

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH 'E' : MUMBAI

BEFORE SHRI R.S. PADVEKAR,(JM) AND SHRI RAJENDRA SINGH ,(AM)

ITA No.4307/Mum/2009

Assessment Year :2006-07

ITA No.4308/Mum/2009

Assessment Year :2007-08

The Asstt. Commissioner of Income tax
Central Circle-13
Room No.1103, 11th floor
Old CGO Annexe Bldg.
Mumbai-400 020.

.....(*Appellant*)

Vs.

M/s. Skylark Build
402, Sagar Avenue
Plot No.54-B
S.V. Road & Lallubhai Park Jn.
Andheri (W)
Mumbai-400 058.
P.A. No.(**AAZFS 0404 K**)

.....(*Respondent*)

Appellant by : Shri B. Jaya Kumar
Respondent by : Shri Uttam Chand Bothra

ORDER

Per RAJENDRA SINGH (AM).

These appeals by the revenue are directed against the common order dated 06.5.2009 passed by the CIT(A) for the Assessment Years 2005-06 and 2007-08. The disputes raised in these appeals is related to addition on account of sale of TDR and regarding completion of project.

2. Briefly stated the facts of the case are that the assessee who is a builder had taken up a slum rehabilitation project at Worli, Mumbai. He started the project with construction of transit building on the land provided by Municipal Corporation of Greater Mumbai (MCGM) at Worli. In Financial Year 2005-06, MCGM came up with a proposal that if assessee was ready to

handover the possession of transit buildings it would grant TDRs. In terms of the said scheme, the assessee received TDR measuring 15308 sq.m. vide certificate No.SRA526 dated 2.10.2005 and another TDR measuring 4690 sq.m. vide certificate No.SRA594 dated 3.6.2006. The TDR dated 2.10.2005 had been sold by the assessee for a sum of Rs.9,92,04,469/- and the TDR dated 3.6.2006 had been sold for Rs.5,55,86,123/-. Both TDRs were sold during the same Financial Year in which these were received i.e. Assessment Years 2006-07 and 2007-08 respectively. The assessee explained before the Assessing Officer that the TDRs had been received in lieu of handing over of formal possession of the buildings constructed by the assessee for slum dwellers. Since the project was not complete, the assessee had set off these receipts against work-in-progress. The assessee was following mercantile system of accounting on project completion basis and therefore, these receipts had not been shown as separate item of income. The Assessing Officer however, did not accept the explanation given. It was observed by him that TDR was nothing but FSI granted by SRA which could be used by recipient for construction of flats /premises in Mumbai. Therefore, the income had accrued to the assessee on account of TDR which was required to be shown as income in the year of receipt. The treatment given by the assessee of set off of TDR against work-in-progress (WIP) was only meant to prolong the payment of ultimate tax, which was not acceptable. The Assessing Officer therefore, rejected the method followed by the assessee and assessed the income on account of receipt of sale of TDR as income of the assessee in the years under consideration.

3. The assessee disputed the decision of the Assessing Officer and submitted before the CIT(A) that TDRs had been received in exchange of transit buildings constructed for slum dwellers as part of on going project. Therefore, receipts from TDRs could not be considered as capital gain. In fact the Assessing Officer himself assessed income from TDR sale as business income. It was also submitted that the expenses had been incurred towards construction of transit camps from Assessment Years 2004-05 to 2007-2008

which had been added to WIP. The cost of construction of transit camps was cost of TDR as latter had been received in exchange of transit camps. The cost incurred was more than TDR receipts and therefore there was net income and rather it was loss. The assessee also furnished the year-wise expenditure incurred from Assessment Year 2004-05 to 2007-08 in support of the plea raised. The assessee also referred to the decision of Mumbai Bench of the Tribunal in the case of Jethlal Mehta vs. DCIT (2005) 2 SOT 422 in which it was held that in case any TDR was generated in lieu of plot or building, then cost of such land or building will be cost of building or TDR.

4. The CIT(A) after considering the explanation of the assessee observed that there was no dispute that nature of income from sale of TDR was in lieu of handing over of transit camp buildings. CIT(A) further observed that the assessee was following project completion method which had been followed by it in the past as well as in future and therefore, the method followed could not be rejected. In such cases, the expenses incurred have to be shown as work-in-progress and any income received from the execution of the project has to be adjusted against work-in-progress till project was completed. The CIT(A) further observed that the project completion method was an accepted method of accounting in construction business and was in line with the accounting standard AS-7 prescribed by the ICAI. He referred to several decisions of the Tribunal in which project completion method had been accepted such as decision of Mumbai Bench of the Tribunal in the case of CIT vs. V.S. Dempo and Co. P.Ltd. (1996)[131 CTR 203(Bom.)]. He observed that the TDRs were directly related to project undertaken by the assessee, therefore, sale proceeds could be taxed only in the year of completion which was Assessment Year 2007-08. CIT(A) also referred to the decision of the Tribunal in the case of ITO vs. Chembur Trading Corporation(2009) in ITA No.2593/Mum/2006 dated 21.1.2009 in which it was held that TDRs have to be recognized as revenue receipts in the year in which the project was completed. The CIT(A) accordingly deleted the addition made by Assessing Officer on account of TDR receipt in Assessment Year 2006-07. The CIT(A)

also held that since project of transit camp was completed in Assessment Year 2007-08, the Assessing Officer will work out the income in Assessment Year 2007-08 by considering entire income and expenditure pertaining to the project from Assessment Year 2003-04. Aggrieved by said decision the revenue is in appeal.

5. Before us the Id. AR reiterated the submissions made before the lower authorities that the assessee was implementing a slum rehabilitation project and as part of the project the assessee had to construct the transit buildings for shifting the slum dwellers on the land provided by MCGM. Since this was long term contract all the expenses incurred had to be shown as work-in-progress. The assessee was following project completion method of accounting of income and, therefore, during the period of construction of project in case there were any receipts from the activities related to the project it had to be reduced from work-in-progress. MCGM had come up with a scheme that in case transit building after full construction were handed over to them they would issue TDR and thus TDR received in the process of setting up of project could not be declared as income separately because income could be computed only in the year of completion of the project. In this case, the transit buildings were handed over to MCGM on 1.6.2006 before finalization of balance sheet for the year ended 31.3.2006 and therefore, these had been reduced from the work-in-progress in Assessment Year 2006-07 and not shown separately. In Assessment Year 2007-08, the TDR receipts had been shown separately in the profit and loss account. He referred to the decision of the Tribunal in the case of Chembur Trading (supra) in support of the proposition that TDR receipts had to be shown as income in the year of completion of the project. It was also submitted that TDRs had been received in lieu of handing over of constructed transit buildings and therefore, cost of TDRs would be the cost of expenditure on transit buildings. In this case the expenditure was more than the income from TDR and therefore, even on this ground no income could be assessed. It was argued that Assessing Officer was not correct in assessing the income

from TDR without giving credit for expenses incurred. It was also submitted that in case income from the completion of transit buildings for which TDRs had been received were computed in Assessment Year 2007-08 entire expenses since the beginning had to be held as allowable as rightly held by the CIT(A).

6. The Id. DR on the other hand supported the order of the Assessing Officer. It was argued that the assessee had been receiving amounts from time to time and therefore the income has to be computed on the basis of partial completion method. It was also submitted that the TDRs had been sold to third parties and therefore, income from the same had to be assessed as independent items of income. He placed reliance on the findings given in the assessment order.

7. We have perused the records and considered the rival contentions carefully. The dispute is regarding assessment of income from sale of TDRs. The assessee was implementing a slum rehabilitation project. In the beginning of the project, the assessee had to construct transit buildings to shift slum dwellers on the land provided by MCGM. Under the scheme formulated by MCGM, the assessee had been offered TDR in lieu of handing over possession of the constructed transit buildings. The assessee had constructed nine transit buildings seven of which had been handed over to MCGM on 1.6.2006. The assessee had received the TDR in two installments part of which was received in advance by order dated 2.10.1995 and the second part by order dated 3.6.2006. Both TDRs were sold in the respective years in which these were received. The Assessing Officer had assessed the income from sale of TDRs during the year of receipt as independent item of income and thus made additions of Rs.9,92,04,469/- and Rs.5,55,86,133/- respectively in the two years under consideration. The case of the assessee is that it was following project completion method on accounting of income and therefore, till the project was completed, any income arising from activities relating to execution of project had to be adjusted against work-in-

progress. The assessee had therefore not declared any income. Alternatively, it has also been submitted that TDRs had been received in lieu of handing over of constructed transit buildings to MCGM and therefore, cost of TDRs were the cost of completed constructed buildings which was more than the income from TDR, and therefore on this ground also there was no net income from the TDR.

8. On careful consideration of the entirety of the facts and circumstances we are of the view that approach adopted by the Assessing Officer for assessing the income from TDR independently without deducting the expenses incurred is not justified. The assessee has been following project completion method which is an accepted method of accounting in construction business and also recommended as per accounting standard AS-7 of ICAI. Therefore, in such cases the income from the project has to be computed in the year of completion. The TDRs received are directly linked to the execution of the project and therefore, before the completion of the project the income from TDR or any other receipt inextricably linked to the project will only go to reduce costs of the project. Therefore, in our view the assessee had rightly set off TDR received against work-in-progress. The addition made by the Assessing Officer in 2006-07 on account of TDR receipt is not justified. Further even if TDR receipt is assessed as independent item, deduction has to be allowed on account of the expenses incurred. The TDRs have been received in lieu of handing over of constructed transit buildings and therefore, cost of those buildings has to be deducted against income from sale of TDR. The cost of the buildings is claimed to be more than income from TDR, full details of which were given to the CIT(A) and therefore, even on this ground no income can be assessed in case of the assessee. In the Assessment Year 2006-07, the project was not complete and there is no dispute about this fact. Therefore, in Assessment Year 2006-07, TDR received has to be set off against WIP and cannot be assessed separately as income. We therefore, confirm order of CIT(A) deleting the addition made in Assessment Year 2006-07. The position regarding

Assessment Year 2007-08 is not clear. The Assessing Officer has not given any finding regarding the year of completion of the project. Though the CIT(A) has held that the project was completed in Assessment Year 2007-08, he has not given any basis of such finding not any such specific plea was taken by the assessee before CIT(A). This aspect therefore requires verification. The construction of the transit buildings was only a part of the project. The actual year of completion of the project is required to be verified. We therefore, restore this aspect to the file of the Assessing Officer for fresh order. In case on verification it is found that the project was completed in 2007-08, Assessing Officer will compute the income from project after taking into account entire expenditure and the receipts from the beginning of the year including the TDRs s directed by CIT(A). However, in case the project is not found complete, the Assessing Officer will set off TDR receipts against work in progress and no income will be assessed on account of TDR receipts separately. We direct accordingly.

9. In the result, both appeals of the assessee are allowed in terms of the order above.

Order pronounced in the open court on 17.6.2011.

Sd/-
(R.S. PADVEKAR)
JUDICIAL MEMBER

Sd/-
(RAJENDRA SINGH)
ACCOUNTANT MEMBER

Mumbai, Dated: 17.6.2011.
Jv.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT(A) Concerned, Mumbai
The DR " " Bench

True Copy

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.

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BEFORE SHRI R.S. PADVEKAR,(JM) AND SHRI RAJENDRA SINGH ,(AM)

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.....(*Respondent*)

Appellant by : Shri B. Jaya Kumar
Respondent by : Shri Uttam Chand Bothra

Corrigendum

Per RAJENDRA SINGH (AM).

These appeals by the revenue were disposed of vide order dated 17.6.2011 of the Tribunal. In para-8 of the said order, the Tribunal confirmed the order of CIT(A) for the Assessment Year 2006-07, which meant that the appeal of the revenue for that year was dismissed. In the same para the Tribunal restored the issue for the Assessment Year 2007-08 to the file of the Assessing Officer which meant that the appeal of the revenue was allowed for statistical

purposes. However, in para-9 by mistake it was written that both the appeals of the assessee were allowed when in fact the appeals were filed by the revenue. The mistake is corrected and para-9 will be substituted by the following:-

"9. In the result, the appeal of the revenue for the Assessment Year 2006-07 is dismissed whereas that for the Assessment Year 2007-08 is allowed for statistical purposes."

Sd/-
(R.S. PADVEKAR)
JUDICIAL MEMBER

Sd/-
(RAJENDRA SINGH)
ACCOUNTANT MEMBER

Mumbai, Dated: 12.7.2011.
Jv.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT(A) Concerned, Mumbai
The DR " " Bench

True Copy

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.