

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H" MUMBAI**

**BEFORE SHRI S.RIFAUH RAHMAN (ACCOUNTANT MEMBER) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)**

**ITA No. 1669/MUM/2019
(Assessment Year: 2014-15)**

Kiran R. Sawlani
104/A, Building No. A/3,
Lok Nirman, Dr. Ambedkar Road,
Khar West, Mumbai – 400 052

ITO (Intl. Tax) 4(1)(1)
Vs. R. No. 1729, 17th Floor,
Air India Building, Nariman Point,
Mumbai – 400 021s

PAN No. ABFPS0770V

(Assessee)

(Revenue)

Assessee by : Shri Viraj Mehta, A.R
Revenue by : Shri Shiddaramappa K., D.R

Date of Hearing : 13/10/2021
Date of pronouncement : 02/12/2021

ORDER

PER RAVISH SOOD, J.M:

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-58, Mumbai, dated 31.01.2019 which in turn arises from the order passed by the A.O u/s 143(3) of the Income Tax Act, 1961 (for short 'Act'), dated 30.12.2016 for A.Y. 2014-15. The assessee has assailed the impugned order on the following grounds before us:

- “1. That the Learned CIT(A) has erred in confirming and upholding the Addition of Income made by the Assessing Officer on account of consideration that the Addition to Income is sustainable within section 56(2)(vii) (b)(ii) and the same can be brought under Tax-net under section 56(2)(vii) (b)(ii) of the Income Tax Act 1961, Which is unjustified, unwarranted and bad in law.
2. That the Learned CIT(A) has erred in confirming and upholding the addition of Rs.61,40,868/= regarding difference between Stamp Duty Value of Rs.1,88,63,868/= and Transaction Value of Rs.1,27,22,500/=, made by the Appellant regarding Booking of an Under Construction Flat with the Developer and the Payments made All together at instead of Deferred Payments of Stage-wise of Three Years and the Risk involved there-in is itself is out of the purview of

the addition under section 56(2)(vii)(b)(ii) of Income Tax Act 1961 ,and as such in fact and in Law the same is unjustified, unwarranted and bad in law,

3. That the Learned CIT(A) has erred in confirming and upholding the addition of Rs.61,40,868/= regarding difference between Stamp Duty Value and Transaction Value, without considering the basis of Valuation considered by the Stamp Duty Authority in a Blanket, manner without considering the Fact as to Ready Flat vs. Under Construction Flat, Deferred Payment vs. Immediate Payment by 3 (Three) Years, SRA Scheme Project, etc, and also Wrong Visit made by the Ward Inspector And without referring to Valuation Officer in-spite of request from the Appellant, the addition under section 56(2)(vii)(b)(ii) of Income Tax Act 1961, and as such in fact and in Law the same is unjustified, unwarranted and bad in law.
4. That the teamed CIT(A) has also erred in considering the fact that, the Appellant has No Cash Transactions and Cash on Hand during the year under consideration And the Learned Assessing Officer has not brought any evidence on record and has applied on assumptions, presumptions and surmises without considering the spirit of the application of the section 56(2)(vii) (b)(ii) Income Tax Act 1961.
5. That the Learned CIT(A) has also erred in considering the very fact that the intention of the Developer was to cheat and commit Fraud on the Appellant and as such the Transaction Value in such a scenario has nothing to do with the Market Value or that of Stamp Duty Value and as such the moot question of application of the section 56(2)(vii)(b)(ii) of Income Tax Act 1961, does not arises to that extent.
6. That the Learned CIT(A) has also erred in considering the very fact that, the booking of an under construction Flat is Not an Immovable Property in itself and hence the application of the section 56(2)(vii) (b)(ii) of Income Tax Act 1961 does not arises.
7. That the Learned CIT(A) has also erred in Not Referring the Matter for DVO-Valuation Officer, without considering the very fact that the Developer has not Constructed any Building at All till date, and only Plinth Level Work remain since year 2013 and the same Fact was Wrongly not Reported by the Ward Inspector for refer the Matter for Valuation to DVO Valuation Officer and Filing of FIR by the Appellant in the matter to Khar Police Station and as such on the Ground for want of Natural Justice, itself the above order be declared as null & void & bad-in-law.
8. That the Learned CIT(A) has also et red in considering the very fact that, the said Agreement is null and void, as the Developer Party is not reflected any intention of performing his part of contract at any point of time till date and in fact the Developer Party has Only *entered into* the said Agreement with solo Object of fraud hence the said Addition can not be sustained both in fact and in law, as No Property has been Transferred between the Party till date and hence the application of the section 56(2)(vii) (b)(ii) of Income Tax Act 1961 does not arises.
9. All the above grounds are independent and without prejudice to each another.

10. That the appellant craves leave to add, amend falter, substitute modify any or all grounds of appeal, which' may be necessary at the time of hearing.”

2. Briefly stated, the assessee had e-filed his return of income for A.Y. 2014-15 on 10.07.2015, declaring an income of Rs.7,02,820/-. The return of income filed by the assessee was processed as such u/s 143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment u/s 143(2) of the Act.

3. Original assessment was framed by the A.O vide his order passed u/s 143(3), dated 30.12.2016, wherein he had after, inter alia, making an addition of Rs.61,40,868/- u/s 56(2)(vii)(b)(ii) of the Act assessed the income of the assessee at Rs.68,43,690/-.

4. Aggrieved, the assessee assailed the addition made by the A.O before the CIT(A). However, the CIT(A) not finding favour with the claim of the assessee upheld the order of the A.O and dismissed the appeal.

5. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. Controversy involved in the present appeal lies in a narrow compass i.e as to whether or not the addition made by the A.O u/s 56(2)(vii)(b)(ii) is sustainable. Shorn of unnecessary details, the assessee had during the year made an investment towards purchase of a property i.e Flat No. 702, 7th Floor, Building No. A2 of wing A5, Lok Nirman, Khar, Mumbai, vide an agreement dated 11.10.2013 that was registered on 15.10.2013. During the course of the assessment proceedings, it was observed by the A.O that while for the agreement value of the property in question (admeasuring 725.26 sq. ft.) was Rs. 1,27,22,500/-, its market price as per the Stamp Valuation Authority was Rs. 1,88,63,367/-. Observing, that as the value of the property per the “agreement” was less than the value that was adopted by the Stamp Valuation Authority by an amount of Rs.61,40,868/-, the A.O called upon the assessee to explain as to why the said difference may not be treated as his income from other sources u/s

56(2)(vii)(b)(ii) of the Act. In reply, the assessee vide his letter dated 30.11.2016 objected to the adoption of the value taken by the Stamp Valuation Authority as the Fair Market Value (F.M.V.) of the property in question. It was the claim of the assessee that as the property under consideration was situated in a slum area, therefore, the market value of the same was much lower than the value of the other buildings in the neighbouring areas. Backed by his aforesaid claim, it was submitted by the assessee that the amount for which the property in question had been transacted as per the 'agreement' be accepted without any reference to its market value as was adopted by the Stamp Valuation Authority. However, the aforesaid explanation of the assessee did not find favour with the A.O who took the value that was adopted by the Stamp Valuation Authority i.e Rs.1,88,63,368/- as the value of the property in question and made an addition of Rs.61,40,868/- u/s 56(2)(vii)(b)(ii) in the hands of the assessee.

6. As is discernible from the assessment order, we find that the assessee had in unequivocal terms objected to the proposed adoption by the A.O of the value that was taken by the Stamp Valuation Authority for valuing the property in question. As observed by us hereinabove, it was the claim of the assessee that as the property under consideration i.e the Flat in question was situated in a slum area, therefore, the market value of the same was much lower than the other buildings in the neighbouring areas. However, the claim of the assessee did not find favour with the A.O and was discarded by him after necessary deliberations. It was observed by the A.O that the rate of locality i.e Khar (W) and specifically the rate of Lok Nirman project i.e the building in which the flat purchased by the assessee was situated, as checked by him from the website magicbricks was on date Rs.34,722/- per sq. ft., therefore, the same relating back to the year under consideration i.e F.Y. 2013-14 would not be less than Rs.20,000/- to Rs.25,000/- per sq. ft. In the backdrop of his aforesaid observations, the A.O was of the view that rate of the property that was adopted by the Stamp Valuation Authority

during the year under consideration i.e Rs.19,856/- was well in conformity with the aforesaid market value which he was of the view would not be less than Rs.20,000/- per sq. ft. to Rs.25,000/- per sq. ft. Backed by his aforesaid observations, the A.O was of the view that the value adopted by the Stamp Valuation Authority duly represented the fair market value of the property in question. It was further observed by the A.O that as the assessee had paid a Stamp duty of Rs.9,63,000/- on the value adopted by the Stamp Valuation Authority i.e Rs.1,88,63,368/-, therefore, it could safely be inferred that he had accepted the said value taken by the registering authority. Backed by his aforesaid observations, the A.O u/s 56(2)(vii)(b)(ii) of the Act made an addition of an amount of Rs.61,40,868/- i.e the amount by which the stamp duty value of the aforesaid property in question exceeded the value at which the assessee had claimed to have purchased the property under consideration vide "agreement", dated 11/15.10.2013. On appeal, the CIT(A) finding no infirmity in the view taken by the A.O upheld the same and dismissed the same.

7. We have heard the Id. Authorized Representatives for both the parties, perused the orders of the of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by them to drive home their respective contentions. Before advertng any further, we deem it fit to cull out the provisions of Sec. 56(2)(vii) of the Act, which reads as under:

- “(2) In particular, and without prejudice to the generality of the provisions of sub-section (1) the following income, shall be chargeable to income-tax under the head “Income from other sources”.
- (vii) where an individual or a Hindu undivided family receives, in any previous year from any person or persons on or after the 1st day of October, 2009 [but before the 1st day of April, 2017],-
 - (a) any sum of money, without consideration, the aggregate value of which exceeds fifty thousand rupees, the whole of the aggregate value of such sum;
 - [(b) any immovable property,—

- (i) without consideration, the stamp duty value of which exceeds fifty thousand rupees, the stamp duty value of such property;
- (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:**

(emphasis supplied by us)

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 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;]

- (c) any property, other than immovable property,—
 - (i) without consideration, the aggregate fair market value of which exceeds fifty thousand rupees, the whole of the aggregate fair market value of such property;
 - (ii) for a consideration which is less than the aggregate fair market value of the property by an amount exceeding fifty thousand rupees, the aggregate fair market value of such property as exceeds such consideration :

Provided that where the stamp duty value of immovable property as referred to in sub-clause (b) is disputed by the assessee on grounds mentioned in sub-section (2) of section 50C, the Assessing Officer may refer the valuation of such property to a Valuation Officer, and the provisions of section 50C and sub-section (15) of section 155 shall, as far as may be, apply in relation to the stamp duty value of such property for the purpose of sub-clause (b) as they apply for valuation of capital asset under those sections :

(emphasis supplied by us)

Provided further that this clause shall not apply to any sum of money or any property received:-

- (a) from any relative; or
- (b) on the occasion of the marriage of the individual; or
- (c) under a will or by way of inheritance; or
- (d) in contemplation of death of the payer or donor, as the case may be; or
- (e) from any local authority as defined in the Explanation to clause (20) of section 10; or

(f) from any fund or foundation or university or other educational institution or hospital or other medical institution or any trust or institution referred to in clause (23C) of section 10; or

(g) from any trust or institution registered under section 12AA [or section 12AB]; [or]

(h) by way of transaction not regarded as transfer under clause (vicb) or clause (vid) or clause (vii) of section 47.]

Explanation.— For the purposes of this clause,—

(a) "assessable" shall have the meaning assigned to it in the Explanation 2 to sub-section (2) of section 50C;

(b) "fair market value" of a property, other than an immovable property, means the value determined in accordance with the method as may be prescribed

(c) "jewellery" shall have the meaning assigned to it in the Explanation to sub-clause (ii) of clause (14) of section 2;

(d) "property" [means the following capital asset of the assessee, namely:—]

(i) immovable property being land or building or both;

(ii) shares and securities;

(iii) jewellery;

(iv) archaeological collections;

(v) drawings;

(vi) paintings;

(vii) sculptures; [***]

(viii) any work of art; [or]

[(ix) bullion;]

[(e) "relative" means,—

(i) in case of an individual—

(A) spouse of the individual;

(B) brother or sister of the individual;

(C) brother or sister of the spouse of the individual;

(D) brother or sister of either of the parents of the individual;

(E) any lineal ascendant or descendant of the individual

(F) any lineal ascendant or descendant of the spouse of the individual;

(G) spouse of the person referred to in items (B) to (F): and

(ii) in case of a Hindu undivided family, any member thereof;]

(f) "stamp duty value" means the value adopted or assessed or assessable by any authority of the Central Government or a State Government for the purpose of payment of stamp duty in respect of an immovable property;]."

Also, we herein cull out the provisions of Sec. 50C(2) of the Act [as referred in “third proviso” to Sec. 56(2)(vii) of the Act], which reads as under:

“50C. (1) Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed (or assessable) by an authority of a State Government (hereafter in this section referred to as the “stamp valuation authority”) for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed (or assessable) shall for the purposes of section 48 be deemed to be the full value of the consideration received or accruing as a result of such transfer:

(2) Without prejudice to the provisions of sub-section (1), where –

(a) the assessee claims before any Assessing Officer that the value adopted or assessed (or assessable) by the stamp valuation authority under sub-section (1) exceeds the fair market value of the property as on the date of transfer;

(b) the value so adopted or assessed (or assessable) by the stamp valuation authority under sub-section (1) has not been disputed in any appeal or revision or on reference has been made before any other authority, court or the High Court.”

(emphasis supplied by us)

On a perusal of the 3rd ‘Proviso’ to Sec. 56(2)(vii) read a/w sub-section (2) of Sec. 50C, we find that the same therein contemplates that in a case where an assessee claims before an A.O that the value adopted by the Stamp Valuation Authority qua the transfer of a capital asset, being land or building or both, exceeds the fair market value of the property as on the date of transfer and, the value so adopted by the Stamp Valuation Authority had neither been disputed by the assessee in any appeal or revision nor any reference had been made before any other authority, court or the High Court, then, the A.O is obligated to refer the valuation of the capital asset to a valuation officer; and if the value so ascertained by the valuation officer exceeds the value assessed by the Stamp Valuation Authority, the value so adopted by such authority is to be taken as the full value of consideration received as a result of the transfer. As noticed by us hereinabove, the assessee had specifically vide his letter dated 30.11.2016 objected to the adoption by the A.O of the value taken by the Stamp Valuation

Authority as the FMV of the property under consideration a/w reasons in support of raising such objection i.e the property was situated in a slum area. However, we find that the A.O instead of referring the valuation of the property to the valuation officer had on his own summarily dealt with the aforesaid objections of the assessee and taking the value adopted by the S.V authority as the FMV of the property under consideration made an addition u/s 56(2)(vii)(b)(ii) of Rs.61,40,686/- i.e the amount by which the value adopted by the S.V. authority exceeded the value at which the assessee had purchased the property vide "agreement, dated 11/15.10.2013. In our considered view the aforesaid method so adopted by the A.O clearly militates against the mandate of law, which as noticed by us hereinabove did cast a statutory obligation upon him to have referred the valuation of the property to a valuation officer and not summarily dispose off the objection raised by the assessee on his own.

8. Before us, the Id. A.R had raised multiple contentions to impress upon us that no addition u/s 56(2)(vii)(b)(ii) could have even otherwise validly been made by the A.O, viz. (i) that as the property in question was an under construction flat and no property had been received by the assessee from the builder who had played foul with the assessee; (ii) that the assessee had filed a suit against the builder, viz. Lok Housing and Construction Ltd for specific performance of contract; and (iii) that the builder had failed to hand over the possession of the property to the assessee. However, we are unable to persuade ourselves to substantiate to the claim of the assessee that as the property under construction was an under construction flat which pursuant to the fraud played by the builder had not been received by him till date; and the matter is sub-judice before the courts, therefore, the provisions of Sec. 56(2)(vii)(b) would not be applicable qua the transaction in question. Considering the definition of "transfer" as contemplated in Sec. 2(47) of the Act, we are of the considered view that pursuant to the execution of the registered "agreement to sell" dated

11/15.10.2013 between the assessee and the seller i.e the builder, viz. M/s Lok Housing and Construction Ltd., the transfer of the property under consideration for the purpose of triggering the provisions of Sec.56(2)(vii)(b) stood completed. We, thus, are of the considered view that the events subsequent to the transaction of “transfer” of the immovable property under consideration will have no bearing on the applicability of the provisions of Sec.56(2)(vii)(b) of the Act. Accordingly, we reject the aforesaid claim of the assessee that the provisions of Sec.56(2)(vii) would not be applicable in its case. At the same time, as we are not inclined to accept the manner in which the A.O had made an addition in the hands of the assessee u/s 56(2)(vii)(b)(ii) of the Act i.e without making a reference to the valuation officer as was required per the mandate of Sec. 50C(2) of the Act, therefore, we herein set-aside the matter to the file of the A.O for fresh adjudication. Needless to say, the A.O shall in the course of the set-aside proceedings afford a reasonable opportunity of being heard to the assessee.

9. Resultantly, the appeal filed by the assessee is allowed for statistical purposes in terms of our aforesaid observations.

Order pronounced in the open court on 02.12.2021

Sd/-
(S.Rifaur Rahman)
ACCOUNTANT MEMBER

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

Mumbai;
Dated: 02.12.2021
PS: Rohit

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,
//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai