

आयकर अपीलीय अधिकरण, पुणे न्यायपीठ "ए" पुणे में
**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE**

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री डी. करुणाकरा राव, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI D. KARUNAKARA RAO, AM

आयकर अपील सं. / **ITA No.1204/PUN/2015**
निर्धारण वर्ष / **Assessment Year : 2010-11**

ITO, Ward-3(1),
Pune.

.... अपीलार्थी/Appellant

Vs.

Shri Arun S. Patil,
1206/42A, Lokmat Bhavan,
J.M. Road, Pune-411004.

PAN : AAVPP3183F

.... प्रत्यर्थी / Respondent

आयकर अपील सं. / **ITA No.1224/PUN/2015**
निर्धारण वर्ष / **Assessment Year : 2010-11**

Shri Arun S. Patil,
1206/42A, Lokmat Bhavan,
J.M. Road, Pune-411004.

PAN : AAVPP3183F

.... अपीलार्थी/Appellant

Vs.

ITO, Ward-3(1),
Pune.

.... प्रत्यर्थी / Respondent

Assessee by : Shri Nikhil Pathak
Revenue by : Shri S. B. Prasad, CIT

सुनवाई की तारीख /
Date of Hearing : 20.02.2019

घोषणा की तारीख /
Date of Pronouncement: 29.04.2019

आदेश / ORDER

PER D. KARUNAKARA RAO, AM :

These are cross appeals filed by the Revenue as well as by the assessee against the order of the CIT(A)-3, Pune dated 28.05.2015 for the assessment year 2010-11.

2. The respective grounds raised by the Revenue as well as by the assessee are extracted hereunder :-

“ITA No.1204/PUN/2015 (By Revenue):

1. The ld. CIT(A) order is contrary in law and to the facts and circumstances of the case.
2. The ld. CIT(A) grossly erred in deleting the additions of Rs.20,04,660/- and Rs.9,28,33,874/- being the gain on sale of land.
3. The ld. CIT(A) grossly erred in deleting the addition ignoring the fact that the assessee has **received the entire sale consideration** and the assessee is in practice of deferring the sales which has been proved by the Assessing Officer.
4. The ld. CIT(A) grossly erred in deleting the addition when the Section 2(47)(iv) r.w.s. 53A of Transfer of Property Act indicate that gain on property is taxable in the year in which transaction were entered into even if the **transfer of an immovable property is not effected** or completed under the general law.
5. The ld. CIT(A) erred into ignoring that any transaction into any manner which have the effect of transferring or enabling or any immovable property u/s. 269UA(d) would also amount to transfer.
6. For these and such other grounds as may be urged at the time of hearing, the order of the ld. CIT(A) may be vacated and that of the Assessing Officer be restored.
7. The appellant craves leave to add, alter, amend or omit any of the above grounds of appeal during the course of the appellate proceedings.

ITA No.1224/PUN/2015 (By Assessee):

- 1] The learned CIT(A) erred in confirming an addition of Rs.56,26,016/- in respect of the transaction entered into with M/s. Ankit Enterprises without appreciating that no such income could be taxed in the hands of the assessee in this year.
- 2] The learned CIT(A) failed to appreciate that M/s. Ankit Enterprises had not completed the development of the entire land and hence, the amounts received by the assessee over several years could not be taxed as an income of the assessee in this year.
- 3] The learned CIT(A) erred in not appreciating that the income relating to the transaction entered into with M/s. Ankit Enterprises could be taxed only in the year in which the project is completed by M/s. Ankit Enterprises and hence, the addition made is not justified at all.
- 4] The appellant craves leave to add, alter, amend or delete any of the above grounds of appeal.”

3. Briefly stated the relevant facts include that the assessee is an individual and is engaged in the business of land aggregation from the farmers and, thereafter, subsequent sale of the same to the builders. The assessee earned the income from house property, business and other sources. The assessee filed the return of income declaring total taxable income of Rs.13,63,531/-. At the end of the assessment proceedings u/s 143(3) of the Act, the Assessing Officer recognized the income on sale transaction of lands and made various additions under the different heads. The contents of paras 3 onwards of the assessment order are relevant in this regard. The Assessing Officer disallowed the claim of set off of the

bank interest against the said recognized income on sale of land and made the addition of Rs.28,47,990/-. Further, the Assessing Officer noticed that huge sundry creditors appear in the Balance Sheet. As per the assessee, the sale advances received are shown in the books as the liabilities of the assessee. After examining the said claims of creditors, the Assessing Officer held that the assessee resorted to postpone the timing of "income recognition" in respect of the transactions of sale of land. In the process, the Assessing Officer held that the assessee deferred the recognition of income of sales and the corresponding tax liabilities. Thus, he made various additions involving the transaction of sale of (i) Land at Hadapsar sold to Kreato Developers, (ii) Land at Kolhapur sold to Kshitij Urban Developers Pvt. Ltd., (iii) Land at Wakad sold to Ankit Enterprises and (iv) Land at Bavdhan sold to Karan Saran Associates.

4. Further, the Assessing Officer made addition of Rs.5,64,995/- involving purchase of a car. There are other estimated addition of Rs.20,00,000/- on account of deferred sales. Thus, the Assessing Officer assessed the total income of the assessee at Rs.10,73,51,066/- against the returned income of Rs.13,63,531/-.

Aggrieved with the above order of the Assessing Officer, the assessee filed an appeal before the CIT(A). After examining each of the additions, the CIT(A) partly allowed the appeal of the assessee.

5. Aggrieved with the order of the CIT(A), the Revenue as well as the assessee are in appeal before the Tribunal with the above extracted respective grounds.

6. At the outset, ld. Counsel for the assessee submitted that the addition involving the transaction with reference to M/s. Ankit Enterprises

is the subject-matter of litigation from the assessee's side. He further submitted that the assessee's appeal is not pressed if the appeal filed by the Revenue is dismissed. Considering the same, we are of the opinion that the Revenue's appeal should be taken up first for adjudication on priority.

ITA No.1224/PUN/2015 (By Revenue)

7. The Revenue was aggrieved with the relief granted by the CIT(A) to the assessee with reference to the transactions on sale of land involving (i) Kreato Developers and (ii) Kshitij Urban Developers Pvt. Ltd.. In this regard, ld. Counsel for the assessee filed a written submission and submitted that the CIT(A) rightly deleted the addition involving the transactions with these two developers. Therefore, the same should be confirmed.

8. On the other hand, ld. DR for the Revenue relied on the order of the Assessing Officer.

9. We have heard both sides on the issues and also considered the written submission filed by the assessee before us. For the sake of completeness, the relevant paras of the 'written submission' are extracted hereunder :-

"1] In the deptl. appeal, the following additions which are deleted by the learned CIT(A) are being challenged :

a. Addition on account of proposed sale of land to M/s. Kreato Developers.

b. Addition on account of proposed sale of land to Kshitij Urban Developers Pvt. Ltd.

2] Addition on account of proposed sale of land to M/s. Kreato Developers :

2.1] In this case, the learned A.O. had made an addition of Rs.20,04,660/- in respect of proposed sale of land by the assessee to M/s. Kreato Developers. According to the A.O., the assessee had entered into a MOU for sale of land at Hadapsar with M/s. Kreato Developers. The said MOU was entered into on 04.03.2008 and copy of the same is given on page 55 to 76 of the Paper Book. The learned A.O. has held that the assessee has not offer the gain arising on the proposed sale of land. Accordingly, he has taxed the difference between the advance received and advance paid by the assessee of Rs.20,04,660/- as an income of the assessee.

2.2] The learned CIT(A) has deleted the said addition on the ground that the assessee had only entered into MOU with Kreato Developers and no actual sale of land has taken place. He has discussed this issue in paras 4 - 4.4 of his order. He has appreciated that there were certain obligations cast upon the assessee as per the said MOU which were not yet fulfilled and even the assessee had not entered into any sale deed in respect of the said land with Kreato Developers. Accordingly, the addition has been deleted by him.

2.3] The assessee submits that the addition made is not justified. The asst. year under consideration is A.Y. 2010 - 11 i.e. relating to F.Y. 2009 - 10. **The said MOU was entered into with M/s. Kreato Developers on 04.03.2008.** The learned A.O. has taxed the income on the basis of the said MOU. At the outset, it is submitted that no agreement has been entered into in F.Y. 2009 - 10 with Kreato Developers. Accordingly, there is no question of taxing any income in the hands of the assessee on the basis of the MOU dated 04.03.2008 in F.Y. 2009 - 10. Further, as held by the learned CIT(A), the various obligations cast upon the assessee have not been fulfilled in this year and therefore, there is no question of making any addition in the hands of the assessee on the basis of the MOU dated 04.03.2008. Accordingly, the addition has been rightly deleted.

3] Addition on account of proposed sale of land to Kshitij Urban Developers Pvt. Ltd :

3.1] The assessee had further entered into MOU with Kshitij Urban Developers Pvt. Ltd. for transfer of land situated at Kolhapur admeasuring 56 Hectares. **The said MOU was entered into on 31.03.2008** and the copy of the same is given on pages 189 to 213 of the Paper Book. The learned A.O. has held that the assessee has not offer the gain arising on the proposed sale of land. Accordingly, he has taxed the difference between the advance received and advance paid by the assessee of Rs,9,28,33,874/- as an income of the assessee.

3.2] The learned CIT(A) has deleted the said addition on the ground that the assessee had only entered into MOU with Kshitij Urban Developers Pvt. Ltd. and no actual sale of land has taken place. He has discussed this issue in paras 5 - 5.4 of his order. He has appreciated that there were certain obligations cast upon the assessee as per the said MOU which were not yet fulfilled and even the assessee had not entered into any sale deed in respect of the said land with Kshitij Urban Developers Pvt. Ltd. Accordingly, the addition has been deleted by him.

3.3] The assessee submits that the addition made is not justified. The asst. year under consideration is A.Y. 2010 - 11 i.e. relating to F.Y. 2009 - 10. **The said MOU was entered into with M/s. Kshitij Urban Developers Pvt. Ltd. on 31.03.2008.** The learned A.O. has taxed the income on the basis of the said MOU. At the outset, it is submitted that no agreement has been entered into in F.Y. 2009 - 10 with Kshitij Urban Developers Pvt. Ltd. Accordingly, there is no question of taxing any income in the hands of the assessee on the basis of the MOU dated 31.03.2008 in F.Y. 2009 - 10. Further, as held by the learned CIT(A), the various obligations cast upon the assessee have not been fulfilled in this year and therefore, there is no question of making any addition in the hands of the assessee on the basis of the MOU dated 31.03.2008. Accordingly, the addition has been rightly deleted.”

10. Further, with reference to transaction involving Kreato Developers, we perused the contents of para 4.2 of order of the CIT(A) and find it relevant to extract the operational para here as under :-

“4.2.1 It is undisputed that the property acquired by the appellant was a disputed property and in the understanding arrived at between the appellant and the Developers it was agreed upon by the appellant to settle

*the dispute between the two families. Thus, the appellant has apparently not transferred any rights to the developers rather only agreed to sell the rights. The Assessing Officer has only held the appellant to have sold the land and received the entire consideration but has not taken into account the aforesaid facts before arriving at the conclusion of taxing the amount. Though the observation of the Assessing Officer regarding the developers to be liable to make payment to the Kulkarni family for settling the dispute has not been disputed but the Assessing Officer has ignored clause 4F of the MOU, which provided that in case the **appellant is not able to transfer the land** to Kreato Developers, the appellant would be required to refund the amount to them and hence there is no scope of any income arising in the hands of the appellant. The appellant has only entered into a MOU for the said land which will be transferred and possession given only after the title of the property gets fully cleared by him. The litigation in respect of the land is not yet over and the same is pending before the Civil Court. The appellant thus is awaiting the Court case to be cleared and also title defects removed so as to complete the sale deed. Where the right to receive depended on performance of a conditional obligation as per agreement, the advance cannot have the character of income till such obligation is discharged. It was so decided in Lakshmi Narayana Films Vs CIT (2000) 244 ITR 344 (Mad). Advances as such do not normally have the character of income. A commercial transaction gets completed on an assessee discharging his obligation under his contract by handing over possession of the goods to his customers and only at that stage of conclusion of the transaction the advance ceases to be so.*

*4.3 The contention raised by the appellant that the **income can only be taxed only when the concrete right in respect of the income is received** finds support from the findings by the apex court in the case of E D Sassoon and Co Ltd (cited supra) wherein the apex court has held that income can be taxed only when the concrete right in respect of income is received by the appellant. The charging provisions of the Act provide that any income becomes chargeable to tax when the assessee has acquired a right to receive such income. The apex court in above mentioned decision and later decisions such as in Kedarnath Jute Mfg. Co. Ltd. Vs CIT (1971) 82 ITR 363 (SC) have conclusively settled the law in this regard.*

4.4 In view of the above facts, the additional ground of appeal no.1 raised by the appellant is allowed.”

11. Thus, the undisputed facts with reference to the transaction of sale of the property to **Kreato Developers** include that the land was proposed for sale vide MOU dated 04.03.2008. The relevant assessment year is 2008-09 and not the impugned assessment year 2010-11. The Assessing Officer did not give reasons for making the addition in the year under consideration. Further, the MOU is very much clear on the refund-ability of the amounts in case the sale transactions did not take place eventually. There is a clear cut finding of fact by the CIT(A) so far as possession of the land is concerned. In-fact, a litigation exists involving the title of this land and the litigation is shown pending before the Hon'ble Civil Court. Appreciating

these facts, the CIT(A) granted relief to the assessee relying on the various decisions mentioned in para 10 above.

Considering the above undisputed facts, we find the order of the CIT(A) on this transaction involving Kreato Developers, is fair and reasonable and it does not call for any interference. Accordingly, relevant ground stands dismissed.

12. Further also, with respect to the transaction involving **M/s. Kshitij Urban Developers Pvt. Ltd.**, we perused the following paras of the order of the CIT(A) and the same are extracted hereunder :-

“5.3 Thus, as discussed above the aforesaid lands acquired by the appellant from various farmers were notified by the State Govt. for land acquisition to be made for setting up MIDC and hence, the appellant was not able to transfer the above land to the developers as per the agreement. Moreover most of the lands being of ‘Limited Rights’ category land required specific permission of the Collector in order to be transferred / sold and as per the clause 7(c) of the MOU the appellant was under the obligation to obtain necessary permission from the Collector so as to sell the above lands. Thus, it is the responsibility of the appellant to obtain the necessary permission from the Collector to sell the lands and handover clear title of the same to the developers i.e. Kshitij Urban Developers Pvt. Ltd., failing which the appellant has to refund the entire sales consideration. The Assessing Officer has not taken into consideration the aforesaid facts and simply observed that the appellant has sold the land and received the entire consideration. The Assessing Officer has thus failed to consider that the appellant has not actually transferred any land or given possession to the developers and, therefore, only on the basis of the MOU entered into, no income can be taxed in the hands of the appellant. The Assessing Officer has only considered the litigation regarding bouncing of the cheque of Rs. 15 lakhs given by the appellant to one of the farmers and thus as per the Assessing Officer’s observation the right in the said land obtained by the appellant by executing the development agreement with the farmers has remained intact, however, the Assessing Officer ignored the fact that the said land has been notified by the State Government for land acquisition purposes and also the various clauses in the MOU which state that the appellant is under an obligation to obtain the necessary permission from the Collector and to transfer the lands to the Developers with clear title by executing a sale deed. Thus the fact which remains and as is evident from the MOU which the Assessing Officer has not considered and taken note of is that if the appellant ultimately is not able to transfer the land, he would be required to refund the entire amount and hence there is no question of any income arising in the hands of the appellant despite the fact that the entire consideration has been received by him. The Assessing Officer has thus failed to consider the fact that the said land has not been transferred to the developer by the appellant and hence only on-the basis of a MOU no income apparently can be taxed simply because the entire sale consideration has been received. The appellant has to complete its responsibility stated in the MOU and, thereafter, transfer and give possession of the land to the developers. Thus, the

consideration received by the appellant remains as an advance and unless & until the final sale deed is entered into and possession of the said land given no income as such could be taxed in the hands of the appellant.

5.3.1 Advances do not normally have the character of income where a dealer in real estate had received monies in advance from prospective buyers it was found that the Tribunal was justified in concluding that such advance monies could not be treated as income till date of maturing - in CIT Vs Fair Deal Traders (2010) 327 ITR 34 (P&H) after discussion of the case law on the subject including that of the decision in CIT Vs Travancore Rubber & Tea Co. Ltd (1991) 190 ITR 508 (Ker) where the right to receive depended on performance of a conditional obligation as per agreement, the advance cannot have the character of income till such obligation is discharged. It was so decided in Lakshmi Narayana Film Vs CIT (2000) 244 ITR 344 (Mad). The fact in the present case clearly indicates the obligation on the part of the appellant that it is yet to be discharged and the appellant has also not been able to transfer and give possession of the said lands to the developers hence, the monies received in advance by the appellant cannot be treated as income. Thus, unless the appellant completes his responsibility stated in the MOU and transfers the lands with clear title, no income can be taxed. A commercial transaction gets completed on the assessee discharging his obligation under his contract by handing over possession of goods to the customers and at the stage of conclusion of the transaction the amount paid in advance ceases to be so. What is taxable is income so that where moneys are received in advance such amount would not assume the character of income till the duty relating to the receipt is performed or is no longer required to be performed. It was so decided in CIT Vs Radico Khaitan Ltd. (2005) 274 ITR 354 (All) following a number of precedents on the subject. Thus the contention raised by the appellant that the income can be taxed in the hands of the appellant only when the appellant received a concrete right in respect of income finds support from the decision of the apex court also relied upon by the appellant in E.D. Sassoon & Co. Ltd (supra) and considering the principle laid down by the apex court the appellant has no concrete right as such on the amount received from the Developers and hence, there is no income which can be taxed in the hands of the appellant. The concrete right over the amount can be established only when the appellant actually transfers the land after getting the required permission from the Collector and also removing the reservation placed by means of the notification by the State Government. Thus, in view of the above facts and the ratio of the judicial decisions the addition made by the Assessing Officer of Rs.9,28,33,874/- is liable to be deleted.”

13. Similar to the transaction discussed above in para 11 for the proposed sale transaction by Kreato Developers, the MOU involving the assessee with Kshitij Urban Developers Pvt. Ltd. is dated 31.03.2008. The relevant assessment year is 2008-09 and not the impugned assessment year 2010-11. The Assessing Officer proceeded to recognize income instead of this transaction in the year under consideration ignoring the fact that the property is not registered and possession was not given to the developers. On appreciating the above facts, the CIT(A) granted relief to the assessee relying on the various decisions referred in para 5.3.1 of his order.

Therefore, it is an undisputed fact that neither the MOU is entered nor the sale deed is registered in the year under consideration. Considering the above facts, we find the order of the CIT(A) on this transaction also is fair and reasonable and it does not call for any interference. Accordingly, relevant ground stands dismissed.

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

ITA No.1224/PUN/2015 (By Assessee)

15. Considering the relief granted to the assessee and also considering the statement of Id. Counsel for the assessee for not pressing the appeal of assessee before us, the issues raised in the appeal of the assessee are dismissed as not pressed.

16. In the result, the appeal of the assessee is dismissed as not pressed.

17. Resultantly, the appeal of the Revenue and the appeal of the assessee are dismissed.

Order pronounced on this 29th day of April, 2019.

Sd/-
(SUSHMA CHOWLA)
न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(D. KARUNAKARA RAO)
लेखा सदस्य / ACCOUNTANT MEMBER

पुणे / Pune; दिनांक Dated : 29th April, 2019.
Sujeet

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-3, Pune;
4. The CCIT, Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "ए" / DR 'A', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune