IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

I.T.R. Nos.343 to 345 of 1995
Date of decision: 17.7.2009

The Commissioner of Income-tax, Patiala.

-----Applicant.

Vs.

M/s Fair Deal Traders, Ludhiana.

-----Respondent

CORAM:- HON'BLE MR. JUSTICE ADARSH KUMAR GOEL
HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present:- Mr. Rajesh Sethi, Sr. Standing Counsel
for the Revenue.

Mr. Rajan Verma, Advocate
for the Assessee.

ORDER:

1. Following question of law has been referred for opinion of this Court under Section 256(1) of the Income Tax Act, 1961 by the Income Tax Appellate Tribunal, Chandigarh Bench, Chandigarh, arising out of its order dated 20.5.1993 in I.T.A. Nos.150 to 152/Chandi/91 for the assessment years 1980-81 to 1982-83:-

> "Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the amount received as advance money towards sale

> price of land was not be considered as assessee's income till the sale was complete and title passed to the buyers under registered sale deeds, though possession of land had been given?

2. The assessee is engaged in the business of purchase and sale of land. An agreement to purchase land was entered into between Smt. Davinder Kaur, on the one hand, and S/Sh. Hardev Singh, Balbir Singh, Shingara Singh, Jiwan Singh and Ujagar Singh, on the other, in the year 1974. Subsequently, the prospective buyers constituted a partnership firm and entered into a second agreement in the year 1979 with the same vendee. The sale deed could not be finalised because of restrictions under the Urban Land (Ceiling and Regulations) Act, 1976. The assessee firm entered into further transactions with the prospective buyers. The Assessing Officer sought to treat the said money as revenue receipt of the assessee. The assessee disputed the liability by submitting that the receipt was advance, since sale had not actually taken place and title had not been passed on to the purchasers. It was, however, not disputed that later on, sale deeds were executed. The Assessing Officer rejected the plea of the assessee and assessed the income to tax. The same view was taken by the Appellate Authority. It was observed as under:-

> ".....Thus, the appellant was never hit by the Urban Land Ceiling Act as he never became the legal owner of the property. Immediately after the agreement to purchase land he sold the same by parceling out

various pieces of land to various parties at a higher rate and thus on one hand he was to pay only Rs. one lac per acre to Smt. Devinder Kaur and he in turn sold the same at a higher rate to various persons and thus made the profits out of this land even before getting the legal possession of the same. The assessee's plea that the advances received from various parties are 'Amanat' with the firm cannot be accepted as 'Amanat' is something which is given only on trust and nothing in-turn is received back. However, in the case of the assessee firm the possession of land was given and the major part of the payment received and the balance was only to be received at the time of execution of the registration document. The clause 7 of the agreement also is general in nature and registration would be the responsibility of the partners and that by itself does not change the nature of the receipt. As regards the assessee's plea that the profit has been wrongly worked out is not acceptable as the ITO has taken the advances received and the corresponding advance to the land lady and the balance is the profit of the appellant. The Hypothetical example given by the counsel is of no use as he has not shown that the payment to Smt. Davinder Kaur is more than the advances realised in any one transaction. Lastly, the assessee's plea that in the case of Kartar Colonisers the income is not assessed to tax under the similar circumstances is also acceptable as in that case, the party was the owner of the land and then it was held that under the Urban Land Ceiling Act cannot dispose off the same. In the case of the appellant he has entered into an agreement with the seller and in-turn entered into

agreements with the purchasers, handed over the possession to them and at the time of registration the registration is done directly between the first seller and the second purchasers and the assessee only gets the increased rate of sale which is his margin of profit. Thus, he has exploited the stock in trade without taking the legal possession of the same and as such, the advances received from the third parties are clearly his profits and have been rightly assessed."

3. The Tribunal reversed the said view, holding that the title had not passed on to the buyers and thus, the sale was not completed. The Tribunal observed as under:-

"11. We have considered the rival contentions and find that the proposition of law is well-settled in favour of the assessee. Receipt of money in the hands of the assessee could not be held to be other than advance money till the transaction assumed maturity by way of registered sale deed. The assessing officer was, therefore, not justified in treating the receipt of money as representing the sale price. The ld. counsel has pointed out that the assessee has duly returned income for assessment year 1987-88 to 1992-93. The assessing officer has also passed assessment orders for these years. A statement placed at page 44 of the paper book makes it clear that the assessee has been duly assessed. It has been contended by the ld. counsel that Davinder Kaur at the instance of the assessee firm and in the terms of agreement to sell dated 26.4.1979, executed sale deeds in favour of different purchasers of plots. These deeds true

registered in financial year 1986-87 to 1988-89. After registration of sale deeds, the assessee proceeded to disclose income and has been duly assessed. It has been argued that in view of the assessments made for the years 1987-88 to 1992-93, assessments under challenge in these three appeals are liable to be cancelled. We entirely agree with the contention of the ld. counsel and find that neither on the legal proposition nor in view of subsequent assessments, orders under challenge could be sustained."

4. We have heard learned counsel for the parties and perused the record.

5. Learned counsel for the revenue submitted that possession having been handed over and substantial amount having been received, the Assessing Officer took a pragmatic view in holding that the amount received was trading receipt of the assessee and not merely earnest money. The Tribunal erred in holding that without the transaction being completed by way of sale deed, the amount will remain as earnest money. He relies on judgment of Full Bench of the Gujarat High Court in ***Commissioner of Income Tax v. Mormasji Mancharji Vaid*** (2001) 250 ITR 542 (paras 20-22) and judgment of this Court dated 29.9.2006 in I.T.R. Nos.102 to 104 of 1990 ***The CIT, Patiala v. M/s Dhir & Co. Colonisers (P) Ltd., Ludhiana***. Therein, after referring to observations of the Hon'ble Supreme Court in ***CIT Bombay etc. v. M/s Poder Cement Private Limited etc.*** AIR 1997 SC 2523, it was observed that having

regard to object of the Income Tax Act, 1961, namely “to tax the income”, owner was the person who was entitled to receive income from the property in his hands. Thus, mere fact that sale deed had not been executed, was not conclusive for holding that the amount received was only earnest money and not trading receipt. The relevant observations are as under:-

> “In **CIT Bombay etc. v. M/s. Podar Cement Private Limited etc.**, AIR 1997 SC 2523, the assessee purchased flats and let out the same and received rental income. During the assessment, the assessee took the plea that the said income was not income from house property as the assessee was not “legal owner” of the flats in as much as ownership was not transferred in the name of the assessee. The plea of the assessee was upheld by the Tribunal and the High Court. It was argued that the assessee being in beneficial enjoyment of the flats, was owner for purposes of income tax. It was held that even though, under the common law, “owner” means a person who has got a valid title legally conveyed after complying with the requirements of Transfer of Property Act, Registration Act etc., having regard to the ground realities and the object of the Income Tax Act, namely “to tax the income”, “owner” was the person who was entitled to receive income from the property in his own rights. It was thus, held that principles of Common law, Transfer of Property Act and Registration Act were not conclusive for interpretation of provisions of Income Tax Act on the question of ownership of property. The Hon'ble Supreme Court, inter-alia, referred to earlier judgments dealing with

the issue in **RB Jodha Mal Kuthiala v. CIT, Punjab, J&K and Himachal Pradesh**, AIR 1972 SC 126, S**mt.Kala Rani v. CIT Patiala-I,** (1981) 130 ITR 321 (P&H) and **Nawab Sir Mir Osman Ali Khan v. Commissioner of Wealth Tax, Hyderabad,** AIR 1987 SC 522. In **M/s Mysore Minerals Limited v. The Commissioner of Income Tax, Bangalore,** AIR 1999 SC 3185, similar view was taken.

We may also quote observations made by the **Kerala High Court in CIT v. Travancore Rubber & Tea Co. Limited**, (1991) ITR 508, which are apt for the present case also:-

> "Prima facie, the moment an earnest money or deposit is received, certain legal incidents are attached to it. It is a security received for due performance of the contract. Whether the contract is effectuated or not, the amount could and will ordinarily be retained by the seller. If the purchaser commits breach of the agreement, earnest money can be forfeited. If, on the other hand, the transaction goes through, the earnest money received will be given credit to, towards the consideration fixed in the agreement. Either way, once earnest money or deposit is received, it is not a refundable amount. This is a great factor to be reckoned in determining whether the receipt of earnest money is a trading or revenue receipt or a capital receipt. It should also be noticed that the company, in carrying on its business, has entered into the deal for the sale of plots. As part of the bargain, it has stipulated payment of earnest money or deposit for the due performance of the contract. Prima facie,

> the earnest money received has got immediate nexus with the "business" carried on by the assessee-company. It is a part of the bargain in the course of carrying on a business."

6. The above observations fully apply to the present case. Accordingly, we answer the question referred in favour of the revenue and against the assessee.

7. The reference is disposed of accordingly.

(ADARSH KUMAR GOEL)
JUDGE

July 17, 2009 **(DAYA CHAUDHARY)**
ashwani **JUDGE**