

आयकर अपीलिय अधिकरण पुणे न्यायपीठ "ए" पुणे में
**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE**

सुश्री सुषमा चावला, न्यायिक सदस्य एवं, श्री डी. करुणाकरा राव , लेखा सदस्य
के समक्ष

BEFORE MS. SUSHMA CHOWLA, JM AND SHRI D. KARUNAKARA RAO, AM

आयकर अपील सं. / ITA No.1743/PUN/2014
निर्धारण वर्ष / Assessment Year : 2010-11

Smt. Chhaya Valmik Nikhade,
Legal heir of Late Shri Valmik
Raghunath Nikhade,
Plot No.25/26, Raghunandan Bunglow,
Sahadeo Nagar, Gangapur Road,
Nashik – 422002

.... अपीलार्थी/Appellant

PAN: ACNPN3313Q

Vs.

The Assistant Commissioner of Income Tax
Central Circle-2, Nashik

.... प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.1804/PUN/2014
निर्धारण वर्ष / Assessment Year : 2010-11

The Assistant Commissioner of Income Tax
Circle-2, Nashik

.... अपीलार्थी/Appellant

Vs.

Smt. Chhaya Valmik Nikhade,
Legal heir of Late Shri Valmik
Raghunath Nikhade,
M/s. Ninad Land Developers,
Vithal Park, Gangapur Road,
Near Veternity Hospital, Nashik

.... प्रत्यर्थी / Respondent

PAN: ACNPN3313Q

Assessee by : Shri Sanket Joshi
Revenue by : Shri Sanjeev Ghei

सुनवाई की तारीख / Date of Hearing : 04.04.2019	घोषणा की तारीख / Date of Pronouncement: 07.06.2019
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आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The cross appeals filed by assessee and Revenue are against the order of CIT(A)-II, Nashik, dated 24.07.2014 relating to assessment year 2010-11 against order passed under section 143(3) of the Income-tax Act, 1961 (in short 'the Act').

2. The cross appeals filed by assessee and Revenue were heard together and are being disposed of by this consolidated order for the sake of convenience.

3. The assessee in ITA No.1743/PUN/2014 has raised the following grounds of appeal:-

- 1 *On the facts and in law, the Id. CIT(Appeals) has erred in confirming the addition of Rs.20,00,000/- on account of compensation paid to Shri Balu Kadal.*
- 2 *On the facts and in law, the Id. CIT(Appeals) has erred in confirming the addition of Rs.20,00,000/- ignoring that the said compensation expenditure has been proved in view of Notarized document filed with the A.O.*
- 3 *On the facts and in law, the Id. CIT(Appeals) has erred in confirming the addition to the extent of Rs.3,60,750/- on account of land development expenses incurred in the course of business and recorded in the audited books of accounts.*
- 4 *On the facts and in law, the Id. CIT(Appeals) has erred in confirming the addition to the extent of Rs.56,21,900/- on account of disallowance of depreciation on flat at Pune used for business purpose.*
- 5 *On the facts and in law, the Id. CIT(Appeals) has erred in confirming the addition to the extent of Rs.69,093/- on account of disallowance of depreciation on flat at Mumbai used for business purpose.*

- 6 *On the facts and in law, the Id. CIT(Appeals) has erred in confirming the addition to the extent of Rs.9,00,000/- on account of alleged unexplained advance received against land from Shri Prashant Hire.*
- 7 *On the facts and in law, the Id. CIT(Appeals) has erred in confirming the addition to the extent of Rs.3,63,455/- on account of disallowance of deduction u/s.80IB(10) of the Act.*
- 8 *On the facts and in law, the Id. CIT(Appeals) has erred in confirming the addition to the extent of Rs.1,26,000/- on account of deemed income from flats at Pune and Mumbai used for business purpose.*
- 9 *Your appellant craves, leave to add, alter, delete above or any other ground/s of appeal."*

3.1 The assessee has also raised the following additional ground of appeal :

On facts and in law,

1. The assessee submits that while computing the 'accumulated profits' for the purpose of section 2(22)(e), the current year profits of the lender company have to be excluded and in the instant case, the balance of accumulated profits of the lender company M/s. Ninad Builders, Contractors and Land Developers Pvt. Ltd., at the start of the year was Rs.Nil and therefore, no addition u/s.2(22)(e) was justified in the hands of the assessee in the year under consideration."

4. The Revenue in ITA No.1804PUN/2014 has raised the following grounds of appeal:-

1. *The Learned CIT(A)-II, Nashik has erred by allowing deduction u/s.80IB on proportionate completion basis inspite of the fact that the project was incomplete before due date of completion and does not qualify for deduction u/s.80IB.*
2. *The Learned CIT(A)-II, Nashik has erred on facts and on law in interpreting provisions of section 80IB(10) of Income Tax Act, 1961. As per provisions of section 80IB, the deduction is allowable on profit derived from a housing project and not on profit from residential unit.*
3. *The Learned CIT(A)-II, Nashik has erred in law and on facts in considering the income of Late Valmik Raghunath Nikhade, Nashik u/s.2(22)(e) of the Income Tax Act, 1961 without considering the provisions laid down within that specific section and its applicability.*
4. *Hence, it is prayed that order of the Learned CIT(A) may be set aside and that of the assessing officer, may be restored.*
5. *The appellant craves the right to alter or modify any grounds or add a new ground."*

5. The grounds of appeal No.3 to 8 raised by the assessee are not pressed and hence, the same are dismissed as 'not pressed'.

6. Coming to the issue raised vide Ground Nos. 1 and 2 is against the addition of Rs.20,00,000/- being compensation paid to Shri Balu Nivruti Kadali.

7. Briefly, in the facts of the case, the assessee was an individual engaged in the business of building and developing housing projects, manufacturing and selling of transformers under the name and style of "PVN Transformers". The assessee had expired on 06-05-2010. The return of income was filed by the legal heir, i.e. his wife by declaring total income of Rs.39,86,430/-. The Assessing Officer noted that the assessee had debited a sum of Rs.20,00,000/- to the profit and loss account. In reply, the assessee pointed out that the said payment was made to Shri Balu Nivruti Kadali as compensation for acquiring right for approach road to get access to the assessee's plot. In support, copy of Sathekhat dated 24-01-2010 and ledger extract of the payment made was furnished before the Assessing Officer. The Assessing Officer noted that the total payment was made in cash. In this regard, the assessee explained that the said person was an Adivasi residing at Chandsi Village and since the village was not served by any bank and he was not having any bank account, the entire payment was made in cash to him, In the agreement dated 24-01-2010 also, this fact was mentioned that the said person had no bank account. The Assessing Officer in order to verify the identity of the person and the genuineness of the transaction issued summons u/s.131 of the Act. However, the said summons could not be served on the ground that Shri Balu Nivruti Kadali was not residing in the village Chandsi, Nashik. It was also noted that he was not residing in the village since last 10 years though he had some

agricultural land in the village. The assessee was confronted with the said facts and was asked to produce Shri Balu Nivruti Kadali. The legal heir of assessee explained her inability to produce him. Thus, the claim of the assessee was not accepted and an addition of Rs.20,00,000/- was made on this ground.

8. Before the CIT(A), the assessee pointed out that the identity of Shri Balu Nivruti Kadali and the genuineness of the transaction stands proved beyond any doubt in view of the Notarized document dated 20-01-2010 which had photo of the said person and seal and signature of notary Shri Pravin B. Kharde, Nashik. The CIT(A) upheld the addition made in the hands of the assessee in the absence of the assessee producing said person for verification since the Inspector had reported that the person was not residing in the village. It was also noted that Shri Balu Nivruti Kadali and his brother had sold the land at Chandsi by a registered deed dated 24-07-2007 to Shri Martand Gomaji Shardul who in turn sold the said land by registered deed to the assessee. Since the land had been sold by Shri Balu Nivruti Kadali the CIT(A) held that he had no right in the said land. Hence, making payment for road to Shri Balu Nivruti Kadali appeared to be not logical. Hence, the onus having not been discharged by the assessee, the contention of the assessee was rejected and addition of Rs.20,00,000/- was upheld.

9. The learned Authorized Representative for the assessee pointed out that the aforesaid payment of Rs.20,00,000/- in cash was made to Shri Balu Nivruti Kadali for right to alter road passing through the land which was purchased by the assessee. He submitted that the right was with Shri Balu Nivruti Kadali. On 24-07-2007 when the land was sold by Shri Balu Nivruti Kadali to Shri Martand Gomaji Shardul the right was there and he never passed on the said right to

Shri Martand Gomaji Shardul. It is clear from Para 5(2) of the said agreement. Shri Martand Gomaji Shardul sold the said right to the assessee vide deed dated 20-02-2008 with the same condition. On a later date, the assessee acquired the right to alter the road and paid Rs.20,00,000/- by a document dated 20-01-2010. The learned Authorized Representative for the assessee stressed that both the Assessing Officer and the CIT(A) have made the aforesaid addition on the ground that the payment was made in cash and the person could not be produced. The CIT(A) further holds that Shri Balu Nivruti Kadali had no right in the road. In reply, learned Authorized Representative for the assessee stressed that Shri Balu Nivruti Kadali was an Adivasi and was not traceable but the identity and genuineness of the transaction stands established. The second plea raised by him was that where the assessee had already expired then his wife was not in a position to produce the said person.

10. The learned Departmental Representative for the Revenue placed reliance on the orders of authorities below.

11. We have heard the rival contentions and perused the record. The issue which arises in the present appeal is against the addition of Rs.20,00,000/-. The said payment was made in cash to one Shri Balu Nivruti Kadali vide document executed between the assessee and said Shri Balu Nivruti Kadali which is a Notarized agreement dated 20-01-2010. But the background of the issue is that Shri Balu Nivruti Kadali was the owner of a piece of land which was sold by registered deed dated 24-07-2007 and 05-09-2007 to Shri Martand Gomaji Shardul. The assessee has filed the copy of the said sale deed at page 34 to 86 of the paper book with English Translation separately filed. As per Para 5(2), the road which was already constructed along East-West direction of

the property was agreed to be maintained as it was. The relevant part of Para 5(2) reads as under :

“Para 5(2) : The area given to you as described in points A to E are marked in red in the layout map attached. From the layout attached there is a Road constructed along the East-West of the property. The right for which are transferred to you along with the property. But the road constructed along the East-West direction of the property is to be maintained as it is and any activity carried out on the property should not affect the Road at any time in future and on this condition only the rights of the road are transferred to you along with this property.”

12. The said land was further sold by Shri Martand Gomajo Shardul to the assessee and Para 5 of the registered document dated 04-02-2010 was on similar lines, copy of which is placed at pages 87 to 113 of the paper book. In other words, the position of road was not to be disturbed by the assessee and no right was given to the assessee to change direction of the road. On a later date, i.e. 20-01-2010, the assessee entered into an agreement with Shri Balu Nivruti Kadali, copy of which is placed at pages 114 to 119 of the paper book and the assessee sought permission to alter the road for approval of layout. As per the terms agreed between the parties, the said permission was given and a sum of Rs.20,00,000/- was paid in cash for the same. The assessee has also mentioned in the said notarized document that no rights in the said road were transferred on the earlier occasion to any person in any form or any consideration was received for such transfer. The said document also mentioned the trail of transaction between the parties, i.e. Shri Balu Nivruti Kadali to Shri Martand Gomaji Shardul and then to the assessee. In the said facts and circumstances where the transaction has been completed through the written documents and a perusal of the notarized agreement dated 20-01-2010 placed at pages 114 to 119 of the paper book also reflect that the photo identity of Shri Balu Nivruti Kadali was there and the agreement was duly notarized and

hence, the same merits to be accepted. Merely because the said person could not be produced would not disentitle the assessee from the aforesaid claim of expenditure especially in the circumstances where the assessee was no more and the case was being represented by his wife (as legal heir). Accordingly, we direct the Assessing Officer to allow the claim of the assessee.

13. Now coming to the additional ground of appeal raised by the assessee, i.e. against the legal issue of computation of accumulated profits for the purpose of section 2(22)(e) of the Act, the issue raised is purely legal and the same is admitted for adjudication.

14. The plea of the assessee before us is that in order to compute the accumulated profits for the purpose of section 2(22)(e) of the Act, the current profits of the lender company have to be excluded. It was also pointed out at the start of the year, the accumulated profit of the lender company was Nil and therefore, no addition u/s.2(22)(e) was warranted. In this regard, both the Assessing Officer and CIT(A) had not accepted the plea of the assessee.

15. The learned Authorized Representative for the assessee has placed reliance on the judgment of Hon'ble Gujarat High Court in CIT Vs. M.B. Stockholding (P) Ltd. reported in (2015) 64 taxmann.com 138 (Gujarat) and the decision of Pune Bench of the Tribunal in Rajmal Lakhichand Vs. JCIT, Range-1, Jalgaon reported in (2018) 92 taxmann.com 94 (Pune-Trib.).

16. The learned Departmental Representative placed reliance on the order of the CIT(A).

17. We have heard the rival contentions and perused the record. The issue which arises before us for adjudication is against the addition made u/s.2(22)(e)

of the Act. The assessee's case is that no such addition is warranted as the accumulated profits at the start of the year was NIL in hands of the lender company. It was also pleaded that current year's profits of the lender company have to be excluded for computing the accumulated profits for the purpose of section 2(22)(e) of the Act. We find that the said issue raised by the assessee is squarely covered by the judgment of Hon'ble Gujarat High Court in CIT Vs. M.B. Stockholding (P) Ltd. (supra) wherein it was held as under :

"4.1 Having heard Mrs. Bhatt, learned advocate appearing on behalf of the Revenue and considering the provisions of Section 2(22)(e) of the Act, more particularly, Explanation 2 to Section 2(22)(e) of the Act, it cannot be said that the learned Tribunal has committed any error in directing the Assessing Officer not to include the current profit to be part of accumulated profit while determining the amount of deemed dividend under Section 2(22)(e) of the Act. While determining the amount of deemed dividend under Explanation 2 to Section 2(22)(e) of the Act, the current profit was not required to be included to be part of accumulated profit. As such, as observed by the learned Tribunal, the issue is already settled by the Hon'ble Supreme Court against the Revenue in the case of Associated Banking Corporation of India Ltd. v. CIT [1965] 56 ITR 1 by which, the view taken that the profit accrues when the books of account are closed.

5. Under the circumstances and considering the Explanation 2 to Section 2(22)(e) of the Act we confirm the view taken by the learned Tribunal and held the question No 1 raised in the present appeal in favour of the assessee and against the Revenue. Consequently, the present appeal deserves to be dismissed and is accordingly dismissed. No order as to costs."

18. The assessee before us has also furnished the audited balance sheet of the said concern Shree Ninad Builders Contractors & Land Developers Pvt. Ltd. The accumulated profits at the start of the year were NIL. The share capital issued and paid-up capital and also Reserves & Surplus as on 01-04-2009 were NIL. Following the parity of reasoning as laid down by the Hon'ble Gujarat High Court (supra), we hold that no addition is to be made in the hands

of the assessee by invoking the provisions of section 2(22)(e) of the Act. Hence, the additional ground of appeal raised by the assessee is allowed.

19. Now coming to the appeal filed by Revenue the first issue raised is against the pro-rata deduction allowed u/s.80IB(10) of the Act. Grounds of appeal No. 1 and 2 raised by the Revenue are against the deletion on the aforesaid issue by the CIT(A).

20. Ground of appeal No.3 raised by the Revenue is against the order of CIT(A) while deciding the issue u/s.2(22)(e) of the Act. Since we have already decided the issue of invoking the provisions of section 2(22)(e) of the Act on jurisdictional basis, ground of appeal No.3 raised by the Revenue becomes academic and the same is dismissed.

21. Coming to the grounds of appeal No 1 and 2, briefly, the facts relating to the issue are that the assessee had constructed housing project at Karjat, Dist. Ahmednagar. The said project was commenced vide commencement certificate dated 20-12-2015 issued by the Gram Panchayat Karyalay, Karjat. The project consisted of 126 residential units and the due date of completion of the project was 31-03-2011. The completion certificate in respect of 126 residential units was issued on 25-03-2010 and consequent thereto the assessee claimed deduction u/s.80IB(10) of the Act in assessment year 2010-11. During the course of assessment proceedings, the Assessing Officer along with the Inspector visited the above housing project on 06-03-2012. As per the visit, it was noticed by the Assessing Officer that construction of 5 units out of 126 units was still under progress and the same was not completed. The visit was on 06-03-2012. The assessee claimed that the construction of 5 units was completed prior to 31-03-2011 and only minor work like painting, tiling and door

fittings was remaining. The said additional work was requested and being carried out, though the possession of the units was given to the customers without doing the said work. The assessee also explained that it was not necessary to complete the above work for obtaining the completion certificate. However, the Assessing Officer did not accept the claim of the assessee and held that the construction of housing project was not completed prior to 31-03-2011. The Assessing Officer also held that even the proportionate deduction in respect of the units completed was not allowable to the assessee. Hence, the entire deduction claimed u/s.80IB(10) of the Act was denied to the assessee.

22. In appeal, the CIT(A) concurred with the finding of the Assessing Officer that 5 units out of 126 units were not habitable prior to 31-03-2011. However, he holds that where the construction of remaining 121 units were complete in all respect prior to the specified date, the assessee was entitled to pro-rata deduction u/s.80IB(10) of the Act. In this regard, reliance was placed on the decision of various High Courts and the Pune Bench of the Tribunal. The Revenue is in appeal against the same.

23. We have heard the rival contentions and perused the record. We find the issue stands covered by a series of decisions including the decision of Pune Bench of the Tribunal in DCIT Vs. M/s. Om Associates in ITA No.1031/PUN/2016 order dated 06-06-2018 for the assessment year 2011-12. Accordingly, we uphold the order of CIT(A) in allowing proportionate deduction u/s.80IB(10) of the Act. Grounds of appeal No.1 & 2 raised by the Revenue are thus dismissed.

24. In the result, the appeal of the assessee is partly allowed and the appeal of the Revenue is dismissed.

Order pronounced on this 07th day of June, 2019.

Sd/-
(D.KARUNAKARA RAO)
लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-
(SUSHMA CHOWLA)
न्यायिक सदस्य / JUDICIAL MEMBER

पुणे Pune; दिनांक Dated : 07th June, 2019
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 (Appeals)-II, Nashik.
4. The CIT-II, Nashik
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "ए" / DR 'A', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	30-05-2019	Sr.PS
2.	Draft placed before author	31-05-2019	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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