

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
DELHI BENCH 'B' NEW DELHI**

**BEFORE : SHRI H.S. SIDHU, JUDICIAL MEMBER &  
SHRI L.P. SAHU, ACCOUNTANT MEMBER**

**ITA No. 4711/Del./2012  
Asstt. Year : 2009-10**

A.C.I.T., Circle 38(1),  
New Delhi.

vs.

D.K.G. Company,  
HS ó 38, Kailash Colony,  
New Delhi.  
[PAN : AACFD 7927K]  
(Respondent)

(Appellant)

Appellant by	:	Smt. Parwinder Kaur, Sr. DR
Respondent by	:	Shri R.S. Singhvi, C.A.
Date of hearing	:	11.09.2015
Date of pronouncement	:	30 .09.2015

**ORDER**

Per L.P. Sahu, Accountant Member:

The Revenue has filed the present appeal against the impugned order dated 21.06.2012 passed by learned CIT(A)-XXVIII, New Delhi for the assessment year 2009-10 on the following grounds :

*õ1. The Ld. CIT(A) grossly erred in deleting the addition of Rs.5.85 crores made by the AO by rejecting the contention of the AO that the undisputed forfeiture of the payment by a party related to the assessee was not genuine and at arms length.*

*2. The Ld. CIT(A) grossly erred in deleting the addition of Rs.1.25 crores on account of advances received by the assessee ignoring that the assessee was unable to discharge the onus placed upon it to establish the genuineness of the transactions on the facts and circumstances of the case.*

*3. The Ld. CIT(A) grossly erred in deleting the disallowance of Rs.20.47 lakhs on account of rent receivable from let out property ignoring the specific provisions of section 23(b) of IT Act which provide that annual value shall be deemed to be rent received or receivable by the owner from such let out property.*

*4. That the grounds of appeal are without prejudice to each other.”*

2. The facts relating to the issue in dispute are that the assessee filed its return of income declaring total income of Rs.65,14,514/- on 29.09.2009. The case of the assessee was selected for scrutiny through CASS. The Assessing Officer issued notice u/s. 143(2) of the IT Act, 1961 (hereinafter called the ~~Act~~) on 22.08.2010. A detailed questionnaire along with notice u/s. 142(1) was also issued on 06.07.2011. In compliance to the same, the AR of the assessee appeared and filed necessary details, information/documents etc. as required. The books of accounts were produced and examined on test check basis. The assessee is engaged in the business of Real Estate, i.e., purchasing of land and selling it after Development. During the F.Y. 2008-09, the assessee has shown Income under House Property and Income from Business & Profession. The assessee has debited profit and loss account by Rs.5.85 crores on account of property. During the assessment proceedings, the assessee was asked to produce justification regarding this expense. In response to the same, the assessee filed its reply, which the Assessing Officer has reproduced in the assessment order. The Assessing Officer further asked the assessee about the relation of assessee firm with D.D. Goel who forfeited the amount of Rs.5.85 crores. In response to the same, the assessee filed reply,

which the assessing Officer has also reproduced in the assessment order. After considering the reply filed by the assessee along with documentary evidence, the Assessing Officer, completed the assessment by giving findings on the issue in dispute at pages No. 9 to 12. As regards to the addition of Rs.5.85 crores and as regards to addition of Rs.1.25 crores on account of advance against future projects, the Assessing Officer had discussed in detail at page 12 to 14 and thirdly, as regards to the addition of Rs.20.47 lakhs, the Assessing Officer has disclosed the addition in para No. 6 page 14 & 15 and completed the assessment u/s. 143(3) of the Act on 31.12.2011. Aggrieved by the order dated 31.12.2011 passed by the Assessing Officer, the assessee filed appeal before the learned first appellate authority, who vide impugned order dated 21.06.2012 allowed the appeal filed by the assessee and deleted the additions in dispute. Now, the Revenue is aggrieved against the impugned order dated 21.06.2012 passed by the CIT(A) and has filed the present appeal on the grounds mentioned above.

3. The learned DR relied upon the order passed by the Assessing Officer. On the contrary, the learned counsel for the assessee relied upon the order passed by the learned First appellate Authority and the documentary evidences filed by him in the shape of paper book, in which he has filed various supporting documents.

4. We have heard both the parties and perused the record available with us along with orders passed by the Revenue Authorities as well as the documentary evidences filed by the assessee in the shape of paper book. We find that the learned first appellate authority has deleted the addition of Rs.5.85 crores made by the Assessing Officer. After going through the impugned order, we find that the learned first appellate authority has decided the issue involved in ground No. 1, at pages 25 to 38 of the impugned order. For the sake of convenience, the same is reproduced as under :

*“I have carefully considered the facts and circumstances of the case and submissions and details filed during the course of appeal proceedings. The only issue for consideration and adjudication IS genuineness of claim of loss on forfeiture of advance paid to Sh. D.D. Goel.*

*The Assessing Officer considered the disallowance of forfeiture of advance as a sham and collusive transaction between father and sons through instrument of partnership. As per various reasons narrated by the Assessing Officer and extracted above, the transaction between father and son was not based on business consideration and same was only to obtain benefit of loss so as to adversely affect the interest of revenue. It was further observed that the above said agreement was not registered and as such the bonafide of the agreement is itself in doubt. Further, as per the Assessing Officer, the assessee's is main area of activity was in Bangalore and project at Sonipat, Haryana was not practical or feasible and in fact assessee itself has never been serious and no approval was obtained for undertaking the said project. The Assessing officer also made reference to report of the inspector as per which the farmers have not confirmed authenticity of agreements with farmers, which are claimed to have been executed by the appellant.*

*The Assessing Officer made reference to decision of Supreme Court in the case of CIT Vs. Durga Prasad More 82 ITR 540 and in the case of MacDowell's and Co. 154 ITR 148.*

*The appellant has furnished detailed submission in respect of each and every issue raised by the Assessing Officer which is extracted above.*

*There is no dispute that there was development agreement between the appellant firm and Sh. D.D. Goel which was executed on 15/06/2006. In terms of the said agreement, the assessee firm made the payment to the extent of Rs. 5.85 crores as advance and acquired right to develop the land for their prospective project at Sonipat. The appellant claimed to have entered into various other agreements with farmers for purchase of land at Sonipat, the copies of which have already been placed on record.*

*It will be relevant to quote the development agreements entered into by the appellant with Sh. D.D. Goel and Sumit Goel (who is also a partner in the appellant firm).*

***Development Agreement with Sh. D.D Goel***

*"This agreement is made on this 15th day of June, 2006 by and between: -*

***Mr. D.D Goel*** *S/o Late Sh. B.P. Goel resident of N-6 Greater Kailash-I, New Delhi- 110048 (hereinafter called the First Party and also referred to as "Associate", which expression shall, unless it be repugnant to the subject or context thereof, include its assigns, legal representatives, successors and administrators etc.) of the First Part;*

***And***

*Mjs DKG Company having its registered office at HS-38 Kailash Colony, New Delhi-I I 0048, through its Partner Sh. Amit Goel (hereinafter called the Second Party and also referred to as "Developer" which expression shall, unless it be repugnant to the subject or context thereof, include its assigns, legal representatives, successors and administrators etc.) of the Second Part;"*

*As per clause 9 of the said agreement payment was to be made @ of Rs.60,00,000/- per acre to the Associate by the developer.*

*"9. That the developer will give a deposit of Rs.60,00,000/- (Rupees Sixty lakhs only) per acre to the Associate and further the sale proceeds will be shared between the developer and the associate in the ratio of 80:20. The whole of the booking/ sale amount will be collected through the developer and the proceeds will be distributed in the above ratio."*

*As per clause 15 of the said agreement in case developer defaults on any terms & conditions of this agreement, the 'Associate' shall have right to forfeit the deposit at his discretion.*

*"15. That the "Developer shall obtain necessary permission/license from the concerned authorities and start the development work with in 24 months from this agreement, incase developer defaults on any terms & conditions of this agreement, the 'Associate' shall have right to forfeit the deposit at his discretion. "*

***Development Agreement with Sh. Sumit Goel***

*"This agreement is made on this 17th day of April, 2006 by and between: - Mr. Sumit Goel S/o Sh. D.D. Goel resident of N-6 Greater Kailash-I, New Delhi-110048 (hereinafter called the First Party and also referred to as "Associate", which expression shall, unless it be repugnant to the subject or context thereof, include its assigns, legal representatives, successors and administrators etc.) of the First Part;*

***And***

*M/ s DKG Company having its registered office at HS-38 Kailash Colony, New Delhi-110048, through its Partner Sh. Amit Goel (hereinafter called the Second Party and also referred to as "Developer" which expression shall, unless it be repugnant to the subject or context thereof, include its assigns, legal representatives, successors and administrators etc.) of the Second Part;"*

*As per clause 9 of the said agreement payment was to be made @ of Rs. 60,00,000/- per acre to the Associate by the developer.*

*"9. That the developer will give a deposit of Rs.60,00,000/- (Rupees Sixty lakhs only) per acre to the Associate and further the sale proceeds will be shared between the developer and the associate in the ratio of 80:20. The whole of the booking/ sale amount will be collected through the developer and the proceeds will be distributed in the above ratio."*

*As per clause 15 of the said agreement incase developer defaults on any terms & conditions of this agreement, the 'Associate' shall have right to forfeit the deposit at his discretion.*

*"15. That the "Developer shall obtain necessary permission/license from the concerned authorities and start the development work with in 24 months from this agreement, incase developer defaults on any terms & conditions of this agreement, the 'Associate' shall have right to forfeit the deposit at his discretion. "*

*There is no dispute that the development agreement has been executed between related parties. However, whether the same is collusive or sham is to be considered in the light of the facts of the case and documents on record. There is no dispute that the partnership firm is engaged in the business of real estate and the appellant has executed various projects as part of its business activities and as such the business activities of the appellant firm are not in dispute.*

*It is also noted that Sh. D.D. Goel was owner of the land in Dist. Sonipat which was suitable for the purpose of development of residential colony in Sonipat. ) The said development agreement was executed in the Financial Year 2006-07 and forfeiture took place in the F.Y. 2008-09 relevant to assessment year 2009-10. There is no dispute that the said agreement is part of record and this fact is also corroborated from audited balance sheets, which have been called for and placed on record. It was further clarified that genuineness of the said agreement was examined during assessment year 2007-08 and there was no dispute or doubt in respect of said*

*agreement or fact of payment of advance and business intention of the parties. In fact, it is only during assessment year 2009-10, when the forfeiture took place, the Assessing Officer raised doubt about genuineness of the agreement because of claim of loss on account of forfeiture of the advance paid. It is not the case of the Assessing Officer that there was no forfeiture clause in the said agreement or that conditions of forfeiture were not applicable.*

*It will be worthwhile to quote the relevant portion of correspondence between) the appellant firm and Sh. D.D. Goel in respect of forfeiture.*

***Letter written by DKG Company to Sh. D.D Goel dated 24.06.2008***

*"In reference to your letter dated 12.06.2008, explaining your intention to forfeit the advance amount in terms of development agreement dated 15.06.2006. In this regard, we may invite your kind attention to our earlier letter wherein the company had explained its difficulties being faced from start of the project and make the balance payment as per the agreement. As you are aware due to certain conditions we have not been able to take up the project till date, we kindly request you to extend the period of two years by another two years. If our request for extension is not considered, as a special consideration we further request you to refund the advance so given to you hope to resolve the issue favorable."*

***Letter written by She D.D Goel to DKG Company dt. 04.12.2008***

*"Please note that as per the terms of the above mentioned agreement you were supposed to pay me a further a sum of RS.27075000 / - despite repeated reminders I have not received the balance amount. You have also not informed me about the progress of the project. I have to receive 20% of the sale proceeds also. Kindly note my money is blocked causing me heavy loss. As per clause 15 of said agreement since you have failed to fulfill your obligation, I hereby inform you that I have forfeited the advance amount of Rs.5.85 crores paid by you to me. Kindly be informed that from now onwards the development agreement stands cancelled and you will have no claim against me and I shall be at liberty to deal with my land in any manner I may so choose., you shall have no right of any sort on the said land."*

*The appellant from sought legal advice and the relevant portion of the same is as under: -*

***Legal advise dt 10.12.2008***

*"3. Keeping in view of the above facts, I would advise that filing a legal suit may not be fruitful as prima facie the matter appears to being favour of Mr. D.D. Goel*

*and it may not be advisable to waste good money for going in legal battle which may be long fought affair with little chances of success."*

*There is no dispute that both the parties were capable of executing the agreement and the fact of agreement was acted upon and also supported from record. The issue of genuineness is to be considered only in the year the said agreement was executed. The appellant has able to demonstrate that the said agreement was duly executed during F.Y. 2006-07 and genuineness of the said agreement was also supported from audited accounts.*

*If the said agreement was for the purpose of business interest of both the parties and acted upon and also corroborated from the record, the same cannot be considered as sham or collusive merely on the ground that the said agreement is between related parties and ultimately resulted in loss to the appellant.*

*The Assessing Officer has not disputed the contention of appellant that on the basis of involvement and hostile attitude of another big industrial house namely Jindal Group, which had also undertaken housing project in Sonipat for their political and business interest, the assessee was not in a position to compete with them or to acquire the land at arbitrary price and as a prudent businessman and on account of business and commercial consideration, there was no possibility of any further progress in the light of requirement of minimum holding of land to the extent of 100 acres. However, the assessee was able to recover the advances paid to farmers as it was in their own interest as they were offered higher price by Jindal Group. However, Sh. D.D. Goel was not in a position to enter into similar development agreement with Jindal Group as they wanted outright purchase of land and not to enter into any business development agreement with Sh. D.D. Goel and as such there was no such agreement between Sh. D.D. Goel and Jindal Group and as a consequence of which, Sh. D.D. Goel enforced the forfeiture clauses after detailed correspondence with the firm. In the circumstances, the assessee had no option but to accept the forfeiture of advance after taking necessary legal advice.*

*The objection of the Assessing Officer that agreement -was between related parties and as such same was sham or collusive could not be accepted as a general proposition under the provisions of the Income Tax Act. The firm and Sh. D.D. Goel, are independent assessee and capable of executing the said agreement on the basis of their respective business interest and once the legal rights of the parties to execute such agreement is not in dispute, no adverse inference could be drawn regarding consequences of such agreement.*

*The reference to decision of Supreme Court in the case of Durga Prasad More and McDowell & Co. are not relevant and on the contrary the presumption laid down in those judgments support the claim of the appellant.*

*The Hon'ble Supreme Court has observed that if there is a self serving statement or documents with intention to evade tax than authorities are entitled to examine the surrounding circumstances to find out the reality and recitals in those documents. The decision of Supreme Court in the case of McDowell & Co. is only in the context of colorable device in order to evade the tax liability by dubious methods. The decision of Supreme Court in the case of Durga Prasad More was in the context of diversion of income for tax advantage by using dubious documents. However, the Hon'ble Supreme Court in the case of Union of India Vs. Azadi Bachao Andolan 132 Taxman 373 has itself disapproved the decision of Supreme Court in the case of McDowell & Co. and reconfirmed the principle laid down in the case of CIT Vs. A Raman & Co. 67 ITR 11.*

*However, in my view, the agreement between Sh.D.D. Goel and appellant firm is a genuine document based on business interest of both the parties and the same cannot be considered as instrument for tax evasion or to hoodwink the interest of the revenue.*

*Further, whether the said agreement is genuine or not is to be considered at the time the said agreement was executed and not to question the same subsequently, merely on the ground that assessee has claimed some loss on the basis of said agreement .. There is no dispute that the said agreement was executed on 15/06/2006 and same was taken note of by the Assessing Officer during the course of assessment proceedings for assessment year 2007-08 and the agreement is also corroborated from audited accounts and as such it is too late in the day to consider the same agreement as sham or collusive. It may be appropriate to make reference to principles laid down by judicial authorities. Further, appellant has clarified each every issue raised by the Assessing Officer. In the light of facts of the case and submission of the appellant, I am of the view that agreement between the appellant firm and Sh. D.D. Goel is genuine, for the purpose of their business interest. The facts and terms of the agreement is also supported from audited accounts of preceding years which are part of record. If there was a case of forfeiture of advance on the basis of business and commercial consideration and after proper legal advice, the Assessing Officer has to consider and allow the said loss, if the same is otherwise permissible under the provisions of Income Tax Act, 1961. In this connection, it is appropriate to make reference to*

*latest decision of Delhi High Court in the case of **CIT Vs. Micromatic Machine Tools (p.) Ltd. 192 Taxman 161 (DELHI)***

*Section 37(1) of the Income-tax Act, 1961 - Business expenditure - Allowability of - Assessment year 1998-99 - Whether an obligation incurred, while entering into a commercial contract, has to be taken as a business expenditure within meaning of section 37(1) unless it is shown that contract itself was a sham document and was made with an ulterior motive - Held, yes - Whether for that purpose what is required to be established is a nexus between expenditure incurred and business purpose of assessee; it is not permissible for Assessing Officer to place himself in position of management of assessee and take it upon himself to decide how much would be a reasonable expenditure for a particular business purpose - Held, yes - The observation of the Assessing Officer that the agreement to sale is not registered. In fact, the Assessing Officer himself has observed that there is no illegality involved for the same being not registered and genuineness of the agreement is to be considered on facts and business consideration. The appellant has been able to demonstrate that this is a case of genuine and bonafide agreement based on business consideration and same being acted by the parties and the claim of loss being on the basis of said agreement, there is no case of disallowance of the same.*

*The observation of the Assessing Officer that assessee has never intended to start the project and only intention was to take benefit of loss on the ground that assessee has never applied or undertaken approval for the said project. The observations of the Assessing Officer are not based on proper appreciation of facts or legal requirements for such approval. As per notification and guidelines issued by **Financial Commissioner and Principle Secretary to Government of Haryana, Town and Country Planning Department Act**, there was a minimum requirement of land holding of 100 acres and as such the assessee was not in a position to obtain the requisite approval. In the light of facts clarified by the appellant and other adverse factors and in the absence of acquisition of 100 acres of land, there was no possibility for such approval. The observation of the Assessing Officer that assessee could have started the project with 14.72 acres of land is not correct and these observation are not in conformity with legal requirement and notification issued by **Financial Commissioner and Principle Secretary to Government Haryana, Town and Country Planning Department Act**.*

*The observation about tax implication in the case of Sh. D.D. Goel is of no relevance for this appeal, as Sh. D.D. Goel is an independent assessee and the matter has to be examined in the case of Sh. D.D. Goel. In any case, whether the forfeiture amount is to be considered as capital or revenue receipt in the case of*

*Sh. 0.0. Goel, same could have no bearing to the 'case of the appellant as the appellant being in the business of real estate and loss being incidental to business activities, same is to be considered as of revenue nature and permissible deduction under the law.*

*The observation of the Assessing Officer that the main areas of activity of the assessee being in or around Bangalore, the project at Sonipat was not possible and as such there was no business justification for the said project is uncalled for as the appellant being in the business of development of real estate, it was open to the assessee to undertake the project at any place as may be decided by the appellant and it is not for the Assessing Officer to decide as to how the business is to be carried on. The observation of the Delhi High Court in the case of Dalmia Cement Ltd. 254 ITR 377 is relevant and appropriate.*

*The observation of the Assessing Officer that there was no forfeiture clause in the case of other agreements with the farmers and as such various agreements were executed with different purposes and motivated by the claim of loss. I have considered the various agreements with the farmers and it is noted that in all such agreements, there was similar clause of forfeiture and as such the allegation of the Assessing Officer is not based on correct appreciation of facts. It may be mentioned that as per agreements with farmers placed in the paper of facts clarified by the appellant and other adverse factors and in the absence of acquisition of 100 acres of land, there was no possibility for such approval. The observation of the Assessing Officer that assessee could have started the project with 14.72 acres of land is not correct and these observation are not in conformity with legal requirement and notification issued by **Financial Commissioner and Principle Secretary to Government Haryana, Town and Country Planning Department Act.***

*The observation about tax implication in the case of Sh. D.D. Goel is of no relevance for this appeal, as Sh. D.D. Goel is an independent assessee and the matter has to be examined in the case of Sh. D.D. Goel. In any case, whether the forfeiture amount is to be considered as capital or revenue receipt in the case of Sh. D.D. Goel, same could have no bearing to the 'case of the appellant as the appellant being in the business of real estate and loss being incidental to business activities, same is to be considered as of revenue nature and permissible deduction under the law.*

*The observation of the Assessing Officer that the main areas of activity of the assessee being in or around Bangalore, the project at Sonipat was not possible and as such there was no business justification for the said project is uncalled for as the appellant being in the business of development of real estate, it was open to the assessee to undertake the project at any place as may be decided by the appellant*

*and it is not for the Assessing Officer to decide as to how the business is to be carried on. The observation of the Delhi High Court in the case of Dalmia Cement Ltd. 254 ITR 377 is relevant and appropriate.*

*The observation of the Assessing Officer that there was no forfeiture clause in the case of other agreements with the farmers and as such various agreements were executed with different purposes and motivated by the claim of loss. I have considered the various agreements with the farmers and it is noted that in all such agreements, there was similar clause of forfeiture and as such the allegation of the Assessing Officer is not based on correct appreciation of facts. It may be mentioned that as per agreements with farmers placed in the paper book page 101-115, there was specific clause about the forfeiture and as such all these agreements were on identical basis and for the purpose of execution of project at Sonipat. However, in the light of business interest, the issue of forfeiture with farmers was not enforced.*

*Regarding the allegation that the inspector of the department personally visited the Village at Haryana and reported that farmers were not aware of the project of the appellant and they also expressed their ignorance for any such project or , any sale of land for the said project. However, whether Assessing Officer provided the said report to the assessee or carried out further investigation is not born out from the assessment order.*

*Further, various agreements with the farmers were part of record and whether I, the report of the inspector is in the context of those agreements or report was of a general nature has never been brought out on record. It is for the Assessing Officer to verify whether these are forged documents and in the absence of any specific finding or investigation, general observation cannot adversely affect the claim of the appellant particularly when assessee was not confronted with the report of the inspector.*

*Regarding observation that in respect of similar agreement with Sh. Sumit Goel, partner of the firm, there was no forfeiture and as such the Assessing Officer doubted the business justification of forfeiture in the case of Sh. D.D. Goel. As per facts clarified, Sh. Sumit Goel is partner of the firm and as such there could be no forfeiture between firm and partners as partner is part of the firm and the firm is not an independent legal or juristic person. Even otherwise, if Sh. Sumit Goel has not forfeited the advance, same cannot have any adverse implication in the case of Sh. D.D. Goel, if the claim of forfeiture is in accordance with terms of agreement between the parties and based on legal rights of the party.*

*The various general observation about preponderance of probability and decisions of Supreme Court in the case of CIT Vs. Durga Prasad More & McDowell & Co., I have already dealt with the nature of the business activities and genuineness of the agreement in the context of principle laid down by the Supreme Court and as such these general observation have no adverse implication or affect the claim of the appellant, if otherwise permissible under the law.*

*In fact, the assessee has been able to establish that a genuine agreement was executed with Sh. O.O. Goel based on business interest of both the parties and same have been acted upon by the parties and corroborated from the record of the revenue from the preceding years, the said agreement cannot be considered as sham or collusive.*

*Regarding contention of the Assessing Officer that it is a case of Capital loss on the ground that it was related to a new project, there is no dispute that the assessee is engaged in the business of real estate and various projects undertaken are part of ongoing business and cannot be considered as a new and independent business activity.*

*In my view, the loss is incidental to business and same has to be allowed as revenue loss. The above said position. is also supported from various judicial authorities referred to hereunder:*

***Havells India Ltd. vs. ACIT 13 Taxmann.com 64 (Delhi)***

*Section 37(1) of the Income-tax Act, 1961 - Business expenditure - Allow ability of - Assessment year 2005-06 - Assessee-company was engaged in business of manufacture of electrical products - It had its head office at Delhi and manufacturing units at various places in India - It set up a new unit at Haridwar for purpose of manufacture of electric fans - During previous year, assessee incurred certain expenditure at its Haridwar unit and claimed deduction of same as revenue expenditure on ground that it had incurred said expenditure for purpose of expansion of its existing business activities - Lower authorities treated expenditure in question as capital expenditure and disallowed same - Whether since documents furnished by assessee clearly showed that there was complete interlacing and intermixing of funds of assessee in all its units, lower authorities were wrong in treating expenditure in question as capital expenditure - Held, yes.*

***CIT Vs. Ghanashyam Steel Work Ltd. 195 TAXMAN 180 (GUJ.)***

*Section 37(1), read with section 36(I)(iii), of the Income-tax Act, 1961 - Business expenditure - Allow ability of - Assessment years 1996-97 to 1998-99 - Assessee was engaged in business of manufacture of chemical processing equipment - During relevant assessment years, it had started construction of a new unit in a separate plot, adjacent to its existing unit - For this new unit, assessee borrowed funds and also collected funds through public issue of equity shares - It also*

*incurred certain expenses in relation to said unit which were capitalized in its books of account - However, while filing returns of income, said expenses were claimed as revenue expenditure - Assessing Officer rejected assessee's claim treating expenses in question as capital expenses - Both, Tribunal as well as Commissioner (Appeals), had recorded concurrent findings of fact that so called new unit was merely an expansion of existing business of assessee and was not setting up of a new business and, as such, expenses incurred in this regard were allowable as revenue expenses - Further, considering the fact that Assessing Officer had not considered claims of each of items of expenditure incurred by assessee from angle as to whether same were in nature of revenue or capital expenditure, matter had been restored to Assessing Officer to look into nature of expenses and to consider as to whether same were allowable under section 36(I)(iii) or section 37 - Whether, on facts, there was no infirmity in approach adopted by Commissioner (Appeals) and confirmed by Tribunal so as to warrant interference - Held, yes.*

***CIT Vs. Sakthi Sugars Ltd. 194 TAXMAN 91 (Mad.)***

*Section 37(1) of the Income-tax Act, 1961 - Business expenditure - Allow ability of - Assessment year 1992-93 - Assessee-company had three sugar manufacturing units - During relevant assessment year, it set up two new sugar factories and claimed deduction of expenses incurred by way of salary, wages, bonus, workmen's welfare expenses, manufacturing expenses, rent for office building, etc., for purpose of running of said two units - Whether since aforesaid expenses were incurred for purpose of manufacture of sugar in respective factories with a view to earn profit assessee was entitled to deduction of said expenses as revenue expenditure - Held, yes*

*In the light of above discussion and case laws relied upon by the appellant, I am of the view that the assessee has incurred a genuine loss of Rs. 5,85,00,000/-, which is incidental to business and same is permissible deduction under the law. Appeal is allowed on this ground.*

5. As regards to the second issue involved in ground No. 2 regarding deletion of addition of Rs.1.25 crores on account of advance received by the assessee, the learned first appellate authority has adjudicated this issue at page 38 to 42 of the impugned order. For the sake of convenience that is reproduced as under :

*“I have gone through the assessment order and written submissions of the appellant. The Assessing Officer made an addition of Rs.1,25,00,000/- as income from undisclosed sources in respect of advance received from various parties against future projects. The particulars of advances have been given in the assessment order and extracted hereunder :*

i).	<i>M/s. Aggarwal Sales Corporation</i>	<i>Rs.20,00,000/-</i>
ii)	<i>Ms. Payal Goel</i>	<i>Rs.30,00,000/-</i>
iii)	<i>M/s. Bindal Footwear Pvt. Ltd.</i>	<i>Rs.50,00,000/-</i>
iv)	<i>Sh. Mukesh Kumar</i>	<i>Rs.10,00,000/-</i>
v)	<i>M/s. Saraswati Trading Co.</i>	<i>Rs.15,00,000/-</i>

*The Assessing Officer analyzed the confirmation furnished by the Assessing Officer and addition was made on the ground that creditworthiness of these parties were not established. The appellant has made detailed submission in respect of the above said issue which is reproduced hereunder:*

*There is no dispute that payments from all the parties were received through account payee cheques and confirmation of these parties alongwith permanent account number were furnished. In fact, these are all trade advances in connection with business activities and these advances were received in connection with various ongoing and future projects of the appellant firm.*

*The particulars in respect of these parties were furnished during assessment proceedings and are extracted hereunder:*

**1. *Aggarwal Sales Corporation, Prop. Satish Kumar***

- i. Copy of account alongwith confirmation and PAN No.*
- ii. Copy of acknowledgement receipt in respect of income tax return for assessment Year 2008-09, 2009-10*
- iii. Copy of bank statement from which the fact of such advances is fully corroborated*

**2. *Bindal Footwear Pvt.Ltd.***

- i. Copy of account alongwith confirmation and PAN No.*
- ii. Copy of acknowledgement receipt in respect of income tax return for assessment Year 2008-09.*
- iii. Copy of bank statement from which the fact of such advances is fully corroborated*

**3. Mukesh Kumar**

- i. Copy of account alongwith confirmation and PAN No.
- ii. Copy of acknowledgement receipt in respect of income tax return for assessment Year 2008-09.

**4. Payal Goel**

- i. Copy of account alongwith confirmation and PAN No.
- ii. Copy of acknowledgement receipt in respect of income tax return for assessment Year 2009-10.
- iii. Copy of bank statement from which the fact of such advances is fully corroborated

**5. Saraswati Trading Co.**

- i. Copy of account alongwith confirmation and PAN No.
- ii. Copy of acknowledgement receipt in respect of income tax return for assessment Year 2008-09.
- iii. Copy of bank statement from which the fact of such advances is fully corroborated

*The Assessing Officer has examined the confirmation and bank statement and it was observed that source and genuineness of the transactions have not been properly explained and these advances represent income from undisclosed sources.*

*At the outset, it is submitted that the Assessing Officer has not disputed identity of the parties and genuineness of other supporting documents. Further, the Assessing Officer himself observed that- information has been passed on to the concerned Assessing officer for appropriate action in the case of concerned parties in the context of these advances.*

*Subsequently, these advances have been repaid through account payee cheques as there was no possibility of development of mutually acceptable projects.*

*Further, the Assessing Officer has not brought on record any evidence or material that these advances represent income from undisclosed sources and entire addition is without proper appreciation of facts and relevant legal principles.*

*It is submitted that appellant has placed on record full and complete details in respect of identity, genuineness and source and as such have fully discharged the onus in the context of provisions of sec. 68 .*

*In this connection, reliance is placed on following case laws:*

**1. Commissioner of Income Tax, Orissa Vs. Orissa Corporation Pvt.Ltd.  
Page 159, ITR 78**

*Held, that in this case the respondent had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assessee. Their index numbers were in the file of the Revenue. The revenue, apart from issuing notices under section 131 at the instance of the respondent, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were creditworthy. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the respondent could not do anything further. In the premises, if the Tribunal came to the conclusion that the respondent had discharged the burden they lay on it, then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion was based on some evidence on which a conclusion could be arrived at, no question of law as such arose. The High Court was right in refusing to state a case.*

*Further, the issue of source of source is not relevant particularly when all these parties are regular income tax assessee and Assessing Officer himself has made reference to concerned Assessing Officer for necessary action in the matter.*

*In this connection, reference may be made to decision of Delhi High Court in the case of CIT Vs. Diamond Products Ltd., 177 Taxman 331. The above said judgment has been considered in the latest decision by ITAT, Delhi in the case of ITO Vs. Brij Lal Tayal and reference may be made to relevant observation in the said judgment.*

*In the case of Diamond Products Ltd. (supra), the Hon'ble High Court has held that "the assessing Officer is not permitted to examine the source of the source once the assessee has been able to establish that the transaction with his creditors is genuine and the creditor's identities and creditworthiness have been established. In the instant case, it had been done. Therefore, it was not open to the Assessing Officer, to make the addition of the amount in question after the examination of the source of the source.*

*In any case, the Assessing Officer has not brought on record any evidence that these advances represent undisclosed income of the assessee and as such there*

*could be no ground for any adverse inference. The legal position to this effect is supported from decision of Delhi High Court in the case of CIT Vs. Value Capital Services Pvt. Ltd. 307 ITR 334 (Del.)*

*I have carefully considered the finding of the Assessing Officer and submission of the appellant. There is no dispute that these advances were received through account payee cheque and all the parties are regular income tax assessee and permanent account numbers .of these parties have been furnished to the Assessing Officer during the course of assessment proceedings. The Assessing Officer has not disputed the identity of the parties and genuineness of the transactions but dispute is only on the ground of capacity and source of such advance. Further, these advances have subsequently been refunded through account paid cheques in the absence of development of any mutually acceptable project. I have carefully considered the various case laws referred to by the appellant in their written submission and I am in agreement with the principles laid down in those judgments. The principle laid by Supreme Court in the case of Orissa Corporation Pvt. Ltd. & Delhi High Court in the case of Diamond Products Ltd. is clearly applicable to the fact of this case.*

*In case, the AO is not satisfied about source of such advance, the AO may forward the information to the concerned AO for appropriate action. However, there is no legal justification for any addition in the case of the appellant particularly when AO has not recorded any finding about any undisclosed income, which is represented by these advances.*

*In the light of above discussion, the impugned addition is not sustainable and same is hereby deleted. Appeal on this ground is allowed.”*

6. Similarly, after going through the impugned order, we find that the learned First Appellate Authority has dealt with the third issue regarding deletion of disallowance of Rs.20.47 lakhs on account of rent receivable from let out property at pages 46 to 49 of the impugned order. For the sake of convenience, that is reproduced as under :

*I have gone through the assessment order and written submission of the appellant. The Assessing Officer made following observation in respect of above said addition.*

*Assessee has shown in the submission that assessee received six month rent from GKB Optolab Ltd. for six months. Assessee has received security of Rs. 48,75,000/- from M/s. GKB Optolab Ltd. Assessee replied that the tenant did not pay rent after six months, therefore rent for remaining six months was not shown in the return. Since assessee has security deposit of tenant it has been considered that assessee has adjusted the six months rent with security deposit. Therefore, six month rent i.e. Rs. 4,87,500 x 6 = Rs. 29,25,000/- is considered at rental income of assessee. However, 30% standard deduction vi] s. 24(a) of Income Tax Act, 1961 is provided to the assessee i.e. of Rs. 8,77,500/-. After providing the deduction balance of the amount i.e. Rs.*

*20,47,500/- is added to the returned income of the assessee as income from house property .*

*The appellant has made following submission.*

*The assessee has rented out its property to M/s. GKB Optolab Ltd. in respect of which rent was received for 6 months which was duly disclosed by the assessee. Subsequently, the rent was not paid by the tenant on the ground that the stipulated rent is substantially higher then the prevailing rent and dispute was going on between the parties. The appellant filed a civil suit against the tenant for vacation of the property and payment of the rent. In the context of civil suit, the Hon'ble civil Judge vide order dt. 03/02/2011 directed M/ s. GKB Optolab Ltd. to vacate the property within two months and as per the direction of the court, property has been vacated. However, the issue of payment of rent is still subject matter of dispute.*

*All the relevant facts were duly clarified to the Assessing Officer vide our letter dt. 10.10.11 and for your reference following documents are enclosed.*

- i. Copy of letter dt. 10/10/2011*
- ii. Copy of rent agreement.*
- iii. Copy of civil suit regarding vacation of property and receipt of rent.*
- iv. Copy of order dt. 03/02/2011 of Hon'ble civil judge, Bangalore.*
- v. Copy of pending recovery suit for unpaid rent.*

*The Assessing Officer has not disputed the fact that the rent was not paid after 6 months and legal proceedings were pending in the court during the relevant*

*period. However, the Assessing Officer has only observed that the assessee should have adjusted the rent against security deposit and accordingly made the impugned addition in respect of unpaid rent on the basis of security deposit with the assessee.*

*The action of the Assessing Officer is uncalled for in the context of fact that there was no receipt of rent for the period of 6 months and legal dispute was before the court of civil judge and as such the assessee could not have adjusted rent against the security deposit in the absence of proper settlement of dispute between the parties or direction of the court.*

*In fact, regarding recovery of rent, the issue is still subjudice and as such there was no case for any addition on hypothetical and notional basis. A reference to provisions of sec. 23 of the Income Tax Act, 1961 regarding determination of annual rent, as per the provisions of sec. 23, only actual rent received or receivable is required to be considered for the purpose of assessment.*

*However, in the case under reference, the party has refused to make the payment of rent and proceedings for recovery of rent is still pending before judicial authorities and as such there could be no addition on hypothetical and notional basis. The security deposit was refundable and in the absence of specific direction of court or mutual settlement between parties, it was not possible to adjust the rent against security deposit, particularly when the matter was in dispute and subjudice.*

*I have carefully considered the relevant facts and contentions of the parties. There is no dispute that the appellant has not received rent for a period of 6 months pertaining to period under consideration. However, the Assessing Officer adopted the rent on the ground that there was security deposit and same was adjusted against claim of rent. In my view, such action of the Assessing Officer is uncalled for, as the issue of tenancy and corresponding rent was in dispute and a civil suit was filed by the assessee against tenant and in the context of the same, eviction order was passed by the civil judge vide order dt. 23/02/2011. In the light of fact that issue of tenancy and rent was in dispute, the Assessing Officer cannot make such adjustments on hypothetical basis. In View of the above discussion, there is no justification for the Assessing Officer to consider addition of rent on the basis of security deposit unless there is direction of the court to this effect or agreement between the parties. It is not for the Assessing Officer to lay down conditions and guidelines regarding adjustment in the absence of any factual or legal basis. Non receipt of rent is not in dispute and as such it is not open to Assessing Officer to contemplate any addition on hypothetical basis particularly when the issue is pending before the judicial authorities.*

*In view of the above position, addition of Rs. 20,47,500/- is not sustainable. However, as and when the arrears of rent are received, the same is required to be assessed in the said year. Appeal on this ground is allowed for statistical purposes.”*

7. Keeping in view of the aforesaid findings given by the learned First Appellate Authority on the issue involved in appeal filed by the department, we are of the considered view that the learned First Appellate Authority has rightly deleted the addition of Rs.5.85 crores made by the Assessing Officer because these expenses were incurred for the purpose of manufacturing of sugar in respective factories with a view to earn profit and, therefore, the assessee was entitled to deduction of the said expenses as Revenue Expenditure. After going through the impugned order, we find that the learned First Appellate Authority has deleted the addition in dispute by respectfully following various decisions rendered by the Hon<sup>o</sup>ble High Courts which are mentioned in the impugned order. We find no infirmity in the impugned order on the deletion of addition of Rs.5.85 crores made by the Assessing Officer. Therefore, we decide the issue involved in ground No. 1 against the Revenue and in favour of the assessee by upholding the impugned order on this ground.

8. As regards to the deletion of addition of Rs.1.25 crores on account of advances received by the assessee, after going through the impugned order, as well

as the Assessing Officer, we are of the view that the learned First Appellate Authority has elaborately discussed the issue at pages 38 to 42 of the impugned order. The learned First appellate Authority has given various details of various parties mentioned in the impugned order. The learned First Appellate Authority has also supported his view by various decisions rendered by Honøble High Courts which includes the jurisdictional High Court, which are mentioned in the impugned order. After going through the same, we are of the considered view that the learned First Appellate Authority has passed a well reasoned order on the deletion of addition of Rs.1.25 crores on account of advances received by the assessee. We, therefore, uphold the impugned order on the issue involved in ground No. 2 by dismissing the appeal of the Revenue on this ground.

9. As regards to the ground No. 3 challenging the deletion of disallowance of Rs.20.47 lakhs on account of rent receivable from let out property, the learned First Appellate Authority elaborately discussed the issue in dispute at pages 46 to 49 in the impugned order which we have reproduced above. The learned First Appellate Authority has also examined the documentary evidence filed by the assessee in respect of its claim , i.e., copy of letter dated 10.10.2011, copy of rent agreement, copy of civil suit regarding mutation of property and receipts of rent, copy of order dated 03.02.2011 passed by Civil Judge, Bangalore and copy of pending recovery suit for unpaid rent. After considering all these documentary evidences, the learned

First Appellate Authority has deleted the addition of Rs.20.47 lakhs. We find no infirmity in the deletion of disallowance of Rs.20.47 lakhs. We uphold the impugned order on the issue involved in ground No. 3. No other point has been argued or raised before us by both the parties.

10. In view of the aforesaid discussion, we are of the considered view that the learned First Appellate Authority has passed well reasoned order and has rightly deleted the additions in dispute. We uphold the impugned order by dismissing the appeal filed by the Revenue.

11. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 30.09.2015.

Sd/-  
**(H.S. SIDHU)**  
Judicial Member

Sd/-  
**(L.P. SAHU)**  
Accountant Member

Dated : 30.09.2015

\*aks/-

*Copy of order forwarded to:*

(1) <i>The appellant</i>	(2) <i>The respondent</i>
(3) <i>Commissioner</i>	(4) <i>CIT(A)</i>
(5) <i>Departmental Representative</i>	(6) <i>Guard File</i>

*By order*

*Assistant. Registrar  
Income Tax Appellate Tribunal  
Delhi Benches, New Delhi*