आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, ए,मुंबई ।

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

श्री जोगिन्दर सिंह, न्यायिक सदस्य **एवं**

श्री संजय अरोड़ा, लेखा सदस्य**,** के समक्ष

Before Shri Joginder Singh, Judicial Member, and
Shri Sanjay Arora, Accountant Member

ITA NO.1344/Mum/2012
Assessment Year: 2008-09

ITO-15(3)(1), Room No.106, Matru Mandir, 1st Floor, Tardeo Road, Mumbai-400007	**बनाम**/ Vs.	Shri Atul Pravinchandra Parekh 303, Shobha Apartment, 3rd Floor, S.No. Road, Tambe Nagar, Mulund (West), Mumbai-400080
(राजस्व /Revenue)		(निर्धारिती /Assessee)
PAN. No.AMBPP5491R		

राजस्व **की ओर से** / Revenue by	Shri Asghar Zain
निर्धारिती **की ओर से /** Assessee by	Shri Bhupendra Shah

सुनवाई की तारीख **/ Date of Hearing :**	**09/12/2015**
आदेश की तारीख /**Date of Order:**	**10/12/2015**

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

The Revenue is aggrieved by the impugned order dated 22/12/2011 of the ld. First Appellate Authority, Mumbai. The only ground raised in this appeal pertains to deleting the addition of Rs.83,58,292/- made on account of unexplained investment in purchasing a flat. The crux of argument

advanced on behalf of the Revenue, the ld. DR,Shri Asghar Zain, is identical to the ground raised by the defending the addition made in the assessment order by further submitting that there was a difference between the purchase price and the Stamp Valuation Authorities and there is a smell of under hand transaction.

2. On the other hand, ld. counsel for the assessee, Shri Bhupendra Shah, defended the conclusion arrived at in the impugned order by contending that the flat was purchased by the assessee from M/s Nirmal Developers and the flat which was originally booked by Milin Deora was finally sold by the developer to the assessee. The addition was explained to be made merely on presumption.

2.1. We have considered the rival submissions and perused the material available on record. The facts, in brief, are that the assessee declared income of Rs.1,72,110/- which was processed u/s 143(1) of the Income Tax Act, 1961 (hereinafter the Act). The only issue pertains to the value of flat and the difference between the purchase price and the valuation made by the Stamp duty authorities. The assessee purchased the flat directing from the Nirmal Developers. The flat was originally allotted to one Mr. Milin Deora. Vide allotment letter dated 15/05/1995, issued by the builder, the allotment value of the flat was Rs.13,12,500/-. Mr. Milin Deora made total payment of Rs.4,59,375/- i.e. 35% of the value of the flat) till 18/06/1996. The work of the project was stand still till 2006

and the construction started in 2007. The builder vide letter dated 11/09/2007 asked Mr. Milin Deora to make the payment, due, totaling to 95% of the flat value. Mr. Deora lost faith in the builder and surrendered the flat. There was not immediate buyer to the flat and refunded the amount to Mr. Deora and Mr. Deora vide letter dated 21/12/2007, surrendered his all rights of the flat to the builder. The builders vide letter dated 02/01/2008 granted NOC to the assessee for purchasing the flat. The assessee and his wife refunded Rs.4,59,375/- to Mr. Milin Deora and the remaining amount of Rs.8,53,125/- paid to the builder and thus the sale deed was executed on 22/02/2008 and thus, the assessee along with his wife jointly owned the flat. The Assessing Officer adopted the value of the flat at Rs.91,87,500/- by doubting the genuineness of the transition and issued summons to Mr. Deora. By the time, Mr. Deora changed his residence and thus the notice/summons returned unserved. The ld. Assessing Officer made addition of Rs.83,58,292/- as an unexplained investment u/s 69B of the Act.

2.2. On appeal before the ld. Commissioner of Income Tax (Appeals), the impugned addition was deleted, now the Revenue is aggrieved and is in appeal before this Tribunal.

2.3. If the observation made in the assessment order, leading to addition made to the total income, conclusion drawn in the impugned order, material available on record, assertions made by the ld. respective counsel, if kept in

juxtaposition and analyzed, under the facts stated hereinabove, we find that the assessee filed written submissions before the ld. Commissioner of Income Tax (Appeals) and furnished the new address of Milin Deora. Mr. Deora was examined by the Assessing Officer and submitted a remand report before the ld. Commissioner of Income Tax (Appeals) on 18/10/2011. Statement was recorded, wherein, Mr. Deora stated that after booking of flat the project was hold for around twelve years and mean time he shifted his residence from Mulund to Vileparle and further he lost interest in the flat. The developer refused to refund the money. So far as, the addition made u/s 69B of the Act is concerned, the Assessing Officer made the addition on the basis of fair market value of the flat. In such a situation, we note that no evidence was brought on record either to prove the real consideration or the amount paid was more than the amount shown in the books of accounts of the assessee. In such a situation, the decision in CIT vs Lalit Bhasin 290 ITR 245 (Delhi) supports our view. The flat was directly purchased by the assessee from the developers. No proof was ever brought on record by the Assessing Officer that the assessee actually paid extra money or reflected in the accounts of the assessee and the builder. The valuation adopted by the Assessing Officer even is more than/double of the stamp duty valuation authority. The bone of contention between Mr. Deora and the developer was the letter in which Mr. Deora was asked to pay 95% of the booking amount and the project was stalled for

twelve years. Even otherwise, there is no justification in enhancing the sale price in the hands of the purchaser by applying provisions of section 50C and the provision can only be applied in the hands of the seller while computing capital gain. There is no application of section 50C of the Act in the case of a buyer. Section 50C was introduced by the Finance Act, 2002 and came into operation from 01/04/2003. The scope and the effect of insertion have been elaborated in department circular no. 8 of the 2002 dated 27/08/2002 with an underline idea for computing capital gain in real estate transaction. It provides that where the consideration declared to be received or acquired as a result of transfer of land or building are both is less than the value adopted or assessed by the authorities of the State Government for stamp duty purposes, in respect of such transfer, the value so adopted or assessed shall be deemed to be the full value of the consideration and capital gains shall be computed accordingly u/s 48 of the Act. Further, explanation -2 was inserted in sub-section (2) of section 50C so as to clarify the meaning of the term "assessable", thus, the amendments were made applicable w.e.f. 01st October, 2009. Vide Circular No. 5 of 2010 dated 03/06/2010, it was made clear that the amendment made by the Finance (2) Act, 2009 is prospective in nature, (CIT vs R. Sugantha Ravindaran (2013) 352 ITR 488 (Mad.)). The object and the purpose of section 50C is to explore the undisclosed income of capital gains, received by the assessee is taxed. It is also noted that reading section 40A

(as introduced by the U.P. Act 11 of 1969) of the Indian Stamp Act, 1899 with Rule 340A of the U.P. Stamp Rules 1942, it was made clear that circle rate fixed by the Collector is not final but is only a prima facie determination of rate of the are concerned only to give guidance to the registering authorities to test prima facie whether the instrument has properly described the value of the property. The Circle rate under that rule is neither final for the authority nor to one subjected to pay the stamp duty. The circle rate does not take away the right of such person to show that the property in question is correctly valued as he gets an opportunity in case of under valuation to prove it before the Collector after reference is made (RameshChandra Bansal vs District Magistrate/ Collector (1999) 5 SCC 62, 67-68). The ratio laid down in State of Punjab vs Mahavir Singh (AIR) 1996 SC 2994, 2995-96) further throw lights on the issue. In Jawajee Nagatham vs Revenue Divisional Officer (1994) 4 SCC 595, 600-01, it was held that basic valuation register maintained for stamp duty has no statutory base or force.

Section 48 of the Act speaks about mode of computation and the income chargeable for capital gains. It may be noted that by Clause 25 of the Finance (No.2) bill 1998, a proviso was proposed to be inserted after the 3rd proviso in section 48 by opining that value adopted for stamp duty purposes is not relevant. From language of section 48(1)(a), it follows that all expenditure incidental to the transfer must be deducted in

computing the amount of capital gains (CIT vs Rohtak Textiles Mills Ltd.)(1982) 138 ITR 195 (Del.), CIT vs Soundra Rajan (150 ITR 80).

So far as, application of section 50C and consequent addition made u/s 69B of the Act is concerned, in the present appeal, the assessee is a buyer of the flat, therefore, section 50C of the Act, under the facts narrated hereinabove, is not applicable and even otherwise, section 69B has been added merely on surmises without bringing any adverse material on record as the assessee is a direct purchaser of the flat from the builder i.e. M/s Nirmal Developers. There is no material on record that there was unaccounted investment made by the assessee over and above which has been disclosed in the books of accounts of the assessee and found recorded in the books of the developer. Section 69B of the Act is applicable only in a situation, where the amount invested by the assessee is not fully disclosed in his books of accounts, maintained by the assessee and further the assessee offers no explanation about such excess amounts or the explanation is not found satisfactory in that case, the excess amount may be deemed to be income of the assessee. The ratio laid down in Smt. Amar Kumari Surana vs CIT (1997) 226 ITR 344 (Raj.), Hindustan Mills and Electric Stores 232 ITR 421 (MP), CIT vs Dinesh Jain; Lata Jain (2013) 352 ITR 629, CIT vs Wester Estates 209 ITR 343 (Cal.), CIT vs Bajranglal Bansal 335 ITR 572 (Del.), Dhanush General Store vs CIT 339 ITR 651 (Chhatisgarh), CIT

vs Sadhna Gupta (2013) 352 ITR 595 (Del.), CIT vs Fair Deal Textile Park Ltd. (2014) 362 ITR 497 (Guj.) and CIT vs Veerdip Rollers Pvt. Ltd. (2010) 323 ITR 341 (Guj.), supports our view. So far as, primary burden of proof to prove under statement or concealment of income is on the Revenue and it is only when such burden is discharged, then addition can be made as was held in CIT vs Punit Sawarbal (2011) 338 ITR 485 (Del.). No burden has been discharged by the Revenue, therefore, such addition u/s 69B, made by the Assessing Officer, therefore, cannot stands on its leg. The ratio laid down in Kishinchand M. Thakur vs CIT (1992) 106 CTR (Bom.) 273, 274. In view of the clear facts, and the judicial pronouncements, discussed hereinabove, we affirm the stand of the ld. Commissioner of Income Tax (Appeals), resulting into, dismissal of appeal of the Revenue.

Finally, the appeal of the Revenue is dismissed.

This order was pronounced in the open court in the presence of the ld. representative from both sides at the conclusion of the hearing on 09/12/2015

Sd/-	Sd/-
(Sanjay Arora)	(Joginder Singh)
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य** /JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 10/12/2015

Shekhar, P.S./नि.स.

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

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**