

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI
BEFORE SHRI G.S. PANNU, AM AND SHRI AMARJIT SINGH, JM

I.T.A. Nos.2787, 2788/M/2017 & 7603/M/2011
(Assessment Years: 2005-06, 2006-07 & 2008-09)

Kishore Kumar Kataruka 71, Land Mark, 175, Karter Road, Bandra (East), Mumbai-400050	Vs.	Income Tax Officer Ward 19(3)(4), Piramal Chambers Mumbai
स्थायीलेखासं. / जीआइआरसं. / PAN/GIR No. : APXPK3340B		
(Appellant)	..	(Respondent)

Assessee by:	Shri Amar Gahlot & Chandni Patel (AR)
Department by:	Shri M.C. Omi Ningshen (DR)

Date of Hearing: 21.12.2017
Date of Pronouncement: 19.03 2018

ORDER

PER AMARJIT SINGH, JM:

The assessee has filed the above mentioned appeals against the different order passed by the Commissioner of Income Tax (Appeals)-33, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the assessment years 2005-06, 2006-07 & 2008-09.

ITA NO.2787/M/2017:-

2. The assessee has filed the present appeal against the order dated 05.12.2016 passed by the Commissioner of Income Tax (Appeals)-33,

Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the assessment years 2005-06.

3. The assessee has raised the following grounds: -

“Being aggrieved by the order of the Ld. Commissioner of Income-tax (Appeals) (hereinafter referred to as "CIT(A)"), the Appellant craves leave to prefer appeal on the grounds, without prejudice to one another, as follows:

1. The Ld., CIT(A) has erred in concluding that the Appellant has preferred no appeal before the Hon'ble ITAT against the protective assessment for A.Y. 2008-09, when Appeal No. 7603/Mum./2011 is already filed on the issue and is pending before the Hon'ble ITAT.

1. The Ld. CET(A) has erred in allowing the action of the Assessing Officer in re-opening the assessment for A.Y. 2005-06, beyond four years of limitation, even when there was full and true disclosure of material facts during the original assessment proceedings. 3. The Ld. CIT(A) has erred in allowing the taxation of capital gains in A.Y. 2005-06:

a) The transfer of property was effected in AY 2008-09, which is the year when the capital gains were offered to tax by the Appellant.

b) There arises no 'transfer' in A.Y. 2005-06 since the possession of the property was not given because the same was under construction, as the property was not constructed in AY 2005-06.

c) There arises no 'transfer' in A.Y. 2005-06 as what was entered into in this year was a mere agreement to sell with conditions precedent in respect of payment of consideration, and such conditions were fulfilled only in AY 2008-09.

4. The Appellant craves leave to alter, modify, add, delete any grounds of appeal at the time of hearing.”

ITA NO.2788/M/2017:-

4. The assessee has filed the present appeal against the order dated 05.12.2016 passed by the Commissioner of Income Tax (Appeals)-33, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the assessment years 2006-07.

5. The assessee has raised the following grounds: -

Being aggrieved by the order of the Ld. Commissioner of Income-tax (Appeals) (hereinafter referred to as "CIT(A)"), the Appellant craves leave to prefer appeal on the grounds, without prejudice to one another, as follows:

1. The Ld., CIT(A) has erred in concluding that the Appellant has preferred no appeal before the Hon'ble ITAT against the protective assessment for A.Y. 2008-09, when Appeal No. 7603/Mum./2011 is already filed on the issue and is pending before the Hon'ble ITAT.

1. The Ld. CET(A) has erred in allowing the action of the Assessing Officer in re-opening the assessment for A.Y. 2006-07, beyond four years of limitation, even when there was full and true disclosure of material facts during the original assessment proceedings.

3. The Ld. CIT(A) has erred in allowing the taxation of capital gains in A.Y. 2006-07:

a) The transfer of property was effected in AY 2008-09, which is the year when the capital gains were offered to tax by the Appellant.

b) **There arises no 'transfer' in A.Y. 2006-07 since the possession of the property was not given because the same was under construction, as the property was not constructed in AY 2005-06.**

c) There arises no 'transfer' in A.Y. 2006-07 as what was entered into in this year was a mere agreement to sell with conditions precedent in respect of payment of consideration, and such conditions were fulfilled only in AY 2008-09.

