

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H" MUMBAI**

**BEFORE SHRI C.N. PRASAD (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 6686/MUM/2016
Assessment Year: 2012-13**

M/s Kanakia Spaces Pvt. Ltd. 215 Atrium, 10 th floor, Near Marriot Courtyard Hotel, Andheri-Kurla Road, Andheri (E), Mumbai- 400093.	Vs.	ACIT, Central Circle- 4(1), Air India Building, 19 th floor, Nariman Point, Mumbai.
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PAN No. AAACK2629J

Appellant

Respondent

Assessee by : Mr. Anuj Kisnadwala, AR
Revenue by : Mr. Manoj Kumar Singh, DR

Date of Hearing : 07/08/2018
Date of pronouncement : 31/10/2018

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the assessee. The relevant assessment year is 2012-13. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-52 [in short 'CIT(A)'], Mumbai and arises out of the assessment order u/s 143(3) of the Income Tax Act 1961, (the 'Act').

2. The 1st and 2nd ground of appeal

1. The Ld. CIT(A), erred in law & on facts in confirming order of the Assessing Officer in adding the ALV of the unsold units which constitutes stock-in-

trade of the appellant as "Income from house property" u/s 22 of the Income Tax Act, 1961.

2. The appellant prays that the order passed u/s143(3) adding sum of Rs.1,55,07,727/- as ALV of the unsold units under the head "Income from house property" is bad in law & should be quashed.

3. Briefly stated, the facts are that the appellant is in the business of real estate development. During the year under consideration, its project Western Edge, Ananta & 351 Icon got completed. The appellant has offered income in respect of sale of flats/units in the above projects and balance unsold flats/units in the above projects is shown as stock-in-trade. The appellant is holding such unsold flats/units of Rs.1,85,95,17,274/- under the head 'closing inventories'. During the course of assessment proceedings, the Assessing Officer (AO) asked the assessee to explain as to why the Annual Letting Value (ALV) of such unsold flats/units cannot be taxed as income from house property as per the provisions of section 22 of the Act. In response to it, the appellant filed a reply stating that "it is holding unsold flats/units as stock-in-trade to earn business income and not rental income. The same cannot be taxed on the basis of ALV notionally because the company is an occupant and such an occupation is in the course of business as builder and developer. Also most of the flats/units are sold in near future or remains to be sold on account of non-approval etc." The appellant also submitted evidence in the form of booking memos etc. in support of its claim that the same is sold in near future.

However, the AO was not convinced with the above explanation of the appellant and relying on the decision in the case of *Ansal Housing*

Finance & Leasing Co. Ltd. (2013) 354 ITR 180 (Del), worked out the ALV at Rs.2,21,53,896/- as the ALV of unsold flats/units and added sum of Rs.1,55,07,727/- under the head 'Income from House Property' after giving deduction @ 30% u/s 24(a) of the Act.

4. Aggrieved by the order of the AO the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) relied on the decision in *Ansal Housing Finance & Leasing Co. Ltd.* (supra) and observing that the facts in the case of the appellant are identical to the facts in the above case, confirmed the addition of Rs.1,55,07,727/- made by the AO.

5. Before us, the Ld. counsel of the assessee files a Paper Book containing the judgement of the Hon'ble Gujarat High Court in *CIT v. Neha Builders P. Ltd.* 296 ITR 661 and the order of the ITAT Mumbai in the case of *Runwal Constructions v. ACIT* (ITA Nos. 5408/Mum/2016 and 5409/Mum/2016 dated 22.02.2018), *ITO v. Arihant Estates Pvt. Ltd.* (ITA No. 6037/Mum/2016 dated 27.06.2018), *C R Developments P. Ltd. v. JCIT* (ITA No. 4277/Mum/2012 dated 13.05.2015), *Sarang Property Developers Pvt. Ltd. v. ACIT* (ITA No. 5620/Mum/2016 dated 26.06.2015). The Ld. counsel relies on the above decisions.

6. *Per contra* the Ld. DR relies on the decision in *Ansal Housing Finance & Leasing Co. Ltd.* (supra) and supports the order passed by the Ld. CIT(A).

7. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decision are given below.

On the above issue, we come across one decision for the assessee and another decision for the revenue. The decision in *Neha Builders Pvt.Ltd.*(supra) is for the assessee, whereas the decision in *Ansal Hsg. Finance & Leasing Co. Ltd.*,(supra) is for the Revenue. The Hon'ble Supreme Court in the case of *CIT v. Vegetable Products* 88 ITR 192 (SC) has held that "if two reasonable constructions of a taxing provisions are possible, that construction which favours the tax payer must be adopted." Thereby, we will follow the decision in *Neha Builders Pvt.Ltd.* (supra).

7.1 The following sub-section (5) has been inserted after sub-section (4) of section 23 by the Finance Act, 2017, w.e.f. 01.04.2018:

"(5) Where the property consisting any building or land appurtenant thereto is held as stock-in-trade and the property or any part of the property is not let during the whole or any part of the previous year, the annual value of such property or part of the property, for the period up to one year from the end of the financial year in which the certificate of completion of construction of the property is obtained from the competent authority, shall be taken to nil."

Thus, in order to give relief to Real Estate Developers, section 23 has been amended w.e.f. AY 2018-19 (FY 2017-18). By this amendment, it is provided that if the assessee is holding any house property as his stock-in-trade which is not let out for the whole or part of the year, the annual value of such property will be considered as Nil for a period up to one year from the end of the financial year in which a completion certificate is obtained from the competent authority.

In view of the above amendment to section 23, we are not advertent to the case laws relied on by the Ld. counsel and Ld. DR.

In the instant case, the assessee is in the business of real estate development. The issue of taxability is with regard to unsold flats/units of Rs.1,85,95,17,274/- held by the appellant under the head 'Closing Inventories'. The AY is 2012-13. In view of the insertion of sub-section (5) in section 23 by the Finance Act, 2017, w.e.f. 01.04.2018 narrated hereinbefore, we set aside the order of the Ld. CIT(A) and allow the 1st & 2nd grounds of appeal.

8. The 3rd and 4th ground of appeal

3. The Ld. CIT(A), erred in law & on facts in confirming order of the Assessing officer in respect of disallowance of interest expenditure to the extent of Rs.2,26,46,285/- out of total interest paid of Rs.85,16,24,163/- on notional basis.
4. The appellant prays that the order passed u/s. 143(3) disallowing interest expenditure of Rs.2,26,46,285/- is bad in law & should be quashed.

8.1 The Ld. counsel of the assessee has also filed a letter requesting for admission of additional evidence under Rule 29 of the ITAT Rules, 1963. It is accompanied by a Paper Book containing (i) chart showing details of loans given, (ii) balance sheet and profit and loss account for the year ended 31.03.2005, 31.03.2007, 31.03.2009 and 31.03.2010.

It is stated by him that the entire loans and advances of Rs.13,32,13,440/- were granted in earlier years. It is further stated that in each of the years in which the loans were advanced by the assessee, it had sufficient interest-free funds available with it to cover the amount of

loan advanced by it. In this regard, reliance is placed by him on the decision in *CIT v. Reliance Utilities & Power Ltd.* 313 ITR 340 stating that no disallowance of interest u/s 36(1)(iii) is required to be made if the assessee had sufficient interest-free funds to cover the loans advanced by it.

Also it is submitted that due to lack of professional advice, the said documents could not be produced before the lower authorities. It is stated that these additional evidences would go to the root of the matter in deciding whether the assessee had sufficient interest-free funds in the respective years in which the advances were given. In respect of the principles of admitting additional evidence, the Ld. counsel refers to the decision in *CIT v. Text Hundred Industries Ltd.* 351 ITR 57 (Del) and *Jeyapore Timber & Veneer Mills (P.) Ltd. v. CIT* 137 ITR 415 (Gau).

The Ld. DR submits that the application for admission of additional evidence filed by the assessee should be dismissed by the Tribunal because the details in the form of balance sheet and profit and loss account for the year ended 31.03.2005, 31.03.2007, 31.03.2009 and 31.03.2010 could have been filed before the AO or the CIT(A). Nothing stopped the assessee from filing these documents before the above authorities. With these arguments, the Ld. DR opposes the admission of the additional evidence filed by the assessee.

We have heard the rival submissions, and perused the relevant materials on record. We are of the considered view that admitting the above additional evidence would be necessary for proper adjudication of the matter in view of the decision in *Reliance Utilities & Power Ltd.*

(supra). Therefore, we admit the above additional evidence filed by the assessee.

9. During the year, the appellant has claimed interest expenditure of Rs.85,16,24,163/- on unsecured loans against interest income of Rs.62,94,96,522/- on loans and advances given. During the course of assessment proceedings, the AO asked the assessee to explain as to why proportionate interest expenses of Rs.2,26,46,285/- @ 17% p.a. on interest free loans and advances outstanding at the end of the year termed as "friendly loans" of Rs.13,32,13,440/- should not be disallowed. In response to it the assessee submitted that its own funds plus non-interest bearing funds are sufficient enough to cover interest-free friendly loans and advances made. However, the AO was not convinced with the above explanation of the assessee and relying on the decision in the case of *Punjab Stainless Steel Inds* (2011) 324 ITR 396 (Del) held that interest paid u/s 36(1)(iii) is allowed in respect of capital borrowed for the purpose of business and profession for commercial expediency and thus disallowed proportionate interest expenses of Rs.2,26,46,285/- on notional basis.

10. In appeal, the Ld. CIT(A) held that the assessee had failed to prove that it had interest-free funds available with it as on the date of advancing interest-free loans to sister concerns and close relatives. Further, it also failed to establish that such loans and advances were given for commercial expediency. Thus the Ld. CIT(A) dismissed the appeal filed by the assessee.

11. Before us, the Ld. counsel of the assessee relies on the decision in *Reliance Utilities & Power Ltd.* (supra) and the documents contained in the Paper Book filed along with application for admission of additional evidence.

On the other hand, the Ld. DR strongly supports the order passed by the Ld. CIT(A).

12. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decision are given below.

In the case of *Reliance Utilities & Power Ltd.* (supra), the assessee claimed deduction of interest on borrowed capital. The AO recorded a finding that the sum of Rs.213 crores was invested out of its own funds and Rs.147 crores was invested out of borrowed funds. Accordingly, he disallowed interest amounting to Rs.4.40 crores calculated at 12% per annum for three months from January 2000 to March 2000. The Commissioner (Appeals) found that the assessee had enough interest-free funds at its disposal for investment and accordingly deleted the addition of Rs.4.40 crores made by the AO and directed him to allow the deduction u/s 36(1)(iii). The order of the Commissioner (Appeals) was upheld by the Tribunal. On further appeal, the Hon'ble Bombay High Court held that if there were funds available both interest-free and overdraft and/or loans taken, then a presumption would arise that investments would be out of the interest-free funds generated or available with the company, if the interest-free funds were sufficient to meet the investments. In this case, this presumption was established

considering the finding of fact both by the CIT(A) and the Tribunal. Therefore, interest was deductible.

In the case of *Madhav Prasad Jatia v. CIT* (1979) 118 ITR 200 (SC), it has been held by the Hon'ble Supreme Court that for claiming deductions u/s 36(1)(iii), the basic requirements are:

(a) the money i.e. (capital) must have been borrowed by the assessee;

(b) it must have been borrowed by the assessee for his business, profession or vocation; and

(c) the assessee must have paid interest on the amount and claimed it as an allowance.

We have admitted the additional evidence filed by the assessee. But we keep in mind that where an additional evidence has been allowed to be adduced, the interests of justice demand that the other side must be given an opportunity to explain or rebut such additional evidence as clarified in the decision in *Smt. Urmila Ratilal v. CIT* (1982) 136 ITR 797, 799 (Guj); *Hiralal Devdutt Jagadhri v. Addl. CIT* (1980) 18 CTR (Punj) 96, 98.

In view of the above facts and position of law, we set aside the order of the Ld. CIT(A) and remit the matter relating to the 3rd and 4th ground of appeal to the file of the AO to make a *de novo* order as per the ratio laid down in *Madhav Prasad Jatia* (supra) and *Reliance Utilities & Power Ltd.* (supra), after giving reasonable opportunity of being heard to

the assessee. We direct the assessee to file the relevant documents/evidence before the AO.

Thus the 3rd and 4th ground of appeal are allowed for statistical purposes.

13. In the result, the appeal is partly allowed.

Order pronounced in the open Court on 31/10/2018

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 31/10/2018

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai