



ITXA2299.13-date's order

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO.2299 OF 2013

The Commissioner of Income Tax-21,
Mumbai 400 051 ... Appellant
v/s
Skyline Great Hills,
Mumbai 400 076 ... Respondent

Mr Arvind Pinto for Appellant.
Mr J.D. Mistry with Mr Atul Jasani for Respondent.

**CORAM: M.S. SANKLECHA AND
B.P. COLABAWALLA JJ.**

DATE : 16TH FEBRUARY, 2016

P.C.:-

1. This Appeal under section 260A of the Income Tax Act 1961 (the Act) challenges the order dated 8th May 2013 passed by the Income Tax Appellate Tribunal (Tribunal). The Assessment Year involved is A.Y. 2009-10.

2. The Revenue urges the following questions of law for our consideration :-

“(A) Whether on the facts and in the circumstances of the case and in law, the Tribunal

ITXA2299.13-date's order

was justified in deleting the addition made u/s 2(22)(e) relying on the decision of the Rajasthan High Court in case of CIT v/s Hill Top, 217 CTR 527(Raj), when the facts of the instant case are different from those of the latter case ?”

(B) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the addition of Rs.28,41,34,500 being business income in the guise of security deposit received by the Respondent fir, as the latter had already transferred its rights of ownership by way of irrevocable covenant as also received the entire consideration by way of security deposit ?”

3. Re :- Question No.(A) :

(a) The Respondent - Assessee is a partnership firm, engaged in the business of real estate and the development of property. In the subject Assessment Year, the Respondent - Assessee had received security deposit of Rs.54.68 crores from one M/s Skyline Mansion Pvt. Ltd. The Assessing Officer in his order dated 28th December 2011 found that the partners of the Respondent Assessee were also shareholders of M/s. Skyline Mansion Pvt. Ltd. Thus, the Assessing Officer invoked section 2(22)(e) of the Act to hold the deposit from M/s. Skyline Mansion Pvt. Ltd. was a deemed dividend in the hands of the Respondent Assessee. However, the same was

ITXA2299.13-date's order

restricted to only Rs.23.63 lakhs being the accumulated profits of M/s Skyline Mansion Pvt.Ltd.

(b) Being aggrieved, the appellant preferred an appeal to Commissioner of Income Tax (Appeals) ('CIT(A)'). By an order dated 21st September 2012 the CIT(A) held that the amount of Rs.54.68 crores as deposit was received partly for business consideration i.e. to the extent of Rs.42.44 crores and the balance for non business considerations. Therefore, the CIT(A) upheld the invocation of section 2(22) (e) of the Act, but only to the extent of non-business consideration of Rs.12.27 crores as deemed dividend. However, the deemed dividend was restricted to as Rs.23.63 lakhs under section 2(22)(e) in view of the accumulated profits in the hands of M/s Skyline Mansion Pvt.Ltd.

(c) On further, Appeal, the Tribunal by the impugned order dated 8th May, 2013 held that Section 2(22)(e) of the Act would have no application in the present facts. This for the reason that it is undisputed position the Assessee - firm to whom the security deposit was made, is not a registered

ITXA2299.13-date's order

shareholder of M/s. Skyline Mansion Pvt. Ltd. nor is it the case of the Revenue that the shares of M/s Skyline Mansion Pvt.Ltd. are held by the individual partners for and on behalf of the Assessee - firm. In the above view, the impugned order placed reliance upon the decision of the Rajasthan High Court in **CIT Vs. Hotel Hill Top 313 ITR 116** and the Special Bench of the Tribunal in the case of **CIT v/s Bhaumik Colour Pvt.Ltd., reported in (2009) 313 ITR 146** to hold that Section 2(22)(e) of the Act could not be invoked in such a case as the person who is liable to pay tax on the same is the registered shareholder of M/s. Skyline Mansion Pvt.Ltd. In the above view, the addition of Rs.23.63 lakhs made by the CIT(A) on application of Section 2(22)(e) of the Act was deleted.

(d) Mr. Pinto, learned counsel for the Revenue submits that the Respondent Assessee is a partnership firm and the shares in the Company would be registered not in the name of the partnership firm but in the name of individual partners. Thus, deemed dividend would be payable by the Respondent - Assessee firm; and

(e) Although the above submission was made by Mr. Pinto for the Revenue, nothing on record was shown to us to indicate that the shares belonged to the Respondent Assessee firm. On the contrary, the impugned order records that it is not the case of the Revenue that the partners who hold shares in M/s. Skyline Mansion Pvt.Ltd. hold it for and on behalf of the firm. Thus, this is a completely new case being urged before us without any evidence on record to support it. Therefore, the submission is without merit.

(f) The issue as raised for our consideration in the question formulated, is no longer *res integra* as this Court in Universal Medicare Pvt.Ltd. (supra) has *inter alia* held thus :-

“Consequently, the effect of clause (e) of section 2(22) is to broaden the ambit of the expression 'dividend' by including certain payments which the company has made by way of a loan or advance or payments made on behalf of or for the individual benefit of a shareholder. The definition does not alter the legal position that dividend has to be taxed in the hands of the shareholder. Consequently, in the present case the payment, even assuming that it was a dividend, would have

ITXA2299.13-date's order

to be taxed not in the hands of the assessee but in the hands of the shareholder. The Tribunal was, in the circumstances, justified in coming to the conclusion that, in any event, the payment could not be taxed in the hands of the assessee.”

(emphasis supplied)

(g) In the above view, the question as formulated for our consideration does not give rise to any substantial question of law. Thus, not entertained

4. Re. Question No.(B) :-

(a) The Respondent - Assessee had during the assessment year 2009-10 entered into a joint development agreement dated 4th April, 2008 with M/s. Skyline Mansion Pvt.Ltd. which was holding land contiguous to its land. The Respondent - Assessee's land was a part of the no development zone besides having various persons claiming some interest in it. However, to ensure that M/s. Skyline Mansion Pvt.Ltd., would endeavour to meet its obligations in terms of joint development agreement dated 4th April, 2008, a security deposit of Rs.54.68 crores was taken from them. The same was refundable on receipt of Sale of constructed premises of 16,500 sq.meters, being that

ITXA2299.13-date's order

of the Respondent Assessee. It was only on 1st February, 2011 that Commencement Certificate was issued after the land was removed from No Development Zone and the interests of others was taken care of. On 25th April, 2011, a license was granted to M/s. Skyline Mansion Pvt.Ltd. to enter upon the land of the Respondent Assessee for development purpose. The Assessing Officer did not add any income on the above account as a part of business Income as he had held the entire amount of security deposit of Rs.54.68 crores as deemed dividend.

(b) However, the CIT(A) while dealing with the Respondent Assessee's appeal in exercise of its powers under Section 251 of the Act, enhanced the Income by Rs.28.41 crores holding the same to be business income. This on the ground that out of Rs.54.68 crores received as deposits, Rs.42.41 crores attributable to FSI of 16,500 sq.meters (stamp duty value). The balance of Rs.12.27 crores was held to be for non business consideration. The difference between the amount received for business of Rs.42.41 crores less the value of the land shown at Rs.14

ITXA2299.13-date's order

crores in balance-sheet i.e. Rs.28.41 crores was held liable to tax as business income in A.Y. 2009-10. This amount of Rs.28.41 crores was added to the total Income.

(c) Being aggrieved, the Respondent - Assessee carried the issue in appeal to the Tribunal. The Tribunal by the impugned order held that the development rights of the Respondent Assessee in its land was its stock in trade. The impugned order holds that in terms of the Agreement dated 4th April, 2008, the license to enter upon its land was to be given within 90 days of M/s. Skyline Mansion Pvt. Ltd. obtaining all requisite permissions to develop the property. This license was given on 25th April, 2011. This is the date when the transaction of development crystallized. Thus, the business income, if any, arose in the AY 2012-13 when possession of land was given. It further holds that in the present facts no sale of the land had taken place on execution of the Agreement dated 4th April, 2008 as it was not stamped as a conveyance. Moreover, the rights of the Respondent Assessee being stock in trade, Section 53A of the Transfer of Property Act will not apply as the same is

ITXA2299.13-date's order

applicable only to capital assets as defined in Section 2(47) of the Act. Moreover, the impugned order of the Tribunal also records that this part of its income is offered to tax for A.Y. 2012-13 while allowing the Appeal of the Respondent Assessee.

(d) Mr. Pinto, learned counsel for the Revenue, in support of the Appeal, submits that the Respondent - Assessee was following mercantile system of accounting, thus the amount received as security deposit has to be taxed as income during the subject Assessment Year. However, nothing was pointed out from the record to indicate that income of Rs.28.41 crores had accrued in the subject Assessment Year out of the security deposit of Rs.54.68 crores received from M/s. Skyline Mansion Pvt. Ltd.

(e) There can be no dispute with the submission advanced by Mr. Pinto that accrual of income in case of mercantile system of accounting would warrant the same being brought to tax. However, the dispute between the parties is when did the income arise / accrue? The

ITXA2299.13-date's order

contesting alternatives are the subject Assessment Year as contended by the Revenue or A.Y. 2012-13 or as contended by the Assessee i.e. when the possession of land by way of license was given to M/s. Skyline Mansion Pvt. Ltd. The Tribunal has in the impugned order rendered a finding of fact that when the security deposit was received under the joint development agreement dated 4th April 2008, no sale took place as no conveyance was executed. Further, the land and rights in respect thereof being stock in trade and not capital assets of the Respondent Assessee, no sale under the Transfer of Property Act also took place in the subject Assessment Year. The impugned order holds that in terms of the joint development agreement dated 4th April, 2008, only after all the requisite permissions are obtained, would the obligation to issue a license to M/s. Skyline Mansions Pvt. Ltd. to enter upon the Respondent - Assessee's land would be granted. It is on the above date 25th April, 2011 i.e. the date when the license was granted to M/s. Skyline Mansion Pvt. Ltd. that income can be said to have accrued. Therefore, on the date when the security deposit was received, in view of the findings of fact rendered by the

ITXA2299.13-date's order

Tribunal, there is no income earned by the Respondent - Assessee in respect of its security deposit of Rs.54.68 crores.

(f) Further, one must not overlook that the impugned order of the Tribunal records the fact "*Since assessee stated that the assessee has already offered income to tax on the aforesaid transfer in A.Y. 2012-13, we allow ground no.3 of appeal taken by the assessee in deleting the addition made by the CIT(A).*"

(g) In the above circumstances, the view taken on the basis of a factual finding that no income accrued to the Respondent - Assessee before 25th April, 2011 when necessary license was granted to M/s. Skyline Mansion Pvt. Ltd. to enter upon its plot of land for the purpose of construction activities is a possible view and not shown to be arbitrary and / or perverse. This view is also supported by the statement made by the Respondent Assessee before the Tribunal as recorded in para (f) above from the impugned order. In view of the above findings of fact, the proposed question does not give rise to any



ITXA2299.13-date's order

substantial question of law. Thus, not entertained.

5. Accordingly, Appeal is dismissed. No order as to costs.

(B.P.COLABAWALLA, J.)

(M.S. SANKLECHA, J.)