

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "E", MUMBAI

Before Shri Mahavir Singh, Judicial Member
& Shri Rajesh Kumar, Accountant Member

ITA No.3117/Mum/2012
Assessment Year: 2009-10

ITO -25(2)(3) Room No. 105, 1 st Floor Building C-11, Pratyakshakar Bhawan Bandr Kurla Complex Bandra(E), Mumbai-400 051	Vs.	M/s Simandhar Association A-402, Trishala Tower Vazira Naka, Borivali(W) Mumbai-400 092 PAN AADAS1997C
(Revenue)		(Assessee)

Revenue By : Shri D.G.Pansari & Ms. Neelima Nadkarni
Assessee By : Shri Rashmikant Kundalia

Date of Hearing :26.04.2019	Date of Pronouncement : 24.05.2019
------------------------------------	---

ORDER

Per Rajesh Kumar, Accountant Member

1. The Revenue by way of this appeal is challenging the order dated 27/02/2012 of the Ld. Commissioner of Income-Tax (Appeals)-35 hereinafter called [CIT(A)], Mumbai, in Appeal No.CIT(A)-35/ITO-25(2)(3)/ITA.226/11-12. The assessment for impugned AY was framed by Ld. Income Tax Officer-25(2)(3),Mumbai [AO] u/s 143(3) of the Income Tax Act,1961 on 28/12/2011. The Revenue has raised the following grounds in its appeal.

The various grounds taken by the revenue are as under:

1. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition made by AO on the ground that the future income attributable to flats has been brought to tax without appreciating the fact that what is being taxed in the year under consideration is a market value i.e. Booking value for the 33 flats which was prevailing during the previous year as evident from the rates at which the flats were booked in the project."*
2. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) failed to appreciate the fact that the consideration received being flats on transfer of Development Right is totally independent transaction vis-à-vis sale consideration of the flats so received in the subsequent years, both are not to be clubbed together."*
3. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition made by the A.O. ignoring the fact that assessee has entered into barter transaction, and hence the prevailing market value of the commodities transferred i.e. 33 flats has property been brought to tax as consideration received."*
4. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition made by the A.O. on the ground that the Agreement dt. 26/05/2008 on the basis of which the income is brought to tax is supplementary agreement, without appreciating the fact that this supplementary agreement is a substantive agreement as it contains the terms of consideration which were not specified in the original agreement."*
5. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) failed to appreciate that the decision of the jurisdictional High Court in the case of Chaturbuj Dwarkadas Kapadia v/s CIT (260 ITR 491) (Bom) is squarely applicable to the instant case."*
6. *"The appellant prays that the order of the Ld. CIT(A) on the grounds be set aside and that of the AO be restored"*
7. *"The appellant craves leave to amend or alter any ground or add a new ground"*

2. The common issue raised by the revenue in the various grounds of appeal as reproduced above is against the order of CIT(A) deleting the additions made by the AO in respect of future income from flats to be given to the assessee under development agreement without appreciating the facts that market value i.e. booking value '33' flats were brought to tax when these flats were booked which is different from actual sales consideration received upon sale of these flats.

3. The facts in brief are that the assessee filed return of income on 29/03/2010 declaring income at "nil" which was

processed u/s 143(1) of the Act. The case of the assessee was selected for scrutiny and statutory notices were issued and duly served on the assessee. The assessee during the year under consideration vide agreement dated 26/05/2008 entered into understanding with M/s. Dimple Realtors Pvt. Ltd whereby the assessee gave development rights to M/s. Dimple Realtors Pvt. Ltd. and in terms of the said agreement, the developer agreed to give the assessee in consideration '33' flats. The AO during the course of assessment proceedings observed that the assessee had capitalized the expenses under the head work in progress and showing income at 'Nil' in the return of income. The opening W.I.P. as on 01.04.2008 was Rs. 1,85,44,356/- which further increased to Rs. 2,23,00,706/- as on 31/03/2009. The AO was of the view that '33' flats to be received by the assessee in consideration of transferring the development rights in favour of Dimple Realtors Pvt.Ltd. has to be brought to tax in the current year as according to the AO, the assessee transferred the developmental right during the year and in consideration agreed to receive consideration in the form of '33' flats. Finally an addition of Rs. 16,15,21,284/- was made to the income of the assessee by framing assessment u/s 143(3) of the Act vide order dated 28/12/2011.

4. In the appellate proceedings CIT(A) allowed the appeal of the assessee after considering the contentions and submissions as raised during the appellate proceedings by observing and holding as under:

"On further perusal of facts and legal citations of the Id.AO as an agreement for Sale is only a Supplementary Agreement which is an integral part and parcel of the

original Agreement for Development executed on 29-12-2007 relevant to A.Y. 2008-09. It clearly means that no transaction took place in the year under appeal. And if at all there were to be any transaction to be considered that had taken place, it wa to be considered in F.Y. 2007-08 relevant to A.Y. 2008-09

ii) Further,, the ratio of Appellant m Cha total constructed area stands reduced from 45% to 33% by and under a Supplementary Agreement executed on 26-6-2010 which makes It clear that the AO has taxed the future uncertain and contingent Income on non-existing asset.

iii) The ownership of the piece of land is never parted with by the Appellant in favor of anybody. The appellant was the owner of the said land before the said development agreement and during the currency of the project and even after completion of the project. Hence, no sale or transfer has taken place nor is there an intention to sell or transfer the said piece of land by the owner.

iv) The owner has given a Power of Attorney to the Developer with a view to facilitate the developer to carry out the development work smoothly. Hence, the said power of attorney is only a functional or performance POA and not an irrevocable one.

v) The intention of the Appellant was not to evade tax on the income from the project is clear from the fact that based on the estimate of income from the project the appellant ahs paid substantial advance tax for F.Y. 2011-12 relevant to A.Y. 2012-13 of an amount of Rs. 2,40,00,000/- by December, 2011.

vi) (a) The asset in question being stock-in-trade and not a capital asset, the provisions of sec. 2(47)(v) of the Income Tax act, 1961 are not applicable to the Appellant at all. And in turn, the question of applicability of Sec. 53A of T.P. Act, 1882 also does not arise. In view of this, the reference Vs CIT 260 ITR 491 (Bom) made by the AO is not applicable here.

Vi(b) In fact the Ld. AR has been able to distinguish the facts and ratio of present appeal with that of the case relied upon by the A.O.

Further, the Id. A.R. has exhaustively quoted the various clauses of the agreement between the appellant and the developer and has been able to demonstrate that there was not any transfer of the land and the land In question was undisputedly stock-in-trade and accordingly the provision of capital gain do not apply. Further the W.A.R. has been able to co-relate the facts & ratio of the present case under consideration with that of the case laws retted upon by the appellant; 'I have also gone through the judgment relied upon by A.R. and find that the ratio of this case is applicable,

(vii) To my mind, AO has taxed non-existent asset or a future asset. The Assessing Officer has applied the current market value to a nor existing property. The method adopted by the A.O. is erroneous. The AO proposes to tax the income based on estimated sale consideration of future asset which is yet to come into Its existence. That basic vacuum Is apparent. It is something to come within a period of three to four years in future. The exercise suggested by the AO Is like a project forecast, relevant for cost and finance management. Accordingly, addition made on future asset or projected sale/receipt can't be taxed at this juncture.

*7. In the result, the appeal is **ALLOWED.**"*

5. The Ld. DR vehemently submitted for the bench that order of CIT(A) is not correct as the CIT(A) failed to appreciating the fact that the right to receive '33' flats has accrued to the assessee during the year with the signing of agreement with Dimple Realtors Pvt. Ltd. and the consideration accrued to the assessee for the 33 flats in view of transfer of developmental rights in the

property. The Ld. DR therefore heavily relied on the order of the AO and prayed that the order of CIT(A) allowed set aside.

6. The Ld. AR on the other hand submitted that the income of the assessee could not be brought to tax during the year as 33 flats did not come into existence during the year and the income was assessed hypothetically which is not the purport of the Act. The Ld. AR further submitted that assessee was handed over these flats by Dimple Realtors Pvt. Ltd. in the subsequent years after completion of construction and income from these flats were offered to tax in the AY 2012-13 and 2013-14 and assessee has already paid due taxes thereon. The Ld. AR relied heavily on the CIT(A) by submitting that CIT has passed correct, reasoned order and prayed for the bench that the same may be referred.

7. After hearing both the parties and perused the material available on record, we observe in this case, the AO has assessed the income on hypothetical basis by bringing 33 flats to tax which the assessee was to receive in consideration on giving the developmental rights to Dimple Realtors Pvt. Ltd. The assessee has *suo-moto* offered the income on these flats in AY 2012-13 and 2013-14 and paid taxes which was accepted by the revenue. The Ld. CIT(A) in our opinion has passed a very reasoned and correct order by holding that the income cannot be brought to tax on hypothetical basis as the actual asset on which the income is sought to be taxed has not come into existence. Therefore, we are in agreement with the findings of the Ld. CIT(A) on this issue. Accordingly we uphold the order of Ld. CIT(A) by dismissing the appeal of the revenue.

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

Order pronounced in the open court on this day of 24th May,2019.

Sd/-
(Mahavir Singh)
JUDICIAL MEMBER

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai, Dated : 24 May,2019

* **Thirumalesh**

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT(A), Mumbai.
4. The CIT
5. The DR, 'B' Bench, ITAT, Mumbai

BY ORDER

(AssistantRegistrar)
Income Tax Appellate Tribunal, Mumbai