

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, डी, मुंबई ।

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

**श्री शैलेंद्र कुमार यादव, न्यायिक सदस्य एवं
श्री अश्वनी तनेजा, लेखा सदस्य, के समक्ष**

**Before Shri Shailendra Kumar Yadav, Judicial Member,
and
Shri Ashwani Taneja, Accountant Member**

**ITA NO.7326/Mum/2013
Assessment Year: 2010-11**

Reliance Prolific Traders P. Ltd., 3 rd Floor, Court House, Lokmanya Tilak Marg, Dhobi TalaO, Mumbai -400002	बनाम/ Vs.	ITO WD 5(3)(2) Aayakar Bhavan, M.K. Rd. Mumbai- 20
(Assessee)		(Revenue)
P.A. No.AABCH6106L		

निर्धारिती की ओर से / Assessee by	Shri Arvind Sonde & Ms. Ritika Joshi (AR)
राजस्व की ओर से / Revenue by	Shri Jeetendra Kumar (DR)
सुनवाई की तारीख/Date Hearing :	23/09/2015
आदेश की तारीख /Date of Order:	28/10/2015

आदेश / O R D E R

Per Ashwani Taneja (Accountant Member):

The present appeal has been filed by the Assessee against the orders of Ld. Commissioner of Income Tax (Appeals) -9,

Mumbai {In short, 'CIT(A)'}, for the assessment year 2010-11 dated 18.10.2013, decided against the assessment order passed by the Assessing Officer (in short 'AO') u/s 143(3) of the Act. The grounds raised by the Assessee are reproduced below:

- "1. Ground No.1: Loss on land purchase deal termination:*
- (i) The learned Commissioner of Income tax (Appeals) [hereinafter referred to as CIT(A)] erred in disallowing loss of Rs. 1,10,00,000/- incurred due to termination of land deal undertaken by the appellant as business loss and treating the same as capital loss.*
 - (ii) He failed to appreciate that the type of business in which the appellant was engaged, such loss is normal business loss and should have been allowed as such.*
 - (iii) The appellant prays that the loss as incurred by it be allowed as business loss.*
- 2. Ground No.2: Disallowance of Operating and Other Expenses:*
- (i) The learned CIT(A) erred in confirming the disallowance of a sum of Rs.69,49,764/- out of normal operating expenses by treating the same as capital expenditure. .*
 - (ii) He failed to appreciate that such expenditure was incurred in relation to existing fixed assets of the appellant and therefore was revenue expenditure and should have been allowed as such.*
 - (iii) The appellant prays that the CIT(A)'s action of confirming the A.O.'s treatment of current revenue expenditure as capital expenditure is totally unjustified and disallowance made on this ground be deleted.*
- 2. The appellant craves leave to add, to amend, vary or alter including by substitution any of the grounds of appeal as they or their representatives may think fit."*

2. This appeal has been argued before us by Shri Arvind Sonde & Ms. Ritika Joshi learned counsel of the assessee and Shri Jeetendra Kumar Departmental Representative (DR).

3. Ground No. 3: In this Ground, the assessee has challenged the action of Ld. CIT(A) in disallowing loss of Rs.1,10,00,000/- incurred due to termination of land deal undertaken by the assessee company as business loss, by treating the same as capital loss.

3.1. The brief facts, as culled out from orders of lower authorities, are that the assessee company having income from development of commercial properties etc. It furnished return of income for Assessment year 2010-11 on 04.10.2010 disclosing total income of Rs. Nil, and claimed current year loss of Rs.63,33,912/. In the assessment proceedings, the AO asked the assessee why the loss claimed on land deal termination amounting to Rs. 1,38,57,823/- should not be disallowed being capital loss to the company. The assessee submitted that the details of loss on land purchase deal consists of two parts i.e. the loss on Karnataka State Financial Corporation (KSFC) Rs.28,57,823/- and the loss on Hyderabad property Rs.1,10,00,000/-. In the case of first land deal i.e. KSFC, the assessee had paid the full amount and had obtained lease deed in their favour. But subsequently, the original owner of the land succeeded in getting the land deal cancelled and accordingly the deal was cancelled and the assessee suffered loss of Rs.28,57,823/-. The AO accepted the same as the said expenditure was incurred to get the deposit amount refunded along with interest, therefore the claim of the appellant company was allowed on this account. However, the A.O. did not allow the other claim that the builders cum

developer of Hyderabad property also incurred expenditure of Rs. 1,10,00,000/- on applying for and getting various clearances required for business purpose. The AO disallowed the loss of Rs. 1,10,00,000/- incurred on termination of land deal by the assessee on the ground that the said loss was on account of capital asset, which cannot be allowed as revenue expenditure.

3.2. Being aggrieved the assessee carried the matter in appeal before the Ld. CIT(A) and filed detailed written submissions. Relevant portion of the submission is reproduced hereunder for the sake of ready reference:

"Ground No.1: Loss on land purchase deal termination:

2. The appellant company was incorporated on 20.07.2005. One of the main objects of the company as mentioned in the Object clause of the Memorandum of Association of the company [relevant extract enclosed in Annexure 1J on its incorporation are as follows:

2. To build, construct, acquire, erect, install, own, purchase, hire, sell, exchange, operate, maintain, develop, promote, manage, repair, administer, provide communication infrastructure facilities for the purpose of business of the Company.

We would like to submit that primary business of the appellant consists of acquisition and development of commercial properties. The appellant had acquired various land parcels for the purpose of its business, the details of which were given during the assessment proceeding. We enclose herewith the list of properties on the balance sheet of the company as on 31.03.2009 and 31.03.2010 in Annexure 2.

During the year, the assessee incurred "Loss on Deal Termination" of Rs 1,38,57,823/- in the ordinary course of carrying on business and being, a business loss which is revenue in nature, was debited to Profit and Loss account.

The details of loss on Deal termination are enclosed herewith in Annexure 3.

A. Loss on Karnataka State Financial Corporation (KSFC)	28,57,823
B. Loss on Hyderabad property	1,10,00,000
Total loss	1,38,57,823

The loss has been incurred on 2 land deals which were either partially completed or were under negotiation. In the case of first land deal i.e. KSFC, we had paid the full amount and had obtained lease deed in our favour. But subsequently, the original owner of the land succeeded in getting the land deal cancelled and accordingly the deal was cancelled and we suffered loss of Rs 28,57,823.

In the second deal of Hyderabad, the facts are as follows;
 (i) The appellant company, Reliance Prolific, Traders Pvt. Ltd. had entered into agreement dt. 26.11.2007 under registration no. 591/07 dt. 06.12.2007 for purchase of a piece of land admeasuring 1.5 acres in Hyderabad from Tapadia Developers/Kasani Hotels & Resorts for a total consideration of Rs. 81,77,13,600/-. Pursuant to the aforesaid agreement, the purchaser paid part payment of Rs. 23,75,10,000/- to the builder/developer on 26.11.2007. The builders/developer of Hyderabad property also incurred expenditure of Rs. 1,10,00,000/- on applying for and getting various clearances required for business purpose. On reconsideration of the purchase proposal, it was realized that the Hyderabad location which was selected earlier did not suit the business requirements and rather than incurring further expenditure, it was considered prudent to cancel the deal and recall back the deposit of Rs.23,75,10,000/- paid to the vendor.

Accordingly on 29.08.2009, a cancellation deed was entered and it was decided that the Vendor namely Tapadia Developers 1 Kasani Hotels & Resorts shall refund the deposit of Rs. 23,75,10,000/- paid by the purchaser after deducting expenditure of Rs. 1,10,00,000/- incurred by the vendor on applying for and getting various clearances required for business purpose. Copy of the cancellation deed is being provided in Annexure 4.

(vi) As a part of cancellation deed the actual expenditure incurred by the vendor had to be reimbursed. It is these expenses of Rs. 1,10,00,000/- which has resulted into loss on deal termination. The Assessing Officer (hereinafter referred as AO; has disallowed the aforesaid loss by making various observations in the Assessment Order.

We would like to submit that this "Loss on Deal Termination" has been incurred in the ordinary course of carrying on business and is a business loss which is revenue in nature because the properties are purchased and sold to earn revenue and the activity has a direct nexus with generating revenue and earning profit. Accordingly, such loss which has been incurred in the ordinary course of carrying on business is a business loss and is allowable as such.

In the land deal of KSFC, the Assessing officer has loss of Rs 28,57,823/-, being loss incurred in the ordinary course of business.

In the second deal of Hyderabad, we had paid part consideration, but subsequent realization that the deal was not suitable for business purposes, the land purchase agreement was cancelled and the expenditure incurred by the vendor of the land had to be reimbursed to them, which resulted in loss on such deal cancellation. We would further like to point out that the main object of the company on its incorporation was to carry on the business of purchasing of commercial properties and developing them for business purposes as duly reflected in the main objects of the company sighted earlier.

On perusal of the list of properties in the balance sheet of the company it will clearly indicate that the company is holding number of properties as on 01.04.2009 the total value of which amounts to Rs.908.06/- crores. The company had started the procedure of acquisition of venous properties as early as March 2006. The nature and volume of acquisition clearly indicate that such acquisition is for business purposes, though (for technical reasons), such properties might have been reflected under the head 'Fixed Assets' in the balance sheet. Considering the volume of transaction entered and the nature of business as reflected in companies' accounts and directors report,

all transactions relating to purchase of land are part of business transactions and any loss or gain arising from such transaction is business loss and gain. We draw your attention to decision of Delhi High Court in the case of CIT vs New Delhi Hotels Ltd. (345 IR 0001) in which on an appeal being filed by the assessee, the High Court had allowed the loss incurred on account of advances given for purchase of properties which subsequently had to be written off due to the fact that property was not handed over to the assessee.

The appellant wants to refer to the decision of the Delhi High Court in the case of CIT v. Dhoomketu Builders and Developers Pvt. Ltd [ITA 52812012 & 529/2012]. The relevant extract is as follows:

In the aforesaid decision of Delhi High Court, the High Court has referred to the decision of the ITAT and has confirmed that on the basis of facts of the case, in the case of real estate developers, as soon as the first action of depositing the earnest money for the purchase of land is undertaken and corresponding loan is obtained for the purpose of payment of such earnest money, the business would be regarded as having been set up and accordingly, the interest receipt on refund of earnest money and the interest payment on the loan taken for payment of such earnest money both constitute business income and accordingly, the net loss being the difference of interest received and interest paid is a business loss and should be assessed as such.

In our case, the fact that we have been purchasing parcels of land and building for the purpose of business is not denied as can be seen from the list of properties as per our balance sheet as on 31.03.2009 and 31.03.2010 and which has been given as per separate annexure. Also, we are already holding large number of properties and in respect of 2 property deals, the loss of Rs. 1,38,57,823/- worked out as follows has been incurred:

<i>A. Loss on Karnataka State Financial Corporation</i>	<i>28,57,823</i>
<i>B. Loss on Hyderabad property</i>	<i>1,10,00,000</i>
<i>Total loss</i>	<i>1,38,57,823</i>

Since in respect of loss of (A) the appellant had received interest income of Rs. 1,41,56,951/-, the AO. has allowed the loss of Rs. 28,57,823/-. However, in respect of loss on cancellation of deal of 2nd property (B), the A O. has taken a different view and has declined to allow such loss of Rs. 1,10,00,000/-.

Regarding the A O. 's remarks for not allowing the aforesaid loss on the ground that this is a capital loss, we would like to submit that one of the main objects of the company on its incorporation is:

2. To build, construct, acquire, erect, install, own, purchase, hire, sell, exchange, operate, maintain, develop, promote, manage, repair, administer, provide communication infrastructure facilities for the purpose of business of the Company.

Moreover, as we have already mentioned above that the appellant had acquired various land parcels for the purpose of its business (details enclosed). In respect of one particular land deal, the appellant was forced to cancel the deal due to its un viability and accordingly incurred a loss of Rs. 1,10,00,000/- being the expenditure incurred by the vendor of the land during the period when the land deal was being negotiated. Such loss was appropriately debited under the head "Loss on Deal Termination" in the Profit & Loss Account. We have also offered interest income arising out of the cancellation of land deal transaction of KSFC as income of the current year and we had not paid any interest on the funds borrowed for paying deposit for the aforesaid both the properties.

Both the streams of interest income and loss on deal termination form part of the same set of transactions and we have not claimed any interest expenditure against such interest income.

A perusal of the aforesaid facts indicates that in one case the deal had been cancelled by the seller (KSFC) and in the second case to avoid further losses to the business it was a prudent decision taken by the appellant to cancel the deal and avoid further losses. The decision of the assessee is in the line of business of real estate and it is quite clear that that the assessee purchased the properties in ordinary course of its regular business activity. The object clause of the Memorandum of Association of the

company (copy enclosed) also mentions the major activities the company deals in and is relevant in this regard. We submit that the object clause, other transactions of purchase and sale of properties and the history of business transactions of the assessee clearly indicates that loss of Rs. 1,10,00,000/- is business loss and should be allowed as such.

In view of this, we request you to consider the aforesaid submissions and allow the loss of Rs. 1,10,00,000/-.

3.3. The submissions of the assessee were considered in detail by Ld. CIT(A) but these were not accepted and the disallowance made by the AO was confirmed. It was held by the Ld. CIT(A) that it is an undisputed fact that the loss on termination of land deal of Rs.1.10 crores pertains to the capital asset of the assessee i.e. the land, and also that the assessee has shown the land as a fixed asset in its balance sheet. Otherwise also, neither the land in question is stock in trade in the hands of the assessee, nor is it, the business of the assessee to purchase and sale land. Under these circumstances, Ld CIT(A) agreed with the finding of the A.O that the loss of Rs.1.10 crore in the land deal of the assessee company was a loss in connection with a capital asset, therefore, the same was not allowable as revenue expenditure in the hands of the assessee company.

3.4 Being aggrieved the assessee filed an appeal before the Tribunal.

3.5 During the course of hearing before us, Ld. Counsel has submitted that lower authorities have erred in treating the

loss of Rs.1.10 crores as capital loss. It has been submitted that nature of business of the assessee has been mentioned at page 4 of the order of Ld. CIT(A), as part of written submissions of the assessee, and reproduced by Ld CIT(A). Ld. Counsel also took us through various pages of the paper book consisting of agreements of Hyderabad property dated 26.11.2007 and copy of conciliation deed with vendors. Our attention has also been drawn on the details of various pieces of land purchased by the assessee time to time. It has been argued that the assessee has been regularly and frequently purchasing pieces of land time to time. Our attention was further drawn on the assessment order passed by Ld. AO wherein loss of Rs. 28.57 lakhs claimed by the assessee in the return of income due to cancellation of an agreement in the similar circumstances, has been treated as business loss by the AO. It was thus argued that since this loss has been incurred during the course of business, therefore, it should be allowed as business loss. It was lastly argued that no such disallowance has been made by the AO so far, in any preceding year.

3.6. On the other hand, Ld. DR has supported the orders of lower authorities. It was submitted that impugned amount of loss is capital loss. The action of lower authorities in treating the same as capital loss is correct as per law and facts of this case. Our attention has been drawn by the Ld. DR on the balance sheet of the assessee company, to show that the land purchased by the assessee has never been shown as part of

stock in trade, rather it has been shown as part of the fixed assets. In fact the assessee does not have any stock in trade, as would be evident from the perusal of the final accounts of the assessee company. It was further submitted that trading or dealing in land is not main object of the assessee company, it may be just one of the objects. The business of the assessee is not clear. It is certainly not dealing in land. It was further submitted that complete facts have not been properly narrated by the assessee before the AO and Ld. CIT(A). With regard to loss of Rs.28.57 lakhs, allowed by the AO, it was submitted by Ld. DR that AO has fairly allowed the expenses incurred by the assessee on other deal of a piece of land, which could not be fructified. The nature of impugned transaction is quite different from the nature of loss incurred with respect to the amount of Rs.28.57 lakhs. It was submitted that the assessee had wrongly claimed the impugned loss as business loss, it was apparently a capital loss, and therefore, lower authorities have rightly treated the same as such.

3.7 We have considered the submissions made by both the sides and factual matrix of this case as well as material placed before us for our consideration. We find that in this case facts have not been thrashed out properly. There are confusions and contradictory stands taken by both the sides i.e. AO and assessee. The assessee is claiming this loss as business loss on account of cancellation of deal of purchase of land. But the assessee has shown all the assets as part of fixed assets. No amount of land has ever been shown as part of stock in trade,

even till date. In fact, as per annual accounts of the assessee company, it does not have any stock in trade. The assessee has claimed that assessee is in the business of sale and purchase of land. But we are not able to accept or reject this contention of the assessee, since from the perusal of the profit and loss account of the impugned year or any other year, we could not find any receipts arising to the assessee on account of sale or purchase of land. We were shown the details of purchase of land done by the assessee in this year as well as in past years, running into huge number. But we were not able to grasp the purpose of purchasing these lands. It was submitted that main object of the assessee company is to deal in the immovable properties. This contention of the assessee has been objected to by the Ld. DR, on the ground that the correct facts have been brought on record by the AO in the assessment order at page 6, wherein it was observed that main object of the assessee company was to carry on the trading business of various products. In the main objects, dealing in the immovable properties was not mentioned. It was further observed in the assessment order that the object quoted by the assessee company as main object before us, is actually just one of the ancillary object of the assessee company. It was thus, contended by the Ld. DR that dealing in immovable property is not main object of the assessee company. On the other hand, Ld. AO has also taken a contradictory stand in the order. He has allowed expenditure incurred aggregating to Rs.28.57 lakhs, which had led to a loss on termination of deal of sale of land. It is seen from the

computation of income done by the AO in the assessment order that income has been computed by him under the head income from business, wherein this amount of Rs.28.57 lakhs has been allowed as business loss, but the impugned amount of loss of Rs.1.10 crore has been disallowed.

3.8 Thus, there are contradictory stands, taken by both the sides and there is lack of clarity on the facts. In our considered opinion this issue needs to go back to the AO. The AO shall reexamine all the facts properly. The assessee shall place all requisite material on record. The AO shall thereafter, after giving the adequate opportunity of hearing, decide the nature of business of the assessee and accordingly thereafter he shall decide the nature of the transactions on which impugned loss of Rs.1.10 crores has been incurred. The assessee shall explain as to why the impugned loss can be claimed as revenue loss, even, without the land having been shown as part of stock-in-trade. The AO shall also take into consideration this crucial aspect that when loss of Rs.28.57 lakhs has been treated as business loss by the AO himself, then whether differential treatment can be given to the impugned loss of Rs.1.10 crores, if the nature of transaction and other connected facts are similar. We are sending this issue back to the file of the AO to clarify and thrash out all these issues. Therefore, ground no.1 is sent back to the file of the AO in terms of our directions contained above.

4. Ground No. 2: In this ground, the assessee has challenged the action of Ld. CIT(A) in confirming the disallowance of a

some of Rs. 69,49,764/- out of normal operating expenses by treating the same as capital expenditure.

4.1 The brief facts are that the AO disallowed aforesaid amount of expense on the ground that these related to purchases of free hold land and completion of various formalities of property purchases like registration, stamp duty and property/land taxes etc. The assessee contested the matter before the Ld. CIT(A) and submitted as under:

“As mentioned earlier the appellant is the holder of various land parcels. The revenue expenditure incurred during the year in respect of various assets has been debited to Profit & Loss Account. The details of such expenditure are provided to the AO during the course of assessment proceedings. However, the AO has treated a part of such revenue expenditure of Rs. 69,49,764/- as capital expenditure and has disallowed the same.

We enclose herewith a table indicating the total expenditure as debited in the P & L A/c and as allowed by the A. O. and also the expenditure which has been disallowed by the A. O. for the year ending on 31.03.2009 and 31.03.2010 in Annexure 5. The appellant submits that the fact that the business has been set up and commenced (Refer to the decision in the case of CIT v. Dhoomketu Builders and Developers Pvt. Ltd. - copy enclosed) and also the fact that the appellant itself wherever the expenditure related to any particular asset/land parcel had debited the same to that particular asset/land parcel and only had debited revenue expenditure not related to any specific asset to the P & L A/c, the action of the A. O. in selectively disallowing all property related expenses by treating the same as capital expenditure is unjustified and such disallowance ought to be deleted.”

4.2. During the course of hearing it was submitted by the Ld. Counsel that facts have not been properly appreciated by the lower authorities. The details were provided to the AO, thereafter no query was asked and inferences were drawn against the assessee. Attention was drawn on the relevant pages of the paper book containing details and breakup of the impugned expenses. It was requested that these expenses should be allowed as revenue expenses. On the other hand, Ld DR has argued that the assessee could not properly substantiate its claim that these expenses have been incurred for carrying out its business. It was submitted by him that these expenses were incurred either for acquiring the land during the year or for betterment of the land already acquired in earlier years, and in both situations impugned expenses would be capital expenses, and therefore, rightly treated as such by the lower authorities.

4.3 We have heard both the sides and gone through material placed before us. In our considered opinion the findings of the AO with respect to examination and determination of facts with respect to Ground no.1 above may have bearing on the adjudication of this ground as well. Further we find that the assessee omitted to give proper details and evidences to show with respect of each and every expenses that whether the expense has been incurred during the course of the business and whether these expenses have been incurred for acquiring the land during the year or for maintenance of the land/properties which were acquired in earlier years. If these

expenses have been incurred for the purpose of acquiring land during the year, these would certainly be not allowed as revenue expenditure. With these directions and also the directions as contained in ground no.1 above, we send this ground back to the file of the AO, wherein this issue shall be reexamined by the AO after giving adequate opportunity of hearing to the assessee.

5. In the result, the appeal of the Assessee is allowed for statistical purposes.

Order pronounced in the open court on 28th October, 2015.

Sd/-
(Shailendra Kumar Yadav)
न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(Ashwani Taneja)
लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 28/10/2015

Patel, P.S./नि.स.

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
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