IN THE INCOME TAX APPELLATE TRIBUNAL

NAGPUR BENCH, NAGPUR

BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER AND

SHRI K.M. ROY, ACCOUNTANT, MEMBER

ITA No. 96/Nag./2021
(Assessment Year : 2011-12)

M/s. Datta Dairy Products Pvt. Ltd,
F-1, Khamgaon, District-Buldhana. ……. Appellant
PAN – ABAPD5671R

v/s

Income Tax Officer, Ward-1,
Khamgaon. ……. Respondent

Assessee by : Miss. J.S.Thakar, Advocate
Revenue by : Shri Abhay Y. Marathe, Sr. DR

Date of Hearing – 02/07/2024	Date of Order – 02/07/2024

O R D E R

PER K.M.ROY, A.M.

The present appeal has been preferred by the assessee challenging the impugned order dated 30/07/2021, passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, [*"learned CIT (NAFC)"*], for the assessment year 2011-12.

2. The grounds of appeal raised are as follows:

[1] Learned C.I.T. (A) erred in treating the advance of Rs.7,00,000/- received on 30.07.2009 against MOU dt. 18.07.2009 and further advance of Rs.15,00,000/- received against agreement dt. 30.09.2010, which agreement ultimately stood cancelled, as income from other source by having recourse of newly introduced section 56(2)(ix) w.e.f. 01.04.2015 inserted by Finance (No.2) Act, 2014 w.e.f. 01.04.2015.

[2] Learned C.I.T.(A) rightly deleted the addition of Rs.1,20,36,356/- made by A.O. on account of short term capital gain on alleged slump sale in reassessment proceedings for the year in question A.Y. 2011-12 on merits but failed to appreciate that the reassessment being itself without jurisdiction as based on mere change of opinion, there was no scope nor any legal sanctity for making/retaining addition of Rs.22,00,000/- as income from other sources for the year in question viz. A.Y. 2011-12.

[3] Learned C.I.T.(A) failed to see and appreciate that on cancellation of agreement dt. 30.09.2010 the amount of Rs.22,00,000/- was legally refundable by the Assessee to said M/s. K.M.Milk Products (P) Ltd. Said K.M.Milk Products also demanded the refund of said earnest money of Rs.22,00,000/- by their reply dt.04.12.2014. It was only after the legal notice dt. 30.01.2015 by the Assessee to K.M.Milk Products that the amount of Rs.11 lakh stood forfeited. Thus, the said amount under no circumstances could be treated as income for A.Y. 2011-12.

[4] Under the facts and circumstances of the case and law applicable thereto the addition of Rs.22,00,000/- made/retained by learned C.I.T.(A) is liable to be deleted.

[5] Assessee craves leave to urge additional grounds at the time of hearing, if necessary.

Prayer : It is prayed that the addition of Rs.22,00,000/- be kindly ordered to be deleted."

3. The Ld. AR has submitted her written compilation containing brief contour of argument :–

"The only dispute in present appeal is whether the amount of Rs.22,00,000/- received as part payment of agreement to Sell it's Dairy unit consisting of land, building, machinery and other moveable and immovable properties and which amount was forfeited by Assesse on cancellation of agreement on account of serious breach thereof, constituted the income of the Assessee from other sources or not.

Brief background is as under :-

Assessee-M/s. Datta Dairy Products Pvt. Ltd. owned a dairy unit consisting of leasehold plot No. A-48 of MIDC, Khamgaon with building, plant and machinery for milk processing and other related moveable and immovable property. Said unit was not successful having incurred losses and huge bank liability Rs.50 Lakh plus interest against mortgage of their said property with Khamgaon Urban Cooperative Bank Ltd., Khamgaon. Hence the Assessee by MOU dt.18.07.2009 agreed to sell the said entire property to M/s. K. M. Milk Products (P) Ltd., Navi Mumbai for a total consideration of Rs. 1,77,00,000/- and received Rs.7,00,000/- as part payment of consideration. Assessee delivered possession of the unit. This was followed by agreement to sell dt 30.09.2010. Assessee received further amount of Rs.15,00,000/- on execution of agreement. Full consideration was to be paid within six months. However said M/s. K.M. Milk Products (P) Ltd. failed to pay any further consideration to the Assessee. Nor did they pay any amount to Khamgaon Urban Coop. Bank causing great loss and embarrassment to the Assessee. In view of the serious breaches of MOU and agreement, Assessee by legal notice cancelled the MOU/agreement and forfeited said advance of Rs.22,00,000/-.

Assessee filed the return of it's income for A.Y 2011-12 on 30 09.2011 declaring NIL income. During the original assessment proceedings the fact about above transaction was enquired into as will be clear from the following two letters dt. 14.08.2012 and dt. 15.05.2013 filed before A.O. After considering these facts the A.O. passed a brief order u/s.143(3) dt. 19.08.2013 accepting NIL income as returned. Above letters dt. 14.08.2012, dt. 15.05.2013 and 143(3) order dt. 19.08.2013 are enclosed herewith.

Thereafter on some change of opinion or some audit objection the A.O. issued notice u/s.148 on 22.12.2015.

A.O. on above facts treated the above referred transaction which was cancelled as slump sale and determined short term capital gain at Rs 1,20,36,356/- as follows:-

Consideration	*Rs. 1,77,00,000/-*
Less: Net worth of unit	*Rs. 56,63,643/-*
	Rs. 1,20,36,356/-

Learned C.L.T.(A) considering the fact the transaction was cancelled, MOU and agreement became ineffective and the Khamgaon Urban Coop. Bank took possession of the property as provided in section 13(4)(2) of Securitisation and Reconstruction of Financial Asset and Enforcement of Security Interest Act, 2002 and sold the property in it's own right in public auction and issued sale certificate to auction purchaser, held that no capital gain arose to the Assessee.

However, Learned CIT(A) held that the amount of Rs.22,00,000/- received by the Assessee by forfeiting the amount on cancellation of agreement constituted income from other sources.

Thus the only dispute in present appeal is about the taxability or otherwise of said amount of Rs.22,00,000/-. Assessee submits that the same is not taxable as income from other sources for following reasons.

Firstly - legally *the above referred transaction was enquired into by learned A.O. in the original assessment and after considering the same A.O. accepted the NIL income as returned. Present reassessment is based on mere change of opinion which is not permissible. It amounts to review of an order passed by one officer by another officer. Thus the reassessment itself is liable to be cancelled.*
Secondly On merits *the amount of part payment of Rs 22,00,000/- against agreement of sell of land, building, plant and machinery amounts to capital receipt and not a revenue receipt and hence the same is not taxable as income from other sources or otherwise/There is admittedly no capital gain arose in favour of Assessee and hence the said amount of advance of Rs.22,00,000/- is not taxable.*
Thirdly *Section 51 has also no application. Since no capital gain at all has arisen to the Assessee there is no question or occasion for reducing the amount of advance money from cost for which the asset was acquired. Similarly section 56(2)(ix) has also no application as it came into force only on 01.04.2015 and hence not applicable in A.Y.2011-12. Similarly section 56(2)(x) is also not applicable as the same came into force from 01.04.2017. Even otherwise the same is not applicable to the facts of the case.*
For the above proposition reliance is placed on the decision of ITAT Delhi Bench 'A', New Delhi decision dt. 23.03.2023 in appeal No. ITA No. 3003/DEL/2018 A.Y. 2014-15 in the case of ACIT Circle-29(1) New Delhi vs. Ahmad Ansari Imtiyaz.
In view of above, it is prayed that the addition of Rs.22,00,000/- retained by learned C.I.T.(A) be kindly deleted."

4. There was no separate addition of Rs.22 lakhs in assessment order, but CIT (A) has suggested the addition by observing as follows;

"7.1. Grounds 1 and 5 are general in nature. Ground 6 deals with the mandatory penalty provisions and doesn't need separate adjudication. The grounds 2, 3 and 4 are answered as under.

7.2. The submissions made by the appellant have been carefully considered. From the perusal of the facts of the case, it is clear that the appellant has entered into agreement of sale with one M/s KM Milk Products Pvt Ltd. The appellant has received an amount of Rs.22 lakhs as acknowledged by him vide receipt dated 30.09.2010. However, the agreement for sale has not got converted into sale deed owing to the non fulfilment of the terms of the agreement by the transferee. Meanwhile the Khamgaon Urban Co-operative Bank had taken possession of the property on 08.01.2015 (PAGE 22 OF THE ANNEXURE).

7.3. From the above, it can be seen that the possession of the property vested with M/s Khamgaon Urban Co-operative Society and not with M/s KM Milk Products. As such, it is not proper to treat the transaction for the purpose of section 50B

for the period relevant to AY 2011-12. The addition made on this account is ordered to be deleted. The following also need to be considered:

The relevant amendment [Section 56(2)(ix)] to deal with such a situation has been brought in the statute w.e.f. AY 2014-15.

1. *Receipt dated: 30.09.2010 acknowledging receipt of Rs. 22 lacs*
2. *Memorandum of understanding dated: 18.07.2009*
3. *Property address: Plot No.A-84, MIDC, Khamgaon*
4. *Possession notice dated 08.01.2015 (Same property as above)*

7.4. However, the appellant had received an amount of Rs.22 lakhs from M/s KM Milk Products Pvt Ltd during the FY 2010-11 which is forfeited by the appellant.

7.5. Since, it is only part of the same consideration to be received as part of slump sale of all aspects are already discussed above another discussion of this part amount is not required. Since, the entire sale issue got changed in view of discussion already made in preceding paragraphs and following the discussion already made which shows that it no longer attracts sec.50B, This amount has to be treated as income from other sources and charged to tax.

8.0. In the result, the appeal of the assessee is partly allowed.

5. We deem it appropriate to refer to Section 56(2)(ix) of the I.T. Act, 1961, as below:

"Sec. 56(2)(ix) – any sum of money received as an advance or otherwise in the course of negotiations for transfer of a capital asset, if, --
(a) such sum is forfeited; and
(b) the negotiations do not result in transfer of such capital asset;"

The above provision has been inserted w.e.f. 01.04.2015. Prior to such insertion we are bound by the order of the Hon'ble Apex Court in ***Travancore Rubber & Tea Co. Ltd. Vs. Commissioner of Income Tax (2000) 243 UTR 0158***, which holds as follows.

"Income - Capital or revenue receipts-Forfeiture of earnest money-Agreements for sale of old and unyielding rubber trees-Each of the purchasers paid earnest money and certain advance under the respective agreements - All the purchasers defaulted in payment and agreements were terminated-Earnest money and advance forfeited by assessee in terms of agreement-Sale proceeds of old and unyielding rubber trees grown and used for obtaining latex therefrom constitute capital receipt-Amount received by way of advance consideration was therefore, capital receipt-Cancellation of sale would not change the nature of receipt of forfeited amount-

Specific provisions of s.51 in respect of capital gains fortify this view-Monies received on previous occasions by way of advance or 'other money' and retained by vendor-assessee cannot, therefore, be treated as revenue receipt-Distinction between earnest money and advance loses its significance in the context of express language of s.51-That being so, forfeited amounts must be treated as capital receipt"

6. The learned Sr. DR could not controvert the above legal proposition.

7. In view of the above legal precedent, the addition of Rs.22,00,000/-, as confirmed by the lower authorities has got no legal legs to stand upon. Hence, the addition of Rs.22,00,000/- needs to be deleted in totality as there is no retrospective application of the provision.

8. For the reasons aforesaid, we allow the appeal.

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

Order pronounced in the open Court on 02/07/2024.

Sd/-	**Sd/-**
V. DURGA RAO	**K.M. ROY**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

NAGPUR, DATED: 02/07/2024

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The PCIT / CIT (Judicial);

(4) The DR, ITAT, Nagpur; and

(5) Guard file.

True Copy

By Order

Rajesh V. Jalit
Private Secretary (On contract)

Sr. Private Secretary
ITAT, Nagpur