

आयकर अपीलिय अधीकरण, न्यायपीठ – “B” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA
(समक्ष) श्री ऐ. टी. वर्की, न्यायीक सदस्य एवं डॉ. अर्जुन लाल सैनी, लेखा सदस्य)
[Before Shri A. T. Varkey, JM & Dr. A. L. Saini, AM]

I.T.A. No. 1934/Kol/2014
Assessment Year: 2008-09

M/s. Mili Marketing Pvt. Ltd. (PAN: AABCM7097M)	Vs.	Deputy Commissioner of Income-tax, Central Circle-VI, Kolkata
Appellant		Respondent

Date of Hearing	03.05.2018
Date of Pronouncement	20.07.2018
For the Appellant	Shri Somnath Ghosh, Advocate
For the Respondent	Shri S. Dasgupta, Addl. CIT, DR

ORDER

Per Shri A.T.Varkey, JM

This appeal preferred by the assessee is against the order of Ld. CIT(A), Central-1, Kolkata dated 16.07.2014 for AY 2008-09.

2. Ground no. 1 is not pressed, therefore, dismissed.
3. Ground no. 2(a), (b) and (c) are against the action of Ld. CIT(A) in confirming addition of Rs.9,42,327/- which assessee received back from booking agent of the flat it agreed to purchase.
4. Brief facts are that the assessee is a private limited company which was incorporated on 29.04.1997 with the main objects of making investments in shares and mutual funds and providing loans and advances. The AO found that the assessee had received a sum of Rs.9,42,327/- from M/s. S.M. Estate on account of refund of commission paid on purchase of an apartment of M/s. DLF group. According to assessee, it had booked an apartment through an agent, M/s. S. M. Estate and was making payment according to their schedule and after best bargain, the assessee had got refund of certain commission and duly disclosed the same by reducing the amount from the value of such apartment in its balance sheet. However, such elucidation did not find favour of the AO. According to AO, since the payee had deducted tax at source u/s. 194H of the Act on such payment, the AO conceived the

same as a revenue receipt by applying the provisions of sec. 28(iv) of the Income-tax Act, 1961 (hereinafter referred to as the "Act") and concluded that "*In the instant case the assessee company had got benefit in form of commission or discount as claimed by the assessee*" and added the said amount as income of the assessee. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A), who was pleased to dismiss the same. Aggrieved, the assessee is before us.

5. We have heard both the parties and perused the records. We note that assessee is not in the business of real estate. It had booked an apartment in "The Belaire" in DLF City on 10.11.2006 relevant to AY 2007-08, through the selling agent of DLF Group M/s. S. M. Estates. In the year under consideration, the assessee company had made total payment of Rs.1,47,97,793/- by 31.03.2008 and was able to retrieve a part of the commission M/s. S. M. Estates received from DLF Group (seller). By the process it got back Rs.9,42,327/-, which the assessee reduced from the advance given to DLF for purchase of flat as well as credit of TDS of Rs.1,12,787/-. We note that assessee was allotted apartment No. D-174 at the "The Blaire" in DLF City vide allotment letter dated 20.11.2006. Before that (the allotment of flat) itself the assessee had an agreement dated 08.11.2006 with the agent M/s. S. M Estates through which it booked the flat for buying the apartment at a consideration of Rs.3,06,47,500/-. It was agreed by M/s. S. M. Estates that immediately after the assessee had made 25% of consideration to M/s. DLF as agreed upon as per payment schedule of DLF Ltd. and in the event the agent gets its brokerage released at 4%, the agent M/s. S. M. Estate in turn was ready to pay back 3.5% i.e. Rs.10,72,662.50 to the assessee the buyer of flat. On this agreement, the assessee agreed to buy the flat at a total consideration of Rs.3,06,47,500/- through the agent M/s. S. M. Estates. We note on 31.03.2008 the assessee had remitted Rs.1,47,97,993/- in DLF account as part payment of consideration and as per agreement dated 08.11.2006 between the assessee and the agent when M/s. S. M. Estates received 3.5% of the 4% commission it received, in-turn gave assessee Rs.9,42,327/- and TDS credit of Rs.1,12,787/-, which the assessee claimed to have reduced the cost of asset, so it reduced the sum from the advances given to DLF for purchase of apartment. However, this treatment given in the books of the assessee was not acceptable to AO/LD. CIT(A), who were of the opinion that it is a revenue receipt and taxable u/s. 28(iv) of the Act. The

nature of expenditure in the hands of assessee for acquiring the apartment, it is a capital expenditure which is not in dispute. Only dispute is in respect of the receipt in the hands of assessee of Rs.9,42,327/- and TDS credit of Rs.1,12,787/- on the said amount. It is now well settled that in order to find out whether a receipt is a capital or revenue receipt one has to see what it is in the hands of the receiver and not its nature in the hands of payer. In other words, the nature of receipt is determined entirely by its character in the hands of the receiver and the source from which the payment is made has no bearing on the question. Here in this case, the assessee has received the amount in question from the agent through whom the assessee booked the flat, that too before the allotment was made by the M/s. DLF. Before the allotment of flat by M/s. DLF itself, the agent had agreed to part with 3.5% of its 4% it receives from M/s. DLF as brokerage when assessee remitted 25% of the total consideration as per schedule of payment fixed by M/s.DLF. Therefore, we note that the assessee had agreed upon buying this apartment of DLF through the agent M/s. S. M. Estates with the aforesaid agreement knowing very well that cost of the apartment will be reduced by Rs.10,72,662.50 when 25% of the total consideration of Rs.3,06,47,500/- is made by the assessee company. So, when DLF gave brokerage to agent M/s. S. M. Estates it may be revenue receipt in the hands of the M/s. S. M. Estates. However, when part of the said receipt is passed on by M/s. S. M. Estates, to the hands of the assessee company in order to find out whether the receipt is a capital or revenue receipt, one has to see what is the nature/character of receipt in the hands of the receiver and not its nature in the hands of the payer as held by the Hon'ble Supreme Court in Empire Jute Co. Ltd. Vs. CIT (1980) 124 ITR 1 (SC). So what we have to see is what is character of income in the hands of the assessee. So, in these facts and circumstances of the case as enumerated above, the assessee on receipt of Rs.9,42,327/- on which TDS of Rs.1,12,787/- was deducted by M/s. S. M. Estates, in its books (i.e. assessee's book) reduced from the advances given to the DLF for purchase of its flat is legally correct and the AO/Ld. CIT(A) erred in treating the same as revenue receipt. So this ground of appeal of assessee is allowed.

6. Ground no. 3 relates to disallowance u/s. 14A read with Rule 8D. The AO found that the assessee had earned dividend income of Rs.1,25,12,551/- which was claimed exempt. It was submitted before the AO by the assessee that substantial disallowance had already been

suo moto offered u/s. 14A of the Act. The assessee also submitted that it had already added in the computation of income sum of Rs.47,307/- and Rs.25,000/- on account of de mat charges and membership and subscription and also Rs.4,06,138/- out of other expenses. However, the AO invoking Rule 8D(2)(iii) made disallowance of Rs.9,08,032/-. So, according to assessee, the AO was not justified in making further disallowance under Rule 8D(2)(iii) of the Rules. On appeal, the Ld. CIT(A) directed the AO to compute the disallowance under Rule 8D(2)(iii) by considering only those investments which have yielded tax free income during the year and make addition only if the disallowance so computed exceeds the sum as voluntarily offered by the assessee by following the decision of ITAT in the case of REI Agro Ltd. Vs. DCIT in ITAT No. 1331/Kol/2011. Aggrieved, assessee is before us.

7. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the Ld. CIT(A) directed the AO to compute the disallowance under Rule 8D(2)(iii) by considering only those investments which have yielded tax free income during the year and make addition only if the disallowance so computed exceeds the sum as voluntarily offered by the assessee by following the decision of ITAT in the case of REI Agro Ltd. Vs. DCIT in ITAT No. 1331/Kol/2011. Since the Ld. CIT(A) adjudicated the issue as stated above by following the decision of ITAT, Kolkata Benches consistently following the dictum of law laid in REI Agro, supra, the action of Ld. CIT(A) is confirmed. Therefore, this ground of appeal of assessee is dismissed.

8. In the result, the appeal of assessee is partly allowed.

Order is pronounced in the open court on 20.07.2018.

Sd/-
[Dr. A. L. Saini]
Accountant Member

Sd/-
[A.T. Varkey]
Judicial Member

Dated : 20th July, 2018

JD.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – M/s. Mili Marketing Pvt. Ltd., C/o, S. N. Ghosh & Associates, Advocates, Seven Brothers Lodge, P.O. Buroshibtala, P.S. Chinsurah, Dist. Hooghly, Pin-712105.
2. Respondent – DCIT, C.C. VI, Kolkata.
3. The CIT(A), Central-1, Kolkata. (sent through e-mail)
4. CIT Kolkata
5. DR, ITAT, Kolkata. (sent through e-mail)

/True Copy,

By order,

Sr. Pvt. Secretary