

**IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK**

**BEFORE S/SHRI N.S SAINI, ACCOUNTANT MEMBER
AND PAVAN KUMAR GADALE, JUDICIAL MEMBER**

ITA No.411/CTK/2014
Assessment Year : 2007-08

Shri Sudhansu Sekhar Ray, S/O. Late Alekh Chandra Ray, Plot No.771, Patia, Bhubaneswar.	Vs.	ITO, Ward 1(4), Bhubaneswar
PAN/GIR No. AISPR 8250 R		
(Appellant)	..	(Respondent)

ITA No.396/CTK/2016
Assessment Year : 2007-08

Shri Uday Keshari Ray, S/O. Late Alekh Chandra Ray, Plot No.771, Patia, Bhubaneswar.	Vs.	ITO, Ward 1(4), Bhubaneswar
PAN/GIR No. AHBPR 0804 B		
(Appellant)	..	(Respondent)

Assessee by : Shri Purna Chandra Mishra, AR
Revenue by : Shri B.N.Das, DR

Date of Hearing : 08/06/ 2017
Date of Pronouncement : 09 /06/ 2017

ORDER

Per N.S.Saini, AM

These are appeals filed by two separate assessees against the order of CIT(A)-1, Bhubaneswar, dated 19.9.2014 u/s.143(3)/147 of the Act and the CIT(A)-2, Bhubaneswar dated 23.8.2016 u/s.147/143(3)/254 of the Act, for the assessment year 2007-08.

2. At the outset, Id A.R. of the assessee submitted that in both these appeals common grounds of appeal are involved and, therefore, he will be arguing the appeal in the case of Sudhansu Sekhar Ray and same arguments should be considered in the case of Uday Keshari Ray. Hence, grounds raised in the case of Sudhansu Sekhar Ray is reproduced hereinbelow:

"1.That the Ld. C. I. T. (Appeals)-I, Bhubaneswar is not justified in confirming the reopening order assessment made by the Assessing Officer under Section 147 in the 'Individual status as the IHUF's alleged income from capital-gains of Rs. 1,51,84,42 6/- and house property income of Rs.1,05,000/-was clubbed.

2. That the Ld. CI.T.(Appeals)-I, Bhubaneswar is not justified in confirming the order of assessment of the AO who treated the appellant's HUF income as 'Individual' income of the appellant as the land which was offered to the builder, M/s. Konark Buildings Pvt. Ltd. for construction of flats belongs to the ancestral inherited property i.e. Great grant parents as per documentary evidence of Patta/Mutation Record, Tahasildar's report and Civil Judge (senior Division)'s decision in partition case,

3. That the Ld. C.I.I.(Appeals)-I» Bhubaneswar should not have completely ignored the written submission filed on 11.6.2014 while passing the order.

4. The CIT (Appeals)1, Bhubaneswar is not justified in treating the alleged income from capital-gains and house property income earned during the Assessment year 2007-08 as the construction of 10 flats allotted to the appellant by the builder was not completed. The construction of above 10 flats was completed during Assessment year 2 009-10 (Instead of Assmt.year 2007-08) as is evident from direct evidence of Builder 's Agreement dt.4,8.2098, subsequent builder's letter dt.5.7.2008 and 16.7.008 regarding handing over possession, CECUS electrical installation latter 'No.1118 dt.28.6.2013 with first municipal assessment record.

5. That the CIT(A)-1, Bhubaneswar is not justified in not considering that the alleged income from capital gains and house property is exempt from taxation under section 10(2) of the I.T.Act and u/s.47(1) of the I.T.Act, 1961 being ancestral property.

6. That the Ld. C.I,T.(Appeals-1, Bhubaneswar should not have accepted the A.O's estimation of income from capital-gains and house property

on hypothetical manner by citing five comparable sale-deed executed by the builder during Assessment year 2009-10 but not during the year in question. Further, the C.I.T.(A) should have deducted the cost of land as mentioned in above file sale-deeds.

7. The C.I.T. (Appeals)-I, Bhubaneswar is not justified in accepting the estimation of income from capital gains and house property made by the AO as there was no sale of flats by the appellant. Receipts of 10 flats from the builder in place of HUF's land is not a transfer in relation to Section 2(47) of the I.T.Act but only conversion of form of asset from land to building(flats) on same price."

3. Ld A.R. submitted that the issue involved in this appeal is covered by the decision dated 2.4.2012 of the Co-ordinate Bench of this Tribunal in the case of Sri Udaya Keshari in ITA No.487/CTK/2011 for the assessment year 2007-08 against the order dated 3.10.2011 of the CIT(A) u/s.147/143(3) of the Act, wherein, the matter was restored back to the file of the Assessing Officer. He submitted that following the same, the issue involved in these appeals are also required to be restored back to the file of the Assessing Officer for fresh adjudication.

4. Ld D.R. had no objection to the above submission of Id A.R. of the assessee.

5. We have heard the rival submissions and perused the orders of lower authorities and materials available on record. We find that the Tribunal in the case of Sri Udaya Keshari Ray (supra) has held as under:

"3. Both the parties were heard regarding the issues raised in the appeal and their legal implications.

4. On careful consideration of the material made available to the Tribunal and analyzing the same in the light of the submissions of both the parties, the undisputed facts relating to the issues are that the assessee filed return for the period under consideration declaring income of ₹81,060 from the gross civil contract work of ₹10,13,263. Subsequently it was found that the assessee has received flats as per the development agreement entered into with a builder for construction of flats by leasing out the same apart from

the fact of capital gain, no such income was disclosed by the assessee in the return of income. Hence, the Assessing Officer reopened the assessment by issuing notice u/s.148 on 17.7.2009, in response to which the assessee by letter dt.3.8.2009 submitted before the Assessing Officer that the return filed by him earlier, the photocopy of which is enclosed to the reply, be treated as return of income in response to the said notice of reopening and he will submit revised return after a fortnight after collecting further information. On 31.8.2009 the assessee filed the return disclosing pension income at ₹64,169 and interest income of ₹ 133 in addition to contract income of ₹81,060 disclosed earlier. The Assessing Officer issued notice u/s.143(2) as well as u/s.142(1). In reply to the notice u/s.142(1), the assessee submitted before the Assessing Officer the copies of the savings bank account maintained in Punjab National Bank, Orissa Sate Co-Operative Bank and State Bank of India, Loan account in OSCB, Chandrasekharapur Branch, Bhubaneswar, copies of agreement with Konark Builders Pvt. Ltd., for development of Land dt.19.9.2001, copy of death certificate of the mother of the assessee, copy of Panchayat rajinama dated 15.2.2003 regarding distribution of profit amongst family members out of development agreement with Konark Builder and Dee of partition dt.8.2.2010. After considering the above documents and hearing the assessee, the Assessing Officer has come to the conclusion that there is transfer of land by the assessee to the builder in pursuance to the agreement entered into between them deeming the same as transfer as contemplated u/s.45 of the I.T.Act and considering the provisions of Section 49(1) and Section 55(2)(b)(ii) of the I.T.Act, fair market value of the asset on the 1st day of April,1981 was taken as capital gain thus arrived at a sum of ₹1,28,92,402 as capital gain and thereon he calculated the tax to be paid by the assessee.

5. Aggrieved by this order, the assessee went in appeal before the CIT(A) and is unsuccessful and hence, the present appeal is filed by the assessee before the Tribunal.

6. During the course of hearing, the contention of the assessee is that the land in question is the ancestral property and constitutes property of HUF consisting of the assessee, assessee's brother and his mother and hence, the transfer having been made by the members of the HUF has to be considered in the hands of the HUF only but not in the case of assessee individually and the assessment being sought to be made on the individual members of the HUF it is not tenable in law. Further he submitted that the development agreement entered into by the assessee, his brothers and mother with the builder will not amount to transfer of land and as per the partition deed entered into by the assessee and his brother and mother, the assessee has received certain flats apart from cash, and those flats are valued by the Assessing Officer and the land being the ancestral property, he ascertained the value of the land as on 1.4.81 as per rate of Government records and after indexation of the same till the date of partition and taking into consideration the valuation of flats received by the assessee towards its share and taking into account the proportionate value of the land has computed the capital gains deeming the transfer of the land as per the

agreement entered with M/s.Konark Builders but as per the agreement entered into between the assessee, his brother and mother and the builder, it is only an agreement for develop the land but not sale or transfer of any kind i.e., covered by the provisions of the I.T.Act. Therefore, it cannot be taken as a transfer and thereby the resultant capital gain at all arise. Thus contending, the AR of the assessee sought to set aside the assessment by allowing the appeal of the assessee.

7. Contrary to this, the learned DR has vehemently argued supporting the orders of the Departmental Authorities and sought for upholding the same by dismissing the appeal of the assessee.

8. On careful analysis of the impugned orders of the lower authorities, it is found that undisputedly the land in question is not assessee's own property. It is the ancestral property of their family consisting of himself, his brother and mother, his father having been inherited the same from his father (i.e., grandfather of the assessee). In that view of the matter, the land property only becomes the property of HUF consisting of the assessee, his brother and mother that is why they have entered into with the agreement with M/s.Konark Builders for development of property and handed over the land to the said M/s.Konark Builders and as per the said agreement the assessee, his brother and mother have been given some lakhs in consideration for giving off the respective rights in the landed property belonging to their HUF. The builder having developed the land and constructed the flats on the land of the HUF and after completion of the construction he handed over the flats to the assessee as per the agreement entered into by the assessee and they were enjoyed by the assessee by letting them out and offered rental income for taxation. Under this factual matrix, it is clear that the mother and brother of the assessee who have also received their part of the consideration for their portion of the HUF land surrendered to the builder and the builder has sold the flats fell to his share after giving the flats allotted to the assessee, his brother and mother. But both the lower authorities have not brought out any material on record to the effect that whether the landed property in question is actually the property of the HUF of the assessee and his brother and mother or it is the individual property of the assessee or of his brother or his mother. Further there is no information about the assessments that were made in the hands of the brother of the assessee as well as his mother because undisputedly they have also received their shares at par with the assessee in pursuance to the agreement entered into with the developer. Apart from that there is no whisper about the sale of the flats given to the builder after giving flats to the share of the assessee, his brother and his mother and there is no information in the orders of both the lower authorities whether the assessee, his brother and mother have signed on the sale deed that was made for the flats that were sold by the builder from out of the flats left to him after allotting the flats belonged to the assessee, his brother and mother and if so what is the rate they have conveyed in those sale deeds for ultimate purchase of the flats. Without deciding all these essential and crucial factual aspects of the case, both the authorities have bent upon to complete the assessment. Therefore, under such undisputed factual

aspects, we are of the considered view that this is a fit case to be restored to the file of the Assessing Officer for de novo assessment after strictly following the principles of natural justice by affording reasonable opportunity to the assessee of being heard and pass necessary consequential order as per law. We further like to observe that the Assessing Officer first of all ascertain as to whether the landed property in question is HUF property of the assessee's combined family consisting of himself, his brother and mother, whether the assessee, his brother and mother have executed in sale deed regarding the flats that were sold by the developer out of his share of flats, if so what is the rate they have conveyed in those sale deed, whether the agreement entered into by the assessee, his brother and mother with the developer is talking about anything of transferring the interest on the land ultimately to the purchasers of the flats remained to the builder and sold by him and whether the brother and mother of the assessee were assessed for their shares so also whether builder has offered income on sale of the flats that remained to his share after allotment of the shares to the assessee, his brother and mother. We, therefore, set aside the impugned orders of the authorities below and restore the case to the file of the Assessing Officer for the purposes as indicated above."

6. In view of above submission of both the parties, we restore back the issue involved in both the appeals to the file of the Assessing officer with the very same direction contained in the case of Udaya Keshari Ray (supra). Hence, both the appeals are restored back to the file of the Assessing Officer.

7. In the result, the appeals filed by the assessee are allowed for statistical purposes.

Order pronounced in the open court on 09/06/2017 in the presence of parties.

Sd/-

sd/-

(Pavan Kumar Gadale)
JUDICIALMEMBER

(N.S Saini)
ACCOUNTANT MEMBER

Cuttack; Dated 09 /06/2017
 B.K.Parida, SPS

Copy of the Order forwarded to :

1. The Appellant : Shri Sudhansu Sekhar Ray/Udaya Keshari Ray, S/O. Late Alekh Chandra Ray, Plot No.771, Patia, Bhubaneswar.
2. The Respondent. ITO, Ward 1(4), Bhubaneswar
3. The CIT(A)-1, Bhubaneswar.
4. Pr.CIT-1, Bhubaneswar.
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

BY ORDER,

SR.PRIVATE SECRETARY
ITAT, Cuttack