IN THE INCOME TAX APPELLATE TRIBUNAL
"J (SMC)" BENCH, MUMBAI

BEFORE SHRI AMIT SHUKLA, JM &
MS PADMAVATHY S, AM

I.T.A. No. 3233/Mum/2024
(Assessment Year: 2014-15)

Aarti Sudarshan Soni, Mahatma Phule Chawl, Kurar Village, Cutting No. 5, Opp. Anand Medical, Malad East, Mumbai-400097 **PAN: AUXPS8511R**	Vs.	**ITO-30(1)(2),** Kautilya Bhavan, Bandra Kurla Complex, Bandra East, Mumbai-400051.
Appellant)	:	**Respondent**)

Appellant /Assessee by	:	Dr. K. Shivram, Sr. Adv. & Nilam Jadhav, AR
Revenue / Respondent by	:	Shri Asif Karmali, Sr. DR
Date of Hearing	:	12.02.2025
Date of Pronouncement	:	21.02.2025

O R D E R

Per Padmavathy S, AM:

This appeal by the assessee is against the order of the Commissioner of Income Tax (Appeals) / National Faceless Appeal Centre (NFAC)- Delhi [for short 'the CIT(A)] dated 29.03.2024 for the AY 2014-15. The assessee raised the following ground of appeal:-

"I. Addition of Rs. 33,00,000/-made u/s 69 as an unexplained investment

1. The learned National Faceless Appeal Centre (NFAC) erred in confirming the addition of Rs.33,00,000/- as an unexplained investment u/s.69 on the basis of information received from the DDIT (Invt.), Unit 2(2) without appreciating that the appellant has not paid any consideration in cash hence the addition of Rs.33,00,000 as unexplained investment may be directed to be deleted.

2. The learned National Faceless Appeal Centre (NFAC) failed to appreciate that there is no difference in consideration paid as per agreement value and stamp valuation, the appellant has filed an affidavit, and also statement was taken on oath wherein the appellant has stated that no cash consideration was paid other than stated in the agreement hence the addition of Rs.33,00,000 may be directed to be deleted.

3. Without prejudice to the above, the learned National Faceless Appeal Centre (NFAC) erred in confirming the addition made by the AO based on a statement recorded u/s.132 (4) of Shri Binesh Balakrishnan, Sr. Accountant without giving an opportunity for cross-examination in the course of assessment proceedings as well as in appellate proceedings, when a specific request was made in the course of assessment as well as appellate proceedings. Hence, the addition confirmed by the National Faceless Appeal Centre (NFAC) without giving an opportunity for cross-examination is bad in law and liable to be deleted."

2. The assessee is an individual having income from House Property and Interest Income. The assessee filed the return of income for AY 2014-15 on 09.08.2014 declaring a total income of Rs. 6,15,200/-. The assessee has purchased a flat from M/s Shah Housecon Pvt. Ltd. vide agreement dated 15.02.2014 for a consideration of Rs. 1,27,30,000/-. A survey was conducted in the business premises of M/s Shah Housecon Pvt. Ltd. on 11.11.2024 and the statement of Shri Binesh Balkrishnan, Senior Accountant was recorded. Based on the documents received during the survey proceedings and the statement recorded, the Assessing Officer (AO) called on the assessee to show-cause why the amount of Rs.

33,00,000/- allegedly paid to the M/s Shah Housecon Pvt. Ltd. as on-money over and above the agreement value should not be treated as unexplained investment. The assessee submitted before the AO that she did not paid any on-money and in this regard submitted the bank statements. The assessee also filed an affidavit dated 02.12.2016 stating that no on-money payments were made to M/s Shah Housecon Pvt. Ltd. The assessee further requested the AO to issue summons to the parties for cross-examination. The AO, however, did not accept the submissions of the assessee and proceeded to treat the amount of Rs. 33,00,000/- as addition under section 69 of the Act for the reason that the parties to whom summons were issued did not appear before the AO. On further appeal, the CIT(A) confirmed the addition. The assessee is in appeal before the Tribunal being aggrieved by the order of the CIT(A).

3. There is a delay of 22 days in filing the appeal before the Tribunal. The assessee in this regard filed a petition for condonation of delay stating that due to bereavement in the family, the assessee could not file the appeal in time. Having heard both the parties and perused the material on record, we are of the view that there is a reasonable and sufficient cause for the delay in filing the appeal before the Tribunal. Therefore following the Hon'ble Supreme Court decision in the case of Collector, Land Acquisition Vs. MST.Katiji & Ors., (167 ITR 471) (SC) we condone the delay of 22 days in filing the appeal and admit the appeal for adjudication.

4. The ld. AR submitted that the assessee has discharged the onus by producing the relevant documentary evidences and also an affidavit stating that no on money was in cash was paid to the M/s Shah Housecon Pvt. Ltd. The ld. AR further submitted that the assessee did not have the opportunity to cross-examine and the parties not responding to the summons issued by the AO is beyond the

control of the assessee. The ld. AR also submitted that the AO has not conducted any independent inquiry but has proceeded to make the addition merely based on the statements recorded and for the reason that the builder did not respond to the summons. It is submitted by the ld AR that based on the same survey conducted at M/s Shah Housecon Pvt. Ltd., an addition under section 69 was made in case of M/s Yash Synthetic Pvt. Ltd. towards on-money payment relying on the statement recorded. The ld AR further submitted that the Co-ordinate Bench in the said case in ITA No. 268/Mum/2024 dated 18.06.2024 has held that no addition can be made based on the statement of Senior Accountant Shri Binesh Balakrishnan. The ld. AR also submitted that there is no difference between the registered value and the stamp duty value of the property and therefore the AO is not correct in making an addition under section 69 of the Act without any basis.

5. The ld. DR on the other hand vehemently argued that the statement found during the course of survey as submitted by the revenue before the Tribunal contains the name of the assessee and therefore the AO has correctly made the addition under section 69 of the Act.

6. We heard the parties and perused the material on record. The AO has made an addition of Rs. 33,00,000/- as unexplained investments in the hands of the assessee based on the statement found during the course of survey and based on the statement recorded from the Senior Accountant of the Builder that the assessee has made on-money payments. The assessee before the AO denied having made any such payment and also filed an affidavit to this effect. The assessee further submitted before the AO that the Builder could be summoned and an opportunity to cross-examine may be given to the assessee. The AO issued summons to the Builder and since there was no response, the AO treated the entire amount of Rs. 33,00,000/- as unexplained investment under section 69 of the Act in the hands of

the assessee and made addition accordingly. We notice that the Co-ordinate Bench while considering a similar addition based on the same survey conducted at M/s Shah Housecon Pvt. Ltd., in the case of M/s Yash Synthetic Pvt. Ltd (supra) has held that

> *"6. We have heard the parties and perused the record. We notice that the Assessing Officer has placed reliance on the statement taken from Shri Binesh Balakrishnan. The statement was given u/s. 133A of the Act and it is well settled proposition that the same does not have any evidentiary value. Hence, it is imperative for the AO to bring any other corroborative material to substantiate the entries made in the document. The responsibility of the assessing officer would go up, when the assessee denies the entries made in the document seized during the course of survey operations. However, we notice that the Assessing Officer neither made any further enquiry nor bring on record any other credible material to substantiate the entries made in the document that the assessee has made cash payment of Rs.1.61 crores.*
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> *7. Further, the entries made in the document are prone to discrepancies. The allotment letter for flats has been issued to the assessee on 22/03/2011, while the document notes down the date of allotment as 07/01/2013. This apparent contradiction brings down the reliability of the document taken during the course of survey, as the entries made therein is contrary to the actual facts. It is stated that the flats were finally registered in the name of the assessee in Financial Year 2016-17 and this fact has not been noted down in the Statement. The case of the assessee is that it has made all payments by way of cheques only and the relevant details were furnished to the AO.*
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> *8. The Ld A.R further submitted that the purchase value of flats are also supported by the valuation report issued by a registered valuer and this report support the case of the assessee that there was no necessity to pay part of consideration in cash, as the purchase was done at market rates. In the case of Shri Anil Jaggi vs. ACIT (ITA No.3049/Mum/2016 dated 20-12-2017), the co-ordinate bench examined the addition made in the hands of buyer of flat on the basis of evidence seized from the builder during the course of search operations conducted u/s 132 of the Act. The co-ordinate bench expressed the view that the addition could not have been made on the basis of recording done at the end of builder, when the purchase consideration matches with the market rates and further no other evidence corroborating those entries are found. The relevant observations made by the co-ordinate bench in the above said case are extracted below:-*

"15. We shall now take up the case of the assessee on merits and deliberate on the validity of the addition of Rs. 2.23 crore made by the A.O on the ground that the assessee had made a payment of "on money" for purchase of flats from M/s Lakeview developers. We have perused the facts of the case and the material available on record on the basis of which the addition of Rs. 2.23 crore had been made in the hands of the assessee. We have further deliberated on the material placed on record and the contentions of the ld. A.R to drive home his contention that no payment of any "on money" was made by the assessee for purchase of flats from M/s Lakeview Developers. We find that the genesis of the conclusion of the A.O that the assessee had paid "on money" of Rs. 2.23 crore for purchase of property under consideration is based on the contents of the pen drive which was seized from the residence of an ex-employee of Hiranandani group. We have perused the print out of the pen drive (Page 42 of APB) and find ourselves to be in agreement with the view of the ld A.R that though against the heading "Amount of on money paid" the name, address and PAN No. of the assessee is mentioned alongwith the details of the property purchased by him, viz. Flat no.2501 in "Somerset" building from Lakeview Developers (a Hiranandani group concern), however, the same would not conclusively prove suppression of investment and payment of "on money" by the assessee for purchase of the property under consideration. We find that the information as emerges from the print out of the pen drive falls short of certain material facts, viz. date and mode of receipt of "on money", who had paid the money, to whom the money was paid, date of agreement and who had prepared the details, as a result whereof the adverse inferences as regards payment of "on money" by the assessee for purchase of the property under consideration remain uncorroborated. We further find that what was the source from where the information was received in the pen drive also remains a mystery till date. We find that Sh. Niranjan Hiranandani in the course of his cross-examination had clearly stated that neither he was aware of the person who had made the entry in the pen drive, nor had with him any evidence that the assessee had paid any cash towards purchase of flat. We have deliberated on the fact that Sh. Niranjan Hiranandani in his statement recorded on oath in the course of the Search & seizure proceedings had confirmed that the amounts aggregating to Rs. 475.60 crore recorded in the pen drive were the onmoney received on sale of flats, which was offered as additional income under Sec. 132(4) and thereafter offered as such for tax in the petition filed before the Settlement commission. We are of the considered view that there is substantial force in the contention of the ld. A.R that mere admission of the amounts recorded in the pen drive as the additional income by Sh. Niranjan Hiranandani,

falling short of any such material which would inextricably evidence payment of "on money" by the assessee would not lead to drawing of adverse inferences as regards the investment made by the assessee for purchase of the property under consideration. We rather hold a strong conviction that the very fact that the consideration paid by the assessee for purchase of the property under consideration when pitted against the "market value" fixed by the stamp valuation authority is found to be substantially high, further fortifies the veracity of the claim of the assessee that his investment made towards purchase of the property under consideration was well in order. We are of the considered view that though the material acted upon by the department for drawing of adverse inferences as regards payment of "on money" by the assessee formed a strong basis for doubting the investment made by the assessee for purchase of the property under consideration, but the same falling short of clinching material which would have irrefutably evidenced the said fact, thus, does not inspire much of confidence as regards the way they have been construed by the lower authorities for drawing of adverse inferences in the hands of the assessee. We thus are of a strong conviction that as the material relied upon by the lower authorities does not corroborate the adverse inferences drawn as regards the investment made by the assessee, therefore, the same cannot conclusively form a basis for concluding that the assessee had made payment of "on money" for purchase of the property under consideration. We thus in the backdrop of our aforesaid observations are of the considered view that the adverse inferences drawn by the A.O as regards payment of "on money" of Rs. 2.23 crore by the assessee for purchase of Flat No. 2501 from M/s Lakeview Developers are based on of premature observations of the A.O, which in the absence of any clinching evidence cannot be sustained. We thus are unable to subscribe to the view of the lower authorities and set aside the order of the CIT(A) sustaining the addition of Rs. 2.23 crores in the hands of the assessee.

In the case before the co-ordinate bench, the pen drive was found during the course of search operations conducted u/s 132(4) of the Act and further the builder has offered the alleged on-money receipts as its income. The coordinate bench has held that the action taken by the builder would not automatically support the presumption that the concerned assessee has paid on money.

9. In the instant case, the facts are not in better footing at all on account of following reasons:-

(a) The impugned document was found during the course of survey operations.

(b) The accountant and director has admitted the entries in the statement taken u/s 133A of the Act, which does not have any evidentiary value.
(c) The dates mentioned in the document did not match with actual dates of allotment or registration.
(d) As observed by the co-ordinate bench in the above said case, the entries made in the document falls short of certain material facts, viz. date and mode of receipt of "on money", who had paid the money, to whom the money was paid, date of agreement etc.

10. In view of the foregoing discussions, we are of the view that the impugned addition of Rs.1.61 crores made by the AO is not sustainable in law. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete the above said addition.

11. In the result, the appeal of the assessee is allowed."

7. The facts in assessee's case are identical where the AO has solely relied on the statement recorded during the course of survey and from the perusal of records we notice that the AO has not conducted any independent enquiry to substantiate that the assessee has made the alleged on-money payments. We further notice that the AO has not considered the bank statements submitted by the assessee and also the affidavit filed stating that no on-money payment in cash is done by the assessee. It is relevant mention here that it is a settled position that the assessee cannot be required to substantiate a negative fact and that the AO ought to have conducted necessary further enquiries in support of the alleged claim that the assessee has made on-money payments. In view of this discussion and respectfully following the above decision of the Co-ordinate Bench, we hold that the addition made by the AO is not sustainable and liable to be deleted.

8. In result, the appeal of assessee is allowed.

Order pronounced in the open court on 21-02-2025.

Sd/-	***Sd/-***
AMIT SHUKLA)	**(PADMAVATHY S)**
Judicial Member	**Accountant Member**

**SK, Sr. PS*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. Guard File
5. CIT

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai