

**IN THE INCOME TAX APPELLATE TRIBUNAL
CHANDIGARH BENCHES, 'A' CHANDIGARH**

**BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER &
Ms. ANNAPURNA GUPTA, ACCOUNTANT MEMBER**

ITA Nos. 369 to 371/Chd/2016
Assessment Years: 2008-09 to 2010-11

Sh. Mohinder Singh Sanghera,
81, Lindenlea Compton,
Wolverhampton,
United Kingdom-WV38BQ

Vs. Asstt. Director of I.Tax,
International Taxation,
Chandigarh

PAN No. CMZPS4270H

&
ITA Nos. 372 to 374/Chd/2016
Assessment Years: 2008-09 to 2010-11

Sh. Jatinder Singh Chatta,
Springhill House,
Walsall Road, Springhill Lichfield,
England- WS 140 BX, United Kingdom

Vs. Asstt. Director of I.Tax,
International Taxation,
Chandigarh

PAN No. AMZPC6933B

(Appellant)

(Respondent)

Appellant By : Sh Samir Mahajan, CA
Respondent By : Smt.Chanderkanta, Sr. DR

Date of hearing : 17.07.2018

Date of Pronouncement : 17.09.2018

ORDER

Per Sanjay Garg, Judicial Member:

The present is bunch of appeals preferred by the different assesseees are against the separate orders of Commissioner of Income Tax (Appeals)-43, New Delhi [hereinafter referred to as 'CIT(A)'] dated 29.1.2016 (in ITA Nos 369 to 371/Chd/2016) & dated 8.2.2016 (in ITA Nos. 372 to 374/Chd/2016).

2. Since common issue is involved in the captioned appeals, hence, the same have been heard together and are being disposed of by this common order. For the sake of conveniences, **ITA No. 372/Chd/2016** in the case of Jatinder Singh Chatta is taken as a lead case for narration of facts.

3. The brief facts of the case are that assessee is a tax resident of United Kingdom (U.K). During the financial year 2007-08, assessee invested in an upcoming project of Omaxe Ltd. along with four other investors. The assessee made payment of 95% of the sale price and was provisionally allotted fourth and fifth floors in a proposed commercial complex. In lieu of such 95% advance payment, Omaxe Ltd. was to pay assured return on monthly basis to assessee till the time possession of the commercial space was handed over. Such payment was made by Omaxe Ltd from assessment year 2008-09 to assessment year 2012-13 after deduction of tax u/s 195 @ 15% under the India-U.K. Double Taxation Avoidance Agreement (DTAA)

The Assessing officer on the basis of information received by him had reopened the assessment and asked the assessee to file its return of income. The assessee accordingly filed its return of income and offered to tax the assured return received from M/s Omaxe Limited treating the same as interest income. Since the TDS @ 15% has already been deducted by Omaxe Limited in accordance with article 12 of the DTAA between India and U.K., income was offered to tax @ 15% accordingly. The Assessing officer, however, was of the view that the assured return received by the assessee from Omaxe Limited was not the interest income, rather he treated the same as return from investment and assessed the same as 'income from

other sources' and thereby making the addition of Rs. 1,63,939/ into the income of the assessee for the year under consideration.

4. Identical facts are there in all the appeals except variation in the amount of assured return received or the amount of addition made by the Assessing officer as per discussion made above. The additions so made by the Assessing officer have been confirmed by Ld. CIT(A). The assessee thus has come in appeal before us.

5. We have heard the rival contentions. Ld. Counsel for the assessee has stressed upon three points. Firstly, that the reopening in this case was bad in law. Secondly, the amount of assured return received by the assessee was a capital receipt which goes on to reduce the cost of the asset and thirdly that the assessee had rightly returned the same as interest income and paid tax @ 15% as per article 12 of the India - U.K. DTAA.

6. The Ld. DR, on the other hand has relied on the findings of the lower authorities.

7. We have considered the rival submissions and have also gone through the record. Admittedly, the assessee booked the commercial floors in the proposed upcoming commercial complex to be built by Omaxe Ltd. The assessee paid 95% of the sale price as advance money against which it received assured return. Now, the question before us is relating to the nature of the above receipts / monthly returns. Apart from that, the assessee has also raised legal objection about the validity of the reopening of the assessment. He invited our attention to the reasons recorded and submitted that the Assessing officer in the reasons recorded has given two reasons; firstly, that the source of the investment made by the assessee is

to be verified. Secondly, the Assessing officer had information that the assessee had received the assured returns from Omaxe Ltd. but the assessee had not filed his return of income. The Ld. counsel has further submitted that as per the provisions of section 115A, sub section (5), it is not necessary for an assessee who is a non-resident to furnish return u/s 139 of the Act, if his income consisted only of income referred to in clause (a) of sub section (1) of section 115A, which include interest income and further that the tax deductible at source under the relevant provisions has been deducted from such income. The contention of the Ld. counsel in this respect has been that since the assessee did not have any income other than the interest income received from Omaxe Ltd. and Omaxe Ltd had already deducted tax at source @ 15% as per the India - U.K. DTAA and, hence, the assessee was not necessarily required to file return of income.

The Ld. counsel's submissions in this respect have been that the reopening cannot be done just to verify the source of investment in the absence of any information or reasons to believe of escapement of income. That the assessment cannot be reopened for making fishing and roving inquiries. Further, that the second reason recorded that the assessee had not filed the return, was not tenable as the assessee as per the provisions of the Income Tax Act was not necessarily require to file the return of income as discussed above.

8. We are not convinced with the above arguments of the Ld. Counsel for the assessee. A perusal of the copy of the reasons recorded reveals that the Assessing officer has not used the word 'interest income' rather he mentioned that he had the information that the assessee had been receiving assured returns on the investment made in Omaxe Ltd. Accordingly, he

reopened the assessment and determined the nature of income as 'income from other sources' and computed the income of the assessee accordingly. In view of this, it cannot be said that the Assessing officer was supposed to assume that the assessee was not required to file the return of income as per the provisions of section 115A sub-section (5) or that the Assessing officer was of the view that the assessee has been receiving interest income only. In view of this, the reopening of the assessment is held valid.

9. Now, coming to the merits of the case, the Assessing officer while making the impugned additions has relied upon the definition of 'interest' as provided under article 12 of the India –U.K. DTAA, which read as under:-

“The term interest as used in Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtors profits, and in particular, income from Government Securities and income from bonds and debentures, including premiums and prizes attaching to such securities, bonds or debentures but, subject to the provisions of paragraph 9 of this Article, shall not include any item which is treated as a distribution under the provisions of Article 11 (Dividends) of this convention.”

10. The Assessing officer has also referred to the clause 23 of the allotment letter issued by the Omaxe Ltd to the assessee, which reads as under-

“23. Unless a conveyance deed is executed and registered, the company shall continue to have full authority over the said Unit and all amounts paid by the Allottee (s) under this allotment shall merely be a token payment for purchase of the allotted unit and shall not give him any lien or interest in the said Unit until he has complied with all the terms and conditions of this Allotment and Conveyance of the said Unit has been executed and registered in his favour.”

A perusal of the above clause 23 of the Allotment letter reveals that as per the terms and conditions of the allotment letter, unless and until the Conveyance deed is executed and registered, the company i.e. Omaxe Ltd will continue to have full authority over the proposed Unit and all the amounts paid by the allottee shall merely be a token payment and shall not give any lien or interest in the said unit to the allottee. Hence, as per the above clause (23), even after payment of 95% of the sale consideration, in advance, the assessee did not get any lien or interest in the proposed unit to be constructed by Omaxe Ltd. However, in lieu of the 95% of the total sale consideration settled, the Omaxe Ltd. agreed to pay a certain fixed monthly amount to the assessee in the name of assured return. Now the question arises what is the nature of the advance payment made by the assessee to the Omaxe Ltd and what is the nature of the amount received by the assessee as assured return. The facts and circumstances on the file reveal that the property for which the assessee had paid the money was not in existence at the time of making payment and even subsequently was not capable of yielding any income in the shape of rent, lease money and even otherwise was not capable to be commercially exploited.

11. Under the circumstances, it cannot be said that the assured return was any return from the property in respect of which the assessee had paid the amount. Even as per the clause 23 of the allotment letter as discussed above, even for making the investment, the payment of the advance money at the rate of 95% of the agreed price, the assessee did not get right of lien in the proposed property. The assessee, under the circumstances, had a claim of debt against the Omaxe Ltd, which means the assessee had

advanced money to the Omaxe Ltd. which was nothing but a debt claim till the proposed property is constructed, possession handed over to the assessee and the conveyance deed executed and registered. In our view, it was a financial transaction and the assured money return received by the assessee was nothing else than the interest received by the assessee on the finances made by the assessee to the Omaxe Ltd to be used for the construction of the property. Therefore, the Omaxe Ltd had rightly deducted the tax @ 15% of the interest / assured return paid to the assessee. Even the assessee on being asked to file the return has also treated the said receipts as interest income. However, subsequently, the assessee changed his stand and come with a plea that the assured return is only in the nature of capital receipt. The assessee in this respect has placed reliance on several decisions of the High Courts and Supreme Court. Without referring to each of the decision, we may point out that the decisions referred to by the assessee are not applicable to the facts and circumstances of the case e.g. in the case of 'CIT Vs. Saurashtra Cement Ltd (2010) 325 ITR 042 (SC) : 192 taxman 300 (SC), the assessee in that case had received liquidated damages for delay in supply of plant and machinery. The Hon'ble Supreme Court held that the damages were directly and intrinsically linked with the procurement of the capital assets i.e. cement plant.

12. Similarly in the other case laws relied upon by the Ld. Counsel for the assessee, it was held that if any expenditure is incurred such as interest paid for acquiring assets, the same will be added to the cost of the assets. However, none of the case laws relied upon by the assessee as discussed above, are applicable to the facts and circumstances of this case. Neither

any damages were paid by the Omaxe Ltd. to the assessee for late delivery of the possession of the commercial floors in question nor any advance money was paid by the assessee to get the commercial floors at some concessional rate or on an early date rather as discussed above, as per the clause of the agreement, even after payment of 95% of the price, the assessee did not get right or lien in the property and as discussed above, this was a financial transaction between the assessee and Omaxe Ltd. In view of this, we hold that the assured return received by the assessee was in the nature of interest and the assessee has rightly returned / offered the same as interest income.

13. In view of this, we do not find any justification on the part of the lower authorities in treating the receipts of the assessee as 'income from other sources'. We, accordingly, set aside the impugned order and direct that the assessee in this case has rightly paid the taxes as India – U.K. DTAA. No further addition is warranted. However, the claim of the assessee that it is a capital receipt not liable for taxation is rejected. The appeal of the assessee is, therefore, treated as allowed.

14. Since the facts and issue involved in all the appeals are identical, hence, the decision arrived at will apply mutatis-mutandis to all the captioned appeals (ITA Nos. 369 to 371 and 373 to 374/Chd/2016), and accordingly all the appeals are treated as allowed in the same terms and with identical directions.

Order pronounced in the Open Court on 07.09.2018

Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER
Dated : 07.09.2018

Sd/-
(SANJAY GARG)
JUDICIAL MEMBER

Rkk

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT*
4. *The CIT(A)*
5. *The DR*