

आयकर अपीलीय अधिकरण] पुणे न्यायपीठ "एक सदस्य" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "SMC", PUNE

(Through Virtual Court)

श्री डी. करुणाकरा राव, लेखा सदस्य के समक्ष
BEFORE SHRI D. KARUNAKARA RAO, AM

आयकर अपील सं / ITA No.1244/PUN/2019

निर्धारण वर्ष / Assessment Year : 2009-10

Prakash Sakahram Sangoankar,
768/A, E Ward, Shop No.1, 2, 3,
Swastik House, Shahupuri,
Kolhapur.

..... अपीलार्थी /
Appellant

PAN : ADXPS7976F.

बनाम v/s

The Asst.Commissioner of Income Tax,
Circle – 2, Kolhapur.

..... प्रत्यर्थी /
Respondent

Assessee by : Shri Nikhil Pathak.
Revenue by : Shri Prashant Gadekar.

सुनवाई की तारीख / Date of Hearing : 24.06.2020

घोषणा की तारीख / Date of Pronouncement : 24.06.2020

आदेश / ORDER

PER SHRI D. KARUNAKARA RAO

The appeal is filed by the assessee against the order of Commissioner of Income Tax (Appeals) – 2, Kolhapur, dated 10.06.2019 for the assessment year 2009-10.

2. Assessee is an individual who filed his return of income for A.Y. 2009-10 declaring total income at Rs.8,12,220/- on 29.03.2010. Originally, the assessment was completed u/s 143(3) of the Act. The case

was reopened by issuing notice u/s 148 of the Act dated 16.04.2013. In response to the notice u/s 148 of the Act, assessee filed return on 29.03.2010 and also filed various documents as required by the AO during the re-assessment proceedings. Thereafter, the re-assessment was framed u/s 143(3) r.w.s. 147 of the Act re-computing the total income of the assessee at Rs.18,34,720/-. Aggrieved by the order of AO, assessee carried the matter before CIT(A) who vide order dt.10.06.2019 granted partial relief to the assessee. Aggrieved by the order of Ld.CIT(A), assessee is now in appeal before me and raised the following grounds :

“1. On the facts and in the circumstances of the case and in law, the learned CIT(Appels) 2, Kolhapur failed to appreciate that no capital gain is attracted on the transfer of property to the Joint Development Agreement or sale of the same once it is liable to tax as business income of the appellant.

2. On the facts and in the circumstances of the case and in law, the learned CIT(Appels) 2, Kolhapur erred in holding that the transaction of sale of property is liable to tax as business income as well as income from capital gain.”

3. The core issue for adjudication in this appeal relates to the application of the correct “Head of Income” for taxing the gains / profits earned in connection with the transaction of the Joint Development Agreement dated 20.12.2003 and the sale of the same. This is the date of acquiring the rights on the land for development. Assessee paid Rs.10,53,500/- to the land owner i.e., Ashok S. Patil for acquiring the right. Subsequently, in 2008, assessee sold the said rights for consideration of Rs. 25,00,000/- and earned profits. The taxation of this income is not disputed and however, the “Head of Income” for taxing the same is disputed during the assessment proceedings. While, the assessee considered the said transaction of purchase and sale of development rights as the “business transaction” taxable under Sec.28 of the Income Tax Act,

on the other hand, the AO considered the same as the transaction attracting the “capital gain” u/s 45 of the Act. The AO determined the assessee’s income after re-assessment proceedings at Rs.18,34,720/- against the returned income of Rs.8,12,220/-. Before the Ld.CIT(A), assessee submitted vehemently stating that it is certainly a case of ‘business transaction’ as assessee has acquired the development agreement, assessee intended to develop the property into stock-in-trade and sold the stocks and earned the business income. Ld.CIT(A) considered the same and on one side he was with the assessee and on the other side he remanded the matter to the AO with certain directions (i.e., DVO’s valuation etc.,) and directed the AO to calculate the capital gains for taxation.

Before the Tribunal.

4. Shri Nikhil Pathak, learned counsel for the assessee narrated the above facts of the case and brought my attention to the contents of Para 5.3.1 at Page No.5 of the order of the Ld.CIT(A) and also brought my attention to certain related findings, which are not in sync with other. He summed up by stating that in certain lines of the said paragraph, the Commissioner of Income Tax (Appeals) gave contradicting finding which does not get with one another, so far as the taxability u/s 28 of the Act is concerned. In certain other parts of the same paragraph, CIT(A) directed the AO to compute the ‘long term capital gains’ while there is a finding that the provisions of Section 28 of the Act apply. Thus, CIT(A) suffered from ambiguity in his mind.

5. On the other hand, Mr. Prashant Gadekar, learned counsel for the Revenue relied heavily on the order of the Commissioner of Income Tax (Appeals) although, he also found some ambiguity in some of the lines mentioned in Para 5.3.1.

6. I heard both sides on this aspect of ambiguity in the mind of CIT(A) on the “Head of Income” and find it relevant to extract some few lines from the paragraphs 5.3.1 and 5.3.2 hereunder :

*“5.3.1. Therefore, the contention of the AO that the development agreement was not executed is factually incorrect. Accordingly, as the property was put to the development agreement, subsequent development of the same and **sale proceeds of the said property is liable to tax as business income of the assessee** and not income from capital gains. I find that there was no wrong claim has been made by the appellant. Having said so, on the date of transfer of the property to the Joint Development Agreement or sale of the same, the appellant in respect of the impugned property transferred should have paid capital gains tax as per law. I find that the issue of dispute is treating the sale consideration of the land at Rs.48,24,600/- being the stamp duty valuation and the sale consideration shown by the appellant much less in the sale deed at Rs. 25,00,000/-. This aspect has neither been dealt with properly by the AO in the assessment order, nor by the appellant in the written submission. The sale consideration of the property has been taken by the AO at Rs. 48,24,600/- for the reason that the stamp duty of the property is such amount. As there was a wide gap between the sale price shown by the appellant at Rs. 25,00,000/- to that of the stamp duty valuation at Rs. 48,24,600/-. It was, therefore, necessary on the part of the AO to refer the valuation of the property to the Departmental Valuation Officer (DVO) and thereafter obtaining report from him, computation could have been done for determining the long term capital gains in respect of sale of property for equity and justice.*

*5.3.2 In view of above facts of the case of the appellant and the judicial decisions cited by me, I direct the AO to refer the valuation of the property to the DVO which has also been raised in ground no. 2 by the appellant. After obtaining the valuation report, the AO shall compute the income from long term capital gains on sale of the impugned plot of land as on date of sale after giving necessary effect to the valuation report. The appeal of the appellant **is accordingly allowed partly thereby dismissing the appellant's claim of income from business in respect of sale of the property but allowing the claim of the referring to the DVO for valuation of the property for determination of income from long term capital gains on account of sale of the impugned plot of land.** Ground Nos. 1 & 2 raised by the appellant are accordingly **partly allowed.**”*

7. From the above, I find that the arguments made by the learned counsel are correct. There is some amount of ambiguity in the order of CIT(A) and requires passing of a speaking order clearly making out what exactly, the Commissioner of Income Tax (Appeals) opines on this issue of the “Head of Income.” For this reason, I find it more appropriate to remand this issue to the file of Commissioner of Income Tax (Appeals) for removal of anomaly and passing of a speaking order. Further, I find it is relevant to remark that the Development Agreement *per se* implies certain “developments” of the land. The expression “development” is no way implying the capital gains. Ld.CIT(A) is directed to apply his mind and go through both the development agreements entered by the assessee at the time of acquisition of rights and also at the time of transfer of such rights. The Ld.CIT(A) shall decide the issue after granting reasonable opportunity of being heard to the assessee in accordance with the set principles of natural justice. Accordingly, both the grounds raised by the assessee are allowed for statistical purposes.

8. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced on 24th day of June, 2020.

Sd/-
(D. KARNUKARA RAO)
ACCOUNTANT MEMBER

पुणे Pune; दिनांक Dated : 24th June, 2020.
Yamini

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. CIT(A)-2, Kolhapur.
4. Pr.CIT-2, Kolhapur.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "एक सदस्य" / DR, ITAT, "SMC" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune.