

आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई

**IN THE INCOME TAX APPELLATE TRIBUNAL  
'B' BENCH, CHENNAI**

श्री चंद्र पूजारी, लेखा सदस्य एवं श्रीजी. पवन कुमार, न्यायिक सदस्यकेसमक्ष

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER  
AND SHRI G. PAVAN KUMAR, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. No. 1412/Mds/2013

निर्धारण वर्ष /Assessment year : 2009-2010

The Assistant Commissioner  
of Income Tax,  
Company Circle I(3)  
Chennai 600 034.

**Vs.** Shri. K.A. Manshoor,  
No.10, Sridevi Gardens,  
AKR Nagar Main Road,  
Valasaraswakkam,  
Chennai 600 087.

**(अपीलार्थी/Appellant)**

**[PAN AADPM 7538C]  
(प्रत्यर्थी/Respondent)**

अपीलार्थी की ओर से/ Appellant by  
प्रत्यर्थी की ओर से /Respondent by

: Shri. A.B. Koli, IRS, JCIT  
: Shri. K. Balasubramanian, Advocate

सुनवाई की तारीख/Date of Hearing

: 09-03-2016

घोषणा की तारीख /Date of Pronouncement

: 31-05-2016

**आदेश / ORDER**

**PER G. PAVAN KUMAR, JUDICIAL MEMBER:**

The appeal filed by the Department is directed against order of the Commissioner of Income-tax (Appeals)-IX, Chennai in ITA No.303/11-12, dt 28.03.2013 for the assessment year 2009-2010 passed u/s.143(3) and 250 of the Income Tax Act, 1961 (herein after referred to as 'the Act').

**2. The Revenue has raised the following grounds :-**

*"2. The CIT(A) erred in deleting the addition made by the Assessing Officer by treating the bulding advance as deemed dividend uls 2(22)(e).*

*2.1 The CIT(A) failed to appreciate that the land on which the project is proposed belongs to the assessee and Joint Development Agreement has been entered between the assessee and the company M/s.Crystal Residency P Ltd.*

*2.2 The CIT(A) ought to have appreciated that the advance received is much higher than the value of the land offered by the assessee.*

*2.3. The CIT(A) failed to appreciate the fact that the advance received has been utilized by the assessee for his personal investments and repayments of debts.*

*3. The CIT(A) erred in deleting the addition made uls 2(22)(e) of RS.50,00,000/- received towards rental advance.*

*3.1. The CIT(A) failed to appreciate the fact that the company has been the tenant of the assessee for more than a decade and did not provide a rental advance in the first year of its occupation.*

*3.2. The CIT(A) erred in not appreciating the fact that the rental advance is a mere advance paid in a disguised form to the assessee.*

*3.3 It is submitted that in the Madras High Court decision in the case of P.K.Mohd. Abubucker (252 ITR 507) it is held that the rental advance between the company and the director is also an advance contemplated u/s 2(22)(e).*

*4. The CIT(A) erred in holding that the profits from sale of land should be taxed under capital gains and not under business income as held by the Assessing Officer.*

*4.1. The CIT(A) failed to appreciate that the land has been held by the assessee for the purpose of promotion of real estate activity with the intention of garnering larger profits by venturing in to real estate.*

*4.2 The CIT(A) ought to followed the decision of Sutelj*

*Cotton Mills Supply Agency Ltd. (100 ITR 206) wherein it is held that if the dominant intention of the assessee was to make profit by resale of assets and not to make an investment, the exercise needs to be characterized as an adventure in the nature of trade and ought to have upheld the action of Assessing Officer.*

4.3. *The CIT(A) failed to appreciate the fact that if a person invests money in land intending to hold it, enjoys its income for some time, and then sells it at a profit, it would form an adventure in the nature of trade.*

4.4 *It is submitted that in the case of Venkataswami Naidu & Co (35 ITR 594)(SC), the Hon'ble Supreme Court has decided a similar issue in favour of revenue.*

5. *The CIT(A) erred in deleting the addition made by treating the income from agricultural land as non-agricultural income.*

5.1 *The CIT(A) failed to appreciate the fact that the lands are held as stock-in-trade and hence, the agricultural income earned is incidental to the business activity”.*

**3.** The Brief facts of the case is that the assessee is engaged in the business of Real Estate Development and having income from salary, income from house property, income from business, income from capital gains and agricultural income and filed return of income on 20.03.2010 admitting total income of ₹.94,98,220/-. Subsequently, there was change of jurisdiction and the case was selected for scrutiny under CASS. The assessee is Managing Director of M/s. Crystal Residency Pvt. Ltd with share holding of 99.5%. The Id. Assessing Officer subsequent to change of jurisdiction issued notice u/s.142(1) of the Act calling for the records and information in respect of return filed. The Id. Authorised Representative of assessee appeared from time to time and filed information in respect of capital

gains and agricultural income. The Id. Assessing Officer on verification found that the assessee is a Managing Director of the company has received building advance and provisions of Sec. 2(22)(e) of the Act are attracted and the source for the company being compensation received from land at Kolapakkam under compulsory acquisition by Government of India. The Id. Assessing Officer has made an addition considering contractual relation of Managing Director of the company. Aggrieved by the order, the assessee filed an appeal before Commissioner of Income Tax (Appeals).

**4.** In the appellate proceedings, the Id. Commissioner of Income Tax (Appeals) considered the findings of the Id. Assessing Officer and submissions of the assessee at page Nos.3 to 6 duly supported by the judicial decisions and minutes of the meeting approving development building advance. The Id. Commissioner of Income Tax (Appeals) considered the submissions of the assessee at para 8.1 of his order where the assessee explained the transaction and reiterated the submissions before the Assessing Officer on the joint development agreement and applicability of provisions of Sec. 2(22)(e) of the Act and judicial decisions. The Id. Commissioner of Income Tax (Appeals) treated the building advance transaction as normal business and the assessee company is a separate entity and observed at para 8.3 to 8.5 of his order as under:-

*"8.3 I have perused the AO's observations and the submissions of the appellant in this regard. After considering the facts of the case I am of the considered opinion that the action of the AO in treating the amount of Rs. 1,46,75,500/- as deemed dividend u/s 2(22)(e) of the Act, as against the appellant's claim of treating it as 'business advance' is not justified. The AO has disputed the nature of transaction between the appellant and the company M/s. Crystal Residency [India] Pvt Ltd. is not a business transaction. On the other hand, the appellant submitted that M/s. Crystal Residency (India) Pvt. Ltd. for the Asst.year 2010-11 has shown an amount of Rs. 29,65,750/- towards expenditure incurred for the development of proposed project. In this regard, I have perused the financials along with the return of income of M/s. Crystal Residency (India) Pvt. Ltd. which was filed on 14.10.2010 and it is found that the Developer of the agreement (M/s. Crystal Residency (India) Pvt. Ltd.) has spent Rs. 29,65,750/- as work-in-progress towards development of the proposed project at Somangalam. However, the AO has not taken this aspect at the time of completion of the assessment i.e. on 21.12.2011 as the above information was very much available with him. Therefore, from the above, it is clear that the intention behind the advance is for the purpose of business only.*

*8.4 Secondly, the appellant has only following a customary practice in property development business in keeping the ownership and development separate.*

*8.5 In view of the above, the advance given by M/s. Crystal Residency (India) Pvt. Ltd to the appellant was purely a business transaction done by the said company for 'commercial expediency', which took it out of the purview of Sec. 2(22)(e) of the Act. Therefore, the nature of transaction between the appellant and 'company' is in the course of business and hence AO is not justified in treating the business advance of Rs. 1,46,75,500/- as deemed dividend u/s 2(22)(e) of the Act. It is also to be mentioned here that the objections raised by the Assessing Officer in the relevant paras of the assessment order have been answered by the appellant in the written submissions. I am in agreement with the appellant's explanation in this*

*regard as they are based on the facts of the case. Therefore, Assessing Officer's objections raised in this regard are hereby not considered. As a result, the addition of ₹1,46,75,500/- made by the Assessing Officer in this regard is hereby deleted. This ground of appeal is allowed".*

and allowed the appeal of the assessee and deleted the addition. Aggrieved by the Commissioner of Income Tax (Appeals) order, the Revenue has assailed an appeal before Tribunal.

**5.** Before us, the Id. Departmental Representative argued the grounds that Commissioner of Income Tax (Appeals) has erred in considering building advance as normal business transaction and the project development is between assessee and the company and the advance is higher than the land offered by the assessee for development and assessee has utilized funds for repayment of loans. The assessee is in real estate development and disclosed in Balance Sheet and prayed for allowing the ground.

**6.** On the other hand, the Id. Authorised Representative relied on the order of Commissioner of Income Tax (Appeals) and opposed the grounds.

**7.** We heard the rival submissions and perused the material on record. The Id. Departmental Representative contested considering relation of assessee and company and also the transaction is in the

nature of deemed dividend. We perused the financial statements and Id. Authorised Representative drew our attention to the joint development agreement dated 1<sup>st</sup> December, 2008 wherein the property situated at No.99, Somanagalam Village, A Block, Sriperumbudur Taluk, Kanchipuram Dist were the total land aggregating to 5 acre 88 cents in plot Nos.1 to 62 for an extent of 1,74,227 sq.ft 'Thoyiba Garden". As per the clauses of joint development agreement, the assessee as a landlord had entered into development agreement with company on the terms and conditions. The developer company shall pay earnest money as part payment on execution of agreement ₹1.50 crores. The Id. Authorised Representative submitted that assessee is in real estate business and it is common practice in business to obtain deposits from the developer/builder before venturing into construction activity. The company is a separate legal entity and the assessee is a landlord and such transactions cannot be considered as deemed dividend u/s.2(22) (e) of the Act based on the joint development agreement executed on 1<sup>st</sup> December, 2008. The assessee has received the earnest money from the developer company, in the normal course as ordinary business transaction as per the terms of agreement. Considering the

apparent facts evidence and judicial decisions, the Id.CIT(A) has dealt on the issue of joint development agreement and explanation of the assessee and deleted the addition. Therefore, we are not inclined to interfere with the order of Commissioner of Income Tax (Appeals) on this ground. The ground of the Department is dismissed.

**8.** On the second ground, the Id. Assessing Officer made addition u/s.2(22)(e) of the Act as deemed dividend towards rental advance. The Id. Authorised Representative submitted that ₹50,00,000/- was paid as rental advance by the Company to the assessee towards security deposits and the assessee is offering income from property let out to the said company ₹1,00,000/- per month. The company is a tenant of the assessee and in occupation for more than ten years and due to its initial stability of business no rental advance was provided. Subsequently, because of availability of liquidity, the company has provided the rental advance and does not fall within the applicability of Sec. 2(22) (e) of the Act but the Id. Assessing Officer made an addition of ₹50,00,000/-. Aggrieved by the order, the assessee filed an appeal before Commissioner of Income Tax (Appeals).

**9.** In the appellate proceedings, the Id. Authorised Representative reiterated the submissions of assessment proceedings

with evidence and judicial decisions. The Id. Commissioner of Income Tax (Appeals) relied on the submissions of the assessee referred in his order at page 9 and also findings of the Id. Assessing Officer. The crux of the issue being whether rental advance come within the ambit of Sec. 2(22) (e) of the Act. The Id. Commissioner of Income Tax (Appeals) observed at para 9.4 of his order as under:-

*“9.4 On perusal of the facts of the case, the said amount of Rs. 50,00,000/- has been received by the appellant towards enhancement of rent. It is to be noted that the rental advance of Rs. 5,00,000/- appearing in the returns of income filed by M/s. Crystal Residency (India) Pvt Ltd. in the earlier years. This fact was not disputed by the AO during scrutiny proceedings. This itself show that the nature of the transaction between the appellant and M/s. Crystal Residency (India) pvt. Ltd. is a business transaction as the appellant has let out its property to M/s. Crystal Residency (India) pvt. Ltd. for the past several years. It is also to be seen that the amount has not been utilized for the renovation/repairs/ remodeling of the property. Accepting rental advance is a widely prevalent practice, therefore, there is nothing unusual done by the appellant. Therefore, the case laws relied upon by the AO cannot be applied to the appellant as the facts are distinguishable. In view of the above, the rental advance of Rs. 50,00,000/- received by the appellant from the company M/s. Crystal Residency (India) Pvt. Ltd. is purely business transaction done by the said company for 'commercial expediency', which took it out of the purview of Sec. 2(22)(e) of the Act. Therefore, the nature of transaction between the appellant and 'company' is in the course of business and hence AO is not justified in treating the rental advance of Rs. 50,00,000/- as deemed dividend u/s 2(22)(e) of the Act. Hence, AO is directed to delete the above addition of Rs.50,00,000/- made in this regard. This ground of appeal is allowed”.*

and allowed the ground of the assessee. Aggrieved by the Commissioner of Income Tax (Appeals) order, the Revenue has assailed an appeal before Tribunal.

**10.** Before us, the Id. Departmental Representative argued that Commissioner of Income Tax (Appeals) has erred in deleting the addition u/s.2(22)(e) of the Act without appreciating that the company is a tenant and assessee is a landlord and in occupation for more than a decade and such advance cannot take the characteristic of security deposits and relied on the findings of the Id. Assessing Officer and prayed for allowing the ground.

**11.** Contra, the Id. Authorised Representative relied on the orders of the Commissioner of Income Tax (Appeals) and opposed the grounds of the Revenue.

**12.** We heard the rival submissions and perused the material on record. The basic contention of the Id. Departmental Representative that the advance is in the nature of personal and not rental advance. Further, the assessee company is in occupation for more than ten years and at this juncture increase in advance does not arise and provisions of Sec. 2(22) (e) of the Act are applicable. The Id.

Authorised Representative reiterated the submissions made in the assessment proceedings and before Commissioner of Income Tax (Appeals) and drew our attention to the rental agreement executed on 9<sup>th</sup> January, 2009 and as per the agreement tenancy shall be for a period of five years and company shall pay rent ₹.1,00,000/- per month. Further, it was agreed that assessee has paid only ₹.5,00,000/- as security deposit and the assessee has increased the security deposit to ₹.50,00,000/- from the date of execution of agreement with terms and conditions being the same in respect of 8500 sq.ft commercial place at Thousand Lights, Chennai where the rental values are comparatively higher being Business area whereas the rent charged by the assessee is less and the additional security deposit paid is only to safeguard the interest of the business transaction. Considering the apparent facts and the lease agreement and the offering of rental income, we are of the opinion that provisions of Sec. 2(22) (e) of the Act shall not apply, we uphold the order of Commissioner of Income Tax (Appeals) on this ground and dismissed the Revenue ground.

**13.** The third ground raised by the Revenue alleging that the

Commissioner of Income Tax (Appeals) erred in holding compensation on compulsory acquisition of land by the Government authority on compulsory acquisition of land by the Government authority as income from capital gains and not under business income, though the assessee is in the business of real estate and obtained loans for development and is adventure in the nature of trade and intention is to make profit in real estate.

**14.** The Id. Authorised Representative relied on the orders of Commissioner of Income Tax (Appeals).

**15.** We heard the rival submissions, perused the material on record and judicial decisions. The Id. Departmental Representative only contention being that land owned by assessee at Kolapakkam Village cannot be treated as capital asset, as the assessee is in real estate business and activities are adventure in the nature of trade. The assessee obtained permission for layout which could not be completed as the land was acquired for Airport expansion were the assessee has disclosed the land duly as fixed asset and development and leveling expenditure as work in progress and carried forward from the subsequent assessment years till assessment year 2009-2010. The assessee has not claimed depreciation on land as per

the provisions of Income Tax Act and compulsory disclosed under fixed assets schedule. The assessee has been in the real estate business and was offering income from construction and real estate income from earlier years. The assessee in the assessment year 2009-2010 has shown the activities of work in progress of land being the assessee real estate works. The assessee obtained development/ planning permission from Panchayat on 22.02.2007 for Kolapakkam land. The Id. Authorised Representative supported his arguments with judicial decisions that land has to be treated as capital asset not business asset. The assessee was directly or indirectly perusing its objective of real estate at different places. Prime Facie, the intention of the assessee on perusal of the financial statements and evidence and the activities are real estate business and Hoteling business further Kolapakkam land is not a sole transaction. Considering the apparent facts and the commercial character of the land supported with assessee's intention to develop residential plots and nature of real estate works, the land cannot take the characteristic of capital asset, considering the work in progress. Therefore, we are of the opinion that object and intention of the assessee are the real estate business and the compensation received from Government of India on compulsory acquisition of land has to be treated as Business

Income and we set aside the order of Commissioner of Income Tax (Appeals) and allow the Revenue ground.

**16.** The last ground raised by the Department is that assessee has offered agricultural income of ₹.1,97,640/- from lands at Somangalam and Jambodai and the assessee is in real estate business and holding the land from earlier years and offering agricultural income. But the Id. Assessing Officer made addition without considering the submissions and treated the income as non agricultural income. Aggrieved by the order, the assessee filed an appeal before Commissioner of Income Tax (Appeals).

**17.** In the appellate proceedings, the Id. Commissioner of Income Tax (Appeals) considered the submissions and findings of the Id. Assessing Officer. The assessee has disclosed agricultural land in financial statements and agricultural income falls within the definition of Sec. 2(1A) (ii) of the Act. The assessee was declaring agricultural income in earlier years and there is no dispute. So, the Id. Commissioner of Income Tax (Appeals) has directed the Assessing Officer to delete the addition. Aggrieved by the Commissioner of Income Tax (Appeals) order, the Revenue has assailed an appeal before Tribunal.

**18.** Before us, the Id. Departmental Representative reiterated the grounds and argued that the Id. Commissioner of Income Tax (Appeals) has erred in treating the income as agricultural income irrespective of the fact that the assessee is in the business of real estate and holding the land as Business asset and income has to be treated as business income prayed for allowing the ground.

**19.** Contra, the Id. Authorised Representative relied on the orders of Commissioner of Income Tax (Appeals) and opposed the grounds

**20.** We heard the rival submissions and perused the material on record. The only contention of the Id. Departmental Representative that the assessee has disclosed the land as business asset and income takes the characteristic of business and agricultural income is only incidental and cannot be exempted. The Id. Authorised Representative substantiated his arguments that the assessee has been offering agricultural income for income tax purpose from earlier years and drew our attention to the assessment order of 2008-09 where the Department has accepted the agricultural income and passed the order u/s.143(3) of the Act. Further, the Id. Authorised Representative produced copy of registration department with survey number and details of land. So, considering the apparent facts that the land held

by assessee was disclosed in the Balance Sheet and agricultural income was offered from earlier assessment years and the same was accepted by the Department without any dispute. Therefore, we are of the opinion, the income takes the characteristic of agricultural income within the definition of Sec. 2(1A)(ii) of the Act and we found that the Id. Commissioner of Income Tax (Appeals) has deleted the addition and we uphold the same.

**21.** In the result, the appeal of the Revenue in ITA No.1412/Mds/2013 is partly allowed.

Order pronounced on Tuesday, the 31st day of May, 2016, at Chennai.

Sd/-

(चंद्र पूजारी)

**(CHANDRA POOJARI)**

**लेखा सदस्य /ACCOUNTANT MEMBER**

Sd/-

(जी. पवन कुमार)

**(G. PAVAN KUMAR)**

**न्यायिक सदस्य/JUDICIAL MEMBER**

चेन्नई/Chennai

दिनांक/Dated:31.05.2016

**KV**

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|--------------------------|------------------------------|-------------------------|
| 1. अपीलार्थी/Appellant   | 3. आयकर आयुक्त (अपील)/CIT(A) | 5. विभागीय प्रतिनिधि/DR |
| 2. प्रत्यर्थी/Respondent | 4. आयकर आयुक्त/CIT           | 6. गार्ड फाईल/GF        |