

**IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH, MUMBAI
BEFORE SHRI P.K. BANSAL, VICE PRESIDENT AND SHRI RAVISH SOOD, JM**

ITA No. 4675/Mum/2016
(निर्धारण वर्ष / Assessment Year:2006-07)

Devaram C. Bhavani, Office No. 2, Laxmi Nivas No. 5, Chandavarkar, Borivali West, Mumbai-400 092.	बनाम/ Vs.	ITO-25(1)(4), Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN No.	AADPB9810A	
(अपीलार्थी / Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	S/Shri Kiran Mehta and Ravi Dasija, A.Rs.
प्रत्यर्थी की ओर से / Respondent by	:	Shri Purushotam Kumar, D.R.

सुनवाई की तारीख / Date of Hearing	:	19.12.2017
घोषणा की तारीख / Date of Pronouncement	:	29.12.2017

आदेश / O R D E R

PER RAVISH SOOD, JUDICIAL MEMBER:

The present appeal filed by the assessee is directed against the order passed by the Commissioner of Income Tax (Appeals)-44, Mumbai, dated 20.04.2016, which in itself arises from the order passed by the A.O under Sec. 143(3) r.w.s 147 of the Income-tax act, 1961(for short 'Act'), dated 21.03.2014. The assessee assailing the

order of the CIT(A) had raised before us the following grounds of appeal:-

“Being aggrieved by the orders of the learned lower authorities, the Appellant craves your Honor’s leave to file the appeal on the following alternative grounds of appeal:

1. *In the facts and circumstances of the case and in law the learned CIT(A) erred in not holding that the reassessment made u/s 147/148 was bad in law.*

2. *In the facts and circumstances of the case and in law the learned CIT(A) erred in confirming the additions of Rs. 47,00,000/- made u/s 69 on account of alleged “on money” paid for the purchase of flat.*

3. *The learned CIT(A) erred in not holding that no addition could be made based solely on the scrap of loose papers found in the course of survey action in the case of Dev Sharda Developers Pvt.Ltd. It is submitted that the said loose papers had no evidential value.*

4. *The learned CIT(A) erred in not appreciating that there were ample other evidences to show that the Appellant had not received “on money” as alleged and hence no addition was tenable u/s 69 or otherwise.*

5. *The learned CIT(A) erred in confirming the interest levied u/s 234A/B/C.*

6. *The appellant craves leave to leave to alter, to amend, to add, or to delete any or all of the grounds of appeal on or before the final hearing.”*

2. Briefly stated, the facts of the case are that the assessee had filed his return of income for A.Y. 2006-07 on 24.03.2008, declaring total income of Rs. 1,53,713/- and agriculture income of Rs. 87,055/-. The return of income filed by the assessee was processed as such u/s 143(1) of the Act. The case of the assessee was thereafter reopened and a notice u/s 148, dated 11.10.2012 was issued to the assessee.

3. The A.O while framing the assessment observed that documents impounded during the course of survey proceedings conducted on M/s Dev Sharda Developers Pvt. Ltd. revealed that the assessee had paid “on money” for purchase of Flat No. 2002 at Kent Garden, Borivali (W), Mumbai. The A.O observed that a perusal of impounded document,

viz. Annexure A-2 – Page 37 and 105 revealed that a total payment (including brokerage) amounting to Rs.76,00,000/- was paid by the assessee for purchase of the aforesaid flat, as against the investment of Rs. 29,00,000/- shown by him. The A.O called upon the assessee to show cause as to why the amount of Rs. 47,00,000/- paid by him as “on money” for purchase of flat may not be added to his income for the year under consideration. The assessee in his reply to the observations of the A.O submitted that Flat No. 2002, Kent Garden, Borivali (W), Mumbai was purchased by him for Rs. 29,00,000/-, and placed on record a copy of the registered agreement vide which he had purchased the property under consideration. However, the A.O not being persuaded to be in agreement with the contentions of the assessee made an addition of Rs. 47,00,000/- under Sec. 69 in the hands of the assessee.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The assessee assailed the addition of Rs. 47,00,000/- before the CIT(A) and averred that the A.O had made the addition only on the basis of conjectures and misconceived observations. The assessee submitted before the CIT(A) that as against the stamp duty valuation of Rs. 21,00,000/- the flat was purchased by him for a consideration of Rs. 29,00,000/-, which fact further fortified the veracity of the purchase transaction of the property under consideration. However, the CIT(A) not finding favour with the contentions of the assessee, being of the view that the assessee had failed to rebut the presumptions regarding the noting of the cash payments in the impounded document, therefore, upheld the addition of Rs. 47,00,000/- made by the A.O.

5. The assessee being aggrieved with the order of the CIT(A) had carried the matter in appeal before us. The ld. Authorised

representative (for short 'A.R') for the assessee at the very outset submitted that he was not pressing **Ground of appeal No. 1**. The **Ground of appeal No. 1** is thus dismissed as not pressed. The ld. A.R took us through the 'Agreement to Sell', dated 23.06.2005, vide which he had had purchased the Flat No. 2002, Kent Garden, Borivali (W), Mumbai, during the year under consideration. The ld. A.R taking us through the relevant extract of the agreement at Page 19 of the 'APB', therein drew our attention to the fact that the area of the flat was 68 Sq. mtr. That in the backdrop of the aforesaid fact the ld. A.R took us through the impounded document, viz. Annexure A-2 – Page 37 & Page 105. The ld. A.R submitted that the A.O had drawn adverse inferences and further alleged payment of "on money" of Rs. 47,00,000/- by the assessee on the basis of the figure of Rs. 72,50,000/- which stood mentioned as against a figure of "1120" multiplied by six thousand at Page 37 and alleged payment of certain cash commission as per impounded Page 105. The ld. A.R submitted that the A.O had whimsically inferred the payment of "on money" of Rs. 47,00,000/- by the assessee by referring to the vague notings in the said impounded documents, viz. Page 37 & Page 105 . The ld. A.R submitted that there was no basis for the A.O to have concluded that the amount of Rs. 72,50,000/- mentioned at Page 37 as well as the dumb notings at Page 105 of the aforesaid impounded diary pertained to the purchase of the property under consideration, viz. Flat No. 2002, Kent Garden, Borivali (W), Mumbai. The ld. A.R in order to drive home his aforesaid contention, therein submitted that the figure of "1120" mentioned in the impounded document possibly referred to an area, which did not tally with the area of the flat under consideration that was of 68 Sq. mtrs (i.e 732 Sq. ft). It was thus submitted by the ld. A.R that there was neither anything in the orders of the lower authorities nor in the impounded document, on the basis of which the

impugned notings as against the figure of Rs. 72,50,000/- at Page 37 or the dumb notings at Page 105 of the impounded diary could be related to the property under consideration. The ld. A.R in the backdrop of his aforesaid contentions averred that the A.O had made an addition of Rs. 47,00,000/- absolutely on a baseless ground, which being nothing better than an addition in the thin air could not be sustained and was liable to be vacated. Per contra, the ld. Departmental representative (for short 'D.R') relied on the orders of the lower authorities. The ld. D.R submitted that as the notings at Page 37 & Page 105 of the impounded diary pertained to the Flat No. 2002, Kent Garden, Borivali (W), Mumbai, therefore, the lower authorities after carrying out a conjoint perusal of the said documents had rightly concluded that the assessee had paid "on money" of Rs. 47,00,000/- for the purchase of the property. The ld. D.R in order to support his contention relied on the judgment of the **Hon'ble High Court of Bombay** in the case of **Surendra M. Khandhar Vs. Assistant Commissioner of Income-tax & Ors (2010) 321 ITR 254 (Bom)**. The ld. D.R relying on the said judgment submitted that it was held by the Hon'ble High Court that as the assessee had failed to rebut the presumption drawn by the A.O under Sec 292C, therefore, the addition under Sec. 69 on the basis of the document seized from the possession of assessee was rightly made by AO and sustained by the Tribunal. It was thus submitted by the ld. D.R that now when the assessee had failed to rebut the presumption drawn by the A.O on the basis of the notings in the diary impounded in the course of the survey proceedings conducted on M/s Dev Sharda developers, therefore, the addition of Rs. 47,00,000/- was rightly made by the A.O.

6. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find that the addition of Rs. 47,00,000/- had

been made in the hands of the assessee on the basis of the notings in Annexure A-2 – Page 37 & Page 105, which are the pages of a diary that was impounded during the course of survey proceedings on the company M/s Dev Sharda developers, in which the assessee is a director. We have deliberated at length on the notings mentioned in Annexure A-2 – Page 37 & Page 105, and find that the adverse inference as regards payment of “on money” Rs. 47,00,000/- for purchase of the flat (including commission) was made by the A.O by referring to the figure of Rs. 72,50,000/- which stood mentioned as against a figure of “1120” multiplied by six thousand in the said document, and certain rough notings marked as ‘Commission’ at Page 105. We are of the considered view that though there is no mention of the amount of Rs. 47,00,000/- in the aforesaid document, the A.O however had inferred the payment of “on money” of Rs. 47,00,000/- towards purchase of the property (including commission) by the assessee by reducing the amount of Rs. 29,00,000/- mentioned in Page 37 of the impounded document from the amount of Rs. 72,50,000/- (supra) and adding up certain amounts mentioned as “Commission” at Page 105 of the impounded diary..

13. We have given a thoughtful consideration to the notings in the impounded document, viz. Annexure A-2 – Page 37 & Page 105 and are unable to persuade ourselves to be in agreement with the view taken by the lower authorities. We find that as against the working of the amount of Rs. 67,20,000/- (forming part of Rs. 72,50,000/-) mentioned in the impounded document, a figure of “1120” is mentioned. We are of the considered view that the figure of “1120” referred to an area of a property. We find that the area of the Flat No. 2002, Kent Garden, Borivali (W), Mumbai, as stands gathered from a perusal of the ‘Agreement to sell’ (Page 18 of ‘APB’) is 68 Sq. mtrs (i.e 732 Sq. ft), therefore, the said fact in itself safely distances the

property under consideration from the workings mentioned against the amount of Rs. 72,50,000/- in the impounded document. We are unable to comprehend that now when there was no basis for concluding that the impugned notings mentioned as against the figure of Rs. 72,50,000/- in the impounded document were in context of Flat No. 2002, Kent Garden, Borivali (W), Mumbai, then how could adverse inferences as regards payment of “on money” by the assessee for the purchase of the said property could have be drawn by the A.O. We are rather of the considered view that as the details mentioned against the amount of Rs. 67,20,000/-(supra) are clearly at variance as against that of the property under consideration, therefore, there was no occasion for the A.O to have acted upon the said *impugned* notings in context of the purchase of the property under consideration. We have further perused the notings marked as “Commission” at Page 105 of the impounded document, and though find that as against the term “Commission” certain amounts are found mentioned, but are unable to comprehend as to how such dumb notings have been related to the purchase of the property under consideration, viz. Flat No. 2002, Kent Garden, Borivali (W), Mumbai by the assessee. We further find that the judgment of the of the **Hon’ble High Court of Bombay** in the case of **Surendra M. Khandhar Vs. Assistant Commissioner of Income-tax & Ors (2010) 321 ITR 254 (Bom)** relied upon by the Id. D.R is distinguishable on facts. We find that in the case before the High Court a zerox copy of a document signed by two parties, revealing payment of a loan of Rs. 20 lac by the assessee to them and the manner as per which the amount was to be received back was seized from the premises of the assessee during the course of Search & seizure proceedings. The assessee in the said case neither at the first available opportunity, nor at any subsequent stage of appeal or before the High Court denied the document, but had only claimed that

the transaction mentioned therein was not given effect to. We find that it was in the backdrop of the aforesaid facts that the High Court held that once a document was seized in the premises under control of the assessee, the presumption under s. 292C as also that under s. 132(4A) followed, and it was for the assessee to rebut that presumption. The High Court observed that as in the case before it, neither the presumption created by the document was rebutted nor had the assessee denied the loan amount, thus no infirmity could be found with the reasoning adopted by the Tribunal for upholding the correctness of the contents of the documents. We find that the facts of the case before us are clearly distinguishable as against the facts involved in the case before the Hon'ble High Court on multiple grounds, viz. (i). that as the presumption under Sec. 292C and under Sec. 132(4A) invoked in the case before the High Court is applicable only in a respect of documents seized during the course of search proceedings, therefore, the same would not be applicable to the case of the present assessee where survey proceedings were conducted; (ii). that unlike as in the case before the High Court, the impounded document in the case of the assessee was an unsigned document; (iii). that unlike as in the case before the High Court, the assessee in the present case had never admitted the contents of the seized document, viz. Annexure A-2 – Page 37 & Page 105 as relating to the purchase of the property under consideration; and (iv) that unlike as in the case before the High Court, in the case of the present assessee nothing could be safely gathered from a perusal of the dumb notings in the *impugned* impounded document. We thus in the backdrop of our aforesaid observations that there is no basis for relating the notings in the impounded document, viz. Annexure A-2 – Page 37 & Page 105 with the purchase of Flat No. 2002, Kent Garden, Borivali (W), Mumbai, by the assessee, therefore, are of the considered view that

the addition of Rs. 47,00,000/- made by the A.O u/s 69 and sustained by the CIT(A), cannot be upheld. We thus set aside the order of the CIT(A) and delete the addition of Rs. 47,00,000/-. The **Ground of appeal No. 2 to 4** are allowed in terms of our aforesaid observations. The **Ground of appeal No. 5** wherein the assessee had assailed the levy of interest u/sss. 234A, 234B and 234C being consequential in nature, therefore, the A.O is directed to recomputed the same after giving effect to our directions. The **Ground of appeal No. 6** being general is dismissed as not pressed.

7. The appeal of the assessee is allowed.

Order pronounced in the open court on 29/12/2017

Sd/-

(P.K BANSAL)

VICE PRESIDENT

मुंबई Mumbai; दिनांक 29.12.2017

Ps. Rohit Kumar

Sd/-

(RAVISH SOOD)

JUDICIAL MEMBER

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

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

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT,

Mumbai

