

IN THE INCOME TAX APPELLATE TRIBUNAL  
“D” BENCH, MUMBAI

BEFORE SHRI G.S PANNU, PRESIDENT &  
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No.1290/Mum/2020 (A.Y: 2010-11)

DCIT, CC – 4(1) Room No. 1918, 19 <sup>th</sup> Floor, Air India Bldg, Nariman Point, Mumbai – 400 021.	Vs.	M/s. R.S. Associates Commerz, 3 <sup>rd</sup> Floor, Business Park, Oberoi Gardens city, Goregaon (E) Mumbai – 400063
PAN/GIR No. : AAAGR2426H		
Appellant	..	Respondent

ITA No. 1349/Mum/2020 (A.Y: 2010-11)

M/s. R.S. Associates Commerz, 3 <sup>rd</sup> Floor, Business Park, Oberoi Gardens city, Goregaon (E) Mumbai – 400063	Vs.	DCIT, CC – 4(1) Room No. 1918, 19 <sup>th</sup> Floor, Air India Bldg, Nariman Point, Mumbai – 400 021
PAN/GIR No. : AAAGR2426H		
Appellant	..	Respondent

Assesse by :	Mr.Vijay Mehta.AR
Revenue by :	Mr.T.Sankar.DR

Date of Hearing	19.04.2022
Date of Pronouncement	04.05.2022

आदेश / O R D E R

**PER PAVAN KUMAR GADALE JM:**

The cross appeal is filed by the revenue and the assessee against the order of the Commissioner of

Income Tax (Appeals) -52, Mumbai passed u/s 147 r.w.s 143 and 250 of the Income Tax Act, 1961.

2. In ITA No. 1349/Mum/2020 the assessee has challenged the validity of reassessment proceedings, being the legal & jurisdictional issue. The assessee has raised the following grounds of appeal.

1. *The Ld. AO has erred in law and facts in issuing notice u/s 148 of the Act by mere change of view/opinion by relying on the same facts and material which had been submitted by the appellant during the course of assessment u/s 143(3) of the Act and Hon'ble CIT(A) has erred in confirming the above action of the A.O.*

2. *The Ld. CIT(A) has erred in law and facts in restricting the claim of opening work in progress of Rs. 4,60,59,347/- to Rs. 3,76,67,717/- by disallowing the expenses of Rs. 83,91,630/- incurred in the earlier assessment years on the ground that the appellant has not furnished supportings before the Hon'ble CIT(A) or the said expenses.*

3. *The Hon'ble CIT(A) has erred in law and facts in disallowing the expenses to the extent of RS. 83,91,630/- in spite of the fact that the AO never disputed the genuineness of the expenses comprised in the whole WIP of Rs. 4,60,59,347/-.*

4. *The appellant craves leave to add to, amend, alter or delete the above grounds of appeal.*

3. The brief facts of the case are that, the assessee is a partnership firm and is engaged in the business of real-estate development. The assessee has filed the return of income for the A.Y 2010-11 on 30.09.2010 with a total income of Rs.30,16,54,952/- and the assessment was completed U/sec 143(3) of the Act dated 05.11.2012 with taxable income of Rs. 30,16,,54,954/-.Subsequently, the assessing officer (A.O.) has reason to believe that, there is income escaping the assessment as per the reasons recorded at page 2 of the assessment order and issued notice u/s 148 of the Act dated 16.12.2015. The assessee has filed a letter on 25.12.2015 to treat the return of income filed u/s 139(1) of the Act as due compliance to notice issued u/s 148 of the Act. The A.O. provided copy of reasons recorded for reopening of assessment referred at page 2 of the order, read as under:

*Excess claim of Work-in-Progress*

*On review of records, it/s observed that the assessee had taken up a project to develop the property at village Pisor, Taluka Borivali, Mumbai-400 101. As per the Supplementary deed of partnership it is observed that the assessee had decided to engage a Joint Venture partner to develop the project and accordingly, MIs Seth Developers Ltd., was engaged for the development of property. Thereafter, vide*

*agreement dated 28.11.2002 entered into between the assessee and M/s Seth Developers Ltd, it was decided that the property shall be developed on the understanding that 50% of the sale proceeds of the flats, car parking shall be shared with the assessee. On perusal of the details of revenue and expenses which have been shared in the ratio of 50% each, it is seen that the assessee has not shared its opening work-in-progress in this ratio and has claimed 100% work-in-progress which is amounting to Rs. 4,60,59,3471- in its P& L account. This has resulted in escapement of income to the tune of Rs. 2,30,29,6681- and consequential tax effect of Rs. 69,08,900/-."*

*In view of the above, / have reason to believe that the income to the extent as mentioned above, has escaped assessment within the meaning of section 147 of the I. T Act, 1961, on account of failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment for the year under consideration."*

4. The assessee has filed the objections for reopening of assessment and the A.O has disposed off the same by office letter dated 14.07.2016. Subsequently, notice u/s 143(2) and 142(1) of the Act are issued. In response to the notice, the Ld.AR of the assessee appeared from time to time and submitted the details. The A.O. found that the assessee is a builder and the owner of land situated at Village Poisar, Taluka Borivili, Mumbai has engaged M/s Sheth Developers Ltd for joint development of the property vide an agreement dated 28.11.2002 with an understanding

that 50% of the sale proceeds of the flats or parking spaces/garages to be sold shall be shared with the assessee firm. Whereas the A.O. has verified the information submitted by the assessee and observed that the assessee has to share the revenue and expenses from the project of Vasant Pride in the ratio of 50:50. The A.O. has worked out the revenue and expenses shared in equal proportion. But the assessee firm has claimed 100% cost of expenditure pertaining to projects towards the opening work in progress (WIP) in the profit and loss account. Finally, the A.O. is of the opinion that the assessee has claimed 50% more expenditure in the opening work in progress and made disallowance of Rs.2,30,29,668/- and assessed the total income of Rs.32,46,84,620/- and passed the order u/s 147 r.w.s 143(3) of the Act dated 26.12.2016.

5. Aggrieved by the order, the assessee has filed an appeal before the CIT(A) whereas the CIT(A) considered the grounds of appeal, submissions of the assessee, findings of the A.O. and granted the marginal relief to the extent of claim of work in progress and partly allowed the assessee appeal. Aggrieved by the CIT(A)

order, the assessee has filed an appeal with the Hon'ble Tribunal.

6. At the time of hearing, the Ld. AR has submitted that the CIT(A) has erred in confirming the validity of reassessment proceedings as the assessment was reopened on the wrong assumption of facts and relying on the same set of material which was available with the A.O. in the original assessment proceedings and is a mere change of opinion. The Ld. AR restricted his submissions to the extent of validity of reassessment proceedings and substantiated the arguments/submissions with the paper book and judicial decisions and prayed for allowing the appeal. Contra, the Ld. DR supported the order of the CIT(A) on the validity of reassessment.

7. We heard the rival submissions and perused the material available on record. The Ld.AR made submissions on the validity of reassessment proceedings that the assessment was reopened on the same set of facts and material and on the wrong assumption of the facts by the A.O. We find that the Ld. AR has restricted his arguments to the extent of

validity of reassessment. The Ld. AR's contentions are that the original order was passed under 143(3) of the Act for A.Y 2010-11 on 05.11.2012 and the assessee has made fair and full disclosure of material information in the Assessement proceedings and now the A.O. on the same facts and material has formed an opinion of escapement of income and issued notice U/sec148 of the Act. The Ld.AR has demonstrated the reasons recorded by the A.O at page 2 of the assessment order and submitted that the A.O. has wrongly interpreted the agreement clauses and was of the opinion that the revenue and expenses of the project shall be shared in the ratio of 50% each and the assessee has not shared the opening work in progress(WIP) and claimed 100% of work in progress in the profit and loss account.

8. The Ld. AR emphasized that as per the agreement the assessee is not entitled to share expenditure with the developers and therefore has claimed opening work in progress in the profit and loss account. The Ld. AR demonstrated the finance-cum-development agreement between the assessee and M/s Sheth Developers Ltd dated 28.11.2002 at page 44 to 76 of the paper book.

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The contentions of the Ld. AR are that the A.O. has wrongly assumed the facts of sharing revenue and expenditure in ratio of 50% each share which is factually incorrect as there is no specific clause in the agreement that the expenditure has to be claimed in ratio of 50% each. The Ld. AR refer to page 49 of paper book where the allocation of property for residential, sanctioned, and construction of retail park and parking lot is being developed was discussed. Further at page 52 clause -4 is read as under:

*The owners are hereby declare and confirm that the title to the said land is clear and marketable and is free from all encumbrances, claims, charges and demands of the any nature whatsoever and the owners have not received any injunction or restraining order from any court, authority of Tribunal in regard to the development/disposal of the said land or any part therefore.*

9. Similarly in the agreement at page 51, there is a discussion on the developers requisite financial, managerial and organizational sources and the infrastructure development of the property as per the layout and sanctioned building plan. Further the Ld. AR referred to clause – 9 & 11 at page 53 & 54 of the paper that the assessee shall obtain the permission from MCGM for development and handing over parking



lot to BMC at the cost of owner/assessee. The Ld.AR demonstrated clause-11 of the agreement that the sales proceeds received from sale of flats in the project shall be shared in ratio of 50% each. Finally the Ld.AR to substantiate that the cost shall be borne by the owner/assessee as per agreement has read clause-21,22,26,27,29,&30 to substantiate that the all the cost of the project has to be incurred by the owner/assessee. The Ld. AR emphasized that except revenue sharing between the assessee and developer no expenditure is shared. Further, the opening balance of WIP is carry forwarded from earlier years and the Ld. AR referred to the chart at page 94 of the paper book and most of the expenses are incurred by the assessee prior to entering into the agreement on 28.11.2002.

10. We considering the factual aspects, material and the submissions of the Ld. AR observe that the provisions of Sec.148 of the Act has to invoked only when the A.O. has reason to believe that the income has escaped assessment. where as in the present case on perusal of the various clauses which the Ld. AR has referred in the hearing, it is very clear that the reasons

for sharing expenses and revenue are supported with the evidences and in most of the cases it is revenue sharing inter se between the assessee and developer and there is no cost/ expenditure sharing by the developer. We find that the Ld.AR submissions are realistic and has referred to the clauses in the agreement in particular to show that no expenditure has been shared by the developer. We are of the opinion that the A.O. has ventured on a wrong assumption of facts though the agreement was available on hand with the A.O. in the original assessment proceedings. The AO has assumed that when the revenue is being shared, the cost/expenditure shall also be shared between the assessee and developer. Further there is no tangible material was brought to our knowledge by the Ld.DR to come to a conclusion that there is an income escaping the assessment. We considering the facts and circumstances are of the opinion that the reopening on the wrong assumption of facts by the assessing officer cannot be sustained. Accordingly, we find the reassessment is bad in law and quash the assessment order passed u/s 143(3) r.w.s 147 of the Act. Since the

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legal issue is decided in favour of the assessee and again adjudicating on merits becomes academic and are left open and we allow the grounds of appeal in favour of the assessee.

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11. Since the reassessment proceedings are invalid, and the Assessement order is annulled, therefore the appeal of the revenue becomes infractious and is dismissed.

12. In the result, the appeal filed by the revenue is dismissed and the assessee appeal is allowed.

Order pronounced in the open court on 04.05.2022

Sd/-

(G.S PANNU)  
**PRESIDENT**

Sd/-

(PAVAN KUMAR GADALE)  
**JUDICIAL MEMBER**

Mumbai, Dated 04.05.2022

KRK, PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. Concerned CIT
5. DR, ITAT, Mumbai

6. Guard file.

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//True Copy//

आदेशानुसार/ BY ORDER,

( Asst. Registrar)  
ITAT, Mumbai