

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI 'C' BENCH, MUMBAI.

Before Shri B.R. Baskaran (AM) & Shri Pavan Kumar Gadale (JM)

I.T.A. No. 2584/Mum/2022 (A.Y. 2017-18)

DCIT-27(2) Room No. 419, 4 <sup>th</sup> Floor Tower No. 6 Vashi Railway Station Complex, Vashi Navi Mumbai-400 703. (Appellant)	Vs.	M/s. Parshwa Associates 109, Central Facilities Building No. 2, Sector 19, Vashi Navi Mumbai-400703.  PAN : AAJFP2117Q (Respondent)
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I.T.A. No. 1900/Mum/2022 (A.Y. 2017-18)

M/s. Parshwa Associates 109, Central Facilities Building No. 2, Sector 19, Vashi Navi Mumbai-400703.  PAN : AAJFP2117Q (Appellant)	Vs.	DCIT-27(2) Room No. 419, 4 <sup>th</sup> Floor Tower No. 6 Vashi Railway Station Complex, Vashi Navi Mumbai-400 703. (Respondent)
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Assessee by	Shri Vimal Punmiya
Department by	Shri V.K. Chaturvedi
Date of Hearing	08.02.2023
Date of Pronouncement	04.05.2023

O R D E R

Per B.R.Baskaran (AM) :-

These cross appeals are directed against the order dated 7.7.2022 passed by the learned CIT(A), National Faceless Appeal Centre, Delhi and they relate to A.Y. 2017-18. The assessee is aggrieved by the decision of learned CIT(A) in confirming the addition of Rs. 5.71 crores made by the Assessing Officer. The Revenue is in appeal assailing the decision of the learned CIT(A) in granting relief in respect of addition of Rs. 3.40 crores relating to receipt of on money on sale of flats.

2. We shall first take up the appeal filed by the revenue. The facts relating to the case are stated in brief. The assessee is a partnership firm and is engaged in the real estate business as builders and developers. The assessee filed revised return of income on 31.10.2017 declaring total income of Rs. 79,89,053/-. The Department had earlier carried out survey action under section 133A of the Act in the hands of the assessee on 30.8.2016. During the course of survey, a statement was recorded on oath from one of the partners named Shri Govind V. Vikmani. In the said statements, he had agreed to surrender a sum of Rs.4.23 crores for taxation over and above regular profit. The above said amount related to 'on money' receipt on sale of flats. The basis for arriving at the above said figure is explained in brief. During the course of survey operations, it was noticed that there was difference of Rs.11,33,21,965/- between MM Value (Value determined by for stamp duty purposes) and Sale value and the said difference was considered as "on money receipts". It was noticed that the assessee had offered a sum of Rs.7,10,00,000/- under Income Disclosure Scheme of 2016. Accordingly, it was agreed by the partner to surrender the balance amount of Rs.4,23,21,965/-. The Assessing Officer noticed that the assessee did not offer the above said amount as mentioned in the statement. Accordingly, during the course of scrutiny proceedings, the Assessing Officer asked the assessee to explain the same.

3. Before the Assessing Officer, the assessee filed a detailed reply stating that, during the year under consideration, it did not receive any 'on money' from the flats sold by it. It was also submitted that the flats have been sold in all the subsequent years and hence the income relating to the flats sold during the year under consideration can be assessed to tax. In this regard the assessee filed a detail summary of sale of flats which contained sale value of flats, MM value (Manva Mandir Value) and difference between MM value and sale value. It was submitted that after survey operations/demonetization announced by GOI, the buyers of the flats did not pay anything in cash and

accordingly, the flats were sold for actual sale consideration, which was more than the MM value. Accordingly, it was submitted that the difference in sale consideration of Rs.4.23 crores have already been included in the sale proceeds and offered to tax during the year under consideration and in the subsequent years. Accordingly, it was contended that no addition is called for during the year under consideration. The assessee also furnished a break up details for the amount of Rs. 4.23 crores referred to in the statement given by the partner as under:-

<i>Sr. No.</i>	<i>Assessment year based on date of execution of Sale Agreement</i>	<i>Difference between MM Value as per Annexure &amp; Value as per Sale Annexure</i>
1	2017-18	1,80,81,586
2	2018-19	1,43,15,463
3	2019-20	65,40,315
4	2020-21 & Subsequent Years	54,02,219
	<i>TOTAL</i>	<i>4,43,39,581</i>
5	<i>Less : Excess Amount of Income offered in IDS, 2016 upto AY 2016-17</i>	<i>20,17,616</i>
	<i>TOTAL</i>	<i>4,23,21,965</i>

4. It was submitted that the amount of Rs. 4.23 crores was related to all the flats and they have been sold in AY 2017-18 and subsequent years and the actual income has been offered to tax whenever the sale has taken place. It was submitted that the buyers have not paid any on money as originally presumed during the course of survey operations and that the sale consideration of flats was equal or more than the MM Value. Accordingly, it was submitted that there is no requirement to make separate disclosure of Rs.4.23 crores.

5. The Assessing Officer, however, did not agree with the explanations given by the assessee. He took the view that the assessee has sold thirty flats during the year under consideration after 1.4.2016 and there was difference in the sale consideration mentioned in the agreement and MM value. The AO computed the said difference at Rs.3,40,69,184/- relating to 30 flats (flat numbers are mentioned in paragraph 3.11 at page 10 of the assessment order). Accordingly, the AO assessed the above said amount as unexplained income u/s 69A of the Act towards on money received by the assessee. The learned CIT(A) deleted the addition and hence the Revenue has filed this appeal.

6. We have heard the parties on this issue and perused the record. We noticed that the learned CIT(A) has deleted the addition with following observations :-

*“2.3 I have gone through the submission of the assessee and perused the assessment order. AO has made addition of Rs. 3,40,69,184/- purportedly on the basis of statement of Shri Govind V Vikmani. Assessee has alleged that working of this figure has not been provided by the AO. I find that in the assessment order at para 11 this figure has been stated to related to certain flats mentioned in that para. However the working is not available in the assessment order.*

*As per the statement the amount represents amount of on- money received on flats which have been booked by customers. It has been mentioned by the AO that Shri Vikmani had offered the amount of Rs 4.3 cr in AY 2017-18. On being asked to explain why the amount was not offered the appellant has stated that the amount was to be offered subject to the registry of the flats. Since registry of flats did not take place in the FY 2016-17 entire profit could not be offered in one year. There were other reasons stated by the assessee. It was stated that post de-monetisation there was a fear among the flat buyers who booked the flat pending execution of agreement, post event of survey on the assessee firm that agreement at a lesser value than the sale value as per annexure may invite Tax troubles to them. Also the assessee insisted in getting whole amount in cheque. In view of this and execution of agreement as per sales value mentioned in the annexure the entire portion receivable against sale of flats is received by cheque only and no on money/cash portion was not received in respect of agreement executed during the relevant FY. The amount received during the year and also in subsequent years toward sale of flats has been duly credited in accounts and profit on the same has been offered on percentage completion method. Working of The entire sale value is accounted for in Financial Statements. The*

Revenue is recognised for the FY 2016-17 as per percentage work completion method and the same is computed as per the ICAI guidance note issue in respect thereof.

On going through the working of the income and dates of registry of flat it is seen that the amount profit was not entirely taxable for AY 2017-18. Out of total 116 number of flats the assessment year wise breakup in which the whole amount should have been offered based on date of sale is as under, provided the agreements were executed at MM value as per annexure-

Sr.No.	No. of flats	Agreement year based on date of execution of sale agreement	Difference between MM value of sale agreement
1	67	2017-18	1, 80,81, 586/-
2	17	2018-19	1,43,15,461/-
3	14	2019-20	65,40,315/-
4	18	2020-21 and subsequent years	54,02,219/-
5		Less: Excess amount of income offered in IDS 2016 upto 2016-17	-20,17,616/-
		Total:	4,23,21,965/-

In spite of the statement made by Mr Vikmani, as per accountancy rules any income has to be credited in books in the year the sale takes place. As per IT Act, it is the real income which has to be taxed. As per the working of the assessee, sale price as per agreement has been taken. The assessee has honoured its commitment to offer the profit on sale of flats. However since sales have taken place in more than one year the respective income has been offered in relevant years. The AO has not relied on any document to establish that the entire amount of Rs 4,23,21,965/- was related to the current assessment year. Also it has not been shown that amount of sale related to the flats sold during the current year has not been credited in the books and not offered in the working of the income of the year.

The assessee is a builder and offers income on the basis of percentage completion method. In respect of sale of flats during the year, receipt of Rs 22,38,92,850/- has been credited. As per the working produced, for the AY 2017-18 the assessee has sold 6280.98 sq.ft area which is 89.8% of total. Sale value of flat sold is Rs 28,21,18,408. After accounting for 72.21 % of cost of construction and 79.36% total cost incurred, income from project has been worked out at Rs 3,46,21,065/- which has been offered.

Any statement recorded during survey has to be supported by documentary evidences. Statement made during search should be

*supported by materials. Undue emphasis should not be given to confessional statement without material- CIT vs S Kader Khan Son 300 ITR 157 Mad 2008. As has been held in the case of ITO vs Vijay Kumar Kesar 327 ITR 497 Confession by the assessee during a survey proceeding is not conclusive and it is open to the assessee to establish that the same was not true and correct by filing cogent evidence. Pursuant to the statement of the assessee, if it is found that any averment made in the statement was wrong, he is free to establish that admission made at time of survey was wrong.*

*The survey team has recorded statement wherein the partner has offered on money from sale of flats in AY 2017-18. However both the parties, the officer recording statement as well as the person whose statement was recorded, have ignored the fact that an amount can be brought to tax only in the year in which sale takes place. The assessee's declaration not based on supporting material cannot be taken as gospel evidence to make addition. Addition based on mere confession and not based on any documentary evidence during survey cannot be sustained - [2010] 231 CTR 165 (Chhattisgarh) High Court of Chhattisgarh in the case of Income-tax Officer v. In view of the above facts and the legal position, the addition made by the AO is deleted and grounds 2 and 3 are allowed.*

7. We notice that the AO has merely relied upon the statement given by the partner of the assessee firm and accordingly come to the conclusion that the alleged 'on money' receipts is to be assessed to tax. We noticed earlier that the difference between the MM Value and Sale value of 116 flats was arrived at Rs.11.33 crores and since the assessee has offered a sum of Rs.7.10 crores under IDS scheme, the difference of Rs.4.23 crores was agreed to be offered for tax. The said offer was made when the sale agreement value was less than the MM Value. With regard to non-offering of above said amount, we notice that the assessee has offered following two explanations:-

(a) After demonetization as well as after the survey proceedings, the sale consideration of flats has been increased and it is almost equal or more than the MM Value. Accordingly, it was submitted that the above said difference of Rs.4.23 crores has already been absorbed in the sale price itself.

(b) The assessee is following percentage completion method as per the Accounting Standard issued by ICAI and hence the income is offered in the year in which sale of flats takes place.

(c) We noticed that the AO has computed the addition of Rs.3.40 crores in respect of 30 flats. It is the case of the assessee that all these flats have not been sold during the year relevant to AY 2017-18 alone.

(d) It is submitted that the alleged on-money receipt was presumed, since the Sale consideration shown in the Agreement for sale was more than the MM Value. However, the consideration declared in the actual sale deed was equal or more than the MM Value.

8. In support of the above, the assessee has furnished the details of flats numbering 30 sold during the years relevant to AY 2017-18, 2018-19 and 2019-20. The assessing officer has computed the difference between the value shown in the Agreement for sale and the M M Value at Rs.3,40,69,184/-. However, the assessee the said difference actually works out to Rs.3,00,06,546/-. It is the submission of the assessee that the actual Sale agreement entered by the assessee was more than the MM Value. The actual sale value of the above said flats was Rs.5.97 crores, where as the MM value of these 30 flats was Rs.5.99 crores, the difference between the two was falling within the tolerance range. The Ld A.R reiterated that these 30 flats have been sold during the years relevant to the AYs 2017-18 to 2019-20. The Ld A.R has furnished the details of date of sale agreement of 30 flats as under:-

S No.	Name of buyer	Flat No.	Date of agreement
1	Parasmal Jain	A1204	20-Apr-16
2	Vipul Shah	A504	20-Apr-16
3	Amit Shah	B1301	13-May-16
4	Kundan Jain	B1304	31-May-16
5	Sudhir Shah	B702	20-Apr-16
6	Nilay Shah	B703	20-Apr-16
7	Shakuntala Jain	B704	20-Apr-16
8	Santhosh Pandey	B901	12-Mar-18

9	Bharat	B602	26-Oct-18
10	Mahavir Sanklesh	B503	12-Mar-18
11	Alka Dhanya	B402	30-Jun-17
12	Prema Devi	B201	19-Sep-16
13	Unsold	B1404	
14	Kaisliwal	B1401	6-Jan-18
15	Alka Kailiwal	B1303	6-Jan-18
16	Mona Vasant Jain	B1302	6-Feb-17
17	Kamlesh Sankles	B1201	26-Oct-18
18	Unsold		
19	Licchamma	B101	17-Nov-16
20	Manish Thakkar	A704	10-May-18
21	Unsold		
22	Unsold		
23	Premiladevi	A302	1-Jul-17
24	Tarachand Gala	A1501	17-Jan-18
25	Unsold		
26	Pista Uttam	A1402	23-Aug-17
27	Kamlesh Sankles	A1203	26-Oct-18
28	Sanjay Shah	A1101	19-Sep-16
29	Bhupesh Jain	A101	12-Sep-16
30	Padam Sankles	A1002	1-Jul-17

9. A careful perusal of the above table would show that all the 30 flats have not been sold during the year relevant to AY 2017-18, i.e., they have been sold in subsequent years also. We also noticed that there was mistake in the computation of alleged unaccounted receipts made by the AO. According to the assessee, it has sold 33 flats after the date of Survey operations, whereas the AO has taken it as 30 flats. Further, the AO has computed the addition in respect of unsold flats also, which is not in accordance with law. We notice that the AO did not conduct any independent enquiry with the buyers of flats in order to ascertain the cash payments made by them. All these facts cumulatively prove that the AO has

made the impugned addition of Rs.3.40 crores without any basis. Probably, he has given much importance to the Statement given by the partner of the assessee firm. Even if an assessee surrenders any income in the Statement, yet it is possible for him to show that the said surrender was made under misconception. In this case, we notice that the assessee has explained as to why it did not offer the additional income surrendered by its partner. The assessee has, in fact, furnished details before the AO stating that the actual sale consideration has been received equal to or more than the MM Value. We notice that the AO has not verified those details at all. Thus, we notice that the AO has made the impugned addition without any basis. When there is no basis for arriving at the conclusion that the assessee has received any on-money, the addition is not justified as held by Hon'ble Supreme Court in the case of PCIT vs. Nishant Construction (P) Ltd (2019)(101 taxmann.com 180)(SC).

10. In view of the foregoing discussions, we hold that the AO has not brought on record any material in support of the addition made by him nor he provided any basis for arriving at the basis, particularly when all the 30 flats have not been sold during the year relevant to AY 2017-18. Accordingly, we are of the view that the Ld CIT(A) was justified in deleting this addition.

11. We shall not take up the appeal filed by the assessee. During the course of a Survey operation conducted at the premises of M/s Nemijin Swetamber Jain Trust on 29-08-2016, a piece of paper was found. In the statement taken from a person named Shri Hemal Chandrakant Bheda, who was son of one of the partners of the assessee herein named Shri Chandrakant Nanji Bheda, he stated that this piece of paper may/appears to belong to the assessee firm. Accordingly, the DCIT (Exemption) forwarded the above said information to the assessing officer.

12. The said document contained details of Receipts and Payments. No specific date is also mentioned in it. The same is extracted below:-

Receipts					Payment			
Sr. No.	Particular	Cash	Cheque	Total Amt.	Particular	Cash	Cheque	Total Amt.
1	Booking Amount	10193601	11520212	21713813	Interest payable	0	437806	437806
2	Loan from K. Galia	42500000	0	42500000	TDS paid	0	45094	45094
3	Rattan Polymers	0	13000000	13000000	Time Gold Expenses (as per their st	7051090	0	7051090
4	Vinod K. Shah	0	5292712	5292712	As per statement 1 to 34	2079856	0	2079856
5	Praful Bhai	2100000	0	2100000	Other miscellaneous expenses as per	5706809	0	5706809
6	Govind Bhai	1381000	0	1381000	Swaminarayan expenses	6328483	22120103	28448586
7	Chandu Bhai	930048	300000	1230048	Expenses Tehsildar & NA	3073400	0	3073400
8	Sagar Trading	0	100000	100000	Govind Bhai expenses	1381000	0	1381000
9	Sunil K. Samjhi	0	500000	500000	Expenses by Praful bhai	2098180	0	2098180
10	Sunil Gavne	0	599999	599999	Expenses by Vinod bhai	9427145	0	9427145
11	Bank Balance	0	55005	55005	Interest as per statement till 30 <sup>th</sup> Se	15041451	0	15041451
					List of sundry creditors	0	11989146	11989146
					Indirect expenses	0	272804	272804
					Direct expense	0	176877	176877
					Joshi-plan pass	1000000	0	1000000
					Rudraksh Developers payable	243333	0	243333
	Total	57104649	31367928	88472577	Total	53430747	35041830	88472577

Before the AO, the assessee denied the contents of the Statement given by Mr Hemal Bheda. However, the assessee sought some time to examine the details contained in the above said document. Since the assessee did not furnish the details, the AO assessed entire cash receipts of Rs.5,71,04,649/-

shown in the above said document as unexplained income of the assessee u/s 69A of the Act. The Ld CIT(A) also confirmed the same.

13. We heard the parties and perused the record. Following arguments, inter alia, were advanced by Ld A.R:-

(a) The AO cannot rely upon the Statement given a third party, that too, when he has stated that the impugned document may/appears to belong to the assessee herein, i.e., even the deponent was not sure as to whom the said document belong to. Hence, the AO could not have related this document to the assessee.

(b) The impugned document is undated, unsigned, unnamed containing receipts and payments. Hence it cannot be definitely said that the transactions, even if it is assumed to belong to the assessee, pertain to the year under consideration. Hence, the AO could not have made addition in the instant year.

(c) The AO has assessed entire receipts as income of the assessee without establishing that the said receipts are revenue in nature. A careful perusal of the document would show that the total receipts of Rs.5.71 crores included "Loan from K Galia" amounting to Rs.4,25,00,000/-. This loan amount cannot be considered to be revenue receipt assessable to tax. Further, there are other receipts against individual names and the nature of those receipts has also not been mentioned. Hence, they cannot also be considered as revenue receipts.

(d) Even though the assessee had asked for cross examination of Mr. Hemal Bheda, the same was not provided by the AO.

(e) Hence the above said document is a dumb document and the same should not have been relied upon by the AO.

14. We noticed earlier that the AO has made the impugned addition of Rs.5.71 crores on the basis of a piece of document found at the premises of a Trust. The assessee has been linked to the said document, since Shri Hemal

Bheda said that this document may/appears to belong to the assessee herein. It can be seen that the reply so given is vague one and not authentic one. The above said person is son of one of the partners of the assessee firm. However, it was not shown that the above said Shri Hemal Bheda had active participation in the affairs of the assessee firm and he was involved in/aware of the day to day activities of the assessee firm. The document is undated, unsigned, unnamed. Hence, the AO should have conducted further enquiries in order to give a finding that the above said document did contain transactions belonging to the assessee only. Hence, we agree with the contentions of the assessee that the AO could not have placed full reliance on the vague statement at all. Even if he had given the reply in an authentic manner, the AO could not have made addition merely on the basis of said statement without corroborating the same with any other material.

15. We also notice that there was total non-application of mind on the part of the AO in making the impugned addition. We noticed that the AO has assessed entire cash receipts as income of the assessee without examining the nature of entries and further, whether those receipts can be considered as revenue receipts assessable to tax. We have earlier noticed that the aggregate receipts of Rs.5.71 crores included loan receipts of Rs.4.20 crores, which is not revenue receipt. Further, a sum of about Rs.44.00 lakhs have been shown against name of certain individuals and nature of those receipts are also not known. Further, we have noticed that this document is undated and hence it cannot be said that these transactions are related to the year under consideration, even if it is assumed that the said document belongs to the assessee. We also noticed that the AO did not make any independent enquiry with regard to this document.

16. Accordingly, we are of the view that the AO was not justified in making this addition on the basis of a document, which should be classified as a dumb document. Accordingly, we are of the view that the Ld CIT(A) was not

justified in confirming this addition. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete the addition of Rs.5.71 crores.

17. In the result, the appeal filed by the assessee is allowed and the appeal of the revenue is dismissed.

Pronounced in the open court on 04/05/2023.

Sd/-  
(PAVAN KUMAR GADALE)  
Judicial Member

Sd/-  
(B.R. BASKARAN)  
Accountant Member

Mumbai; Dated : 04/05/2023

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(Judicial)
4. PCIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)  
ITAT, Mumbai

PS