IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO.361 OF 2013

The Commissioner of Income Tax-8 Mumbai .. Appellant
vs
M/s Chemosyn Ltd, Mumbai .. Respondent

Mr.Arvind Pinto for Appellant
Mr.Jignesh R.Shah for Respondent

CORAM: M.S.SANKLECHA &
G.S.KULKARNI, JJ
DATE: 11TH FEBRUARY, 2015

P.C.

1. In this appeal by the revenue under section 260A of the Income Tax Act,1961 (the Act) the challenge is to the order dated 7.9.2012 passed by the Income Tax Appellate Tribunal (for short the ' Tribunal'). The assessment year involved is A.Y.2007-08.

2. Mr.Pinto learned counsel appearing for the revenue submits that following re-framed questions of law arise for consideration of this Court:

> *1. "Whether in law and on the facts of the instant case the Tribunal was justified in holding that income in the form of 18000 sq.feet did not accrue to the company ignoring the fact that the Development agreement dated 16.06.2006 was executed by the company with M/s Dipti Builders;*
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> *2. Whether in law and on the facts of the case was the Tribunal right in coming to the conclusion that no capital gains arose during the year, ignoring the fact that during the year development rights*

were transferred to Dipti Builders during the relevant financial year."

3. Whether in law and on the facts of the instant case, was the tribunal justified in holding the amount spent in acquiring a shareholding in Umesh Shah group, revenue when the expenditure pertained to a stake in the assets of the latter group?

4. Whether in law and on the facts of the instant case was the Tribunal justified in its finding that the expenditure incurred on the family settlement is revenue, ignoring the finding of the CIT (A) who held it to be capital expenditure of a personal nature?

5. Whether on the facts and in the circumstances of the case and in law, was the finding of the Tribunal perverse failing to appreciate that the expenditure on the family settlement was money paid to enable an individual director namely Samir Shah to acquire a majority stake and not for the business of the company?"

3. The questions as framed can be broadly divided into two issues:

(i) Questions 1 and 2 relate to the issue-whether under development agreement dated 16.6.2006 capital gains can be said to have arisen in the subject assessment year to the extent of the value of 18,000 sq.feet of constructed area to be provided by the developer even though the same was not provided for ?

(ii) While Questions nos.3 to 5 is whether the amounts paid by the respondent-assesee for purchase and subsequent cancellation of the

shares belonging to an estranged brother of the person in the management of the company is in the nature of revenue expenditure or not ?

4. So far as the 1st issue is concerned, briefly the facts are that the respondent company owned two plots of land namely plot nos.256 and 257. On 16.6.2006 the respondent-assessee entered into a development agreement with one M/s Dipti Builders to develop plot no.257 for a consideration of Rs.16.11 crores and construction of 18,000 sq.ft of built up area free of cost on plot No.256. Thereafter on 5.7.2007 a tripartite agreement was entered into between M/s Dipti Builders, a new buyer and respondents under which both the plots were transferred to the new buyer at a total consideration of Rs.29.11 crores. Thus, in the return of income filed on 31.10.2006 for subject Assessment year, the petitioner offered only an amount of Rs.16.11 crores for the purpose of capital gains tax. This was as the development agreement dated 16.6.2006 stand rescinded/modified by the sale agreement dated 5.7.2007.

5. For the following Assessment year viz.2008-09 the respondent-

assessee did offer as capital gains an amount of Rs.13 crores being the difference between Rs 29.11 crores and Rs.16.11 crores received earlier from M/s Dipti Builders and duly offered in the A.Y.2007-08. The respondent pointed out that the consideration in the form of constructed area of 18000 sq.feet is concerned, the same was neither received nor had accrued and therefore, no occasion to bring it to tax could arise. The Assessing Officer did not accept the contention of the petitioner and concluded that in view of the decision of this Court in **Chatrubhuj Dwarkadas Kapadia vs Commissioner of Income Tax 260 ITR 260 491** capital gains tax would be payable on the market value of the 18,000 sq.feet of construction to be carried out by M/s Dipti Builders. Resultantly, an addition of Rs.9.51 crores was made on the basis of Ready Rekoner rates as long term capital gains. Thus, determining the respondent-assessee's income at Rs.19.94 crores for the A.Y.2007-08 by order dated 2nd December, 2009.

6. In appeal, the Commissioner of Income Tax (Appeals) (CIT (A) did not accept the petitioner's contention and upheld the Assessing Officer's order by relying upon decision of this Court in **Chatrubhuj Dwarkadas**

Kapadia's case (supra). However, the CIT (A) held the consideration for the 18000 sq.feet of constructed area is to be arrived at on the basis of cost of construction and not the Ready Reckoner rates adopted by the Assessing Officer. Consequently, the consideration to be brought to tax was an amount Rs.2.17 crores**.** On further appeal, the Tribunal set aside the orders of the Assessing Officer and the CIT (A) by holding that the decision of **Chaturbhuj Dwarkadas Kapadia (supra)** would not apply in the facts of the present case as in this case there is no dispute as to transfer of property taking place as a result of the development agreement. The dispute is with regard to quantum of sale consideration to be taken for the purpose of computing capital gains. Moreover, the Tribunal also placed reliance upon decision of **Kalpataru Construction Overseas P.Ltd 13 SOT 194** wherein on similar facts the Tribunal had held that where consideration to be received originally was Rs.1.25 crores but, finally settled at Rs.1 crores then such a subsequent settling of the consideration of at Rs.1 crores although arrived at a subsequent year it would relate back to an earlier assessment year. Further, the Tribunal also placed reliance upon the decision of this Court in **Commissioner of Income Tax vs Shivsagar Estates 204 ITR 1** to conclude that on the

basis of real income theory in the facts of the present case no income on account of 18,000 sq.feet of constructed area has either been accrued or received for it to be brought to tax.

7. Grievance of the revenue is that the decision of this Court in **Chaturbhuj Dwarkadas Kapadia (supra)** should apply to the present facts. As pointed out by the Tribunal, the issue before the Court in the above case was to determine the year in which the property was transferred for the purpose of capital gains. In this case the issue is what is the consideration received for the transfer of an asset. Thus, reliance upon **Chaturbhuj Dwarkadas Kapadia (supra)** does not assist the revenue. We specifically asked the revenue whether the decision of the Tribunal in **Kalpataru Construction Overseas (P) Ltd** has been appealed to this Court and to which the answer was “we do not know”.

8. We find that on facts the impugned order of Tribunal has held that no income has been accrued or received of the value of 18000 sq.feet of constructed area under the development agreement dated 16.6.2006. This on account of the fact that the agreement dated 16.6.2006 was not acted upon as it came to be superseded/modified by the Tripartite agreement

dated 6.7.2007. This was the position when the return of income was filed. The income accrued and earned under the subsequent agreement dated 6.7.2002 was offered as capital gains in the subsequent years. Therefore, on the application of the real income theory, the Tribunal held that on these facts there would be neither accrual nor receipt of income to warrant bringing to tax to the constructed area of 18,000 sq.ft which has not been received by the respondent-assessee. As observed by the Apex Court in **CIT vs Shoorji Vallabhdas 46 ITR 144** :

> " Income-tax is a levy on income. No doubt, the Income-Tax Act takes into account two points of time at which the liability to tax is attracted viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book keeping, an entry is made about a 'hypothetical income' which does not materialise. Where income tax, has in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account." (emphasis supplied)

Thus no income has either accrued or received in the form of 18000 sq.feet of constructed area. No occasion to tax the same can arise. The Tribunal on consideration of facts has reached a finding of fact that no income in respect of 18000 sq.ft of constructed area has been accrued or

received. This finding cannot be said to be perverse or arbitrary. According to us no substantial question of law arises to warrant interference with the order of the Tribunal. Thus, question nos.1 and 2 are dismissed.

9. So far as the 2nd issue as raised in question nos. 3 and 5 with regard to the nature of expenditure, the brief facts are that there was a dispute between brothers who together owned the respondent-assessee company. As a consequence of differences between the two groups, the dispute reached the Company Law Board as well as the Supreme Court of India. Thereafter, a settlement was arrived at between the two warring groups of shareholders and as per directions of the Company Law Board the assessee-company was directed to buy 34 % shareholding of one of the warring group and cancel the same. The respondent-assessee had claimed before the Assessing Officer that the amount of Rs.6.81 crores (being the difference between consideration paid and face value of the shares acquired for cancellation) was revenue expenditure. This on the basis that in view of the dispute between its shareholders, the business was adversely affected and therefore, the payment was expected to be incurred

for purposes of business. However, the Assessing Officer did not accept the same and held the expenditure to be of capital nature and disallowed the claim of revenue expenditure.

10. On appeal, the CIT (A) did not accept the respondent-assessee's contention and upheld the order of the Assessing Officer. On further appeal, the Tribunal by the impugned order set aside the order of the Assessing Officer and the CIT (A)'s orders by placing reliance upon its decision in **Echjay Industries Ltd vs DCIT 88 TTJ (Mumbai) 1089** and on identical facts and circumstances the expenditure incurred by the assessee company to purchase its shares was held to deductible as revenue expenditure. An appeal from the order of the Tribunal in **Echjay Industries Ltd (supra)** was also dismissed by this Court. Besides, the Tribunal records a finding of fact that in view of the dispute between the two warring groups of shareholders the business of respondent assessee had suffered. It records that the total sales of the respondent-assessee which was in the range of Rs.20 to 25 crores per annum during the pre-dispute period had come down to around Rs 9 crores in the financial year 1999-2000 when dispute arose and remained in the range of Rs.10 to 14

crores during the period of litigation between its two groups of shareholders spanning over six years. It also records that after the settlement of dispute in the financial year 2005-06 there was a substantial increase in the sales touching nearly Rs.18 crores per annum. The impugned order of the Tribunal also notes that after settlement of the dispute new products were launched by the respondent-assessee-company. All this was evidence of the fact that the dispute between two groups of shareholders had affected the business of the company.

11. We find that the impugned order records a finding of fact that the amounts which were paid by the respondent assessee for the purpose of purchase of its shares, to its shareholder for subsequent cancellation was an expenditure incurred only to enable smooth running of the business. Thus, the expenditure was incurred for carrying on its business smoothly and therefore, was a deductible expenditure. Thus, the impugned order of the Tribunal is essentially a finding of fact. The respondents have not been able to show that these findings are in any manner perverse or arbitrary. Therefore, questions nos. 3 to 5 do not give arise to any substantial question of law. Thus, question nos.3 to 5 are dismissed.

12. Accordingly, appeal dismissed. No order as to costs.

(G.S.KULKARNI, J) **(M.S.SANKLECHA, J)**