

IN THE INCOME TAX APPELLATE TRIBUNAL "SMC" BENCH,
MUMBAI

BEFORE SHRI ABY T. VARKEY, JM

आयकर अपील सं/ I.T.A. No.25/Mum/2023
(निर्धारण वर्ष / Assessment Year: 2010-11)

Mr. Rajesh Prabhudas Parekh D-508, Kamala Nagar, M. G. Road, Kandivli (W), Mumbai-400067.	बनाम/ Vs.	CIT(A), ITO National Faceless Appeals Centre, Delhi.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ADLPP1104G		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Anil Thakrar
Revenue by:	Shri Anil Gupta

सुनवाई की तारीख / Date of Hearing: 28/02/2023
घोषणा की तारीख /Date of Pronouncement: 31/03/2023

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of the Ld. CIT(A)/NFAC, Delhi dated 17.11.2022 for AY. 2010-11.

2. The main grievance of the assessee is against the action of the Ld. CIT(A) confirming the addition of Rs.3,86,000/- (being 50% of Rs.7,72,000/-) made by the AO.

3. Brief facts as noted by the AO are that, the assessee is an individual employed with M/s. Shapoorji Pallonji & Co and had not filed his return of income for AY. 2010-11. The AO notes that he received an information regarding the assessee having made payment of Rs.7,72,000/- in cash (*on money*) to M/s. Shakti Developers of Ekta Group for purchase of flat in "Ekta Bhoomi Garden. And therefore, the assessment of the assessee was reopened by issue of notice u/s 148 of the Income Tax Act, 1961 (hereinafter "the Act"); and pursuant thereto



ITA No.25/Mum/2023
A.Y. 2010-11
Rajesh Prabhudas Parekh

the assessee filed return of income declaring income of Rs.7,74,590/-. The AO thereafter issued show cause notice to assessee as to why the cash payment of Rs.7,72,000/- (*i.e. on money purportedly paid developer of flat*) should not be added to his income. However, the assessee denied to have made any such payment to M/s. Ekta Shakti Developers and requested AO for furnishing of any evidence from the developer to prove such payment (cash/on-money) for purchase of flat. Pursuant thereto, the AO issued summons dated 05.12.2017 to key person of M/s. Ekta Shakti Developers to be present before him. And on the date fixed for appearance, the AO noted that even though the assessee was present, none appeared on behalf of M/s. Ekta Shakti Developers. Nevertheless, according to the AO, the promoter of M/s. Ekta Shakti Developers, Shri Vivek Mohanani during search has given statement on oath that assessee and his wife (co-owner) had paid cash (Rs. 7,72,000) over and above the sale consideration of Rs. 54,18,115 for purchase of a flat. And since the flat has been jointly purchased by assessee along with his wife, and the assessment in the case of Mrs. Bhakti Parekh (wife of assessee) has been completed wherein 50% of the cash payment of Rs. 7,72,000/- i.e. Rs.3,86,000/- has been added, the same amount was also added in the hands of the assessee. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who dismissed this ground of appeal of the assessee on the ground that there was no reason why Shri Vivek Mohnani should have given statement that assessee and his wife had paid cash of Rs.7,72,000/- over and above the sale consideration. Therefore, according to the Ld. CIT(A), onus was on the assessee to



ITA No.25/Mum/2023
A.Y. 2010-11
Rajesh Prabhudas Parekh

prove that he has not paid such an amount to promoter. Aggrieved, the assessee is before this Tribunal.

4. I have heard both the parties and perused the records. The assessee is an individual employed with M/s. Shapoorji Pallonji & Co. Ltd. And had purchased a flat (jointly with his wife) in M/s. Ekta Bhoomi Group Garden. According to the AO, when the developers of this flat M/s. Ekta Shakti Developers/Ekta Group was searched on 05.10.2015, the statement of Shri Vivek Mohanani (promoter of M/s. Ekta Group) was recorded u/s 131 of the Act wherein he admitted that the cash has been paid by the assessee over and above the sale consideration/agreed value. And that cash which has been received is recorded in the form of amenities; and that the same has not been recorded in the regular books of account. According to the AO, list contains the name of the assessee and his wife have paid Rs.7,72,000/- over and above the sale consideration of Rs.54,18,115/- and since 50% of it i.e. Rs.3,86,000/- has been added in the hands of the assessee's wife, the same amount has been added in the hands of the assessee. Therefore, he confirmed the addition.

5. The Ld. AR assailing the action of the Ld. CIT(A)/AO drew our attention to page no. 2 of the assessment order wherein the assessee has denied the allegation of giving any cash payment to the developer of the flat he purchased. According to the Ld. AR, the assessee requested the AO to summon Shri Vivek Mohanani on whose statement the assessment has been reopened; and even though the AO summoned Shri Vivek Mohanani on 05.12.2017, he did not appear before the AO. According to the Ld. AR, this omission on the part of



ITA No.25/Mum/2023
A.Y. 2010-11
Rajesh Prabhudas Parekh

Shri Vivek Mohanani not to appear before the AO itself exposes the falsity of the allegation against the assessee. According to him, for reasons best known to the promoter, he must have made the statement and even it cannot be ruled out that his statement was extracted under duress. So, these facts could have been ascertained only if he was examined by AO in his (assessee's) presence. So according to the Ld. AR, the adverse view and the addition made merely on the basis of the statement/allegation recorded behind the back of the assessee and without providing copy of the same (i.e., statement recorded u/s 131 of the Act) the impugned addition was bad in law. According to the Ld. AR, if the allegation made by the promoter of the M/s. Ekta Group (statement recorded u/s 131 of the Act) was correct, then he ought to have appeared before the AO and asserted the allegation against the assessee and his wife. And if such an exercise was done, then assessee could have got chance to cross-examine Shri Vivek Mohanani. Without doing so, according to Ld. AR, the action of the AO to draw adverse inference against the assessee based on statement uncorroborated with material/evidences is bad in law. In this context, it is noted that the assessee in fact during assessment proceedings had denied making any payment in cash, over and above, sale consideration of Rs.54,18,115/-. In the back-drop of such a stand of assessee, I have carefully gone through the assessment order and impugned order of the Ld. CIT(A) and find that other than the statement of promoter (recorded behind the back of assessee) there is no other material which has been relied by the AO for drawing adverse inference against the assessee. It is even noted that the AO has not



ITA No.25/Mum/2023
A.Y. 2010-11
Rajesh Prabhudas Parekh

stated when (date) the statement of promoter u/s 131 of the Act has been recorded; and that statement of Shri Vivek Mohanani has not been furnished to assessee and his wife. And even though on the request of assessee, Shri Vivek Mohanani was summoned, he did not appear before the AO, therefore,, the veracity of the statement could not be tested on the touch stone of cross-examination. In such a scenario, it would be unsafe to rely only on the statement of Shri Vivek Mohanani, which has been recorded behind the back to the assessee to saddle the addition without some corroborative material which has been found during search showing that the assessee and his wife had paid cash of Rs.7,72,000/- over and above the sale consideration of Rs.54,18,115/-. For such a preposition, I rely on the decision of the Hon'ble Supreme Court in the case of Andaman Timber Industries Vs. CCE (281 CTR 241) (SC). Therefore, the AO is directed to delete the addition of Rs.3,86,000/-.

6. Ground no. 2, 3 and 4 are argumentative/general in nature so dismissed.

7. In the result, the appeals of the assessee are partly allowed.

Order pronounced in the open court on this 31/03/2023.

Sd/-
(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 31/03/2023.
Vijay Pal Singh, (Sr. PS)



ITA No.25/Mum/2023
A.Y. 2010-11
Rajesh Prabhudas Parekh

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai