

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI**

**BEFORE SHRI G.D. AGRAWAL, HON'BLE PRESIDENT
AND
SHRI AMIT SHUKLA, JUDICIAL MEMBER**

ITA No. 767/DEL/2015
Asstt. Year 2008-09

Jasmine Buildtech Pvt. Ltd. M-11, Middle Circle, Connaught Circus, New Delhi 110 001 PAN AABCJ6865E	Vs.	ACIT Central Circle-23, E-2, ARA Centre, Jhandewalan Extension New Delhi.
(Appellant)		(Respondent)

ITA No. 507/Del/2015
Asstt. Year: 2008-09

DCIT, Central Circle-32 New Delhi.	Vs.	Jasmine Buildtech Pvt. Ltd. M-11, Middle Circle, Connaught Circus, New Delhi 110 001 PAN AABCJ6865E
(Appellant)		(Respondent)

Assessee by:	Shri Ajay Bhagwani, CA
Department by :	Shri Sanjeet Singh CIT DR
Date of Hearing	21/06/2018
Date of pronouncement	19/09/2018

ORDER

PER AMIT SHUKLA:

The aforesaid cross appeals have been filed by the assessee as well as by the revenue against impugned order dated 31.10.2014

passed by Ld. CIT (Appeals) XXXIII for the quantum of assessment passed u/s 153A for the assessment year 2008-09.

2. In assessee's appeal, assessee has raised mainly two issues, firstly, Ld. CIT (A) has erred in holding that wherever the date of PDCs are extended, interest is to be taken to have paid @15% p.a. in cash outside the books of account and is to be treated as undisclosed income; and secondly, disallowance u/s 40A (3) amounting to Rs. 80,000/-.

3. Whereas in the Revenue's appeal following grounds have been raised:-

1. *“On the facts and in the circumstances of the case and in law, CIT(A) has erred in directing the AO to compute the interest on Post Dated Cheques from the date after the six months of issue of such post dated cheques i.e. date of execution of sale-deed.*

2. *On the facts and in the circumstances of the case and in law, CIT (A) has erred in holding that additional payment made to the owner of the land is allowable as an expense u/s 37 of the Act.”*

4. We will first take up assessee's appeal. At the outset Ld. Counsel for the assessee submitted that similar issues have been decided in favour of the assessee by the Tribunal in assessee's own case for the assessment year 2007-08 in ITA No. 1679/DEL/2013 and ITA No. 1767/Del/2013 vide order dated 21.11.2017.

5. Before us Ld. CIT (DR) has given his detailed written submissions which for the sake of record is reproduced hereunder:-

“2. As regards the issue of PDC interest, the CIT(A) has directed interest to be computed if date of encashment of PDC is more than six months from the date of sale deed and has asked the AO to

verify the same, ignoring chart in para 2.5 of the assessment order reflecting no such case. Therefore, the order of CIT (A) is without application of mind apparently on the basis of facts in other cases of the group with him. However, there being no such case the assessee's grievance and Ground No 2 to 2.3 are not understood.

3. *As regards Ground No 4, the CIT(A) has confirmed the addition as per para 7.3 of the order. Most of the decisions relied upon by the assessee, pertaining to various cases of the group, have followed the decisions of Hon'ble ITAT in the case of Westland Developers P. Ltd and IAG Promoters & Developers P. Ltd besides the decision in the case of ISG Estate P. Ltd. The very basis of the decisions of Hon'ble ITAT relied upon by the assessee is that a payment which is reimbursed and not taken to P & L A/c cannot be disallowed u/s 37(1) or section 40A(3). This finding is in contradiction with the decision of the Apex Court in the case of Tuticorin Alkali Chemicals & Fertilizers Ltd. reported in 227 ITR 0172. In para 14 of the said decision the Apex Court has observed as under:*

"It is true that this Court has very often referred to accounting practice for ascertainment of profit made by a company or value of the assets of a company. But when the question is whether a receipt of money is taxable or not or whether certain deductions from that receipt are permissible in law or not, the question has to be decided according to the principles of law and not in accordance with accountancy practice. Accounting practice cannot override s.56 or any other provision of the Act. As was pointed out by Lord Russell in the case of B. S. Footwear Ltd. the IT law does not, mark step by step in the footprints of the accountancy profession. "

4. Moreover, the assessee's contention defeats the very purpose of Sec.37(1) and section 40A(3). The assessee is contesting that if an expenditure is incurred by B and reimbursed by A to B, the same cannot be disallowed in the hands of B. With such an interpretation if A has to incur any expenditure in cash in violation of Sec.40A(3) or an expenditure which is not allowable u/s 37(1) **including illegal payment and bribes**, it can always be ensured that all such payments are made by B in cash or otherwise and are reimbursed by A to B by cheque. In such case no disallowance can be made in the hands of A, as the payment from A to B is not disputed. However, the exact nature and genuineness of purpose of payment cannot be examined in the hands of A as it has been ultimately been paid by B. That means disallowance cannot be made u/s 40A(3)/37(1) in case of A, as A has not directly made such cash expenditure or illegal expenditure. The disallowance cannot be made in the case of B as well (as per assessee's contention) as in the B's books the amount has been reimbursed. This reduces Sec.40A(3) and 37(1) to silence.

4.1 The Apex Court in the case of Surat Art Silk Cloth Manufacturer Association, reported in **121 ITR 01 dated 19.11.1979** (5 Member Bench decision) has observed as under:

"The construction contended for the Revenue would have the effect of rendering s.11(4) totally redundant after the enactment of section 13(1)(bb). A construction which renders a provision of the Act superfluous and reduces it to silence cannot be accepted."

5. Therefore, the term expenditure for the purpose of Sec. 40A(3)/37(1) means all out goings. It is a term of wide import and has not been defined in the Act. Therefore, as per the decision of the Apex Court (supra) and another decision in the case of **Attar Singh**

Gurmukh Singh reported in 1991 AIR 2189, all outgoings are to be treated as expenditure. Even as per basic concepts of accountancy the revenue receipt is expenditure incurred plus profit component. If profit component is kept zero between associated enterprises, it does not take the outgoings out of definition of expenditure. In the case of assessee it was entitled to a payment of cost of land + Rs.35,000 per acre from its group company for land consolidation services and development rights. **It was an understanding/agreement between two associate concerns and the revenue of the assessee was decided on cost plus basis**, which is also one of the method for determining arm length price in transactions between associate enterprises. The fact that the charges for consolidation services/development rights have been fixed at cost + Rs.35,000/- per acre does not take the cost component of revenue receipt outside the definition of revenue receipt and expenditure. Else it would give licence to everyone to incur disallowable expenditure u/s 37(1) and 40A(3) through associated concern floated for this purpose. Applicable by of section 40a(ia) would also be impossible, if it is accepted that it is not an expenditure. That reduces even section 40a(ia) to silence.

6. To summarise the case of the appellant rests of the decision of Hon'ble ITAT dated 31st October, 2014 for A.Y. 2008-09 in the case of IAG Promoters and Developers P. Ltd and the decision in the case of West Land Developers P. Ltd., A.Y. 2006-07 decision dated 22.08.2014. **In both the above decisions the relief has been given only by holding that an expenditure which has not been claimed in P & L A/c cannot be disallowed u/s 37(1) and 40A(3). The contradiction of said findings with the decisions of the Apex Court have already been highlighted in the above submissions.**

7. As regards Ground No 3 to 3.3 on the issue of additional payment, the AO has discussed the issue from page 6 onwards. The decision of CIT(A) is on page 38. As regards various decisions of Hon'ble ITAT, which have followed the decision in the case of IAG Promoters & Developers P. Ltd. A.Y. 2008-09 (supra), ground in the case of IAG Promoters & Developers P. Ltd. A.Y. 2008-09 (supra) was payment in violation of Stamp Duty Act. However, the relief has been given by setting aside the issue for verification as to whether the payment had been claimed u/s 37(1) as expenditure or not. **The issue of violation of Stamp Duty Act was not decided. Moreover, the basis of relief by Hon'ble ITAT, was that such expenditure was not claimed in P & L A/c. The Revenue relies on its submissions made in respect of disallowance u/s 40A(3) (supra) as all the earlier decisions are Sub-Silentio in respect of the arguments of the Revenue. Reliance is also placed on the decision dated 30.11.017 of Hon'ble ITAT, Ahmedabad in ITA 3451/Ahd/2014 in the case of Mayurbhai Mangaldas Patel, holding that an error may not be perpetuated in the name of binding nature of judicial precedence.**

