

**IN THE INCOME TAX APPELLATE TRIBUNAL MUMBAI BENCHES
“B”, MUMBAI
BEFORE SHRI R.C. SHARMA(ACCOUNTANT MEMBER) AND
SHRI SANDEEP GOSAIN (JUDICIAL MEMBER)**

**ITA No. 7204/MUM/2012
Assessment Year: 2004-05**

Asst. CIT Circle 22(1)
R.No. 411, 4th Floor,
Tower No. 6, Vashi Stn Complex
Mumbai- 400703

Vs. Mr. Nitin Babu Desai
Flat No. 18 Trupti Praja
Chs Nath Pai Nagar
Ghatkopar
Mumbai- 400077

PAN No. ADQPD1447D

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**ITA Nos. 7205 & 7206/MUM/2012
Assessment Years: 2004-05 & 2008-09**

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Asst. CIT Circle 22(1)
R.No. 411, 4th Floor,
Tower No. 6, Vashi Stn Complex
Mumbai- 400703

Vs. AOP of Mr. Nitin Babu Desai
Lucy Aveline Jacinto
Flat No. 18 Trupti Praja
Chs Nath Pai Nagar
Ghatkopar
Mumbai- 400077

**ITA No. 2501/MUM/2012
Assessment Year: 2008-09**

Mr. Nitin Babu Desai
Flat No. 18, Tripti Praja
CHS., Nathpai Nagar
Ghatkopar(E),
Mumbai-400077

Vs. Asst. Commissioner of Income Tax
22(1), Mumbai

(Appellant)

(Respondent)

Assessee By : Shri. Kisit N. Mehta
Shri. Ankit Virendra Sudha Shah
Revenue By : Shri. Neil Philip

Date of Hearing : 19/07/2016
Date of pronouncement : 30/09/2016

ORDER**PER R.C. SHARMA, ACCOUNTANT MEMBER :**

These are cross appeals filed by the Assessee and Revenue against the order of Ld. CIT(A) for the AY 2004-05 and 2008-09, in the matter of order passed under section 144/143(3) r.w.s 147 of the Act.

ITA No. 2501-Mum-2012 Assessment Year 2008-09

2. Facts in brief are that the AIR information was received by the AO to the effect that assessee had sold immovable property worth Rs. 25,10,73,000/- which was registered on 14/12/2007 at Joint Sub Registrar office, Andheri-2. On the basis of this sale deed AO has made an addition of Rs. 2,00,50,000/- as income from other sources. AO also made an addition of Rs. 20 Lakhs as income from other sources received on account of giving right of way.

3. As regards the AIR information regarding the transaction in immovable property the assessee produced a copy of the agreement between Lucy Aveline Jacinto (kul), Mr. Nitin B Desai (assessee) the confirming party and M/s. Nexus Developers Pvt. Ltd. during the relevant previous year. The AO held that since money has been received by assessee from Nexus builder Rs. 2,00,50,000/- during the F.Y. 2007-08, however, the assessee is no where appearing as owner nor any trace of ownership has been proved. Therefore, the entire receipts in the hands of assessee was treated as income from other sources and no expenses were allowed on the plea that expenses are not incurred to receive the amount.

4. By the impugned order Ld. CIT(A) observed that Ms. Lucy Jacinto was in adverse possession right in the said immovable property which though was transferred to M/s Dinshaw Trapinex Builders P. Ltd. due to cancellation was given

to the assessee Shri Nitin Bapu Desai on account of the fact that he paid the consideration received by Ms. Lucy Jacinto from M/s. Dinshaw Trapinex, this amount was Rs. 2,00,50,000/-. Against this the assessee get whatever right Ms. Lucy Jacinto had in the said immovable property including possession thereof in future. Lucy entered into an agreement dt. 24/09/2003 to transfer the rights in the said property to M/s. Dinshaw Trapinex Builders P. Ltd. for Rs. 2,25,00,000/-. The assessee thus came into the picture without actual getting anything till 24/09/2003. The CIT(A) further observed that even if it is considered that he paid Rs. 50,00,000/- at the best it is an advance towards some right which he may get in future, it is a fact that nothing came to him, as the land has not come to his possession and hence the right if any embedded in the land obviously did not come to him. It is also seen that his name is appearing as confirming party only in the agreement dated 24/09/2003 where Mrs. Lucy Jacinto is seller (being owner of the land due to adverse possession of the land property) and purchaser; M/s. Dinshaw Trapinex Builders P. Ltd. who are developers to whom the right in the said property was transferred by Lucy. For the said transaction M/s. Dinshaw Trapinex Builders P. Ltd. paid Rs. 2,25,00,000/- to Ms. Lucy Jacinto. This deed was then cancelled as purchaser developer was uncertain about getting possession of the property. The cancellation deed is dated 07/12/2007 wherein Ms. Lucy Jacinto is appearing as first party, Shri Nitin Bapu Desai, the assessee again as confirming party and then M/s. Dinshaw Trapinex Builders P. Ltd. as developer, the second party. Para 7 of this agreement clearly states that since the amount taken by Ms. Lucy Jacinto from M/s. Dinshaw Trapinex Builders P. Ltd. had to be returned which has been returned on her behalf by Shri Nitin Bapu Desai an amount of Rs. 2,50,00,000/- vide three cheques No. 126374 dated 11/08/2007 and two cheques both dated 15/10/2005, in lieu of that

what ever right in the said the property which were granted by Ms. Lucy Jacinto to developer including possession thereof shall now rest in confirming party. As per Ld. CIT(A) what assessee paid at the time of cancellation deed remain as advance to Lucy Jacinto Rs. 2,25,00,000/- by paying to M/s Dinshaw Trapinex Builders P. Ltd. on her behalf. Against this he became entitled to receive Rs. 3,00,00,000/- for doing his part i.e. cancellation of agreement entered with M/s Dinshaw Trapinex Builders Pvt. Ltd. and registration of the same and POA in favour of nominee of the Nexus Properties and Developers Pvt. Ltd. It is seen that same is already done by assessee on the date of agreement dated 14/12/2007, as he is nominee himself and is having POA in his name by this very. The clauses of agreement dated 07/12/2007 depict that part of agreement has already been done meaning thereby consideration of Rs. 3 crores has accrued to assessee and against that he has received also Rs. 2,50,00,000/- which he has given to Lucy together with another amount of Rs. 50,00,000/- as advance for the right to be received in future together with possession of land, something which has not materialized till 14/12/2007 i.e. date of this agreement with Nexus Pvt. Ltd.

5. We have considered rival contentions and carefully gone through the orders of authorities below and found from record that one Ardeshar Homarjee Wadia Charitable Trust, were owners of the land lying, being and situate at Village Kole Kalyan, Taluna Andheri at Kalina, Santacruz (East), bearing survey No.158, Hissa No.23, corresponding to CTS No.5408-A admeasuring 1 Acre 39 gunthas equivalent to 7995.43 sq.mt. with the structures standing thereon. Mrs. Lucy Aveline jacinto is in actual, occupation and possession of the said property and claiming to be the owner of the said property. We also found that the name of Mrs. Lucy is entered in to the other rights column in the revenue records of the said property vide entry number

7787 dated 28.03.1995 by Taheshildar, Andheri. We have carefully gone through agreement dated 24.09.2003, 07.12.2007, 14.12.2007, no objection letter from Ardeshar Homarjee Wadia Charitable Trust, order of debt recovery appellate Tribunal dated 15.05.2002 and various other orders concerning litigation with MMRDA. Lucy, Nitin Desai and dinshaw Trapinex Builders Pvt. Ltd. had entered into an agreement for transfer of development rights for the property on 24.09.2003 for Rs.2,25,00,000/-. Lucy, Nitin Desai and dinshaw Trapinex Builders Pvt. Ltd. had entered into an agreement on 07.12.2007 to cancel the above development agreement dated 24.09.2003 for Rs.2,50,00,000/-.After considering various agreements so entered by assessee, the CIT(A) found that assessee was in receipt of Rs.3.00 crores for transfer of development right. In view of the detailed finding recorded by CIT(A) which has not been controverted by learned A.R. by bringing any positive material on record, we do not find any reason to interfere in the order of CIT(A) bringing to the tax net receipt of Rs. 3 crores in the hands of the assessee under the head "income from other sources'. However, CIT(A) has not given any deduction for the expenditure so incurred for earning this income. We therefore, restore this matter with a limited issue for deciding the quantum of expenditure incurred for earning this income and to decide the matter afresh as per law.

6. With regard to addition of Rs.10 lacs received from M/s. Orbit Shelter Pvt. Ltd., we found that the deed of Grant of Right of Way was executed between Mr. Nitin Desai and M/s. Nexus Developers Pvt. Ltd., on the one part and M/s. Orbit Shelter Pvt. Ltd., on the other part. The consideration in the agreement was Rs. 20 lakhs to be shared equally between Mr. Nitin Desai and M/s. Nexus Developers Pvt. Ltd., The receipt of Rs. 10 lakhs each is offered as income from other sources by Mr. Nitin Desai. The expenses in relation to this income has been claimed at Rs. 1,70,000/-.

The entire 20 lakhs was added by CIT(A) in assessee's hands. The contention of the learned AR was that Rs. 20 lakhs was received by M/s. Nexus Developers Pvt. Ltd., therefore, assessee's share of Rs. 10 lakhs only can be brought to tax in his hands and not the entire amount of Rs. 20 lakhs. However, no contrary finding has been given by CIT(A) in this regard. In the interest of justice and fair play, we restore this ground also back to the file of the AO. AO is directed to verify the income offered by Nexus Developers Private Limited and if the AO finds that if the Nexus Developers Private Limited had offered its share of income of Rs. 10 lakhs then addition in the hands of the assessee should be restricted to Rs.10 lakhs only. AO has to decide the issue afresh after giving due opportunity to the assessee.

7. The CIT(A) has also made an addition of Rs. 50 lakhs under Section 2(22)(e) of the IT Act by observing that the assessee who is an individual, is a director with M/s Nexus Developers Pvt. Ltd. with 39.10% of total paid up capital along with his wife Mrs. Manjula Desai having 41.40 of total paid up capital. There was some understanding of assessee with Mrs. Lucy Jacinto and he became her POA. The amount of Rs. 50 lacs so received by assessee was brought to tax under Section 2(22)(e).

8. We have considered rival contentions and found that addition under Section 2(22)(e) can be made to the extent of balance in the account of Reserve and Surplus of the company making payment. Since the company from whom assessee has received this amount had only reserve of Rs.5 lacs, there is no justification for adding entire 50 lacs in the hands of the assessee under Section 2(22)(e). In the interest of justice, we also restore back this ground to the file of the AO for verifying the fact of availability of reserve and surplus in the balance sheet of Nexus Developers Pvt. Ltd and for deciding the issue afresh as per law. We direct accordingly.

ITA No. 7204/Mum/2012 (2004-2005)

9. In this appeal Revenue is aggrieved for deletion of Rs. 2.25 crores in the Assessment Year 2004-2005 being addition made by AO on account of sale proceed of property, treating the same as business income.

10. We have considered the rival contention and found that addition of Rs. 2.25 crores made by the AO on account of sale proceed of property treating the same as business income, was deleted by CIT(A) after observing that this income was already included in the income of the assessee for AY 2008-09. The precise observation of the CIT(A) was as under:

“3.5 I have considered this submission also. It was decided in AY 2008-09 that the income arising from the said transaction was Income from Other Source for the detailed reasons mentioned therein. The A.O. has treated it in the nature of adventure, and assessed as ‘Income from Business’ in the A.Y. 2004-05 for the reason that same was not returned by appellant, a stand which is now unsupported by facts. Further as this amount was embedded in the amount upheld in A.Y. 2008-09, I am of the view that same cannot be taxed here again and hence being not sustainable is deleted herewith. Accordingly the addition made for the amount Rs. 2,25,00,000/- is deleted herewith.”

Since CIT(A) had already confirmed the addition of Rs.3.00 crore in the A.Y.2008-09 with respect to very same transaction, which we had dealt with in ITA No.250/Mum/2012, hereinabove, accordingly, there is no infirmity in the order of CIT(A) deleting the addition so made by AO in Assessment Year 2004-2005.

ITA No. 7205/Mum/2012

11. This is an appeal filed by the Revenue against the order of Ld. CIT(A) for AY 2004-05, in the mater of order passed under section 144 of the Act.

In this appeal Revenue is aggrieved by action of Ld. CIT(A) in directing that the income on sale of property cannot be taxed in the hands of AOP as the same was not in existence.

12. Rival contentions have been heard and record perused.

13. During the course of assessment under section 144 AO made an addition on account of sale proceed of property of Rs. 2.25 Crores as business income. The AO also held that Mr. Nitin Desai is not a sole owner of the property but is holding it as AOP with one Lucy Jacinto. By the impugned order Ld. CIT(A) directed the AO not to tax the income on sale of property in the hands of AOP as the same was not in existence. The precise observation of the CIT(A) is as under:

4.3 As regards the status taken as AOP, it was also discussed in the said appellate order. The relevant portions of Para 7 of the appellate order passed for A.Y. 2008-09 are reproduced as under:-

"7. Coming to ground no. 4 and 5, they deal with the treatment given as AOP and assessment done in substantive capacity by the A.O. It is seen that the A.O. has discussed the issue in the assessment order and treated that it was an association of persons of the appellant Shri Nitin Babu Desai and Ms. Lucy Jacinto with interest in immovable property which has been sold to M/s. Nexus Developers P. Ltd., a company with 100% share holding in the name of the appellant and his wife Manjula Desai.

7.1 I have considered these aspects also. As per the discussion made above while deciding ground no. 2, it was made clear that no right has actually come to the appellant till date as the very right over the land is still with Lucy on account of adverse possession and hence I am in agreement that the appellant has to be assessed in his individual capacity and not as AOP. Accordingly ground no. 4 is allowed.

7.2 Coming to ground no. 5, that he should be assessed on protective basis I am not in agreement with him for the reason he is only entitled for the job done by him which is cancellation of deed and getting POA that has been done and so he is only entitled to Rs. 3 crores as confirming party which is only he; the appellant himself. For these reasons he has to be assessed on his income on substantive basis for the income received in the instant A.Y. 2008-09. The ground no. 5 is dismissed."

4.4 In view of this, as per my understanding, as there is no AOP in existence, I am in agreement with appellant that assessment in the capacity of AOP to Shri Nitin Babu Desai and Ms. Lucy Aveline Jacinto (Kul) being not in existence, cannot be taxed accordingly.

We have considered the rival contentions in view of the finding recorded by the CIT(A) to the effect that there is no AOP in existence, therefore, there was no

justification for adding the amount in the hands of AOP in so far as amount has already been added in the hands of Nitin Desai in his individual capacity. Accordingly, there is no infirmity in the order of CIT(A).

ITA No. 7206/Mum/2012 - AY 2008-09

12. This is an appeal filed by the Revenue against the order of CIT(A) for the AY 2008-09.

13. Similar ground has been taken by the Revenue as taken in AY 2004-05 in ITA No. 7205. As the facts and circumstances are the same, following the reasoning given in AY 2004-05, we do not find any reason to interfere in the order of the Ld. CIT(A).

14. In the result appeal of the Revenue are dismissed whereas the Assessee appeal is partly allowed for statistical purposes.

Order pronounced in the open court on 30/09/2016.

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER

sd/-
(R.C. SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated: 30/09/2016

AG (On Tour)

Copy of the Order forwarded to :

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

BY ORDER, //True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai

