

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

BEFORE SHRI AMIT SHUKLA, HON'BLE JUDICIAL MEMBER

AND

SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER

ITA NO. 3646/MUM/2023 (A.Y: 2017-18)

Kundal Raghbir Bhandari A-9/6:6 Millennium Tower Sector-9, Sanpada Navi Mumbai- 400705 PAN: AMVPB3846J	v.	ITO (Intl. Tax) Ward- 1(2)(1) Room No. 16 A-Wing 3 rd Floor Mittal Court 22 Nariman Point, Mumbai- 400021
(Appellant)		(Respondent)

Assessee Represented by	:	Shri. Nikhil Natekar & Shri. Sreekumar Nair
Department Represented by	:	Ms. Anam Benish
Date of conclusion of Hearing	:	12.03.2024
Date of Pronouncement	:	27.03.2024

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of the Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [hereinafter in short "Ld. CIT(A)"] dated 16.08.2023 for the A.Y.2017-18.

2. Brief facts of the case are, assessee filed his return of income on 14.07.2017 declaring total income of ₹.18,886/- and the return was processed under section 143(1) of Income-tax Act, 1961 (in short "Act"). Assessing Officer received information from the O/o DCIT, Central Circle 1(3), Mumbai that assessee had paid ₹.11,33,000/- in cash during the F.Y. 2016-17 pertaining to the A.Y. 2017-18 to the M/s. Bhagwati Developers for the purchase of the FLAT NO. H-702, in 7th floor in the building named 'Bhagwati Imperia', while the agreement value of the said property is ₹.87,74,000/-. Accordingly, Assessing Officer issued notice under section 148 of the Act on 31.03.2021 after taking approval u/s. 151(1) of the Act from the competent authority. The reasons recorded for re-opening of the assessment are reproduced as under:

"1. Brief details of assessee-It is seen from the e-filing portal of department that the assessee has filed return of income for A.Y.2017-18 on 14.07.2017 declaring total income of Rs. 18,886/- The Return has been processed u/s 143(1) on 30-05-2018 at the Returned Income.

2. Brief details of information received - Vide email dated 25-02-2021, information was received from A.C.I.T. Central Circle-1(3), Mumbai that a search and survey action was conducted in the case of M/s Bhagwati Developers and its group concern on October 15, 2018. The main concerns of the group are M/s. Bhagwati Developers, M/s Shree Bhagwati Enterprises, M/s. Shanti Enterprises, M/s Patel Developers, M/s. Patel Enterprises, M/s Bhagwati Infra, M/s. Shree Hari Enterprises and key persons are Manji Karman Patel, Bhogilal M. Vora, Kulin Shantilal Vora, Munji Ranchod Gajora, Pankaj Patel, Narayan Hirabhai Dubariya and Dharmendra Manji Patel. M/s. Bhagwati Developers is a builder and

developer firm that focuses on projects mainly in Navi Mumbai. The projects of Bhagwati Group are both in commercial and residential segments. The Group is known for its series of luxury apartments developed at several prime spots in Navi Mumbai.

2.1 During the search action, it was the group was engaged in receiving on- money in various residential and commercial projects. The on-money was being accepted on sale of flats and commercial units in both ongoing as well as in completed projects. Generally the cash component was taken in full before registration of the agreement or issuing the allotment letter. After receipt of full cash component, agreements with the customers were made close to the prevailing circle rate/ stamp duty value or little higher than that. However, it was noticed that the actual transaction/sales considerations was much higher than the circle rate, part of which was not being accounted in the regular books of accounts.

2.2 During the post search investigation, based upon the seized material, it is seen that assessee has purchased a flat at consideration of Rs.99,07,000/-and has done on money transaction of Rs. 11,33,000/-. Thus total investment of Rs.99,07,000/-was made by assessee during previous year to purchase the immovable property.

3. Analysis of Information received- Since the assessee has made cash payment of Rs.11,33,000/- to acquire immovable property from his undisclosed sources and was not offered in his return of income. The transaction remains undisclosed and the same are required to be considered in computing total income of the assessee.

4. Basis of forming reason to believe. In this case, the assessee has purchased a flat and has done on money transaction of Rs.11,33,000/-. The income element in respect of above transactions remains undisclosed and the same are required to be considered in computing total income of the assessee. In view of the above and by reason of the failure on the part of the assessee to disclose fully & truly all material facts necessary thereto in his return of Income, I have reason to believe that the income at least to the extent of Rs. 11,33,000/-chargeable to tax in the hands of the assessee has escaped assessment within the meaning of section 147 of the Income Tax Act, 1961. A notice u/s 148 r.w.s 147 of the Act, is being proposed to be issued to assess such

income and also any other income chargeable to tax which has escaped assessment, which comes to my notice subsequently in the course of assessment proceedings for A. Y. 2017-18."

3. In response to the notice, assessee has filed the return of income filed in response to the notice u/s 148 on 29.04.2021. Therefore, for the purpose of proceedings u/s 148, this return was considered as return of income filed on 29.04.2021. Accordingly, notices 143(2) and 142(1) of the Act were issued and asked the assessee to furnish the details(s)/evidences in support of his claim made in the return. In response, assessee filed his reply on ITBA portal.

4. During the course of assessment proceedings, Assessing Officer observed that as per the records mentioned in the reasons recorded for initiation of proceedings u/s 147, the assessee had paid ₹.11,33,000/- (for purchase of the FLAT NO. H-702, in 7th floor in the building named 'Bhagwati Imperia', to the builder M/s. Bhawati Developers. in cash during the financial year under consideration). Accordingly, assessee was issued a show cause notice by referring to the reasons recorded for reopening and was asked to explain why the above said on money paid to purchase the flat should not be added as his undisclosed income.

5. The assessee vide letter dated 31.01.2022 had made his submission on ITBA portal and submitted that assessee denies any payment of on money to the builder and asked for cross examination as well as submitted that the testimony of a witness is not a legal evidence unless it is subjected to cross examination, also a statutory right.

6. In response to the above queries raised by the assessee, the requisite information like the copy of approval accorded by the competent authority for initiating the proceedings under section 148 of the Act was provided to the assessee. Further, the assessee was also given an opportunity for cross examination by issuing letter to the assessee and summons u/s 131 of the Act to the builder, fixing appearance on 08.02.2022 at 10:30 AM. The assessee appeared personally and his statement was recorded u/s 131 of the Act on 08.02.2022 wherein he has stated that he had not paid any cash to the builder. A copy of statement was provided to the assessee on his demand on 11.02.2022. Further, the assessee was given an opportunity to produce the builder for verification before the undersigned. However, he did not produce the builder for verification before the under signed. Hence onus on the assessee remains un-discharged.

7. Based on the above circumstances, Assessing Officer observed that during the search and survey action conducted in the case of M/s.Bhagwati Developers and its group concerns on 15.10.2018, statement of the key-persons Shri Kulin Shantilal Vora were recorded u/s. 132(4) dated 19.10.2018. In their statements they had accepted that a sum of ₹.11,33,000/- was paid in cash by Kundal Raghbir Bhandari for purchase of FLAT NO. H-702, in 7th floor in the building named 'Bhagwati Imperia'. Relying on statements of Shri Kulin Vora and post search investigation by the Investigation wing, Assessing Officer came to the conclusion that assessee had paid ₹.11,33,000/- in cash during the F.Y.2016-17 pertaining to the A.Y. 2017-18 to the to the builder M/s.Bhawati Developers (for purchase of the FLAT NO. H-702, in 7th floor in the building named 'Bhagwati Imperia while the agreement value of the said property is ₹.87,74,000/- and the cash amount of ₹.11,33,000/- was not disclosed in his books of account. Assessing Officer by relying on various case law completed the assessment by treating the payment of ₹.11,33,000/- as unexplained investment.

8. Aggrieved, assessee preferred an appeal before the Ld. CIT(A) and filed detailed submissions. After considering the detailed submissions of

the assessee, Ld. CIT(A) dismissed the ground raised by the assessee by observing as under: -

"6. *Ground No.2 is regarding source of cash payment from cash withdrawals.*

....

6.2 The facts recorded in the assessment order and the submission of the appellant has been considered.

As mentioned in para 5.3 of this appellate order that a search operation carried out in the case of M/s. Bhagwati Developers & Group revealed that the appellant had cash of Rs.11,33,000/- for purchase of flat No. H-702 in Bhagwati Imperia building. This fact was admitted by Shri Kulin Shantilal Vora in the statement recorded u/s.132(4) dated 19.10.2018. At the first instance, the appellant had denied of making any cash payment of Rs.11,33,000/- to M/s. Bhagwati Developers for purchase of the flat. Alternatively, the appellant has tried to explain the source of cash payment being from the withdrawal made from the SBI NRO A/c. and SBI NRE A/c. from A.Ys. 2014-15 to 2017-18. In support of cash withdrawal, the appellant has provided a copy of bank statement and the date wise extracts of the cash withdrawal. From the details of cash withdrawal, it is seen that the appellant has made cash withdrawal from ATM on various dates and the amount of withdrawal varied from Rs.2,000/- to Rs. 1 lakh at each instances. The withdrawal has been made frequently during the last 4 years. During the assessment proceedings, the appellant did not take such alternative arguments. Further, the appellant has not demonstrated that the builder has asked for cash payment over and above the value shown in the agreement. Clear denial of the appellant in the statement recorded u/s.131 of the Act that no cash was paid to the builder over and above the agreement value for purchase of the flat, goes contrary to the alternate claim and does not support that the appellant made frequent withdrawal for the purpose of making cash payment to the builder. Thus, the explanation offered by the appellant in respect of cash payment of Rs. 11,33,000/- is not satisfactory.

6.3 It is a settled principle of law that the addition made u/s.69 of the Act is justified if the assessee fails to offer any explanation or explanation offered by the assessee is not satisfactory. In this regard the following decision is relevant.

In the case of Dinesh Kumar Jain v. Pr. CIT [2018] 97 taxmann.com 113 (Delhi), the Hon'ble High Court of Delhi has held that assessee claimed that he withdrew certain amount from his bank account for construction of a building and surplus money, when not required, was re-deposited, in same bank account, since assessee failed to produce any bills/vouchers relating to construction, and justify substantial cash withdrawals for meeting construction cost and re-deposits when money was not required, additions under section 68 in respect of amount re- deposited was justified.

.....

6.4 As discussed above, the appellant had not offered any satisfactory explanation regarding source of cash payment of Rs.11,33,000/- made to M/s. Bhagwati Developers for purchase of the flat. The A.O. was justified in making addition of Rs.11,33,000/- u/s.69 of the Act and the addition made by the A.O. is upheld.

Accordingly, ground no.2 is dismissed."

9. Aggrieved, assessee is in appeal before us raising following grounds in his appeal: -

- 1. The learned CIT appeals-55, Mumbai has erred in accepting the additions made by assessing officer without providing opportunity to cross examine the witness and not following the principles of natural justice.*
- 2. The learned CIT appeals, has erred in not accepting and discussing the additional grounds taken during the appeal proceedings, which should have considered and disposed on merits and as such denied justice to the appellant.*
- 3. The authority to assess the cases where search is initiated under section 132 is provided under section 153A or 153C and not under section 148 of the income tax act. The re-opening under section 148 was made without jurisdiction.*
- 4. The learned assessing officer has made addition without any documentary evidence in his procession and relied on information provided by investigation department and hence the order is passed as per the satisfaction of investigation officer and not own satisfaction. Such orders are liable to be set aside and the order lacks satisfaction of assessing officer.*

10. At the time of hearing, with regard to Ground No. 1 which is in respect of Ld.CIT(A) erred in accepting the additions made by Assessing office, without providing opportunity to cross examine the witness and not following the principles of natural justice, Ld.AR brought to our notice that assessee had purchased a Residential flat on 7th floor, Flat No. H-702, in "Bhagwati Imperia" which was constructed by "M/s Bhagwati Developers". The agreement value of the said property is ₹.87, 74,000/-. The statement recorded by the investigation wing during the search operation in case of Builder who has alleged in his statement that an amount of ₹.11,33,000/- is paid over and above the agreement value of the property.

11. Ld. AR brought to our notice that assessee vide letter dated 31.01.2022 denied payment of any such money to the builder M/s.Bhagwati Developers. Further assessee personally attended before the assessing officer on 08.02.2022 and a statement was recorded under section 131 of the Act. The assessee denied any such payment in the statement recorded. The assessee also requested for contrary evidence used against him and in the possession of Assessing Officer which has not been provided by the department. This clearly means that

the Assessing Officer do not have any evidence except the information received.

12. Ld.AR of the assessee submitted that testimony of the witness cannot be taken as legal evidence until opportunity has not been given for cross examination. The Evidences gathered behind the back of the assessee cannot be used unless an opportunity of rebutting the same is given and the assessee is entitled to ask for such material before cross examination.

13. Further, Ld. AR submitted that assessee has requested the Assessing officer to provide evidences and also cross examination of witness vide letter dated 31.01.2022. The copy of letter is annexed in Exhibit A. The relevant extract of the letter is reproduced below: -

a) The assessee would like to verify the evidence found in the possession of the builder based on which the proceedings are initiated.

b) Further, the assessee would like to cross examine the builder who had provided such information. Right to cross-examine also flows from the principles of Natural Justice that evidence may not be read against a party until the same has not been subjected to cross examination or at least an opportunity has not been given for cross examination. Thus the provisions of section 138 of Indian Evidence Act are not only a technical rule but it is a rule of essential justice.

14. Further, Ld. AR submitted that assessee vide letter dated 14.02.2022 has further requested the Assessing officer to provide evidences and also cross examination of witness. The copy of letter is annexed in 'Exhibit B'. The relevant extract of the letter is given below:

"Therefore, the above cited judicial pronouncements have clearly stated that cross examination is an essential for justice and would amount to violation of natural justice. The assessee has called upon the learned assessing officer to produce the documentary evidence received from the impugned builder based on which the proceedings are initiated against the assessee, the same is not yet received."

15. Ld.AR of the assessee submitted that since the documentary evidences are not made available to the assessee and no cross examination of the builder are provided in this case, the assessment order is against the principle of natural justice. Ld.AR of the assessee filed his written submissions, for the sake of clarity it is reproduced below: -

"8. Principles of natural justice are those rules which have been laid down by the Courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice. Cross examination of witness is one of the important aspects of principles of natural justice.

9. If the opportunity of cross-examination is not given it is treated as violation of natural justice. The right to fair hearing involves the right of the affected party to cross-examine the deponents. The Supreme court and other appellate authorities had time and again held that denial of cross examination of witnesses,

whose statements were relied upon, amounted to violation of principles of Natural Justice.

10. Assessing officer has concluded the assessment with following remarks in his assessment order:

- *Para 5.3*

In the backdrop of above facts I had proceed to adjudicate on the assessee's submission dated 31/01/2022. Perusal of the submissions revealed that the assessee had merely claimed that he had not paid any amount any cash to the builder for purchase of flat. In this context, it would be reiterated in view of the facts divulged by the Shri Kulin Vora of M/s. Bhawati Developers, it is quite apparent that the assessee had paid Rs. 11,33,000/- in cash to the builder.

- *Para 5.3.2*

In the backdrop of the above admitted preposition of law, it would be reiterated that the statements given by Shri Kulin Vora of M/s. Bhagwati Developers and documents submitted by M/s. Bhagwati Developers during post search proceedings clearly establish that the assessee had paid cash of Rs. 11,33,000/- in the shape of on-money for purchase of that flat. Thus the same do constitute the substantial circumstantial evidence that the assessee had paid Rs. 11,33,000/- in cash to the builder.

11. The complete assessment is based on the allegation made by Shri Kulin Vora of Bhagwati Developers and any such evidence cannot be used against the assessee without following the rules laid down under evidence act and using of such evidence cannot be made without giving proper cross examination of such witness by the aggrieved assessee.

12. The apex court and various high courts have held that assessment made without providing opportunity to cross examine the witness is against the principle of natural justice and such additions should be rightfully deleted. The appellant relies on following case laws:

- *KALRA GLASS FACTORY VS SALES TAX TRIBUNAL SUPREME COURT 167 ITR 488 OF 1987*
- *DHAKESWARI COTTON MILLS LTD. vs. C.L.T., 26 ITR 775 (SC)*
- *KRISHNA CHAND CHELA RAM V CIT 125 ITR 713 SUPREME COURT*

- *AMITABH BANSAL, DELHI V. ITO, [ITA 7804/DEL/2018] DATED 11.02.2019*
- *CHARTERED MOTORS PVT. LTD. V/S ACIT (ITA NO. 26/AHD/2012) DATED 29.08.2014*
- *ALOK AGRAWAL V. DCIT, 67 TTJ 109*
- *LAXMANBHAI S. PATEL V. CIT 327 ITR 291 (2010)*
- *FIRE ARCOR INFRASTRUCTURE PVT. LTD. VS. COMMISSION OF INCOME TAX, CENTRAL CIRCLE COURT, 23.07.2019, ITA NO. 30 OF 2018 2(1), NAGPUR, BOMBAY HIGH COURT, 23.07.2019, ITA No. 30 OF 2018.*

13. *Even Mumbai tribunal in case of Shri Rajesh Ravjibhai Patel, ... vs Asstt.Cit- Circle.26(2), Mumbai on 19 May, 2023 considered similar instances and held as follows:*

"Be that as may be, whether statement has been retracted or not, however, the Id. AO simply based on an information found from the possession of a third party cannot make an addition and draw adverse inference without carrying out further enquiry and rejecting the assessee's explanation. In so far as the burden cast upon the assessee, the same has been duly discharged and then it was upon the Id. AO to bring material on record after some enquiry that assessee's explanation is incorrect and there was any material found that other party has given details for the payment of cash paid by the assessee. If any entry by a third party of cash received has been recorded then presumption is it his unaccounted money and burden is upon that person to explain that this money has come from the other person and has to substantiate that. It is then the burden shifts upon the other person, i.e., assessee here to prove that he has not given any money. Thus, uncorroborated information cannot lead to addition in the hands of the assessee, specifically when nothing has been brought on record as to what was the fate of that information or material found and what inference in the case of the searched person has been made; and whether that person has accepted as his own undisclosed income or as stated that all these on-money have come from respective persons specifying the details. Unless something is brought on record or AO conducts inquiry that the said person in whose possession it was found has given the details or has confirmed or AO finds some other information or material, addition cannot be made simply relying on uncorroborated data or entry in third party books. Thus, on merits, we do not find any justification for making an addition u/s.69B for alleged payment of On-

money in cash without any material evidence brought on record by the Id."

16. In view of the above submissions, Ld.AR of the assessee prayed that addition may be deleted.

17. On the other hand, Ld. DR brought to our notice observations made by the Assessing Officer in Page No. 5 of the assessment order. He submitted that the assessee was given all the relevant information including the statement recorded, wherein the builder has accepted that the assessee has paid the on money and it is for the assessee to bring the Mr. Kulin S Vora before Assessing Officer. Therefore, he submitted that the findings of the lower authorities are within the legal frame and justified.

18. Considered the rival submissions and material placed on record, we observe that there was a search action in the case of the builder Shri Kulin S Vora and in that case the builder has accepted that they have received on-money from the various projects conducted by them and he has disclosed the name of all the flat owners. The Tax Authorities proceeded to make the addition based on the above declaration of receipt of on-money in the hands of the Flat Owners. Assessee being one of the flat purchaser, the assessment was reopened.

However, no cross examination opportunity was given to the assessee. In this case, no such opportunity was granted to the assessee and only the statement recorded were supplied to the assessee and in fact, it was asked the assessee to bring the builder before the Assessing Officer. After careful consideration, we observe that the assessee is or will never in a position to bring any builder before the tax authorities, it is the duty of the tax authorities if they want to rely on statement to arrange for the cross examination and opportunity to be extended to the assessee. Apart from the above statement of the builder and whatever they have declared in their assessment was with the authorities, this information was never available with the Assessing Officer in this case, hence, there is no evidences available in the hands of the Tax Authorities against the assessee except the statement of the builder. The additions proposed by the Assessing Officer merely relying on the statement of the builder. Therefore, in our considered view the addition cannot be made without bringing proper material on record or bringing on record the proper joint statement from the builder as well as the assessee wherein assessee should be one of the party should concede that they have made the on-money. In this case merely relying on the statement of the third party and without giving opportunity to the assessee to prove its point of view, which is against the natural justice. In this situation, the

addition cannot be made in the hands of the assessee. Therefore, we are inclined to treat the assessment order as bad in law which was made purely on the basis of assumption and unverified statement of the third party. Accordingly, appeal filed by the assessee is allowed.

19. With regard to Ground No. 2, at the time of hearing, as Ld.AR of the assessee has not made any submissions/arguments before us, accordingly, this ground is dismissed as not pressed.

20. With regard to Ground No. 3, Ld.AR of the assessee submitted that this ground is not pressed. Accordingly, the same is dismissed as not pressed.

21. In the result, appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 27th March, 2024.

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER
Mumbai / Dated 27.03.2024
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum