Atul R. Aggarwal vs Assistant Commissioner Of Income-Tax on 26 June, 2000

Equivalent citations: [2001]78ITD343(DELHI)

ORDER

1. These appeals, preferred by the assessee, relate to assessment years 1990-91, 1991-92, 1994-95 and 1995-96. Since common issues are involved for consideration, all the appeals were taken up together for hearing and are being disposed of by a composite order for the sake of convenience.

2. The main ground involved in all these appeals relates to interest income worked out by the Assessing Officer (hereinafter referred to "AO") on accrual basis.

2.1 The facts as transpired from the record relating to assessment year 1990-91, giving out the above controversy, are as under.

2.2 On 2-5-1987 an association of persons (AOP), comprising of assessee alongwith twelve other persons, titled as Devidayal Builders and Developers (Vikas Marg Project) (hereinafter referred to DDB&D) came into existence vide agreement dated 2-5-1987 itself. This AOP entered into an agreement on 15-7-1987, copy of which is appearing at pages 78 to 90 of the paper book of assessee, with Shri Sitaramji Bhandar, a society owning 64 acres of land at Karkarduma, Shahadra, Delhi. Through this agreement the AOP agreed to carry on the business of developing plots at the above 64 acres of land. On 29-11-1988 one of the Members of AOP Shri Harbansh Singh retired and on 27-4-1989, Smt. Komal Atul Aggarwal, Ms. Ananya Madhupati Singhania and Miss Rasilika Madhupati Singhania became members of the AOP raising the strength to fifteen in number, Acharya Arundev and Dev Kumar Aggarwal were also members of the aforesaid AOP. On 26-5-1989 Dev Kumar Aggarwal representing for himself and 13 other AOP entered into an agreement with Acharya Arundev by which it was agreed that said project shall absolutely belong to Acharya Arundev. Neither Dev Kumar Aggarwal nor any other member of the AOP shall have any interest in respect thereof as Acharya Arundev either alone or jointly with any person shall develop the said land. Dev Kumar Aggarwal himself and on behalf of remaining members of AOP shall not be having any right, title or interest in the said project in any manner what-so-ever. Acharya Arundev was also given liberty to negotiate with tenants TEXMACO and any other person having any interest or right in the said premises. However, in consideration of above Acharya Arundev agreed to pay to Mr. Dev Kumar Aggarwal a sum of Rs. 11.50 crores and payment schedule was as under : Rs. 25.00 lakhs on or before 10th June, 1989 Rs. 2.00 crores on or before 30th September, 1989 Rs. 3.00 crores on or before 31st October, 1989 Rs. 3.00 crores on or before 30th November, 1989 Rs. 3.25 crores on or before 30th December, 1989. Time was held to be of essence of the contract. In the event of default it was provided through above referred to memorandum of understanding that Dev Kumar Aggarwal will be entitled to receive interest @ 4 per cent p.m. It appears that in pursuance of this memorandum of understanding an agreement was executed on 22-8-1989 (copy thereof is appearing at pages 94 to 98 of the paper book) in between Dev Kumar Aggarwal for himself and

remaining 13 members of AOP and Acharya Arundev and it was agreed that AOP shall stand dissolved and said development collaboration agreement shall absolutely belong to second party viz Acharya Arundev and first party viz. Dev Kumar Aggarwal who acted on behalf of remaining members of AOP, shall not be having any right, title, interest or claim what-so-ever in the said development collaboration agreement. Rest of the terms were identical except that in agreement it was also mentioned that Dev Kumar Aggarwal has received Rs. 25 lakhs and Rs. 2 crores. The contention of the assessee was that Acharya Arundev had not paid Rs. 2 crores as mentioned in the above referred to agreement and Dev Kumar Aggarwal also stated not to have received such amount of Rs. 2 crores but receipt of Rs. 25 lakhs was admitted to both of the parties, and payment of all the amount was to be made finally up to 28-2-1990 otherwise default clause will come into operation whereby Dev Kumar Aggarwal shall be entitled to receive compound interest @ 4 per cent p.m. 2.3 From the record it is noted that Acharya Arundev did not make payment as per schedule and Dev Kumar Aggarwal on behalf of the parties issued a letter on 5-4-1990 (copy appearing at page 99 of the paper book). Contents of this letter are important and that is why they are reproduced hereunder :

> "Dear Sir, We draw your attention to the above agreement and have to inform you that the last payment out of Rs. 11.25 crores was to be paid by 30-12-1989 with a maximum extension upto 28-2-1990.
>
> Since you have not fulfilled your commitment, we are costrained to inform you that we shall now only wait till 30-4-1990 for receiving the full payment alongwith the interest and that after this date the agreement will stand no more."

Kindly note.

Thanking you, Very truly yours, For Devidayal Builders and Developers Sd/-

Dev Kumar Aggarwal."

2.4 This letter had failed to bring any result and it appears that there were some personal discussion in between Dev Kumar Aggarwal and Acharya Arundev. A letter dated 2-5-1990 copy appearing at page 100 of the paper book, was issued by Dev Kumar Aggarwal to Acharya Arundev referring to their personal talk and about the expiry of time limit of compliance of terms and conditions of the agreement which expired on 30-4-1990. It was mentioned by Dev Kumar Aggarwal that in case Acharya Arundev pays the accrued interest for delayed payment worked out up to 30-4-1990 alongwith other amount within one week's time from 2-5-1990, then understanding between the same shall remain intact, otherwise they will go back to their rights. It appears that nothing happened for more than two years. Afterwards the parties viz. all the 14 members of the aforesaid AOP entered into an agreement with Acharya Arundev and TEXMACO Company on 24-9-1993 which had taken note of the fact that earlier agreement dated 22-8-1989 (copy appearing at pages 116 to 124 of paper book) had remained un-complied with. This agreement dated 24-9-1993 provided that TEXMACO and Acharya Arundev agreed to fulfil the terms and conditions of earlier agreement but in lieu of payment of Rs. 11.25 crores, as agreed vide agreement dated 22-8-1989, 14

members of AOP, being first party to this agreement agreed to accept 3 lakhs sq. ft. land in the said housing project undertaken by the Company at Shahadra and further agreed to accept 50,000 sq. ft. of saleable area in the housing project undertaken by the company situated at Bandra Kurla Complex, Bandra, Bombay. About factual position, it is to be noted that Acharya Arundev had filed his affidavit before lower authorities and the latest affidavit is dated 17-10-1993 (copy appearing at pages 127 and 128 of paper book) in which he had specifically mentioned that he had not paid Rs. 11.25 crores to members of AOP in terms of the agreement dated 22-8-1989 nor agreement dated 24-9-1993 had been complied with because the whole matter is pending for settlement and there was no further development as on date in respect of the possession of land etc. 2.5 For assessment year 1990-91 the assessee filed return of income and assessment was completed under section 143(3) of Income-tax Act, 1961 on 26-2-1993 at an income of Rs. 19,27,780. However, notice under section 148 of the Act was issued on 18-3-1994 and assessee filed return at Rs. 19,27,780 itself. The Assessing Officer after considering the terms and conditions of the agreement dated 22-8-1989 between Acharya Arundev as well as Dev Kumar Aggarwal on behalf of remaining members of AOP was of the opinion that Acharya Arundev committed default in not making the payment of Rs. 11.25 crores and as per terms and, conditions of the agreement the assessee was entitled to get interest @ Rs. 4 per cent p.m. on the amount of his share out of Rs. 11.25 crores and he called upon the assessee to explain as to why interest income as per agreement dated 22-8-1989 be not taxed as income. The assessee explained that in assessment year 1991-92 the interest income was assessed on protective basis while in assessment year 1992-93 the same was assessed on substantive basis and no reason has come as to why there were departure from the findings recorded in assessment year 1991-92. It was also submitted that appeals for assessment years 1991-92 and 1992-93 were pending before the CIT(A), Muzaffarnagar. The main submission was that no interest income had actually accrued and in alternative it was submitted that assessee was following cash system of accounting regularly for so many years and accepted by the Department then the income even if accrued, was not liable to be assessed. The assessee placed reliance on the written submission for assessment year 1991-92 as well as for assessment year 1992-93. The other plea of the assessee was that all the clauses of the agreement have not been read and in case whole of the agreement is read then the only conclusion will be that agreement dated 22-8-1989 came to an end as per clause 8 of the agreement. The amount of Rs. 11.25 crores had not been paid before 20-12-1989 and thus agreement no longer survives. Not only this, it was submitted that Acharya Arundev was given a concession to pay all the amount due under the said agreement by 9-5-1990 but he failed to avail that opportunity and that fact goes to prove that agreement came to an end for non-compliance of the terms and conditions. The explanation given by the assessee was considered by the Assessing Officer who was of the opinion that it could not be accepted. He took into consideration the reasoning recorded in the case of assessee for assessment year 1992-93 in which various grounds raised by the assessee were discussed and rejected. The Assessing Officer was of the opinion that agreement dated 22-8-1989 was still valid and held good even after execution of agreement dated 24-9-1993 as it has been specifically mentioned in that agreement date in case TEXMACO company and Acharya Arundev failed to hand over the 3 lakh sq. ft. area in Shahadra and 50,000 sq. ft. land in Bandra Complex, Bombay then members of the AOP will be entitled to get their dues as per agreement dated 22-8-1989. It was also noted by the Assessing Officer that other plea of the assessee that interest can only be assessed on cash basis is also without any substance as from the copy of account of M/s Devidayal Tulsiram for financial year 1990-91 it was noted by him that assessee was showing

interest income on accrual basis. The Assessing Officer concluded on the basis of the above that method of accounting followed by the assessee was mercantile system and as per provisions of section 145 of the Act the income is to be assessed under the head "profits & gains" of the business or profession or income from other sources on the basis of method of accounting regularly followed by the assessee. The Assessing Officer was of the opinion that interest income was to be assessed on accrual basis. He worked out the interest on accrued basis at Rs. 8,31,776 which was added, to the total income of the assessee. The assessee preferred an appeal against this order before the CIT(A).

2.6 The submissions which were taken before the Assessing Officer were reiterated by the assessee before the CIT(A) as well. Giving put factual position, it was submitted that none of the terms and conditions of the agreement dated 22-8-1989 was fulfilled by the said Acharya Arundev and he did not pay the amount as per time schedule. Not only this, the learned counsel submitted before the CIT(A) that a concession was granted to Acharya Arundev to pay the amount by 9-5-1990 which he did not avail of and thus agreement dated 22-8-1989 came to an end AOP which was dissolved through memorandum of association, survived. Statement of Acharya Arundev recorded by the Assessing Officer was also referred to in which he admitted not to have paid any amount to members of AOP. The contention was that first agreement dated 22-8-1989 was no more effective and subsequent agreement dated 24-9-1993 provides different terms and conditions as members of AOP were to receive 3 lakh sq. ft. area of housing project at Shahadra, Delhi and 50,000 sq. ft. area in the project at Bandra, Bombay. The contention was that no interest income accrued and the alternate plea was that assessee was following cash basis in respect of income from interest then the same is not taxable. These contentions of the assessee were considered and it was concluded by the learned CIT(A) that in assessment year 1990-91 assessee had declared interest income from M/s Devidayal Tulsi Ram at Rs. 3,41,515 and that was on the basis of accrual and thus alternate plea of the assessee was not available to him. So far as first plea of the assessee was concerned, it was concluded by the CIT(A) agreement dated 22-8-1989 was very much alive as the new agreement dated 22-4-1993 contained specific averment to the effect that rights of the parties under earlier agreement will not be affected by the new agreement. Both the contentions of the assessee were rejected and action of the Assessing Officer was confirmed against which the assessee is in appeal before the Tribunal.

2.7 So far as facts in assessment years 1991-92, 1994-95 and 1995-96 are concerned, the issue is common except the difference in the amount of addition. The assessee preferred appeals and CIT(A) confirmed the action of Assessing Officer and appeal has been preferred. The salient feature for assessment year 1991-92 is that Assessing Officer added an amount of Rs. 57,12,517 in the hands of assessee on protective basis without prejudice to the right of the department but considered the accrued interest in the hands of AOP M/s DB&D (Vikas Marg Project) for tax. The CIT(A) confirmed the action without mentioning as to what amount is to be added on protective basis as done by Assessing Officer or on substantive basis. Appeal for other assessment years were also dismissed and it is how these appeals have come before the Tribunal.

3. The learned counsel for the assessee Shri C.S. Aggarwal had taken us to the factual position as noted by the Assessing Officer and learned CIT(A). The contention of the assessee's learned representative is based on the earlier submissions which were adduced before the Assessing Officer

as well as before the CIT(A). Referring to the first agreement dated 22-8-1989, the learned counsel submitted that Dev Kumar Aggarwal for himself and on behalf of 13 members of the AOP received Rs. 25 lakhs and rest of the amount was to be paid as per time schedule giver, in the said agreement. The last instalment was to be cleared on or before 30-12-1989. It was also referred that in all circumstances the payment was to be cleared by 28-2-1990 and in case of default, interest @ 4 per cent p.m. was to be paid by Acharya Arundev to each member of the AGP. The learned counsel submitted that undisputedly except Rs. 25 lakh payment rer ceived at the time of execution of that agreement. Acharya Arundev had net paid any amount till date. The factual position as noted by the Assessing Officer was that on 5-44990 a notice was issued by Dev Kumar Aggarwal to Acharya Arundev in which by way of concession Acharya Arundev was asked to clear the amount of instalment alongwith interest by 30-4-1990 otherwise the agreement will come to an end. The contention is that terms and conditions of agreement dated 22-8-1989 go to show that time was the essence of the contract which has been specifically mentioned in clause 6 of memorandum of understanding, copy of which is appearing at pages 91 to 93 of the, paper book. This memorandum of understanding had been made part or the agreement dated 22-8-1989 and thus binding on the parties. Once, according to learned counsel for the assesses, time is made essence of the agreement then promiser viz. Acharya Arundev was expected to fulfil the part of contract and in case he failed, necessary consequences as provided under section 55 of the Indian Contract Act. 1872 shall apply and according to that an agreement is voidable at the option of promisee viz., Dev Kumar Aggarwal on behalf of the members of the AOP. The learned counsel submitted further that this option was exercised by the said Dev Kumar Aggarwal who served a notice dated 5-4-1990 giving concession to Acharya Arundev to clear the amount as terms and conditions of agreement dated 22-8-1989 by 30-4-1990 otherwise agreement will come to an end. This clearly proves that the agreement dated 22-8-1989 remains no more alive, nor any terms and conditions of the said agreement can be acted upon.

3.1 The other part of argument of the learned counsel was that even it agreement is taken as alive, it was to confer a right of mere claim on each of the members of the AOP and mere claim to receive any amount will not be resulting into accrual of income. The contention was that once agreement came to an end assessee cannot be said to have earned any income on ,the basis of that agreement which stands rescinded by promisee and no right flows out of that.

3.2 About the contention of the Department that subsequent new agreement dated 24-9-1993 also admitting the very existence of earlier agreement dated 22-8-1989 as per para 2.3, thereof rights of the parties under earlier agreement have been made intact subject to fulfilment of new terms and conditions of this new agreement, the learned counsel submitted that new agreement is not reviving the old agreement dated 22-8-1989. The contention is that first party of that agreement viz. members of AOP were held entitled to receive payments as per agreement dated 22-8-1989 but subject to terms and conditions of new agreement dated 24-9-1993 were fulfilled. The learned counsel submitted that this contention makes the earlier agreement as contingent one as no perfect right accrues to members of AOP to receive the amount of instalment or interest unless and until the terms and conditions of new agreement are fulfilled. It was further submitted that as per statement of Acharya Arundev recorded by Assessing Officer and in view of his un-controverted affidavit it has come on record that there had been dispute regarding clearance of various sanctions and villagers

were already in possession with whom dispute was going on regarding possession and Acharya Arundev had not been able to get possession of the land nor any development work started as all these points were pending settlement. On the basis of above facts the counsel submitted that no right accrues in favour of any member of the AOP what to say of accrual of income. There was mere understanding arrived at in between members of AOP and Acharya Arundev and that understanding will not create an enforceable right in favour of the members of AOP. Not only this the earlier agreement dated 22-8-1989 stands cancelled and evaporated and there was no real income which could be taxed in the hands of assessee or in the hands of others. The learned counsel submitted that what is taxable is real income and not any hypothetical/theoretical notional income. In support of this contention reliance has been placed pn the decision of Hon'ble Supreme Court in the case of Godhra Electricity Co. Ltd. v. CIT [1997] 225 ITR 746 in which principle of real income had been discussed at length. Their Lordships, according to learned, counsel, have started with the famous case of CIT v. Shoorji Vallabhdas & Co. [1962] 46 ITR 144 (SC) in which the concept of real income was defined for the first time. Their Lordships further took into consideration the decision in the case of Morvi Industries Ltd. v. CIT [1971] 82 ITR 835 (SC) and the ratio of decision in the case of CIT v. Birla Gwalior (P.) Ltd. [1973] 89 ITR 266 (SC) and also considered the decision in the cast of Poona Electric Supply Co. Ltd. v. CIT [1965] 57 ITR 521 (SC) and that of State Bank of Travancore v. CIT [1986] 158 ITR I02 (SC) and concluded that no income accrued to the assessee. The learned counsel pointed out the facts of that case in belief that said assessee-company was the successor of LSC company which authorised to generate and supply electricity to the consumers in Godhra area and state government had fixed the charges for supply of electricity and motive power against which two representative suits were filed by the consumer s which stood decreed by the trial court but High Court decided the issue in favour of the assessee which was also confirmed by the Apex Court. During the pendency cf this litigation the assessee-cornpany was not able to realise the enhanced charges but had shown the amount in the account books on accrual basis. When it proceeded to recover, state governmment came in between directing the assessee-company not to realise the amount but Assessing Officer assessed the income on the basis of accrual and that addition was deleted by the AAC. The Tribunal also confirmed the action of AAC but High Court reversed the view of Tribunal by concluding that assessee-company had a legal right to recover the consumption charges at the enhanced rate from the consumers, Hon'ble Supreme Court reversed the decision and concluded that there was no real income accrued to assessee even though it was following the mercantile system of accounting and had made entries in the books regarding enhanced charges for the supply made to the consumers. The learned counsel submitted that all the cases which have been referred to by the Hon'ble Supreme Court are in favour of assessee as concept of real income as defined by their Lordships of Apex Court as well as by different High Courts go to show that no doubt income is to be assessed on accrual basis if the assessee is following mercantile system of account but there must be some real income as laid down by Their Lordships in the case of Soorji Vallabhdas & Co. (supra) and relevant para which had been reproduced by Their Lordships in the case of Godhra Electricity Co. Ltd. (supra) is relevant and the relevant portion is reproduced below :

> "Income-tax is a levy on income. No doubt, the Income-tax Act taken into account two points of time at which the liability to tax is attracted viz. the accrual of income or its receipts; 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."

3.3 On the basis of "this it was submitted that there was no income resulted in favour of assessee and thus there can not be any tax.

3.4 Not only this, the learned counsel submitted that assessee was maintaining hybrid system of accounting and interest income from various firms was being shown on cash basis and example was given in respect of interest income from M/s Devidayal Tulsi Ram which was shown on cash basis. The learned counsel submitted that Assessing Officer as well as the CIT(A) have rejected this contention of the assessee for no good reasons inspite of bare facts. Our attention was drawn to page 130 of the paper book which is summarised analysis of running deposit account of M/s Devidayal Tulsiram with the assessee and the amount of interest was credited but on cash basis in assessment years 1990-91 and 1991-92. The contention was that assessee's plea should have been allowed on this point.

3.5 The last contention of the learned counsel was that assessee's case stands on better footings as assessee had not shown any entry in its books of account in respect of alleged accrued interest income from Acharya Arundev nor Department has brought anything on record to show that Acharya Arundev had shown that amount in his books of account as payable to assessee. Oh the basis of this it cannot be said that any interest income alleged to have accrued to the assessee on the basis of entry.

3.6 The learned counsel submitted that reliance of the learned CIT(A) on the decision of Apex Court in the case of CIT v. Shiv Prakash Janak Raj & Co. (P.) Ltd. [1996] 222 ITR 583 in which the principle of real income was also defined by Their Lordships, is misplaced as facts were totally different. In that case it was loan which was advanced by assessee to firm whose partners were share holders and interest earned on such loans was given up after expiry of relevant accounting years. Their Lordships after following the decision of Morvi Industries Ltd.'s case (supra) accepted the decision of that court in the case of Birla Gwalior (P.) Ltd. (supra) and concluded that interest accrued and was assessable in the hands of assessee. In the case in hand it is not the amount of loan on which interest is held to be accrued but alleged amount of interest flows from terms and conditions of agreement dated 22-8-1989 which stands cancelled by promisee for non-fulfilment of terms and conditions and thus the very basis giving rise to the accrual of income remains no more in existence and there will be no accrual of interest income to the assessee.

3.7 Lastly it was also submitted that out of 14 members of AOP it is only assessee and one Dev Kumar Aggarwal who had been picked up by the Department and case of Dev Kumar Aggarwal is altogether different as he surrendered crores of rupees in the search but except assessee no other member of AOP had been assessed with such income and that also shows that Department was not sure about the correctness of their approach because they have spared all members of AOP.

3.8 On the basis of above submissions it was submitted that view taken by Assessing Officer and CIT(A) deserves to be set aside.

4. As against it the learned D.R. had placed reliance on the order of Assessing Officer as well as CIT(A). Main plank of the argument of the learned D.R. is that agreement dated 22-8-1989 is very much in existence and for that our attention was drawn to para 2.3 to the terms and conditions of new agreement dated 24-9-1993 in which rights or parties in the old agreement dated 22-8-1989 had been made intact and first part viz, members of AOP had been held entitled to receive payment as per terms and conditions of that agreement. The contention is that submissions of the learned counsel for the assessee that earlier agreement remained no more alive is misconceived. The learned D.R. submitted that in case first agreement came to an end as pleaded by assessee, there was no justification for making the terms and conditions of first agreement as enforceable. Further, the Department is supposed to find out whether income accrued on the basis of that agreement which admittedly came into existence in between the parties and whose terms and conditions remained intact in subsequent agreement dated 24-9-1993 and for that the terms and conditions clearly go to show that assessee alongwith other members of AOP was entitled to get interest in case of default committed by Acharya Arundev in payment of Rs. 11.25 crores to members of AOP.

Acharya Arundev committed default and thus right to receive the interest accrued and in case assessee or other members of AOP are not proceeding to recover the amount, it amounts relinquishment of the legal right on their part and that move cannot be allowed as the same will tantamount to deprive the Revenue of its dues and such a move has not been appreciated by Their Lordships in the case of Morvi Industries Ltd. (supra). Once an income accrues as per mercantile system of accounting, being followed by the assessee, assessee cannot be allowed postponement of actual payment and he cannot be allowed to escape from paying the legitimate tax and the same is the view of Hon'ble Supreme Court in the case of Shiv Prakash Janak Raj & Co. (P.) Ltd. (supra).

4.1 The learned D.R. further submitted that assessee was following mercantile system of account and not the cash system and if it is mercantile system then income which accrued to the assessee is to be shown and reliance was placed on the decision in the case of CIT v. Toshoku Ltd. [1980] 125 ITR 525 (SC). The learned D.R. also pointed out that it is immaterial for assessee to judge as to why Department has picked him alone and allowed other members of AOP to go and the Bench is supposed to examine liability of the assessee to pay tax and the case of other persons will be looked into when matter will come before authorities. (However it is to be mentioned here that learned D.R. was given opportunity to bring necessary material to show as to what action the Department has taken in the case of other members of AOP, but he failed to bring any information on record). On the basis of above submissions the learned D.R. submitted that the Assessing Officer as well as the CIT(A) have taken a correct view, as such no interference is called for in the orders of authorities below and the appeals filed by the assessee be dismissed.

5. We have considered the rival submissions and perused the record carefully and also gone through the case laws referred to by learned representatives of the parties. At the very out set it is noteworthy to mention that most of the facts are not in dispute. It may be recapitulated that the assessee alongwith 12 other persons was member of AOP in the name of M/s Devi Dayal Builders & Developers. On 15-7-1987 this AOP entered into an agreement with Shri Sitaram Ji Bhandar, a society and owner of a plot of 64 acres of land at Karkarduma, Shahadra, Delhi with intention to develop the said land. Out of AOP one member retired and three others joined on 27-4-1989. It

appears further that on 26-5-1989 a memorandum of understanding was drawn between the members of AOP and it was agreed that Dev Kumar Aggarwal representing for himself and 13 members of AOP entered into memorandum of understanding with Acharya Arundev the only other remaining member of the AOP and that memorandum of understanding was executed in which it was. agreed that hence-forth said development project shall absolutely belong to Acharya Arundev who will develop that plot either alone or jointly with another person of his liking. Acharya Arundev shall pay to Dev Kumar Aggarwal a sum of Rs. 11.50 crores as per time schedule mentioned therein and time was made essence of the contract and in default Dev Kumar Aggarwal was made entitled to receive interest @ 4 per cent p.m. It appears further that in pursuance of this memorandum of understanding an agreement was executed on 22-8-1989 in which it is admitted by Dev Kumar Aggarwal for himself and on behalf of 13 members of AOP that he had received Rs. 25 lakhs and Rs. 2 crores before execution of the said agreement and remaining amount was to be paid by 30-12-1989 and finally by 28-2-1990, otherwise in case of default an interest @ 4 per cent p.m. was to be paid. It is also on record that said Acharya Arun Dev failed to honour the commitment of payment as per time schedule and it is now admitted fact that Rs. 25 lakhs alone were paid by him and not Rs. 2 crores as mentioned in the said agreement dated 22-8-1989 as Department has also accepted this preposition that no such amount of Rs. 2 crores were paid by him to Dev Kumar Aggarwal otherwise this amount would have also been added in the income of the assessee as per his share. As Acharya Arun Dev failed to make payment, a letter was written on 5-4-1990 to him by Dev Kumar Aggarwal giving a concession to him to pay the amount by 30-4-1990 and in the absence of failure, it was specifically mentioned that agreement will come to an end. This letter also failed to bring any result and time extended up to 9-5-1990 by Dev Kumar Aggarwal also went unheaded and admittedly no payment either of principal amount or interest was made by Acharya Arundev to Dev Kumar Aggarwal for himself and for remaining 13 members of so called AOP, which as per memorandum of understanding stood dissolved. It is also on record that nothing material happened till 24-9-1993 when a new agreement came into existence among 14 members of AOP forming first party, Acharya Arundev second party and one TEXMACO company which came forward to safeguard the interest of first party and agreed to honour the terms and conditions of earlier agreement but instead of making payment of the amount of Rs. 11.50 crores, the first party agreed to receive 3 lakh sq. ft. area out of housing project at Karkarduma, Shahadra and 50,000 sq. ft. saleable area in housing project, Worli, Bombay. This agreement as per affidavit of Acharya Arundev remained un-complied with and statement of Acharya Arundev had also been referred by Assessing Officer in which he had specifically admitted that he had neither paid any amount to any of the members of AOP nor handed over any area out of housing project at Shahadra or out of Bandra Complex, Worli, Bombay. The reason given by him was that he had not been able to take over the possession of plot situated at Karkarduma on account of the protest by villagers who were said to be in possession over the land and on account of certain other sanctions from various authorities which were not cleared. Further, it has also been mentioned by the learned counsel during the course of arguments that till date the agreement dated 24-9-1993 has also not been acted upon and Acharya Arundev or TEXMACO company had not come forward to give any saleable area from Bandra Complex, Bombay or any area out of housing project at Karkarduma, Shahadra nor any payment had been made to assessee or any other member of AOP. Under these facts it is to be concluded as to whether any income accrued to the assessee and if so whether it was real income in the terms used by Apex Court and different High Courts.

5.1 Before we come to the concept of accrual of income or in that context real income, it will be be-fitting to examine as to what is the fate of the earlier agreement as learned counsel for the assessee had argued that time was essence of the contract in the agreement dated 22-8-1989 and failure to perform his part of contract by Acharya Arundev had brought that agreement to an end and no right accrued to assessee or any other member of AOP.

5.2 So far as concept of time as essence of the contract is concerned, section 55 of the Indian Contract Act gives out the effect of delay to perform contract at fixed time and we are reproducing the relevant portion of section 55 which reads as under :

> "55. Effect of failure to perform at fixed time, in contract in which time is essential - When party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.
>
> Effect of such failure when time is not essential - If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promiser or for any loss occasioned to him by such failure."

5.3 Whether time is of the essence of a contract is a question of fact and decision of this depends on the entire relevant facts on record of the case. Whether the time is the essence of the contract or not could be gathered from the following circumstances :

> (1) Intention to make time of the essence which must be expressed in writing and must be in language which is unmistakable;
>
> (a) it may also be inferred from the nature of the work or works agreed to be carried out;
>
> (b) conduct of the parties; and
>
> (c) the surrounding circumstances at or before the contract.
>
> (2) Even when the time was not originally of the essence of the contract it would be so made by a later notice either before or after the day named in the contract requiring completion by a particular day, if time allowed is reasonable.
>
> (3) If time is the essence of the contract that may be waived by the conduct of the parties.

5.4 Time will not be considered to be of the essence unless, the parties expressly, stipulate that conditions as to time must be strictly complied with.

5.5 It is also to be mentioned that so far as contract relating to purchase of immovable properties are concerned, time will not be the essence of the contract. If it is mercantile contract time shall be of essence of contract. It is well settled general law that where time is specified in a contract it should be performed within the time specified otherwise within a reasonable time. As per provisions of Section 55, as reproduced above, if the promiser fails to do any such thing at or before the specified time, the contract becomes voidable at the option of the promisee. These settled prepositions are to be examined so far as facts in the case of assessee are concerned. Undisputedly memorandum of understanding, a copy of which is appearing at pages 91 to 93 of the paper book and which had been made part of the agreement dated 22-8-1989, the time had been made the essence of the contract. The first requirement of Section 55 that intention of the parties to make time as the essence of the contract should be expressed in writing and in unmistakable language is fulfilled in this case. Not only this the penalty clause was also there as in case of default the interest will be payable by Acharya Arundev and it has been concluded that in the case of Sankal vs. Joit Ram 1949 B 193, appearing at page 349 in the sixth Edition of Commentary of Dutt by A.C. Sen on Indian Contract Act, 1972 that time has been held to be of essence of the contract because the amount due was carrying interest. Further, it is to be pointed out that Dev Kumar Aggarwal on behalf of 14 members of AOP had transferred the development rights of 64 acres of land taken over by AOP from Shri Sitaram Ji Bhandar to Acharya Arundev and in lieu thereof agreed to receive Rs. 11.50 crores. It was purely a mercantile contract and as a general rule time had been made of essence of the contract in mercantile contract. The reason for this general rule is obvious as a mercantile contract is not always an isolated transaction but a chain of transactions and if a promisor does not keep his contract with promisee then promisee may not be able to keep his contract with other persons resulting into disorders in different transactions. It is on account of this very preposition that general rule had been that in mercantile contract, as in the present case, time is to be treated as essence of the contact and intention of the parties was also very clear.

5.6 Undisputedly Acharya Arundev failed to adhere to the schedule of payment and except payment of Rs. 25 lakhs nothing was paid by him. Dev Kumar Aggarwal on behalf of the 14 members of AOP served a notice on 5-4-1989 asking Acharya Arundev to make the payment by 30-4-1990 otherwise agreement will come to an end. It is nothing but exercise of option given under section 55 of Indian Contract Act to promisee that contract became voidable in view of non-performance of his part of contract by Acharya Arundev. Once that option was utilised by Dev Kumar Aggarwal then the agreement dated 22-8-1989 came to an end and it survives no more.

5.7 Even if it is taken that paper No. 99, copy of letter dated 5-4-1990 served on Acharya Arundev was not a notice then still it is not necessary in all the cases that a person who has got option to avoid the contract should issue notice under section 64 of the Contract Act terminating the contract as observed in the case of Koyana Suryanarayana Reddy v. C. Chellayyamma AIR 1989 AP 276 reported at page 704 in Mukherjee's Law of Contract Vol. I. In the case in hand Dev Kumar Aggarwal though not required to serve the notice, had informed Acharya Arundev that agreement will stand no more and thus agreement came to an end from the date of service of this notice.

5.8 Now we take up the new agreement dated 24-9-1993 and admittedly this agreement is in between all the members of AOP as first party and Acharya Arundev and one Growth Techno Projects Ltd. Copy of this agreement is appearing at pages 116 to 123 of the paper book. This company had undertaken liability to fulfil the terms and conditions of the agreement and the first party viz. members of AOP agreed to receive 3 lakh sq. ft. area in Karkarduma, Shahadra and 50,000 sq. ft. area in Bandra, Bombay in lieu of amount of payment. The authorities below have referred to the clause 2.3 of this agreement to conclude that agreement dated 22-8-1989 still survives. This clause 2.3 reads as under :

> "2.3 Nothing contained in this agreement shall affect the rights of the First party in terms of Agreement dated 22nd August, 1989 to receive payments, until the terms and conditions of this agreement dated 24 September, 1993 are fulfilled in toto"

5.9 A perusal of this clause shall show that no doubt the new agreement will not be going to affect the rights of the first party to receive payment in pursuance of the first agreement but that has been made subject to fulfilment of all the terms and conditions of new agreement dated 24-9-1993. It again shows that members of AOP will resort to recover the amount as per agreement dated 22-8-1989 if terms and conditions of new agreement remain to be fulfilled. This condition makes the earlier agreement as contingent agreement because right of members of AOP is made conditional subject to fulfilment of the terms and conditions of new agreement dated 24-9-1993 and that contingent agreement can be enforced for specific performance if that condition remains to be fulfilled. The very inference out of this is that if terms and conditions of the new agreement are not fulfilled by Acharya Arundev and Growth Techno Project Ltd., then only members of AOP will be having a claim against both of them for seeking specific performance of the terms and conditions of earlier agreement so far as it relates to payment of the amount.

5.10 Apart from it mere mentioning of the rights of first party about right to receive payment in pursuance of the agreement dated 22-8-1989 is not going to revive the earlier agreement but intention of the parties is to incorporate the terms and conditions regarding payment of the amount alongwith interest to members of AOP by Acharya Arundev as well as by Company instead of making a new clause about payment of Rs. 11.50 crores alongwith interest. The parties have simply confirmed that members of AOP will be entitled to receive Rs. 11.50 crores from the company if terms and conditions of this agreement dated 24-9-1993 remained un-complied with. So, the earlier agreement is no more alive but it is new agreement which has come into existence.

5.11 It may be noted that in case of Century Spg. & Mfg. Co. Ltd. v. Motilal Dhariwal AIR 1966 MP 313 relevant at page 316, it has been concluded by Their Lordships that when the subsequent contract deals with same subject-matter as the original contract and contains terms and conditions which enable the parties to sue upon the second arrangement alone even if the original contract did not exist rescission of the original contract may be properly inferred. This case had been reported at page 866 in Mukherjee's Law of Contract Vol. I. If we apply the above reasoning to the facts of the present case then undisputedly new agreement dated 24-9-1993 deals with the same subject-matter as the original contract and terms and conditions of new agreement are not interconnected with the earlier as in case of non-fulfilment of terms and conditions by Acharya Arundev and Company, the

members of AOP can file a suit for recovery of the amount of Rs. 11.50 crores alongwith interest without help of earlier agreement as clause of payment of earlier agreement stands incorporated in the new agreement. So new agreement is complete contract among the parties and it can easily be inferred that original contract dated 22-8-1989 stands rescinded and once that agreement is no more alive, assessee cannot be held to have earned any type of income out of the agreement dated 22-8-1989.

5.12 In alternative, if we proceed with the proposition that, for the sake of argument, the agreement dated 22-8-1989 is still existing and enforceable, the next question will be whether assessee earned any income, much less real income, which can be taxed under the Income-tax Act. The assessee was having a mere right to claim the amount of Rs. 11.25 crores and interest for the period of default. It has come on record and not controverted by the Department that assessee or other members of AOP have not been paid any amount by Acharya Arundev till the date of hearing because Acharya Arundev could not proceed with the development project transferred by AOP in lieu of the above referred to amount and he failed to get the possession over the land though eleven years have since passed.

5.13 So far as phrase "real income" is concerned, it has not been defined any where in the Act. Under Income-tax Act, income chargeable to tax is the income that is received or is deemed to be received in the previous year relevant to the year in which assessment is made or the income that accrues or arises or is deemed to accrue or arise in India. The concept of "real income theory" had been subject-matter of the scrutiny before different High Court as well as the Apex Court. The learned counsel had referred to the decision of the Hon'ble Supreme Court in the case of Godhra Electricity Co. Ltd. (supra). The facts of that case have been reproduced by us In the earlier part of the order and it will be noted that assessee company enhanced electricity charges for supply of electricity and motive power against which two representative suits were filed by consumers and trial court decreed the said suits. The High Court in turn decided the issue in favour of the assessee and Apex Court confirmed the view of the High Court making the assessee company entitled to receive the electricity charges at enhanced rate. But during the pendency of this litigation the assessee company was not able to realise the enhanced charges even though shown that amount in its account books. The Assessing Officer assessed the income on the basis of accrual and addition was deleted by the AAC and Tribunal also held in favour of assessee, but High Court reversed the view of the Tribunal on the ground that assessee company had a legal right to recover the consumption charges at enhanced rate from the consumers. The Hon'ble Supreme Court was called upon to decide the issue. Issue before the Hon'ble Supreme Court for consideration was as to whether assessee was liable to pay tax on the said alleged income on accrual basis or not.

5.14 Their Lordships took into consideration the view of Apex Court in the case of Soorji Vallabhdas & Co. (supra) in which the concept of "real income" was discussed for the first time and Their Lordships observed as under:

> "Income-tax is a levy of income. Though 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, yet 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 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 tg that effect might, in certain circumstances, have been made in the books of account."

5.15 Their Lordships also took into consideration the decision of Apex Court In the case of Poona Electric Supply Co. Ltd. (supra) in which it was held that Income-tax is a tax on the real income ie. the profit arrived at on commercial principle subject to the provisions of Income-tax Act.

5.16 Their Lordships also considered the view of Apex Court in the case of Morvi Industries Ltd. (supra) in which Their Lordships have taken into consideration about the concept of relinquishment of income earned on accrual basis but Their Lordships have also observed that real question for decision was whether the income had really accrued or not. This is not hypothetical accrual of income that has got to be taken into consideration but the real accrual of the income.

5.17 Their Lordships further considered the ratio of decision in the case of State Bank of Travancore (supra) and quoted with approval the observation of Hon'ble Chief Justice appearing at page 154. The observation relates to notion of real income. His Lordships has observed that when and how does an income accrue and what are the consequences that follow from accrual of income are well settled. The accrual must be real taking into account the actuality of the situation. Whether an accrual has taken place or not must, in appropriate cases, be judged on the principle of real income theory. After accrual, non-charging of tax on the same because of certain conduct based on the ipse dixit of a particular assessee cannot be accepted. In determining the question whether it is hypothetical income or whether real income has materialised or not, various factors will have to be taken into account.

5.18 On the basis of these discussions Their Lordships considered the factual position of Godhra Electricity Co. Ltd.'s case (supra) and concluded that no accrual of real income had taken place to the assessee on which income-tax can be levied. This ratio of Apex Court had been followed in the case of CIT v. Bakaro Steel Ltd [1999] 236 ITR 315.

5.19 The gist of the above decisions of Hon'ble Apex Court can be summarised that it is real income which is taxable and not any hypothetical or notional income. To arrive at this finding one has to look into the surrounding circumstances and if we apply those ratios to the factual positions of this case, the assessee and other members of AOP had not received any amount except Rs. 25 lakhs at the time of agreement dated 22-8-1989 though eleven years have since passed. The reason is obvious as averred by Acharya Arundev in his affidavit filed before Assessing Officer and admitted in his deposition before the Assessing Officer to the effect that there had been dispute in relation to the possession over the land as different villagers are in physical possession over portion of the land. Further, there are various sanctions awaiting clearance and he had not been able to take possession over the land nor development project for which AOP came into existence as early as on 2-5-1987

had proceeded an inch inspite of more than ten years. This fact goes to show that Acharya Arundev or his Associate M/s Groth Techno Projects Ltd. was not in a position to take the possession over the property and to proceed with the project, Further on account of this they were not in a position to fulfil the terms and conditions of the agreement and in such circumstances, which had not been rebutted by the Department, it cannot be said that any income, much less real income, accrued to any of the members of the AOP. As per our conclusion, agreement dated 22-8-1989 was no more alive and even if it was in existence, no real income accrued and further new agreement is in existence and the Department is expected to watch the execution of this agreement so far as members of AOP and Acharya Arundev as well as Company is concerned about their respective obligations and rights. The assessee will be getting a right to claim the amount if Acharya Arundev and Company do not fulfil their part of contract in handing over 3 (three) lakh sq. ft. area in housing project, Karkarduma, Shahadra and 50,000 sq. ft. area in housing project Bandra, Worli, Bombay in reasonable time, as no time limit is admittedly given in the new agreement. The Department may proceed with the members of the AOP as and when any part of agreement is fulfilled or in case of non-fulfilment still Department will be examining the circumstances of giving rise to the accrual of real income or not. But in view of the facts discussed above, no income accrued to the assessee in the assessment years under consideration on the basis of earlier agreement or new agreement.

5.20 The other alternative argument of the learned counsel for the assessee was that assessee was showing interest income on cash basis and not on accrual basis and instance of M/s Devidayal Tulsi Ram was referred to in which it was alleged that income was shown on receipt basis. This plea of the assessee had rightly been rejected by the learned CIT(A) as income shown by the assessee from this firm was on accrual basis and this plea is not going to help the assessee.

5.21 It was also agitated that there were 14 members of AOP but it was only assessee who had been picked up by the Department. No doubt it is the discretion of the Department to examine the case of any assessee but fact remains that identical facts are involved in cases of 14 members of AOP then it cannot be appreciated in any manner that Department will be examining the case of one and leaving 13 persons, having identical case. However, it is up to the Department to decide in which case they have to proceed and the Tribunal is supposed to decide the controversy which is before it. The cumulative result of the above discussion is that the ground which is common to all the appeals of the assessee stands decided in favour of assessee as there was no real income earned by the assessee which can be subject to levy of tax.

6. In ITA No. 1930/Delhi/98 ground Nos. 1 to 3 were not pressed by the learned counsel and the same stand rejected as such. Ground Nos. 4 to 9 stand disposed of vide paras 2 to 5.20 above. Ground Nos. 10 to 15 raised in ITA No. 1930/Delhi/98 relate to levy of interest under sections 234A and 234B of Income-tax Act, 1961. The learned counsel submitted that while completing the assessment the Assessing Officer did not pass any specific order for levy of interest. He simply mentioned "Assessed". Interest under sections 234A, 234B and 234C charged. According to learned counsel the issue is squarely covered in favour of asscssee by the ratio of decision of the Hon'ble Patna High Court in the case of Uday Mistanna Bhandar & Complex v. CIT[1996] 222 ITR 44. We have heard learned representatives of the parties on the issue in question. We find that in the case of Uday Mistanna Bhandar & Complex (supra) the matter was referred to the larger Bench. In any case

charging of interest under the aforesaid sections is consequential. The learned Assessing Officer shall quantify the charging of interest, if any, while giving effect to the appellate order.

6.1 Rest grounds raised in ITA No. 1930/Delhi/98 are general in nature and require no comments. In the result appeal is partly allowed.

7. In ITA No. 1931/Delhi/90 ground Nos. 1 to 9 stand decided in favour of the assessee in view of our findings given in paras 2 to 15.20 above. Ground Nos. 7 to 12 relate to charging of interest under sections 234B and 234C of the Act. Identical issue has been decided by us in ITA No. 1930/ Delhi/98 vide para 6 above. The Assessing Officer is direct to quantify the charging of interest if any while giving effect to the appellate order. Rest of the grounds raised have not been pressed and the same stand rejected accordingly. In view of above, ITA No. 1931/Delhi/98 is partly allowed.

8. In ITA No. 5906/Delhi/98 ground Nos. 1 to 7 stand decided in favour of assessee in view of our findings recorded in paras 2 to 5.20 above.

8.1 Next ground raised in this appeal relates to addition on account of low withdrawals at Rs. 42,500. While completing the assessment the Assessing Officer noted that withdrawals for household expenses at Rs. 17,500 were not sufficient. Rejecting the explanation furnished by the assessee the Assessing Officer made an addition of Rs. 42,500 on account of low withdrawal for household expenses for the assessment year under consideration. In appeal the CIT(A) confirmed the action of the Assessing Officer. Aggrieved, the assessee is in second appeal for the year under consideration. We have heard the submissions of the parties. Considering the social status of the assessee who belongs to an industrial group we do not find any basis for interference in the orders of the authorities below on the issue in question. Ground fails.

8.2 Next ground raised in this appeal relate to charging of interest under sections 234B and 234. We direct the Assessing Officer to quantify the charging of interest, if any, under the aforesaid sections while giving effect to the appellate order.

8.3 Rest of the grounds raised are general in nature and require no comments.

8.4 In the result appeal is partly allowed.

9. In ITA No. 5907/Delhi/98 ground Nos. 1 to 8 stand decided in favour of assessee in view of our findings given in paras 2 to 5.20 above.

9.1 Next ground raised in this appeal relates to addition on account of low withdrawals at Rs. 48,500. In view of our finding given in para 8.1 above, the ground stands rejected.

9.2 Next ground raised in this appeal relates to charging of interest under section 234B. The charging of interest being consequential, the Assessing Officer is directed to quantify the interest, if any, while giving effect to appellate order.

9.3 Rest grounds raised in this appeal are general in nature and require no comments.

10. In the result, all the four appeals stand partly allowed.