

**IN THE INCOME TAX APPELLATE TRIBUNAL  
 "A" BENCH, MUMBAI  
 BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER &  
 SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER  
 ITA No. 689/Mum/2022  
 (A.Y.2013-14)**

Magestic Premises Private Limited 201, Oasis Silver Stone, Ram Maruti Road Near Gajanan Maharaj Temple Thane - 400602	Vs.	DCIT, CC-2 6 <sup>th</sup> Floor, Room No. 13 A-Wing, Ashar I.T. Park, Thane - 400 604
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAECM5625L		
Appellant	..	Respondent

Appellant by :	Mani Jain & Prateek Jain
Respondent by :	Mehul Jain

Date of Hearing	24.11.2022
Date of Pronouncement	30.11.2022

आदेश / O R D E R

**Per Amarjit Singh (AM):**

The present appeal filed by the assessee is directed against the order passed the CIT(A)-11, Pune, dated 09.03.2022 for A.Y. 2013-14.

The assessee has raised the following grounds before us:

- “1. On the facts and circumstance of the Appellant's case and in law the Id CIT (A) erred in confirming the action of Id. A.O. in making addition of Rs.1,03,83,721/- under the head income from business and profession on account of sale of TDR as per the reasons stated in the impugned order or otherwise.
2. The appellant craves leaves to alter, amend, withdraw or substitute any ground or grounds or to add any new ground or grounds of appeal on or before the hearing.”

2. The fact in brief is that return of income declaring total income at Rs.17,50,690/- was filed on 26.09.2013. The case was subject to scrutiny assessment and notice u/s 143(2) of the Act was issued on 04.09.2014. The assessee is a company engaged in the business of construction of residential premises as builder and developer in the name and style of M/s Magestic Premises. During the course of assessment the A.O noticed that assessee has sold TDR to the various parties for Rs. 2,32,35,752/- as mentioned below:

Sr. No.	Date of TDR sale	TDR No.	Details of Land	Area (in sq. mts)	Amount (in Rs.)
1.	09.08.2012	2005/65/TMC/TDD/265 dtd. 29.11.2011	Tikka No.9 CTS No.4B(1) and 5B(1)	124.92	21,52,000/-
2.	08.01.2013	RC No. Reservation//112- TDR/2/Res/55/2007 dt.	Tikka No. 9, CTS No. 4B(1) and 5B (1)	200	43,05,000/-
3.	10.01.2013	RC-112, Sector-II	Tikka No. 10, CTS No. 155/A2/	330	70,00,000/-
4.	31.10.2013	RC-112, Sector -II	Tikka No. 10, CTS No. 155/A-2	350	75,00,000

The AO has further noticed that assessee has purchased the TDR during the years for the amount of Rs.97,12,010/- as mentioned below:

Sr. No.	Date of TDR purchase	TDR No.	Details of Land	Area (in sq. mts.)	Amount (in Rs.)
1.	01.09.2009	RC-112, Sector-II 14.07.2009	Tikka No. 10, CTS No. 155/A-2/	880	97,12,010/-
2.	29.11.2011	2005/65/TMC/TDD/26 5 dated 29.11.2011	Tikka No. 9,CTS No.4B(1) and 5B(1)	124.92	NIL
3.	29.11.2011	2005/65/TMC/TDD/26 5 dtd. 29.11.2011.	Tikka No. 9, CTS No. 4B(1) and 5B(1)	128.75	NIL

On query the assessee explained that it has deduced the sale proceeds amounting to Rs.2,53,87,752/- from the work in progress. However, the A.O has not agreed with the submission of the assessee and he was of the view that the cost of TDR amounting to Rs.97,12,010/- was proposed to be deducted from closing work in progress of assessment year 2013-14 and the same should have been at Rs.41,65,89,849/- (42,63,01,859 – 97,12,010). Therefore, the difference between the sale consideration and the cost of TDR was computed by the A.O. at Rs.1,34,87,990/- and same was treated as profit on sale of TDR and added to the total income of the assessee.

3. The assessee filed the appeal the appeal before the Id. CIT(A). The Id. CIT(A) has partly allowed the appeal of the assessee. The relevant part of the decision of Id. CIT(A) is as under:

*“8.1 I have considered the facts of the case and the submissions made by the appellant. Before examining the facts of the present case, it is important to examine the ratio laid down by the Hon'ble Mumbai Tribunal in the cases of M/s Skylark Builders (supra), DBS Realty (supra) and DKP Engineers and Construction Pvt Ltd (supra). A perusal of these case laws suggests that the ratio laid down by the Hon'ble Tribunal is that whenever the receipts on sale of TDRs are directly linked to the execution of the project, in that case, the receipts should be reduced from the cost of the project, because, such receipts are incidental to the entire project under taken by the assessee. A further perusal of these case laws suggests that the Hon'ble Mumbai Tribunal after examining the facts of each case held that in those cases, the TDR receipts were directly linked to the execution of the project. In the case of M/s Skylark Builders (surpa), the TDRS were received in lieu of handing over a portion of project and thus, the Hon'ble Mumbai Tribunal held that the TDRS were directly linked to the execution of project. Thus, the facts of the case of M/s Skylark Builders are different than the facts of the present case. Similarly, the facts of other two cases relied upon by the appellant are different than the facts of the present case.*

*8.2 As explained earlier in this order, the mode as well as purpose of acquisition of both type of TDRs Le. TDRS purchased from the open market and TDRs allotted by the TMC are different. In fact, the appellant itself has given different treatments to sale consideration on these TDRs in its books of account. As far as, sale of TDRs which were purchased from the open market, is concerned, it may be mentioned that TDR is a separate right available to a person which can be transferred in the open market. The TDR No. TDR/2/Res/55/2007 (880 sq m) was acquired by the appellant from the open market in FY 2009-10 for*

a consideration of Rs: 97.12.010/-. These TDRS can be used in any project by any one and were not linked to any specific project. The appellant did not acquire these TDRS by virtue of execution of any specific project. Thus, it cannot be said that the TDR corresponding to 880 sq m was directly linked to any specific project undertaken by the appellant. The appellant has also filed the copies of agreement for transfer of these TDRS entered into by the appellant and these agreements do not suggest that there was any restriction on utilization of these TDRs for any specific project. Therefore, it cannot be said that the income on sale of these TDRS is inextricably linked to the execution of any specific project. Also the fact that the appellant itself has offered profit amounting to Rs. 90,92,990/- in the next assessment year ie. A.Y 2014-15, shows that the income on sale of these TDRS is not directly linked to the project undertaken by the appellant. Accordingly, the claim of the appellant that no income should be chargeable to tax on the sale of these TDRS because these receipts are linked to the execution of the project, cannot be accepted.

8.3 The alternate argument of the appellant is that, since the income of Rs 90,92,990/- has been offered in the subsequent assessment year ie AY 2014-15, taxing the same in AY 2013-14 shall amount to double taxation. The appellant has submitted that due to certain procedural formalities, these TDRs could be finally transferred only in AY 2014-15, therefore, the income has been offered in A.Y 2014-15 This claim of the appellant has been examined From the details filed, it is seen that the TDR purchased from open market in FY 2009-10 were sold to three different parties. The details of sale consideration and date of registration of agreement transferring these TDRs are as under:

Sr. No.	Area of TDR (sq. mtr)	Name of the buyer	Consideration	Date of registration of agreement
1.	200	Gaurang Associates	43,05,000/-	08.01.2013
2.	330	H.R. Group	70,00,000/-	10.01.2013
3.	350	Jagdamb Construction Co.	75,00,000/-	31.10.2013

8.4. As per prevalent practice, TDRs stands transferred once the sale consideration is received and the Agreement for Transfer of Development Right is registered with the competent authority. The above table clearly suggests that sale of TDRs to M/s Gaurang Associates and M/s HR. Group were completed in the FY 2012-13 on registration of Agreement to Transfer of TDRs. Although, the appellant has submitted. that certain procedural formalities were completed in FY 2013-14, however, details of any such formality which was left to be completed after the registration of agreement and was completed in next year, has not been indicated by the appellant. Thus, the claim of the appellant that the sale of these two TDRs was not completed during the year under consideration cannot be accepted. It may also be mentioned that it is a well settled legal position that income has to be taxed in the assessment year in which it has accrued. Neither the assessee nor the revenue has a choice to tax the income in any assessment year other than the year in which same is taxable. Since, the transfer of TDRS to Gaurang Properties and M/s HR. Group was completed in FY 2012-13, therefore, the income arising on sales to these two parties shall be taxable in AY 2013-14 only. As far as, the sale of TDR to M/s Jagdamb Construction Co is concerned, it

*is seen that the agreement was registered on 31/10/2013. In fact, the Assessing Officer in the table at page 3 of the assessment order has also mentioned the date of this particular TDR sale as 31/10/2013. In these facts, the income on sale of transfer of TDR to M/s Jagdamb Construction Co becomes taxable in AY 2014-15 and not in AY 2013-14 In this manner, the income taxable on account of sale of TDR to Gaurang Properties and M/s H R. Group is worked out as under:*

*Sale consideration of TDRS transferred= Rs. 1,13,05,000/- (4,305,000+70,00,000)*

*Cost of TDR (530/880 x 97,12,010/-) = Rs 58,49,279/-*

*Profit = Rs. 54,55,721/-*

4. Heard both the sides and perused the material on record. The assessee company had undertaken project namely Kopat Property Project (Oasis Sapphire) commercial project plot which was purchased in F.Y. 2007-08. On the basis of the area of the aforesaid plot the assessee was eligible for TDR (Transferable Development Right) @ 40% of the area of the plot as per the terms of the Thane Municipal Corporation. Accordingly, assessee purchased TDR of 880 sq. mtr. for sum of Rs.97,12,010/-. In view of the approved project, the assessee had also surrendered land area for the development of road etc. In lieu of surrendering the land area assessee got TDR of 128.75 sq. mtr. and 125.95 sq. mtr respectively without any cost. The assessee has initiated the project and shown work in progress for assessment year 2010-11 to assessment year 14-15 as per the break up given at page no. 25/32 of the paper book filed by the ld. Counsel during the course of appellate proceedings before us. On the said plot the assessee had incurred construction expenses to the amount of Rs.1.88 crores. The project was under work in progress stage and the assessee company has followed consistently percentage completion method of revenue recognition on the basis of advance received. However, subsequently, the assessee company has scrapped the project, therefore, TDR purchased as well as allotted by the Thane municipal corporation become unusable, therefore same were

sold for total consideration of Rs.2,37,33,000/-. The TDR which was purchased for Rs.97,12,010/- on the basis of the land area of the project was sold for Rs.1,88,05,000/- and the same was reduced from the cost of the work in progress during the year under consideration. Alternatively, it is undisputed fact that assessee had offered the income of Rs.90,92,990/- (1,88,05,000 – 97,12,010) in the subsequent assessment year 2014-15. The assessee had demonstrated that there was some procedural formality since part of the TDR of 350 sq. mtr. was actually sold on 31.10.2013 to Jagdamba Construction Company. Therefore, we find the decision of the Id. CIT(A) to tax the same again in the year 2013-14 is not justified.

5. Regarding TDR acquired by the assessee from Thane Municipal Corporation in lieu of surrendering area of the project to be developed, we consider that it is directly connected to the project under construction and it would reduce the cost of the project. In this regard we have also perused the decision of the coordinate bench of the ITAT, Mumbai in the case of ITO Vs. M/s DKP Engineers & Construction Pvt. Ltd. vide ITA No. 7796/Mum/2011 dated 31.08.2012 wherein held that TDR has a direct nexus with the development work and hence it is incidental to the entire project undertaken and the assessee was correct in reducing the sale proceeds from the work in progress. In the case of the assessee also TDR was having direct nexus with the project work undertaken by the assessee. The said TDR was allotted by the Thane Municipal Corporation only on the basis of surrendering of area from the project land for the development of the road. The said Oasis Sapphire project was under work in progress stage and the assessee company had followed the project completion method but subsequently the project scrapped which showed that TDR was connected to the project undertaken by the

assessee. In support of its contention the assessee has submitted copies of break-up of work in progress for assessment year 2010-11 to A.Y. 2014-15, copies of agreement of TDRs, balance sheet, break-up of profit and loss account etc, demonstrating that the TDR was connected to the project undertaken before lower authorities. In the light of the above facts and findings we consider that the decision of the Id. CIT(A) is not justified. Accordingly, grounds of appeal of the assessee are allowed.

6. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 30.11.2022

Sd/-  
(Rahul Chaudhary)  
Judicial Member

Sd/-  
(Amarjit Singh)  
Accountant Member

Place: Mumbai

Date 30.11.2022

Rohit: PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT,  
Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//  
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण/ ITAT, Bench, Mumbai.