

आयकर अपीलीय अधिकरण "F" न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL "F" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 5752/Mum/2015

(निर्धारण वर्ष / Assessment Year : 2008-09)

ITO 28(3)(4) R.No.320, Vashi Rly, Station Complex, Tower no. 6, 3 rd Floor, Vashi, Navi Mumbai	बनाम/ v.	V.M. Construction, Gala No.H-544/545, APMC Fruit Market, Sec-19 Turbhe, Navi Mumbai- 400705
स्थायी लेखा सं./PAN : AAFFV4933L		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Revenue by :	Ms. Pooja Swaroop
Assessee by:	Ms. Ritika Agarwal

सुनवाई की तारीख /**Date of Hearing** : **03-10-2017**

घोषणा की तारीख /**Date of Pronouncement** : **23.11.2017**

आदेश / O R D E R

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the Revenue, being ITA No. 5752/Mum/2015 for assessment year 2008-09, is directed against the appellate order dated 07-10-2015 passed by learned Commissioner of Income Tax (Appeals)-26, Mumbai (hereinafter called "the CIT(A)"), for assessment year 2008-09, appellate proceedings had arisen before learned CIT(A) from the assessment order dated 26-03-2014 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) r.w.s. 147 of the Income-tax Act, 1961 (hereinafter called "the Act").

2. The grounds of appeal raised by the Revenue in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

" 1. On the facts and in the circumstances of the case and in law, the Ld. CIT-A erred in deleting the addition of Rs.2,71,00,000/- u/s.

69A of the Act made by the Assessing Officer without appreciating the fact that the addition has been made on the basis of evidences received during search and seizures u/s. 132 of the Act conducted on third party case and also after enquiries made by the department.

2. The appellant prays that the order of the CIT(A) on the above ground be reversed and that of the A.O be resorted.

3. The appellant crave leave to amend or alter any ground or add a new ground which may be necessary.”

3. The Brief facts of the case are that the assessee is builder and developer . The assessee filed its return of income on 30-09-2008 which was processed by Revenue u/s 143(1). Information was received by the A.O from the JCIT(OSD) which led to reopening of the assessment u/s 147, wherein notice u/s 148 dated 24-09-2012 was issued by the AO and duly served on the assessee on 25-09-2012 . The reasons recorded for reopening of the assessment u/s 147 by the AO are as under:

"Information was received from the office of the Jt. CIT (OSD), Central Circle - 39, Mumbai that a search & seizure action u/s.132 of the Act was carried out on 22.01.2009 in the case of Mr. Madan Kolambekar Group of cases, mainly dealing in the business of properties/real estate based in Navi Mumbai.

Mr Madan Kolambekar was engaged in buying of 12.5% CIDCO plots for various entities of Jai Carp Group. During the course of search in the case of Mr. Madan Kolambekar Group on 22.01.2009, various incriminating evidences were gathered, which clearly show on-money payments made by Jai Corp Group entities in respect of land deals made through Mr Madan Kolambekar. On the same day i.e. on 22.01.2009, a survey operation u/s.133A was also conducted in the offices of Jai Corp Group at Embassy Centre, Nariman Point. During the course of the survey operation, various incriminating documents / evidences were recovered which further corroborate these facts. Subsequently, various incriminating documents were unearthed during the course of search and seizure operation which was conducted in the cases of Jai Corp Group on 05.03.2009. These evidences gathered during various operations of the department, clearly establish that unaccounted cash payments were made to sellers of these plots.

Mr. Madan Kolambekar is one of the land aggregators for Jain Corp Group. The Jai Corp Group has given advances to Mr. Madan Kolambekar from its various entities namely, M/s. Iconic Realtoers Ltd, M/s. Ekdant Realty & Developers Ltd, M/s. Rudradev Developers Ltd. and M/s Krupa Realtors Ltd, to work out the acquisition of lands/plots. The entire funding for the said land acquisitions have been made by the Jai Corp Group only.

Mr. Madan Kolambekar brings offers of land deals to Jain Corp Group and after getting the consent of Jain Corp Group, he utilizes the money received as advance for making advances to various farmers/ investors / sellers. At later stage, it is mutually, decided that whether the land would be directly purchased in the name of Jain Corp Group entities or it will be routed through Mr. Madan Kolambekar.

The details of unaccounted payments made to sellers of the plots who had entered into deals with Mr. Madan Kolambekar/Jai Corp Group entities have been discussed in Page Nos.89 to 114 of the Appraisal Report in the case of Madan Kolambekar Group and also Page No.100 to 140 of the Appraisal report in the case of Jai Corp Group.

Analysis of the evidences found and incriminating documents seized (especially from details contained under the head "Development Charge"), it was revealed that M/s V M Constructions had made a land deal (LOI Stage) in respect of CIDCO plot (Sec.No.48, Plot No.5, Area - 2000) (CIDCO File No. is 50 as enquired from the CIDCO) in Dronagiri node for which M/s V M Constructions have received unaccounted cash of Rs.2,71,00,000/- on 28.01.2008 (A.Y. 2008-09) Page no. 221 of Annexure A-3, seized and impounded indicates the payments received by M/s. V M Constructions.

Since the assessee M/s. V M Constructions (PAN AAFFV4933L) has not shown these receipts of Rs.2,71,00,000/-, I am satisfied that the income to that extent has escaped assessment in the hands of M/s. V M Constructions for A.Y 2008-09 and required to be taxed in its hands.

In view of the above, your honour kind permission is sought as per the provisions of section 151(2) of the Act, to re-open the case of M/s. V M Constructions for A.Y 2008-09 u/s. 147 of the I.T. Act."

The assessee submitted certain details and the A.O in order to verify the details , deputed ward inspector to visit the site to enquire and find out actual land rate in the area and give his report. The ward inspector submitted his report as under:

"As directed by you, I visited the plot situated at Sector 48, Plot No. 5, Dronagiri Node on 03.02.2014. On inspection of the site, it was seen that the plot is situated at prime location surrounded by natural serene surroundings, river flowing nearby, close proximity to the highway, easily accessible by road and reliable good transport facilities.

It is situated near Mahagenco GTPS Bottling Plant, Bharat Gas Company and D.B.A Engineering College. I made enquires with the local estate agencies like Estate Hub, ARB Direct Estates and Arham Structures. From the information

gathered from these agents the rate of land in the financial year 2007-08 was around Rs. 20,000/- to Rs. 25,000/- per sq mtr,"

The A.O show-caused assessee as to why cash of Rs.2,75,00,000/- received by the assessee from Shri Madan Kolambekar on transfer of land at Dronagiri node of Navi-Mumbai should not be treated as its undisclosed income , which is reproduced as under:

“ Information was received from the office of Jt. CIT(OSD), Central Mumbai that a search & seizure action u/s 132 of the Act was carried out on 02/01/2009 in the case of Mr. Madan Kolambekar Group of cases, mainly dealing in the business of properties / real estate based in Navi Mumbai. The details of unaccounted payments to sellers of the plot who had entered deals with Mr. Madan Kolombekar / Jai Corp Group entities have been discussed on Page Nos. 89 to 114 of the Appraisal Report in the case of Madan Kolombekar Group , and also Page No. 100 to 140 of the Appraisal Report in the case of Jai Corp Group. Analysis of the evidences found and incriminating documents seized (especially from details contained under the head "Development Charge"), it was revealed that M/s V M Constructions had made a land deal (LOI stage) , in respect of CIDCO plot (Sector-48, Plot No.5, Area - 2000) in Dronagiri node for which M/s V M Constructions have received unaccounted cash of Rs. 2,71,00,000/- on 28/01/2008. Page No. 221 of Annexure A-3, seized and impounded indicates the payments received by M/s V M Constructions.

In spite of the concrete evidence as above with the department, the undersigned have also gone through in details of the above land deal. Ward Inspector was deputed to field enquiry of the details of rate of land in Dronagiri Node of Navi Mumbai in F. Y. 2007-08. The information was also gathered from the internet to enquire the above details. It was found that the land in question is situated at plot no.5 in Sector-48 in Dronagiri Node of Navi Mumbai. The rate of the land in the Sector-48 in Dronagiri Node was in the range of Rs. 20,000/- per square meter to Rs. 25,000/- per square meter (Rs. 2,000/- per square feet to Rs. 2,500/-) . Accordingly, the assessee could have deal the above transaction in the range of Rs. 4,00,00,000/- to Rs. 5,00,00,000/- (Rs. 20,000 x 2000 and Rs. 25,000 x 2000). The assessee had shown the above transaction in Rs. 1,75,00,000/- in a rate of Rs. 8,750/- per square meter (Rs. 812/- per square feet). This fact established that ale assessee had received in cash in the range of Rs. 2,25,00,000/ to Rs. 3,25,00,000/ on the above deal land transaction.

In view of the above, the assessee is hereby show caused as to why cash of Rs. 2,75,00,000/- received from Shri Madan Kolambekar on transfer of land at Dronagiri Node of Navi Mumbai as mentioned above should not be treated as its undisclosed income.

You are asked to furnish your explanation, if any on 07.03.2014 at 03.45 P.M., failing which the assessment would be completed as mentioned above.”

The assessee submitted that the rate retrieved by inspector of the said plot of land of Rs. 20,000-Rs.25,000/- per square meters was from internet while stamp duty value of the said plot was Rs.92,00,000/- in December, 2007 which is mentioned in the tri-partite agreement between CIDCO , the assessee and the seller which was later sold by assessee in February , 2008. It was submitted that there was very little gap of 2 months in the purchase and sale of said plot . It was submitted that the ready reckoner rate for the year 2012 was Rs. 11,000/- as against rate of Rs.20,000 to Rs.25,000/- mentioned by the A.O for the year 2007-08 and it was submitted that sale consideration of 1.75 crores was true and fair according to the prevailing market rate and the ready reckoner rates.

The A.O. rejected the contentions of the assessee . The AO observed that search and seizure operations u/s 132 were conducted by Revenue in the case of Mr Madan Kolambekar group of cases on 22-01-2009 , mainly dealing in the business of properties/real estate in Navi Mumbai. Unaccounted payments were made by Mr Madan Kolambekar/Jai Corp Group to sellers of the plot of land which are duly entered by these entities in their books of accounts , the details of which are mentioned in appraisal report page no. 89 to 114 in the case of Madan Kolambekar Group and page no. 100 to 140 of the appraisal report in the case Jai Corp Group , both the said parties were subjected to search u/s. 132 of the Act. It was observed by the AO that the assessee has not entered these cash receipt of Rs. 2.75 crores in its books of accounts and the same was not offered for tax. It was observed by the A.O. based on analysis of incriminating documents seized that the assessee had made land deal (LOI stage) , in respect of CIDCO Plot no. 5, Sector-48 of area of 2000 square meters at Dronagiri Node, Navi Mumbai wherein the assessee had received cash of Rs.2,71,00,000/- on 28.01.2008 . Reference was made to seized document vide page no. 221 of Annexure A-3 seized and impounded by the revenue which indicates that the payment was received by the assessee in cash which was not offered for tax by the assessee. It was observed by the AO that the assessee has not responded to the above issue. The A.O also justified that the rate adopted of Rs.25,000/- per square meter of the aforesaid land is correct rate keeping in view prime location and infrastructure around the said plot which are elaborated in para 8 of the A.O order . The AO therefore made an addition to

income of the assessee to the tune of Rs. 2,71,00,000/- u/s 69A vide assessment order dated 26.03.2014 passed by the AO u/s. 143(3) r.w.s. 147 of the Act on the grounds that the assessee has received cash of Rs. 2,71,00,000/- from Shri Madan Kolambekar on sale of plot admeasuring about 2000 square meters at plot no. 5, Sector-48, Dronagiri Node of Navi Mumbai which is not reflected in the return of income filed by the assessee with the Revenue and hence consequently nor offered for tax by the assessee.

4. The assessee carried the matter in appeal before the learned CIT(A) and challenged reopening of the assessment u/s 147 which grounds of appeal were dismissed by learned CIT(A). However on merits learned CIT(A) allowed the appeal of the assessee by holding as under, vide appellate order dated 07-10-2015:-

“6.1 I have carefully considered the submissions of the appellant and I have also verified the assessment record. The A.O on receipt of the information, directed the Income Tax Inspector to make an enquiry in and around sector 48 of Dronagri Node, Navi Mumbai to ascertain the market rate of the property at the relevant time when the transaction took place. The Income Tax Inspector furnished a report which has been referred to in the assessment order passed by the A.O.. Apart from this it is seen that no other verification has been carried out by the A.O. There is much force in the submission of the appellant that the only basis for the assessment of the amount of Rs.2,71,00,000/- in the hands of the appellant, are the entries found in the books of accounts/ registers seized from the premises of Shri Madan Kolambekar/ Jai Corp. the A.O had not summoned Shri Madan Kolambekar or anybody from Jai Corp. to record a statement to ascertain the veracity of the entries which had been found in the books seized . As a result, the appellant neither get a chance to cross examine the parties who were supposed to have paid them the amount nor it got a chance to rebut the information received from the JCIT, Central Circle 39. There has also been no effort to find out what the appellant had done with the money it is said to have received. In the absence of worthwhile or meaningful effort to ascertain the factual position, it becomes difficult to sustain an addition based only on the entries found in the books of a third party even if the party is the purchaser of the property from the appellant. As a result, it is seen, the A.O. has not gone beyond the initial stages of the verification and had not taken the reopening of the assessment to its logical conclusion. The entries which were found on a sheet of paper found in the premises of the purchaser, have not been corroborated by any other material or other evidence. As submitted by the appellant the absence of any supporting documents or evidence renders the assessment of the amount, arbitrary in nature. The third party, no doubt, is purchaser of the property for which the unaccounted money is said to have been received by the appellant. However even in a situation like this, it would not be proper and correct to come to a

conclusion that the appellant had received the money in the absence of any other supporting documents or evidences. Therefore the addition made by the A.O of the amount of Rs.2,71,00,000/- which is the cash component of the transaction of the sale of the property {plot no.5, Sec.48 of Dronagiri Node of Navi Mumbai} is not sustainable. The addition of Rs.2,71,00,000/- as unexplained money is deleted. The ground of appeal is allowed.

The addition of Rs.2,71,00,000/- as unexplained money is deleted. The ground of appeal is filed.”

5. The Revenue has come in appeal before the tribunal being aggrieved by appellate order dated 07-10-2015 passed by learned CIT(A) giving relief to the assessee. It is the say of learned DR that there was a search and seizure operations conducted by Revenue u/s 132 on Madan Kolambekar Group on 22.01.2009 and simultaneously there was a survey conducted by Revenue u/s 133A on Jai Corp Group on 22.01.2009 . It was submitted by learned DR that search was conducted u/s. 132 on Jai Corp Group on 05.03.2009 . It was submitted that documents were seized during the search operations u/s 132 wherein document vide Annexure A-3 /page 221 (pb/76) was seized wherein there is a mention of payments of Rs. 2.71 crores being made to the assessee in cash on 28.01.2008 which was not offered for tax by the assessee. It was submitted that appraisal report was prepared by Revenue in the case of Mr. Madan Kolambekar group vide page no. 89 to 114 wherein there is a detail report as to cash paid to the assessee of Rs.2,71,00,000/- . Similarly appraisal report was prepared in the case of Jai Corp Group vide page no. 100 to 140 wherein the there is a mention of payment of Rs.2,71,00,000/- in cash to the assessee . The Ld. DR relied upon the decision of Hon'ble Delhi High Court in the case of CIT v. Jansampark Advertising & Marketing Private Ltd. (2015) 56 taxmann.com 286(Del) to contend that the learned CIT(A) powers are coterminous with that of the AO and the learned CIT(A) should have conducted enquiry instead of blaming the AO. the Ld. Counsel for the assessee submitted that it is inspector who has estimated the value of the plot at Rs. 20,000 to 25,000 per square meter which was done in February 2014 while the relevant financial year under consideration is 2007-08 (AY 2008-09). It was submitted that assessee has purchased aforesaid plot of land which was later sold and all the agreements are placed in the paper book page no. 1 to 26 . The said plot of land was purchased for Rs.1.62 crores on 20.12.2007 which was later sold for Rs.1.75 crores on 26.02.2008 to Madan Kolambekar . It was submitted and

statement was made at bar by learned counsel for the assessee before the tribunal that the Revenue has not given copy of seized material to the assessee and the seized material as contained in page no. 76/paper book was obtained in pursuance to an RTI application made by the assessee . It was also submitted that reasons for reopening of the assessment u/s 147 were not furnished by the A.O. to the assessee. It was submitted by learned counsel for the assessee that second opportunity cannot be given to the A.O and no addition can be sustained . It was also submitted that no addition can be made in pursuance to document seized from 3rd party without confronting the same to the assessee and without providing an opportunity to rebut to the assessee and to cross examining the said third party from whom said document was seized. The Ld. DR in rebuttal submitted that assessee was duly given copy of reasons for reopening on 3rd August, 2013 which duly found mentioned in the appellate order of learned CIT(A) and it was submitted that wrong contentions are being made by the learned counsel for the assessee before the tribunal . She would rely on the decision of Hon'ble Delhi High Court in the case of CIT v Jansampark Advertising & Marketing Private Ltd.(supra) to contend that learned CIT(A) is duty bound to make necessary enquiry in case the AO has not made the necessary enquiry during assessment proceedings as powers of learned CIT(A) are co-terminus with that of the AO . It was submitted that the matter can be set aside and restored to the file of the A.O for denovo determination of the issue on merits.

6. We have considered rival contentions and perused the material on record including case laws cited before us as well orders of authorities below. We have observed that assessee is builder and Developers . The assessee has sold Plot no. 5, sector-48 of Dronagiri Node , Mumbai admeasuring 2000 square meter to Shri Madan Kolambekar for Rs.1.75 crores on 26.02.2008. The said agreement is placed in paper book/ page no. 19-26 . The said plot of land was purchased by the assessee on 20.12.2007 for Rs.1.62 crores and agreement for purchase of the said plot of land is placed at page no . 1 to 9/paper book. There was search and seizure operations u/s 132 against Shri. Madan Kolambekar on 22.01.2009 and simultaneously survey operations u/s. 133A were conducted in the case of Jai Corp Group . Thereafter on 05.03.2009 search operation u/s. 132 were conducted in the

case of Jai Corp Group . There was seizure of incriminating material during the search operations . During the course of aforesaid search operations u/s. 132 , there was a seizure of document marked Annexure A-3/page 221 (page 76/pb) wherein there is a mention of Rs. 2,71,00,000/- against the name of the assessee being paid on 28-01-2008 towards development charge which is decoded by Revenue as on money being paid to the assessee for purchase of the said plot of land which was purchased by Madan Kolembekar from assessee vide registered agreement dated 26-02-2008 . the said purchasing parties have entered these cash payments to the assessee in their books of accounts while the assessee has not entered receipt of Rs. 2.71 crores in cash from Mr Madan Kolemekar towards sale of aforesaid plot of land in its books of accounts and the same was not offered for tax by the assessee. It is the claim of the assessee that reasons recorded were not provided nor the copies of seized material were provided to the assessee. The learned DR disputed the contention of the learned counsel for the assessee and claimed that reasons for reopening of the assessment u/s 147 were duly supplied to the assessee on 12-03-2008 which found mentioned in learned CIT(A) appellate orders while it is claimed by the assessee that so far as seized material is concerned, the same was obtained vide RTI application. Revenue has also prepared appraisal report in the case of Madan Kolambekar Group as well Jai Corp Group wherein it is claimed by the Revenue that there is mention of receipt of Rs.2.71 crore in cash by the assessee against the sale of the afore-said plot. The learned CIT(A) has deleted the additions by entering into blame game wherein the AO was blamed for not following proper procedure and enquiry during assessment proceedings . The powers of the learned CIT(A) are co-terminus with the powers of the AO and in case the learned CIT(A) finds any deficiency in the manner assessment proceedings were conducted by the AO, he is duty bound to conduct proper enquiries. The learned DR has rightly relied on decision of Hon'ble Delhi High Court in the case of CIT v Jansampark Advertising & Marketing Private Ltd.(supra) . The Hon'ble Supreme Court in the case of CIT v Kanpur Coal Syndicate (1964) 53 ITR 225(SC) has also held that powers of learned CIT(A) are co-terminus with powers of the AO. Thus, it was not appropriate for the learned CIT(A) to have deleted the additions by blaming the AO for not conducting proper enquiry and proceedings during assessment proceedings. However, at the same time we are in agreement

with the contention of the assessee that the assessee cannot be prejudiced based on incriminating material seized from third parties at the back of the assessee unless the said relied upon incriminating material is confronted to the assessee and opportunity to rebut as well cross examination is provided to the assessee in view of the decision of Hon'ble Supreme Court in the case of Andaman Timber Industries v. CCE(Civil Appeal no 4228 of 2006 orders dated 02-09-2015) . Thus, the matter need to be set aside and restored to the file of the A.O wherein the A.O is directed to provide copies of seized material and others incriminating material relied upon by the Revenue before prejudicing the assessee and the assessee be granted opportunity to rebut the same/cross examine the third parties from whom such incriminating material was seized by the Revenue which revenue intend to rely to prejudice the assessee . Needless to say that the AO shall provide an opportunity of being heard to the assessee in accordance with principles of natural justice in accordance with law. The evidences/explanations submitted by the assessee in support of its contentions shall be admitted by the AO in the interest of justice and be adjudicated on merits in accordance with law. We order accordingly.

7. In the result appeal of the Revenue in ITA 5752/Mum/2015 for assessment year 2008-09 is allowed for statistical purposes.

Order pronounced in the open court on 23.11.2017

आदेश की घोषणा खुले न्यायालय में दिनांक: 23.11.2017 को की गई ।

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Mumbai, dated: 23.11.2017

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench, E
6. Master File

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BY ORDER
DY/ASST. REGISTRAR
ITAT, MUMBAI