

IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER,
AND SHRI RAMLAL NEGI, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No.4987/Mum/2014
(निर्धारण वर्ष / Assessment Year: 2010-11)

M/s. Sun Enterprise 288, 3 rd Floor, Kalbadevi Road, Kalbadevi, Mumbai-400 000.	बनाम/ Vs.	Income tax officer-14(3)(4) Room No.608, 6 th Floor Earnest House, Nariman Point Mumbai-400 021.
स्थायी लेखा सं./PAN : AACCS 2167 F		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by :	Shri Vallabhdas D.Parmar
प्रत्यर्थी की ओर से/ Respondent by :	Shri V. Justin-DR

सुनवाई की तारीख /Date of Hearing : 23/04/2018

घोषणा की तारीख /Date of Pronouncement : 16/07/2018

आदेश / O R D E R

PER SHAMIM YAHYA, ACCOUNTANT MEMBER:

This appeal by the assessee is directed against the order of ld. Commissioner of Income tax(Appeals) dated 01/05/2014 and pertains to assessment year 2010-11.The Grounds of appeal read as under :-

Being aggrieved by the order of the Commissioner of Income-tax (Appeals)-25, Mumbai (hereinafter referred to as Learned CIT (A)) dated 01.05.2014 under section 250 of The Income Tax Act, 1961 (herein after referred as 'IT Act'), the appellant submits this appeal on the following grounds each of which may please be considered without prejudice to one another:

ON THE FACTS AND CIRCUMSTANCES OF THE CASE AND IN LAW:-

1.Income from House Property

The learned CIT (A) erred in considering the rental income under the head 'Income from House Property. .

1.2 The learned CIT (A) failed to appreciate that the rent was earned from v persons living on the land which has been used by the Appellant for its business purposes.

1.3 The learned CIT (A) failed to appreciate that rental income from property which is mainly "land along with some dilapidated buildings"cannot be taxable under the head of income from house property.

1.4 Without prejudice to the above, the learned CIT (A) failed to appreciate that the Appellant is entitled to deduction of municipal taxes of Rs. 4,648 from its gross annual value and interest expenditure u/s 24(b) in respect of borrowings for acquisition of

property, income of which is chargeable to tax under the head of income from house property.

2. Income from assignment of Development Rights of Chaudhary Plot at Thane:

2.1 The learned CIT (A) erred in considering the monetary consideration of Rs. 25,00,000 and non-monetary consideration of 10,500 saleable built up area (Valued at Rs. 2,62,50,000) from assignment of Development Rights of Chaudhary Plot net of expenses incurred in relation to the same as income for the financial year 2009-10.

2.2. Without prejudice to the above, the learned CIT (A) also erred in considering the total consideration from assignment of Development Rights of Chaudhary Plot at Rs. 2,87,50,000 (monetary consideration of Rs. 25,00,000 and non-monetary consideration of 10,500 saleable built up area at Rs. 2500 per feet of Rs. 2,2,50,000), as against stamp duty valuation of Rs. 1,64,09,000.

3.General

3.1. The appellant craves leave to add, delete, withdraw and or modify any one/more or all the above grounds of appeal.”

2. Apropos ground no 1:

Brief facts of the case are that the AO observed that the assessee had received rent income from Datar Block aggregating to Rs.1.67.613/- which was credited to the construction account. On being asked as to why the rent income should not be assessed under the head 'Income from House Property’, the assessee submitted that the rental income received from Datar Block was towards tenancy charges received from tenants in the course of business of the assessee as a builder and developer. The assessee submitted that these incomes and expenses being incidental to the business, the same have been transferred to -in-progress. The AO observed that no construction/development activities were shown. The AO opined that the rent income needs to be taxed under the head "Income from House Property', and accordingly, the income of assessee was computed under the head "Income from House Property" at Rs.1,1,327/-, after allowing deduction u/s.24(a) @30% of rent received.

2.1. Upon assessee’s appeal Id. CIT(A) confirmed the action of the Assessing Officer by holding as under:

"I have carefully perused the facts of present case. As per Section 22 of the Act, "The annual value of property consisting of any buildings or land appurtenant thereto which the assessee is the owner, other than such portions of such property as he may occupy for the purposes of any business or profession carried on by him the profits of which are chargeable to income tax, shall be chargeable to income tax under the head "Income from house property" In the present case, the appellant is the owner of the property "Datar Block," and the property is not used for the purpose of business or profession as the same is rented by the appellant. The appellant has contended that it had acquired the said property, being land with structures comprising four chawls standing thereon, with a view to develop and construct thereon commercial property by demolishing all the existing structures. The appellant has further submitted that it had not constructed any of the chawls from which rental are received but the said structures along with the tenants already exist at the time of acquisition of the land, and that the said land is the inventory for carrying on business in normal course as builders and developers. I do not find merit in said contentions of appellant, as far as the chargeability of rental income under the head "income from House Property" is concerned. I find that there is no stipulation in Section 22 that the rented out structures should be of any particular standards, or that the same should have been constructed by the assessee himself. The Section 22 stipulates the "Annual Value" of property to be charged under that section, and the Annual Value is determined as per Section 23 of the Act. As per Section 23, even if any particular owned property is not rented out, still it may be considered as deemed rented out in certain cases, and the Annual Value of such property is charged to tax u/s 22, Hence there is no question of not charging the Annual value of owned & actually rented property to tax u/s 22. The exclusion of property which the assessee "may occupy for the purpose of any business or profession carried on by him " is only to exclude such property from the deeming provisions of Section 23 for the purpose of determining its Annual Value. It cannot be construed to mean that any owned business property even if out for a temporary period would not be taxable u/s 22. Relying upon the decision of Hon'ble Supreme Court in the case of Shambhu Investment (P.) Ltd. vs. CIT (2003) 263ITR 143 (SC), I observe that the prime object of rent agreement was to let out the property, and hence it would be wrong to say that the appellant was exploiting property for its commercial business activities. Therefore, I find no infirmity in the action of AO in taxing the rental income of "Datar Block" owned by the appellant after already allowing deductions u/s. 24(a) under the head "Income from House Property. The appellant has further contended that if the rental income is charged to tax under Income from House Property, it is entitled to interest expenditure u/s 24(b) in respect of borrowings for acquisition of property, I find that the appellant has charged the entire interest expenditure to work-in-progress as its business expenditure, and hence the same cannot be allowed again against the Income from House Property. In view of the above. I confirm the addition of Income from House Property of Rs.1,17,327/- and therefore, the ground no. 1 of appeal is dismissed."

3. Against the above order, assessee is in appeal before us.

4. We have heard both the counsel and perused the records. The submission of the Id. Counsel of the assessee in this regard are summarized as under :-

(i) *The appellant is a partnership firm and the main object as per partnership deed is to do business of trading, developing, constructing and selling real estate.*

(ii) *The appellant's predominant activity is of development and construction of properties which is clear from following facts;*

The firm had purchased two properties (1) Datar Block property and (2) Choudhary Plot.

For purchasing such properties which represents stock in trade, or business asset the appellant has taken huge loans and same were invested in purchase of said two properties:

A.Y.	Loan Rs	Interest paid	Stock in trade
AY 2009-10	14.18 crores	1.14 crores	Rs 14.88 crores
AY 2010-11	15.26 crores	1.26 crores	Rs 17.20 crores

The appellant has taken Datar Block property along with tenants. Originally there were 45 tenants in said property. In prior years appellant got vacated many tenants and paid huge sums to tenants against surrender of tenancy rights. The appellant had 27 tenants as on 31-3-2010. The appellant has paid huge amounts of sum of Rs 59.70 lacs during the year for surrender of tenancy rights of 7 tenants in Datar Block properties:

Sr.No	Date of payment	Name of tenant	Kholi /room no	Amount Rs
(1)	22-4-2009	Meghasyam Pandey	46	3,66,000
(2)	6-8-2009	PandurangS Burve	50	7,50,000
(3)	16-5-2009	Jayesh Makwana	34	7,50,000
(4)	24-9-2009	Chintamani Raje	39	9,04,000
(5)	30-11-2009	Sushila D Gore	35	9,50,000
(6)	15-9-2009	MadhavV.Datar	49	10,00,000
(7)	7-8-2009	Kishore H Rathod	34 Bldg no 3	12,50,000
			Total payment	59,70,000

Thus it is clear that appellant wanted to develop the old dilapidated Chawl property known as "Qatar Block Property". Thus it cannot be said that no business activity is carried out during the previous year.

The primary object of appellant is to develop the properties which the firm has purchased and for this, existing tenants have to be vacated and for this till year end the firm has paid about Rs 2.03 crores for surrender of tenancy rights of various tenants. Such sum paid towards vacating tenancy rights were capitalised in work in progress in balance sheet. This is accepted by AO. So amount received as rent from remaining tenants also requires

be considered or adjusted in Work in progress. Appellant has not voluntarily given such right to any tenant after purchase of property rather appellant has purchased said property along with sitting tenants. In order to carry out business of development, the said property is purchased so such rent received Is In course of business.

It is not a case where appellant has developed property and then given on rent some units to earn income.

No businessman will purchase a tenanted property for Rs 7.50 crores to earn rent income of paltry sum of Rs 1,67,613/- that too by borrowing huge loans on which appellant is paying interest of Rs 1.26 crore.

This clearly proves that primary motive of appellant is to develop the property and not earn rent income. Thus reliance placed by Ld. CIT(A) on decision of Shambhu Investment (P) Ltd. v CIT (2003) 263 ITR 143 Is misplaced. In this case It was primary object of assessee was to earn rent income. This decision is distinguishable on facts.

The appellant also relies on decision of Hon'ble Supreme Court in case of M/s Rayala Corporation Pvt. Ltd, v ACIT (2016) 72 taxmann.com 49. In this case it is held that the business of assessee is to lease its property and to earn rent then it should be taxed as business income and not as income from house property.

In case of PFH Mall & Retail Management Ltd. v. /TO [2008] 110 ITD 337 (ITAT - Kol) it was held as under:

"The mere fact that income is attached to immovable property cannot be sole criterion for assessment of such income as income from house property. It is necessary further to find out the primary object of the assessee while exploiting the property. If the main intention is simply letting the property or any portion thereof the resultant income must be assessed as income from house property. If on the other hand, the main Intention is of exploiting immovable property by way of commercial activities, and then the resultant income must be held to be business

Income"

In case of CIT vs Neha Builders P Ltd. (2007) 164 Taxman 342 Gu] it is held that" If property is given on rent and property is held as stock in trade then property income represents business income.

In case of CIT vs Lokholdings (2010) 189 Taxman 452 (Bombay), it was held as under :- Assessee-flrm was Involved In business of development of properties - In course of Its business, it received money in advance from its customers intending to purchase flats in properties developed by it - As said moneys could not be utilized immediately for purpose of business, assessee temporarily invested surplus amounts from such moneys in banks and other concerns and earned interest thereon - Whether, on facts, interest Income In question would be assessable as Income from business as claimed by assessee and not as Income from other sources - Held, yes

In this case also Interest received was ultimately reduced from WIP of project. The ratio of this decision is squarely applicable to present case in hand.

In case of Samar Estate Pvt. Ltd vs ITO, 61 Taxmann.com 23 (Chandigarh Trib.) it was held that interest earned on FOR is business income and not income from other sources as FDRs were purchased out of sale proceeds on sale of flats and as project was not completed during the year so all expenses were capitalized as work in progress so interest received also requires to be reduced from WIP.

In view of above discussion the Ld. CIT(A) erred in confirming the rent income to be taxed under head income from house property and not under business income. As a result, it is hereby requested that AO may be directed to tax rent income as income from business and not as income from house property and rent income may be allowed to be reduced from WIP of the project.”

5. Per contra, the Id. DR relied upon the order of authorities below.
6. Upon careful consideration, we find that the assessee is engaged in the business of builder and developer. The assessee was in the possession of Datar Block property which it was in the process of developing. The said property had some tenants. The assessee had to pay large amounts of money in order to get the property vacated. These sums paid have been capitalized in work-in-progress which has been accepted by the Assessing Officer. However, for the same property, the tenants had paid rent also which were treated by the assessee by crediting to the work-in-progress. However, the Assessing Officer holds the same to be income from house property. In this regard, we note that the assessee's business is development of property. For the same property, for getting vacation, the sums paid are being debited to the work-in-progress which is being accepted by the Assessing Officer. However, pending vacation, the rent receipt from the tenants of the said property is not being given the same treatment by the Assessing Officer. He is treating the same as income from house property. In our considered opinion, the rent received is inextricably linked with the business of the assessee, i.e., development of the property. Hence, in our considered opinion, the rent received cannot be treated as income from house property and the assessee's

treatment of crediting the same towards work-in-progress is justified. For this proposition, the case laws relied upon by the Id. Counsel of the assessee referred in the submissions hereinabove are germane and support the case of the assessee, particular the case law from the Hon'ble Bombay High Court in the case of *Lokholdings* (supra) is of particular emphasis. Accordingly, in the background of the aforesaid discussion and precedent we set aside the orders of the authorities below and decide the issue in favour of the assessee.

6. Apropos ground No. 2:

Brief facts of the case are that the AO observed that during the year under consideration as per agreement dated 19.06.2009, assessee had entered into an agreement with M/s Shree Sachidanand Developers for the development of Choudhary Plot at Thane for a monetary consideration of Rs.25 lakhs and constructed area with all amenities equivalent to 7,395 sq.ft. carpet area (equivalent to 10,500 sq.ft.) saleable residential constructed area on pro-rata basis in the building to be constructed on the said property. It was observed that the assessee had considered the monetary consideration of Rs.25 lakhs received in the construction account, and no income was shown by assessee on the basis of development agreement 19.06.2009. Hence, the assessee was asked to explain why the consideration received of Rs.25 lakhs alongwith sale consideration of constructed area equivalent to 10500 sq.ft. built up area should not be taken as income earned. In response, the AR of assessee submitted that the amount received of Rs.25 lakhs was transferred to WIP account, and on receipt of the final sale consideration in F.Y. 2011-12, the assessee had offered to tax the net profit (sale proceeds - WIP as on date of sale after reducing the amount of Rs.25 lakhs). It was further submitted that if the amount of Rs.25 lakhs was charged as income, the cost incurred by assessee would be required to be reduced from the sale consideration. After considering the reply of assessee, the AO found that the possession of the plot was given to

the said developer of plot. Therefore, the monetary consideration received of Rs.25 lakhs along with selling cost of the constructed saleable area equivalent to 10,500 sq.ft. built up area was to be taxed. In absence of details, the AO considered the cost of saleable area at the rate of Rs.2,500 per sq.ft. which worked out to Rs.2,65,50,000/- and allowed the expenses of Rs.1,89,95,977/- provided by assessee in respect of Choudhary Plot and proportionate interest & other expenses of Rs. 16,63,3257-. Accordingly, the income of assessee from Choudhari Plot was calculated at Rs.25,00,000 + 2.62,50,000 - 1,89,95,977 - 16,63,325 - Rs. 80,90,698/-”

7. Upon assessee's appeal Id. CIT(A) confirmed the action of the Assessing Officer by holding as under:-

“5.4. I have perused facts of the case carefully. The AO has brought to tax the profit on transfer of development rights of "Chaudhary Plot, Thane" property on the basis of "Agreement for Development & Sale" dated 19.06.2009. The appellant has submitted the copy of said agreement dated 19.06.2009, which is duly registered with the Registrar. As per said agreement, the appellant, referred as "Owners", was desirous of developing the said property by constructing thereon cluster of buildings as per the Plans and specifications to be sanctioned by the Thane Municipal Corporation and other Competent Authorities. In consideration of the Owners granting development rights of said property to the Developers, the Developers would pay to the Owners (A) Monetary Consideration of Rs.25 lakhs simultaneously with the execution of said agreement, (B) 7395 Sq. Ft. of carpet area, equivalent to 10500 Sq. Ft. of Built up area on pro-rata basis in the building constructed on sale property. The parties in joint consultation shall decide the said area to be allotted to the Owners after issuance of Commencement Certificate but before commencement of work on the site. Simultaneously with the execution of the agreement, Owners have handed over to the Developers the physical possession of the said property as Licensee, and henceforth, the Developers would be irrevocably and unconditionally entitled to approach the Planning Authority and to obtain the legal possession of the said property. Simultaneously with the execution of the agreement, the Owners had executed a Power of Attorney constituting the Developers as their true and lawful Attorney to do various work relating to the property including the sanction of plans, specifications for construction on the said property, to carry out construction and development of said property, save and except the Saleable area to be given to the owners, to sell the remaining flats and premises etc. The Owners shall execute in the name of Developers the Conveyance of said property. The Developers shall have an option either to call upon the Owners to execute the Conveyance personally or at the discretion of Developers, to get the conveyance executed on the strength

of said substituted Power of Attorney and Developers' decision in this respect would be final.

On going through the aforesaid terms of agreement, it appears that the appellant It had transferred all rights in the said property for consideration of Rs.25.00,000/- plus 10500 sq.ft. of constructed area in the building proposed to be constructed. Also, the appellant has alienated possession of the property, and moreover executed irrevocable power of attorney in favour of the developer assigning all rights in the said property, "except the 10500 sq.ft. of constructed area. As per Sec.2(47)(v), "any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1885 (4 of 1882)" is considered as a "Transfer". Further, the referred Section 53A of Transfer of Property Act, 1882 stipulates that "53A. Part performance.—Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract: Provided that nothing in this section affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof. " In the present case, the possession of immovable has been given in part performance of the contract; Contract (registered has been entered into, consideration is ascertained i.e. Rs.25,00,000/- plus 10500 sq.ft. of built-up area; Transferee (the appellant) has performed his part of contract by giving possession of property and also by executing irrevocable power of attorney in favour of the developers; and the rights of parties are expressly provided by the terms of the contract, Moreover, the appellant itself has captioned the said agreement as "Agreement for Development & Sale". Therefore, the appellant can safely be construed as having transferred the said property in the year under consideration. Merely because part of the sale consideration was receivable by the appellant in the form of certain built-up area in the proposed building did not change the character of the transaction, as it was only a mode of receiving the sale consideration. Therefore, the appellant was liable to offer the income to tax in the year of entering into said agreement dated 19.06.2009, i.e. in the A.Y. 2010-11 under consideration. Therefore. I find no infirmity in the action of AO in bringing the income on transfer of said property to tax in A.Y. 2010-11 under consideration.

As regards the computation of such income, the appellant had not provided any information to compute the sale rate for 10500 sq.ft.. and in absence of details, the AO computed the cost of saleable area at the rate of 2,500/- per sq.ft. aggregating to Rs.265.50 lakhs. The appellant has stated that the stamp duty valuation was only Rs. 164.09 lakhs, however I find

that the AO was not obliged to estimate the sale consideration based on stamp duty valuation, and he was justified in estimating the sale consideration at market rate to the best of his judgment in the given circumstances. It is also on record that the appellant subsequently has agreed to receive Rs.300.00 lakhs in lieu of the 10500 sq.ft. built up area by executing another agreement dated 28.11.2011. which proves that the estimate made by the AO was not exaggerated.

'The appellant's further contention that it had already offered to tax the profit on the transaction in subsequent A.Y. 2012-13 is of no significance when it is proved that the same was already taxable in A.Y. 2010-11 under consideration. Without prejudice, the appellant has submitted the I.T. return and computation of income for A.Y. 2012-13. which shows that the appellant has filed a loss return showing loss of Rs. (98.60,085/-). The profit & loss account of appellant shows "Income from Share, Profit etc." of Rs.97.30 lakhs against which interest payable on unsecured loans of Rs.196.51 lakhs is claimed amongst other expenses, the allowability of which against the profit on transfer of property is not proved. Therefore, effectively, the appellant has not even offered the said profit to tax in A.Y. 2012-11.

In view of the above, I confirm the addition made of Rs.80,90,698/- to business income of the appellant. Therefore, the ground no. 2 of appeal is dismissed.

6. The Ground No. 3 of appeal is general in nature, and hence does not require separate adjudication. In the said ground, the appellant has also prayed to cancel the penalty proceedings u/s 271(1)(c). However, since no penalty has actually been levied in the assessment order, it being premature at this stage need not be adjudicated.

8. Against the above order assessee is in appeal before us.

9. We have heard both the counsel and perused the records. The submission of the Id. Counsel for the assessee is summarized below:-

“ The appellant has shown Choudhary plot of Thane as stock in trade ie business asset which subsequently appellant has given to M/s Shree Sachidanand Developers for development, as appellant Is not able to redevelop the plot because of preoccupation in other work.

The appellant as stated earlier Is entitled 10500 sq ft constructed area of project which appellant will get in future.

The Plan of project is not approved during the year, no construction work has admittedly started during the year. So there is no question of accrual of income during the year under consideration.

On Identical facts in case of ITO vs Ffnian Estate Developers Pvt. Ltd. [2012] 23 taxmann.com 360 (Delhi Trib) It was held that as there is no approval of plan of project nor there was any construction activity started during the year so there Is no accrual of Income during the year.

Reliance Is also place on decision in case of Fardeen Khan vs ACIT [2015] 58 taxmann.com 186 (Mumbal Trib.)

ii) Further the appellant has entered in to an agreement to sale the development right in said property which is stock In trade . So provisions of section 2(47)(v) are not applicable

which is relating to capital asset for the purpose of computing capital gain . So CIT(A) has misguided himself by applying provisions of sec 2(47) (v) relating to transfer of capital asset.

On identical facts in case of *Dheeraj Amim vs ACIT* [2016] 71 taxmann.com 288 (Bangalore), It was held that a assessee-builder who is having property as stock in trade and he enters into agreement with other developer to develop stock in trade property and in return the assessee gets certain constructed area in future project then profit cannot be brought to tax in the year of agreement as assessee has not got constructed area In the year under consideration.

In present case on hand, the appellant has entered into an agreement for development of Choudhary plot of land, which is stock in trade, with M/s Shree Sachidanand Developers. The appellant firm is getting in consideration is Rs 25 lacs plus constructed area of 10500 sq ft in future project. Thus in closing stock even if appellant is to substitute it's the right in Choudhary property to sale 10500 sq ft of constructed area, it would not make any difference to the profit figure as far as appellant is concern., as cost of acquiring this right is same as cost of giving up the right in hand and it is the settled legal position, the closing stock can only be valued at cost or market price whichever is lower. In present case cost of appellant's right in Chodhary plot is less than the market price of right to sell the 10,500 sq ft in the project.

Accounting standard 2, which is mandatory accounting standard under sec 145(2) also states that "Inventories shall be valued at cost or net realisable value whichever is lower." Hence cost of newly constructed area has to be taken at cost.

Thus no profit can be taxed in the year under consideration.

iii) The appellant as stated earlier has entered in to an agreement to sale the rights in Choudhary property. The appellant has received part of sale consideration i.e. 25 Lacs during the year. The said right in the property is stock in trade or business asset. Appellant is following mercantile method of accounting. In such case sale consideration for transfer of right shall be taxable as per revenue reorganisation method regularly employed and followed by appellant.

In case of *CIT vs Motilal Patel & Co.* (1988) 40 Taxrnan 336 (Guj) it Is held that unless and until sale transaction of immovable property is completed by means of registered sale deed there cannot be earning of profit. The fact that the sale consideration Is received prior to such registration, in pursuance of an agreement to sale would not make any difference.

The appellant reduced Rs 25,00,000/- from work In progress as appellant being developer and Is following booking of profit on percentage completion method. During the year under consideration there is no construction activity of the said project even the plan of project is not approved by competent authority during the year. Thus as per accounting standard the appellant has correctly reduced the work in progress by Rs 25 lacs as same is part of sale proceeds only when In future appellant gets 10500 sq ft built up area as per development agreement till that time said amount is not part of sale proceeds.

iv) The appellant has shown profit relatable to sale of Choudhary plot In AY 12-13 and after considering such profit there was returned loss of Rs.98,60,085/- .As per details available on record the profits on sale of development rights in Choudhary plot was already taxed In AY 2010-11 so AO should have excluded such, profits from computation of Income in AY 2012-13 or alternately AO should have recorded the finding that such profit is being

taxed on protective basis in AY 2012-13 as same is already taxed in AY 2010-11. The AO is not clear in his mind in which year the said Income is to be taxed and as a result he has taxed said income in both assessment years substantively which is not in accordance with the law and for the reasons stated earlier the said income has to be correctly taxed in AY 2012-13 and accordingly addition made by AO of Rs. 80,90,698/- needs to be deleted as this amounts to double taxation.

v) In view of above discussion it is humbly prayed that order of CIT(A) may kindly be set aside and returned nil income may be restored.”

10. Per contra, the Id. Departmental Representative relied upon the orders of authorities below.

11. We have heard both the counsel and perused the records. Upon careful consideration, we note that the assessee has entered into an agreement for sale with Sachidanand Developers for the development of its plot at Thane for a monetary consideration of Rs.25 lacs and constructed area with all amenities equivalent to 7,395 sq.ft. carpet area, saleable residential constructed area. The monetary consideration of Rs.25 lakhs received was credited by the assessee in the work-in-progress. However, no income was shown for the carpet area receivable as per the development agreement. Subsequently, the assessee entered into an agreement for the receipt of Rs.300 lacs on 28.11.2011 in lieu of the carpet area it was entitled as per the agreement for sale. The assessee offered the same for taxation in assessment year 2012-13. The above was not accepted by the authorities below. The Revenue is of the view that the assessee should have accounted for the value of constructed area to be acquired pursuant to the development agreement. However, the assessee's plea is that no construction work had commenced and even the plan of the project was not approved. Hence, it has been claimed that there is no question of accrual of income during the year. For this proposition, reliance has been placed by the tribunal decisions. Further, the claim of the assessee is that the agreement to sale the development right in the said property is related to assessee's stock-in-trade and, hence, since the stock-in-trade is to be valued at cost or net realizable value, no profit can be attributed by the assessee in this regard.

12. We find that the case law from the Tribunal referred by the Id. Counsel of the assessee support the proposition that if the plan of the project is not approved and no construction work has been done during the year, there cannot be any accrual of income during the said year. Principally, we find ourselves in agreement with this proposition in light of the tribunal decision referred by the Id. Counsel of the assessee. However, this factual aspect needs verification at the level of the Assessing Officer. The Assessing Officer shall examine as to whether the assessee's claim that during the year neither the plan of the project was approved nor any construction was started. If the said claim is true, the ratio from the tribunal's decisions referred by the assessee in the submissions hereinabove will follow. The assessee cannot be fastened with liability for taxation on hypothetical income. Accordingly, we remit the issue to the file of the Assessing Officer with the above directions.

13. In the result, this appeal by the assessee stands partly allowed for statistical purposes.

Order pronounced in the open court on 16/07/2018.
आदेश की घोषणा खुले न्यायालय में दिनांक को की गई।

Sd/-

(RAMLAL NEGI)
न्यायिक सदस्य / JUDICIAL MEMBER
MEMBER
मुंबई, Mumbai, दिनांक Dated : 16/07/2018
JV, Sr. PS

Sd/-

(SHAMIM YAHYA)
लेखा सदस्य / ACCOUNTANT

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, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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