4. The Appellant craves leave to alter, modify, add, delete any grounds of appeal at the time of hearing."

ITA NO.7603/M/2011:-

6. The assessee has filed the present appeal against the order dated 30.08.2011 passed by the Commissioner of Income Tax (Appeals)-30, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the assessment years 2008-09

7. The assessee has raised the following grounds:-

“The Assessing Officer has erred in making an addition of 1797490/- on account of Long Term Capital Gains on protective basis;

2. The CIT(A) erred in upholding the findings of the Assessing Officer in so much as the LTGC needs to be taxed in the hands of the appellant for assessment year 2005-06 and 2006-07; and

3. The appellant craves leave to, add to, alter, amplify, modify or delete all or any of the aforesaid grounds at or before the hearing.”

8. The brief facts of the case are that the assessee filed his return of income on 20.03.2009 declaring total income to the tune of Rs.5,26,470/- for the assessment year of 2008-2009. Thereafter, the assessee has filed the revised return of income on 30.03.2009 declaring total income to the tune of Rs.5,26,470/-. The return was processed u/s 143(1) of the I.T. Act, 1961. Subsequently, the case was selected for scrutiny and notice u/s 143(2) of the Act was issued and served upon the assessee. Thereafter, the notice u/s 142(1) of the Act along with questionnaire was also issued and served upon the

assessee. The assessee was an individual and during the year assessee's total income consisted of income from salary, income from business, capital gains and income from other sources. The assessee received the loan amounting to Rs.65,95,287/- from Fashion Exim India Pvt. Ltd. a closely held company in which the assessee was substantially interested. After giving the notice, the said amount was held to be the income of the assessee and taxed u/s 2(22)(e) of the Act, 1961. The assessee also received the income from Development of inherited property received by virtue of will dated 20.08.1987 on the basis of the probate by 3rd Additional District & Sessions Judge, Patna on 6th December, 1990. The assessee along with his brother entered into the development agreement dated 05.03.2003 with the One Max Enterprises Pvt. Ltd. of Patna. According to para no. 5 of the said agreement, the assessee and his brother transferred 60% share of the land to the developer Max Enterprises Pvt. Ltd. or their nominees in lieu of which they were entitled to 40% of the constructed area. The assessee indicated his two flats and received consideration in the A.Ys. 2005-06 & 2006-07 in sum of Rs.47,06,500/- and the long term capital gain was assessed to the tune of Rs.17,97,490/-. The Assessing Officer was of the view that the income to the assessee was accrued in the A.Y. 2005-06 & 2006-07, therefore, the long term capital gain was liable to be taxed in the said year, hence, the Assessing Officer assessed the tax on long term capital gain upon the sale consideration of the flats to the tune of

Rs.47,06,500/- on protective basis and also reopened the assessment in the year of 2005-06 and 2006-07 also. In the A.Y. 2005-06 & 2006-07, notices u/s 148 of the Act dated 21.03.2012 were issued and served upon the assessee. Thereafter the part of the receipt of the sale of the flats was taxed as long term capital gain in the year of 2005-06 & 2006-07 also. The assessee filed an appeal before the CIT(A) who confirmed the said order, therefore, the assessee has filed the present appeal before us.

ISSUE NOs. 1& 2:-

9. Issue nos. 1 & 2 are being taken up together for adjudication. Under these issues the assessee has challenged the addition of Rs.17,97,490/- on account of long term capital gain on protective basis and also challenged the finding of the AO in which the AO has observed that the LTCG was liable to be taxed in the hands of the assessee in the A.Ys. 2005-06 & 2006-07 also. The ownership of the assessee upon the plot in question by virtue of will dated 20.08.1987 is not in dispute. The assessee along with his brother became the owner of the plot by virtue of probate by the 3rd Additional District & Sessions Judge of Patna on 6th December 1990. Subsequently, the assessee alongwith his brother entered into the development agreement dated 05.03.2003 with one Max Enterprises Pvt. Ltd. of Patna in respect of property in question. The assessee and his brother allowed the development upon the said inherited property by the said

developer i.e., Max Enterprises Pvt. Ltd. The assessee sold two flats along with undivided share in the property to Shri Bijay Kumar Kishorepuria and Shri Sunil Khemka and received sale consideration of Rs.19,80,500/- by virtue of agreement to sell dated 10.11.2004 in the A.Y. 2005-06 and the assessee received the sale consideration of Rs.27,26,000/- by virtue of agreement dated 05.05.2005 in the A.Y. 2006-07. The agreement is on the file which lies at page no. 127 to 143 of the paper book. In ITA. No.7603/M/2011, the agreement dated 04.05.2005 between the assessee's and Sunil Khemka lies at page no.109 to 125 of the paper book. The para no. 6 to 6.4 of the sale agreement, it has been clarified that the sale would be completed after the full consideration. The sale was completed in the A.Y. 2008-09 in which the long term capital gain was offered to tax. In the said assessment order, the Assessing Officer was of the view that the income received by the assessee in the year of 2005-06 and 2006-07 was also liable to be taxed in the relevant assessment year. The cases of the assessee for the A.Y. 2005-06 and 2006-07 were reopened by the issuance of notice dated 21.03.2012 u/s 148 of the Act. These notices were issued after the expiry of 4 years. Now it is to be seen whether the assessee was at default and the cases of the assessee could be reopened u/s 148 of the Act or not for the assessment year of 2005-06 and 2006-07. The reasons are hereby reproduced below as under: -

“Mr. KISHORE KUMAR KATHRUKA

**ITA Nos. 2787/Mum/2017
2788/Mum/2017
7603/Mum/2011
A.Y. 2005-06, 2006-07 & 2008-09**

71, Land Mark, 175, Carter Road, Bandra (West),

Mumbai-400050.

Sir,

Sub : **Reasons** for reopening : -Reassessment **proceeding u/s 147 of the I.T.Act** for the **A. V. 2005-06 PAN : ABXPK3340B;**

Ref: Your letter dated **3.04,2012**

refer to the above.

Vide letter dated 03.04.2012 you **have** requested to provide reasons for reopening of the assessment u/s 147 for the A. Y. 2005-06. In view of the above, the Reasons for reopening of assessment u/s 147 of the Income tax Act, 1961 is provided to **you as under:-**

During the course of assessment proceedings for the A.Y. 2008-09, it is observed from the details by the assessee that the assessee had told his residential unit being first, to one Mr. Bijay Kumar Kishorepuria. The date of sale agreement being 10-11.2003 of the flat falls in the financial year 2005-06 and the sale consideration for the same is Rs. 19,80,500/-. The assessee has not declared this sale transaction in the Return of Income filed for A.Y. 2005-06 resulting thereby in under assessment (non-assessment) of income under the heading 'Long Term Capital Gain' of Rs. 9,90,123/-. Assessment u/s 43(3) of the I.T. Act, 1961 has been made for the A. Y. 2005-06 vide order dated 23.10.2007.

I have, therefore, reasons to believe that income in the form of Long Term Capital gain of Rs. 9,90,124/- chargeable to tax has escaped assessment for the Assessment Year 2005-06 as per provisions of Section 147 of the I.T. Act. Accordingly, Sanction u/s 151 of the I.T. Act for issuing Notice U/S 148 of this Act to reopen the assessment u/s 147 of the Act is hereby solicited, "

10. In the A.Y. 2006-07 the reasons have been given which lies at page no. 77 of the paper book. Which is hereby reproduced below as under:-

“““**Mr. KISHORE KUMAR KATHRUKA**

71, Land Mark, 175, Carter Road, Bandra (West),

Mumbai-400050.

Sir,

Sub : **Reasons** for reopening : -Reassessment **proceeding u/s 147 of the I.T.Act** for the **A. V. 2006-07 PAN : ABXPK3340B;**

Ref: Your letter dated **3.04,2012**

refer to the above.

Vide letter dated 03.04.2012 you **have** requested to provide reasons for reopening of the assessment u/s 147 for the A. Y. 2006-07. In view of the

above, the Reasons for reopening of assessment u/s 147 of the Income tax Act, 1961 is provided to you as under:-

During the course of assessment proceedings for the A.Y. 2008-09, it is observed from the details by the assessee that the assessee had told his residential unit being first, to one Mr. Sunil Khemka. The date of sale agreement being 04.05.2005 of the flat falls in the financial year 2005-06 and the sale consideration for the same is Rs,27,26,000/-. The assessee has not declared this sale transaction the Return of Income filed for A.Y. 2006-07 resulting thereby in under assessment(non-assessment) of income under the heading long Term Capital Gain' Of Rs.11,27,278/-. Assessment u/s 43(3) of the I.T. Act, 1961 has been made for the A. Y, 2006-07 vide order dated 08.12.2008.

I have, therefore, reasons to believe that income in the form of Long Term Capital gain of Rs. 11,27,278/- chargeable to tax has escaped assessment for the Assessment Year 2006-07 as per provisions of Section 147 of the I.T. Act. Accordingly, Sanction u/s 151 of the I T. Act for issuing Notice U/S 148 of this Act to reopen the assessment u/s 147 of the Act is hereby solicited, "

11. In ITA. No. 2787/M/2017 the reasons have been given that the assessee received the sale consideration of Rs.19,80,500/- in the assessment year of 2005-06 and the assessee did not declare the long term capital gain to the tune of Rs 9.90,123/. for tax in the return of income. The assessee submitted his reply that the assessee filed the objection by virtue of letter dated 03.12.2012 which lies at page no.75 to 82 of the paper book in ITA. No. 2787/M/2017. The assessee also filed the objection in ITA. No.2788/M/2017 by virtue of letter dated 03.12.2012 which lies at page no. 69 to 76 of the paper book. It is specifically explained that the issue was earlier examined by concerned AO at the time of original assessment u/s 143(3) of the Act. In this regard, the ledger was produced on dated 15.10.2007 which lies at page no. 96 to 97 of the paper book. Accordingly, the Assessing Officer also raised the question about non-offering the tax on sale

consideration received from Bijay Kumar Kishorepuria and Mr. Sunil Khemka in his notice dated 06.11.2008 which was replied but the Assessing Officer nowhere choose to tax in the assessment years 2006-07. Needless to say that the capital gain tax has been offered to tax in the A.Y. 2008-09 after the receipt of the full payment. The Assessing Officer nowhere choose to tax the long term capital gain in the A.Y. 2005-06 and 2006-07 during the original assessments u/s 143(3) of the Act. The reopening u/s 147/148 of the Act for assessment years 2005-06 and 2006-07 is otherwise also untenable as it has been reopened after a period of four years where the original assessment was completed u/s 143(3) of the Act. In this context, the proviso to Section 147 of the Act is attracted and the reopening would be justified only when the AO has recorded that there is a failure on the part of the assessee to disclose fully and truly all facts necessary for his assessment. In this case, there is no such charge by the assessee. It is not in dispute that the assessee transferred flats along with undivided share in the plot to Bijay Kumar Kishorepuria and Mr. Sunil Khemka. The sale would be deemed to be concluded after the full payment and on the date of registration which effected after the A.Y. 2006-07. In this regard we also find in support of law settled in **Shri Raj Rani Devi Ramna Vs. CIT-(1993) 201 ITR 1032 Patna, Suraj lamp and Industries P. Ltd. Vs. State of Harayana and Anr. (2012) 340 ITR 1 Supreme Court.** The assessee admitted that the sale-deed was registered in the year 2011-12 but he received full

consideration in the A.Y. 2008-09, therefore, he offered the same to tax under the head of long term capital gain. In the above said facts and circumstances of the case, the Long term capital gain has been assessed to tax on protective basis in the A.Y. 2008-09. The long term capital gain assessed on protected basis in the assessment year 2008-09 is hereby treated as substantive assessment. Therefore in the said circumstances, we are of the view that the notice u/s 148 of the I.T. Act, 1961 to the assessee dated 21.03.2012 for the A.Y. 2005-06 and 2006-07 are not justifiable and are held to be wrong against law and facts and are hereby ordered to be set aside by relying upon the law settled in **Hindustan Lever Ltd. Vs. R. B. Wadkar (2004) 268 ITR 332 (Bom)**, **Arthur Anderson Vs. ACIT (2010) 324 ITR 240 (Bom)**, **Bhavesh Developers Vs. AO 329 ITR 249 (Bom)**, **Lupin Limited Vs. ACIT (2014) 224 Taxman 225 (Bom)** etc. In view of the said circumstances, we allowed the claim of the assessee for the A.Y. 2005-06 & 2006-07 in ITA. No. 2787/M/2017 and 2788/M/2017 respectively and order to treat the substantive assessment order in the appeal of the assessee in respect of ITA. No.7603/M/2011.

12. In the result all the appeals filed by the assessee are hereby ordered to be allowed.

Order pronounced in the open court on 19.03.2018

Sd/-

(G.S. PANNU)

Sd/-

(AMARJIT SINGH)

लेखासदस्य / ACCOUNTANT MEMBER न्यायिकसदस्य/JUDICIAL MEMBER
मुंबई Mumbai; दिनांक Dated : 19.03.2018

Vijay

आदेशकीप्रतिलिपिअग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकरआयुक्त (अपील) / The CIT(A)-
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापितप्रति //True Copy//

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai