

**IN THE INCOME TAX APPELLATE TRIBUNAL "H", BENCH
MUMBAI**

**BEFORE SHRI M.BALAGANESH, AM
&
SHRI RAM LAL NEGI, JM**

**ITA No.2629/Mum/2012
(Assessment Year :2007-2008)**

M/s Kutch Development Organisation-Hope 1000 309/310, Veena Chambers, Dana Bunder, Masjid Bunder, Mumbai-400009	Vs.	CIT, City-13, Mumbai
PAN No.AAAAK 0225 E		
(Appellant)	..	(Respondent)

AND

**ITA No.236/Mum/2014
(Assessment Year :2007-2008)**

M/s Kutch Development Organisation-Hope 1000 309/310, Veena Chambers, Dana Bunder, Masjid Bunder, Mumbai-400009	Vs.	ITO13(2)(4), Mumbai
PAN No. AAAAK 0225 E		
(Appellant)	..	(Respondent)

Assessee by	Shri Vipul Joshi, AR
Revenue by	Shri B. Srinivas, CITDR Mrs. Jathilakshmi Nayak, DR
Date of Hearing	10/05/2019
Date of Pronouncement	29/05/2019

आदेश / O R D E R

PER M. BALAGANESH (A.M):

The appeal in ITA No.2629/Mum/2012 has been filed by the assessee for the assessment year 2007-2008 arising out of the order passed by the CIT, City-13, Mumbai, dated 31.01.2012 u/s.263 of the I.T.Act and appeal in ITA No.236/Mum/2014 has been filed by the assessee arising out of the order passed by the Commissioner of Income

Tax (Appeal)-24, Mumbai, dated 28.10.2013 for the assessment year 2007-2008 (in short 'Id. CIT(A)), pursuant to order passed by Income Tax Officer-13(2)(4), Mumbai (in short ' the Id. AO') u/s.143(3) r.w.s.263 of the Act dated 30.10.2012 giving effect to the order passed u/s.263 of the Act by the CIT.

ITA No.2629/Mum/2012

2. This is an appeal filed against the order passed by the Id. CIT u/s.263 of the Act, dated 31.01.2012. The assessee Kutch Development Organisation - Hope 1000 (in short KDO), which is the name of the community i.e. Kutchi Dasha Oswal (KDO) and HOPE, is a good symbolic name, made up of two words, i.e. **HO**using **PE**ople. The assessee-organization was formed as an Association of Persons (AOP) consisting of 14 members and is a non-profit organization. It was a Special Purpose Vehicle (SPV) to acquire land and carry out day to day management of money and administration and finally hand over to a charitable organization the land and other rights and close the AOP. None of the members of the AOP have contributed any money and there is no profit sharing. Their contribution was honorary and selfless service and their goodwill. Thus it is not a usual AOP as is understood normally. The AOP formed vide agreement dt.25.01.1995 wherein the preamble in page No.3 at para 2 of the said agreement reads as under :-

"Whereas the parties of 1st to 14th parts hereto are doing their own respective businesses and are doing very well by the grace of almighty and the forefathers of the community. At this stage of life they feel that they should wholeheartedly contribute their mite for the betterment of the community people and other Jains at large by

providing them residences with amenities at reasonable or even a subsidised rates and provide them better living environment with modern facilities and proposed township site at Dombivli (East). With this sale objective this instrument of association executed on this 25th day of January, 1995 as Real Estate Owners, Builders, Developers, Contractors etc. under the" name and style of "KUTCH DEVELOPMENT ORGANISATION - HOPE 1000".

3. It is, thus, evident from the reading of the agreement dt.25.01.1995 that 14 persons have come together under one roof as association to contribute towards upliftment of the people of Kutchies and other Jains at large and the object for which the AOP was formed was charitable in nature.

4. Kutch Development Organisation Ltd is a registered company under Section 25 of the Indian Companies Act, 1956 and is also assessed to tax. It is to this no dividend charitable company the AOP was to assign the ultimate land etc. received in the form of overriding title. Keeping in view the above objectives, the AOP acquired development rights in about 16 Acres of land at Dombivli (east). The money required for acquiring this was raised in a novel way i.e. land was used as a resource. About half of the land was plotted and 125 plots of land were allotted to community members. The balance land was to be used for subsidized housing scheme for the not so well to do jains. As this scheme was progressing, many community members expressed desire that if the community can think of a small sanatorium in natural environment with green foliage all around, growing their own style of vegetables and food items, getting fresh milk, and in the vicinity of the city of Mumbai, it will be of great help to the weaker sections to recoup health. With this view in mind, the

impugned agricultural land at Ritghar, Panvel, was purchased by the AOP. The project was named as ABDASHA ESTATE, in the name of the Taluka in Kutch where Jain community people resided before migrating to Mumbai and other areas. The assessee stated before the authorities that it was doing this entire housing project with an intention of not making any profit thereon. It explained that it had an approach problem for their acquired land and path leading to their land was being claimed by the village. There were few pockets of land in between the land belonging to the assessee, which it could not purchase and those owners of land locked parcels of land were creating terrible problems to the assessee. The villagers did not allow the assessee to grow any crops. It was also submitted that as a matter of fact, some of the villagers, actually continued to till the land and enjoyed the income and the assessee could not prevented in spite of appointing security. The assistance of police and legal help sought by the assessee was of no avail. Since the members of the AOP, who were extremely busy in their respective businesses in Mumbai had no time or energy to fight villagers or for litigation and that too at Panvel, the land was continued to be classified in the revenue records as agricultural (underlining provided by us) . There is no dispute that the land, which was being tilled but by others, was fully surrounded by farm lands. The assessee pleaded that the said land is located about 14kms away from Panvel. No plotting of land or conversion of agricultural land into non-agriculture was done. No layout, roads and other facilities were provided. The land was purchased in acres and was sold in acres.

5. The return of income for the assessment year 2007-08 was filed by the assessee on 22-11-2017 declaring Nil income. The original assessment was completed u/s.143(3) the Act on 24.12.2009 determining total income at Rs. Nil. The AOP is engaged in the business of Real Estate, Owners, Builders, Developers, Contractors, etc. During the course of assessment proceedings, the assessee produced the copy of bank statement, balance sheet, profit and loss account, capital account, copy of agreement for formation of AOP, copy of sale agreement and statement showing purchase agreement of agriculture land at Panvel, copy of agreement of Dombivali land, statement showing application money received for Bungalow plot, monthwise details of expenses etc. The Id. AO in the assessment order passed u/s.143(3) of the Act dated 24.12.2009 in para 5 observed as under :-

“5. During the year under consideration the assessee has sold agricultural land at Panvel and shown loss at Rs.8,31,799/- which is shown as exempt. The P & L A/c reveals that the assessee has shown net profit at Rs.7,10,661/- and transferred to Work in Progress A/c.”

Finally the Id. AO in the computation of income in the assessment order framed u/s.143(3) of the Act dated 24.12.2009 observed that long term capital loss on sale of agricultural land at Panvel of Rs.8,31,799/- is exempt. It is not in dispute that the Id.AO examined the aspect as to whether the land sold at Panvel by the assessee is an agricultural land or not during the course of assessment proceedings. In this regard, the assessee placed on record a letter dated 30.11.2009 filed before the Id. AO (enclosed in page 34 of paper book), wherein the authorised

representative of the assessee had written a letter to the Id.AO stating that the land sold during the year at Panvel is agricultural land and capital gain on the same is not applicable, however, while filing the return of income, capital loss was shown thereon and the same is not to be considered as capital loss while framing the assessment. In other words, authorised representative of the assessee had categorically stated before the AO that since the land sold at Panvel is an agricultural land and such sale had resulted in long term capital loss of Rs.8,31,799/- and the said loss is not eligible to be carried forward to subsequent years since this is an agriculture land. The Id. AO on being duly satisfied on this aspect, accepted the plea of the assessee vis-à-vis relevant documents and completed the assessment.

6. The assessee also stated that the successor Assessing Officer was of the opinion that the income earned by the assessee on sale of land at Panvel would have to be treated as business income and sale value of such agricultural land should be taken as per the provisions of Section 50C of the Act. The successive AO issued a notice u/s.154 of the Act dated 28.07.2011 seeking to rectify the computation of capital gains by adopting consideration value fixed as per the Stamp Duty Authority in terms of Section 50C of the Act by treating the sale of land as business income. The assessee filed a detailed reply dated 10.08.2011 objecting to the proposal of the Id. AO. Thereafter no order was passed u/s.154 of the Act by the Id. AO.

7. The Id.AO thereafter carried the matter to Id. CIT for invoking revisional jurisdiction u/s.263 of the Act. Ld. CIT issued show cause notice to the assessee u/s.263 of the Act by treating the order of the Id.AO as erroneous and prejudicial to the interest of revenue on the ground that the sale of agriculture land at Panvel is to be taxed as business income and the consideration thereon is to be fixed in terms of Section 50C of the Act. The assessee replied to the said show cause notice before the Id. CIT which are summarized as under :-

- (a) The agriculture land at Panvel was purchased by the assessee by various agreements in the year 1995 for a sum of Rs.19,53,748/-;
- (b) The said agricultural lands at Panvel were sold vide agreement dated 30.06.2006 for a total consideration of Rs.27,76,728/-;
- (c) It was pleaded that copies of both the purchase agreements as well as sale agreements were duly filed before the Id.AO and examined by the Id. AO. In the sale agreement dated 30.06.2006, the Stamp Duty valuation of the land sold was mentioned at Rs.52,98,075/- and the same was examined by the Id. AO and then the workings of the assessee were accepted by the Id. AO in the assessment.

From the above, it was argued that the Id. AO had duly applied his mind on the aspects of the sale of agricultural land at Panvel by the AOP including the consideration thereon. Ld.AO had also applied his mind on the claim of long term capital loss arising due to indexation benefit provided in the statute. There cannot be two possible views on the subject

mentioned matter and the only view that was possible in this regard was taken by the Id. AO. Hence, the same cannot be the subject matter of revision u/s.263 of the Act by the Id. CIT. It was also pleaded that the Id. AO has duly also applied his mind on the non-eligibility of the resultant long term capital loss thereon to be carried forward to subsequent years as the land sold was agricultural land.

8. It was also pleaded that in any case the value as per the Section 50C of the Act cannot be applicable for land held as stock-in-trade as the provisions of Section 50C are applicable only for capital assets. The assessee in support of its various arguments placed reliance on the series of decisions rendered in the context of Section 263 of the Act by various Hon'ble High Courts and the Hon'ble Supreme Court.

9. Ld.CIT, however, disregarded the contention of the assessee on the ground that the assessee did not do any agricultural activities on the subject mentioned land at Panvel and no agricultural income was reported thereon. Moreover, since the assessee is engaged in the business of real estate, owner, builder, developer and contractor etc, the land at Panvel would also be of business asset of the assessee and, hence, the gains from sale of such land would have to be construed only as business income of the assessee. Ld.CIT also observed that there is no doubt that the land is shown as agriculture land in the revenue records. He observed that merely the land is shown as agricultural land in the revenue records, it would not be sufficient to hold the sale of land as agricultural activity. The main criteria would be to examine as to whether the land was actually

or ordinarily used for agricultural purposes at or about the relevant period in consonance with the intention of the owners of the land. He observed that the real intentions of the owners (i.e. the assessee herein) were not ascertained by the Id. AO, nor the Id. AO had called for any record to examine these issues nor was any discussion made by the Id. AO. Hence, it cannot be held that the Id. AO had formed any opinion on the issue. Ld.CIT also observed that the group of persons came together to form an AOP to do the business of real estate, developers etc and not to do any agricultural operations. The lands were purchased in pursuance of the objects of the association which was to provide residential facilities to people for their own community, hence, there cannot be two opinions that the lands were nothing but stock-in-trade and business asset of the assessee. Hence, the gains arising from the sale of such lands would have to be treated only as business income of the assessee.

10. With regard to examination of the purchase and sale agreements of lands by the Id. AO as contended by the assessee is concerned, the Id. CIT observed that the purchase of sale agreement documents alone would not determine the nature of income. The Id. AO did not examine the objects of the AOP and the nature of the land. The Id. AO ought to have appreciated the fact that there was no agricultural operations carried out by the assessee and no agricultural income was reported from the subject mentioned lands, hence, no consideration of these vital aspects would make the order of the Id. AO erroneous and prejudicial to the interest of revenue. With these observations, the Id. CIT passed order u/s.263 of the

Act, dated 31.01.2012 setting aside the order of Id. AO with the direction to treat the sale proceeds of land at Panvel as business income of the assessee. Aggrieved, the assessee is in appeal before us.

11. We have heard rival submissions and perused the materials available on record including the paper book filed by the assessee. It is not in dispute that the lands purchased at Panvel were agricultural lands as per the revenue records. We find that the assessee had explained with cogent reasons as to why the agricultural operations could not be carried out by it on the subject mentioned lands in view of the encroachments by certain villagers. We find that the assessee had also explained that certain villagers were actually tilling the lands belonging to the assessee for agricultural purposes and the agricultural income derived thereon were taken away and enjoyed by those villagers. These facts were not controverted by the Id. DR before us, hence, one of the contentions of Id. CIT that no agricultural operations was carried out by the assessee and no agricultural income was reported by the assessee for treating the lands as non-agricultural land, cannot be accepted.

12. The Id. AR also argued that without prejudice to his original arguments that the subject mentioned land is agriculture land and the gains derived thereon would have to be taxed only under the head capital gains, also argued that the provisions of Section 50C of the Act cannot be made applicable to business asset. Hence, replacing the sale consideration value at Rs.52,98,075/- being the Stamp Duty value as per Section 50C of the Act cannot be done in the instant case. We are in

complete agreement with this alternative argument of Id. AR and held that provisions of Section 50C cannot be made applicable to business asset. Reliance in this regard is placed on the decision of Hon'ble Madras High Court in the case of CIT Vs.Thiruvengadam Investments (P.) Ltd., (2010) 320 ITR 345 (Madras).

13. We also find that the subject mentioned land at Panvel is situated beyond 8 kms. from the municipal limits, which fact is not disputed by the Id.CIT. Hence, even if the sale of agriculture land is to be subjected to tax under the head capital gains, we find that the subject mentioned land is exempt u/s.2(14) of the Act. Hence, the sale of agricultural land in the instant case at Panvel, cannot be taxed even under the head capital gains, as it is not a capital asset u/s.2(14) of the Act.

14. We find the purchase of agriculture land at Panvel being made for sanatorium purpose as enumerated in the facts above, which admittedly an independent activity other than the regular objects enumerated in the objects of the association as business of real estate, builders and developers etc.

15. In any case, we hold that whether the agriculture land is held as capital asset or as business asset, it does not alter the character of the asset.

16. We also find that the Id. AO has made elaborate enquiry on the subjected mentioned issue of sale of agricultural land at Panvel and had categorically mentioned in the assessment order by not following the long term capital loss on sale thereon in the sum of Rs.8,31,799/- to

subsequent years. This goes to prove that the Id. AO has fully applied his mind on the subject mentioned issue and the Id. CIT is only trying to substitute his own opinion in the place of opinion already framed by the Id. AO. In our considered opinion, the same cannot be done under revision proceedings u/s.263 of the Act. There is no incorrect assumption of facts or incorrect opinion of law on the part of the Id. AO. We find that the Id. CIT did not have any fresh material that has come to his knowledge to take a different view contrary to the view already taken by the Id. AO on the issue. This is a clear case of Id.CIT negating from the same documents that are already available on record and it is a different conclusion, which amounts to substitution of his opinion.

17. We also find from the perusal of the balance sheet of the assessee that the assessee main object of engaging in business of real estate, developers is being carried on as is evident from the figures reflected in “work-in-progress” in respect of Dombivli project in the balance sheet of the assessee. In any case, the object clause of the association is not determinative of the activity carried on by the assessee. Reliance in this regard is placed on the decision of Hon’ble jurisdictional High Court in the case of Fort Properteis (P.) Ltd. Vs. CIT, 208 ITR 232.

18. In view of the aforesaid observations and by placing reliance on the various judicial precedents, cited hereinabove, we hold that the Id. CIT has erred in invoking the provisions of Section 263 of the Act, in the instant case of the assessee and we hereby quash the proceedings

initiated by the Id. CIT u/s.263 of the Act. Accordingly, the grounds raised by the assessee in ITA No.2626/Mum/2012 are allowed.

19. The appeal in ITA No.236/Mum/2014 is also to be allowed as the appeal filed by the assessee is against the consequential order passed by the Id. AO pursuant to the order passed by the Id. CIT u/s.263 of the Act and, accordingly, we allow the grounds raised by the assessee in the present appeal.

20. In the result, both appeals of the assessee i.e. ITA No.2629/Mum/2012 and ITA No.236/Mum/2014 are allowed.

Order pronounced in the open court on 29/05/2019

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Mumbai; Dated 29/05/2019
Prakash Kumar Mishra, Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

सत्यापित प्रति //True Copy//

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai