

आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ , मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

BEFORE SHRI RAJENDRA, ACCOUNTANT MEMBER AND

SHRI C.N. PRASAD, JUDICIAL MEMBER

आयकर अपील सं /I.TA No. 2380/Mum/2014

(निर्धारण वर्ष / Assessment Year:2010-11

The DCIT, Circle-3, B-Wing, Ashar IT Park, Road No. 16Z, Wagle Ind. Estate, Thane(W),-400 602	बनाम/ Vs.	M/s. Shubh Builders & Developers, Ofice No. H. Dev Prayag, Gr Floor, Bhakti Mandir Road, Pachpakhadi, Thane(W),-400 602
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. ABFFS 1174D		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
अपीलार्थी ओर से/ Appellant by:		Shri Kailash Gaikwad
प्रत्यर्थी की ओर से/Respondent by:		Shri Subodh Ratnaparakhi

सुनवाई की तारीख / Date of Hearing :12.07.2016

घोषणा की तारीख /Date of Pronouncement : 30.09.2016

आदेश / O R D E R

PER C.N. PRASAD, JM:

This appeal is filed by the Revenue against the order of the Ld. CIT(A)-1, Mumbai dated 18.12.2013 pertaining to assessment year 2010-11.

2. The Revenue has raised the following ground in its appeal:

“ On the facts and in the circumstances of the case and in law, the Ld. CIT(A)-1, Thane has erred in deleting the addition of Rs. 60,57,41/- being the cost of construction of 2251 Sq. ft. of the constructed premises @ Rs. 2,691/- per sq. ft. overlooking the fact that the assessee has failed to submit any evidence to prove that the consideration paid to Mr. Yusuf H. Mukadam in the form of 2886 sq. Ft. of constructed area for Rs. 29,00,000/- was for acquiring development rights from Mr. Yusuf H. Mukadam.”

3. Briefly stated the facts are that appellant is a partnership firm engaged in the business of Builders & developers. The appellant had acquired development rights in land measuring 1239.90 sq. mts. at survey No. 64 at Village Balkum, Thane. Prior to acquisition by the appellant, the development rights in respect of the said land were held by Mr. Yusuf H. Mukadam, who had acquired the same in turn, from another party i.e. M/s. Mittal Builders & Associates, who had acquired the same from the original landlord i.e. Shri Dadu Kanha Mhatre. The appellant entered into an agreement with Mr. Yusuf H. Mukadam, according to which Mr. Yusuf H. Mukadam has surrendered his rights in the said land in favour of the appellant. For this surrender of rights the appellant agreed to grant to Mr. Yusuf H. Mukadam 2886 sq. ft. of constructed premises for the concessional price of Rs.29,00,000/-. The appellant had also entered into an agreement with the original land owner for acquiring the development rights on the said land for which the appellant agreed to give the land owner 30% of the total constructed area i.e. 5543 sq. ft. of the constructed area (total constructed area being 18479 sq. ft.). As a result of this agreement, the appellant gave the land owner five flats whose constructed area was 3293 sq. ft. For the balance constructed area required to be given to the land owner was 2251 sq.

ft. Instead of giving this constructed area to the land owner to the extent of 2251 sq. ft. the appellant gave the land owner an amount of Rs. 72,50,000/- as the appellant had sold this area in the open market and out of the sale proceeds this amount was given to the original land owner.

3.1. The assessment was completed by the Assessing Officer u/s. 143(3) of the Act and while completing the assessment, the Assessing Officer denied cost of construction of Rs. 60,57,441/- observing that when the assessee had entered into an agreement with the land owner directly and had paid the original land owner consideration for acquisition of development rights, there was no need or no reason for the assessee to provide 2886 sq.ft to Mr. Yusuf Hussain Mukadam at concessional price.

4. On appeal, the Ld. CIT(A) allowed the claim of the assessee and deleted the addition observing that there is no evidence to show that the consideration was not infact allowed to Mr. Yusuf Hussain Mukadam or assessee had received any amount over and above the payment of Rs. 29,00,000/- from Mr. Yusuf Hussain Mukadam or the transaction between the assessee and Mr. Yusuf Hussain Mukadam is not an arm's length transaction. Against which order, the Revenue is in appeal before us.

5. The Ld. Departmental Representative submits that the assessee incurred expenditure in kind to Mr. Yusuf Hussain Mukadam. He submits that the expenditure is not for the purpose of business. The Ld. Departmental Representative further submits that assessee

directly entered into an agreement for development with land owner and there was a cancellation deed dated 26.2.2008. The existing rights of Mittal Builders and Associates/ Mr. Yusuf Hussain Mukadam in the said land were terminated in favour of the assessee and this was done later to entering into development agreement by the assessee with the land owner on 2.5.2006. Thus, the Ld. Departmental Representative submits that the Assessing Officer is right in denying the cost of construction.

6. The Ld. Counsel for the assessee vehemently supports the order of the Ld. CIT(A). He submits that the expenditure was incurred in the course of development of property and is therefore revenue expenditure. He also submitted a brief note on the issue.

7. We have heard the rival submissions and perused the orders of the authorities below. The assessee is a partnership firm engaged in the business as builders and developers. The Id. A.O has made addition of Rs. 60,57,441/- disallowing the cost of construction of premises given at concessional rate to the predecessor in title of the project land, one Mr. YusufH. Mukadam. The sequence of passing of title of the project land to the respondent is explained by the assessee as under:

A. Originally, under agreement dt. 26.06.1987, development rights of land admeasuring 1239.90 sq. mtrs at survey no. 64, village Balkum, Thane were granted by Shri. Dadu Kanha Mhatre (Landlord) to M/s. Mittal Builders and Associates of Mumbai.

Thereafter, vide agreement dt.24.06.2006, the said M/s. Mittal Builders and Associates agreed to assign the development rights of the said land to one Mr.Yusuf H. Mukadam of Thane.

As the assessee intended to develop the said land, he acquired the rights, title and interest in the said land from Mr. Yusuf H. Mukadam as well as from the original landlord, Shri Dadu Kanha Mhatre family.

Mr. Yusuf H. Mukadam vide agreement dt. 26.02.2008 surrendered his rights, title and interest in the said land to the respondent for consideration of 2886 sq. ft. of constructed premises at the concessional price of Rs.29,00,000/-.

Accordingly, vide deed of cancellation dt. 26.02.2008, the existing rights of M/s.Mittal Builders and Associates/ Mr.Yusuf H. Mukadam in the said land were terminated in favour of the assessee .

B. The assessee has also acquired development rights in respect of the project land under registered agreement dt. 02.05.2006 directly from Dadu Kanu Mhatre.

It is thus the case of the assessee that the title of the said land has moved as under:-

Dadu Kanu Mhatre
(Landlord)

Mittal Builders & Associates of Mumbai
(Agreement dt. 26.6.1987)

Mr. Yusuf H. Mukadam
(Agreement dt. 24.6.2006)

(Rights cancelled with mutual
Understanding by all parties on 26.2.2008)

Development rights with the respondent under agreement dt. 2.5.2006.

C. It is thus the case of the assessee that the consideration paid to Mr. Yusuf H. Mukadam was for perfecting the title of the project land and hence is revenue expenditure for the assessee

3. The only argument of the Id AO in taking adverse view of the matter is that according to the Id AO the assessee was not required to provide the constructed premises to Mr.Yusuf H. Mukadam at concessional price.

In arriving at the above conclusion, the Id AO has

- Not appreciated that Mr.Yusuf H. Mukadam held valuable development rights in the said land and had to be suitably compensated for surrendering the same in favour of the assessee .
- Appropriated the decision making power of the assessee firm to decide as to what was commercially justified in acquiring the legal title of the said land.

It may kindly be appreciated that the Id AO has not disputed the genuineness of the transaction.

8. It is an established principle of law that any claim for expenditure has to be judged from the point of view of a businessman. In applying the test of commercial expediency for determining whether the expenditure was wholly and exclusively laid out for the purpose of business, the reasonableness has to be judged from the point of view of a businessman and not revenue. This has been held in several judicial pronouncements as under:

(i) CIT -Vs - Walchand & Co. (P) Ltd., 65ITR 381 (SC) (1967)

(ii) S.A. Builders Ltd. - Vs - CIT (A) & Anr, 288 ITR 1 (SC) (2007)

9. Further we also find that the issue has been considered by the Ld. CIT(A) with reference to the submissions and evidences on record and deleted the addition which in our view is well reasoned. The relevant portion of the Ld. CIT(A)'s findings are as under:

"I have carefully considered the appellant's submissions, the observations of the AO in the assessment order, the facts of the case and have also gone through various decisions relied upon by the appellant. The A.O. has made addition of Rs.60,57,441/- being cost of construction of 2251 sq. ft. of the constructed premises @ Rs.2,691/- per sq. ft., which according to A.O. was granted to Mr. Yusuf H. Mukadam as a concession, which the appellant was not required to do as the appellant had directly entered into development agreement with the land owner of the land. In this regard, it is seen that the AO has not appreciated the fact that Mr. Yusuf H. Mukadam had valuable development rights in the said land which he had acquired from M/s. Mittal Builders & Associates through the written agreement dated 24.06.2006. M/s. Mittal Builders & Associates, in turn, had acquired these development rights from the land owner vide agreement dated 26.06.1987. When the appellant approached Mr. Yusuf H. Mukadam for getting development rights in the land, Mr. Yusuf H. Mukadam entered into an agreement with the appellant for surrendering his valuable development rights in the said land for a consideration of getting the constructed premises to the extent of 2886 sq. ft. for a concessional price of Rs. 29,00,000/-. A written agreement to this effect has been entered into by the appellant with Mr. Yusuf H. Mukadam dated 26.02.2008. Therefore, the consideration paid by the appellant to Mr. Yusuf H. Mukadam was on account of valuable development rights held by Mr. Yusuf H. Mukadam in the land, which he agreed to surrender in favour of the appellant. Therefore, the expenditure incurred by the appellant for securing the development rights in the land was an allowable business expenditure. The observation of the AO that the appellant was not required to pay any consideration to Mr. Yusuf H. Mukadam does not take into account the fact that Mr. Yusuf H. Mukadam had valid development rights in the said land, which he surrendered in favour of the appellant. The fact that the appellant paid separate consideration to the original land owner has no bearing on the consideration allowed to Mr. Yusuf H. Mukadam in respect of surrender of his development rights.

10. In view of the various judgements relied upon by the appellant, as reproduced above, it is further held that it is the prerogative of the assessee to conduct his business based on the principles of commercial expediency. The A.O. therefore, was not

justified in observing that the appellant was not required to make any payment to Mr. Yusuf H. Mukadam. Further, in the absence of any evidence to show that the consideration was not in fact allowed to Mr. Yusuf H. Mukadam or that the appellant had received any amount over and above the payment of Rs. 29,00,000/- from Mr. Yusuf H. Mukadam or that the transaction between the appellant and Mr. Yusuf H. Mukadam was not an arm's length transaction, the AO was not justified in making this addition,. Therefore, the addition of Rs . 60,57,441/- made by the AO on this account is deleted.

10. On going through the order of the Ld. CIT(A), we do not find any infirmity with the findings of the Ld. CIT(A) in deleting the addition being the cost of construction claimed by the assessee. Thus, we sustain the order of the Ld. CIT(A).

11. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 30th September, 2016.

Sd/-

(RAJENDRA)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 30th September, 2016

व.नि.स./ Rj , Sr. PS

Sd/-

(C.N. PRASAD)

न्यायिक सदस्य/JUDICIAL MEMBER

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार

(Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai