

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F", MUMBAI
BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER AND
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER**

ITA NO.3297/MUM/2023
ASSESSMENT YEAR :2015-16

I.T.O Ward 41(4)(1),BKC Mumbai
Kautilya Bhavan,
Bandra Kurla Complex,
Mumbai 400 051.

---- Appellant

Vs.

Fairdeal Realite,
Flexcel Park, B-Wing,
Ground Floor, S.V.Road,
Next to Karat Multiplex
Mumbai 400 102
PAN: AAAFF-7074-K

--- Respondent

C.O NO.29/MUM/2024

[Arising out of ITA No.3297/Mum/2023,A.Y.2015-16]

Fairdeal Realite,
Flexcel Park, B-Wing,
Ground Floor, S.V.Road,
Next to Karat Multiplex
Mumbai 400 102
PAN: AAAFF-7074-K

..... Cross Objector

Vs.

I.T.O Ward 41(4)(1),BKC Mumbai
Kautilya Bhavan,
Bandra Kurla Complex,
Mumbai 400 051

..... Appellant in appeal

Revenue by : Shri Surendra Meena

Assessee by : Shri Dharan Gandhi

Date of Hearing : 12/06/2024

Date of Pronouncement : 18/06/2024

ORDER

PER B.R. BASKARAN, ACCOUNTANT MEMBER :

The appeal of the revenue and the cross objection filed by the assessee are directed against the order passed by Ld CIT(A), NFAC, Delhi and they relate to the assessment year 2015-16. The revenue is aggrieved by the

decision of Ld CIT(A) in deleting the addition of Rs.3.93 crores made by the AO. In the cross objection, the assessee is challenging the valuation determined by the DVO.

2. The facts relating to the case are discussed in brief. The assessee is a builder and developer. It had developed and sold flats under the name "Garden Court" in Andheri (west), Mumbai in financial year 2004-05 relevant to AY 2005-06. During the year under consideration, the assessee has transferred the remaining rights over the project to the "co-operative society", which is the usual practice in Mumbai. The assessee had also constructed two units in basement area and they have not been sold to anyone. Hence, in order to establish its ownership rights over those two units, the assessee executed a "Deed of retention" in its name. The stamp authority determined the value of these units for stamp duty purposes at Rs.2,03,93,000/- and Rs.1,89,40,000/-, both aggregating to Rs.3,93,33,000/-. Accordingly, the assessee paid stamp duty on the value so determined by the stamp authorities.

3. The assessing officer noticed that the assessee had claimed entire cost of construction in FY 2004-05 relevant to AY 2005-06. He expressed the view that the assessee should have shown the cost relating to the above said two units as 'Closing Stock'. Accordingly, the AO held that the value of the above said two units should be considered as 'undisclosed stock in trade' and also held that the stamp duty value of RS.3,93,33,000/- is assessable as income of the assessee.

4. The assessee objected to the value of properties. Hence the AO referred the matter of valuation to the DVO. Since the AO did not receive the valuation from the DVO before the completion of assessment, the AO assessed the value of Rs.3,93,33,000/- determined by the Stamp authorities as income of the assessee.

5. Before Ld CIT(A), the assessee contended that it did not sell the two units located in the basement area to any third party. It was further submitted that the two units do not have proper ventilation or lighting and they can be used as godowns/storage area only. It was submitted that, since the assessee did not sell these two units to any third party and since it transferred the apartment rights to the co-operative society, it was required to execute the retention agreement in order to establish its ownership rights over these two units. Accordingly, it was submitted that the assessee has not transferred these two units to anyone and hence there is no question of making any profit thereon. In this regard, the assessee took support of the decision rendered by Hon'ble Supreme Court in the case of Sir Kikabhai Premchand vs. CIT (1953)(24 ITR 506)(SC). It was also submitted that the established principle of law is that one cannot profit from himself. The Ld CIT(A) was convinced with the contentions of the assessee. Since the assessee has not sold the two units located in the basement, the Ld CIT(A) held that the impugned addition could not be made and accordingly deleted the same. The revenue is aggrieved.

6. We heard the rival contentions and perused the record. There is no dispute with regard to the fact that

(a) the assessee did not sell the two units located in the basement area of the apartment complex developed by it by name "Garden Court".

(b) the above said project was completed by the assessee in Financial year 2004-05 relevant to the assessment year 2005-06.

(c) the assessee has only executed "Deed of retention" and the purpose is to establish the ownership rights of the assessee over these two units located in the basement area of "Garden Court".

During the year under consideration, the assessee has transferred the apartment rights to the concerned "co-operative society", which is a routine feature after completion of the project. Since the two units located in the

basement area have not been sold, in order to establish the right of the assessee over those two units, the assessee was constrained to execute “retention agreement” and for that purpose, the stamp authorities have collected stamp duty by determining the value of two units.

7. Since the assessee has not sold those two units to anyone, the question of determining profit will not arise. As held by Hon’ble Supreme Court in the case of Sir Kikabhai Premchand (supra), the execution of retention agreement is not a business transaction and hence the question of estimating any profit there from will not arise. The assessee itself has constructed the apartments and it has retained the ownership of both the units located in the basement area. It is established principle of law that no one can make profit from out of himself.

8. The case of the AO is that the assessee has claimed entire cost of construction of the project in AY 2005-06 including the cost relatable to the impugned two units. It is the case of the AO that the assessee should have declared the cost attributable to the impugned two units as Closing stock as on 31.3.2005. Since the assessee has declared NIL closing stock, the AO held that the cost attributable to these two units should be assessed as “undisclosed closing stock” in AY 2015-16. In our view, the AO has misdirected himself. If at all, it is considered that the assessee has claimed excess deduction in AY 2005-06, then the cause of action would arise in that year only and not in the assessment year 2015-16. The alleged excess deduction made in a particular year can be rectified in that year only and not in any other year. Accordingly, the reasoning given by the AO in assessing the value of “unsold units” as income of the assessee in AY 2015-16 is not legally correct. Further, as held by Ld CIT(A), there is no provision under the Act to assess the registration value determined by the stamp authorities in executing the “Retention Agreement” . Accordingly, we are of the view that the Ld CIT(A) was justified in deleting the amount of Rs.3,93,33,000/- assessed by the AO.

9. The cross objection filed by the assessee relates to the valuation determined by the DVO. It appears that the DVO has forwarded his report after the completion of the assessment. The assessee is disputing the value determined by the DVO in the cross objection. Since we have held that no addition could be made on the strength of retention agreement, the ground raised by the assessee in the cross objection shall become infructuous.

10. In the result, the appeal of the revenue and the cross objection filed by the assessee are dismissed.

Order pronounced in the open court on 18th June, 2024.

Sd/-

(SANDEEP SINGH KARHAIL)

JUDICIAL MEMBER

Mumbai, Date : 18th June, 2024

Vm

Copy to :

- 1) The Applicant
- 2) The Respondent
- 3) The PCIT/CIT concerned
- 4) The D.R, " F" Bench, Mumbai
- 5) Guard file

Sd/-

(B.R. BASKARAN)

ACCOUNTANT MEMBER

By Order

Dy./Asstt. Registrar

I.T.A.T, Mumbai