

| आयकर अपीलीय अधिकरण न्यायपीठ, मुंबई |
IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, MUMBAI

BEFORE SHRI NARENDRA KUMAR BILLAIYA, HON'BLE ACCOUNTANT MEMBER
&
SHRI RAJ KUMAR CHAUHAN, HON'BLE JUDICIAL MEMBER

I.T.A. No. 219/Mum/2024
Assessment Year: 2020-21

Asstt. Commissioner of Income Tax, Circle -1(2)1, Mumbai	Vs	Chandiwala Enterprises Private Limited, Mumbai 222A, 1 st Floor Al-Moonaz Arcade S.V. Road, Oppo. Andheri P.O. Andheri West Mumbai - 400058 [PAN: AAHCC1760D]
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)

C.O. No. 45/Mum/2024
Assessment Year: 2020-21

Chandiwala Enterprises Private Limited, Mumbai 222A, 1 st Floor Al-Moonaz Arcade S.V. Road, Oppo. Andheri P.O. Andheri West Mumbai - 400058 [PAN: AAHCC1760D]	Vs	Asstt. Commissioner of Income Tax, Circle -1(2)1, Mumbai
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)

Assessee by :	Shri Suchek Anchaliya & Ms. Vaishali More, A/Rs
Revenue by :	Ms. Madhu Malati Ghosh, CIT, D/R

सुनवाई की तारीख/Date of Hearing : 23/07/2024
घोषणा की तारीख /Date of Pronouncement: 25/07/2024

आदेश/ORDER

PER NARENDRA KUMAR BILLAIYA, AM:

I.T.A. No. 219/Mum/2024 & C.O. No. 45/Mum/2024, are appeal by the revenue and cross-objection filed by the assessee preferred

against the order of the NFAC, Delhi dt. 14/11/2023, pertaining to AY 2020-21.

2. The appeal and cross-objection are disposed by this common order for the sake of convenience and brevity.

3. Representatives of both the sides were heard at length. Case records were carefully perused and relevant documentary evidence duly considered in the light of Rule 18(6) of the ITAT Rules, 1963.

4. Briefly stated the facts of the case are that the assessee is engaged in construction work. Return of income was filed on 14/12/2020, declaring Nil income showing current year loss of Rs.6,37,018/-. The return was selected for CASS and accordingly statutory notices were issued and served upon the assessee.

5. The AO was in possession of the information that the assessee has purchased two immovable properties at Ambivali village and Wshiwara village in Andheri, Mumbai for the purchases value of Rs.13,81,87,000/- and Rs.32,950/- whereas the stamp duty value of the properties are Rs.80,35,63,000/- and Rs.5,81,96,200/- respectively. The AO sought to add the difference in the stamp duty value and actual purchase value as income from other sources in the hands of the assessee u/s 56(2)(x) of the Act. A showcause notice was issued to the assessee asking it to showcause why the difference amounts of Rs.66,53,76,000/- and Rs.5,81,63,250/ be not treated as income from other sources and added back to the total income of the assessee.

6. The assessee filed a detailed reply stating that it is engaged in construction activity and undertakes SRA Projects by entering into development agreements with the owner/landlords whereby the

assessee will develop the land by constructing buildings thereon and in lieu of such development rights being acquired, the assessee will transfer certain percentage of the constructed area of the owners/landlords in lieu of the consideration for acquiring such rights and then retain the remaining portion for sale in the open market.

7. Pursuant to its business activities, the assessee has undertaken such SRA Projects with M/s Sainath Enterprises and M/s. Sainath Developers and similarly entered into Memorandum of Understanding ("MOU") with Shri Samsheer Hassan Khan Dalwai and Shri Amanullah Hassan Khan Dalwai.

8. We have given a thoughtful consideration to the aforementioned factual matrix. We are of the considered view that the assessee has never purchased any immovable property during the year under consideration and the AO has proceeded on a factually incorrect premise. We have carefully considered the conveyance deed and the MOU and found that the assessee has only acquired development rights in the impugned properties. On perusal of the documentary evidence, we find that the assessee has only acquired development rights to develop the properties. The assessee will be entitled to 80% of the constructed area out of the total saleable constructed areas arising of the development potential of the said property. Such license cannot be said to be possession within the meaning of Section 53A of the Transfer of Property Act which is a legal concept and it denotes control over the land and not actual physical control over the land. Section 53A of the Transfer of Property Act, cannot possibly be attracted to the facts of this case. We find that the Id. First Appellate Authority has placed strong

reliance on this propositions laid down by the Hon'ble Supreme Court in the case of *Seshasayee Steels (P) Ltd. vs. ACIT, Company Circle VI(2), Chennai*, reported in [2020] 115 taxmann.com 5 (SC).

9. We find that the AO has drawn support from the provisions of Section 56(2)(x) of the Act. In our understanding of the law, Section 50C of the Act applies to the seller whereas Section 56(2)(x) applies of the buyer. Accordingly, immovable property is restricted only to land or building or both but not applicable to a developer who has taken over the possession of lawn or building or both for the purpose of the development in terms of the relevant development agreement or MOU for development of a property. It would not be out of place to refer to the judgment of the Hon'ble Supreme Court in the case of *Seshasayee Steels (P) Ltd. vs. ACIT (supra)*, wherein the Hon'ble Court *inter alia* held as under:-

■ *In order that the provisions of section 53A of the Transfer of Property Act be attracted, first and foremost, the transferee must, in part performance of the contract, have taken possession of the property or any part thereof. Secondly, the transferee must have performed or be willing to perform his part of the agreement. It is only if these two important conditions, among others, are satisfied that the provisions of section 53A can be said to be attracted on the facts of a given case. [Para 11]*

■ *On a reading of the agreement to sell dated 15-5-1998, what is clear is that both the parties are entitled to specific performance. [Para 12]*

■ *Clause 16 is crucial, and the expression used in clause 16 is that the party of the first part hereby gives 'permission' to the party of the second part to start construction on the land. [Para 13]*

■ *Clause 16 would, therefore, lead to the position that a license was given to another upon the land for the purpose of developing the land into flats and selling the same. Such license cannot be said to be 'possession' within the meaning of section 53A, which is a legal concept, and which denotes control over the land and not actual physical occupation of the land. This being the case, section 53A of the T.P. Act cannot possibly be attracted to the facts of this case for this reason alone. [Para 14]*

■ This Court in *Commissioner of Income-tax v. Balbir Singh Maini* [2017] 86 taxmann.com 94/251 Taxman 202/398 ITR 531 adverted to the provisions of this section 2(47)(vi) and held that the object of section 2(47)(vi) appears to be to bring within the tax net a de facto transfer of any immovable property. The expression 'enabling the enjoyment of' takes colour from the earlier expression 'transferring', so that it is clear that any transaction which enables the enjoyment of immovable property must be enjoyment as a purported owner thereof. The idea is to bring within the tax net, transactions, where, though title may not be transferred in law, there is, in substance, a transfer of title in fact. [Para 16]

■ Given the test stated in paragraph 25 of the aforesaid judgment, it is clear that the expression 'enabling the enjoyment of' must take colour from the earlier expression 'transferring', so that it can be stated on the facts of a case, that a de facto transfer of immovable property has, in fact, taken place making it clear that the de facto owner's rights stand extinguished. It is clear that as on the date of the agreement to sell, the owner's rights were completely intact both as to ownership and to possession even de facto, so that this Section equally, cannot be said to be attracted. [Para 17]"

10. In light of the above, let us consider the relevant provision of Section 56(2)(x)(b) of the Act, which reads as under:-

"Income from other sources.

... ..

....(b) any immovable property, –

(A) without consideration, the stamp duty value of which exceeds fifty thousand rupees, the stamp duty value of such property;

[B) for a consideration, the stamp duty value of such property as exceeds such consideration, if the amount of such excess is more than the higher of the following amounts, namely: –

(i) the amount of fifty thousand rupees; and

(ii) the amount equal to [ten] per cent of the consideration:]

Provided that where the date of agreement fixing the amount of consideration for the transfer of immovable property and the date of registration are not the same, the stamp duty value on the date of agreement may be taken for the purposes of this sub-clause :

Provided further that the provisions of the first proviso shall apply only in a case where the amount of consideration referred to therein, or a part thereof, has been paid by way of an account payee cheque or an account payee bank draft or by use of electronic clearing system through a bank account [or through such other electronic mode as may be prescribed], on or before the date of agreement for transfer of such immovable property:

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Provided also that where the stamp duty value of immovable property is disputed by the assessee on grounds mentioned in sub-section (2) of section 50C, the Assessing Officer may refer the valuation of such property to a Valuation Officer, and the provisions of section 50C and sub-section (15) of section 155 shall, as far as may be, apply in relation to the stamp duty value of such property for the purpose of this sub-clause as they apply for valuation of capital asset under those sections.....
.....”

11. As mentioned elsewhere, the assessee has not purchased any immovable property but has only acquired development rights and considering the facts of the case, in light of the decision of the Hon’ble Supreme Court *supra*, we do not find any reason to interfere with the findings of the Id. CIT(A). Accordingly, the effective grounds raised by the revenue are dismissed. The cross-objection filed by the assessee becomes academic in nature and hence not adjudicated.

12. In the result, the appeal of the revenue is dismissed.

Order pronounced in the Court on 25th July, 2024 at Mumbai.

Sd/-

(RAJ KUMAR CHAUHAN)
JUDICIAL MEMBER

Sd/-

(NARENDRA KUMAR BILLAIYA)
ACCOUNTANT MEMBER

Mumbai, Dated 25/07/2024

SC S.P.

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

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

आदेशानुसार/ BY ORDER,
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Mumbai