

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

**BEFORE SHRI KULDIP SINGH, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

ITA.NO.1088/MUM/2022 (A.Y: 2016-17)

Income Tax Officer – 24(1)(1) Room No. 702, 7 th Floor Piramal Chambers, Parel Mumbai – 400 012	v.	Gitika Ganesh Sane 102, Kalpaka CHS Ltd., Siddharth Nagar IV Road No. 16, Near Vivek College Goregaon (W), Mumbai - 400062 PAN: AABPS5120Q
(Appellant)		(Respondent)

C.O.No. 106/MUM/2022

[ARISING OUT OF ITA.NO.1088/MUM/2022 (A.Y: 2016-17)]

Gitika Ganesh Sane 103, Kalpaka CHS Ltd., Siddharth Nagar IV Road No. 16, Near Vivek College Goregaon (W), Mumbai - 400062 PAN: AABPS5120Q	v.	Income Tax Officer – 24(1)(1) Room No. 702, 7 th Floor Piramal Chambers, Parel Mumbai – 400 012
(Appellant)		(Respondent)

Assessee Represented by	:	Shri Venugopal C. Nair
Department Represented by	:	Dr. Shri Ujjwalkumar Chavhan
Date of conclusion of Hearing	:	15.12.2022 & 03.07.2023
Date of Pronouncement	:	01.09.2023

ORDER

PER S. RIFAUH RAHMAN (AM)

Order giving effect to the order passed by the Third Member.

1. On account of difference of opinion arising between the Members in respect of the above said appeal, following question was referred to Hon'ble Third Member for his decision: -

"On facts and circumstances of the case and law applicable, whether the provisions of section 56(2)(vii)(b) of the Act is attracted to the impugned transaction of purchase of immovable property and the addition made thereunder by the Assessing Officer is justified?"

2. Hon'ble President has nominated Shri George George K, Vice president, (BZ) as the Third Member for taking decision on the point of difference between the Members constituting Division Bench. The Third Member vide his order dated 11.07.2023 has agreed with the view take by Hon'ble Accountant Member and held that the impugned addition u/s. 56(2)(vii) of the Act, is liable to be deleted.

3. In view of the majority opinion, we hold that the addition u/s. 56(2)(vii) of the Act is liable to be deleted and decided in favour of the assessee and against the revenue.

4. In the result, appeal filed by the Revenue as well as cross objection filed by the assessee are dismissed.

Order pronounced in the open court on 01st September, 2023

Sd/-

(KULDIP SINGH)
JUDICIAL MEMBER

Mumbai / Dated 01/09/2023
Giridhar, Sr.PS

Copy of the Order forwarded to:

1. The Assessee
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

Sd/-

(S. RIFAUH RAHMAN)
ACCOUNTANT MEMBER

BY ORDER

(Asstt. Registrar)
ITAT, Mum

**IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH : MUMBAI**

**BEFORE SHRI GEORGE GEORGE K, VICE PRESIDENT
(THIRD MEMBER)**

ITA No.1088/MUM/2022
Assessment Year :2016-17

Income Tax Officer – 24(1)(1) Room No. 702, 7th Floor Piramal Chambers, Parel Mumbai – 400 012	Vs.	Gitika Ganesh Sane 102, Kalpaka CHS Ltd., Siddharth Nagar IV Road No. 16, Near Vivek College Goregaon (W), Mumbai - 400062 PAN: AABPS5120Q
APPELLANT		RESPONDENT

C.O. No.106/MUM/2022 [Arising out of ITA No.1088/MUM/2022]
Assessment Year :2016-17

Gitika Ganesh Sane 103, Kalpaka CHS Ltd., Siddharth Nagar IV Road No. 16, Near Vivek College Goregaon (W), Mumbai - 400062 PAN: AABPS5120Q	Vs.	Income Tax Officer – 24(1)(1) Room No. 702, 7th Floor Piramal Chambers, Parel Mumbai – 400 012
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Assessee by	:	Shri. Venugopal C. Nair, CA
Revenue by	:	Shri. Rameshwar P. Meena, DR

Date of hearing	:	03.07.2023
Date of Pronouncement	:	11.07.2023

ORDER

The Hon'ble President vide order dated 10.05.2023 has nominated me as a Third Member on the point of difference between the members of the Division Bench, under section 255(4) of the Income Tax Act, 1961 (hereinafter called 'the Act').

2. While referring the matter to Third Member, separate questions were framed by both the Members in order to settle and finalize the question that was required to be considered and decided by the Third Member. The learned representatives of both sides were required to propose a draft question in such a manner that same shall project the exact controversy involved in the point of reference. They were directed to confine themselves to the order of reference while preparing the draft question and not to enlarge or modify the point of difference referred by the differing Members to the Third Member. Accordingly, the learned representatives of both sides proposed the following draft question after detailed discussion and deliberation.

“On facts and circumstances of the case and law applicable, whether the provisions of section 56(2)(vii)(b) of the Act is attracted to the impugned transaction of purchase of immovable property and the addition made thereunder by the Assessing Officer is justified ?”

3. Although the learned Accountant Member and learned Judicial Member have narrated the facts relevant to the controversy in their respective orders, I would briefly recapitulate the same for the sake of completeness and ready reference. The assessee, an individual, by virtue of an agreement for sale dated 26.08.2015, had purchased office premises Nos.101, 102, 103 and 104 at Siddharth Nagar Chaitanya CHS Society Ltd., for a total sale consideration of Rs.2,17,00,000/-. However, the possession of the same was taken by the assessee by making payment of Rs.1,00,000/- and thereafter got the same registered with a Sub-Registrar concerned by making payment of stamp duty on the total sale consideration of Rs.2,17,00,000/-. During the course of assessment proceedings, assessee was called upon to explain why the balance outstanding amount of Rs.2,16,00,000/- ought not to be added under the provisions contained under section 56(2)(vii)(b) of the Act. The assessee raised objections to the proposed addition under section 56(2)(vii)(b) of the Act. However, the objections of the assessee were rejected and the assessment was completed by making an addition of Rs.2,16,00,000/- under section 56(2)(vii)(b) of the

Act. The AO was of the view that the sale agreement was not a commercial transaction, rather it was a colourable device to evade the payment of tax by not making payment for remaining sale consideration of Rs.2,16,00,000/- which according to him was made by unaccounted cash. The AO also made an addition of Rs.15,12,000/- being the deemed rental income from house property as per Leave and Licence deed dated 10.07.2015. Accordingly, the assessment was concluded under section 143(3) of the Act, vide order dated 29.12.2018.

4. Aggrieved, the assessee filed appeal before the First Appellate Authority. The CIT(A) deleted the addition made under section 56(2)(vii)(b) of the Act and partly granted relief to the assessee with reference to the addition made under the deemed rental income from house property. Out of the four units, the CIT(A) held that one unit is entitled to exemption as a self-occupied property.

5. Aggrieved by the order of the CIT(A), the Revenue filed an appeal before the Tribunal (ITA No.1088/Mum/2022) and the assessee filed a cross-objection (C.O. No.106/Mum/2022). The learned Accountant Member concurred with the view of the CIT(A) in deleting the addition made under section 56(2)(vii)(b) of the Act. The primary reason for the learned Accountant Member to concur with the view taken by CIT(A) was that the assessee had filed the payment vouchers of balance sale consideration of Rs.2,16,00,000/- paid to the builder and thereby making good the entire sale consideration. The learned Judicial Member, however, disagreed with the learned Accountant Member. The learned Judicial Member was of the view that the assessee has not acted as per the terms of the sale agreement dated 26.08.2015. Further, the learned Judicial Member was of the view that as per the Leave and Licence agreement which was dated prior to the sale agreement, the assessee has taken possession of the property by making the paltry sum of Rs.1,00,000/- instead of the entire sale consideration. Further, the learned Judicial Member was of the view that taking possession of the property before payment of the entire sale consideration and against

the terms of the sale agreement would tantamount to round tripping of money from undisclosed source and concluded that the addition made under section 56(2)(vii)(b) of the Act is justified on facts of the case. As regards the deemed rental income from house property, both the learned Accountant Member and learned Judicial Member dismissed the cross-objection filed by the assessee (therefore, there is no difference of view between the learned Accountant Member and learned Judicial Member with regard to the issue of assessment of deemed rental income on house property).

6. When the matter was heard by me, I had asked for certain clarifications which are detailed below:

- i. *Whether sale deed has been executed and registered for the units purchased subsequent to settlement of balance outstanding amount? If yes, copy of sale deed needed.*
- ii. *Relationship of assessee and/or her husband with the builder (M/s. Neminath Mumbai Shelter) — to be established in clear terms and percentages with documentary evidence.*
- iii. *Reasons/clarifications from builder for not enforcing the clause of penal interest for delay in payment of consideration.*
- iv. *Rationale and legal basis for renting out one of the units before having obtained possession of the same.*

7. To the above questions raised by me, assessee had given the following clarifications:

1. *Formal Sale deed has not been executed and registered for the units purchased under the agreement for sale subsequent to settlement of balance outstanding amount*
2. *Documents establishing relationship of assessee /her husband with builder M/s Neminath Mumbai Shelter — The deed for constitution of AOP (Joint Venture Agreement) for executing development projects is enclosed showing that Mumbai Shelter Housing Development Pvt. Ltd and Neminath Construction are members of this AOP This deed also shows profit sharing ratio between members, Shareholding Pattern as On 31-03-2016 in Mumbai Shelter Housing Development Pvt Ltd is also enclosed showing that Ms Gitika Sane, Mr Ganesh Sane are holders of 9% shares each*

3. *Reasons/Clarifications from builder for not enforcing the clause of penal interest for delay in payment of consideration: Certificate from M/s Neminath Mumbai Shelter enclosed*
4. *Rationale and Legal Basis for renting out one of the units before having obtained possession of the same. The extract of agreement to sale showing the plan and the letter from the tenant would indicate that all the four units were combined and given on rent. The rationale was that right at the inception, the units were contemplated to be given on rent. Though formal possession was received on executing sales agreement, the possession of all the premises as stock in trade was with the builder AOP of which Ms Gitika Sane as a shareholder and director could access and hence with mutual consent of both members of AOP entered into the Leave and License agreement to enable the tenant to make necessary modifications to the office units including making shelves and other structures at inception rather than breaking pre existing structures and spoiling the show.*

8. The learned DR strongly supported the order of learned Judicial Member and the Assessment Order.

9. Learned AR reiterated the submissions made before the AO, the CIT(A) and the Tribunal.

10. I have heard the rival submissions and perused the material on record including two separate orders passed by the learned differing Members. The assessee had purchased office premises vide agreement of sale dated 26.08.2015 for a consideration of Rs. 2,17,00,000. It is undisputed that the said agreed consideration exceeded the stamp duty value of the immovable property. Section 56(2)(vii)(b)(ii) of the Act applies to a case where the consideration is less than the stamp duty value of the property. Therefore, prima facie there is no case for invoking the aforesaid section.

11. The matter of dispute rests on the conduct of the parties. It is alleged that the assessee had obtained possession of the property prior to the date of agreement of sale and merely on payment of a token amount of Rs. 1,00,000. This was possible due to the pre-existing business connection between the assessee and the developer, as claimed by the assessee. While the learned Accountant Member approves of such

relationship, the learned Judicial Member questions the very existence of the same in the absence of any evidence. On the basis of the clarification obtained by me, it is clear that seller M/s. Neminath Mumbai Shelter is constituted as a AOP. The joint venture agreement for executing development projects is enclosed showing that Mumbai Shelter Housing Development Pvt. Ltd., and Neminath Construction are members of this AOP. The deed of AOP shows the profit sharing ratio between members. As regards Mumbai Shelter Housing Development Pvt. Ltd., the share holding pattern as on 31.03.2016 (also enclosed) clearly shows that assessee and her husband hold 9% shares each.

12. Keeping aside the aspect of business connection with the developer, it is brought on record that the assessee has paid the balance outstanding consideration in the months of February and March, 2019. It is on this premise that the learned accountant member has passed a favourable order for the assessee. The learned judicial member questions the timing of such payments alleging that the assessee anchored a new defense for the first time after conclusion of the assessment as well as the first appellate proceedings. The learned judicial member as well as the Assessing Officer are of the opinion that since possession was obtained by the assessee before discharging the entire consideration, it is certain that the balance consideration was paid by the assessee in cash (unaccounted money).

13. In this context, it is worthy to note the decision of the Hon'ble Supreme Court in Umacharan Shaw & Bros. (1959) 37 ITR 271 (SC) wherein it has been held that suspicion howsoever strong cannot take place of proof. From the entire appreciation of the evidence, I note that the Assessing Officer has failed to establish that the assessee had paid unaccounted money/cash to the developer. The Supreme Court in the case of Kishanchand Chellaram Vs. CIT[1980] 125 ITR 713 has observed that "*It was for the revenue to rule out this possibility by bringing proper evidence on record, for*

the burden of showing that the amount was remitted by the assessee was on the revenue".

14. It was the duty of the Assessing Officer to bring on record sufficient evidences and material to prove assessee had paid unaccounted money to the developer in order to obtain possession of the property. The Supreme Court in yet another case in CIT Vs. Daulat Ram Rawatmull [1973] 87 ITR 349 held that *"The onus to prove that the apparent is not the real is on the party who claims it to be so"*. While making addition as income from undisclosed sources, burden on the department is very heavy to establish that the alleged payment was actually from undisclosed sources.

15. Contrary to the above, the assessee has brought on record proof for payment of balance consideration to the developer. If the lower authorities have not examined such payments and receipts supporting them, the ideal situation could have been to remand the case back to the Assessing Officer to verify the same. To the contrast, alleging that such payments were mere round tripping of money, without bringing any material on record, may not be sound. In other words, section 56(2)(vii)(b)(ii) of the Act, being a deeming provision, it is not legally permissible to expand the scope of the said section by stating that there is round tripping of money. Ideally, AO ought to have examined the applicability of section 69 of the Act, provided there was material on record to suggest there was some payment not recorded in the books of account of the assessee (unaccounted money). However, the AO has candidly admitted in the Assessment Order that there is no material on record to suggest unaccounted money/on money was paid prior to taking possession of the impugned property. There is only an assumption and no material / evidence for making the addition. Therefore, I concur with the views of the learned Accountant Member and accordingly hold that the impugned addition under section 56(2)(vii) of the Act, is liable to be deleted. Hence, I answer to the above question framed in the negative and in favour of the assessee.

16. In light of the above discussion, the matter may be placed before the regular Bench for an appropriate order, in accordance with law.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-

(GEORGE GEORGE K)
Vice President

Bangalore,
Dated: 11.07.2023.
/NS/*

Copy to:

- | | |
|---------------|---------------|
| 1. Appellants | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.

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

**BEFORE SHRI KULDIP SINGH, HON'BLE JUDICIAL MEMBER AND
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(Appellant)		(Respondent)

Assessee Represented by	:	Shri Venugopal C. Nair
Department Represented by	:	Shri Rameshwar P. Meena
Date of Hearing	:	15.12.2022
Date of Pronouncement	:	01.03.2023

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal and cross objection are filed by revenue and assessee respectively, against order of the Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [hereinafter in short "Ld.CIT(A)"] dated 14.03.2022 for the A.Y.2016-17.

2. Brief facts of the case are, assessee filed her return of income on 05.08.2016 declaring total income of ₹.6,56,170/-. The return of income was processed u/s.143(1) of Income-tax Act, 1961 (in short "Act"). The case was selected for Limited Scrutiny under the category CASS and subsequently, notice u/s. 143(2) of the Act was issued and served upon the assessee.

3. The assessee is an individual and during the year under consideration having income from salaries, income from house property and income from other sources. During the assessment proceedings Assessing Officer observed that assessee had purchased office premises Nos. 101, 102, 103 and 104 at Siddharth Nagar Chaitanya CHS Society Ltd., vide agreement for sale dated 26.08.2015 for total purchase

consideration of ₹.2,17,00,000/- and during the course of assessment proceedings, assessee was asked to submit the source of purchase of property vide notice u/s 142(1) of the Act. In response, Authorised representative of the assessee vide letter dated 12.11.2018 has submitted that the cost of property is ₹.2,17,00,000/- but have paid ₹.1,00,000/- and balance is still payable to the builder. Therefore, a show cause notice dated 27.11.2018 was issued to the assessee and at the same time notice u/s. 133(6) of the Act dated 30.11.2018 was issued to M/s Neminath Mumbai Shelter.

4. In response, Authorised representative of the assessee submitted as under: -

"On behalf of our client Mrs Gitika Sane, assessed with ITO-24(1)(4) under your charge, we reply to your notice requiring her to show why difference between total consideration and amount paid should not be added back as unexplained investments, as under:

It is true that an agreement was entered into the builder M/s.Neminath Mumbai Shelter for acquiring the office premises at a consideration of Rs. 2,17,00,000/- and she made actual payment was only Rs. 1 lacs only. Balance amount is Payable to Builder till date which would be confirmed by the builder, if your good-self desires to verify. We have explained that the builder gave possession on payment of Rs. 1 Lac due to

- *M/s Neminath Mumbai Shelter is a Joint Venture between Mr Neminath Jain and Mumbai Shelter*
- *Our clients and her spouse are Shareholders & Directors of Mumbai Shelter Housing Development*

- *Joint Venture still in existence, and Mumbai Shelter Housing Development Pvt Ltd has yet to receive its share of profit, which is likely to be in excess of amount due from our clients, as business arrangement, she sought and received possession.*

Hence, actual investment by way of outflow of fund is only Rs 1 Lacs. If any material- documents/statements having evidentiary value showing payments made in excess of 1 lac have come to your possession, kindly confront us with that material before considering addition U/s. 69 of an investment that has not been actually made

Meanwhile as a matter of abundant caution, we have made an application for direction U/s. 144A, to Additional CIT 24(1). Hence kindly hold the assessment proceedings in abeyance till our application is disposed off on merits."

5. Based on the submissions made by the assessee u/s. 144A of the Act, Assessing Officer received status report and direction from Jt. CIT-24(1), Mumbai, for the sake of clarity it is reproduced below:-

"4) In the normal circumstances the transfer was completed only when the entire consideration was paid for the property and the possession was given to the buyer only after payment of all consideration for the particular transaction.

5) In this case, the total consideration for the property is Rs. 2.17.00.000, out of this Rs.1,00,000 was paid and the possession was given without payment of full consideration. The assessee purchased the property from M/s. Neminath Mumbai Shelter in which the assessee's husband is the one of the partner and M/s. Mumbai Shelter housing development Pus. Lad is the another partner in which Mr Neminathjain the share holder and director.

6) The assessee claimed that the joint venture still in existence and her husband yet so receive the share of profit and the balance payable will be adjusted against the share of prof receivable. The assessee failed to appreciate the fact that the assessee and his husband are separate entity. There is connection between the property was given to the assessee at throw away prices and share of profit yet to be received by the assessee 1 husband if the property is sold to the third party the possession will be given only after getting the entire sale consideration. In this transaction, since the

assessee is wife of Mr Neminath Jain who is having substantial interest in the seller entity M/s. Neminath Mumbai Shelar, the property has transferred to the assessee at the throw away price of Rs. 100,000/ which is lesser than the market value of the property.

7) *Therefore the difference between the market value of the proper and consideration paid is to be assessed us income from other sources s/s 56 (2)(vi)(b) of the IT Act, 1961 For better understanding of the provision the same is reproduced as follows:*

"For a consideration which is less than the stamp duty value of the property by an amount exceeding fifty thousand rupees, the stamp duty value of such property as exceeds such consideration"

From the above facts of the case it is clear that the transaction which was entered by the assessee is the co-lovable device by way of purchasing the property lower than the market value of the property and evade the payment of tax by way of understating the source for purchase of the property. Without payment of full consideration, the seller would not sell the property, therefore it is understood that the remaining consideration of Rs 2.16.00.000 was paid as cash to the seller before transferring the property to the assessee. Therefore the assessing officer is directed to assess the balance payable amount of Rs.2,16,00,000/ as income from other source us 56(2)(vii)(b)(ii) of the IT Act 1961."

6. Following the direction of Jt.CIT a show cause notice was issued to the assessee. In response Ld. AR of the assessee vide letter dated 24.12.2018 submitted as under: -

"On behalf of our client Mrs Gitika Sane, we reply to your notice requiring her to show why difference between total consideration and amount paid should not be added back as u/s 56(2)(vii)(b)(ii). At the out-set we state that our invoking section 56(2)(vii)(b) is totally misplaced as effect of this section is that if consideration as per agreement at less than consideration for stamp duty purposes the difference would be taxable in the hands of the buyer. This section certainly do not state that difference between consideration payable as per agreement & the consideration actually seen to have been paid would be taxable under this section, as your good-self has proposed to carry out in your show cause notice.

Now we reproduce, provisions of section 56(2X) (b) for you to understand the appreciate that what this section purpose to tax is difference between consideration as per agreement and consideration adopted for stamp duty purposes and difference between total consideration as per agreement and the consideration seemed to have been paid:

b) any immovable property.-

(ii) for a consideration which is stamp duty value of the property by an amount exceeding fifty thousand rupees, the stamp value such property as exceeds such consideration:

Since the crux of the deification it the "consideration" understanding the term consideration is very important. The Income Tax Act has not defined the term "consideration in respect of a contract by which an asset is purchased/sold. Hence the term consideration as per contract act is to be seen.

According to Section 2(d) of Indian Contract Act, 1872 Consideration is defined as: "When at the desire of the promisor, the promisee or any other person has done or abstained from doing or does or abstains from doing, or promises to do or abstain from doing something such act abstinence promise is called consideration for the promise."

Here the seller is considered as Promise to transfer the flat - The consideration is the payment already made or the Promise to make Payment given by the promisee the buyer. Thus consideration includes amount paid or payable as per agreement. That is precisely the reason for mentioning the consideration as the aggregate amount for which the seller agrees to transfer the flat to the buyer- The consideration mentioned in our registered agreement is not 1 lac but 2.17 crores and on which stamp duty is also paid. There is no concept of cash system of accounting in determining consideration for a transfer of property ie ne recognizes only what is actually - received as consideration for the transfer One has to necessarily recognize the consideration as per accrual system- Le A Consideration of 2.17 Crores-that has accrued and on which stamp duty is paid. Hence based only on the actual amount paid holding that consideration is less than the amount as per valuation for stamp duty purposes and invoking section 56(2)(vii)(b)(ii) is misplaced.

We also given information on following matters on which you have raised query.

1. Detailed working on rent received from two official units let out:

1. Rent from Shop No. 1-Charkop Shree Manesha CHS Ltd, Charkop, Kandivali West - 400 067: Rs.13091 per month.

2. Rent from Office at Siddharth Nagar Chaitanya CHS Ltd, Goregaon West-400104 - Rs.6,00,000 per month.

1. Reason for not taxing deemed rent on unit No. 101A, 102, 03 & 104 as deemed rent on your perception that only office nit no 102 is given on rent- We draw your attention to stamp duty payment receipt which is duly stamped by office of sub-registrar wherein Premises No. 101A, 102, 103 & 104 has been entered indicating stamp duty is paid for letting out all these units. Since they were all combined to one when it was given in rental, only 102 was written in the agreement."

7. Subsequently Jt.CIT vide letter dated 26.12.2018 gave a further direction u/s. 144A of the Act which is reproduced below: -

"Direction u/s. 144 of the IT Act, 1961.

5) In the normal circumstances, the transfer was completed only when the entire consideration was paid for the property and the possession was given to the buyer only after payment of all consideration for the particular transaction.

6) In this case, the total consideration for the property is Rs.2,17,00,000, out of this Rs.1,00,000 was paid and the possession was given without payment of full consideration. The assessee purchased the property from M/s. Neminath Mumbai Shelter in which the assessee's husband is the one of the partner and M/s. Mumbai Shelter housing development Pvt. Ltd is the another partner in which the assessee is holding nine percentage shares and the assessee's husband Mr. Neminathjain is the share holder and director.

7) The AR has relied on the decision of Honourable Bombay High Court in the case of Keshub Mahindra vs. CIT. The AR failed to appreciate the fact that the said case law is supporting revenue stand rather than the assessee's argument. The AR relied on the particular paragraph of the said decision that substance of the particular commercial transaction is more important than form of the particular commercial transaction. In this case, the form of the transaction is that the remaining consideration of Rs.2,16,00,000/- was shown as

payable whereas the substance of the transaction is that the remaining consideration was paid as cash

Further, the AR submitted that the liability to pay Rs. 2,16,00,000/- is still exist, therefore the agreement is not entered for lesser consideration than the market value, therefore section 56(2)(vii)(b) is not applicable in this case The AR failed to appreciate the fact that it is mentioned in Page No. 4 of Para No. 4(M) of in the agreement that the balance consideration of Rs.2,16,00,000/- is to be paid on or before date of handing over possession of property to the assessee. In this transaction the possession was handed over to the assessee without payment of Rs.2,16,00,000/-. Hence, this transaction is the prudent commercial transaction whereas this particular transaction is the co-lovable device to evade the payment of taxes by the way of made the payment of remaining sale consideration of Rs 2,16,00,000/- through unaccounted cash.

It is learnt through the assessment records that the assessee rented out the property before the date of payment of Rs. 1. 00.000 The assessee-paid Rs 1,00,000/- on 20.07.2015 whereas the property was rented out from 05.06.2015 through leave and licence agreement registered on 10.07.2015

From the above facts, it is understood that in the normal prudent commercial transaction, the possession of the property would not be handed over without payment of entire consideration whereas in this case the property was handed over to the assessee and rented out before the date of payment of small sum Rs.1,00,000/ Therefore, this is not the prudent commercial transaction and the remaining consideration of Rs 2,16,00,000/- was paid as cash from the unaccounted income of the assessee. Though there is no direct evidence for payment of cash from the surrounding circumstances and human probabilities. It is understood that the remaining consideration of Rs. 1,00,000/- was paid as cash. The above principle was upheld by the Honourable Supreme Court in the case of Durga Prasad More vs CIT (82 ITR 540].

8) The assessee claimed that the joint venture still in existence and her husband yet to receive the share of profit and the balance payable will be adjusted against the share of profit receivable. The assessee failed to appreciate the fact that the assessee and his husband are separate legal entity. There is connection between the property was given to the assessee at throw away prices and share of profit yet to be received by the assessee's husband. If the property is sold to the third party, the possession will be given only after

getting the entire sale consideration. In this transaction, since the assessee is wife of Mr.Neminath Jain, who is having substantial interest in the seller entity M/s. Neminath Mumbai Shelter, the property was transferred to the assessee at the throw away price of Rs 1.00 000/- which is lesser than the market value of the property.

9) Therefore, the difference between the market value of the property and consideration paid is to be assessed as income from other sources us. 56 (2) (vii)(b)(ii) of the IT Act, 1961. For better understanding of the provision the same is reproduced as follows:

"For a consideration which is less than the stamp duty value of the property by an amount exceeding fifty thousand rupees, the stamp duty value of such property as exceeds such consideration."

From the above facts of the case, this clear that the transaction which was entered by the assessee is the co-lovable device by way of purchasing the property lower than the market value of the property and evade the payment of tax by way of understating the source for purchase of the property. Without payment of full consideration, the seller would not sell the property therefore it is understood that the remaining consideration of Rs 2 16 00, 000/ was paid as cash to the seller before transferring the property to the assessee, Therefore the assessing officer is directed to assess the balance payable amount of Rs.2,16,00,000/- as income from other source us 56(2)(vii)(b)(ii) of the IT Act, 1961."

8. After considering the submissions of the assessee and the direction of the Jt.CIT, Assessing Officer invoked the provisions of section 56(2)(vii)(b)(ii) of the Act and treated the difference between registered value and the amount paid by the assessee i.e., ₹.2,17,00,000/- (-) 1,00,000/- as deemed income of the assessee and he observed that the assessee claimed that the joint venture is still in existence and her husband yet to receive the share of profit and the balance payable will be adjusted

against the share of profit receivable. Assessing Officer observed that assessee failed to appreciate the fact that the assessee and her husband are separate legal entity. There is no connection between the property was given to the assessee at throw away prices and share of profit yet to be received by the assessee's husband. It is not a normal transaction and the husband of the assessee having substantial interest in the seller entity M/s. Neminath Mumbai Shelter, which transferred the assets to the assessee at the throw away price of ₹.1,00,000/- which is lesser than the market value of the property.

9. Further, Assessing Officer observed that the possession of the four offices in the hands of the assessee are vacant and she has rented out only one of the unit i.e., 102 for agreed rent of ₹.60,000/- per month and it is declared as income under the head "income from house property". However, rent received of the other office units have not offered by her. Therefore, he estimated the income under section 23(1)(a) of the Act and estimated the income from rent of the other three offices @60,000/- per month and gave a deduction u/s. 24 of the Act @30% and brought to tax ₹.15,12,000 as deemed income of the assessee.

10. Aggrieved assessee preferred an appeal before the Ld.CIT(A) and before him assessee filed following submissions:

"Ground 1: Addition U/s 56(2)(vii)(b) of the Income tax Act 1961, overlooking that consideration for acquiring the premises was more than value for stamp duty.:

- *After discussing on his surprise on the fact that agreement was for 2.17 crores and I could get possession by paying only 1 lac,*
- *Not believing business interest that the company in which I am a shareholder and director had, with the seller due to a joint venture for re-development, share of profit of JV lying with builder (seller) being the comforting factor for him if I default after taking possession*
- *Not believing many documents that both the buyer and the seller provided and making baseless allegation that balance amount is paid in cash.*

Made addition U/s 56(2)(vii)(b) which reads as:

(vii) where an individual or a HUF receives, in any previous year, from any person or persons on or after the 1st day of October, 2009 but before the 1st day of April, 2017.

(b) any immovable property-

1. without consideration, the stamp duty value of which exceeds fifty thousand rupees, the stamp duty value of such property;

2. for a consideration which is less than the stamp duty value of the property by an amount exceeding fifty thousand rupees, the stamp duty value of such property as exceeds such consideration:

Thus this section proposes to tax the difference between consideration as per agreement and consideration adopted for stamp duty purposes:

I enclose index -2, as per which consideration 2.17 crores can be seen to be higher than the stamp duty value of the property of Rs 21691000. Since the Income Tax Act has not defined the term "consideration in respect of a contract for purchase/sale of an asset, the term consideration as per Section 2(d) of Indian Contract Act 1872 is seen according to which Consideration is

"When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing something, such act or abstinence or promise is called consideration for the promise" Thus here the seller, the Promisor to transfer the flat for the consideration which is

- *Either the payment already made or*
- *Promise to make Payment given by the Promisee - The buyer*

Thus consideration is aggregate amount for which seller agrees to transfer the flat to the buyer, which mentioned in our registered agreement is 2117 crores and on which stamp duty is also paid.

Since there is no cash system of accounting in determining consideration for transfer of property the consideration of 2.17 Crores has accrued and on which stamp duty is paid.

Hence holding that consideration is only what has been actually paid and which being lesser than the amount for stamp duty purposes to invoke sec 56 (2)(vii)(b)(ii) is heavily misplaced.

In fact I have made balance payment subsequently enclosed evidence.

Ground 2: Addition of Rs.15,12,000/- as deemed rent, overlooking the impugned units as per were not vacant and the rent from renting out them had been offered for taxation in ROI

The submission made to AO on this point is

"Reason for not taxing deemed rent on unit no 101, 102, 103 & 104 as deemed rent on your perception that only office unit no 102 is given on rent - We draw your attention to stamp duty payment receipt which is duly stamped by office of sub- registrar wherein Premises No 101A, 102,103 & 104 has been entered Indicating stamp: duty is paid for letting out all these units. Since they were all combined to one when it was given on rental, only 102 was written in the agreement Also the area mentioned in the Stamp Duty Payment is 1075 Sq Feet is more than the total area mentioned in Point 4 of the Sale

Agreement which is 1002 sq ft. You may kindly verify the fact from the tenant Mr. Ravindra Bhatia whose address is as per rental agreement - His telephone no. is 9892361600. We also enclose certificate from the tenant to state the same"

11. After considering the submissions of the assessee Ld.CIT(A) deleted the additions with the following observations:

"5.1.1 The Ld. AO discussed the related addition of Rs.2,16,00,000 in Para 13 & 14 of the impugned order dated 29 12.2018. The discussion is as under:

"From the above facts of the case, it is clear that the transaction which was entered by the assessee is the colorable device by way of purchasing the property lower than the market value of the property and evade the payment of tax by way of understating the source for purchase of the property. Without payment of full consideration, the seller would not sell the property, therefore it is understood that the remaining consideration of Rs 2,16,00,000 was paid as cash to the seller before transferring the property to the assessee.

In view of the above, the assessee has paid Rs 1,00,000/- to M/s Neminath Mumbai Shelters through accounted sources and the remaining consideration of Rs. 2,16,00,000/- is paid as cash through unaccounted sources. Therefore, an amount of Rs 2,16,00,000/- is treated as income of the assessee under head income from other sources. The same is added back to the total Income of the assessee. It is very clear that the terms and conditions laid down in the agreement has not been honoured by the assessee. Further, it is also seen from the leave and licence agreement dated 10.07 2015 submitted during the course of assessment proceedings that the assessee has let out the office unit no 102 in Chaitanya CHS Ltd to Ravindra Bhatia for twelve month commencing from 05/06/2015 to 04/06/2016. The date of leave and licence agreement itself a documentary evidence that the assessee has taken the possession of the office unit even without entering in to agreement with M/S Neminath Mumbai Shelters. From the above discussion, following facts have emerged.

a. In the normal circumstances, the transfer was completed only when the entire consideration was paid for the property and the possession was given to the buyer only after payment of all consideration for the particular transaction.

b. In this case, the total consideration for the property is Rs 2 17 00 000 out of this Rs.1,00,000 was paid and the possession was given without payment of full consideration. The assessee purchased the property from M/s. Neminath Mumbai Shelter in which the assessee's husband is the one of the partner and M/s. Mumbai Shelter housing development Pvt. Ltd is the another partner in which the assessee is

holding nine percentage shares and the assessee's husband Mr. Neminath jain is the share holder and director.

c. The AR has relied on the decision of Honorable Bombay High Court in the case of Keshub Mahindra vs CIT The AR failed to appreciate the fact that the said case law is supporting revenue stand rather than the assessee's argument. The AR relied on the particular paragraph of the said decision that substance of the particular commercial is more important than form of the particular commercial transaction. In this case the form of the transaction is that the remaining consideration of Rs 216,00,000 was shown as cash. Further, the AR submitted that the liability to pay Rs 2 16 00 000 is still exist therefore payable whereas the substance of the transaction is that the remaining consideration was paid in the agreement is not entered for lesser consideration than the market value, therefore section 56(2)(vii)(b) is not applicable in this case The AR failed to appreciate the fact that it is mentioned in Page No. 4 of Para No. 4(M) of the agreement that the balance Consideration of Rs. 2.16,00,000/- is to be paid on or before date of handing over possession of property to the assessee. In this transaction the possession was handed over to the assessee without payment of Rs 2.16,00,000/- Hence, this transaction is not the prudent commercial transaction whereas this particular transaction is the colourable device to evade the payment of taxes by the way of make the payment of remaining sale consideration of Rs.2,16,00,000/- through unaccounted cash.

It is learnt through the assessment records that the assessee rented out the property much before the date of payment of Rs. 1,00,000/- The assessee paid Rs. 1,00,000/- on 20.07.2015 whereas the property was rented out from 05.06.2015 through leave and licence agreement registered on 10.07.2015.

From the above facts, it is understood that in the normal prudent commercial transaction, the possession of the property would not be handed over without payment of entire consideration whereas in this case the property was handed over to the assessee and rented out much before the date of payment of small sum Rs 1.00 000/- Therefore this is not the prudent commercial transaction and the remaining consideration of Rs. 2,16,00,000/- was paid as cash from the unaccounted income of the assessee.

Though, there is no direct evidence for payment of cash, from the surrounding circumstances and human probabilities, It is understood that the remaining consideration of Rs.2,16,00,000/- was paid as cash. The above principle was upheld by the Honourable Supreme

Court in the case of CIT VS Durga Prasad More (82 ITR 540] and in the case of Sumati Dayal Vs CIT [214 ITR 801)

d. The assessee claimed that the joint venture still in existence and her husband yet to receive the share of profit and the balance payable will be adjusted against the share of profit receivable. The assessee failed to appreciate the fact that the assessee and his husband are separate legal entity. There is connection between the property was given to the assessee at throw away prices and share of profit yet to be received by the assessee's husband If the property is sold to the third party, the possession will be given only after getting the entire sale consideration. In this transaction, since the assessee is wife of Mr. Neminath Jain, who is having substantial interest in the seller entity M/s. Neminath Mumbai Shelter, the property was transferred to the assessee at the throw away price of Rs. 1,00,000/- which is lesser than the market value of the property.

e. The assessee replied on 26/12/2018 that the builder tried to recover the amount of Rs. 2,16,00,000/- through letter dated 18/12/2015 10/02/2016 and the agreement between the builder and the assessee was cancelled through letter dated 25/03/2016 The nature and veracity of the letter was perused and found that the assessee is trying to prove the genuineness of transactions through these kind of letters. If the correspondence was there, the same should be submitted at the time of raising this issue for the first time. The submission of the assessee is rejected as an afterthought to establish the genuineness the transaction, which is actually colorable device to evade the payment of taxes.

f. Therefore the difference between the market value of the property and consideration paid is to be assessed as income from other sources u/s 56(2)(vii)(b)(i) of the IT Act 1961.

For better understanding of the provision the same is reproduced as follows

"For a consideration which is less than the stamp duty value of the property by an amount exceeding fifty thousand rupees, the stamp duty value of such property as exceeds such consideration."

"From the above facts of the case it is clear that the transaction which was entered by the assessee is the colorable device by way of purchasing the property lower than the market value of the property and evade the payment of tax by way of understating the source for purchase of the property. Without payment of full consideration, the seller would not sell the property, therefore it is understood that the

remaining consideration of Rs 2, 16, 00, 000/- was paid as cash to the seller before transferring the property to the assessee.

14. In view of the above the assessee has paid Rs. 100,000 to M/s Neminath Mumbai Shelters through accounted sources and the remaining consideration of Rs 2 16.00.000/- is paid as cash through unaccounted sources. Therefore, an amount of Rs 2,16,00,000 is treated as income of the assessee under head income from other sources. The same is added back to the total income of the assessee.

5.1.2 In this regard, following points out of submission of the appellant (reproduced fully in Para 4 supra) being relevant for adjudication of the impugned addition of Rs.2,16,00,000 are as under-

i. That Ld. AO could not appreciate the fact that agreement was for 2 17 crores and the appellant could get possession by paying only 1 lac.

ii. That Ld. AO could not understand business interest that the company in which the appellant lady was a shareholder and director, due to a joint venture for re- development, had with the seller, share of profit of JV lying with builder (seller) being the comforting factor for him if the appellant defaulted after taking possession.

iii. That Ld AO did not believe many documents that both the buyer and the seller provided and made baseless allegation that balance amount was paid in cash.

iv. That Section 56(2)(vii)(b) of the Act proposes to tax the difference between consideration as per agreement and consideration adopted for stamp duty purposes. It was further submitted that as per enclosed Index -2 consideration 2 17 crores could be seen to be higher than the stamp duty value of the property of Rs 2,16,91,000. Since the Income Tax Act did not define the term 'consideration' in respect of a contract for purchase/sale of an asset, the term consideration as per Section 2(d) of Indian Contract Act 1872 could be seen according to which Consideration is:

"When at the desire of the promisor the promisee or any other person has done or abstained from doing or does or abstains from doing, or promises to do or abstain from doing something such act or abstinence or promise is called consideration for the promise."

v. Thus here the seller was the Promisor to transfer the flat for the consideration which was either the payment already made or Promise to make Payment given by the Promisee-the buyer.

vi. That Consideration is aggregate amount for which seller agrees to transfer the flat to the buyer, which was mentioned in the registered agreement as 2 17 crores and on which stamp duty was also paid. Since there was no cash system of accounting in determining consideration for transfer of property the consideration of 2 17 Crores had accrued and on which stamp duty was paid.

5.1.3 In light of the above facts the appellant lady requested that action of which stamp duty was paid Ld. AO holding that consideration was only what had been actually paid and which having been found to be lesser than the amount for stamp duty and his invoking Sec 56 (2)(vii)(b)(i) was heavily misplaced It was also lastly submitted that the appellant lady had made balance payment subsequently as per enclosed evidence.

5.1.4 In light of the above discussion and after duly considering all the facts and circumstances and applicable law related to impugned addition of Rs 2,16 00,000 it is noted that the Ld. Ao could not appreciate the related facts of the case. The Ld A/R of the appellant lady also got uploaded a copy of a letter dated 15 11 2016 written by the appellant to one Neminath Mumbai Shelter in which the fact was mentioned that the said concern had agreed to distribute share of profit of the joint venture, to which Mumbai Shelter Housing Development Pvt Ltd was entitled to The appellant had planned to take a loan of this profit from Mumbai Shelter Housing Development Pvt. Ltd and meet her obligation. It was further mentioned in the said letter that since the said concern (Neminath Mumbai Shelter) could not distribute the profit. Mumbai Shelter Housing Development Pvt. Ltd had a liquidity crunch and hence could not advance her a loan and hence she was unable to make balance payment.

5.1.5 At the end of letter it was also mentioned that since the said concern (Neminath Mumbai Shelter) was fully secured as share of profit of her company was still with it, which would cover her liability request was made not to cancel the transaction related to the purchase of the Immovable property (the office premises).

5.1.6 In light of above discussion made from Para no. 5.1 to 5 15 of this appeal order, the appellant gets relief for which she is found to be entitled. Ld. AO is directed to delete the impugned addition of Rs.2,16,00,000 and Ground No. 1 is allowed.”

12. With regard to additional rent, Ld.CIT(A) gave relief on the ground that one of the property is self-occupied by the assessee and the rental agreement referred by the Assessing Officer for making the addition is only for the period of July 15 to June 16. Therefore, for the period of July 2015 to March 2016 the relevant interest to be considered only for nine months. Accordingly, Ld.CIT(A) worked out the deemed rental income by adopting the same rent of ₹ 60,000/- per month for two properties. i.e,

60000 X 2 X 9	=	₹.10,80,000
Less deduction u/s. 24	=	₹.3,24,000
Balance	=	₹.7,56,000/-

13. Accordingly, he partly allowed the grounds raised by the assessee.

14. Aggrieved revenue is in appeal before us raising following grounds in its appeal: -

"1. Whether on the facts and in the circumstances Ld. CIT(A) erred in deleting the addition of Rs 2,16,00,000/- made by the AO under section 56(2)(vii)(b) of the IT Act 1961.

2. Whether on the facts and in the circumstances Ld. CIT(A)/NFAC, Delhi erred in not appreciating the fact that the assessee failed to prove that the transaction entered by the Builder/Assessee is not the prudent Commercial transaction whereas this particular transaction is the colourable device to evade the payment of taxes and the remaining consideration of Rs.2,16,00,000/-.

3. Whether on the facts and in the circumstances Ld. CIT(A)/NFAC, Delhi erred in not appreciating the fact that the assessee and her spouse are separate legal entities and the terms of the Joint

Venture with Builder company and assessee's spouse should not dilute the payment terms and agreement with the assessee.

4. *The appellant prays that the order of the CIT(A)/ NFAC, Delhi on the above ground be reversed and that of the Assessing Officer be restored.*

5. *The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."*

15. At the time of hearing, Ld.DR brought to our notice facts in this case and he supported the findings of the Assessing Officer that assessee has paid ₹.1,00,000/- only and acquired the property of ₹.2,17,00,000/-. It is not a prudent and commercial transactions and he objected to the submissions of the assessee that the joint venture is still in progress and husband of the assessee will receive the share of profit to compensate the purchase consideration. Accordingly, he supported the disallowance made by the Assessing Officer u/s. 56(2)(vii)(b)(ii) of the Act.

16. On the other hand, Ld.AR brought to our notice the findings of the Ld.CIT(A) in Page No. 5 to 8 of the appellate order and Further, Ld.AR of the assessee brought to our notice subsequent payments made by the assessee and filed the various receipts in support of the claim that assessee has actually paid the payment subsequently by making the payment through RTGS dated 15.02.2019, 16.02.2019, 18.02.2019 and 22.03.2019 and also in support of the same assessee has filed the copy

of the bank statement in support of the above said claim and prayed that the transaction is genuine and assessee has properly remitted the payments after receipt of share of profit from the company.

17. Considered the rival submissions and material placed on record, we observe from the record that assessee has actually paid ₹.1,00,000/- as consideration at the time of registration whereas stamp duty of the property is ₹.2,17,00,000/- crores in support the claim Ld. AR of the assessee has submitted that assessee's husband is one of the director of the Seller company namely M/s. Neminath Mumbai Shelter and the project has not completed and assessee's husband is due to receive share of profit from the company which will compensate the purchase consideration due to be paid. We observe that assessee has filed payment vouchers to the extent of ₹.2.16 crores paid to the builder on various dates and relevant receipts are filed as part of Paper Book and assessee also brought on record bank statement in support of the above claim that assessee has subsequently settled all the payments. Therefore, it may look not prudent commercial transactions. However, we observe that the assessee and family members are the owners of the company through which the assessee has acquired the certain properties and assessee's husband is

having substantial interest in the above said company and for the sake of convenience assessee has registered by acquiring the property this way.

As evidences were submitted before us that assessee has made the settlement subsequently proves that the transaction is genuine.

Therefore, the appeal filed by the revenue in this regard is dismissed.

18. With regard to Cross objection filed by the assessee, we observe that assessee has entered into rental agreement for the period of 05.06.2015 to 04.06.2016 effectively the property was given on rent for nine (9) months. At the time of hearing it was submitted that all the premises i.e., flat Nos. 101A, 102, 103 and 104 which is situated at first floor of the building is only one property by filing e-stamp payment receipt which is filed in Page No. 4 of the Paper Book having area of 1075 sq.ft. and the assessee mentioned in the rental agreement only office premises No. 102. It is not clear from the submissions made by the assessee that the whole property consists of four office premises are rented out or only one office premise. In appeal, Ld.CIT(A) has partly allowed the grounds raised by the assessee by considering one office premises as self-occupied and confirmed the other two office premises for the purpose of deemed rent and adopted the same rent of ₹.60,000/- per month mentioned in

the rental agreement. The information submitted by the assessee merely relying on the basis of e-stamp payment receipt is insufficient and the finding of the Ld.CIT(A) is proper considering the facts on record. Therefore, we are inclined to dismiss the cross appeal filed by the assessee.

19. In the result, appeal filed by the Revenue as well as cross objection filed by the assessee are dismissed.

Order pronounced in the open court on 01st March, 2023

(KULDIP SINGH)
JUDICIAL MEMBER

Mumbai / Dated 01/03/2023
Giridhar, Sr.PS

Copy of the Order forwarded to:

1. The Assessee
 2. The Respondent.
 3. The CIT(A), Mumbai.
 4. CIT
 5. DR, ITAT, Mumbai
 6. Guard file.
- //True Copy//

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

BY ORDER

(Asstt. Registrar)
ITAT, Mum

DISSENTING ORDER PASSED BY THE JUDICIAL MEMBER

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

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER**

**ITA No.1088/M/2022
Assessment Year: 2016-17**

Income Tax Officer-24(1)(1), Room No.702, 7 th Floor, Piramal Chambers, Parel, Mumbai - 400012	Vs.	Mrs. Gitika Ganesh Sane, 102, Kalpana CHS Ltd., Siddharth Nagar IV, Road No.16, Near Vivek College, Goregaon (W), Mumbai – 400 062 PAN: AABPS5120Q
(Appellant)		(Respondent)

**CO No.106/M/2022
(Arising out of ITA No.1088/M/2022)
Assessment Year: 2016-17**

Mrs. Gitika Ganesh Sane, 102, Kalpana CHS Ltd., Siddharth Nagar IV, Road No.16, Near Vivek College, Goregaon (W), Mumbai – 400 062 PAN: AABPS5120Q	Vs.	Income Tax Officer-24(1)(1), Room No.702, 7 th Floor, Piramal Chambers, Parel, Mumbai - 400012
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Venugopal C. Nair, A.R.

Revenue by : Shri Rameshwar P. Meena, D.R.

Date of Hearing : 15. 12 . 2022

Date of Pronouncement : 16. 03 . 2023

ORDER

Per : Kuldip Singh, Judicial Member:

I have perused the proposed order passed by Hon'ble Accountant Member, Shri S. Rifaur Rahman who has dismissed the captioned appeals filed by the appellant, Income Tax Officer, Mumbai (hereinafter referred to as 'the Revenue'). However, being not agreed with the proposed order passed by Hon'ble Accountant Member, Shri S. Rifaur Rahman, I propose to pass a separate order which is as under:

2. For the sake of brevity aforesaid appeal and cross objections emanated from same impugned order passed by Ld. Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] are being taken up for disposal by way of composite order.

3. Briefly stated facts necessary for consideration and adjudication of the issues at hand are: by virtue of the agreement for sale dated 26.08.2015, the cross objector, Mrs. Gitika Ganesh Sane (hereinafter referred to as 'the assessee') has purchased office premises No.101, 102, 103 & 104 at Siddharth Nagar Chaitanya CHS Soc. Ltd. for a total sale consideration of Rs.2,17,00,000/- by making payment of Rs.1,00,000/- and thereafter got the same registered with sub-registrar concerned by making payment of stamp duty on the total sale consideration of Rs.2,17,00,000/-. The assessee has rented out the property in question vide leave licence agreement dated 10.07.2015 even prior to agreement to sale dated 05.06.2015. During the scrutiny proceedings the

assessee was called upon to explain, to which she has filed comprehensive submissions. The Assessing Officer (AO) after declining the contentions raised by the assessee proceeded to invoke the provisions contained under section 56(2)(vii)(b) of the Income Tax Act, 1961 (for short 'the Act') and thereby concluded that it was not a commercial transaction rather a colourable device to evade the payment of taxes by not making payment of the remaining sale consideration of Rs.2,16,00,000/- through unaccounted cash and thereby assessed the income of the assessee from other sources under section 56(2)(vii)(b) of the Act by making addition of Rs.2,16,00,000/-. The AO has also made addition of Rs.15,12,000/- being the deemed rental income from house property as per leave licence deed (supra) and thereby framed the assessment under 143(3) of the Act.

4. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has deleted the addition by partly allowing the same. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the Revenue and the assessee have come up before the Tribunal by way of filing appeal and cross objections respectively.

5. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

6. Undisputedly by virtue of the agreement of sale dated 26.08.2015 the assessee had purchased office premises in question for a sale consideration of Rs.2,17,00,000/- by only making payment of Rs.1,00,000/-. It is also not in dispute that the agreement for sale (supra) was got registered with the sub-registrar by making payment of stamp duty on the total sale consideration of Rs.2,17,00,000/-. It is also not in dispute that till the passing of the assessment order dated 29.12.2018 balance sale consideration of Rs.2,16,00,000/- has not been paid. It is also not in dispute that as per para 4 of the agreement to sale (supra) possession of the property in question was to be delivered to the assessee only after making payment of balance sale consideration of Rs.2,16,00,000/-, however, even prior to the agreement to sale dated 26.08.2015 the assessee was given possession which she has rented out vide leave licence agreement dated 10.07.2015. It is also not in dispute that by virtue of the leave licence agreement dated 10.07.2015 the assessee has rented out office premises No.102 on first floor of the building in question to Mr. Ravindra Bhat at the rent of Rs.60,000/- per month.

7. In the backdrop of the aforesaid undisputed facts questions arise for determination by the Bench are:

(I) As to whether sale transaction qua the property in question by virtue of the sale agreement (supra) in favour of the assessee for a sale consideration of Rs.2,17,00,000/- only by making payment of Rs.1,00,000/- is a prudent commercial transaction or a colourable device to evade the payment of taxes on the remaining sale consideration of Rs.2,16,00,000/-?

(II) As to whether the assessee has rented out entire property in question viz. office premises No.101, 102, 103 & 104 or only one of her unit No.102 vide leave licence agreement (supra) to Mr. Ravindra Bhat at the rate of Rs.60,000/- per month?

Question No.1

8. In order to decide the first question framed, the Ld. CIT(A) deleted the addition by returning following findings:

“5.1.4 In light of the above discussion and after duly considering all the facts and circumstances and applicable law related to impugned addition of Rs. 2,16,00,000 it is noted that the Ld. AO could not appreciate the related facts of the case. The Ld. A/R of the appellant lady also got uploaded a copy of a letter dated 15.11.2016 written by the appellant to one Neminath Mumbai Shelter in which the fact was mentioned that the said concern had agreed to distribute share of profit of the joint venture, to which Mumbai Shelter Housing Development Pvt. Ltd. was entitled to. The appellant had planned to take a loan of this profit from Mumbai Shelter Housing Development Pvt. Ltd. and meet her obligation. It was further mentioned in the said letter that since the said concern (Neminath Mumbai Shelter) could not distribute the profit, Mumbai Shelter Housing Development Pvt. Ltd. had a liquidity crunch and hence could not advance her a loan and hence she was unable to make balance payment.

5.1.5 At the end of letter it was also mentioned that since the said concern (Neminath Mumbai Shelter) was fully secured as share of profit of her company was still with it, which would cover her liability; request was made not to cancel the transaction related to the purchase of the Immovable property (the office premises).

5.1.6 In light of above discussion made from Para no. 5.1 to 5.1.5 of this appeal order, the appellant gets relief for which she is found to be entitled. Ld. AO is directed to delete the impugned addition of Rs. 2,16,00,000 and Ground No. 1 is allowed.”

9. Hon’ble Accountant Member upheld the impugned order passed by the Ld. CIT(A) by holding that **“It may look not prudent commercial transactions. However, we observe that the assessee and family members are the owners of the company through which the assessee has acquired certain properties**

and the assessee's husband is having substantial interest in the above said company and for the sake of convenience the assessee has registered by acquiring the property this way. As evidences were submitted before us that assessee has made the settlement subsequently proves that the transaction is genuine."

10. Bare perusal of the impugned order passed by the Ld. CIT(A) goes to prove that he has passed a cryptic order without addressing the legal and factual issue that the entire sale transaction was a colourable devise in order to hoodwink the tax authority to evade the taxes on the remaining amount of Rs.2.16 crore which has never been proved to have been paid till passing of the assessment order dated 29.12.2018 nor any such balance payment made by the assessee has been proved or discussed by the Ld. CIT(A) during the first appellate proceedings.

11. I am unable to agree with the findings returned by Hon'ble Accountant Member that "it may not look prudent commercial transaction, however the assessee and family members are the owners of the company through which she has acquired certain properties and that she has made the settlement subsequently which proves the transaction as genuine", because, the entire issue raised in the present appeal as well as cross objection is centered around contract entered into between the vendor and the vendee (Assessee) and licensor and the licensee (Assessee) by virtue of the agreement to sale dated 26.08.2015 and leave licence agreement dated 10.07.2015 respectively. Since "a contract includes understanding and action in concert by both the parties" out

of which nothing can be added or deleted, the Bench is required to examine the entire issue in the light of the contents and intentions of the parties to the contract. So my reasons for dissenting with order passed by the Hon'ble Accountant Member are as under:

(i) when undisputedly the assessee has purchased property in question for a sale consideration of Rs.2,17,00,000/- and got the agreement for sale registered in her favour only by making part payment of Rs.1,00,000/- and payment of remaining sale consideration of Rs.2,16,00,000/- has never been made, it is highly improbable to treat the sale in question as a genuine transaction.

(ii) that there is not an iota of evidence on record nor discussed by the lower revenue authorities that the assessee's husband is having substantial interest in the property in question and the assessee has having 9% stakes in M/s. Neminath Mumbai Shelter from whom the property in question was purchased. There are mere submissions of the assessee in this regard.

(iii) that even if it is assumed for argument sake that the assessee's husband was having substantial share in M/s. Neminath Mumbai Shelter (seller) and the assessee was having 9% share in the same, it would not absolve the assessee to get the property in question transferred for a paltry amount of Rs.1,00,000/-, whose agreed valule was Rs.2,17,00,000/- nor this fact can validate the agreement for sale which was never

complied with by the parties to the sale. All of sudden during the first appellate proceedings the assessee has come up with new defence that she has made the payment of balance sale consideration of Rs.2,16,00,000/- to M/s. Neminath Mumbai Shelter (seller) and brought on record receipts issued by the seller which have never been examined or discussed by the AO, the Ld. CIT(A) nor examined by Hon'ble Accountant Member but just a vague reference thereof has been given in the proposed order.

(iv) that in case balance payment was to be made by the assessee, it was to be made in accordance with the terms and conditions agreed to in the agreement to sale. For ready perusal relevant terms and conditions of the agreement sale are extracted as under:

"4) The purchaser hereby agrees to purchase from the Developer the ~~Shop~~/Office on FIRST No. No. 101A, 102, 103 & 104 (pt) _____ on FIRST Floor and parking space No. __ on Ground Floor hereinafter called the said building under construction by the developer as per the plans and specification seen and approved by him/her/them for Rs.2,17,00,000/=/(Rupees Two Grove Seventeen Lacs only)

which consideration amount shall be paid by the purchaser/s to the Developer in the manner given below.

- a) Rs.1,60,000/- on or before execution of these agreement
- b) Rs. _____ /-on or before completion of plinth.
- c) Rs. _____/- on or before completion of 1st slab
- d) Rs. _____/- on or before completion of 2nd slab
- e) Rs. _____/- on or before completion of 3rd slab
- f) Rs. _____/- on or before completion of 4th slab
- g)Rs. _____/- on or before completion of 5th slab
- h) Rs. _____/- on or before completion of 6th slab

- i) Rs. ____/- on or before completion of 7th slab
- j) Rs. ____/- on or before completion of 8th slab
- k) Rs. ____/- on or before completion of 9th slab
- l) Rs. ____/- on or before completion of Terrace
- m)Rs. 2,16,00,000/- on or before handing over possession

Total 2,17,00,000/=

(Time Being essence of this Agreement)

5) The purchaser's herein had agreed to purchase the said shop/office on lump sum basis and same shall have no bearing on the area mentioned herein above and purchasers herein has agree not to raise dispute or claim any on the basis of area.

6) The purchaser has prior to the execution of this Agreement is satisfied him/herself the title of the Developer to the said property and has accepted the same and shall not be entitled any further investigation relating thereof.

7) If the Purchaser/s commits default;

a) In payment of any of the installments aforesaid at the respective time for payment (time being the essence of the contract) and/or

b) In observing and performing (prior to the delivery of possession of the said shop/office by the Developer to the Purchaser/s) any of the terms and condition of this Agreement and if the default continues inspite of 15 days notice to be sent by the developer to the purchaser/s, the Developer shall be at liberty to terminate this Agreement, in which event the said deposit or earnest money paid by the purchaser/s to the developer shall stand forfeited. The developer shall, however, refund installment to the purchaser/s the part payment, if any, which may have till then been paid by the Purchaser/s to the Developers, but without any further amount by way of interest or otherwise.

c) On the Developer opting to terminate this Agreement under this clause, they shall be at liberty to sell and. dispose off the said shop/office to any other person as they deem fit, at such price as the developer may determine and the purchaser/s shall not be entitled to question such sale or to claim any amount from the developer.

8) Without prejudice to the Developers other rights under this Agreement and/or in law, the purchaser/s shall be liable to and shall at the option of the Developers, pay to the developer interest at the rate of 24% (Twenty four Percent) per annum on all amounts that may be due and payable by the purchaser's under this Agreement, if any such amount remains unpaid for seven days more after becoming due.

9) Possession of the said Shop/office shall be delivered to the Purchaser/s after the said shop/office are ready for use and occupation provided all the amounts dues and payable by the purchaser/s under this Agreement are paid to the Developers. The purchaser/s shall take possession of the said shop/office within seven days of the developer giving written notice to the purchaser's intimating that the said flats/s is ready for use and occupation."

(v) that perusal of para 4 of the agreement to sale shows that on the date of agreement for sale Rs.1,00,000/- was paid by the assessee and remaining sale consideration of Rs.2,16,00,000/- was to be paid on or before handing over the possession.

(vi) that perusal of para 4 of the agreement to sale (supra) further shows that since the time was made "essence of agreement to sale" the balance sale consideration of Rs.2,16,00,000/- was paid by the assessee through unexplainable channel before taking over the possession of the property in question as is evident from the leave licence agreement (supra). Leave licence agreement (supra) proves that the assessee took the possession of the property in question on 10.07.2015.

(vii) that but it is admitted fact on record that even prior to this agreement to sale the assessee took the possession of the property in question and rented out the same to one Mr. Ravindra Bhat by virtue of the leave licence agreement (supra) meaning thereby amount of

Rs.2,16,00,000/- was paid by the assessee in cash at the time of taking possession of the property in question.

(viii) that para 8 of the agreement for sale (supra) further shows that the assessee herself has agreed that she shall be liable to and shall at the option of developer, pay interest @ 24% per annum on all amounts that may be due and payable by the purchaser under this agreement. However, no such penal interest is shown to have been paid by the assessee.

(ix) that since it is proved from the recital made in the agreement to sale that the assessee has taken possession of the property in question after making payment of entire consideration, she is estopped by her own act and conduct from claiming that she has made the balance payment of Rs.2,16,00,000/- from 15.02.2019 to 22.03.2019, which is further a round tripping of the money from one account to another or an afterthought when hauled up by revenue authorities. So when the assessee has already paid entire sale consideration qua the property in question at the time of taking possession there is no question of again making payment by virtue of the receipts placed on record and which have never been examined by the revenue authorities below.

(x) that the receipts for making payment of Rs.2,16,00,000/- even if assumed to be correct for argument sake, the evidential value of the same have never been examined nor the assessee has moved any application

for leading additional evidence before the Ld. CIT(A) nor any such application has been moved before the Tribunal. So the same cannot be read into evidence.

(xi) that in the given circumstances, substance and intention of the party as reflected in the agreement for sale in question is relevant to decide the issue in question than the form of the same. As discussed in the preceding paras substance of the agreement itself proves that the remaining sale consideration of Rs.2,16,00,000/- was paid in cash by the assessee at the time of taking possession of the property in question as per recital made in para 4 of the agreement to sale (supra) but prepared a colourable devise i.e. agreement for sale to camouflage real transaction in order to hoodwink the tax authorities to avoid payment of taxes.

(xii) that in the given circumstances the AO has rightly invoked the provisions contained under section 56(2)(vii)(b) of the Act by making addition of Rs.2,16,00,000/- to the income of the assessee.

12. In view of what has been discussed above I am unable agree with Hon'ble Accountant Member that the transaction in question is a genuine transaction, so the impugned order passed by the Ld. CIT(A) is not sustainable in the eyes of law, hence set aside and assessment order passed by the AO is restored, resultantly the question framed is answered in favour of the Revenue.

Question No.2

13. I am also not in agreement with the findings returned by the Hon'ble Accountant Member dismissing the cross objections filed by the assessee by

holding that “with regard to the cross objections filed by the assessee also dismissed for the reason that main appeal filed by the Revenue is dismissed”. Because cross objections filed by the assessee are also required to be decided on merits and are not to be dismissed merely because of the fact that the appeal filed by the Revenue is dismissed.

14. So far as the second question framed in the preceding para as to making addition by the AO for an amount of Rs.15,12,000/- as income from house property and confirmed by the Ld. CIT(A) is concerned, I am of the considered view that the addition has been made by the AO in accordance with leave licence agreement wherein it is categorically mentioned in para 1 & 2 that the office premises No.102 on 1st floor has been rented out and the remaining premises was never rented out and the contention of the assessee that the leave licence agreement was for entire property i.e. unit No.101, 102, 103 & 104 is in contravention to the leave licence agreement relied upon by the assessee herself. In these circumstances, the AO has rightly assessed the deemed rent qua the remaining property.

15. However, the Ld. CIT(A) further given part relief to the assessee by returning following findings:

“5.2.6 The Ld. A/R of the appellant also submitted through the written submission that one property could be deemed to be self-occupied. Thus of the four, only one according to AO (though the argument of the appellant was that all being combined had been given by paying stamp duty on all) could be presumed to have been given on rent. Thus for 2 premises for 9 months, even by adopting the deemed rent of Rs.60000 per month as was taken by the Ld. AO the calculation should have been as under:-

$$60000 \times 2 \times 9$$

$$= \text{Rs. } 10,80,000$$

Less Deduction u/s 24	3,24,000
Balance	7,56,000

5.2.7 In light of above discussion made from Para no. 5.2 to 5.2.6 of this appeal order, the appellant gets relief for which she is found to be entitled. However since the calculation of deemed rent as was made by Ld. AO is itself contested by the appellant therefore the Ld. AO is directed to recalculate and give appropriate relief related to the impugned addition of Rs.15,12,000 when he gives effect to this appeal order. The Ld. A/R of the appellant lady is also requested to co-operate the Ld. AO in making the appropriate addition in light of the recalculation of the deemed rental income. Ground No. 2 is, therefore, partly allowed.”

16. In view of matter I am of the considered view that when the assessee has never taken defence before the AO that out of 4 units one was self occupied but merely on the basis of bald submissions without any evidence made by the assessee, the Ld. CIT(A) upheld the deemed rent of two units only. When it is nowhere comes on record before the AO that out of 4 units one unit is a self occupied rather the assessee has taken a categoric stand that by virtue of the leave licence agreement (supra) all the 4 units have been rented out at the rent of Rs.60,000/- per month, it is beyond comprehension as to how the Ld. CIT(A) has given the relief qua one unit alleged to be self occupied by the assessee. In these circumstances, the order passed by the Ld. CIT(A) is not sustainable in the eyes of law, hence set aside and the order of AO is hereby upheld.

17. So in these circumstances, the appeal filed by the Revenue is hereby allowed and cross objections filed by the assessee are dismissed.

Order pronounced in the open court on 16.03.2023.

**Sd/-
 (KULDIP SINGH)
 JUDICIAL MEMBER**

Mumbai, Dated: 16.03.2023.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.