# आयकर अपीलीय अधिकरण
# मुंबई पीठ "एस एम सी" मुंबई
# श्री विकास अवस्थी, न्यायिक सदस्य एवं
# श्री अमरजीत सिंह, लेखाकार सदस्य के समक्ष

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC" BENCH
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

**आ.आ.सं. ५२/मुंबई/२०२० (नि.वं. २०१३—१४)**
ITA No.52/MUM/2020 (A.Y.2013-14)

**आ.आ.सं. ५३/मुंबई/२०२० (नि.वं. २०१४—१५)**
ITA No.53/MUM/2020 (A.Y.2014-15)

Vijaykumar Kanaiyalal Matta
8/B/104, 10th Floor, S. S. Nagar,
Sion Koliwada, Sion
Mumbai-400 037
PAN No. AROPM6060D ..... अपीलार्थी/Appellant

बनाम Vs.

Income Tax Officer – 26(3) (4)
Room No.507, 5th Floor,
Pratyaksha Kar Bhawan,
B. K. C. Bandra (E),
Mumbai-400 051 ..... प्रतिवादी/Respondent

| | | |
|---|---|---|
| अपीलार्थी द्वारा / Appellant by | : | Shri Tejveer Singh, Advocate,<br>Ms. Manisha Rawat & Dharti Mehta |
| प्रतिवादी द्वारा / Respondent by | : | Shri Abhishek Kumar Singh, Sr. AR |

| | | |
|---|---|---|
| सुनवाई की तिथि / Date of hearing | : | 06/03/2023 |
| घोषणा की तिथि / Date of pronouncement | : | 31/05/2023 |

## आदेश/ ORDER

PER VIKAS AWASTHY, JM:

These two appeals by the assessee are directed against the order of Commissioner of Income Tax (Appeals)-38, Mumbai (hereinafter referred to as "the

CIT(A)") for the assessment year 2013-14 and 2014-15, respectively. Both the impugned orders are of even date that is 29.08.2019.

2. Since, identical grounds have been raised in both these appeals and the issue raised in these appeals germinate from same set of facts, these appeals are taken up together for adjudication and are decided by this common order.

3. The facts common to both impugned assessment years, in brief are as follows: The assessee is a non-resident. The assessee purchased a property that is Flat No.902 in a project known as "Silver Arch" developed by Argent Constructions for a consideration of Rs.1 crore. A search action was carried out on the premises of Vipul Mangal, Partner in M/s. Argent Constructions. During the course of search, certain documents were found and seized from his premises indicating that Vipul Mangal had accepted on-money aggregating to Rs.9,75,50,000/- from the purchasers of the flat in the project Silver Arch. In post search proceedings, Vipul Mangal furnished a list of flat purchasers and on-money received in cash from each one of them. On the basis of the statement of Vipul Mangal and the documents found in the course of search action, assessment for AY 2013-14 and 2014-15 in the case of assessee was reopened. Notice u/s 148 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") was issued on 12.09.2016 to the assessee. In response to the said notice, the assesse filed return of income on 30.07.2017 declaring total income of Rs.41,760/- for AY 2013-14. During the course of reassessment proceedings, summons u/s 131 of the Act were issued to Vipul Mangal. He appeared before the AO and recorded his statement on 12.12.2017 in the presence of Shri Umang Dedhia, CA, Authorised Representative of the assessee. In response to one of the questions, Vipul Mangal gave the details of alleged on-money aggregating to Rs.47 lakhs received from the assessee on various dates. On

the basis of disclosure made by Vipul Mangal, the AO made addition of Rs.25 lakhs u/s 69 of the Act in AY 2013-14 and Rs.22 lakhs in AY 2014-15 in the hands of assessee. The assessee remained unsuccessful before the CIT(A). Hence, the present appeals by the assessee.

The appeals of assessee are decided in seriatim of assessment years.

**ITA NO. 52/MUM/2020 (A.Y.2013-14)**

4. The assessee in appeal has primarily raised two grounds. Ground no. 1, assailing reopening of assessment u/s 147 of the Act. Ground no. 2, against addition of unexplained investment u/s 69 of the Act.

5. Shri Tejveer Singh appearing on behalf of the assessee submits that the assessee is a resident of Muscat. The assessee along with his wife purchased a flat in housing project Silver Arch vide agreement for sale dated 26.12.2013 for a total consideration of Rs.1 crores (at page 6 to 66 of paper book). The source of funds for the purchase of asset was his income from Muscat. The entire payment was made through banking channel. The Ld. Authorised Representative (AR) referred to bank statement of the assessee (at page 67 to 72 of the paper book). He contended that since, the assessee is resident of Muscat, the assessee does not have any taxable income in India, therefore, does not file return of income in India. Notice u/s 148 of the Act was issued to the assessee merely on the basis of statement recorded in search proceedings of a third party. He submitted that the reasons recorded for reopening would show that the reasons are recorded without proper application of mind by the Assessing Officer (AO). The assessment has been reopened merely on the basis of information received from Investigation Wing. The

assessment has been reopened without any cogent material on record, hence, reopening is bad in law.

5.1 In respect of ground no. 2, the ld. Counsel for the assessee submitted that there is no substantive material except statement of Vipul Mangal to show payment of on-money by the assessee to the Developer of the housing project. The Ld. Counsel submitted that a perusal of the agreement for sale would show that the consideration for purchase of flat was settled at Rs.1 crore and as is evident from bank statement, the consideration was paid by the assessee through banking channel. The market value of flat as per registered agreement for sale is Rs.86,04,500/-. The agreed consideration for purchase of flat is already more than the market value, hence, there was no question of payment of on-money over and above the agreed price. The ld. Counsel further pointed that Vipul Mangal in his statement recorded on 12.12.2017 has stated that the on-money of Rs.47 lakhs was received from family members of the assessee. However, the names of the family members from whom alleged on-money was received, has not been disclosed. One thing is evident from the said statement that on-money has not been paid by the assessee, someone else paid the alleged on-money in the name of assessee. Addition on the basis of vague statement cannot be made in the hands of assessee. The Ld. Counsel further submitted that proper/effective opportunity of cross-examination was not provided to the Authorised Representative of the assessee when statement of Shri Vipul Mangal was recorded on 12.12.2017.

5.2 The ld. Counsel for the assessee stated that not admitting but assuming that even if on-money was paid by assessee, the source of income for payment of such on-money is outside India. Therefore, the provisions of section 69 of the Act cannot be invoked. The ld. Counsel in support of his argument placed reliance on the

decisions in the case of ITO vs. Rajiv Suresh Ghai, 198 ITD 348, Mumbai-Trib. (supra). He further contended that since, the assessee is resident of Muscat and his source of earning is outside India, the provisions of India-Oman DTAA would come into play. The assessee is protected by Article 24 of India-Oman DTAA.

5.3 The Ld. Counsel further submitted that since the addition is made in the hands of Developer u/s 153C of the Act, consequent to search therefore, section 147 of the Act cannot be invoked in the case of assessee to make addition of the same amount twice. The ld. Counsel prayed for deleting the addition.

6. Per contra, Shri Abhishek Kumar Singh representing the Department strongly supported the impugned order. The ld. Departmental Representative (DR) submitted that during the course of search at the premise of Vipul Mangal loose paper files/note books/diary were found and seized. Statement of Vipul Mangal was recorded wherein, he had admitted to the fact of receipt of on-money in cash from the purchasers of flats in the project Silver Arch. He gave the list of purchasers of flats along with details of on-money received from each one of them. As per the request of assessee, Vipul Mangal was summoned after issuance of notice u/s 131 of the Act dated 04.12.2017. His statement was recorded on 12.12.2017 in the presence of Shri Umang Dedhiya, AR of the assessee. Vipul Mangal in his statement gave the details of amount received from assessee along with the dates and breakup of the amount received on each of the date. Opportunity of cross-examination was provided to the AR of assessee but he failed to utilise that opportunity. Onus is on the assessee to prove that no on-money was paid by him. The ld. DR prayed for upholding the impugned order and dismissing appeal of the assessee.

7. We have heard the submissions made by rival sides and have examined the orders of authorities below. The assessee in ground no. 1 of appeal has assailed reopening of assessment primarily on the ground that the reasons for reopening have not been recorded in a valid manner. We have examined the reasons for reopening furnished to the assessee by the AO vide communication dated 30.11.2017. From the perusal of same, we find that the roots of reassessment proceedings in the case of assessee are in the information received from Joint DIT (Investigation), Mumbai. As per the information received, the assessee has paid on money amounting to Rs.47 lakhs in cash to Vipul Mangal, Partner of M/s Argent Constructions for purchase of flat in Silver Arch project developed by M/s Argent Constructions. The details of alleged on-money paid by the assessee to Vipul Mangal is as under:

| F.Y. | Date of Payment | Amount (Rs. in lakhs) |
|---|---|---|
| 2012-13 | 05.12.2012 | 10.00 |
| 2012-13 | 16.12.2012 | 15.00 |
| 2013-14 | 05.05.2013 | 02.00 |
| 2013-14 | 05.06.2013 | 08.00 |
| 2013-14 | 21.12.2013 | 12.00 |
| | **Total** | **47.00** |

It is not simpliciter on the information received from Investigation Wing that the AO re-opened assessment. Though, the belief of the AO stemmed from information from Investigation Wing, the AO further gathered information through AIR on another issue. After receipt of information, the same was examined by the AO and thereafter he proceeded on to reopen the assessment. We find no infirmity in reopening of the assessment, hence, ground no. 1 of appeal is dismissed, being devoid of any merit.

8. In ground no. 2 of appeal, the assessee has assailed addition of Rs.25 lakhs u/s 69 of the Act. Multiple arguments have been raised by the ld. Counsel for the assessee assailing the addition on merits. One of the contention raised by the ld. Counsel for the assessee is that the assessee has no taxable source of income in India. The assessee has purchased flat from the funds having source outside India (Muscat). The fact that the assessee is NRI and for purchase of flat, the entire agreed amount of consideration Rs.1 crore has been paid by the assessee through banking channel has not been disputed by Department. The Revenue has not brought on record any material whatsoever to substantiate that the assessee has source of income in India that is utilised for payment of alleged on-money in cash. Thus, the only source of payment of on-money, if any, are the funds from Muscat. Under the provisions of section 5(2) of the Act, income of previous year of a person who is a non-resident is taxable in India if the source of income is in India or the income is received or deemed to be received in India by or on behalf of NRI or accrues or arise or is deemed to accrue or arise in India during relevant period. The provisions of section 69 of the Act would get triggered if the investment is made from an unaccounted money having source in India i.e. received or deemed to receive in India or accrue or arise or deemed to accrue or arise in India. De hors, the source based taxation the assessee being NRI would be eligible for treaty benefit in respect of his income earned in Muscat.

9. The Tribunal in the case of ITO vs. Rajeev Suresh Ghai (supra) decided somewhat similar issue where the Revenue had made addition u/s 69 of the Act in respect of unaccounted money paid to the builder by the assessee, a resident of UAE. The relevant extract of the order of Tribunal giving the facts and the findings thereon is reproduced herein below:

*"5. Let us, first of all, consider as to what is the basic nature of the transaction, which has resulted in the impugned tax liability. The assessee is said to have, even going by the claim of the revenue authorities, paid some unaccounted monies to the builder, and, by a fiction of law, these unaccounted or unexplained investments are being brought to tax. The trigger for taxability is thus investment in the immoveable property- unexplained investment at that. Bearing this in mind, let us now see the treaty provisions under which this income can be brought to tax in the hands of the assessee- in terms of the provisions of the Indo UAE tax treaty, as there is no dispute that the assessee is, being resident in and fiscally domiciled in the UAE, entitled to the benefits of the Indo UAE tax treaty. We are right now dealing with an assessment year in which tax residency certificate was not even mandatory, but quite fairly, that aspect has not even been raised before us. Coming to the taxability under the Indo UAE tax treaty, such an income is not specifically taxed under any of the heads in the tax treaty in question. That brings us to the residuary head of income, dealing with 'other income', which is covered by article 22. Under Article 22 (1) of the Indo UAE tax treaty, "Subject to the provisions of paragraph (2), items of income of a resident of a Contracting State, wherever arising, which are not expressly dealt with in the foregoing Articles of this Agreement, shall be taxable only in that Contracting State". It is not even anyone's case that income has arisen here; the case is that the income has been invested here. In any event, the assessee is all along tax resident in UAE, and he does not undertake any economic activities in India. The unexplained investments, which are inherently in the nature of the application of income rather than earning of income, cannot thus be taxed in India under Article 22(1). Article 22(2) only restricts the scope of article 22(1) by providing that "The provisions of paragraph (1) shall not apply to income, other than income from immovable property as defined in paragraph (2) of Article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other State) independent personal services from a fixed base situated therein, and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base". Obviously, this has no application in the present situation either, but what it does highlight anyway is the economic activity nexus with the income, which can be taxed under Article 22(1). Of course, where revenue authorities can bring on record any material to demonstrate, or indicate, that the unexplained investments in question have been made out of incomes generated in India, the situation will be materially different, but that is not the case at present.*

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*11. It is always useful to bear in mind the fact that, on the first principles, the trigger for taxation of an income in a source jurisdiction is either the economic*

*activity or the linkage of an income with that jurisdiction, and that in the absence of such a linkage or economic activity nexus, there cannot be any source taxation. The assessee before us is certainly an Indian national, but he is admittedly resident in the UAE so far as his residential status, under the Indo UAE tax treaty is concerned, is of the UAE tax resident. The residuary taxation rights, in terms of the treaty provisions, belong to the residence jurisdiction, but even if that was not to be so, the residence rights can at best go to the source jurisdiction, which in turn refers to a jurisdiction in which the income is earned, rather than a jurisdiction in which the income is invested. By no stretch of logic, therefore, such an income could be taxed in India, which is neither residence nor source jurisdiction; it is at best investment jurisdiction. However, the scheme of tax treaties limits the rights of taxation either to residence or to source jurisdiction.*

*12. What essentially follows is that if, under the domestic tax laws of the UAE, the amounts in question can be treated as of income nature, the tax implications of these amounts, under the scheme of the Indo UAE tax treaty, can at best follow in the UAE, but that is not relevant in the present context of holding these amounts to be, even if so permissible in our domestic tax laws, taxable in India. The revenue thus derives no support from the Indo UAE tax treaty, which, under the scheme of Section 90(2), must make way to the domestic law provisions except to the extent the applicable treaty provisions are 'more' favourable to the assessee."*

(Emphasized by us)

10. In the instant case, Article 24 of India-Oman DTAA would come to the rescue of assessee. For the sake of completeness Article 24 of the DTAA is reproduced herein below:

*ARTICLE 24*

***OTHER INCOME***

*1. Subject to the provisions of paragraph 2 of this Article, items of income of a resident of a Contracting State, wherever arising, which are not expressly dealt with in the foregoing Articles of this Agreement, shall be taxable only in the Contracting State.*

*2. The provisions of paragraph 1 of this Article shall not apply to income, other than income from immovable property as defined in paragraph 2 of Article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other Contracting State independent*

*personal services from a fixed base situated therein, and the right of property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or 16, as the case may be, shall apply.*

*3. Notwithstanding the provisions of paragraphs 1 and 2, items of income of a resident of a Contracting State not dealt with in the foregoing Articles of this Agreement and arising in the other Contracting State may also be taxed in that other State."*

The provisions of Article 24 of India-Oman DTAA are *pari-materia* to Article 22 of India-UAE DTAA that was examined by the Co-ordinate Bench in the above said case. As per the provisions of section 90(2) of the Act, the assessee is entitled to benefit of treaty to the extent it is more beneficial to the assessee. Thus, in facts of the case, the decision of Co-ordinate Bench (supra), and the provisions of India-Oman DTAA, the addition made u/s 69 of the Act is unsustainable and is thus, liable to be deleted. We hold and direct, accordingly.

11. In the result, appeal of the assessee is partly allowed.

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12. Both these sides are unanimous in stating that the grounds of appeal and the facts germane to the issue in appeal are identical to the AY 2013-14.

13. We find that in the statement recorded on 12.12.2017, Vipul Mangal has disclosed that Rs.47 lakhs was received in cash as on-money from the assessee. The details of the same are recorded in para 7 above. The amount of alleged on-money was received on various dates by Vipul Mangal, Rs.25 lakhs was allegedly received by him in FY 2012-13 relevant to AY 2013-14 and Rs.22 lakhs in three trenches in FY 2013-14. Hence, the AO made addition of Rs.22 lakhs u/s 69 of the Act in AY 2014-15.

14. We have given our detailed findings in respect of ground challenging reopening of the assessment and addition u/s 69 of the Act on merits while adjudicating appeal for AY 2013-14. The detailed findings given in AY 2013-14 would mutatis mutandis apply to the AY 2014-15. For parity of reasons, ground no.1 of appeal is dismissed and the assessee succeeds on ground no. 2 of appeal. Ergo, appeal of the assessee is partly allowed.

15. **To sum up, appeals of the assessee for AY 2013-14 and 2014-15 are partly allowed.**

Order pronounced in the open court on Wednesday the 31st day of May 2023.

| | |
|---|---|
| **Sd/-** | **Sd/-** |
| (AMARJIT SINGH) | (VIKAS AWASTHY) |
| **लेखाकार सदस्य/ACCOUNTANT MEMBER** | **न्यायिक सदस्य/JUDICIAL MEMBER** |

मुंबई/Mumbai,
दिनांक/Dated: 31/05/2023
Mahesh R. Sonavane

**<u>प्रतिलिपी अग्रेषित Copy of the Order forwarded to</u>:**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/The Respondent.
3. आयकर आयुक्त/ CIT
4. विभागीय प्रतिनिधी, आय. अपी. अधि., मुंबई/DR, ITAT, Mumbai
5. गार्ड फाईल/Guard file.

BY ORDER,

//True Copy//

(Dy. /Asst. Registrar)/
Sr. Private Secretary
**ITAT, Mumbai**