

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH 'E', MUMBAI**

**BEFORE SHRI D. MANMOHAN, VICE PRESIDENT AND  
SHRI D. KARUNAKARA RAO, ACCOUNTANT MEMBER**

**I.T.A. NO. 6394/M/2011  
ASSESSMENT YEAR: 2009-2010**

Smt. Sarita S. Mantri, G-1, Court Chambers, Ground Floor, V. Thakersey Marg, 35, New Marine Lines, Church gate, Mumbai-400020. <b>PAN: ADXPM8070E</b>	Vs.	Asst. Commissioner of Income Tax, Central Circle-29, Mumbai.
(Appellant)		(Respondent)

Appellant by	:	Shri Shri Prakash Jhunjhunwala and Mr. Prakash Inani
Respondent by	:	Shri V. Krishnamurthy, DR

**Date of Hearing: 29.11.2012**

**Date of order:12.12.2012**

**ORDER**

**Per D. KARUNAKARA RAO, AM:**

This appeal filed by the assessee on 16.9.2011 is against the order of the CIT (A)-40, Mumbai dated 27.8.2011 for the assessment year 2009-2010.

2. In this appeal, assessee raised the following grounds which read as under:

"1. On the facts and circumstances of the case and in law, Ld CIT (A) erred in confirming the **addition of Rs. 53,57,600/-** as perquisite under the head "Salary Income" in respect of two Flats purchased by the appellant from M/s. Sunil Mantri Reality Ltd.

2. The Ld CIT (A) before confirming the addition, ought to have considered the understated vital facts being;

a)The appellant has not received any amenity or benefit under terms of employees;

b)The appellant purchased the flats at fair market price and in support filed copies of registered sale agreements executed by M/s. Sunil Mantri Reality Ltd with outside parties at same price;

c)M/s Sunil Mantri Realty Ltd had sold flats to appellant at a price above its cost of acquisition;

d)The appellant purchased such 2 flats on executing the registered sale deed and had made the payments of entire sale consideration at agreed price."

3. Briefly stated the facts of the case are that the assessee is a Director of Sunil Mantri Realty Ltd (SMRL). She purchased total of six flats from M/s. SMRL from the housing project located at Mantri Park, Goregaon (East), Mumbai. All these flats are equal in areas admeasuring 630 sq.ft approximately. However, the purchase price varies from 38,82,900/- to Rs. 66,53,300/-. Out of six, two flats were purchased with the purchase price of Rs 38,82,900/- per flat and other four flats has the purchase price range of Rs. 64 lakhs to Rs. 66.50 lakhs. In connection with the said two flats purchased with lower purchase price, AO is the view that the M/s. SMRL granted or passed on some benefit or perquisite to the assessee, the employee by way of concession. Considering the lower purchase price in respect of the said two flats, AO invoked the provisions of section 17(2) of the Act relating to the 'perquisites' and proposed to tax the different amounts of Rs. 53,57,600/- i.e (Rs 65,61,700 – Rs 38,82,900 = 26,78,800 X 2). Accordingly, AO made addition of Rs. 53,57,600/- to the income returned by the assessee.

4. Aggrieved with the above addition, assessee filed an appeal before the CIT (A). Before him, assessee submitted that the provisions of section 17(2) of the Act are not applicable as there is no 'employer and employee relationship' between the company-SMRL and Director-assessee. Further, it was submitted that the assessee purchased the said two flats at fair market price and said purchase price is not below the purchase cost in the hands of the Company, the seller. As per the assessee, the purchase price of Rs. 38,82,900/- per flat is a fair market value and filed a copy of the registered sale deed in support of the same. For proving that the said price is fair market price, the assessee filed another registered sale deed executed by M/s. SMRL with other customer named Dr. Dhiraj Gupta and the purchase price of the said flat is exactly the same as that of the assessee. Further also, as per the assessee, the said two flats were purchased sold by the company to the assessee-director for lower price as the same are in raw condition, in perfect in all respects. In this regard, assessee filed written submissions too. On considering the above arguments and the written submission, CIT (A) rejected the same. On the issue of absence of employer-employee relations between the director and the company, CIT(A) held that so long as the assessee is a working director and received

remuneration, the provisions of section 17 of the Act apply. Further, CIT (A) concluded stating that the assessee has not disputed the facts relating to the different purchase prices of the six flats and assessee failed to give justification for variance in purchase price of two sets of flats of the same size. Assessee could not substantiate the fact that the two flats were purchased in the raw condition. Accordingly, CIT (A) concluded that the assessee falls within the definition of perquisite u/s 17(2) of the Act and confirmed the addition made by the AO.

5. Aggrieved with the same, assessee filed the present appeal before us. Before us, Shri Shri Prakash Jhunjhunwala and Mr. Prakash Inani, Ld Counsels for the assessee mentioned that the assessee is undoubtedly a working Director of the M/S SMRL and derives remuneration from the company - M/s. SMRL. He has not pressed much on this part of the grievance. Further, describing the purchase price of Rs. 38,82,900/- per flat as the fair market price, Ld Counsel relied heavily on the purchase deed of the flat no 201 owned by Dr. Dhiraj Gupta, a third party for the similar price and mentioned that the rates are comparable, therefore, there is no benefit derived by the assessee from the company. A price of Rs. 38,82,900/- is not only a market rate but also higher than the cost of construction of the flat in the hands of the company. In that case, the provisions of section 17(2) of the Act do not have any application. In this regard, Ld Counsel brought our attention to the purchase deeds and mentioned that the market value (*Bazar Bhav*) of the flat as per the SRO is Rs. 24,73,152/- whereas, the purchase price of the flat is Rs. 33,95,000/. Further, Ld Counsel brought our attention to page 6 & 7 of the paper book and mentioned that the price of Rs. 36,86,000/- is higher vis-à-vis many flats of the same area figuring in the list which are sold to the third parties. Some of the flats are equal size were sold at the price as low as Rs. 25 lakhs per flat. Therefore, as per Ld Counsel, assessee has not derived any perquisite from the employer. Ld Counsel also mentioned that the assessee purchased six flats from the Company and it constitutes bulk purchases. In that case, he is entitled to concessional rates. Further, referring to the applicable Rule 3(7)(ix) r.w.s. 17(2) of the Act, Ld Counsel argued stating that cost of the flat to the employer is the parameter to be compared with and further argued that the purchase price of the two flats is much above the

cost of the flat. Ld Counsel filed copies of certain decisions in order to support his argument that the value of the alleged benefit, if any, to the employee determined on the basis of loss suffered to the company alone constitutes perquisite and decisions are as under:

1. Ashok W. Phansalkar vs. ITO (2010) 38 SOT 136 (Mum)
2. M.A.E. Paes vs. CIT (1998) 230 ITR 60 (Bom)
3. A.K. Chellani vs. ITO (1983) 3 ITD (Hyd) 194
4. ITO vs. R.No. Singhanian (1986) 25 TTJ (Del) 301
5. ITO vs. G.D. Kasera (1986) 26 TTJ (Del) 336

6. On the other hand, Ld DR criticized the arguments of Ld Counsel for the assessee and mentioned that the provisions of section 17(2)(iii) of the Act specifies that the concession, if any, offered by the employer to the Director, is a taxable perquisite. Referring to the provisions of section 2(24)(iv), Ld DR mentioned that the value of any benefit for perquisite obtained from the company constitutes income in the hands of the Director. In this regard, referring to the decision of the Tribunal in the case of Ashok W. Phansalkar vs. ITO [2010] 38 SOT 136 (Mum), Ld DR mentioned that *assessee a promoter director of the company having purchased a flat at a value lesser than the market value is liable to tax on the value of the perquisite in terms of section 2(24)(iv)*. Further, referring to the assessee's arguments on the applicability of Rule 3(7)(ix) read with section 17(2) of the Act, Ld DR mentioned that these rules do not relate to the immovable properties and in any case there are no particulars relating to the cost of the flat to the company, therefore, it requires examination of more facts by the AO. On the issue of comparable flat located at second floor of *Lily* owned by Dr Dhiraj Gupta, Ld DR was critical of the arguments of the assessee and mentioned that the flats purchased by Dr. Dhiraj Gupta is not a comparable flat as the said flat is not located at 16<sup>th</sup> floor (Flat numbers: 1605 and 1606) and not located in the same building. Dr Gupta's flat no 201 is located in the 2<sup>nd</sup> floor in the building named '*Lily*'. Referring to page 6 & 7 of the paper book, Ld DR mentioned that purchase price of the said alleged two flats namely 1605 and 1606 is @ Rs 3800 per sq.ft and the same is less when compared with the many flats sold by the assessee to the third parties. Referring to the other decision relied upon by the Ld Counsel for the assessee, Ld DR mentioned that they are related to rental issues therefore, they are distinguishable on facts.

7. We have heard both the parties, perused the order of the Revenue along with the paper books and copies of the decisions filed before us. There is no dispute on the fact that the assessee works as working Director in the company who sold the flats to the assessee. It is a fact that the assessee purchased six flats from M/s. SMRL and the purchase price of the two flats is lower vis a vis the purchase price of the other four flats. AO made addition considering the difference in the said purchase prices. The core issue to be decided by us relates to if the AO is justified in making additions relying on the outcome of the straight comparisons and without giving a finding on the issue ie what is the cost of construction/acquisition of the impugned flats 1605 and 1606 located in 16<sup>th</sup> floor as well as the other four flats and what is their market prices? As such , AO did not invoke any particular provision of the Act for bringing the difference amount of Rs. 53,57,600/- to tax and it is the CIT (A) who invoked the provisions of section 17(2) of the Act before confirming the said addition. Before us, new arguments are brought out which revolve around the provisions of section 2(24)(iv) of the Act and the applicability of the Rule-3(7)(ix) r.w .s 17(2) of the Act. During the proceedings before us, Ld Counsel mentioned that the impugned purchase price of the flats at 16<sup>th</sup> floor should not be compared with market price for quantifying the disallowance as perquisite and in principle, the should compared only with reference to the construction cost of the flat in the hands of the seller ie M/s. SMRL and relied on the provisions of Rule-3(7)(ix) r.w.s. 17(2) of the Act. It is the argument of the assessee, but for this rule, there is no other rule under which the quantification of perquisite of a immovable property is arrived at. But the perusal of the relevant Rule which relates to value of any other benefit or amenity, service, right or privilege etc. There is no reference to the immovable properties in the said Rule 3(7)(ix) of the I T Rules, 1962. This line of argument was taken for the first time before us and there are no relevant facts with regard to the cost of the flat and therefore, there is need for obtaining the finding of fact on the applicability of Rule-3(7)(ix) to the facts of the case. It is fair that the revenue must be given a chance to rebut these new lines of arguments.

8. Regarding the applicability of the provision of section 2(24)(iv) of the Act, we find that the same is discussed at length in the order of this Tribunal in the case of

Ashok W. Phansalkar vs. ITO (supra) it is the finding of the Tribunal that the similar concessions offered to the Director attract such provisions. The facts of the said case are that the assessee-Director purchased a flat from the company for Rs. 10 lakhs against the market value of Rs. 3.85 crores. AO taxed the difference amount of Rs. 3.75 crores as a value of the benefit on perquisite invoking the provisions of section 2(24)(iv) of the Act. Honble Tribunal confirmed the fact of benefit in purchasing the properties at a lesser value than they would have been sold in the open market. In principle, the comparison between the market value and purchase value of the property is approved by the Tribunal. The other decisions, relied upon by the Ld Counsel, undisputedly distinguishable on the facts as assets relates to the car or rental value. From the above, it is evident that the provisions of section 2(24)(iv) r.w.s. 17(2) allow the difference in value of the asset between the purchase price and fair market value of the property or flats. Assessee's attempt to compare the value of the flats with that of the flat no.201, in our opinion, is not proper considering the differences narrated above. We do not find the price with reference to the other flats which are comparable with other blocks at 16<sup>th</sup> floor. The lower authorities have not explored the applicability of the provisions of section 2(24)(iv) of the Act and the market value of the flats in question. The decision in the case of Ashok W. Phansalkar vs. ITO (supra) was not cited before the CIT (A). So far as the employer –employee relationship is concerned that it is a settled issue that there exists such relationship between the Director and the company. May be for that reason the assessee has not raised the ground in this regard as evident from the Form 36 of the Appeal Memo. Therefore, we are of the opinion that for want of market rate of the impugned flats ie all six flats and the corresponding construction cost of the said flats in the hands of the developer, the ground should be set aside to the files of the AO for examining the issue afresh in the light of the discussion given above. AO is directed to grant a reasonable opportunity of being heard to the assessee. Accordingly, grounds raised by the assessee are allowed for statistical purposes.

9. In the result, appeal of the assessee is **allowed** for statistical purposes.

Order pronounced in the open court on this 12<sup>th</sup> day of December, 2012.

**Sd/-**  
**(D. MANMOHAN)**  
VICE PRESIDENT

**Sd/-**  
**(D. KARUNAKARA RAO)**  
ACCOUNTANT MEMBER

Date : 12.12.2012  
At : Mumbai  
Okk

Copy to :

1. *The Appellant.*
2. *The Respondent.*
3. *The CIT (A), Concerned.*
4. *The CIT concerned.*
5. *The DR "E", Bench, ITAT, Mumbai.*
6. *Guard File.*

// True Copy//

By Order

Assistant Registrar  
ITAT, Mumbai Benches, Mumbai