6. The brief facts are that assessee is a group company of BPTP Ltd., which is the flagship company, engaged in the business of real estate development. A search and seizure was conducted on BPTP Ltd. on 7.12.2010 including in the case of the assessee and accordingly, notice u/s 153A was issued. The relevant facts as noted by the AO in his assessment order is that during the assessment proceedings u/s 153A it was found that assessee used to pay part payment of the sale consideration in respect of the land purchased at the time of execution of the sale deed and the payment of balance sale consideration were invariably made through post dated cheques and for the intervening

period i.e. period between the date of sale deed and the date of encashment of PDCs interest was paid in cash to the vendors of the land by the vendee company on monthly basis @ 1.25% p m , on the amount of PDCs and this cash payment of interest by the vendee company was not accounted for by it in its books of account. Then addition was made in several group companies of BPTP group. The Ld. AO following the orders in the group case of BPTP and looking to the fact that same business model / *modus-operendi* is permeating in the assessee's case also, hence, he held that the interest paid through cash to the vendors on the amount of PDCs @ 1.25% i.e. 15% per annum outside its books of account. Accordingly, he computed the disallowance of interest at Rs. 8,76,372/-. Apart from that, he also noted that certain additional payments were made to the vendors of the land basically farmers and these additional payments were over and above the sale consideration mentioned in the sale deeds. These payments have been made much after the execution of the sale deeds without specifying the purpose. In the case of assessee also similar additional payment of Rs. 26,80,936/- was made. The AO thus, following the earlier appellate orders of the group company added the sum of Rs. 26,80,936/-. He further noted that assessee company had made part payment of total sale consideration in cash credit of Rs. 80,000/- on which he held that there is a contravention of section 40A(3) and accordingly an addition of Rs. 80,000/- was made, again following the earlier orders passed in the group.

7. Ld. CIT(A) following the findings given in Business Park Promoters Pvt. Ltd., being one of the BPTP groups, directed the AO to compute unaccounted interest on post dated cheques to the farmers in the similar lines. On the issue of addition of Rs. 2680,936/-, he has confirmed the addition disagreeing the ITAT order in the case of M/s Westland Developers P Ltd. in ITA No.1752/Del/2013. As regard

addition of Rs. 80,000/- made u/s 40(A)(3) is concerned, has also been confirmed by him by not following the said ITAT order.

8. We find that all these issues have been discussed threadbare by the Tribunal in assessee's own case for the assessment year 2007-08. In so far as the addition on account of alleged amount paid in cash outside the books this Tribunal has decided this issue which has been raised by the revenue as well as by the assessee in the following manner :-

"5. Now coming to the aspect of interest on PDCs, it is an admitted fact that the assessee is a part of BPTP Group and similar additions were made in respect of many group entities. Some matters were disposed of by the Tribunal also. Ld. AR submitted before us that in respect of the interest on PDCs, when a similar addition was made in the case of M/s IAG Promoters and Developers Pvt. Ltd., a coordinate bench of this Tribunal in ITA No. 1674/Del/2013 examined the issue at length and reached a conclusion that the directions given by the Ld. CIT (A) to recalculate the interest on PDCs was on a sound logic and was upheld. The observations of the Tribunal, vide paragraph no. 5 are as follows:

"After examining the loose papers seized at the time of search at the assessee's premises, it was noticed that interest is paid on the PDCs only during the period of extension of PDCs and, therefore, he directed the Assessing Officer to recomputed the interest on PDCs at the time of extension of the PDCs. He has further observed that if it is not possible to work out the extension of PDCs in each case, then the Assessing Officer is directed to recomputed interest on PDCs after six months from the date of issue of the PDCs. Therefore, the ground of appeal of the Revenue that the CIT(A) deleted the addition of -5,06,625/ - made by the

Assessing Officer on account of interest on PDCs is factually incorrect and contrary to the order of the CIT(A). The CIT(A) directed to recalculate the interest on PDCs and there was a sound logic for such direction. His direction is based on material found and seized at the time of search. In view of the above, we do not find any justification to interfere with the order of learned CIT(A) in this regard ... "

6. *Now coming to the additional payment over and above the agreement price, a similar payment was involved in the case of M/ s IAG Promoters and Developers Pvt. Ltd. and vide paragraph no. 11, the Tribunal considered this issue and found that there was neither any finding by the Ld. CIT (A) nor by the Assessing Officer on the aspect of whether such a payment was claimed as an expenditure while computing its business income, as such, the issue was set aside to the file of the AO directing him to verify whether the assessee has claimed such payment as an expenditure, and in case no deduction was claimed the question of any disallowance would not arise, and its only if the deduction was claimed then. the AO would work out the disallowance as directed by the Ld. CIT. Relevant observations are as follow:*

"11. We have carefully considered the submissions of both the sides. So far as the legal principle is concerned, we agree with the legal proposition made by the learned counsel that when no expenditure is claimed by the assessee, the question of disallowing the same by the Assessing Officer does not arise. It was explained by the learned counsel that the assessee was purchasing the land for and on behalf of another company of BPTP Group viz., M/ s Countrywide Promoters Pvt. Ltd. and whatever payment is made by the assessee to land owners or their relatives for purchase of land was debited by the assessee to the account

of CWPPPL and the payment for purchase of land whether as per stamp duty or additional payment has not been claimed as an expenditure by the assessee. We find that on this factual aspect, there is neither any finding by the CIT(A) nor by the Assessing Officer. The ITAT in the case of M/ s Westland Developers Pvt. Ltd. (supra) has also accepted the principle that when the expenditure is not claimed by the assessee, the same cannot be disallowed. In fact) there cannot be any dispute to the said legal proposition. However) the question still remains whether such payment i.e. additional payment made by the assessee to land owners or their relatives is claimed by the assessee as a deduction or not. We, therefore, set aside this matter to the file of the Assessing Officer and direct him to verify whether the assessee has claimed the payment of Rs.1,01,32,501/- as an expenditure while computing its business income. If no deduction is claimed) then the question of any disallowance would not arise. If the deduction is claimed, then the Assessing Officer would work out the disallowance as directed by the CIT(A).”

7. *Nothing contrary is brought to our notice on either of the aspects. Hence, while respectfully following the above, we upheld the findings of the Ld. CIT (A) and dismiss the grounds of appeals of both assessee and the Ld. CIT (A) on the aspect of interest on PDCs and set aside the issue relating to the payments made in addition to the agreement amount to the file of Ld. AO for verification as to whether the assessee has claimed the payment of as an expenditure while computing its business income. If no deduction is claimed, then the question of any disallowance would not arise. If the deduction is claimed, then the Assessing Officer would work out the disallowance as directed by the CIT(A).”*

9. Thus, respectfully following the earlier year precedents we also give similar direction.

10. In so far as issue of disallowance of additional payment which are allowable u/s 37, the Tribunal has decided this issue in para 6 above and matter was restored to the file of the AO for re-computation. We also give similar direction to the Assessing Officer, whether the assessee has claimed the payment as expenditure while computed in business income or not.

11. Lastly, coming to the issue of disallowance u/s 40 (A)(3), the Tribunal has decided this issue in the following manner :-

“8. Now coming to the disallowance u/s 40(A)(3), similar pleas taken by the assessee to the effect that when no payments were claimed as expense the question of deduction does not arise and in the case of a group company namely Westland Developers P. Ltd. vs. ACIT, I.T.A .No. 1752/Del/2013 (Assessment Year-2006-07) a coordinate bench of this Tribunal held as follows:

“10. We have also taken ourselves through the judgement of the Jurisdictional High Court in the case of CIT vs. Industrial Engineering Projects Pvt. Ltd. (cited supra) which has been relied upon before us for the proposition that reimbursement of expenses cannot be treated to be a Revenue receipt. How the judgement of the Apex Court in Tuticorin Alkali Chemicals & Fertilizers is applicable to the facts of the present case has not been set out in the order of the authorities nor has the Ld. DR been able to address the applicability of the said judgement to the issue at hand. We have taken ourselves through the said judgement and seen that it proceeds on entirety different facts and circumstances and has no applicability to the facts of the present case. Consequently, it is seen that from the ratio of the judgements

relied upon before the CIT(A) and also before us which have been discussed in the earlier part of this order no arguments have been advanced by the Revenue so as to contend how they are not applicable to the case at hand, no distinguishing fact, circumstance or position of law has been relied upon so as to come to a contrary finding than the one arrived at. Accordingly on a consideration of the peculiar facts and circumstances of the case and the judgements relied upon 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 and the assessee has successfully demonstrated that the payment were re-imbusement made by CWPPL."

9. We have perused the orders in the group company's cases and it is held in both M/s IAG Promoters and Developers Pvt. Ltd. and Westland Developers P. Ltd. that when the payments are not claimed as expense no disallowance arises. We, therefore, hold that disallowance u/s 40 (A)(3) is not sustainable and the same has to be deleted. We direct the AO to do so. Grounds of appeal on this aspect are answered accordingly."

Accordingly, respectfully following the past precedent which is applicable mutatis-mutandis, the disallowance u/s 40(A)(3) is deleted.

12. Consequently, the appeal of the assessee and revenue are allowed in part for statistical purposes.

Order pronounced in the Open Court on 19th September, 2018.

sd/-

sd/-

(G.D.AGRAWAL)
PRESIDENT

(AMIT SHUKLA)
JUDICIAL MEMBER

Dated: 19/09/2018

Veena

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi