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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL (LOD) NO.966 OF 2011

The Metal Rolling Works Ltd.,]
225/227J, Dadaji Road, Tardeo,]
Mumbai-400 034.] ..Appellant.

V/s.

Commissioner of Income Tax,]
Central Circle-1, Mumbai, R. No. 1001,]
10th Floor, Old CGO Building,]
M.K. Road, Mumbai - 400 020.] ..Respondent.

Mr. J.D. Mistri, senior Advocate with Atul K. Jasani for the appellant.

Mr. D.A. Athawale for the respondent.

CORAM : J.P. DEVADHAR AND
K.K. TATED, JJ.

DATED : 11TH OCTOBER, 2011

JUGMENT (PER J.P. DEVADHAR, J.)

1. Heard. The appeal is admitted on the following (re-framed) question of law :-

> " Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in upholding the penalty of Rs.

3,44,40,616/- levied on the appellant under Section 271(1)(c) of the Income Tax Ac t, 1961 ? ”

2. By consent of the parties, the appeal is taken up for final hearing.

3. The assessment year involved herein is AY 2002-03.

4. The relevant facts are that on 24/8/2001 the assessee had entered into a Memorandum of Understanding (MoU) with M/s. Maitri Associates for development of its property. Thereafter, a formal land development agreement was entered into by and between the parties on 21/3/2002. As per the MOU and the land development agreement, the assessee was to receive Rs.6 crores upfront and balance in the form of 40% of sale proceeds to be received on construction and sale of the flats.

5. In the audited profit and loss account, the balance sheet and the audit report dated 28/10/2002, relating to AY 2002-03, the receipt of Rs.6 crores was shown as advance against the sale of property. It may be noted that while seeking approval from the Appropriate Authority, the assessee in Form No.37-I had estimated the consideration receivable under the MOU / Agreement at Rs.14,01,64,316/-. In the return of income filed for the assessment year 2002-03 on 31/10/2002, the

amount of Rs.6 crores was not offered to tax. Even amount disclosed to the Appropriate Authority was not offered to tax. However, a note appended to the Balance Sheet read thus:-

> " The company has, with an objective to turn its net worth, entered into a property development agreement for its land, against which, it has received an advance payment of 6 crores ".

6. In the Financial Year 2005-06 the assessee received part of the balance consideration from the developer and on 16/3/2006 the assessee with a view to offer the capital gains to tax in AY 2006-07 paid advance tax of Rs.2.75 crores.

7. On 12/9/2006 search action under Section 132 of the Income Tax Act, 1961 ('the Act' for short) was carried out at the premises of the assessee. After receipt of notice issued under Section 153C of the Act, the assessee filed return of income on 30/11/2006 offering the long term capital gain to tax in AY 2006-07. Subsequently, the assessee obtained legal opinion from a leading tax practitioner, who opined that the capital gains are liable to be taxed in AY 2002-03 on the basis of the consideration approved by the Appropriate Authority and the amounts received thereafter would not be liable to tax.

8. On 9/8/2007 the assessee received fresh notice under Section 153C of the Act for AY 2001-02 to 2006-07. On the basis of the opinion of the leading tax practitioner, the assessee thought it fit to offer the capital gain in AY 2002-03. Accordingly, the original return filed for AY 2002-03 on 31/10/2002 was revised and a revised return for AY 2002-03 was filed on 4/10/2007 offering the capital gains to tax and the capital gains offered in AY 2006-07 was withdrawn.

9. By a show cause notice dated 17/1/2008 the assessing officer called upon the assessee to show cause as to why the capital gains should not be taxed in the hands of the A.O.P. instead of taxing the capital gains in the hands of the assessee.

10. On receipt of the aforesaid show cause notice, the assessee once again sought legal opinion from other leading tax practitioners, who opined that the capital gains would be taxable not in AY 2002-03 but in AY 2006-07, 2007-08 and 2008-09 depending upon the actual date of sale of individual flats.

11. Thereafter, the assessing officer contrary to his earlier show cause notice, issued a fresh show cause notice on 24/12/2008 seeking to tax the amounts received by the assessee as 'business income' in the respective years of receipt.

12. The assessing officer issued yet another show cause notice on 26/12/2008 seeking to tax Rs.6 crores under the head 'capital gain' in AY 2002-03 and the balance as 'income from other sources' in the respective years of receipt.

13. In these circumstances, the assessee as per the second legal opinion obtained from the leading tax practitioners once again filed revised return on 26/12/2008, wherein the income was offered to tax in AY 2006-07, 2007-08 and 2008-09 and the capital gain offered in AY 2002-03 was withdrawn.

14. Contrary to the show cause notice dated 26/12/2008, the assessing officer passed the assessment order for AY 2002-03 on 31/12/2008, wherein the total consideration of Rs.43,88,87,617/- received by the assessee during the period 2002 to 2008 have been held liable to be taxed under the head 'income from capital gains' at a discounted value of Rs.34,02,51,805/-. After allowing the cost of indexation the capital gain liable to tax was computed at Rs. 18,14,45,690/-. In the said assessment order passed on 31/12/2008 for AY 2002-03, the assessing officer further held that the assessee had concealed the particulars of its income and furnished inaccurate particulars of income and, therefore, penalty under Section 271(1)(c)

was imposable on the assessee.

15. Since the assessment order dated 31/12/2008 was beneficial to the assessee, as capital gains were taxed at a discounted value, the assessee did not challenge the assessment order in so far as it pertains to the computation of capital gain is concerned. But the assessee contested the penalty proceedings initiated by the assessing officer. However, penalty order under Section 271(1)(c) of the Act was passed on 30/6/2009 imposing penalty of Rs.3,44,40,616/-.

16. On appeal filed by the assessee, the CIT(A) by his order dated 15/12/2009 deleted the penalty by holding that the assessee has neither concealed the income nor furnished inaccurate particulars of income and, therefore, the penalty was not imposable.

17. Being aggrieved by the aforesaid order, the revenue filed an appeal before the ITAT and by the impugned order dated 11/3/2011, the ITAT reversed the decision of the CIT(A) and held that in the facts of the present case, the assessee has failed to disclose fully and truly all the material facts relating to the computation of income as required in the explanation 1 to Section 271(1)(c) of the Act. Challenging the aforesaid order, the present appeal is filed by the appellant-assessee.

18. Mr. Mistri, learned senior Advocate appearing on behalf of the assessee submitted that in the present case, the assessee had fully and truly disclosed all material facts in the original return of income filed on 31/10/2002 for AY 2002-03. Even the amounts received in the subsequent years were offered to tax voluntarily and it is only because of the divergent views expressed by the leading tax practitioners, there was confusion as to the year in which the capital gain was to be taxed. Even the assessing officer was not confident till two days prior to the passing of the assessment order as to the year in which the amounts were to be taxed and under which heading the income were to be taxed. Moreover, on the date of filing of the original return on 31/10/2002 there was a Mumbai Bench decision in the case of *DCIT V/s. Asian Distributors Ltd.* reported in [*2001] 70 TTJ (Mumbai)* 88, wherein it was held that if the property development agreement contains a clause that possession of the property would be given to the developer only upon payment of the last instalment, then, even if licence to enter upon the land is given to the developer, there would be no transfer of the property under Section 2(47)(v) of the Act and capital gains would be taxable only on receipt of the last instalment under the agreement. In the present case, the assessee has disclosed all material facts and the capital gain was offered to tax in the subsequent years on receipt of the sale proceeds and, therefore, no fault could be found with the assessee. The decision of this Court in the case of *Chaturbhuj Dwarkadas Kapadia*

V/s. CIT reported in *[2003] 260 ITR 491 (Bom)* was delivered on 13/2/2003 which is after the filing of the original return of income for AY 2002-03 on 31/10/2002. As per the said decision the capital gain was taxable in 2002-03. However, the revenue itself had challenged the decision before the Apex Court. Moreover, even the assessing officer till the date of passing the assessment order on 31/12/2008 was not confident as to the year of the taxability and the head under which the income was to be taxed. Accordingly, Mr. Mistri submitted that the ITAT was not justified in holding that the assessee was liable to pay penalty under Section 271 (1)(c) of the Act.

19. Counsel for the revenue, on the other hand, supported the order of ITAT. He submitted that even after the decision of this Court in the case of Chaturbhuj Kapadia (supra) the assessee could have revised the return of income which the assessee failed to do. He submitted that on receiving part consideration of Rs.6 crores on 21/3/2002, the possession of the property was handed over to the developer. Thus, the transfer took place in AY 2002-03 and since the capital gains arising from transfer were not offered to tax in the original return filed for AY 2002-03, the assessing officer was justified in levying penalty under Section 271 (1)(c) of the Act and the ITAT was justified in upholding the penalty levied by the assessing officer.

20. We have carefully considered the rival submissions. In the present case, it is not in dispute that on the date of filing of the original return for AY 2002-03, there was a decision of the Mumbai Bench in the case of Asan Distributors Ltd. (supra) wherein it was held that mere licence to enter upon the property does not amount to handing over possession of the property and if the development agreement contains a clause that the possession would be handed over on payment of the last instalment then, the transfer takes place only on payment of the last instalment. In the present case, the development agreement did contain a clause to that effect and, therefore, since the last instalment was not received in AY 2002-03, the assessee was justified in not offering the capital gains to tax in AY 2002-03 in the original return of income filed on 31/10/2002.

21. Although Rs.6 crores received initially was not offered to tax in the original return filed for AY 2002-03, it is not in dispute that in the original returns filed for AY 2002-03 the assessee did disclose receipt of Rs.6 crores as advance on account of development agreement entered into with a developer in respect of its land. Once the receipt of Rs.6 crores was disclosed in the original return of income as advance receipt under the development agreement entered into with the developer, the assessee cannot be said to have concealed income or furnished inaccurate particulars of income.

22. The argument of the revenue that even after the decision of this Court in the case of Chaturbhuj Kapadia (supra) the assessee could have revised the return of income for AY 2002-03 is without any merit, because, firstly, even after laying down the law, this Court in the case of Chaturbhuj Kapadia (supra) allowed the claim of the assessee therein in view of the decisions prevailing prior to the said decision. Thus, the said decision was not to affect the transaction concluded prior to the decision. Secondly, the revenue itself was aggrieved by the said decision of this Court and had filed S.L.P. challenging the said decision which was ultimately dismissed on 6/2/2004. Thus, the argument of the revenue that in the light of the judgment of this Court in the case of Chaturbhuj Kapadia (supra) the assessee ought to have revised the return of income for AY 2002-03 cannot be accepted.

23. Moreover, in the present case, the assessing officer himself was not sure till the date of passing the assessment order on 31/12/2008 as to whether the assessee is liable to pay capital gains tax and if so in which assessment year and under which head of income. As noted earlier, by a show cause notice issued as late as on 17/1/2008 the assessing officer was of the opinion that the capital gains were not taxable in the hands of the assessee but were taxable in the hands of A.O.P. Thereafter, by a show cause notice dated 24/12/2008 the

assessing officer sought to tax the consideration in the hands of the assessee under the head 'business income' in the respective years in which the amounts were received. In the subsequent show cause notice dated 26/12/2008, the assessing officer sought to tax Rs.6 crores under the head 'capital gain' in AY 2002-03 and the balance as 'income from other sources' in the respective years of receipt. Ultimately, in the assessment order passed on 31/12/2008 the assessing officer sought to tax the entire amount of Rs.43.88 crores received during the period from 2002 to 2008 in AY 2002-03 as capital gains at a discounted value of Rs. 34.02 crores. Since the assessee got relief of Rs.9.86 crores under the assessment order, the assessee has not challenged the assessment order. Thus, in the facts of the present case, where the assessing officer himself was not sure of the assessment year in which the income was to be taxed, it would be improper to hold that the assessee has concealed income or furnished inaccurate particulars of income, especially when the receipt of Rs. 6 crores was disclosed in the original return filed for AY 2002-03 and amounts received subsequently were also offered to tax by filing return of income for AY 2006-07.

24. It is relevant to note that as per the development agreement dated 21/3/2002 the assessee was to receive Rs. 6 crores initially and the balance at the rate 40% of the sale proceeds received on sale of the flats. What could be sale proceeds could not be visualised till the flats

were actually sold. Therefore, in the facts of the present case, when the amount received from time to time have been disclosed by the assessee, it could not be said that the assessee concealed the income or furnished inaccurate particulars of income. Moreover, if the assessing officer himself could not take any definite stand regarding the assessment year in which the amount received by the assessee was taxable, it would be improper to penalise the assessee for not offering the amount to tax in AY 2002-03.

25. In the result, we hold that the assessee had disclosed all the materials necessary for the assessment in AY 2002-03 and that the assessing officer as also the ITAT were not justified in holding that the assessee had concealed income and furnished inaccurate particulars of income and accordingly impose penalty under Section 271(1)(c) of the Act. Accordingly, the question framed herein is answered in the negative, that is, in favour of the assessee and against the revenue.

26. The appeal is disposed off accordingly with no order as to costs.

(K.K. TATED, J.) (J.P. DEVADHAR, J.)