

THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai
Shri B.R. Baskaran (AM) & Shri Rahul Chaudhary (JM)

I.T.A. No. 7162/Mum/2018 (A.Y. 2010-11)

Vishwanath Ramchandra Panvelkar 45, Ramsmruti, Suryodaya CHS, Shivaji Road, Ambarnath (West) Thane, Maharashtra Pincode : 421 501 PAN : AAWPP9190L (Appellant)	Vs.	DCIT, Circle-2 Mohan Plaza 1 st Floor Wayle Nagar Khadakpada Kalyan, District Thane Pincode :421 301. (Respondent)
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Assessee by	Shri Devendra Jain
Department by	Shri/Ms. Vrunda Matkarni
Date of Hearing	21.06.2022
Date of Pronouncement	08.07.2022

ORDER

Per B.R.Baskaran (AM) :-

The assessee has filed this appeal challenging the order dated 24.9.2018 passed by learned CIT(A)-3, Thane and it relates to assessment year 2010-11. The assessee is aggrieved by the decision of learned CIT(A) in confirming the addition made by the Assessing Officer under section 68 of the I.T. Act.

2. The facts relating to the issue are stated in brief. The assessee is an individual and is engaged in the business of transportation, hiring out of JCB, proclaim and dumpers. The assessee is also a partner in three partnership firms. The return of income filed by the assessee for the year under consideration was taken up for scrutiny. The Assessing Officer, inter alia noticed that the assessee has credited a sum of Rs. 1,77,32,218/- to his capital account. The Assessing Officer asked the assessee to explain sources of the same, but the assessee did not furnish any detail. Hence the Assessing Officer completed the assessment to the best of his judgement under section

144 of the Act, wherein he assessed the above said amount of Rs. 1,77,32,218/- as unexplained cash credit under section 68 of the Act.

3. Before learned CIT(A) the assessee furnished various details. It was submitted that the above said amount of Rs. 1,77,32,218/- represented net capital introduced by him. The details thereof were furnished as under :

CAPITAL ACCOUNT

Advances received	: Rs. 4,20,09,999/-
Loan from family members	: Rs. 73,70,000/-
Other receipts including loan from outsiders	: <u>Rs. 1,26,66,759/-</u> : Rs. 6,20,46,758/-
Less : withdrawals	: <u>Rs. 4,43,14,540/-</u>
	Rs. 1,77,32,218/- =====

Hence learned CIT(A) called for a remand report from the Assessing Officer. The dispute herein is with regard to the advance of Rs. Rs.2,11,99,999/- received by the assessee. The facts relating thereto are that the assessee has entered into the MOU on 23-09-2009 for sale of the property located at Kashid Kopar, Vasai with M/s. Samarth Enterprises for a sum of Rs. 2,75,00,000/- and received a sum of Rs.2,11,99,999/- as advance from it. The assessee, in turn, had earlier entered into an agreement on 22.09.2009 with Smt. Jayaben V. Shah and others for purchase of above said property. However, it was noticed that the assessee has finally purchased the above said land from Smt. Jayaben V. Shah and others on 01.10.2011 for a sum of Rs. 1,82,70,900/-. The Assessing Officer noticed that the assessee had entered into a MOU on 23.9.2009 with M/s Samarth Enterprises (Rajendra Desai) for sale of land, which was actually purchased by him only on 10.1.2011. He also noticed that the assessee has not transferred the land to M/s Samarth Enterprises till date. He further expressed the view that the MOU entered by the assessee on 23.9.2009 with M/s. Samarth Enterprises was not registered with registration authorities and hence the same is not reliable. The assessee had submitted that M/s. Samarth Enterprises has not paid the balance amount of sale

consideration of Rs.63,00,000/- to him and hence land was not registered in its favour. The said explanation was not accepted by the Assessing Officer. He further noticed that the MOU contained a clause for revocation of amount paid as advance, if the transaction was not completed within specified time, but the assessee has not exercised the said right. Accordingly the Assessing Officer took the view that the amount of Rs.2,11,99,999/- claimed to have been received from M/s Samarth Enterprises is unexplained cash credit. He also held that this amount is also taxable as gift in the hands of the assessee under section 56(2) of the Act. The Learned CIT(A) also concurred with the view expressed by the Assessing Officer in the remand report. He also took the view that the addition should be enhanced to Rs. 2,11,99,999/-. Accordingly he enhanced the addition to Rs. 2,11,99,999/- and confirmed the addition made u/s 68 of the Act.

4. Aggrieved by the order passed by learned CIT(A) the assessee has filed this appeal before us.

5. We heard the parties and perused the record. We noticed that the assessing officer has made the addition of Rs.2,11,99,999/- u/s 68 of the Act as unexplained cash credit. We notice that the assessee has explained as under before the AO in the remand proceedings:-

II 1 Transaction of proposed Sale | Memorandum of Understanding 1 :
Unexplained credit u/s. 68 of the Income Tax Act, Rs. 2,11,99,999/-.

1/ The Appellant Purchased the land bearing S. No. 51/1/1 & 52/1 at Kashid Kopar after executing Sale Deed (Conveyance Deed) on 01-10 2011. The said Sale Deed is registered at Sr. No. 384/2011 before Asst. Sub-Registrar, Vasai-1.

2/ While the transaction of purchase / discussion was in progress, the appellant came across intending Purchaser [Samarth Enterprises represented by Mr. Rajendra Desai] to Purchase land for Rs. 2,75,00,000/=

3/ Since the Appellant was not the Owner of the Land at that point of time, the appellant could not execute either Agreement for Sale or a Conveyance Deed with the said Samarth Enterprises.

4/ A Memorandum of Understanding ["the MOU"] was executed on 23-09-2009 and as per the said MOU, the said Samarth Enterprises (Proprietor Rajendra Desal) paid Rs. 2,11,99,999/- to the appellant as follows:

Rs. 99,99 999/- on 23-09-2009 through RTGS of IDBI Bank vide

UTR No. UTIBH09266004691.

Rs. 1,12,00,000/ on 21-01-2010 through RTGS of IDBI Bank vide

UTR No. UTIBH10021025587.

[Copy of the Memorandum of Understanding (M.O.U.) is attached herewith].

5/ The appellant [along with Mr. Ranka] became Absolute Owner by the Sale Deed referred above on 10-01-2011. Till then the appellant had received part payment of Rs. 2,11,99,999/ from the said M/s. Samarth Enterprises.

6/ Immediately on 25-01-2011 the appellant sent a letter asking for balance consideration of Rs. 63,00,000/- and for completing the transaction of sale, to the said Samarth Enterprises, which is duly acknowledged by the said Mr. Rajendra Deasi

7/ However, Samarth Enterprises could not / did not pay the balance of Rs. 63,00,000/- to the appellant. Said amount is not received by the assessee as on date. The said transaction was therefore could not be completed, and the appellant did not execute Sale Deed in favour of Samarth Enterprises (Rajendra Desal).

Therefore, even as on date, the appellant & Mr. Ranka are the Owners as per the 7-12 in revenue records; and have the possession of the said Kashidkopar property.

[Copies of 7-12 extracts of the lands are annexed herewith.]

8/ On 26-11-2015 the said Mr. Rafendra Desal submitted a letter to the Asst Commissioner of Income Tax. Circle 2. Kalyan during the instant Remand Proceedings of the appellant, stating and confirming the said facts.

9/ Mr. Rajendra Desai has also given Confirmation Letter dated 01-04 2010 quoting his PAN which reflects the amount of Rs. 2.11.99.999/-given by him to the appellant, which was submitted during the appellate and remand proceedings.

10/ Moreover, a Certificate from IDBI Bank (along with RTGS advice) regarding the RTGS Receipts from Samarth Enterprises, which proves the claim of the appellant of receiving the said amounts from Samarth Enterprises through banking channel were submitted during the remand proceedings.

CONCLUDING REMARKS :

1/ Based on the aforesaid facts, it is evident that the transaction of Sale of Land to Samarth Enterprises was not complete, hence there was no gain or income on the transaction. In fact the same is in dispute as on date.

2/ It appears that the Dy. Commissioner of Income Tax has NOT made any inquiry with the Circle 4, Thane where the said Samarth Enterprises (Rajendra Desai) is assessed regarding the amounts given to the appellant. If the inquiry was made, the appellant was neither given the copies of reply from the said Samarth Enterprises, nor was given any opportunity to explain further, if there was any pending explanation from appellant's side.

3/ As regards the receipt of Rs. 2,11,99,999/ received from Samarth Enterprises (Mr. Rajendra Desai), the appellant had submitted:

- a/ Copy of Memorandum of Understanding.
- b/ Confirmation Letter from the said Samarth Enterprises (Rajendra Desai) stating the facts and that he is assessed to tax at Circle 4, Thane.
- c/ Copy of Letter dated 18-04-2011 and 23-07-2011 sent by the appellant to M/s. Samarth Enterprises (Rajendra Desai), being notice for demand of overdue payment of Rs. 63 Lacs.
- d/ Copy of Letter dated 26-11-2015 directly sent by Samarth Enterprise to the Asst. Commissioner of Income Tax, Cir 2, Kalyan during the remand proceedings of the appellant.
- e/ Certificate given by the IDBI Bank, Ambernath East, confirming the payment received from the bank account of Samarth Enterprises.
- f) RBI RTGS Settlement Report showing the transfer from the bank account of Samarth Enterprises to he appellant's account [2 pages].

Also attached herewith: Copy of letter forwarding letter dated 29-11-2 by Sarangdhar & Co., CAs in the course of remand proceedings, w explains the facts clearly.

4/ The Ld. Dy. CIT has observed in point C) on page 8 that "The proprietor of Samarth Enterprises Mr. Rajendra Desai who had advanced a sum of Rs. 2,11,99,999/= in FY 2009-10..... "AND in point F) "The assessee has received an amount of Rs. 2,11,99,999/= from some Rajendra Desai,....." This shows that the Ld. Dy. CIT accepts that the appellant has received the sum from Samarth Enterprises, proprietor Mr. Rajendra Desal.

The appellant did not receive balance of Rs. 63 Lacs from the said Samarth Enterprises and hence the Sale Deed was not executed by the appellant in favour of Samarth Enterprises.

5/ Thus the appellant has also proven the

- 1) Identity of the Person (M/s. Samarth Enterprises - Rajendra Desai),
- 2) Creditworthiness of the person and
- 3) Genuineness of the Transaction.

6/ Based on the above Facts and explanations, it can be concluded that the appellant had explained the Transaction and the Receipts properly, along with supporting documents / papers, and has submitted what best he could submit.

The Department has not tried to cross check the facts either from the Said Samarth Enterprises directly or from the Income Tax Department, by asking for the records of Samarth Enterprise: internally.

Hence, at the backdrop of above Facts, it cannot be said that the amount received by the appellant or the said transaction was "Unexplained" by the appellant.

It is therefore humbly prayed that the proposed addition of 2,11,99,999/= should NOT be made either as a Gift u/s. 56 (2) of Income Tax Act, nor as Unexplained Credit u/s. 68 of the Income Tax Act."

6. A careful perusal of the above said submissions and also the discussions made by the tax authorities, it can be noticed that the assessee has explained the transactions entered with M/s Samarth Enterprises explaining the details of receipt of advance from it. The above said intended purchaser of the land has also confirmed the transaction to the AO in an independent enquiry made by him. The receipt of money was through banking channels only. The AO has not expressed any doubt on the identity of M/s Samarth Enterprises or its credit worthiness.

7. We notice that the AO has expressed doubt only on the MOU entered by the assessee with M/s Samarth Enterprises, since it was not registered. However, the AO is placing reliance on the very same MOU to express the view that the assessee should have forfeited the advance amount as per the right given in the MOU and accordingly expressed the view that it is taxable as gift u/s 56(2) of the Act. We noticed that the assessee had entered into agreement for purchase of the property on 22-09-2009 and in turn, entered into agreement to sell the same to M/s Samarth Enterprises on 23-09-2009. In pursuance of the said agreement, the assessee has received the sum of Rs.2,11,99,999/- from M/s Samarth Enterprises as against the agreed consideration of Rs.2,75,00,000/-. The assessee himself could complete the

purchase transaction on 01-10-2011 and hence the assessee could have transferred the land to M/s Samarth Enterprises only after that date. It is the submission of the assessee that the purchaser, viz., M/s Samarth Enterprises has not paid the balance consideration and hence the sale deed could not be executed. The assessee has also given copies of notices sent to M/s Samarth Enterprises asking them to complete the transaction. The said party has also confirmed the transaction in an independent enquiry. Hence we find no reason to doubt the genuineness of the transaction entered by the assessee with M/s Samarth Enterprises. The question as to whether the assessee should wait for completion of the sale transaction or should forfeit the advance money as per the clause stated in MOU is the matter to be decided by the assessee and, in our view, the tax authorities cannot enter into the shoes of the assessee in this matter. The important point is that there was sufficient reason for the assessee in not completing the sale transaction. Further, the Act contains specific provision with regard to the manner of treatment to be given for advances forfeited in respect of a sale transaction. Hence, in the facts and circumstances of the case, the question of applying the provisions of sec. 56(2) do not arise.

8. As observed by us earlier, the addition has been made in the hands of the assessee u/s 68 of the Act. We noticed that the tax authorities have given undue importance to the clauses of MOU and expressed the view as to how the assessee should have dealt with these transactions. Under the provisions of sec. 68, the initial onus placed upon the assessee is to prove three main ingredients, viz., the identity of the creditor, the credit worthiness of the creditor and the genuineness of the transactions. We notice that the AO has not expressed the view that the assessee has not discharged the initial onus placed upon it. The independent enquiry has been made by AO and the intended buyer has also confirmed the transaction and MOU. Hence, the registration or otherwise of MOU may not be relevant here, when the parties to the MOU have confirmed the execution of said agreement. Accordingly, we are

of the view that the AO has not made out a case for assessing the amount of Rs.2,11,99,999/- u/s 68 of the Act, i.e., we are of the view that the assessee has discharged the onus placed upon him in respect of cash credit and the assessing officer could not disprove them. Under these set of facts, we are of the view that the addition made u/s 68 cannot be sustained.

9. Accordingly, we set aside the order passed by Ld CIT(A) and direct the AO to delete the addition of Rs.2,11,99,999/- made u/s 68 of the Act.

10. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 08.07.2022.

Sd/-
(RAHUL CHAUDHARY)
JUDICIAL MEMBER

Sd/-
(B.R. BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 08/07/2022

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

PS