आयकर अपीलीय अधिकरण, पुणे न्यायपीठ "बी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT
AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / **ITA No.613 & 614/PUN/2011**
निर्धारण वर्ष / **Assessment Years : 2003-04 & 2004-05**

M/s. Pimpri Chinchwad New
Town Development Authority,
Sector-24, Pradhikaran,
Pune – 411 044
PAN : AAALP0279Q .....अपीलार्थी/Appellant

Vs.

JCIT, Range-10,
Pune .....प्रत्यर्थी / Respondent

Assessee by : Shri Kihor Phadke
Revenue by : Shri S.S. Meena

सुनवाई की तारीख / **Date of Hearing : 25.10.2018**		घोषणा की तारीख / **Date of Pronouncement: 26.10.2018**

आदेश / ORDER

PER R.S.SYAL, VP :

These two appeals by the assessee arise out of the separate orders, both dated 07-03-2011, passed by the CIT-V, Pune, u/s. 263 of the Income Tax Act, 1961 (hereinafter called as 'the Act') in relation to the assessment years 2003-04 and 2004-05. Since both the appeals are based on similar facts and identical grounds, we are, therefore, proceeding to dispose them off by this consolidated order for the sake of convenience.

ITA No.613/PUN/2011 - A.Y. 2003-04

2. Succinctly, the factual matrix of this case is that the assessee namely, Pimpri Chinchwad New Town Development Authority (PCNTDA) was enjoying the benefit of exemption u/s.10(20A) of the Act up to 01-04-2003. On omission of such section, the AO opined that the assessee was supposed to

file its return of income, which it did not. Notice u/s.148 of the Act was served on the assessee, pursuant to which, the assessee filed the return declaring NIL income claiming that its income should be treated as exempt u/s.11 r.w.s. 13 of the Act. The AO held that the assessee was not eligible for exemption u/s 11 as it was not registered u/s.12A of the Act. He further noticed that the Commissioner passed the order u/s.12AA r.w.s. 12A on 30.05.2007 rejecting the application of the assessee. He proceeded to frame the assessment at a total income of Rs.7.42 crore and odd by adding back the amount of depreciation amounting to Rs.1.68 crore and odd to the excess of Income over expenditure to the tune of Rs.5.74 crore and odd. The Ld. CIT, invoking the provisions of section 263 of the Act held that the assessment order passed by the AO on 12-12-2008 was both erroneous and prejudicial to the interest of the Revenue inasmuch as the assessee adopted a faulty method of revenue recognition. He noticed that the assessee was spreading over lease premium at 1/99th on the basis of the lease period of 99 years, and in case of transfer, it was recognizing the same at 1/78th, apart from showing profit at 10% of the amount of Premium on the lease of plots of land. The Ld. CIT held that entire amount of the lease premium was chargeable to tax in the year of receipt itself and hence the AO committed a serious mistake by accepting the shifting of income from the year of receipt of Premium to several years by means of spreading it over to 99/78 years. After entertaining the objections from the assessee, the Ld.CIT set-aside the assessment order by holding it to be erroneous as well as prejudicial to the interest of the Revenue. He directed the AO to frame the assessment *de novo* after taking into account the facts of the case and the submissions made by the assessee. The assessee is aggrieved by the order passed by the Ld.CIT.

3. All the grounds raised in the Memorandum of Appeal are directed against holding the assessment order erroneous and prejudicial to the interest of the Revenue by the ld. CIT. In support of such grounds, the Ld. AR submitted that 10% of total premium was declared as income in the year of receipt of premium itself and the remaining 90% of the premium was spread over the life of lease, viz., 99/78 years. The Ld. AR argued that the AO examined each and every aspect concerning the revenue recognition in this manner, even though there is no specific discussion made in the assessment order. It was thus argued that the assessment order could not have been termed as erroneous and prejudicial to the interest of the Revenue so as to enable the ld. CIT to take recourse to the provisions of section 263 of the Act. This was strongly opposed by the Ld. DR who heavily relied on the impugned order.

4. Having heard both the sides and perused the material available on record, it is noticed that the assessee, a Town Development authority, is leasing out plots as well as buildings for a period of 99 years. During the year under consideration, only plots were leased out. Transfer of lease is permitted after a certain period. Certain sum is received at the time of signing of the lease agreement, which is termed as `Premium'. In addition, the lessee is required is pay rent at the rate of Re.1/- per annum during the entire lease period. The controversy is on treatment to be given to the amount of Premium received by the assessee. The assessee is showing 10% of lease premium as revenue in the year of receipt in addition to 1/99th of the remaining amount or 1/78th of the remaining amount in case of transfer of lease, as the case may be. The ld. CIT has canvassed a view that the entire amount of Premium is chargeable to tax in the year of receipt, without any spread over the life of lease.

5. The question as to whether the Premium should be shown as income in the year of receipt or spread over the life of lease, depends upon the fact whether the assessee acquired the unbridled right to receive and adjust full amount of such Premium as its own at the time of receipt itself without there being any legal obligation of repaying a part of it during the term of lease or the accrual of such Premium takes place on annual basis and the assessee can be made to return a part of the premium for the unused period of lease by terminating the lease agreement. Or, in the alternate, has the lessee any right to claim refund of the proportionate part of Premium at any time during or at the end of the lease period under any circumstance?

6. The assessee has placed on record two lease agreements for consideration, which have been stated to be representative of all the lease agreements inasmuch as the terms and conditions of all the lease agreements are stated to be similar. We have gone through the copy of one of such lease agreements, which is dated 18-07-2002, entered between the assessee and one Shri Kurkute Jivan Kumar Dinkar. It can be seen from this Agreement that the assessee gave a plot of land on lease to the lessee for a period of 99 years and, in consideration, it received a sum of Rs.2,07,774/-, being the amount of Premium and also rent of Rs.1/- payable every year during the life of the lease. The assessee declared 10% of such Premium as income in the year of receipt and also recognised revenue at 1/99th of the remaining amount in the year of receipt and then continued to show revenue at the rate of 1/99th in the successive years. We have gone through the terms of the lease agreement, from which it is apparent that the lessee is supposed to pay rent @ Re.1/- per annum and pay all existing and future taxes. The lessee has to construct building structure on the land so allotted to it and the commencement and completion of the construction work has to be done

within the stipulated period in addition to maintaining sanitation etc. Such a land on which construction is to be carried out by the lessee becomes his residential building to be used by him with all amenities etc. There is no clause in the Agreement under which the assessee can terminate the lease and re-possess the land on which construction has been done by the lessee and being used for his residence. Clause 3(q) of the Agreement provides that at the expiration of the lease period, the lessee shall deliver to the lessor the demised land. There is an obligation on the lessee for not selling, mortgaging or assigning etc., of the demised land without the previous written consent of the Development authority and at the same time the Development Authority is obliged to give such a consent, if requested. There is another clause in the Agreement, which prohibits the lessee from Mortgaging his leasehold rights, but that too, can be done with the consent of the assessee. In other words, there is no possibility of the assessee-lessor terminating the Agreement during the currency of the lease period of 99 years and hence it can, under no circumstance, dispossess the lessee from the leased property. At the same time, our attention has not been drawn towards any clause in the lease Agreement, which entitles the lessee to claim refund of the part or the full amount of Premium in any situation whatsoever. Thus, it is manifest that upon entering into the lease agreement for 99 years, the assessee acquires an enforceable right to receive the full amount of Premium at the threshold itself without there being any obligation to repay the same as there is no possibility of the assessee terminating such lease during its currency and dispossess the lessee from the demised property. It shows that the full amount of Premium becomes the income of the assessee at the time of its receipt and there is no legal rationale in spreading it over a period of 99 years. It is the other consideration of Re.1/- per annum, which is dependent upon the user of the property. If the lessee pays a sum of Rs.99/-, being the lease rent for a full

period of 99 years in advance at the time of entering into lease, it is this amount of Rs.99/-, which will be a liability of the assessee and can be charged to revenue only at the rate of Re.1/- per annum, by keeping the remaining amount as liability. Since the right to receive the Premium amount gets crystalized and vests in the assessee at the time of entering into agreement only, without there being any corresponding right of the lessee to claim refund of it, such an amount assumes the character of income there only, as the income not only gets accrued but is also received. Ergo, it is manifest that the amount of full Premium is required to be taken as income in the first year itself.

7. The argument of Ld. AR that, by spreading such income over a period of 99 years, no prejudice has been caused to the Revenue and hence no revision is possible on this count, is misplaced. Every year is an independent unit of assessment. A particular amount of income which is required to be taxed in the first year, if spread over certain years, causes prejudice to the Revenue insofar as the income of the first year is concerned. Such a treatment of income offered and accepted by the AO not only renders the assessment order erroneous but also prejudicial to the interest of the revenue.

8. The ld. AR contended that though the AO did not elaborately discuss the matter of revenue recognition in the assessment order, but took a decisive stand after due consideration of the matter in accepting such a treatment of revenue shown by the assessee. He, therefore, argued that taking such a possible view is sufficient to prohibit the CIT from undertaking the exercise of revision.

9. Firstly, it is seen that there is no whisper of the issue of treatment of revenue in the assessment order. Secondly, on a specific query, the Ld. AR could not draw our attention towards any judicial pronouncement accepting the spread over of lease premium over the life of lease in the hue of the terms of the lease agreement as are prevalent in the case of the assessee. Under such circumstances, the assessment order passed by the AO accepting such spread over has necessarily to be held as erroneous, even if the assessee had put forth its explanation about the spreading over of Premium and the AO accepted the same without recording anything in the assessment order.

10. To buttress the point that the assessee rightly spread the Premium over the life term of the lease period, the Ld. AR relied on Circular No.05/2001, dated 02-03-2001. This was opposed by the Ld. DR.

11. This Circular deals with the : `Problems faced by the assessees in getting due credit for tax deducted at source under section 199'. It provides that where tax is deducted at source u/s 194-I on advance rent pertaining to more than one financial year to be adjusted against future rent, credit shall be allowed in the same proportion in which such income is offered for taxation for different assessment years based on the single certificate furnished for tax so deducted on the entire advance rent. Thus, this Circular primarily deals with the cases in which advance rent is received which has suffered deduction of tax at source at the time of receipt, but the income is to be offered in later years as well.

12. In order to be covered by this Circular, it is *sine qua non* that there should be receipt of advance rent. The primary question which, thus, falls for our consideration is, whether the amount of lease premium received by the

assessee, can be construed as rent. In our considered opinion, the answer to this poser can be in negative alone. Lease premium received by the assessee cannot be categorized as rent, much less the advance rent, as argued by the Ld. AR. We have noticed above that the amount of lease premium accrues to the assessee at the time of its receipt. Such a lease premium does not bear any traits of rent, which in the extant case resembles with annual payment by the lessee at the rate of Re.1/-. Since the amount of lease premium has no characteristics of rent, in our view, such amount cannot be subjected to TDS u/s 194-I of the Act, which, therefore, rules out the application of Circular No.05/2001. It is further noted that the CBDT has recently clarified vide Circular No.35/2016 dated 13.10.2016 that on the amount of lump sum lease premium, which is not adjustable against the periodic rent, as is the case under consideration as well, there is no requirement of tax withholding u/s 194-I of the Act. We therefore jettison the contention raised on behalf of the assessee on this aspect of the matter.

13. To sum up, since the assessee did not offer full amount of lease premium in the year of receipt and the AO accepted such a position, we are satisfied that the Ld.CIT was justified in invoking the provisions of section 263 of the Act and thus holding that the assessment order to be erroneous and also prejudicial to the interest of the Revenue. We therefore uphold the same.

14. The assessee has taken an additional ground, which reads as under :

> *"7. The appellant is an authority notified under Maharashtra Regional and Town Planning Act of Maharashtra State and carries out functions as development Authority for New Town. Hence the appellant functions as extended Arm of State Government of Maharashtra. Consequently income of the Appellant is exempt from taxation under Income Tax Act, 1961.*
>
> *As such, the assessment order passed by learned AO cannot be said to be prejudicial to interest of the revenue."*

15. Since the additional ground raised by the assessee is a legal one requiring no fresh examination of facts, we admit it and take up for consideration and decision.

16. In support of the additional ground, the Ld. AR argued that the assessee functions as an extended arm of the State Government of Maharashtra and hence does not come within the ambit of taxation. To put it simply, he stated that there is no question of allowing or not allowing any exemption to the assessee as at the threshold, it does not fall within the tax net as it is an extended arm of the State Government of Maharashtra.

17. We do not find any force in the submissions made by the Ld. AR on this score. The assessee is a statutory authority and is not a State Government in itself so as to claim any immunity from taxation. In our considered opinion, this issue is no more *res integra* in view of the latest judgment dated 12-10-2018 rendered by the Hon'ble Supreme Court in ITO Vs. M/s. Urban Improvement Trust The Hon'ble Apex Court has held that Urban Improvement Trust constituted under the Rajasthan Urban Improvement Act, performing various municipal functions, is chargeable to tax in respect of its income and further no exemption u/s.10(20) is available to it. Since the Hon'ble Supreme Court has held that Urban Improvement Trust, doing admittedly activities similar to those of the instant assessee, is chargeable to tax and further not entitled to exemption u/s. 10(20) of the Act, the argument of the Ld. AR that assessee should be treated as not at all chargeable to tax as an arm of the State Government, deserves to be and is hereby repelled.

18. In the result, the appeal of the assessee is dismissed.

ITA No.614/PUN/2011 - A.Y. 2004-05 :

19. Both the sides are in agreement that the facts and circumstances of the A.Y. 2004-05 are *mutatis mutandis* similar to those of A.Y. 2003-04. In fact, both the sides adopted their earlier arguments without making any fresh submission. In this year again, the assessee spread over the lease premium to 1/99 or 1/78, as the case may be, and also declared 10% and the lease premium as income during the first year of lease. The AO accepted such a position and the Ld. CIT held the assessment year to be erroneous and prejudicial to the interest of the Revenue.

20. In view of the candid admission by both the sides that the facts and circumstances for this year are similar to those of preceding year, following the view taken herein above, we uphold the impugned order revising the assessment order u/s.263 of the Act.

21. In the result, the appeal of the assessee is dismissed.

Order pronounced in the Open Court on 26th October, 2018.

Sd/-	Sd/-
(VIKAS AWASTHY)	**(R.S.SYAL)**
न्यायिक सदस्य /JUDICIAL MEMBER	उपाध्यक्ष/ **VICE PRESIDENT**

पुणे Pune; दिनांक Dated : 26th October, 2018
सतीश

आदेश **की** प्रतिलिपि अग्रेषित/**Copy of the Order is forwarded to :**

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT-V, Pune.
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "**बी**" / DR 'B', ITAT, Pune;
5. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

/ True Copy // Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune.*