

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "E", MUMBAI**

**BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA No.458/M/2016
Assessment Year: 2010-11**

M/s. Shreepati Arcade, 401, 4 th Floor, Shreepati Arcade, A.K. Marg, Nana Chowk, Mumbai-400 036 PAN: AAAAR1234I	Vs.	The Dy. Commissioner of Income Taxm Central Circle-09, Mumbai
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Anil Sathe, A.R.
Revenue by : Shri V. Justin, D.R.

Date of Hearing : 05.04.2018
Date of Pronouncement : 14.05.2018

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against the order dated 01.11.2015 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2010-11.

2. The various grounds raised by the assessee are as under:

"Ground No.1

On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the disallowance made by the learned A.O. regarding sundry balances written off of Rs.77,96,174/- being capital loss and not allowed as business expenses u/s 36(i)(vii).. The appellant prays that the said disallowance may please be deleted.

Ground No.2:

On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the disallowance made by the learned A.O. regarding license

fees of Rs.2,35,50,100/- in view of provision of section 43B of the Act. The appellant prays that the said expenditure be allowed as a deduction as the provisions of section 43B are not attracted in case of the BMC license fees/ deposits.

Ground No.3:

On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the disallowance made by the learned A.O regarding society maintenance charges amounting to Rs.47,35,028/-. The appellant prays that the society maintenance charges paid by the appellant being builder, before the handing over the building to society should be allowed as expenses. The appellant prays to delete the disallowance made of Rs.47,35,028/- with respect to the society maintenance charges.

Ground No.4:

On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the disallowance made by the learned A.O. regarding legal expenses of Rs.50,00,000/-.The appellant prays that the said amount should be allowed as a deduction under section 37(1) of the Act as the same has been created for the legal expenses likely to be incurred for the formation of society and to cover up the expenses for conveyance deed for transferring the land to the society.

The appellant reserves its right to add, alter, amend or delete the grounds of appeal.”

3. The issue raised in ground No.1 is against the upholding of disallowance of Rs.77,96,174/- as made by the AO on account of sundry balances written off being capital loss and not allowed as business expenses under section 36(1)(vii) of the Act.

4. The brief facts of the case are that AO during the course of assessment proceedings noticed that the assessee has written off sundry balances to the tune of Rs.77,96,174/- and debited the same to the P&L Account and accordingly assessee was asked vide order sheet entry dated 08.03.2013 to justify the same. The assessee vide written submissions dated

21.03.13 submitted before the AO that it has written off sundry balances to the tune of Rs.77,96,174/- which comprised of loans and advances of Rs.26,55,000/- given to various parties in connection with the business of the assessee, deposits with BEST and Municipal Corporation of Rs.16,56,647/- for the construction purposes and sundry debtors not recoverable of Rs.34,88,500/-. The assessee submitted that this being the loan taken and all these loans and advances/deposits were given for the business of the assessee wholly and exclusively and therefore, the same were rightly claimed by the assessee under section 36(1)(vii) of the Act. However, the AO brushed aside the submissions of the assessee and added the same to the income of the assessee by holding that all these balances written off were of capital in nature and could not be allowed under section 36(1)(vii) of the Act.

5. In the appellate proceedings, the Ld. CIT(A) also dismissed the appeal of the assessee after considering the reply of the assessee which has been incorporated in para 3.2 of the appellate order. The Ld. CIT(A) qua the advances observed that the sundry balances were never credited to the P&L Account and therefore are not covered under section 36(1)(vii) of the Act. Similarly, the deposits with BEST and Municipal Corporation amounting to Rs.16,56,647/- were also not recognized as revenue. The Ld. CIT(A) noted that the loans/deposits/advances etc. in the balance sheet are not covered under the provision of section 36(1)(vii) of the Act when written off and may at best be considered at in the

hands of the assessee and also observed that in order to allow such deduction u/s 37 or u/s 28 of the Act, the assessee has to prove that such has become irrecoverable during the year and simply cannot be allowed in the year in which written off and thus upheld the decision of the AO.

6. The Ld. A.R., vehemently submitted before us that assessee AOP was formed for a limited purpose of redeveloping the building called Shreepati Arcade and this was the only project in the said AOP and after completion of the said project and selling of the projects, the AOP will cease to exist in the last year which is the current year the assessee found that the advances which were shown in the balance sheet as loans and advances to the tune of Rs.26,55,000/- to various parties in connection with the business of the assessee and not on capital account but on purely for business purposes were found to be not recoverable and hence were written off. The said advances clearly fall under section 36(1)(vii)/37 of the Act as the advances were made in the ordinary course of business in connection with the business activities of the assessee. Similarly, the deposits with the BEST and Municipal Corporation were given for the construction purposes out of which some were not recoverable as assessee failed to recover the same during the year to the tune of Rs.16,56,647/-. Likewise the money recoverable from the flat buyers to the tune of Rs.34,88,500/- which was shown as recoverable from the debtor was written off after the assessee failed to realize the same. The Ld. A.R. brought to the notice of the Bench that all these items which were written off were clearly

covered either under section 36(1)(vii) or under 37 of the Act as the sundry debtors became bad and could not be realized and similarly the loans, advances and deposits which were shown in the balance sheet given in connection with the business of the assessee became recoverable and therefore, the Ld. CIT(A) has grossly erred in upholding the order of AO on this ground.

7. On the other hand, the Ld. D.R. relied on the order of authorities below and submitted that assessee has failed to prove as to how the money recoverable from the flat purchasers, which are normally realized before handing over the possession of the flats, became bad. Likewise the advances or deposits given to the Municipal Corporation which could not be realized could not be written off as bad or business expenses. Under these circumstances, order of Ld. CIT(A) should be affirmed by dismissing the appeal of the assessee on this ground.

8. Having heard the rival submissions of both the parties and perusing the relevant materials on record, we find that in this case the AOP was formed for a limited purpose to construct a project called Shreepati Arcade and thereafter the AOP would cease to exist after selling off the flats. In the business of the construction certain advances are required to be given in connection with the business for obtaining various connections and approvals etc which are not apparently of capital in nature as the assessee is not engaged in the business of creation of any capital asset but holding it as

trading till these flats are sold in the market and thus any advances given or deposits placed in the municipal authorities are purely for business purposes which if not realizable or recoverable has to be allowed as wholly and exclusively in connection with the business of the assessee under section 36(i)(vii)/37 of the Act. Similarly, the money due from sundry debtors which could not realized till the last year has to be allowed under section 36(i)(vii) of the Act. In view of these facts, we are not in agreement with the conclusion reached by the Ld. CIT(A) that sundry balances written off were of capital in nature and could not be allowed. In our considered opinion all these advances/deposits are arising out of business exigencies of the assessee and have to be allowed whether or not routed through the profit and loss account. So far as sundry debtors are concerned , the same are allowable in the year of writing off. In view of these facts, we are inclined to reverse the order of Ld. CIT(A) on this issue and allow the ground raised by the assessee. The AO is directed accordingly.

9. The issue raised in ground No.2 is against the confirmation of disallowance of Rs.2,35,50,100/- by Ld. CIT(A) as made by the AO on account of non payment of license fee under the provisions of section 43B of the Act.

10. The facts in brief are that the assessee claimed by way of license fee in the P&L Account a sum of Rs.2,35,50,100/- which was shown as payable to BMC. Upon a query by the AO as to how the said claim is allowable in view of the provisions of section 43B of the Act, the assessee submitted that after

completion of multi storey building with basement, developer has to keep basement deposit with BMC and such deposit is non refundable and is part of the cost of the construction of the project. While finalizing the accounts, the assessee has debited to the P&L Account the amount payable to BMC towards basement deposit. This being the last year of the AOP, all the assets as well as liabilities were transferred to Mr. Rajendra R. Chaturvedi and it was decided between the members that all future liabilities with respect to the project will be discharged by Mr. Rajendra R. Chaturvedi. The AO has not found any merit in the submissions of the assessee and added the same to the income of the assessee on the ground that license fee payable to government agency cannot be allowed until and unless paid as per the provision of section 43B of the Act.

11. In the appellate proceedings, the Ld. CIT(A) also dismissed the appeal of the assessee on this point by holding that any non refundable deposit payable to BMC in connection with the multi storey building is a statutory liability and is covered under the provision of section 43B of the Act clearly. The Ld CIT(A) also noted that in order to claim the deduction of this amount, the payment has to be made on or before filing the return and thus dismissed the appeal of the assessee.

12. The Ld. A.R. submitted before the Bench that both the lower authorities have misconstrued and misappreciated the facts of the case by terming the non refundable deposit which

was to be mandatorily placed with the BMC in relation to multi storey construction of building with basement and same was not covered under the provision of section 43B of the Act. The Ld. A.R. submitted before us that since it was a last year of existence of AOP and all the liabilities and expenses were duly provided for in order to settle the account between the members of AOP per se and accordingly the amount was provided in the P&L account to the extent of Rs.2,35,50,100/- and thereafter all the assets and liabilities were transferred to the capital account of Mr. Rajendra R. Chaturvedi to be paid as per the demand of BMC which was not covered under the provision of section 43B. The Ld. A.R., without prejudice with the matter, also made an alternative plea that the issue be restored to the file of AO to examine and allow the same on a payment basis to Mr. Rajendra R. Chaturvedi, if the assessee does not succeed in this main prayer that same should be treated as expenses on mercantile basis.

13. The Ld. D.R., on the other hand, relied on the order of Ld. CIT(A) and submitted that the amount of deposit is purely a statutory in nature and fall within the purview of section 43B of the Act. Since the amount was not paid before the due date as contemplated by section 139(1) of the Act, the same was rightly disallowed by the AO and affirmed by the Id CIT(A).

14. Having heard the arguments of both the parties, we find that a sum of Rs.2,35,50,100/- was provided in the books of accounts and charged to the P&L Account on account of provision of non refundable deposits to BMC which is to be

compulsorily made in relation to a multi storey construction of a building with basement. The said deposit was not paid till the year end and it was transferred to the capital account of the partner Mr. Rajendra R. Chaturvedi for the payment to the BMC as and when the demand is raised by the BMC. The authorities below treated the same as statutory payment covered under the provision of section 43B of the Act and disallowed and added the same to the income of the assessee. After perusing the order of the authorities below, we find that facts are not coming out conspicuously as to the nature of the payment except that the assessee submitted before the authorities below that the said payment represented the non refundable deposit to be placed with the BMC for the multi storey building constructed by it. Under these circumstances, we are of the view that the matter requires a thorough examination and verification at the level of AO. Therefore, we restore it back to the file of AO with a direction to examine the same and decide afresh as per law and facts after affording a reasonable opportunity of being heard to the assessee. This ground is allowed for statistical purposes.

15. The issue raised in ground No.3 is against upholding the disallowance of Rs.47,35,028/- by Ld. CIT(A) as made by the AO regarding society maintenance charges.

16. The facts in brief are that during the assessment proceedings, the AO noticed that the assessee has debited an amount of Rs.47,35,028/- under the head society maintenance charges after adjusting/netting off interest

received on corpus fund created for the society to be formed. The AO specifically raised a query on the assessee as to how the said expenses were allowable on behalf of the society in the assessee's hands and should have been debited to the corpus fund created for the society since AOP is acting as an caretaker till the society is formed. The AO upon not receiving any cogent information/reply from the assessee, the said society's maintenance charges were added to the income of the assessee.

17. In the appellate proceedings, the Ld. CIT(A) upheld the disallowance by observing and holding as under:

"I have carefully gone through appellant's submission and the material on record and order of AO. The appellant has debited the society maintenance charges of Rs.47,35,028/- after netting of interest earned from bank on corpus fund created for the society formation. As per appellant until society is formed and management of building is handed over to society, it is the liability or responsibility of developer/builder to meet such maintenance expenses. The contention of the appellant is not tenable on facts and in law. In the instant case, since the flats were handed over to buyers or tenants, needless to say that after such handing over of flats, the maintenance charges had to be met by tenants and not by the builder/developer as clearly specified in sub clause (k) of clause 46 of the agreement dated 22/12/2004 entered into between appellant (promoter) and buyers/tenants. Further, as per clause 16 of the said agreement, maintenance charges are not to be borne by developer even for unsold flat. Thus, I do not find any infirmity in the order of the AO and he is justified in making disallowance of Rs.47,35,028/-. This ground of appeal is dismissed."

18. Having heard the rival submissions of both the parties and perused the material on record, we find that assessee charged Society Maintenance Charges of Rs.47,35,028/- after reducing the interest earned from the bank on corpus fund created for the society formation. The assessee has to look after the management and maintenance of the building as

caretaker till the society is formed. Thus, whatever expenditure incurred on the said maintenance of the building were charged to the P&L Account after reducing the interest received from the bank on the corpus fund created for the society formation. Ld. CIT(A) upheld the disallowance on the ground that assessee has already handed over the possession to the buyers/tenants the premises and therefore maintenance charges have to be made by the residents and not by the builder. During the course of hearing, the Ld. A.R. filed minutes of proceedings of the society dated 12.08.2017 and submitted that assessee has contributed Rs.1,20,00,000/- towards corpus funds in order to cover the various expenses. Therefore, the said expenses are covered in the mutual settlement reached between the builder and the society. The Ld. A.R. also filed a certificate before the Bench stating that society has provided some amount towards expenses as settlement amount for handing over to the society. In our view, the matter needs examination and verification at the level of AO as to whether the said expenses incurred by the assessee to the tune of Rs.47,35,028/- is in fact borne by the assessee in terms of the various documents filed by the assessee during the year. Accordingly, we restore this issue to the file of AO with a direction to decide the same afresh, as per facts and law after affording a reasonable opportunity of being heard to the assessee. The ground raised is allowed for statistical purpose.

19. Ground No.4 is against the confirmation of disallowance by Ld. CIT(A) as made by the AO on account of legal expenses to the tune of Rs.50,00,000/-.

20. The brief facts are that AO noticed that assessee has claimed Rs.50,00,000/- by way of legal expenses in the P&L Account. Upon a query by the AO, the assessee replied that the assessee had created a provision for legal fees amounting to Rs.50,00,000/- towards legal expenses likely to be incurred for the formation of society and handing over of management and affairs of the society to the elected body of the society and to cover up the expenses for conveyance deed for transferring the land to the society. However, the said plea of the assessee was not accepted by the AO and subsequently the same was added to the income of the assessee. The Ld. CIT(A) also sustained the addition by holding and observing as under:

“I have carefully gone through appellant's submission, material on record and the order of AO. The appellant has made a provision of legal expenses of Rs 50,00,000/- towards future liability to meet society formation and other legal expenses. There is no basis for arriving at such liability and it is also not clear to whom the same is payable. Further, there is no bill raised by any legal firm, company, etc. against the appellant to meet such liability. Perusal of clause 13 of the agreement dated 22/12/2004 entered into between appellant (promoter) and buyer/tenant unambiguously shows that such expenses have to be met out of separate account specifically maintained independently by appellant for which contribution is separately collected by the appellant developer from its tenants/buyers and further, as per clause 46(k) (Page 28) of the said agreement, the tenants /buyers have to contribute regularly for such outgoings, in as much as in the event and in future if such expenses are incurred, then the same have to be met by tenants/buyers and not by the developer. Considering the factual matrix as aforesaid of this uncrystallised liability, I do not find any merit in the contention of the appellant. The AO is justified in disallowing the provisions of legal expenses of Rs 50,00,000/-. This ground of appeal is dismissed.”

21. Having heard the rival submissions of both the parties and perusing the material on record including the documents filed by the Ld. A.R. in the form of certificate from the assessee and minutes of proceedings of the society , we find that the issue is seized off between the society and the assessee as is apparent from the documents placed before us. Since these documents require verification and examination at the level of AO, we restore the issue back to the file of the AO with the direction to examine the same and decide the issue afresh as per law after affording the reasonable opportunity of hearing to the assessee. The ground is allowed for statistical purpose.

22. In the result, appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 14.05.2018.

**Sd/-
(Mahavir Singh)
JUDICIAL MEMBER**

Mumbai, Dated: 14.05.2018.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

**Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER**

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.