IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'H', NEW DELHI

BEFORE SHRI J. SUDHAKAR REDDY, ACCOUNTANT MEMBER
AND SH. SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No. 1675/Del/2013
AY: 2006-07

ACIT, Central Circle 23, New Delhi	vs	Wellworth Developers (P) Ltd., M-11, Middle Circle, Connaught Circus, New Delhi-110001 (PAN: AAACW1092J)

ITA No. 1761/Del/2013
AY: 2006-07

Wellworth Developers (P) Ltd., New Delhi.	vs	ACIT, CC-23, New Delhi.
(Appellant)		**(Respondent)**

Appellant by : Smt. Jyoti Kumari, CIT D.R.
Respondent by : Shri V.S. Rastogi, CA

ORDER

PER SUDHANSHU SRIVASTAVA, ACCOUNTANT MEMBER

Both the appeals arise out of the order passed by the ld. CIT (A)-XXXIII, New Delhi dated 28.12.2012 for assessment year 2006-07. I.T.A. No. 1675/Del/2013 has been preferred by the Department whereas I.T.A. No. 1761/Del/2013 has been filed by the assessee. Both the appeals were heard together and are being disposed of by this common order.

2. The facts of the case, as borne from the records, are that the assessee is a company incorporated under the Indian Companies Act, 1956 and engaged in the business of Real Estate. Return of income declaring an income of Rs. 408,225/- was filed on 20.11.2006 and subsequently the assessee's case was selected for scrutiny. During the year under consideration, the assessee had purchased land from farmers/villagers and after taking over possession of the land so purchased, it was handed over to M/s Country Wide Promoters Pvt. Ltd. for development and promotion of a proposed township in pursuance of a collaboration agreement. It was the AO's contention that in consideration of the transfer of land to M/s Country Wide Promoters Pvt. Ltd., the assessee company has charged a fee of Rs.35,000 per acre. The Assessing Officer has noted in his order that during the year under consideration, the assessee company did not carry any other business other than that of acquiring land from the villages through registered sale deeds and transferring the land so acquired to M/s Country Wide Promoters (Pvt.) Ltd. The Assessing Officer noted that a sum of Rs.67,18,002/- was paid in cash towards the purchase of land to different parties, and as, according to him, the land purchased constituted stock-in-trade

of the assessee, he disallowed a sum equal to 20% of the amount paid in cash (being Rs.13,43,600/-) u/s 40A(3) of the Act. The Assessing Officer also added a sum of Rs.796,743/- u/s 2(22)(e) of the Act as deemed dividend on account of loans and advances received from associated concerns. The Assessing Officer further disallowed additional payment of stamp duty of Rs. 8,75,000/- holding it to be non-deductible under section 37 as it was, according to him, in violation and contravention of the Government Rules and Regulations. The assessment u/s 143(3) was completed at Rs. 34,23,568/-.

3. Aggrieved, the assessee went into appeal before the Ld. CIT (A) wherein the Ld. CIT (A) upheld the disallowance made u/s 40A (3) but deleted the addition pertaining to deemed dividend. As far as the issue of disallowance of additional payment was concerned, the Ld. CIT (A) held that additional payment was not illegal under any provisions of the Stamp Act and was not hit by Explanation to section 37(1) of the Income Tax Act, 1961. He, however, upheld the disallowance to the extent the additional payments were made to persons who did not have any legal claim over the land for which the additional payment was made.

4. Now, both the revenue as well as the assessee are in appeal before us.

The Department has raised the following grounds of appeal:-

1. *On the facts and in the circumstances of the case, the CIT(A) has erred in deleting the addition of Rs. 8,75,000/-, made by the Assessing Officer in view of the provisions of Section 37(1) of the Income tax Act, 1961 on account of additional payment in violation of Stamp Duty Act, 1899.*

2. *On the facts and in the circumstances of the case, the CIT(A) has erred in deleting the addition of Rs. 7,96,743/-, made by the Assessing Officer in view of the provisions of Section 2(22)(e) of the Income tax Act, 1961 on account of deemed dividend."*

5. On the issue of additional payments made for the purchase of land, the Ld. DR submitted that the assessee is not entitled to claim the deduction of this additional payment because there is no consideration received in lieu of these payments other than the land which had already been received by the assessee company at the first instance itself i.e. at the time of sale-deeds. The possession of these lands was taken in each and every case by the assessee company at the time of execution of sale-deeds as is expressly mentioned in the registered sale deeds. The additional payments were made much after the execution of the registered sale-deeds as per which the possession of the land and all its

rights were already with the assessee company. He further submitted that the amount of additional payments have been added to the cost of the land and no stamp duty has been paid on the said additional payment which means that the assessee company has claimed in its books all the payments which have been made over and above the sale consideration as described in the sale deed and on which no stamp duty has been paid to the Government. As per Indian Stamps Act, prosecution proceedings can be initiated for this violation. Hence, these additional payments cannot be allowed as expenditure to the assessee company. Hence this expense of additional payment is not allowable as deduction.

6. Regarding the issue of deemed dividend u/s 2(22)(e), Ld. DR submitted that the assessee had received Rs.9,00,000/- from Super Belts (P) Ltd. and Rs.10,78,000/- from Green Valley Housing & Land Development (P) Ltd. in the course of business transactions but at the time of assessment proceedings itself, in order to buy peace of mind and to avoid any litigation with the department, it had offered the same to be taxed as deemed dividend and thus, the Ld. CIT(A) has wrongly deleted the addition. He submitted that the order of the Assessing Officer

should be restored on both the counts.

7. The assessee has raised as many as six grounds of appeal. However, the main ground pertaining to the issue of disallowance u/s 40A (3) of the Income Tax Act, 1961 is ground no. 4, which reads as under:-

> *"4. That on facts and circumstances of the case and in law, the CIT (A) erred in upholding the disallowance u/s 40A (3) in respect of which no deduction was claimed by the appellant."*

8. Ld. AR submitted that the assessee had not claimed any deduction for the purchase of land and, therefore, the disallowance of Rs.13,46,000/- u/s 40A(3) of the Act on this account was not sustainable. He submitted that the assessee is not deriving income from purchase and sale of land and the Assessing Officer has made an incorrect observation that the assessee had transferred the land to M/s Country Wide Promoters Pvt. Ltd. He submitted that the Assessing Officer has drawn a wrong inference that the land was acquired as a stock in trade. He submitted that the assessee had not claimed any deduction in respect of cost of land in the computation of total income under the head 'business income' and therefore section 40A(3) was not applicable. Since no deduction has been claimed,

no disallowance can be made. He also placed reliance on the decision of the Coordinate Bench 'H' of this Tribunal in I.T.A. No. 1752/Del/2013 on the issue.

9. Responding to the Department's arguments on deemed dividend, the ld. AR submitted that the assessee was not a registered shareholder of the payer company and, therefore, in view of the following case laws, the said amount could not be taxed in its hands: –

(i) CIT vs Universal Medicare Pvt. Ltd. 324 ITR 263 (Bom)

(ii) International Technologies Pvt. Ld. In ITA No. 6182/Mum/2008

(iii) CIT vs Ankitech Pvt. Ltd. 11 Taxmann.com 100 (Del)

(iv) CIT vs Navyug Promoters Pvt. Ltd. 16 Txmann.com 292 (Del)

(v) CIT vs Marketing P. Ltd. 16 Taxmann.com 411 (Del)

10. On the issue of additional payment towards purchase of land, the Ld. AR submitted that the additional payment recorded has not been claimed as an expense, therefore, no disallowance was called for in assessee's case and in any case the cost has been reimbursed by M/s Country Wide Promoters (P) Ltd to the

assessee company.

11. In response to the Ld. AR's arguments on the issue of disallowance u/s 40A (3), the Ld. DR relied on the order of the Ld. CIT (A).

12. We have heard the rival submissions and carefully perused the relevant material placed on record. As far as the issue of deemed dividend in the Department's appeal is concerned, it is an undisputed fact that the assessee company is not a registered shareholder of the payer companies who have advanced loans to the assessee company. The Hon'ble Jurisdictional High Court has held in the case of CIT vs Ankitech (P) Ltd. (supra) as under:-

> *"Further, it is an admitted case that under normal circumstances, such a loan or advance given to the shareholders or to a concern, would not qualify as dividend. It has been made so by legal fiction created under section 2(22) (e) of the Act. We have to keep in mind that this legal provision relates to 'dividend'. Thus by a deeming provision, it is the definition of dividend which is enlarged. Legal fiction does not extend to 'shareholder'. When we keep in mind this aspect, the conclusion would be obvious, viz, loan or advance given under the conditions specified under section 2(22) (e) of the Act would also be treated as dividend. The fiction has to stop here and is not to be extended further for broadening the concept of shareholders by form of dividend to its shareholders/ members and such dividend cannot be given to nonmembers. The second category specified under section 2(22)(e) of the Act viz. a concern (like the assessee herein), which is given the loan or advance*

is admittedly not a shareholder/member of the payer company. Therefore, under no circumstance, it could be treated as shareholder/member receiving dividend. If the intention of the Legislature was to tax such loan or advance as deemed dividend at the hands of deeming shareholder' then the Legislature would have inserted deeming provision in respect of shareholder as well, that has not happened. Most of the arguments of the learned counsels for the revenue would stand answered, once we look into the matter from this perspective" …….. "Insofar as reliance upon Circular No. 495 dated 22-09-1997 issued by Central Board of Direct Taxes is concerned, we are inclined to agree with the observations of the Mumbai bench decision in Bhaumik Colour (P) Ltd's case (supra) that such observations are not binding on the Courts. Once it is found that such loan or advance cannot be treated as deemed dividend at the hands of such concerns which is not a shareholder, and that affording to us is the correct legal position, such a circular would be of no avail."

13. Respectfully following the decision of the Hon'ble High Court, we hold that the amount of Rs.796,743/- is not taxable as deemed dividend in the hands of the assessee company u/s 2(22)(e) of the Act as the assessee company is not a shareholder of the payer companies. Hence, this ground of appeal of the Department is rejected.

14. As far as the issue of deletion of disallowance of Rs.875,000/- paid on account of additional payments is concerned, it is seen that no such claim was made by the assessee as these payments were not routed through the profit/loss account of the assessee. The Ld. AR has submitted

that his arguments on the issue remain the same as raised on the issue of disallowance u/s 40A (3). On a consideration of the same we are of the view that since the material issue is that the said payment was never claimed by the assessee as business expenditure, the occasion to make a disallowance of the same does not arise. There is no dispute on the fact that the expenditure was not claimed as an expense by the assessee. In the circumstances, the occasion to make an addition of the same by way of a disallowance does not arise. Accordingly, we hold that the disallowance of Rs.875,000/- on account of additional payments was wrongly made by the Assessing Officer. Moreover, the partial sustenance of this addition by the Ld. CIT (A) is also incorrect and is liable to be deleted for the reason afore said. Hence, this ground of appeal of the Department is also rejected.

15. Accordingly, the appeal of the Department is dismissed.

16. As far as the assessee's appeal i.e. I.T.A. No. 1761/Del/2013 is concerned, after going through all the relevant records and after giving a careful consideration to the rival submissions, it is seen that the fact remains unassailed on record that the expenditure disallowed by the AO, which has been upheld by the

Ld. CIT (A), was never claimed as an expense by the assessee. Section 40A starts with the non-obstante clause setting out that the provisions of this section shall have effect notwithstanding anything to the contrary contained in any other provisions of the Act relating to the computation of income under the head 'profits and gains of business or profession'. Sub-section (3) of section 40A is an exception to the deductibility of expenditure under the computation provisions of 'profits and gains of business or profession'. Thus consequently what does not fall within the computation of income will not attract the provisions of section 40A (3). On this issue the judgement of the Hon'ble Rajasthan High Court in the case of Motilal Khatri (2008) 218 CTR 602 (Raj.) is very clear. Their Lordships before arriving at their decision categorically took note of the fact that the provisions of section 40A (3) had been looked at and thereafter the position is very clear in as much as when the assessee has not claimed any deduction of any expenditure the question of not allowing any part of that expenditure as deduction does not arise. For ready-reference, we extract the relevant finding of their Lordships from the said judgement:-

"In our view, a bare reading of the language of this sub-section is enough to show, that in the circumstances of the case, provisions of s.40A(3) are not attracted with respect to either of the transactions; obviously because it only prohibits allowing of deduction as expenditure. Expenditure obviously means expenditure admissible to be deducted from out of the income, which may include the expenditure on purchase and the like, and the sub-section provides that if any such expenditure is incurred after specified date, in a specified manner, then 20 per cent of such expenditure shall not be allowed as a deduction. In the present case the assessee has not claimed any deduction of any expenditure of Rs.3,88,000 or Rs.7,35,000 and therefore, there is no question of not allowing any part of that expenditure, as deduction. Thus, the finding arrived at in this regard, by the learned CIT (A), and the learned Tribunal cannot be said to be wrong. Question No.2 is accordingly answered in favour of the assessee and against the Revenue."

17. Similarly, it is seen that the judgement of the Hon'ble Punjab & Haryana High Court in the case of CIT vs Alpha Toyo Ltd. (2008) 174 Taxmann 427 (P & H) also fully supports the view taken. For ready-reference, we reproduce paras 6 & 7 of the said judgement:-

"We have heard learned counsel for the revenue. The Tribunal has found as a fact that the annual reports for the assessment year 1989-90 of the assessee clearly shows the outstanding loans to the three parties as on 1-

4-1989. Copies of the loan account of the three parties for the period comprising the previous year are also available on the record. The plea of the assessee that the payments were made in respect of the capital account have been rightly accepted by the Commissioner of Income tax (Appeals).The Assessing Officer without giving any finding on the issue has merely gone on the presumption that the books of account have been manipulated. ***The Assessing Officer has also not given a finding that the sum in question was actually revenue expenditure which were claimed as deduction in profit and loss account.*** (Emphasis supplied).

In view of the above finding of facts, the Tribunal has rightly concluded that the payment in question were made on account of capital account, therefore, provisions of section 40A(3) of the Act were not attracted. Thus, we do not find any merit in this appeal and no substantial question of law arises for determination of this Court. Hence this appeal is dismissed."

18. Accordingly on a consideration of the facts and circumstances of the case and considering the relevant provision of the Act namely Section 40A(3), we hold for the detailed reasons given hereinabove that Section 40A(3) of the Act has been wrongly invoked as admittedly no expenses relatable to the addition has been claimed. Accordingly this ground of the assessee's appeal is allowed.

19. In the final result, the appeal of the department is dismissed whereas the appeal of the assessee is allowed.

The order is pronounced in the open court on 10/2/2016

Sd/- Sd/-

(J. SUDHAKAR REDDY)
ACCOUNTANT MEMBER

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Dated: the 10th of February, 2016
'GS'

Copy of the Order forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR
6. Guard File

By order

Asstt. Registrar