IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "D", MUMBAI

BEFORE SHRI B.R.BASKARAN (AM) AND SHRI RAM LAL NEGI (JM)

ITA No 4156/MUM/2013
Assessment Year: 2008-09

M/s. Deccan Enterprises, Flat No. 1A, Hill Top Society, Pali Hill Road, Bandra(West), Mumbai- 400 050. PAN:- AAAFD2751M	**Vs.**	The ITO 19(3)(1), Piramal Chambers, Lalbaug, Mumbai- 400 012.
(Appellant)		**(Respondent)**

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ITA No 4748/MUM/2013
Assessment Year: 2008-09

The ITO 19(3)(1), Room No. 307, 3rd Floor, Piramal Chambers, Lalbaug, Mumbai- 400 012.	**Vs.**	M/s. Deccan Enterprises, Flat No. 1A, Hill Top Society, Pali Hill Road, Bandra(West), Mumbai- 400 050. PAN:- AAAFD2751M
(Appellant)		**(Respondent)**

Appellant by : Shri. K.Gopal.
Respondent by : Shri. Nitin Waghmode.

Date of Hearing: 21/07/2016
Date of Pronouncement: 27/07/2016

O R D E R

PER RAM LAL NEGI, JM

These cross appeals have been preferred by the assessee and the revenue against order dated 17/04/2013 passed by the Ld. CIT(Appeals)-30 Mumbai for the Asst. Year 2008-09.

2. The assessee has challenged the impugned order on the following effective grounds:-

> *1) On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in upholding the assessment order passed u/s 143 of the I.T. Act, which is invalid and bad in law.*
>
> *2) On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the addition of an amount of Rs. 15,00,000/- as 'Receipt from Mrs. Bharti Gandhi/Doshi treated as unexplained cash credit u/s. 68'.*

3. Brief facts of the case are that the assessee filed its return of income for the Asst. year 2008-09 on 29.7.2008 declaring the total income as Nil. Since a survey action u/s 133A of the Income Tax Act, 1961 (in short 'the Act') had been conducted on 12/09/2007, the AO sought explanation of assessee during the assessment proceedings regarding payment of Rs. 15,00,000/- made to Bharti Gandhi/Doshi and after hearing the plea of the assessee the A.O *inter-alia* made an addition of Rs. 15,00,000/- as unexplained cash credit u/s 68 of the Act to the income of the assessee. The assessment order was challenged by the assessee before the first appellate authority. The said appellate authority confirmed the addition though not under section 68 of the Act. Against the said order the assessee is in appeal before the Tribunal.

4. The Ld. Counsel for the assessee submitted before us that the Ld. CIT(A) has wrongly upheld the assessment order passed u/s 143(3) of the Act as the same has not been passed on the basis of evidence on record and in accordance with law. As regards the second ground The Ld. Counsel contended before us that the transaction found in the document related to the partner of the assessee and not to the assessee. It was further submitted that amount was repayment of loan taken by the partner of the assessee in his individual capacity as is clear from reply to question No 7 put to the assessee by AO

during the assessment proceeding. Moreover, the transaction pertains to the assessment year 2007-08 whereas the assessment year under consideration is 2008-09. Hence, the addition of Rs. 15,00,000/- to the income of the assessee is not justified. On the other hand the Ld. Departmental representative (DR) relying on the concurrent findings of authorities below submitted that there is no scope to interfere with the order passed by the Ld. CIT(A).

5. We have heard the rival submissions and also examined the documents placed on record. The only grievance of the assessee is that the Ld. CIT(A) has wrongly upheld the addition in question made by the AO. The Ld. CIT(A) has upheld the findings of the AO holding as under:-

> *"According to AO, as observed in para 6.1 of the order of assessment, no documentary evidence has been filed to explain the entry. In the appellate proceedings it is contended that the amount under consideration is actually payment by the assessee and not receipt as understood by the AO. The contention of the Ld. counsel that the AO has not understood nature of the transaction is not correct. Perusal of the reproduction of question no. 38 of the statement recorded in the course of survey as contained in page no. 10 of order of assessment reveals that the question is very specific and the response categorically confirms that the amount under consideration is payment by the assessee. The Ld. was counsel questioned in the appellate proceedings about the source of this payment. The counsel has not been able to give any specific source of the payment under consideration. Even in the assessment proceedings, no documentary evidence has been given about the source of payment of the amount under consideration. At the appellate stage also, the counsel has declined to offer any source of payment of this amount. In such a situation, the addition of Rs. 15 lakhs to income of the assessee is justified and is upheld it is a different matter that AO has invoked section 68 of the act in the order of assessment, which is not correct in the facts of the case. To this extent, the order stands modified. However, the addition is confirmed."*

6. In the opinion of the Ld. CIT(A), the assessee has failed to explain the source of amount in question paid to the party concerned to the satisfaction of the AO. Even the assessee has failed to discharge its burden during the appellate proceedings. However, we notice that as per the copy of receipt at page 12 of the paper book, the payment in question was made by the assessee on 17 May, 2006, the assessment year of which was 2007-08. However, the AO has taken the same in the assessment year under consideration i.e., 2008-09. As per the provisions of the Income Tax Act, all transactions of previous year are taken into consideration while assessing income of an assessee for any assessment year. In the present case the AO has taken into consideration the transaction pertaining to financial year 2006-07 while assessing the income of the assessee for the assessment year 2008-09. Therefore, the impugned order is erroneous and bad in law. We accordingly, set aside the impugned order and direct the AO to delete the questioned addition.

ITA No. 4748/Mum/2013 A.Y. 2008-09

The revenue has challenged the impugned order on following effective grounds of appeal:-

"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 22,50,000/- on account of sale of property and confirmed the addition of Rs. 2,50,000/- as 10% of profit, despite the fact that the assessee has failed to furnish details of expenses to work out the profit and without there being a finding that any expenditure over and above that already deducted in accounts had been incurred.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing to apply profit rate of 15% on sale of car parking despite the fact that the assessee had agreed to offer the same during the course of survey, but he failed to do so and without

there being a finding that any expenditure over and above that already deducted in accounts had been incurred.

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 2 Lakhs u/s 68 of the I T Act despite the fact during the survey proceedings the assessee was confronted with the issue of source of cash amounting to Rs. 2 Lakhs however assessee has not filed any supporting documentary evidences either during the course of survey nor during the assessment proceedings.

4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 2,57,833/- on account of interest payment and directing to reduced WIP by Rs. 2,57,833/- despite the fact that the assessee has not shown any work in progress in the original return filed and had not filed any revised return of income.

5. The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the A.O be restored."

2. At the outset, the Ld. Counsel for the assessee submitted that the tax effect in this case is below Rs.10,00,000/-,therefore, as per the CBDT Circular No. 21 of 2015, dated 10/12/2015, the present appeal is not maintainable.

3. The Ld. DR fairly admitted that the tax effect in department's appeal is below Rs.10 Lakhs, We find that the issue raised in appeal does not fall under any of the exceptions specified in para 8 of the Circular. Since, it has been specifically clarified in the Circular aforesaid that the instruction will apply retrospectively to all the pending appeals; the present appeal filed by the revenue is not maintainable. We, therefore, dismiss the same *in limine*.

In the result, the appeal filed by the assessee is allowed and the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 27th July, 2016

Sd/-	Sd/-
(B.R.BASKARAN)	(RAM LAL NEGI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 27/07/2016

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**

Pramila