

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'A' अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, AHMEDABAD
(Conducted through Virtual Court)
BEFORE SHRI RAJPAL YADAV, VICE-PRESIDENT
AND
SHRI AMARJIT SINH, ACCOUNTANT MEMBER

ITA No.906 and 907/Ahd/2018

निर्धारण वर्ष/ Asstt.Year : 2003-2004 and 2004-05

Bankimbhai D. Patel Prop. Viral Construction 49, Krishna Housing Society Station Road, Anand. PAN : ADUPP 5276 G	Vs.	ITO, Ward-1 Anand.
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(Applicant)		(Responent)
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Assessee by :	Shri Mukund Bakshi, AR
Revenue by :	Shri S.S. Shukla, Sr.DR

सुनवाई की तारीख/Date of Hearing : 23/03/2021

घोषणा की तारीख /Date of Pronouncement: 19/05/2021

आदेश/ORDER

PER RAJPAL YADAV, VICE-PRESIDENT:

Present two appeals are directed at the instance of the assessee against common order of the Id.CIT(A)-4, Baroda dated 17.12.2015 passed for the assessment years 2003-04 and 2004-05.

2. In both the assessment years, the assessee has taken three grounds of appeals which are verbatim same except variation in the quantum. In brief the grievance of the assessee is that the Id.CIT(A) has erred in confirming the addition of Rs.29,39,524/- and Rs.50,45,333/- in the Asstt.Year 2003-04 and 2004-05 respectively on

the ground that the assessee has received the above amount as on-money on sale of land.

3. The facts on all vital points are verbatim same, more so the discussions in both the assessment orders are also identical. Therefore for the facility of reference, we take the facts from the Asstt.Year 2003-04.

4. Brief facts of the case are that in both the assessment years, originally the assessment orders were passed under section 143(3) read with section 147 of the Income Tax Act, 1961 on 28.12.2007 whereby the income of the assessee was determined at Rs.29,86,640/- and Rs.50,93,470/- as against returned income of Rs.47,120/- and Rs.48,140/- in the Asstt.Years 2003-04 and 2004-05 respectively. A survey under section 133A was conducted at the premises of M/s.Vastu Construction & M/s.Viral Construction on 23.9.2003. Both these concerns are proprietor-ship of the assessee. In Vastu Construction, 23 residential houses in different areas under name and style of “Maruti Pravesh-II” were constructed. In brief, the case of the AO is that the assessee was the power of attorney holder on certain pieces of land on which construction was made, and these were sold. He has received on-money and that the on-money has not been accounted for by the assessee. The ld.AO has made reference to the statement of Shri Rasikbhai C. Patel which was recorded on 20.1.2006. According to the AO, he confessed that he had paid Rs.8,71,695/-, but the documents were executed for a sum of Rs.1,32,500/- on the basis of this statement, the ld.AO harboured a belief that difference of this amount amounting to Rs.7,39,195/- was

collected by way of on-money. He applied this rate to all the plots sold during the year and treated that the assessee has retained on-money which deserves to be assessed in the hands of the assessee. Similar exercise has been made in the Asstt. Year 2004-05.

6. Dispute travelled to the Tribunal, which was agitated in ITA No.1291-1292/Ahd/2009, 401-402/Ahd/2009 & 1260-1261/Ahd/2012. The Tribunal has recorded the following finding and remitted the issue back to the file of AO.

“7. We have considered the rival submissions and perused the materials on record and gone through the orders of authorities below. We find that this addition was confirmed by Ld. CIT(A) on this basis that the matter is pending finalization at the assessment stage itself in the case of land owners. This addition in the hands of the present assessee is confirmed on a protective basis as per order of Ld. CIT(A) dated 14-12-2007. Hence, we feel that by now, the issue first have been finalized in the hands of the land owners but the same is not made available before us. Hence in the facts of the present case, we feel that the matter should go back to the file of AO for fresh decision and hence, we set aside the order of Ld. CIT(A) on this issue and restore the matter back to the file of AO for fresh decision. The AO should find out as to what arrangement was between the land owners and the power of attorney holder and who has received the sale consideration and whether the recipient of sale consideration has offered capital gains and after examining all these aspects and after also finding out as to what happened in the hands of land owners, the AO should decide the issue afresh and pass necessary order as per law after providing adequate opportunity of being heard to the assessee. Ground No.1 is allowed for statistical purposes.”

7. In the very assessment proceedings, the Id.AO has made reference to the evidence collected in the first round of assessment proceedings, and thereafter issued a show cause notice to the assessee. The reply of the assessee along with finding of the AO in the Asstt. Year 2003-04 reads as under:

“5. Accordingly, vide notice u/s. 142(1) r.w.s. 254 of the Income Tax Act, 1961 dtd. 01.10.2013, the assessee was requested to explain as to why the addition of RS. 29,86,644/-, on account of unaccounted/unrecorded on-

money receipt in respect of land, should not be added in assessee's hands. The assessee was also requested to bring all supporting material/evidences with regard to what arrangement was made between the land owners and the power of attorney holders, who are the recipient of sale consideration and whether the recipient has offered capital gain on such sale consideration or not.

6. In response to the said notice, Shri Pankaj Mordani, CA from K.G. Pate! & Co., Chartered Accountants attended and made written submissions. Some of the main/relevant contentions are reproduced as under;

"Your assessee was a PA holder of the land holders and there was having no direct or indirect benefit to him - All the owners of the land has been identified and from the working of the capital gains it reveals that there is no tax liabilities to 12 nos. of land holders.

Your honour can very well verify that Shri Bankimbhai D. Patel was only acted as POA of all the co-owners of the land and the sale consideration were received by the owner of the land.

Ail the land owners have been identified and from the working of the capital gains, it reveals that there is no tax liability to 12 nos. of land holders.

In the case of Mr. Bankin D. Patel, addition has been made inspite of the fact all 12 co-owners has fully explained that the conveying deed has been okeyed and there is no question of making addition on protective basis."

7. I have carefully considered the submission of the assessee. In this regard, it is to state that the facts emerged from the assessee's submissions are that the 12 co-owners being land holders have not filed its return of income for A.Y. 2003-04, as there is no tax liabilities from the working of the capital gain in their respective hands on account of land value as per agreement received by them. Here it is pertinent to mention that the Hon. ITAT has not disputed the receipt of 'on money' amounting to Rs. 36,74,405/~ in respect of the project Maruti Pravesh~II during the F.Y. 2002-03 relevant to A.Y. 2003-04. Further, the land owners also have not admitted on "money receipt" by them. In these circumstances, the liability for tax on account of "on money" receipt cannot be shifted to their hands from assessee's hand at this stage especially because the 12 co-owner have not filed their return of income for A.Y. 2003-04. Hence, the addition of Rs.29,86,644/- on account of unrecorded and undisclosed income on account of "on money" receipt is made in the hands of the assesses on substantive basis, as was directed by the Ld.CIT(A). Penalty proceedings u/s. **271(1)(c)** is separately Initiated for concealing the particulars of income.

8. Subject to above remarks and on the basis of material available on records, the total income of the assessee for A.Y, 2003-04 is computed as under:

Total income as per return of income : Rs. 47,120

<i>Add: Addition on account of unrecorded and Undisclosed income as discussed above ;</i>	<i>Rs. <u>29,39,524</u></i>
<i>Total Income :</i>	<i>Rs. 29,86,644</i>
<i>Rounded off to</i>	<i>: Rs. 29,86,640"</i>

8. Findings in the Asstt.Year 2004-05 are also identical. On the strength of the above reasoning, the Id.AO has made addition which stands confirmed at the end of the Id.CIT(A).

9. With the assistance of the Id.representatives, we have gone through the record carefully. A perusal of the finding of the Id.Revenue authorities below would reveal that both the authorities have failed to analytically examine the issue as per the direction of the ITAT in the first round. From the very beginning, the stand of the assessee is that he was a power of attorney holder of the land-owners. Whatever act has been done, they were done in the capacity as representative of the original owner. If cheque amount is being taken by the owner, then it is to be assumed that on-money is also to be taken by the owners, unless there is evidence to prove otherwise. Faced with this situation, in the first round, the Tribunal has specifically directed the AO to examine understanding between the land-owners and the assessee; whether it has been agreed upon that land-owners would only receive the amount mentioned in the sale deed. The AO has not recorded statement of any of the land owners. He was given all the details. He has recorded the statement of one of the purchasers in the first round; but that is not a relevant evidence; that evidence can be taken for the determination of quantum, but who has received that quantum, that evidence cannot be used. A perusal of the assessment order would indicate that the Id.AO behaved in a very illogical manner by observing that if the land owners are not paid the

capital gain on-money, then the assessee should pay. The law contemplates that the AO has to first determine in whose hand income has to be assessed; who are the rightful owner. The assessee being a power of attorney holder, cannot be treated as rightful owner of the income, which has arisen on sale of a particular property. His action was only in the representative capacity. We could appreciate the stand of the AO if he was able to bring on record the terms of agreement between the assessee as well as land owners specifying the distribution of amount between the assessee in the capacity as power attorney holder vis-à-vis the actual owner. No such steps were taken by the AO; more so when specifically directed by the Tribunal in the first round of litigation. Taking into consideration all these aspects, we are of the view that there is no justification for sustaining addition in both the assessment years in the hands of the assessee. Therefore, we allow both the appeals and delete impugned addition of Rs.29,39,524/- for the Asstt.Year 2003-04, and Rs.50,45,333/- for the Asstt.Year 2004-05.

10. In the result, both appeals of the assessee are allowed.

Order pronounced in the Court on 19th May, 2021 at Ahmedabad.

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

Sd/-
(RAJPAL YADAV)
VICE-PRESIDENT

Ahmedabad; Dated 19/05/2021