the AO on account of unrecorded cash component of sale of shops in A.Y. 2006-07 for Rs.40,00,000/- and A.Y. 2007-08 for Rs.5.20 crores. The addition was also made for Rs.21,12,500/- on the basis of sale of shop no.03. Thereafter, the assessee filed an appeal for these two years before the Ld. CIT(A) wherein the Ld. CIT(A) upheld the addition of Rs.1.50 crores made by the

AO towards cash receipt on sale of flats as was declared by the assessee in the return for A.Y. 2007-08. With respect to addition made on account of cash component (i.e. 'on money') in respect of sale of shop, Ld. CIT(A) upheld the addition made for A.Y. 2007-08 but for A.Y. 2006-07 addition was deleted by him on the ground that no evidence was found by the AO.

3.2. Aggrieved by the order of Ld. CIT(A) for both these year both the assessee and Revenue filed an appeal before the Tribunal. Thereafter the Tribunal vide its order dated 24.02.2016 in ITA No.5113-5114/Mum/2009 quashed the assessment orders on legal grounds, without adjudicating the same on merits. Thus, the issues on merits have not yet been addressed before the tribunal in any year including the impugned year.

3.3. In the year before us i.e. A.Y. 2008-09, it was noted by the AO that out of the same cluster, assessee had sold 5 shops during the year and on the basis of document impounded during the course of survey showing the sale consideration of the shop involving cash component of Rs.21,12,500/- it was held by the AO that during the year under consideration the assessee had received aggregate amount of cash component ('on money') for Rs.1,05,62,500/- and brought to tax the same as undisclosed income of the assessee.

3.4. Being aggrieved, the assessee filed an appeal before the Ld. CIT(A) wherein Ld. CIT(A) relying upon his order for earlier years held that there was no evidence of receipt of 'on money' and therefore, addition could not have been made in the impugned year and therefore he deleted the same.

3.5. Being aggrieved the revenue filed an appeal before the Tribunal.

3.6. During the course of hearing, it was submitted by the Ld. DR that all the shops belong to the same cluster, and these are located at the same place having identical location etc. The construction of the shop has also been done on the similar pattern. Under these circumstances, if a shop has been sold in A.Y. 2007-08 at an amount of Rs.27,62,500/- wherein the cheque was shown at Rs.6,50,000/-, then in the next year, the assessee will not sell it for the total consideration of Rs.6,50,000/- only. It was further submitted by him that the Revenue cannot close its eyes from truth which is writ large on the face of it. The AO had made an attempt during the course of assessment proceedings to extract truth from the buyers of these shops, but they being affected and interested party did not reveal complete facts. It was further submitted by him that assessee did not come out with proper documentary evidences showing that total market value of these shops was not more than Rs.6,50,000/-. Under these circumstances, the impugned documents became speaking documents on the basis of which addition has been rightly made by the AO in the peculiar facts and circumstances of this case and therefore AO's order should be upheld and that of Ld. CIT(A) should be reversed.

2.7. Per contra, Ld. Counsel of the assessee made exhaustive arguments to oppose the submissions made by the Ld. DR. It was submitted by him that the disclosure of undisclosed income made by the partners was with regard to the cash

component involved in the sale of residential flats only and since there was no cash component involved in the sale of shops, therefore, no disclosure was made with regard to sale of shops. It was further submitted by him that AO recorded statement of the buyers of these shops who had denied to have paid any cash component. It was further submitted that evidences were found with regard to sale of shops in A.Y. 2007-08 and no evidence was found for sale of shops in impugned year and therefore no addition could have been made only on the basis of documents found in A.Y.2007-08. In absence of any evidence, the addition was wrongly made and has been rightly deleted by the Ld. CIT(A). In support of his arguments, he placed reliance on the judgment of Hon'ble Delhi High Court in the case of CIT v. Anand Kumar Deepak Kumar 284 ITR 497 and upon the judgment of Orissa High Court in the case of Banshidhar Onkarmall v. CIT 3 ITR 353.

2.8. We have gone through the orders of the lower authorities and submissions made by both the sides before us. The impugned documents on the basis of which addition has been made was admittedly found at the premises of the assessee wherein certain facts were clearly mentioned which have not been denied or controverted so far. These facts are that shop no.03 was sold by the assessee for an aggregate consideration of Rs.27,62,500/- out of which a sum of Rs.6,50,000/- was received by cheque and balance amount of Rs.21,12,500/- was received in cash. During the year under consideration the assessee has sold 5 shops, and requisite particulars with regard to the same as under:

Shop No.	Name of the Party	Date of booking	Date of agreement	Agreement value
S-10	Ambavi R. Patel	20.12.07	27.12.07	6,50,000
S-11	Gopal A Patel	31.03.08	N.A.(shop cancelled)	7,00,000
S-14	Parasmal Mehta	19.12.07	22.12.07	7,00,000
S-19	Sunanda S. Raut	9.4.07	09.04.07	6,50,000
S-20	Shashikant H Raut	09.04.07	09.04.07	6,50,000

2.9. The perusal of the above details shows that the agreement value of these shops at Rs.6,50,000/- per shop is exactly same as has been mentioned in the impounded documents. As per section 292C of the Income Tax Act 1961, where any books of accounts or other documents etc. are found during the course of search u/s 132 or survey u/s 133A, then it may be presumed that such books of accounts and other documents etc. belong to the person upon whom search/survey has been done and that contents of such books of accounts and other documents are true. Though, it has been held in many judgments that this presumption is rebuttable, and this is an admitted position of law and there is no denial to it, but main point involved here is that burden to rebut this presumption as per law is upon the shoulders of the person (i.e. assessee in this case) from whose possession impounded document is found. Coming back to the facts of this case, it has not been denied that this document is found from assessee's premises. These facts have not been controverted so far that shop no. 03 was sold for an aggregate consideration of Rs.27,62,500/-

which involved cash component of Rs.21,12,500/- and cheque component (i.e. agreement value) of Rs.6,50,000/- per shop. Under these circumstances, the law clearly stipulates and puts the burden upon the shoulders of the assessee to show that other shops did not have a cash component at all or the sales consideration of the remaining shops having identical location and other contribution was equivalent to their agreement value only. The least, an assessee is expected to do in this regard is to establish with the help of documentary evidences that market value of the other shops are equivalent to their agreement value at the time of their sale. No such exercise has been done. On the contrary it is noted that sales price of these shops has been shown at even less than one-fourth of the total sales consideration of shop no.03. It is true that revenue authorities are obliged under the law to make fair assessment of income and determine tax payable thereon strictly within the parameters of law, but simultaneously, at various places, the legislature has also drafted appropriate 'safeguard provisions' to ensure that the law of evidence under the income tax proceedings is applied in such a manner so as to ensure that tax evasion is checked. The game of burden is not static under the income tax law. The legal obligations between the assessee and AO swing like a pendulum. It keeps shifting depending upon facts and circumstances of the case and also upon discharge of obligations by the parties in a rightful manner. Under the normal circumstances, the burden to prove an allegation is upon the person who makes an allegation. But in the facts of the case before us, the documents impounded

indicating receipt of cash portion on sale of shops, coupled with own admission about involvement of cash component in sale of Flats, have clearly established factum of involvement of receipt of cash component on sale of shops during the year before us. If the assessee claims that the factual position is different from the facts established on the basis of document impounded from him, then it was for the assessee to rebut the same that too with the help of adequate evidences admissible in the eyes of law.

2.10. We find that nothing has been brought during the course of assessment proceedings in this regard by the assessee. We also find that the AO also failed in bringing any further information or evidence on record in this regard. Thus, we find that both the parties failed in their respective duties to take this case at a stage which is beyond apparent doubts. Under these circumstances, in the interest of justice and fair play to be done with both the parties, we find it appropriate to send this issue back to the file of the AO to give the assessee an opportunity to bring requisite evidences to show that market value of these shops were equivalent to the amount on which transactions has been done. The assessee is free to bring further material or evidences on record to establish that sale transactions of these shops have been done only at the amount for which cheques were received by the assessee. If we confirm the addition at this stage without giving this opportunity to the assessee, then it may not be fully justified keeping in view principles of natural justice and facts of this case. The AO shall also make requisite verification of any

details or document and may raise requisite queries so as to bring complete truth on record. The AO shall decide this issue afresh after taking into account entire material as may be gathered or as may be brought on record by the assessee. Before we part with, we shall like to deal with the judgments relied upon by Ld. Counsel. Ld. Counsel of assessee had relied upon the judgment of Hon'ble Orissa High Court in the case of Banshidhar Onkarmall (supra). It is noted by us that in the said judgment it was held that merely on the basis of past history income could not be ascertained of the current period. Similarly, in the case of Anand Kumar Deepak Kumar (supra), Hon'ble Delhi High Court held that if unaccounted sale was found in a year, there cannot be general presumption that unaccounted sale will continue in the post search period also. We find that the facts of the case before us are totally different from the facts involved in these two cases. This case is not being decided merely on the basis of general past history. It is not a case of unaccounted sales transactions, in general. In the case before us, specific documents have been found during the course of survey which established factum of cash component involved in the sale of a shop. If the other shops which are identical in all respects are sold, then these are expected to fetch a similar price. There cannot be a variation of more than four times. The Revenue is not expected to put linkers on its eyes in such cases and if it is so done then it will give rise to un-restricted tax evasion in our country. Under these circumstances, in the peculiar facts of this case, where specific documentary evidences were found, we find that the

burden was clearly on the shoulders of the assessee to disprove or negate the effect of these documentary evidences upon other identical transactions. Therefore, the assessee cannot take the benefit of these judgments on the facts of the case before us. Our view also finds support from the judgment of Hon'ble Supreme Court in the case of CST vs. H.M. Esufali H. M. Abdulali 90 ITR 271. Thus, with the aforesaid directions, this issue is sent back to the file of the AO.

3. Now we shall take up Revenue's appeal in ITA No.5682/Mum/2014 for A.Y. 2010-11:

3.1. In this year, the facts are that the assessee had sold 4 shops namely S-01, S-23, S-31 & S-32. It is brought to our notice by the Ld. Counsel that as accepted by the Ld. CIT(A) in his order that shop nos. S-31 & S-32 were sold in earlier year and addition with regard to the same as already been made A.Y. 2008-09 and therefore making an addition for the same in this year again has led to a double addition. It is noted by us that Ld. CIT(A) had deleted this addition on this ground itself. Ld. DR is not able to controvert the facts recorded by the Ld. CIT(A) and reiterated before us by Ld. Counsel of the assessee. In our opinion double addition is not permitted under the law and therefore Ld. CIT(A) rightly deleted the addition in his order, and his order to this extent is confirmed.

3.2. With regard to shop no S-1 & S-23, we find that facts are identical to A.Y. 2008-09 and therefore the issues with regard

to these two shops are sent back to the file of the AO, in accordance with our directions as given in our order for A.Y. 2008-09. The AO is directed to follow our order for A.Y. 2008-09.

4. Thus, with these directions, both appeals of the revenue are partly allowed for statistical purposes.

Order pronounced in the open court on 27th July, 2016.

Sd/-	Sd/-
(Amit Shukla)	(Ashwani Taneja)
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य** / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 27/07/2016
*Patel, P.S.*नि.स.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**