

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, 'बी', मुंबई।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "B", MUMBAI**

श्री संदीप गोसाई, न्यायिक सदस्य एवं

श्री जी. मंजूनाथ, लेखा सदस्य, के समक्ष

**Before Shri SANDEEP GOSAIN, Judicial Member AND
Shri G. MANJUNATHA, Accountant Member,**

ITA No.684/Mum/2017

Assessment Year: 2011-12

Bipin J Sampat, 11A, 1 st Floor, Vatsa House, S.A. Barelvi Road, Fort, Mumbai-400001	बनाम/ Vs.	ITO-17(1)(2), R. No.114, 1 st Floor, Aayakar Bhavan, M. K. Road, Mumbai-400020
(निर्धारिती / Assessee)		(राजस्व / Revenue)
P.A. No.AEDPS2760N		

निर्धारिती की ओर से / Assessee by	Dr. K. Shivaram, Sr. Advocate and Ms. Nilam C. Jadhav
राजस्व की ओर से / Revenue by	S. Padmaja-CIT

सुनवाई की तारीख / Date of Hearing :	10/01/2019
आदेश की तारीख / Date of Order:	10/04/2019

आदेश / ORDER

Per G. Manjunatha (Accountant Member)

This appeal filed by the assessee is directed against order of the Ld. CIT(A)-28, Mumbai, dated 17/11/2016 and it pertains to AY. 2011-12. The assessee has raised following grounds of appeal:-

“Ground No.1: Addition of Earnest Money of R5.2.5 Crores as Income from Other Sources:

1.1 The C.I.T. (Appeals) - 28, Mumbai, erred in confirming the addition of Rs.2.5 Crores, being earnest money received from the Developers as Income from other sources on the ground that even after lapse of six years no development agreement was entered into with the said Developer and the said earnest money is interest free.

1.2 The said C.I.T.(A) erred in not considering the fact that out of total consideration of Rs.11 Crores, the appellant had received an earnest money deposit of Rs.2.5 Crores and had not given possession of the property to the said Developer during the year under appeal as the said Developer could not obtain consent of 70% of the tenants and was also in negotiation with neighboring plot owners as provided in the MOU dated 25/05/2010. The said OT(A) erred in not considering the confirmation letter of the said Developer about non-receipt of possession.

1.3 The C.I.T. (A) erred in not considering the fact that the appellant has neither forfeited the said earnest money nor has cancelled the said MOU and therefore the said earnest money cannot be taxed u/sec 56(2) (ix) as the said clause (ix) is a substantive law inserted w.e.f. 01/04/2015 and is not a clarificatory in nature.

1.4 Without prejudice, the said CIT(A) erred in not appreciating that the time limit for executing the Deed of Assignment had not expired till the end of the year under appeal as provided under Clause 6 of the said MOU and therefore erred in holding that the sum of Rs.2.50ores should be treated as income of the appellant.

1.5 Without prejudice the said C.IT(A) erred in not considering the plea of the appellant to reduce the said earnest money from cost of property as provided u/sec 51.

Ground No.2: Addition of outstanding loans of R3.3,56,811/-

2.1 The said C.I.T. (A) erred in confirming the addition of Rs.3,56,811/- being outstanding loans on the ground that the same was an "extinguished liability" when the appellant had shown as liability in his books.

2.2 The said C.I.T.(A) erred in not considering the fact that the appellant had succeeded the said outstanding loans from erstwhile partnership firm 'M/s Sampat Brothers' which was dissolved in 2008 and the appellant had never claimed the said loans nor any interest on it as an expenditure in his return of income in earlier years and therefore same cannot be added as income u/s 41(1).

2.3 Without Prejudice to above, the said C.I.T. (A) also erred in not considering the fact that the said outstanding loans cannot be considered as extinguished liability as the same is payable as and when demanded.

Ground No.3: Addition of Rs.8,80,311/- due to Estate of Daksha Sampat:

3.1 The said C.I.T.(A) erred in confirming addition of Rs.8,80,311/- being amount due to the Estate of Daksha Sampat on the ground that the said due is an "extinguished liability".

3.2 The said C.I.T. (A) erred in not considering the facts that the appellant had succeeded to the business of a partnership firm M/s Sampat Brothers' on dissolution of partnership firm in 2008 and the said was due to her as her capital contribution and the appellant had neither claimed the said dues nor claimed any interest expenditure on the same in his return of income in earlier years and therefore cannot be added as an extinguished liability u/sec 41(1).

3.3 The said C.I.T.(A) also erred is not considering the fact that the said dues were payable to the legal heirs of the Estate, i.e. the appellant himself and to his sister, and therefore question of extinguishment of liability does not arise.

Ground No.4: Addition of Rs.1,38,805/- being difference of closing balance of creditor:

4.1 The said C.I.T.(A) erred in confirming the addition of Rs.1,38,805/- being difference in the closing balance of a creditor - M/s. Dhanlaxmi Traders on the ground that the same could not be reconciled before A.O.

4.2 The said C.I.T. (A) erred in not considering the fact that the appellant was never provided any opportunity to reconcile the same by the said A.O.

4.3 Without Prejudice to the above, the said C.I.T. (A) erred in not considering the fact that M/s Dhanlaxmi Traders have outstanding debit balance of Rs.5,39,339/- in the books of the appellant as against credit balance of Rs.6,78,144/- as appearing in the books of the said creditor, therefore, the said difference cannot be considered as income of the appellant.

Ground No. 5: Interest u/sec 234B and 234C

The said AG. erred in levying interest u/sec 234B and 234C when no such interest can be charged

Ground No.6:

The appellant craves leave to add, amend, alter, modify, delete and/or change all or any of the above grounds on or before the date of hearing.

2. The brief, facts of the case are that the assessee is an individual and proprietor of M/s Sampat Brothers who is engaged in the business of paper trading. M/s Sampat Brothers was a partnership firm and the assessee was one of partner alongwith his mother late Daksha and his two sisters. After death of his mother in the year 1993 and his younger sister in 2008, the assessee became the proprietor of M/s Sampat Brothers. The assessee has filed his return of income for AY 2011-12 on 30/09/2011, declaring total income at Rs.2,71,154/-. The case was selected for scrutiny as per CASS to examine source of capital introduced for the year under consideration. Accordingly, notice u/s 143(2) and 142(1) of the Income Tax Act, 1961 (hereinafter 'the Act') were issued. The assessment has been completed u/s 143(3) of the Act on 30/03/2014, determining total income at Rs.2,66,47,081/- by making additions towards earnest money, treated as income for Rs.2.5 cores, extinguishment of liability towards loan for Rs.3,56,811/-, balance due to late Daksha Rs.8,80,311/- and unexplained & unreconciled sundry creditors of Rs.1,38,805/-. The assessee carried the matter in appeal before the First Appellate Authority.

3. The Ld. CIT(A), for detailed reasons recorded in his appellate order dated 17/11/2016, dismissed the appeal filed by the assessee and confirmed additions made by the AO towards earnest money, extinguishment of liability and unexplained & unreconciled sundry creditors. Aggrieved by the order of the Ld. CIT(A), the assessee is in appeal before us.

4. The first issue that came up for our consideration from ground no.1 is additions towards earnest money of Rs.2.5 Crores as income from other sources. The facts with regard to the impugned dispute are that during the course of assessment proceedings, the AO in order to verify sources for capital introduced in the business for the year under consideration issued a notice calling for necessary details. In response to notices, the assessee has filed various details including explanation for capital introduced for the year. As per which the assessee has deposited a sum of Rs.2,12,88,891/- to his capital account for which the source has been explained out of interest free earnest money of Rs.2.5 crores received from Mr. Mahesh Nanji Thakkar and Mr. Ramesh Nanji Thakkar towards development of building at Sambhav, King Circle, Mumbai. The assessee has also filed MOU dated 25/05/2010. During the course of assessment proceedings, the AO noticed that although the assessee claims to have received a sum of Rs.2.5 crores from Mr. Mahesh Nanji Thakkar and Mr. Ramesh Nanji Thakkar by way of MOU dated 25/05/2010, but no development agreement was entered between the parties setting forth terms and conditions for development of property. The AO further observed that the assessee has not furnished any documents including confirmations from developers to prove receipt of earnest money deposit of Rs.2.5 crores. Therefore, he came to the conclusion that a sum of Rs.2.5 cores received from the assessee as income assessable under the head income from other sources, accordingly, made addition of Rs.2.5 crores to the total income of the assessee.

5. The Ld. AR for the assessee submitted that the Ld. AO as well as the Ld. CIT(A) were erred in making additions towards earnest money under the head income from other sources without appreciating the fact that the assessee has received interest free earnest money by way of MOU dated 25/05/2010 from Mr. Mahesh Thakkar and Mr. Ramesh Thakkar for development of property. The property could not be developed because the assessee could not obtained consent from 70% tenant/occupant on or before 31/03/2011. The negotiations with the tenants/occupants are not concluded and hence consent as required for redevelopment in accordance with D.C. Regulations 33(7), 1991 is not received. In this regard, the assessee has filed a confirmation letter from the developers, where they have stated that MOU between the parties is in force on the terms mentioned therein and also they have paid an interest free earnest money of Rs.2.5 cores to the assessee. The Ld. AR further submitted that when the assessee has filed confirmations from the parties for having received the amount and the MOU between the parties is in force, the AO was erred in making additions towards earnest money on the ground that the liability has been deemed to be ceased or extinguished. In this regard, the assessee relied up on the decision of ITAT Mumbai Bench in the case of ITO vs M/s Vikram A. Pradhan in ITA No.2212/Mum/2012, dated 17/08/2016. The Ld. AR for the assessee have also taken an alternative plea in light of provisions of clause (ix) of sub-section (2) of section 56 of the Act, to argue that the said provisions is came into existence from 01/04/2015 and therefore, the same cannot be applied to the year under dispute.

6. The Ld. DR, on the other hand, strongly supported the order of the Ld. CIT(A).

7. We have heard both the parties and perused the material available on record. We have also gone through the cases relied upon by the assessee. The AO has made additions towards earnest money received from Mr. Mahesh Thakkar and Mr. Ramesh Thakkar for Rs.2.5 crores on the ground that the assessee has failed to file any evidences including confirmations from the parties in order to prove its claim that it has received interest free earnest money for development of the project. According to the AO although, MOU is entered into between the parties in the year 2010, but no development agreement has been entered setting forth terms and conditions of development of property, therefore, he came to the conclusion that the claim of the assessee is a make believe statement which cannot be accepted. It is the claim of the assessee that it has filed a confirmation from the party for having received interest free earnest money of Rs.2.5 Crores for development of property. The assessee further claimed that the property could not be developed because the assessee could not obtain 70% consent from tenants/occupants of the building on or before 31/03/2011, however, the MOU between the parties is in force and the amount received from the developers is repayable.

8. Having heard both sides, we find that although the assessee has filed a confirmation letter from the developers before the AO, vide his letter dated 20/02/2014 to

prove the amount of money received from Mr. Ramesh Thakkar and Mr. Mahesh Thakkar towards development of property, but on perusal of confirmation letter filed by the assessee which is available on paper book page-62, we find that the confirmation letter issued by the party is dated 03/11/2016, whereas, the assessee claim to have filed said confirmation letter before the AO on 20/02/2014. We, further noticed that the Ld. AR for the assessee in its paper book has certified that documents at serial no.1 to 6 are filed before the AO, but we are wondered how a confirmation letter obtained on 03/11/2016 could be produced before the AO on 20/02/2014. Be that being as it may be, the issue in question whether advances received from the developers towards interest free earnest money received can be treated as income of the assessee under the head income from other sources, when such liability is continued to be shown in the books of accounts and also such liability has been confirmed by the parties has to be decided first. No doubt, remission or cessation of any liability is liable to be taxed under the provisions of section 41(1), when such liability has been allowed as deduction in the earlier year. If the liability is continued in the books of accounts of the assessee and such liability has been acknowledged by both of parties, no additions can be made on deemed cessation or extinguishment of liability by effluxion of time, because when both parties have acknowledged the debt, then it automatically extend a period of limitation u/s 18 of the limitation act. Therefore, we are of the considered view that there is no reason for the AO to make additions merely because such liability is continued in the books of accounts of the assessee for long period, unless the AO proves that the

assessee has derived certain benefit out of cessation or extinguishment of liability. However, facts are not clear whether confirmation letter stated to have been filed before the AO, is in fact available before AO or not. Since, we have already noted that there is a difference between the date of confirmation letter and confirmation stated to have filed before the AO, we are of the considered view that the issue needs to be examined by the AO in light of confirmation letter filed by the assessee. Hence, this issue is set-aside to the file of the AO and direct the AO to decide this issue afresh in light of our observation hereinabove.

9. The next issue that came up for our consideration is additions towards outstanding loan amounting to Rs.3,56,811/- and addition of Rs.8,80,311/- due to Estate of Daksha Sampat treated as income. The AO has made additions of Rs.3,56,811/- towards unsecured loan from various parties on the ground that the assessee has failed to prove said loans by filing necessary details including confirmations from the parties. Similarly, the AO has made addition of Rs.8,80,311/- due to estate of Late Daksha on the ground that the liability is no longer payable, because the amount is due to retired partner who is no more alive. It is a claim of the assessee that when liability is continued to be shown in the books of accounts, but merely for the reason that no confirmation has been filed, additions could not be made. The assessee further contended that it has already written back said outstanding liability in its books of accounts for AY 2013-14 and the said amount is subject to assessment 143(3) of the Act for AY 2013-14, therefore, no

additions could be made for the year under consideration when such liability remains in the books of accounts.

10. Having heard both sides and considered the material available on record, we find merits in the arguments of the assessee for the reasons that any liability in the books of account of the assessee cannot be converted into income merely because of effluxion of time, more particularly when the assessee has proved that such liability is continued to be shown in the books of accounts of the assessee. However, the case of the AO in this case is that the assessee could not file any details in respect of unsecured loans taken from various parties even though such loan is carried forward from last more than ten years. Similarly in respect of amount due to the estate of late Daksha, the AO came to the conclusion that when the person to whom such amount due is not alive, the question of payment of such liability does not arise and hence the same is very much income of the assessee without bringing on record, how a liability shown in the books of accounts of the assessee can be treated as income of the assessee. Further, the assessee claimed that he had already write back said unsecured loans and amount due to estate of late Daksha for AY 2013-14 and it is subjected to assessment u/s 143(3) of the Act. Therefore, we are of the considered view that first of all, the AO cannot make additions by unilateral deemed cessation or extinguishment of liability when such liability is remain in the books of accounts of the assessee. Further, the assessee claims that the liability towards loans and amount due to other parties has been already written back in the

books of accounts of the assessee and treated as income for the Assessment Year 2013-14. Therefore, there is no reason for the AO to make addition for the year under consideration. However, the fact with regard to written back of amounts for the AY 2013-14 were before the AO or not is not coming from the records. Therefore, for limited purpose of verification of facts to ascertain whether those amounts are subjected to assessment for AY 2013-14 or not, we remit this issue back to the file of the Ld. AO and if the AO found that the assessee has written back those unsecured loans and amount due to estate of late Daksha, then additions made towards those amounts for the year under consideration needs to be deleted. We ordered accordingly.

11. The next issue that came up for our consideration from ground no.4 is difference in closing balance of M/s Dhanlaxmi Traders for Rs.1,38,805/-. The AO has made additions of rs.1,38,805/- on the basis of confirmation letter filed by the creditors M/s Dhanlaxmi Traders, as per which the party shown amount due to the assessee at Rs.6,78,144/-, whereas, the assessee has shown balance of Rs.5,39,339/-, therefore, he came to the conclusion that difference of Rs.1,38,805/- represents unreconciled amounts which is liable to be added as income of the assessee. It is a claim of the assessee that amount debited by the third party in the books of accounts as debit referring bill No.520 of dated 19/05/2006 is neither pertains to the year under consideration nor can be assessed as income of the assessee. The assessee further contended that the alleged

sale booked by the vendor in the books of account cannot be added as income of the assessee as he has neither booked the purchase nor has made payment.

11. Having heard both sides and considered the material available on record, we find merits in the arguments of the assessee, for the reason that when the AO verifying the balance appearing in the name of certain parties, he is required to compare the balances appearing in the books of accounts of the assessee and the balances confirmed by the parties as on date of balance sheet. In this case, the AO has arrived at a difference by taking into account the confirmation filed by the parties, as per which M/s Dhanlaxmi Traders has reported a balance due from the assessee of Rs. 6,78,144/- on account of bill No.520 dated 19/05/2006 which the assessee claims to have never purchased from the parties. Therefore, we are of the considered view that the AO was erred in making additions towards difference in sundry creditors amounting to Rs.1,38,805/-, which is not pertains to the year under consideration and hence, we direct the AO to delete the additions made towards difference in sundry creditors.

13. In the result, appeal filed by the assessee is partly allowed for statistical purpose.

Order pronounced in the open Court on 10/04/2019.

Sd/-

(Sandeep Gosain)
न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई/Mumbai; दिनांक Dated : 10/04/2019

Shekhar, P.S./नि.स.

Sd/-

(G. Manjunatha)
लेखा सदस्य / ACCOUNTANT MEMBER

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

1. अपीलार्थी / The Appellant (Respective assessee)
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai,
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITA.
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai