आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD - BENCH 'C'

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

आयकर अपील सं./ **ITA No.2523/Ahd/2015**
*निर्धारण वर्ष***Asstt. Year: 2013-14**

ITO, Ward-2(1)(2) Navjivan Trust Bldg. Ahmedabad.	Vs.	M/s.Kalika Buildcon P.Ltd., 53, Nirant Park Opp: Sun & Step Club, Thaltej, Ahmedabad 380 0061. PAN : AAACK 3275 G

अपीलार्थी/ (Appellant)		*प्रत्यर्थी/* (Respondent)

Revenue by	:	Shri Lalit P. Jain, Sr.DR
Assessee by	:	Shri B.K. Patel, CA

*सुनवाई की तारीख/*Date of Hearing : 13/12/2018
*घोषणा की तारीख /*Date of Pronouncement: 15 /01/2019

*आदेश/***O R D E R**

PER AMARJIT SINGH, ACCOUNTANT MEMBER:

This is Revenue's appeal against order of ld.CIT(A)-2, Ahmedabad dated 12.7.2016 passed for the assessment year 2013-14.

2. Sole issue raised in this appeal is that the ld.CIT(A) has erred in law and on facts in deleting addition of Rs.90.00 lakhs on account of alleged extra income reflected in the AIR.

3. Brief facts of the case are that the assessee is engaged in real estate development and contractor work. The assessee has filed its return of income showing total loss of Rs.(-)10,92,481/-. The case of the assessee was selected for scrutiny assessment by issuance of notice

under section 143(2) of the Act. During the course of assessment proceedings, the ld.AO noticed that the assessee along with Shubhratna Co-op. Hsg. Society and one Smt.Vanitaben Dilipkumar had sold an immovable property viz. Shop No.7 situated at 3rd Eye-2 Complex of Subhratna Co-op. Hsg. Society Ltd. to one Shri Kutubdin F. Kapidia for a consideration of Rs.281 lakhs. The AO sought information from the assessee in this regard. It was explained by the assessee that the assessee-company was appointed as developer by the society viz. Subhratna Co-op. Housing Society to develop the said scheme as per the development agreement. The assessee was also authorized by the society to accept amount of booking and sale of units in the said scheme on behalf of the assessee. It was explained that the property in question was earlier booked by Smt.Vanitaben Dilipkumar for Rs.179 lakhs. Thereafter the said shop no.7 was sold to Kutubdin F. Kapidia for a consideration of Rs.281 lakhs. The buyer has paid a sum of Rs.90 lakhs to the assessee, which was taken by the assessee as credit to the society and reflected in their books. The balance amount of Rs.191 lakhs was paid to Vanitaben Dilipbhai (Rs.179 lakhs against her booking amount and the balance amount of Rs.12.00 lakhs as her profit on sale). After considering this explanation, the AO proposed an addition of Rs.90.00 lakhs, because according to AO, developer has received an amount of Rs.90 lakhs and Smt.Vanitaben Dilipbhai has received Rs.179 lakhs plus Rs.12 lakh as profit. Therefore, an amount of Rs.90 lakhs received by the assessee was its income/surplus generated out of the transaction, and was subjected to tax. The assessee explained that the amount of sale consideration was received by the assessee on behalf of the society as per development agreement entered into with the society and the assessee and the same was reflected in the books of accounts. The amount of Rs.90 lakhs was received by the assessee as credit to the Society account and the same was shown accordingly in their books, and therefore, there was no income in the hands of the

assessee. This explanation of the assessee was not accepted by the ld.AO. The AO was of the view that as per clause -25(a) of the development agreement between the assessee and the society, all surplus/profit received from the buyers of the property shall absolutely belonging to the developer i.e. the assessee, and the amount of Rs.90 lakhs received by the assessee was to be treated as extra income/profit earned by the assessee, and was taxed accordingly. The AO accordingly made addition of Rs.90.00 lakhs in the hands of the assessee. Aggrieved assessee went in appeal before the ld.CIT(A), who after considering the issue in details allowed claim of the assessee and deleted the impugned addition. The Revenue is now before the Tribunal against order of the ld.CIT(A).

4. Before us, the ld.DR supported order of the ld.AO and further submitted that as per clause-25(a) of the development agreement entered into between the assessee and the Society, whatever profits and/or surplus generated out of the sale of the property belonged to the assessee and there is no case that the assessee has received the said sum of Rs.90 lakhs on behalf of the society. Therefore, AO has rightly added the same to the income of the assessee, and the finding of the ld.AO requires to be confirmed.

5. On the other hand, the ld.AR relied upon the order of the ld.CIT(A) and reiterated submissions as made before Revenue authorities. He further submitted that the amount of Rs.90 lakhs received from the buyer was not surplus or profit earned by the assessee, rather it was balance amount received against the sale price of Rs.269 lakhs as agreed vide *banakhat* agreement. It was received by the assessee on behalf of the society and due credit has been given to the society in their accounts. Therefore, there is no question of treating the same as income of the assessee.

6. We have heard both the parties and gone through the orders of the Revenue and other details available on record. The case of the assessee is that amount of Rs.90 lakhs received by it was on behalf of the society which was duly reflected in accounts of the society, and therefore, question of treating the same as profit to this extent in the hands of the assessee does not arise. Whereas, the case of the Revenue was that as per clause 25(a) of the development agreement, profit or income or any benefit or loss that may arise out of the sale of property in the project belongs to the developer i.e. assessee, and therefore, surplus/profit generated out of such transactions will belong to the assessee and is to be taxed accordingly. We find that the ld.CIT(A) has considered all these aspects in detail. He has considered development agreement entered into by the assessee and the society, and also accounting treatment reflected in accounts of both the parties and came to the conclusion that an amount of Rs.90 lakhs received in the year under consideration was the balance amount received for and on behalf of the society, in pursuance of the right of collection as per the agreement and it was never been the profit of the assessee. He further observed that the impugned amount of Rs.90 lakhs generated from the original transactions was belonged to the society and not the assessee. The assessee was only authorized to collect the amount on behalf of the society and therefore, it was not the income of the assessee. The ld.CIT(A) also made a logical conclusion that when the assessee had received an amount from Rs.179 lakhs at the time of booking of shop no.7 by the said Vanitaben Dilipkumar in the preceding years i.e. Rs.1 crore in F.Y.2008-09, Rs.78 lakhs in F.Y.2009-10 and Rs.1.00 lakh in F.Y.2012-13, the same was not treated as income of the assessee in the respective years, then how the receipt of Rs.90 lakhs could be taxed in the year of receipt i.e. A.Y.2013-14 respectively. The ld.CIT(A) also found that the sale in the cases of other units in earlier years, by which the assessee has received sale proceeds for and on

behalf of the society, has not been brought to tax in the hands of the assessee, for the simple reason that the same was not belonging to the assessee, but was received on behalf of the assessee society. This was accepted by the department. Therefore, the findings of the AO were factually as well as logically incorrect. For better conceptualization of the issue and to arrive at a just conclusion, we would quote the observation and finding of the ld.CIT(A) recorded in his order, which read as under:

> *"2.3. Decision:*
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> *I have carefully considered the facts of the case, the assessment order and the written submission of the appellant. The appellant is engaged in the business of real estate development and contractors. The AO has made the addition of Rs.90 lakhs in the hands of the appellant towards sale proceeds received from Kutbuddin F. Kapadia and 9 other persons received in respect of the last installment of the sale proceeds of shop No.7 sold owned by the society. The appellant was also confirming party to the said sale deed. It has been noticed that in respect of the aforesaid shop, the appellant company has received Rs.179 lakhs in the preceding years through different cheques from Vanitaben Dilipkumar as booking amount being a developer, to whom initially the aforesaid shop was sold for the society. Subsequently this shop was sold in the year under consideration by Vanitaben Dilipkumar to Kutubudin F. Kapadia in consideration of Rs.281 lakhs which included the profit of Rs.12 lakhs received by Vanitaben Dilipkumar.*
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> *2.4. The AO observed that as per the development agreement entered by the appellant with the society namely Subhratna Co.op, Housing Society Ltd. dtd. 10.07.2008 and its clause No.25 (a) it was observed that the profit or income or any benefit or loss that may arise out of the disposal of the premises (land and construction and infrastructure) of the proposed project will belong to the developer. Further all surplus that may be received in addition to the cost of the project to include the said consideration of the land payable to the society, received from the prospective acquirers of the premises shall absolutely belong to the developer as its profits. The losses, if any, shall also be borne and paid by the developer. As per the interpretation of the A.O. about the aforesaid clause Rs.90 lakhs as sale consideration*

received during the year from the aforesaid party was the surplus received as income of the appellant and same was held to be taxed in its hands.

2.5. The claim of the assessee that the aforesaid amount was received by it for and on behalf of the society and the said amount of Rs.90 lakhs has duly been accounted for in the books of the society was found not acceptable since as per agreement whatever income/profit has been received, the same belong to the appellant company and the question of accounting the same In the hands of the other party does not arise at all. The AO also relied upon the clause-21 of the development agreement which states that the developer shall be entitled to receive and retain with all the monies from the persons to whom the said premises are sold or allotted as the case may be, in the scheme to be constructed by the developer on the said land to appropriate the same in such a manner as the developer may deem fit.

2.6. In view of the aforesaid clauses to the development agreement, the AO observed that the amount of Rs.90 lakhs received by the society from Kutubuddln F. Kapadia and others belonged to the appellant company towards the sale of the shop and it is not the case that the appellant company received the same on behalf of the society. Thus the addition was made as income/profit earned by it during the year under consideration from the above project.

2.7. On the other side, the appellant has submitted that the society has floated the scheme namely 3rd Eye-2 on its land for which the appellant has been appointed as developer of the said scheme as per the development agreement provided to the AO in the assessment proceedings. The appellant was authorized by the society to accept the amount of booking and sale of units in the said scheme on behalf of the society. Accordingly, the appellant had received Rs.179 lakhs from time to time from Vanitaben Dillpkumar who had booked shop No.7 on ground floor of the said scheme against the total consideration of Rs.269 lakhs as agreed by the registered Banakhat agreement dtd. 18.8.2009 entered into between the Vanitaben Dilipkumar as buyer and Shubharanta Co,Op. Housing Society as owner of the premises to which the appellant was a confirming party. A copy of the said registered Banakhat agreement was provided to the appellant. As per the aforesaid agreement, out of the sale consideration of Rs.269 lakhs the appellant had received Rs.179 lakhs in the preceding years on behalf of the society and the balance amount of Rs.90 lakhs in the year under consideration for the society. Thereafter in the year

under consideration this shop was sold to Kutubudin F. Kapadia and 9 other persons for Rs.281 lakhs by Vanitaben Dilipkumar by earning the profit of Rs.12 lakhs. Since the society had to obtain balance of Rs.90 lakhs out of the sale consideration which has been received by the appellant during the year under consideration while registered the sale deed in favour of Kutubuddin F. Kapadia. So the appellant submitted that it was the money received from Shrl Kutubuddin F. Kapadia for and on behalf of the society which does not belong to the appellant. Therefore, the question of having any surplus/profit of the project to the above extent of Rs.90 lakhs which was nothing but the sale consideration belonging to the society does not arise at all.

2.8. Having considered the facts and submission, it is noticed that a registered development agreement dtd. 10.7.2008 was made by the appellant with the society on final Plot No.680/2/ part of TP Scheme No.3/5 on which the scheme in the name of 3rd Eye-2 was launched. This development agreement was subsequently clarified vide agreement dtd. 07.10.2008. The relevant clauses of the agreement are reproduced as under:-

> *(C) The aforesaid lands bearing (i) Final Plot No. 680/2 (Part) (ii) Final Plot No. 680/3 (iii) Final Plot No. 681/6/1 and (iv) Final Plot No. 681/6/1 Paiki 1, collectively admeasuring 3084 Sq. Mtrs. (As per revenue records and inclusive of land admeasuring 149.88 Sw. Mrts. for road widening) are adjoining to each other. The Ahmedabad Municipal Corporation has approved the plan for amalgamation of said lands and issued its Raja Chitthi in this behalf (Ref. Raja Chitthi No, 10790/031108/A5484/M1 dated 03/12/2009. Full particulars of / description of the said lands are described in the FIRST SCHEDULE hereunder written and the same is hereinafter collectively referred to as "the said land". Further the said land is adjoining to land of Final Plot No. 680/1.*
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> *(F) As the party of the Second Part was desirous of having one commercial shop in the said Third Eye Two Complex, they had approached the Confirming Party hereto, for getting full information in respect of said Complex as a whole and the Confirming Party had given full information and particulars about the said Complex including the titles of the Society, approval of plans and all other permissions and sanction, alt types of building raw materials to, to be used in the complex / building, facilities and amenities provided / to be provided, common rights and*

responsibilities of allottee members and / or reserved rights upon some facility / utility given / to be given to members, area of different shops and offices, contribution / consideration to be paid by the allottee member/s, rights, responsibilities and obligations of allottee member/s, terms and mode of payment, addl. costs / charges to be paid, time schedule for completion of Scheme / Complex etc. The confirming party had also shown to the Party of the Second Part all the documents, writings, permissions, plans, sanctions etc. pertaining to the said land and the said Complex, building and the Party of the Second Part has perused / verified the same and after being fully satisfied the party of the Second Part had requested the party of the Third Part to make available for them, Shop No. 06 for the party of the Second Part. In this behalf, all the terms of allotment of said Shop No. 06 were finally decided, fixed and agreed by and between the parties hereto,"

2.9. As per this agreement the appellant was entitle to receive 25% of the total cost of the construction as a development fees being income. Through this agreement, the appellant has been given the right to make the booking or to enter into an agreement and collect the money for booking amount for sale of the unit developed for and on behalf of the said society. All the receipts from the booking amount were shown in the balance sheet as advance from customers and amount given to the said society were shown in the loans and advances to others in pursuance to the agreement.

2.10. It has been noticed that as against the sale of shop No.7, at ground floor for the consideration of Rs.269 lakhs sold to Vanitaben Dilipkumar advance payment of Rs.179 lakhs was received by the appellant for and on behalf of the society in the preceding years i.e. Rs.1 crore in F.Y. 2008-09, Rs.78 lakhs in F.Y. 2009-10 and balance Rs. 1 lakh in F.Y. 2012-13 as is verifiable from the ledger account copy of Smt. Vanitaben Dilipkumar in the books of accounts of the appellant. Thereafter Vanitaben sold this property for Rs.281 lakhs vide registered sale deed dtd. 04.01.2013 in which the appellant was confirming party to the said sale deed being developer. By virtue of this sale deed appellant received Rs.90 lakhs due as per the original registered agreement to sale dtd. 18.08.2009 and Vanitaben got the balance amount of Rs.l2 lakhs as a profit as mentioned in the sale deed. Therefore, Rs.90 lakhs received in the year under consideration is the balance amount received for and on behalf of the society in

pursuance to the right of collection as per the development agreement and it was never been the profit of the appellant.

2.11. Receiving the balance amount of Rs.90 lakhs does not amount income to the appellant as it was from the original transaction which was belonging to the society and not to the appellant. The appellant has only authorized to collect the amount for and on behalf of the said society and therefore it was not the income of the appellant. This fact was also evident from the accounting entries made by the appellant in its books of account by debiting the account of the party and crediting the account of the society. As has been mentioned in the preceding paras that the appellant had the income in the form of development fee @25% of the cost of the construction which has been duly recorded on year to year basis in its profit and loss account.

2.12. Considering the facts, the logic of taxing Rs.90 lakhs received as the last installment of the sale consideration of the Shop No.7 for and on behalf of the society is not acceptable. When the appellant had also received Rs.179 lakhs from the same party namely Vinitaben Dilipkumar in the preceding years (Rs. 1 crore in F.Y. 2008-09, Rs.78 lakhs in F.Y. 2009-10 and balance Rs.1 lakh in F.Y. 2012-13) and the same have not been treated as income of the appellant in the respective years, then on the same logics the receipts of Rs. 90 lacs was also to be not taxed in the year of receipt i.e. A. Y. 2013-14 respectively. Not only with regard to the sale of shop No.7 but for the sale of other units for which the appellant has received the sale proceeds for and on behalf of the society has not been brought to tax in the hands of the appellant obviously for the reason that those were not pertaining to the appellant but the same were received as an agent for and on behalf of society. Thus, there was no difference on facts with regard to receipts of the sale proceeds of Rs. 90 lacs in the year under consideration.

2.13. It is worth here to mention that in the preceding years the appellant had collected the receipts towards the sale proceeds of various units for and on behalf of the society in different years as under:-

SHUBHRATNA CO.OP. HOU. SOC. LTD.

Year	*Unit*	*Sq. Feet*	*Doc Amount*	*Charges*	*Sales*
31/03/2009					
31/03/2010	*12*	*30337.00*	*149287500.00*	*2936500.00*	*152224000.00*

31/03/2011	*11*	*21442.00*	*50131364.00*	*3898900.00*	*54030264.00*
31/03/2012	*3*	*9680.00*	*41721000.00*	*2015700.00*	*43736700.00*
31/03/2013	*3*	*9473.00*	*53450000.00*	*297000.00*	*53747000.00*
31/03/2014	*3*	*8883.00*	*44030429.00*		*44030429.00*
Total	*32*	*79815.00*	*338620293.00*	*9148100.00*	*347768393.00*

2.14. Further it has also been noticed that the appellant had received the development fee in different years from the society and offered for taxation in the profit and loss account of the respective years which had not been doubted by the A.O. Along with the development fee received from the society, the appellant had charged the service tax from the society and the society has also made the TDS upon such development fee payments to the appellant. The details of such receipts are noted as under:-

SHUBHRATNA CO.OP. HOU. SOC. LTD.

Sr. No.	*A.Y.*	*Development fee receive from society*	*Service Tax*	*Development fee receive from society Total*	*TDS*
1	*2009-10*	*3019792.00*	*360997.00*	*3380789.00*	*383043.00*
2	*2010-11*	*7030000.00*	*724090.00*	*7754090.00*	*878538.00*
3	*2011-12*	*4034335.00*	*415537.00*	*4449872.00*	*741 646.00*

2.15. Thus, the appellant had the right to collect the development fee in consideration to the development of the scheme which was @25% of the cost of the project which has been duly shown as income in the profit and loss account from inception of the project and the same has not been rebutted by the A.O. Further the appellant has also received the sale proceeds in respect of sale of the units in the scheme in different years of which details have been noted in the aforesaid paras and no such sale proceeds required to be taxed in the hands of the appellant as those were belonging to the society only and not to the appellant. In view of the above, the sale proceeds of Rs.90 lakhs received in the year under consideration as has been treated as income of the appellant though not belonging to it is not justified.

2.16. In view of the aforesaid discussion, there Is no case to make the addition in the hands of the appellant for the sale proceeds of the Shop No.7 which is owned and belonging to the society only. The appellant was not the owner of the said scheme but it had the right to develop the scheme only. The AO's objection that as per clause-25(a) the surplus of the project has to be taxed in the hands of the appellant only is without any basis. Nowhere the AO has worked out the net surplus derived on the entire scheme of the society. An amount of Rs.90 lakhs received by the appellant in the last installment of the Shop No.7 cannot be said to be the surplus /profits of the scheme and hence same is not liable to be treated as income of the appellant in view of the clauses of the development agreement as alleged by the A.O.

2.17. For the sale proceeds received in respect of various units in the scheme the appellant has never credited such sale proceeds in its profit and loss account but the same have been credited to the account of the society only. In other words, the profit and loss account have never been given effect in respect of the receipts towards sale proceeds and payments made to society thereof. All these entries have been made in the personal account of the parties and society. The balances in their ledger account have been carried to the balance sheet which were in order. These accounting entries have never been challenged by the AO in the year under consideration and also in the preceding years.

2.18. In view of the aforesaid discussion, the addition made by the AO in the hands of the appellant is found untenable and same is deleted. Thus the ground of appeal is allowed."

7. On perusal of the above order of the ld.CIT(A), we find that the ld.CIT(A) has analyzed all materials viz. books of accounts of the assessee, receipts collected by the assessee towards sale of various units on behalf of the society in the preceding years, details development fees along with TDS collected from the society, relevant clauses of development agreement entered into by the assessee and the society, while arriving at the conclusion. There is no material placed before us, which compel us to deviate from the finding of the ld.CIT(A). Therefore, considering well reasoned order of the ld.CIT(A), we do not

find merit in the appeal of the Revenue. Order of the ld.CIT(A) is upheld, and the ground of appeal of the Revenue is rejected.

8. In the result, appeal of the Revenue is dismissed.

Order pronounced in the Court on 15th January, 2019 at Ahmedabad.

Sd/-	Sd/-
(RAJPAL YADAV)	(AMARJIT SINGH)
JUDICIAL MEMBER	ACCOUNTANT MEMBER