

IN THE INCOME-TAX APPELLATE TRIBUNAL "E" BENCH MUMBAI
BEFORE SH.B.R.BASKARAN, ACCOUNTANT MEMBER
AND SHRI PAWAN SINGH, JUDICIAL MEMBER
ITA No.2656/Mum/2016 (Assessment Year 2012-13)

M/s Shah Realtors 2nd Floor, Parshwa Padmavati, Beside Oriental Bank of Commerce, Ambadi Road, Vasai(W), Thane-401202 PAN: ABHFS7795J	Vs.	ACIT Circle -4, A Wing, 6 th Floor, Ashar IT Park, Road No. 16-Z, Wagle Industrial Estate, Thane-400604.
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Appellant

Respondent

Appellant by : Dr. K. Sivaram Sr. Advocate with
Sh. Sashank Dandu Advocate

Respondent by : Sh. Suman Kumar (Sr. DR)

Date of Hearing : 19.04.2018

Date of Pronouncement: 25.05.2018

ORDER

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by assessee under section 253 of Income tax Act is directed against the order of Commissioner (Appeals)-3, Thane, dated 14th January 2016 for assessment year 2012-13.
2. Brief facts of the case are that assessee is a partnership firm, engaged in the business of builder and developer. The assessee filed its return of income for relevant assessment year on 22nd of September 2012 declaring total income of Rs.61,10,630/-. The assessment was completed on 20th February 2015 under section 143(3). The assessing officer while passing assessment order besides the other additions made addition of Rs.2,52,65,247/- on account of difference of sale price between building

No. 3 and building No. 10, sold during the financial year in Shah Industrial Plaza at Sativali, Vasai (East) Thane. On appeal before Commissioner (Appeals) the action of assessing officer was confirmed. Therefore, further aggrieved by the order of Id. Commissioner (Appeals) the assessee approached this Tribunal in second appeal. The assessee has raised following grounds of appeal;

Addition of variance and sale price of flats

- (1) The learned Commissioner (Appeals) erred in confirming the addition of Rs. 2,52,65,247 /-under the pretext of suppressed receipt on account of alleged 'on money', wherein the Stamp Duty value is lower than the amount declared under sale, the addition has been made without any evidence on record or conclusive proof, and merely based on conjecture and surmises. Hence the addition may be deleted.*
- (2) The learned Commissioner (Appeals) erred in not appreciating the sale of the Gala No.3 has been done at a higher rate due to the advantage of having immediate and exclusively use of the recreational ground and hence, the same cannot be compared with the other units. In view of the same, the addition may be deleted.*
- (3) The appellant craves leave to add, amend, alter or delete any or all the above grounds of appeal.*

3. We have heard learned AR of the assessee and the learned DR for the revenue and perused the material available on record. The learned AR of the assessee submits that during the assessment year sold various buildings/ gala in the industrial park developed by assessee, which is commonly known as 'Shah Industrial Plaza' near Vasai. The assessing officer on his observation that there is variations in the rate of properties in two building sold, ranging between Rs. 1948/-per square for building No. 10 and Rs. 5025/-per square feet for building No.3 and Rs. 1948/- per

sq feet for building No.10, therefore, the assessing officer took his view about the payment of 'on money'. The assessee has no occasion to receive 'on money'. The variation in the sale price was due to the fact that assessee also handed over possession of approximately 12,000 sq. ft. of adjoining plot which exclusively used by the said buyer, therefore, taking the advantage of situation, the said building was sold to buyer at a lump-sum price of Rs. 4.25 Crore. The assessing officer issued notice under section 133(6) to the buyer of building No.3 i.e. M/s Classi-Mech Equipments Pvt Ltd. In response to the notice of assessing officer, the buyer filed its reply dated 14th January 2015. The buyer of building No.3, in his reply confirmed the sale price. The buyer/ M/s Classi-Mech Equipments Pvt Ltd also filed the copy of the sale agreement dated 17.06.2011. The buyer also confirmed about the exclusive access to the open area adjoining to their property which is about 12,000/- Sq feet, (recreational area) which was handed over to them by the assessee. The said area is exclusively used by them. The market value of building No.3 is Rs.1,38,14,500/- and building No. is Rs. 1,35,55,000/-, however, the sale value of building No. 3 is Rs. 4,25,00.000/- and building No. 10 is Rs.1,60,00,000/-. Both the buildings were sold at more than the value of Stamp valuation Authority. No notice was issued by the assessing officer to the buyer of property / building No.10. The addition was made by assessing officer solely on the basis of surmises and conjectures which is

bad in law. The Id. Commissioner (Appeals) confirmed the addition without valid reasons. The Id. AR of the assessee filed a comparative chart showing the date of sale of building no.1 to 10 in the Industrial Park, name of buyers, area purchased (in sq.ft.), market rate per sq. ft., market value as per Ready Recknor Value, agreement rate and value of agreement, copy of Income tax returns of both the buyers along with the profit and loss accounts and the audited balance sheets. The location plan/site plan of the entire area is also placed on record. The Id AR for the assessee further submits that the case law relied by assessing officer in ITO Vs Diamond Investment and Properties in ITA No. 5537/M/2009 dated 29.07.2010 is not applicable on the facts of this case. In support of his submissions the Id AR for the assessee relied on the decision of Tribunal in case of ACIT Vs Rustom Soli Sethna ITA No. 5086/M/2014 dated 22.06.2017, Prashant Arjunrao Kolhe Vs DCIT [2016] 75 taxmann.com 156(Mumbai Tri), Aum Shiv Enterprises Vs ACIT ITA No. 6985 /M/2010 dated 24.08.2013, Neelkamal Realtors and Erectors Vs DCIT ITA No.1143/M/2013 dated 16.08.2013 and decision of Hon'ble Apex Court in K.P. Varghese Vs ITO [1981] 131 ITR 597(SC).

4. On the other hand the Id. DR for the revenue supported the order of the authorities below. The Id. DR for the revenue further submits that there was about 75% difference in the rate of price of building No. 3 and 10. The assessee failed to substantiate the reason when both the building

were sold within a short span of time. The building No.3 was sold on 17.06.2011 @ Rs.5025/- per sq feet, however, the other building No.10 was sold on 24.10.2011 only @1948/- per sq feet. Moreover, the building No.3 was sold at higher price than the building No.10, which was sold four month prior to building No.10. In support of his submissions the Id. DR for the revenue relied on the decision of CIT Vs Diamond Investments & Properties in ITA No.5537/M/2009 dated 29.07.2010 and decision of Hon'ble Supreme Court in Diamond Investment & Properties Vs ITO [2017] 81 taxmann.com40(SC).

5. We have considered the rival submissions of the parties and have gone through the orders of the authorities below. The assessing officer during the assessment proceeding noted that the assessee has sold two building in industrial complex at the variance of Rs. 3077/- per sq. ft. i.e. building no.3 consisting of area of 8456.44 sq.ft. was sold on 17.06.2011 @ Rs.5025 per sq. ft. for total consideration of Rs. 4.25 Crore to M/s Classi-Mech Equipments Pvt Ltd., however, building no.10 consisting area of 8211.20 sq. ft. was sold on 24.10.2011 @ Rs. 1948/- per sq. ft. for a total consideration of Rs. 1.60 Crore to M/s Viren Industries. The Assessing Officer vide order-sheet dated 08.09.2014 asked the assessee to explain the inconsistency in selling price and to produce the copy of the sale agreement. The assessee furnished its reply dated 06.10.2014. In the reply the assessee contended that sale of building to M/s Classi-Mech

Equipments Pvt Ltd. vide agreement to sale dated 17.06.2011, the buyer was occupying the same Gala/Building on leave and licence basis approximately from last 18 months and that plant and machinery were already fastened to earth. Besides that assessee also handed over possession of approximately 12,000 sq. ft. of adjoining plot which exclusively used by the said buyer, therefore, taking the advantage of situation, the said building was sold to buyer at a lump-sum price of Rs. 4.25 Crore. Thus, there is reason for difference in sale price with building No.10 sold to Viren Industries, which was sold to them at Rs. 1.60 Crore. The assessee also furnished the copy of transfer document related to both the building. The building No.3 was transferred through “agreement to sale”. However building No.10 was transferred through “Conveyance Deed”. The contention of assessee was not accepted by Assessing Officer holding that the assessee received on money from a major part of sale consideration has been received in cash. Therefore, the Assessing Officer proposed to estimate the sale consideration of building no.10 @ 5025 per sq. ft thereby proposed addition of Rs. 2,52,61,280/-. In order to verify the transaction, the Assessing Officer issued notice under section 133(6) to buyer of building no.3, calling upon them to submit copy of rent agreement, details of machinery installed, confirmation whether exclusive possession has been granted for use of adjoining area, how the adjoining area has been put to use by them, source of financing cost of Gala/building

details of Director/shareholders. The buyer vide its reply dated 14.01.2015 submitted copy of rent agreement, details of machinery installed in AY 2010-11 to AY 2013-14. The buyer confirmed that the adjoining are/Recreation Garden area is forming part of their building and have exclusive access to the said portion. The said area is utilized by them for stocking the material. The funds for purchase of building were obtained through long term loan from State Bank of India. They also furnished the details of Directors. The Assessing Officer after perusal of rent agreement dated 17.06.2011 noted that the cost of installed machinery is worth Rs. 421,81,837/-, which have been acquired and installed in the year of purchase. In the period prior to the sale or during the period where the Gala was allegedly leased to assessee machinery valued only of Rs. 83,195/- installed by buyer, therefore, contention of buyer was not accepted. The Assessing Officer also deputed the Inspector to verify the exclusive use of open area, if the open area is open to other building owner in the vicinity or not. The Ward Inspector reported that the open area was not exclusively used by buyer and only old wooden logs were found in the said area, which is open for all occupant of the building situated at "Shah Industrial Plaza". The Assessing Officer therefore, made the addition of Rs. 2,52,65,247/- holding that the assessee has obtained 'on money' to that extent. The Id. Commissioner (Appeals)

has not given any other finding except confirming the order of Assessing Officer.

6. We have noted that the Assessing Officer issued notice under section 133(6) only to the buyer of building no.3, who has paid higher price per square feet. No notice under section 133(6) was issued to buyer of building no.10 or any other buyer, those purchased at lower rates. We have noted that the assessee has sold the Gala/Building No.3 & 10 at higher rate than the stamp value rate. There is no allegation of Assessing Officer that transfer of Gala No.10 has been understated by the assessee. The Assessing Officer on his suspicious about the “on money” made the addition on the basis of variation of rates between two buyers. The onus was upon the Assessing Officer to prove that the assessee received “on money” on sale of Gala No.3. The assessee throughout the proceeding contended that the higher rate was negotiated with the purchaser of Gala No.3 because of location and the additional benefit of adjoining open space of 12,000 sq. ft. The Assessing Officer made the addition of difference of alleged sale price without any evidence in his possession. No enquiry is made from the purchaser of Gala No.10. In our view, the purchaser of Gala No.10 was a crucial witness on the basis of whose transaction, the difference/variation of sale price was added, to through any light, if any, “on money” was paid. No enquiry from other purchaser

was carried out by Assessing Officer, though the assessee has furnished the details of all the purchasers.

7. It is settled law that the onus to claim that apparent is not real is on one who so claims. In our view, when the Assessing Officer requires the assessee to show-cause as to why there is difference between two purchasers and that the assessee offered explanation, no addition can be made simply discarding his explanation. There must be something concrete evidence to show that the version given by assessee is not correct. It is settled law that no addition can be made on hypothetical basis or presuming a higher sale price by simply rejecting the contention without cogent reason. Moreover, the higher rate of building No.3 was disclosed by assessee in his books of accounts, rather it was not discovered by the assessing officer. In our view the addition was made by assessing officer merely on assumption and presumption basis and without any evidence.
8. The case law relied by Assessing Officer in ITO Vs Diamond Investment and Properties (supra) is not applicable on the facts of the present case. In case of Diamond Investment and Properties (supra), the flats were sold to the related parties was much lower than the price charged from the other parties. However, there is no allegation of related parties' transaction in the present case. The coordinate bench of Tribunal Neelkamal Realtor & Erectors India (PO Ltd (2013) 38 taxmann.com 195 held that when the

assessee offered an explanation for charging lower price in respect of some of flats sold by it and Assessing Officer without controverting such explanation made addition to income of assessee by applying rate of another flat sold by it, Assessing Officer was not justified in his action. Similar view was taken by another bench of Tribunal in ACIT Vs Rustom Soil Sethna (supra).

9. The Hon'ble Supreme Court, in K.P. Varghese v. ITO (supra) in context of Sub-section (2) of Section 52 held that it can be invoked only where the consideration for the transfer has been understated by the assessee or, in other words, the consideration actually received by the assessee is more than is declared or disclosed by him and the burden of proving such an understatement or concealment is on the Revenue. Sub-s. (2) has no application in the case of an honest and bona fide transaction where the consideration received by the assessee has been correctly declared or disclosed by him, and there is no concealment or suppression of the consideration. Similar view was taken in CIT Vs Shivakami Co. (P.) Ltd. [1986] 159 ITR 71/25 Taxman 80K (SC) and in CIT v. Godavari Corporation Ltd. [1993] 200 ITR 567/68 Taxman 344 by holding that the burden is on the Revenue to prove under-statement of the consideration. Further, the Hon'ble Kerala High Court in CIT v. M.J. Cherian [1979] 117 ITR 371 has held that the ITO cannot fix higher sales price without any evidence. The mere presumption that the excess price could have

been charged has been held to be not a ground for coming to the conclusion that the assessee did charge a higher price. In view of the above factual and legal discussion the assessing officer was not justified in making the addition without any evidence, therefore, the grounds of appeal raised by the assessee are allowed.

10. In the result the appeal of the assessee is allowed.

Order announced in the open court on 25th May 2018.

Sd/-

B.R.BASKARAN
ACCOUNTANT MEMBER

Sd/-

PAWAN SINGH
JUDICIAL MEMBER

Mumbai, Date: 25.05.2018

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Copy of the Order forwarded to :

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| 1. Assessee | 2. Respondent |
| 3. The concerned CIT(A) | 4. The concerned CIT |
| 5. DR "A" Bench, ITAT, Mumbai | |
| 6. Guard File | |

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai