



**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**NAGPUR BENCH, NAGPUR**  
**BEFORE SHRI P.K. BANSAL, VICE PRESIDENT AND**  
**SHRI AMARJIT SINGH, JUDICIAL MEMBER**

ITA no. 70/Nag./2015  
(Assessment Year : 2009-10)

Income Tax Officer  
Ward-4(1), Nagpur

..... Appellant

v/s

Shri Swapnil Anil Ahirkar  
Ahirkar Niwas, Ganjakhet Chowk  
Gandhibagh, Nagpur

..... Respondent

Assessee by : Shri Manoj Moryani  
Revenue by : Shri A.R. Ninawe

Date of Hearing – 22.06.2017

Date of Order – 30.06.2017

**ORDER**

**PER AMARJIT SINGH, J.M.**

The Revenue has filed the present appeal against the impugned order dated 28<sup>th</sup> October 2014, passed by the learned Commissioner (Appeals)-I, Nagpur, relevant to the assessment year 2009-10.

2. The grounds raised by the assessee is reproduced below:-

*"1. Whether on the facts and circumstances of the case and in law, the learned CIT(A), Nagpur erred in deleting the addition of Rs.42,49,485/- made by the Assessing Officer on account of disallowance of commission, without appreciating the fact the assessee has not furnished any material evidence to substantiate his claim of commission before the A.O.*

*2. Whether on the facts and circumstances of the case and in law the learned CIT(A)-I, Nagpur erred in deleting the addition of Rs.*

*24,00,000/- made by the Assessing Officer on account of disallowance u/s 40A(3), on account of cash payments of Rs.12 lakhs each in respect of land in Kh.No. 60/2 & 60/3, P.H. no.46, Mouza–Isanani, The. Higna, District Nagpur.*

*3. Whether on the facts and circumstances of the case and in law the learned CIT(A)-I, Nagpur erred in deleting the addition of Rs. 9,60,000/- being disallowances of Rent expenses."*

2. Brief facts of the case are that the assessee filed his return of income on 29<sup>th</sup> September 2009, declaring total income to the tune of ₹ 7,94,850. The return of income was processed under section 143(1) of the Income Tax Act, 1961 (for short "*the Act*") on 5<sup>th</sup> September 2010. The assessee is engaged in the business of purchasing and selling of land after developing. The business is run by the proprietor concerned in the name and style of "*Dream Developers, Nagpur*" established in the year July 2007. The assessee also derived his income from interest during the year. The books of account were duly audited and audit report in Form 3CB and 3CD was filed. The case of the assessee was selected for scrutiny under CASS. Notices under section 143(2) / 142(1) was issued and served upon the assessee. After verification of the facts of the case, the Assessing Officer disallowed the commission to the tune of ₹ 42,49,485 and also disallowed the amount of ₹ 24 lakh under section 40A(3) and also disallowed rent expenditure to the tune of ₹ 9,60,000 and assessed the total income to the tune of ₹ 85,54,335. Feeling aggrieved, the assessee filed an appeal before the learned Commissioner (Appeals)

who allowed the claim of the assessee, therefore, the Revenue is in appeal before us.

### **ISSUE NO.1**

3. Under this issue, the Revenue has challenged the deletion of addition of ₹ 42,49,485 on account of commission. Now it is to be seen what are the reasons taken by the learned Commissioner (Appeals) for the deletion of the said addition. Therefore, it is necessary to advert the findings of the learned Commissioner (Appeals) on record.

*"7.0 I have carefully gone through the assessment order, the submissions of the AR of the appellant and the aforesaid judicial decisions relied upon by the AO and the appellant.*

*7.1 On careful examination of the facts, it is seen that the appellant has booked the commission on sale of plots on accrual basis. However, sale is booked when sale deed is executed and possession of the plot sold is given to the buyer on execution of the Agreement to Sale. It is but for this method of accounting followed by the appellant that the appellant has claimed the commission on accrual basis on finalisation of deals and receipt of advance against sale of property but the sale has been booked in the subsequent year. The appellant in this regard has submitted the names and addresses of the persons to whom commission has been paid along with their confirmation letters for having received the commission before the AO during the assessment proceedings. The appellant also furnished the plot-wise details of the commission paid. The payment for commission has been made by account payee cheques to all the parties and such parties have declared such commission receipts in their respective returns of income filed, which have been accepted by the department. This fact was also submitted before the AO. However, the AO has restricted, the allowance of commission @15% of the sales on ad-hoc basis without assigning any logical reasoning for applying the percentage of 15% of commission on total sales. On perusal of the records and the assessment order, it becomes obvious that the AO has not challenged the issue of payment of commission as such, however, by restricting such payment of commission @ 15% of sales, the*

*A.O. has inferred the excessive payment on account of commission by the appellant. As discussed above, the appellant has furnished before the AO, the names and addresses of the parties to whom the commission has been paid along with the confirmation letters. But, the Ld.AO has omitted to take cognizance of this fact and proceeded to restrict the commission @ 15% of total sales without any cogent basis. It is an undisputed fact as emanated from the order of the AO and the assessment records that the AO has not pointed out any infirmities in the confirmation letters filed by the appellant in support of his claim for payment.*

*7.2 Coming to the method of accounting of commission and sales, it is found that the appellant has rightly booked the commission on the basis of finalisation of the deal of sale of plot and receipt of advance which is in conformity to the mercantile method of accounting. So far as sales are concerned, the appellant has accounted for the sales on execution of agreements to Sale and delivery of possession. In this regard it is significant to note that the Ld.AO has accepted the profits on the sales declared by the appellant in the respective years, including the year under appeal without questioning the taxability of the profit embedded in such sales. The AO, in fact as such has also not disputed the claim for commission debited by the appellant in the year in which it has accrued to the appellant. Thus, the Assessing Officer's action that having admitted the claim for commission, without challenging the veracity of its genuineness and by not disturbing the taxability of profits attributable to such sales in the respective years, without pointing out any infirmity, amounts the acceptance of mercantile method of accounting followed by the appellant. It is not a case where taxability embedded in the transaction of sale has been omitted or that the commission actually has not been paid. The AO has brought to tax, the income embedded in the transaction of sale of plots by the appellant without disturbing the method of accounting followed by the appellant. The A.O. has also not challenged the genuineness of the actual payment of the commission. The books of account of the appellant are duly audited and such audit report was furnished by the assessee before the A.O. along with the books of account and bills and vouchers which were examined by the AO as is obvious from the finding recorded in Para 2 of the assessment order without pointing out any defect as such in the books of account and Bills & vouchers. If, there was any deviation in the method of accounting the commission and sales, according to the AO, in that case, it was incumbent for AO to invoke provisions of Section 145 of the Act instead of accepting and taxing the profits arising out of all such transactions of sales in respect of which commission was claimed by the appellant. Therefore, after having considered all the cumulative factors, I do not find any justification for restricting the commission @ 15% without any basis. Therefore, the addition made by the AO of*

*Rs.42,49,485/- on account of disallowance of commission is directed to be deleted. Hence, this ground is allowed."*

4. On appraisal of the above findings, it is quite clear that the Assessing Officer did not consider the evidence adduced by the assessee at the time of assessment, however, the learned Commissioner (Appeals) considered the evidence adduced by the assessee and allowed the claim of the assessee. The Assessing Officer disallowed the commission @ 15% without rejecting the claim of the assessee raised in the books of account. The Assessing Officer did not invoke the provisions of section 145 of the Act. THE assessee booked the commission on sale of plot on accrual basis on the finalization of the deal and receipt of advance against the sale of property but the sale has been booked in the subsequent years. The appellant submitted the name and address of the person to whom the commission was paid. Confirmation letters were also produced before the Assessing Officer. The assessee furnished the plot-wise details of commission paid. The payment was made by account payee cheques to all the parties and the parties declared such receipt in their respective return of income filed before the Department which was also accepted by the Department. The books of account have not been rejected. We find no reason to restrict the commission @ 15%. In view of the said circumstances, we are of the view that the learned Commissioner (Appeals) has rightly allowed the commission after

going through the record produced by the assessee and by going through the details of each and every person to whom the commission was paid. In view of the said circumstance, we are of the view that the learned Commissioner (Appeals) has passed the order judiciously and correctly and no interference is required at this appellate stage. Accordingly, we confirm the order of the learned Commissioner (Appeals) and dismissed the ground raised by the Revenue.

**ISSUE no.2**

5. Under this issue, the Revenue has challenged the deletion of addition of ₹ 24 lakh made by the Assessing Officer on account of disallowance under section 14A(3) on account of cash payment of ₹ 12 lakh each in respect of land in Khasra no.7/2, 7/3, Ph. No.46, Mouza, Isanami, Teh. Hingna, Dist. Nagpur. On verification of the return of income and documents, the Assessing Officer observed that the assessee paid the amount of ₹ 24 lakh otherwise than through an account payee cheque or demand draft. Therefore, the assessee has violated the provisions of section 14A and accordingly, an amount of ₹ 24 lakh was added to the income of the assessee. Before going further, it is necessary to advert the finding of the learned Commissioner (Appeals) on record. Para-9 of the learned Commissioner (Appeals)'s order is reproduced below:-

*"9.0 I have carefully gone through the assessment order, the submissions of the AR of the appellant and the aforesaid judicial decisions relied upon by the AO and the appellant.*

*9.1 The appellant is a Developer. The appellant purchases the Agricultural land, gets it converted into N.A. and sell the same after doing plotting. The contention of the AR of the appellant is that the land purchased was originally Agricultural Land and the vendor (Seller) being the Agriculturist from the small Village "demanded certain portion of amount in cash. It is in view of this fact that out of the total consideration of Rs.120 Lakhs, a sum of Rs. 24 Lakhs was paid by the appellant to the said Vendors in cash in order to honour the terms and conditions of sale, to avert any breach of contract and to prevent any foul play from the vendor. The appellant further argued that the disallowance u/s 40A(3) is not warranted keeping in view of the fact that the cash payment made was duly reflected in the sale deed, seller of the land were Agriculturists from the small Village, the appellant purchased the land as Capital Assets for the purpose of converting the same into stock-in-trade. The appellant finally argued that the cash paid on purchase of land was not claimed as an expenditure by debiting the same to the Profit & Loss account and the account and the cost of the land was debited to the Work-in-Progress, therefore, contended that the provisions of Section 40A(3) are not applicable to the case of the appellant.*

*9.2 The appellant in this regard has relied on the decision of the Hon'ble 1TAT Delhi Bench in ITA no.3303/2013 in of Hon'ble ITAT. The facts of the case of the present appellant are squarely covered by the decision of the Hon'ble ITAT, Delhi Bench referred above. The Hon'ble ITAT in that case has held as under :-*

*"The Ld.CIT(A) has not disputed the applicability of section 40A(3) in respect of cash payment made by the assessee. However, any expenditure can be disallowed only when the deduction in respect of expenditure is claimed by the assessee. In this case admittedly, the asaessee has not claimed the expenditure on purchase of land by debiting the same to the Profit & Loss account but he expenditure for purchase of land has been debited to work-in-progress."*

*9.3 The appellant has reflected the amount as Work-in-Progress in the Balance Sheet as on 31.03.2009. Since the ratio-decidenti of the above judgement is mutatis-mutandi applicable to the facts of the case of the present appellant, hence respectfully following the same, the disallowance made by the AO is directed to be deleted. Hence, this ground is allowed."*

6. On appraisal of the order passed by the learned Commissioner (Appeals) in question, we noticed that the appellant is a developer and purchased the land to get it converted into the non-agricultural land. The same was to be sold after plotting. It is not in dispute that the amount of ₹ 24 lakh was paid in cash to the vendor. The said amount was not claimed as expenditure to the Profit & Loss account the cost of land was debited to the work-in-progress. In view of this factual position, the learned Commissioner (Appeals) has deleted the addition on the basis of the finding of the Co-ordinate Bench of the Tribunal, Delhi Bench, in ITA no.330/Del./2013 in the case of M/s. AT Properties Pvt. Ltd. The factual position is also the same. Since the matter of controversy has been decided by the learned Commissioner (Appeals) on the basis of finding of the Tribunal, Delhi Bench, cited supra, therefore, we are of the view that the learned Commissioner (Appeals) has decided the matter judiciously and correctly specifically in the circumstances that no distinguishable material has been placed on record before us. Therefore, the finding of the learned Commissioner (Appeals) is not liable to be interfered with and we affirm the same. The ground raised by the Revenue is dismissed.

### **ISSUE no.3**

7. Under this issue, the Revenue has challenged the deletion of disallowance by the Assessing Officer of a sum of ₹ 9.60 lakh on

account of rent expenditure. The assessee claimed the rent expenditure to the tune of ₹ 9.60 lakh in his Profit & Loss account. The Assessing Officer asked the details in connection with the claim. The assessee submitted the copy of municipal tax receipt in respect of one property belonging to Shri Anil G. Ahirkar and Smt. Surekha A. Ahirkar. With regard to the other property, the assessee explained that the business operations were being conducted from these premises and were reflected as rent in the return of income filed by the recipient. The Assessing Officer was of the view that the rent to the tune of ₹ 1.20 lakh was paid each to Shri Anil G. Ahirkar and Smt. Surekha A. Ahirkar, in connection with one premises i.e., plot no.6, 7 and 8, Vijay Nagar, Behramji Town, Nagpur. Therefore, disallowed the claim of one person i.e., to the tune of ₹ 9.60 lakh and added back to the total income of the assessee. Now, it is to be seen in which circumstances the learned Commissioner (Appeals) has allowed the same. The finding of the learned Commissioner (Appeals) is reproduced herein below:—

*"11.0 I have carefully gone through the assessment order, the submissions of the AR of the appellant and the material placed on record. On careful examination of the facts, it is seen that the appellant has paid the rent for premises used for the purpose of business through account payee cheques on which TDS has also been made. The Ld. AO has not pointed out any infirmity as regards to the use of the premises for the purpose of business by the appellant and merely based on the physical inspection and hoardings not being displayed on such premises, much after the end of the relevant Financial Year, inferred that the premises were*

*not used by the appellant. The inference drawn by the AO has no legs to stand. It is quite manifest from the material facts that the appellant has paid the aforesaid amount of rent by cheque and same amount were duly reflected in the return of income of the landlord Ganpatrao Ahirkar, Anil Ahirkar and Surekha Ahirkar, and tax on the income from rent were duly paid by above said persons. These aspects have not been disputed by the A.O. Therefore, the addition made by eth A.O. of Rs.9,60,000 on account of disallowance of rent is directed to be deleted. Hence, this ground is allowed.”*

8. On appraisal of the above mentioned findings, we noticed that the appellant was paying the rent of the premises through account payee cheque on which the TDS has also been deducted. It is not disputed that the appellant was not using the said premises the landlord has also reflected the rent in their return of income and accordingly they also paid the tax. This factual position was not in dispute. Therefore, in the circumstances, by going through the facts of the case and by going through the record of the assessee and even on going through the record of the landlord namely Shri Ganpatrao Ahirkar, Shri Anil Ahirkar and Smt. Surekha Ahirkar, learned Commissioner (Appeals) has arrived at the conclusion that there is no ambiguity of any kind in the transaction. These facts are not distinguishable at this stage also. The learned Commissioner (Appeals) passed the order judiciously and correctly which is not liable to be interfered with at this appellate stage. Accordingly, we affirm the findings of the learned Commissioner (Appeals) on this issue and decide the issue in favour of the assessee.

9. In the result, Revenue's appeal is dismissed.

Order pronounced in the open Court on 30.06.2017

**Sd/-  
P.K. BANSAL  
VICE PRESIDENT**

**Sd/-  
AMARJIT SINGH  
JUDICIAL MEMBER**

**NAGPUR, DATED: 30.06.2017**

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Nagpur City concerned;
- (5) The DR, ITAT, Nagpur;
- (6) Guard file.

*Pradeep J. Chowdhury  
Sr. Private Secretary*

True Copy  
By Order

(Dy./Asstt. Registrar)  
ITAT, Nagpur