

IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" Bench, Mumbai
Before Shri Shamim Yahya, Accountant Member

I.T.A. No. 916/Mum/2020
(Assessment Year 2012-13)

| | | |
|--|-----|---|
| Maharishi Construction Pvt.Ltd. 133/2, Kala Smruti Daftary Road, Shivaji Chowk Malad(E) Mumbai-400 097 PAN : AAACA4141K (Appellant) | Vs. | ITO-12(3)(3) Room No.224, Aaykar Bhawan, M.K.Road Mumbai-400 020 (Respondent) |
|--|-----|---|

| | |
|-----------------------|----------------------|
| Assessee by | Shri Mahesh Rajpopat |
| Department by | Shri T.Sankar |
| Date of Hearing | 12.01.2022 |
| Date of Pronouncement | 17.03.2022 |

O R D E R

Per Shri Shamim Yahya (AM) :-

This appeal by the assessee is directed against the order of learned Commissioner of Income Tax (Appeals)-21 dated 12.12.2019 and pertains to assessment year 2012-13..

2. Grounds of appeal read as under:-

“The income of A.Y. 2013-14 considered for AY 2012-13 and addition of Rs. 85,00,000/- being sale consideration of Property after deduction of expenses without allowing deduction of matching Expenses to the related Income.”

3. Brief facts of the case are that this case was selected for scrutiny. Brief facts noted by the AO as under:-

'i) the assessee company entered into agreement called "Deed of Conveyance" on

21/02/2012 with M/s Aiyannar Enterprises w.r.t property bearing CIS No.13 of village kurar, Taluka-Borivali , Mumbai known as "Rashmi Kunj" lying at S.K.Patil hospital Road.Malad

(E),Mumbai-400097.having 999.97 Sq.mtrs of area.

ii)The said property was sold on a/c of "As is where is basis".

iii)The said property consisted of land with building of 3 upper floors in which there where originally 58 tenants and all the tenants where occupying their respective premises on the date of sale agreement i.e.21/02/2012.

iv)There was long standing litigation in respect of the property under consideration & at the

time of sale the purchaser was aware about the said litigation being force & its producing in

court i.e. suit no.2405 of city civil court, Dindoshi.

v)The assessee company has shown the receipt of Rs.85,00,000/- in the P/L/ account filed for the year ending 31/03/2013, being a business receipt against which the assessee company has claimed following expenses:-

| | |
|--|----------------|
| Cost of land & Building transferred from WIP | Rs.41,71,267/- |
| Administrative Expense | Rs.65,76,947/- |
| Depreciation | Rs.282/- |

this has resulted in loss of Rs.22,48,496/-. Moreover the Administrative Expenses shown above includes payments to five tenants for surrender of their rights to the assessee company as per agreements entered into before the "Deed of Conveyance" on 21/02/2012 with M/s Aiyannar Enterprises, However, it is pertinent to mention here that no mention of agreement with tenant has been made in the said "Deed of Conveyance" dtd. 21/02/2012 with M/s Aiyannar Enterprises.

vi) As per balance sheet as on 31/03/2011,31/03/2012 & 31/03/2013, the current asset & current liabilities are shown as under:-

| Current Liability | 31/03/2013 | 31/03/2012 | 31/03/2011 |
|-------------------------|----------------|----------------|---------------|
| Trade payable | Rs.65,00,000/- | Rs.19,51,518/- | Rs17,01,518/- |
| Other current Liability | ----- | ----- | Rs.31,545/- |
| | | | |

| | | | |
|-----------------------------|----------------|----------------|----------------|
| Inventory | | Rs.41,71,267/- | Rs.41.71.267/- |
| Trade Receivables | Rs.67,37,684/- | Rs.82.684/- | Rs.82.684/- |
| Cash & Cash Equivalent | Rs.67,026/- | Rs.2,80,972/- | Rs.52,950/- |
| Short term loans & Advances | Rs.45.672/- | Rs.15.190/- | Rs.15,190/- |
| Other Current Assets | Rs.8,372/- | Rs.8,372/- | Rs.8,372/- |

vii) On going through the details, it is further noticed that as on 31/03/2013 the receivable

from M/s Aiyannar Enterprise was still at Rs.66,55,000/-.However, as on 31/03/2012 the receivables from the said party was shown at Rs.NIL/-

vii) Only Rs.2,50,000/- is shown as advance taken against sale of land from M/s Aiyannar Enterprises even after the sale agreement entered into on 21/02/2012. The balance receivables is not appearing in the Balance sheet as on 31/03/2012 as receivables;

ix) With respect to trade payable shown at Rs.65,00,000/- as on 31/03/2013 it is submitted that the assessee company entered into MOU with following tenants on 27/12/2011.

| | Name | Room No. |
|----|---|---------------------|
| A | Mrs.Kantilal Furiya | 206, second Floor |
| E. | Mr.Shivlal.B.Tailor | A-401, Four1h Floor |
| C. | Mr.Vinod Chandra Vora | 311,Third Floor |
| D. | Mrs.Geeta S.Shah daughter of Late.Vinod.R.kenla | 1 14, First Floor |
| E. | Mr.Kantilal R.sagar son in law of Late Mrs. Shantidevi Jitendra Kumar Doshi | B-10, Ground Floor |

The said agreement was made on Rs.100/- Non Judicial Stamp paper. However, the said agreement was not registered as per the copy of MOU placed in record. It is submitted that this agreement was made w.r.t surrender of their rights of tenancy on

payment of Rs. 13,00,000/- to each of the above mentioned tenants towards the reimbursement of cost for full & final consideration as computation for the inconvenience suffered by the tenants to

x) There is no mention of such MOU with the above said (5) tenants in the Deed of Conveyance entered subsequently on 21/02/2012 with M/s. Aiyannar Enterprises.”

4. AO made enquiry from the assessee as to why the sale consideration of Rashmi Building should not be considered for the year ending 31.03.2012 instead of 31.03.2013 and as to why the amount of Rs. 65,00,000/- debited against the sale consideration should not be disallowed and added to the total income of the assessee for the year ending 31.03.202012. The assessee responded as under:-

“The transaction of sale of property , which is a business inventory (not fixed assets investment) for the builder/developer, was accounted during A.Y.2013-14 as business income after providing for payments to the above tenants and other incidental expenses , since the possession of the property was given to (he purchaser only on 18-03-2013, as per copy of possession letter attached, when the purchaser wanted to develop the property and start construction.

On 27th day of December 2011 a MOU, copy attached , was signed with the 5 tenants that they would be given Rs.13,00,000/- each upon their surrendering of tenancy, vacation of their rooms and giving of peaceful possession to the Landlord (assessee). 4-of-the-fenanfs had entered into Deed of Surrender of Tenancy on 2nd /28th of September 2013 respectively upon the assessee making of the above payments to them.”

5. However, AO was not satisfied, he made the impugned addition holding as under:-

a) The assessee company received the full & final payment i.e. sale consideration duly for F.Y. 2013-14 relevant to A.Y. 2014-15 and not the F.Y. 2012-13 relevant to A.Y. 2013-14. Hence, the date of 'Deed of conveyance" i.e 21/02/2012 with M/s Aiyannar Enterprises should be the sole criteria for offering the receipt in F.Y. 2011-12 relevant to A.Y. 2012-13, which is under consideration.

b) The sale agreement was entered into with M/s. Aiyannar Enterprises for the property named "Rashmi Kunj" on 21/02/2012 which is relevant to A.Y. 2012-13 i.e. current year account.

c) The assessee company failed to show the balance amount of Rs. 82,50,000/-as trade receivables in the balance sheet as on 31/03/2012;

d) The MOU entered into with 5 tenants as discussed above is not registered. It is alleged and held that the assessee company signed the MOU subsequently in order to reduce the profit & accordingly the taxability as no payments were made till 31/03/2013 which is evident from the balance sheet as on 31/03/2013 as Rs.

65,00,000/- is shown as trade payable. The details of payments made to four tenants out of five tenants appearing in the said MOU are as under-

| Bank | Date | Tenant | Amount (Rs.) |
|------------|------------------------------|----------------|--------------|
| ICICI Bank | 06/09/2013 and 11/09/2013 | Kantilal Sagar | 13,00,000/- |
| ICICI Bank | 06/09/2013 and 11/09/2013 | Shivlal Tailor | 13,00,000/- |
| ICICI Bank | 01/10/2013 | Vinod C Vora | 13,00,000/- |
| ICICI | 01/10/2013 | Geeta Shah | 13,00,000/- |

It is further with mentioning here that the payments to the fifth tenant Mrs. Hemlata Kantilal Furiya is still pending.

e) The assessee company failed to substantiate the purpose for which the possession was given F.Y. 2012-13 and not in F.Y. 2011-12. The reason behind this was well known to the assessee. The assessee chosen to give possession during F.Y. 2012-13 without change in status as it was on 31/03/2012. It is also pertinent to note here that the possession letter is on single paper sheet which is in this case at the discretion of the assessee company given during F.Y. 2012-13. The assessee company as per the final account copy for i.e. 31/03/2013 has not claimed any expenditure on the Rashmi Building which could show that the property was developed between the period i.e. between the date of sale agreement to M/s Aiyannar Enterprises and the date of possession letter issued by the assessee company.

f) The AR of the company as per order sheet noting dated 11/03/2015 confirmed that the MOU dated 27/12/2011 between 5 tenants and the assessee company was not registered as the same was mutually done between the parties. It is also mentioned that the reference of MOU dated 27/12/11 is not appearing anywhere in the "Deed of Conveyance" dated 21/02/2012 with M/s. Aiyannar Enterprises. It is also confirmed that the most of the payments were received from M/s Aiyannar Enterprises during F.Y. 2013-14 and F.Y. 2014-15.

g) As per the balance sheet as on 31/03/2013 as well as and 31/03/2012 the trade receivables were shown at Rs. 67,37,684/- and Rs. 82,684/- respectively, this clearly shows that the assessee could not show the amount receivables from M/s Aiyannar Enterprises as on 31/03/2012 of Rs. 82,50,000/- since Rs. 2,50,000/- is shown as advance received. Further, it is also noticed that the payment from said concern was still pending as on 31/03/2013. Moreover, as per the details filed vide letter dated 18/08/2014 by the AR of the assessee company the payments of Rs. 53,00,000/- was stated to be received during F.Y. 2013-14. In view of the same, the taxability of sale received of Rs. 85,00,000/- shown for the year ending 31/03/2013 i.e. F.Y. 2012-13 is not acceptable as the same has no basis at all.

h) The assessee failed to provide reason for giving possession to the purchase M/s Aiyannar Enterprises during F.Y. 2012-13. This seems to be after thought of the

assessee company. Since most of the payments were made during F.Y. 2013-14 providing possession during F.Y. 2012-13 is not acceptable on this ground also. In view of the above I held the sale consideration of Rs. 85,00,000/- as business receipt for the year under consideration i.e for the year ending 31/03/2012 relevant to A.Y. 2012-13 instead for A.Y. 2013-14 shown by the assessee. Further, the claim of Rs. 65,00,000/- as expense as compensation to tenants is also disallowed and added to the total income of the assessee company under consideration.

6. Upon assessee's appeal, Id.CIT(A) recorded the assessee's submissions. He rejected the AO's action by observing as under:-

“ I have considered the facts of the case and submissions made by the appellant. It appears from the records that the assessee had entered into a deed of conveyance dated 21/02/2012 with the purchaser in respect of property known as Rashmi Kunj, Malad East, Mumbai-400 097 for consideration of Rs. 85 lakhs and this deed of conveyance was registered with stamp duty authorities and a sum of Rs.2,50,000/- was received by the assessee. Assessee was required to fulfill certain obligations under the conveyance deed and assessee fulfilled these obligations of getting tenants vacated and obtaining surrender of tenancy and assessee had entered into five such MOUs, that is memorandum of understanding dated 27/12/2011 for a total consideration of Rs. 65 lakhs even though formal deeds of surrender of tenancy with five tenants were executed on 28 September 2013. Assessee had not offered any income from the sale of the immovable property at Rashmi Kunj Malad Mumbai either in the P & L Account or in the return of income and hence the AO examined the facts of the case, treated the date of conveyance deed dated 21/02/2012 as the date of sale and computed the sales consideration of Rs. 85,00,000/- on sale of immovable property as 'sales receipts' and computed the profits on sale of the stock in trade consisting of immovable property at Malad East Mumbai at Rs. 42,70,640/- as follows after allowing deduction for the cost of inventory of Rs. 41,71,267/- and depreciation and other administrative expenses Rs.345/-and Rs.27,433/- respectively.

It is assessee's contention that the income from the sale of immovable property is assessable in AY 2013-14 since both the parties had accounted for 'sale transaction' during AY 2013-14 and the expenditure of Rs.65,00,000/- by way of compensation was also accounted for in AY 2013-14 on the basis of matching principles of accounting expenditure against income/sales value and have also requested that if its submissions for taxing the sale consideration during AY 2013-14 are not accepted and the income from the sale of immovable property at Malad Mumbai are taxed during AY 2012-13 itself, then a revenue deduction for Rs.65 lakhs against the sales consideration in addition to the deduction already allowed totaling Rs.42,29,361A. It appears from the records that the compensation on surrender of tenancy to five tenants were made during August 2013 to October 2013 during previous year relevant to AY 2014-15.

Contention of the assessee's CAs that revenue deduction for compensation of surrendering tenancy rights totaling Rs 65 lakhs has a force since the payment of tenancy rights of Rs.65 lakhs have a direct bearing on the cost of property and in view of the facts of the case, cost of Rs. 65 lakhs by way of compensation of to five tenants is an allowable revenue deduction per se. However there are two issues in this matter which need attention, one is the non filing of conveyance deed dated 21/02/2012 and second is that relating to the non deduction of tax at source u/s. 194LA of the IT Act, 1961. First of all assessee has not filed a copy of conveyance deed dated 21/02/2012 which would have shown the terms and conditions regarding the sale of property and whether the liability for payment of compensation of Rs. 65 lakhs to five tenants was to be borne by the assessee or the purchaser of the property. Even if it is assumed that the liability to get five tenants vacated and compensation paid was that of the seller of the property, that is, the assessee assessee had not deducted tax at source under section 194LA of the IT Act 1961 in respect of compensation of Rs.13 lakhs paid to each tenant during July 2013 to October 2013 and hence in view of the provisions of section 40 (a) (ia) of the IT Act 1961 which were applicable for payments made during the period and hence even if the deduction for Rs.65 lakhs may be allowable under the general provisions of law, provisions of section 40(a)(ia) of IT Act, 1961 as applicable to the and for the year of payment of compensation of AY 2014-15, will apply and the deduction of Rs 65 lakhs will not be allowed as a revenue deduction. In short, assessee's claim for revenue deduction is not allowed for AY 2012-13 even on the basis of matching principles of mercantile system of accounting followed by the assessee. In short assessee's claim for revenue deduction of Rs. 65 lakhs in addition to allowance of administrative expenses of Rs, 42,29,361/- already allowed by the AO, against the sale consideration of Rs 85 lakhs is rejected and the GOA is rejected in facts of the case and in law.”

7. Against the above order assessee is in appeal before us.

8. I have heard both the parties and perused the records.

9. Ld. Counsel of the assessee has summarized the submission as under:-

The Hon.CIT (Appeal) agreed for deduction of Rs. 65,00,000/- as have direct bearing on the cost of property but declined on two counts ;

1. Non filing of Conveyance deed dated 21-02-2012 which would have shown the Terms and conditions regarding sale of property and whether the liability for payment of compensation of Rs. 65 Lacs to Five tenants waste be borne by the assessee or purchaser of the property.

2. Non Deduction of Tax at source u/s 194LA of the Income Tax Act 1961 and hence not allowable in view of provisions of section 40(a)(i) of the Income Tax Act 1961.

We state that

1. The property sold vide deed of conveyance dated 21-02-2012 but the payment received during the year F.Y 2011-12 was only Rs 2,50,000/-which works to 2.94% of the agreed consideration Rs 85 Lacs.

2. Possession of the property was passed on 18-03-13 during F.Y 2012-13 when revenue to the extent of 21.71% was secured.
3. As the revenue with respect to the property sold was very meagre and not even 5% of the Total consideration the recognition of transactions deferred which is general practice in real estate trade and on receipt of reasonable consideration during F.Y 2012-13 the possession of property passed and the transaction offered as sale in the books of account.
4. In view of these facts the transaction subjected to the Tax by assessing officer was not correct and be accepted as sale for A.Y 2013-14.

Secondly regarding deduction of Rs.65,00,000/- with respect to payment for surrender of tenancy right was in accordance with MOU dated 27-12-2011 and was directly bearing to the cost of property and hence claimed as cost during F.Y 2012-13 relevant to A.Y 2013-14.

And in view thereof even if the sale is consider for A.Y 2012-13 the Direct cost Rs. 65 Lacs too should have been allowed in that year. And or alternatively the transaction of sale and direct cost should been accepted for A.Y 2013-14 as claimed by the Appellant company .

Further the payment made for surrender of tenancy rights not liable for TDS U/s 194LA as the provision read as under:

"Section 194LA relates to the TDS provisions applicable on the payment of compensation at the time of acquisition of certain type of immovable property. Any person, who is responsible for paying to a resident, any sum, being in the nature of compensation or the enhanced compensation or the consideration or the enhanced consideration on account of compulsory acquisition, under any law for the time being in force, of any immovable property (other than agricultural land) shall, deduct TDS at the rate of 10%". So the payment for surrender of Tenancy rights are not on account of compulsory acquisition u/s. 40(a)(i) of the Income tax Act 1961.

10. Upon careful consideration, I note that the transaction was entered into financial year 2011-12 as the deed of conveyance is dated 21.02.2012. Assessee has also received a sum of Rs. 2,50,000/- being the part payment. These facts substantiated established that the transaction was entered into in financial year 2011-12 and the income has accrued in financial year 2011-12. The assessee wants to account for the same in subsequent accounting year on the ground that a large portion of the payment was received in that year and assessee entered into a memorandum of understanding with the existing tenants for vacation of the premises. In this regard, I note that accrual of income cannot be at the desire of assessee. It has to be accounted

for when the income legally accrues. Further, I note that the AO has doubted the veracity of this memorandum of understanding for the payment Rs. 65 lacs as an afterthought. However, Id.CIT(A) has partly accepted the same. But, he has rejected the assessee's appeal of allowance of expenses on the ground that tax deduction at source under section 194LA has not been done.

11. I note that there is no mention in the order of the Id. CIT(A) as to whether, he has given the assessee an opportunity to give submissions on this plank of CIT's disallowance. The Id.CIT(A) has not also categorically held that whether he is of the opinion that but for compliance of the requirement of 194LA, the amount claimed for compensation was allowable during the concerned assessment year.

12. In this view of the matter, in my considered opinion, the matter should be remitted to the file of Id.CIT(A) to give clear finding on the issue of payment of compensation. As regards, the accounting for the income is concerned, it is abundantly clear that the same should be accounted for in the present assessment year.

13. In the result, this appeal by the assessee is partly allowed.

Pronounced in the open court on 17.03.2022

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 17.03.2022

Thirumalesh, Sr.PS

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai