IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH 'A ' NEW DLEHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER

I.T.A. Nos.4772 & 3507/Del/2015
Assessment Years: 2008-09 &2009-10

M/s Prestige Buildwell P. Ltd., **154, 1st Floor,** **Aggarwal Cyber Plaza-1,** **New Delhi.** **(PAN: AADCP6788N)**	**vs**	**Asstt Commissioner of Income-tax,** **Central Circle 1, New Delhi.**

I.T.A. No. 3506/Del/2015
Assessment Year: 2008-09

M/s MittasoPrjects P. Ltd., **154, 1st Floor,** **Aggarwal Cyber Plaza-1,** **Plot Nos.C-4,5,6, Netaji Subhash Palace** **New Delhi.** **(PAN: AAECM3563F)**	**vs**	**Asstt Commissioner of Income-tax,** **Central Circle 1, New Delhi.**
(Appellant)		(Respondent)

Assessee by: Shri Arun Jain, CA
Department by: Shri Sanjay Goyal, CIT DR

Date of hearing: 30.01.2019
Date of Pronouncement: 12.02.2019

ORDER

PER K. NARASIMHA CHARY, JM

All these appeals are filed by the assessees, who are group companies. ITA Nos. 4772 & 3507/Del/2015 for the AY 2008-09 and 2009-

10 are filed by M/s Prestige Buildwell P. Ltd. whereas ITA No.3506/Del/2015 is filed by M/s Mittaso Projects P. Ltd. for the AY 2008-09.

2. Inasmuch as both the assessees belong to the Unity Group of companies in respect of which the search took place and facts and issues are similar in all these appeals we find it just and convenient that these were heard together and be dispose of by of this common order with reference to the facts in ITA No.4772/Del/2015.

3. Brief facts of the case are that assessee is a Unity Group of which both, M/s Prestige Buildwell P. Ltd. and M/s Mittaso Projects P. Ltd., were members was engaged in the business of promotion and development of DDA approved Commercial Projects. During the year the company had started three new projects in Delhi and purchased land for the same. However, there was no sale and the company has received only interest income. For the AY 2008-09 M/s Prestige Buildwell P. Ltd. have filed their return of income on 13.9.2008 declaring an income of Rs.17,84,530/- and regular proceedings were initiated with the issuance of notice u/s 143(2) and 142(1) of the Income-tax Act, 1961 (“the Act”).

4. As the matters stood thus,a search and seizure operation was carried on in the Unity Group of Companies and individuals on 20.8.2009. Both the assessees involved in these appeals are covered by the same. Notice u/s 153A was initiated on 26.7.2011. Assessment was complete by order dated 27.12.2011 with the additions which includes Rs.36,50,647/-, being the interest expenses disallowed on the ground that inasmuch as the projects were not complete and no sales were booked, as such, the interest expense should be capitalized.

5. When the assessee preferred appeal before the learned CIT(A), they have challenged the same on two counts. Firstly, that inasmuch as no incriminating material was found during the search, no addition could have been made in view of the decision of the Hon'ble jurisdictional High Court in the case of Kabul Chawla, 380 ITR 573 (Delhi); and secondly, that for the immediately earlier assessment years viz. 2006-07 and AY 2007-08, learned AO allowed the interest expenses and for the first time disallowed the same for the AY 2008-09 by applying the decision of the Hon'ble Supreme Court in the case of CIT vs. Dr. V.P. Gopinathan, 248 ITR 449, for the proposition that the interest received by the assessee on his fixed deposits cannot be reduced by the amount of interest paid on the loan taken on security of such deposit as there is no such provision in law, and also DCIT vs. Core Health Care Ltd. (2008) 298 ITR 194 (SC) for the principle that interest on capital borrowed for acquisition of new asset will not be allowed as deduction after the insertion of amended provisions w.e.f. 1.4.2004. According to the assessee, such decisions have no application to the facts of the case. Assessee placed reliance on the decision of the Hon'ble Bombay High Court in the case of CIT vs Lokhandwala Construction Inds. Ltd., 260 ITR 579.

6. Learned CIT(A) rejected both the contentions. Learned CIT(A) took the stand that since the time limit for issuance of notice u/s 143(2) was available till 30.9.2009 and the search took place on 20.8.2009, time was available with the learned AO to issue notice u/s 143(2), as such, the assessment for the AY 2008-09 was pending on the date of initiation of search. On this premise, learned CIT(A) held that the assessment for the AY 2008-09 was abated and the decision in the case of Kabul Chawla (supra) has no application to the facts of the case.

7. Secondly, on merits, learned CIT(A) followed the decision of the Hon'ble Supreme Court in the case of CIT vs Core Health Care P. Ltd. (supra) and held that the interest on capital borrowed for acquisition of new assets will not be allowed as deduction after the insertion of amended provisions w.e.f. 1.4.2004. He further held that clause (iii) of Section 57 which provides for deduction of any expenditure not being in the nature of capital expenditure laid out or expended wholly and exclusively for the purpose of making of earning the income described u/s 56 of the Act, cannot be considered because the assessee could not established that the FDRs were taken out by the borrowed capital and on that ground the interest expenditure incurred on OD limited should not be allowed as deduction.

8. Assessee is, therefore, in this appeal before us stating that the assessment order passed by the learned AO is invalid in the eye of law because there was no incriminatory material unearthed during the search operations as contemplated in the case of Kabul Chawla (supra). Learned AR submitted that mere availability of time to issue notice u/s 143(2) cannot be taken as the pendency of the assessment proceedings. He submitted, on an analogy of section 147 proceedings, that the time limit of 4 years for issuance of notice u/s 147 of the Act but it does not mean that such a jurisdiction was exercised by the learned AO until the notice u/s 148 was given. He further submitted that if the order u/s 153A is set aside or annulled in any legal proceedings then abated assessment shall be revived. On this, he submitted that if the stand taken by the learned CIT(A) is accepted, it would lead to a strange situation of not reviving any assessment whatsoever because there was no assessment u/s 143(3) of the Act in this case before invoking the assessment u/s 153A of the Act.

9. He placed reliance on the decision of Hon'ble Delhi High Court in the case of Ashok Chaddha vs ITO (2011) 337 ITR 399 (Del) wherein it was held that there is no specific provision in the Act requiring the assessment made u/s 153A to be after issue of notice u/s 143(2) as there is specific provision in first proviso to Section 153A that assessment for all the six years are to be made mandatorily, therefore, issuance of notice u/s 143(2) is not mandatory in assessment proceedings u/s Section 153A; whereas in regular assessment proceedings it is mandatory to issue notice u/s 143(2) in response to the income-tax return filed u/s 139 of the Act. The sum and substance of the argument of the learned AR is that whether or not any time was available for issuance of notice u/s 143(2) of the Act as on the date of search, unless and until notice u/s 143(2) of the Act was issued, no assessment proceeding could be said to have been pending on the date of search and, therefore, no question of abatement of assessment proceedings arise. He, therefore, submits that for want of issuance of notice u/s 143(2) of the Act, it cannot be said that any assessment proceedings were pending as on the date of search to be abated, as such, in the absence of any incriminating material unearthed during the search in view of the decision in the case of Kabul Chawla (supra), no addition could have been made by the AO.

10. It is the argument of the learned DR that as submitted by the learned AR himself when once the search took place and notice u/s 153A had to be issued mandatorily, no question of Section 143(2) arises. It is an undeniable fact that time for issuance of notice u/s 143(2) was available in this case till the end of September, 2009 and any time before such date, learned AO could have issued such notice. It is, therefore, clear that a notice could be issued only when the assessment proceedings are pending

and it goes without saying that till the end of September, 2009 assessment proceeding would remain pending. Merely because a search took place earlier to such date, it cannot be said that the time period for the pendency of the assessment proceedings will be truncated to the date prior to the search to say that as on the date of search, the proceedings were not pending and will not be abated. This argument cannot be accepted for the simple reason that no issuance of notice u/s 143(2) could take place after the search or the issuance of notice u/s 153A. It is, therefore, the submission of the learned DR that the decision in the case of Kabul Chawla (supra) has no application to the facts of the case.

11. Insofar as the merits of the case are concerned, ld. DR placed reliance on the orders of the authorities below.

12. We have gone through the record in the light of the submissions on either side. In so far as the dates are concerned, absolutely there is no dispute. The return of income was filed by the assessee on 30.9.2008. The time for issuance of notice u/s 143(2) was available to the AO till 30.9.2009. Search took place on 20.8.2009. Therefore, as on the date of search, the assessment proceedings were pending. Simple logic is that the Ld. AO could have issued notice under section 143 (2) till the end of September, 2009 even after search and unless and until the assessment proceedings are pending, such notice is not permissible to be issued during that period. Only reason for non-issuance of such noticed is that section 153A does not require such a compliance. In view of the decision of the Hon'ble jurisdictional High Court in the case of Kabul Chawla (supra), in all the pending proceedings, there cannot be two orders, one u/s 143(3) and the other u/s 153A/153C or as the case may be. Such pending proceedings

stand abated and only one order u/s 153A/153C as the case may be, shall take place.

13. We, therefore, find that the analogy drawn by the learned AR basing on the decision in the case of Ashok Chadha (supra) is a far fetching one. Interpretation shall not stretch the provisions of law to such an extent as to attribute redundancy to the will of legislation.When the Hon'ble jurisdictional High Court has stated in unequivocal terms that in abated assessment, learned AO got the original jurisdictional assessment authority as well as authority u/s 153A, we do not find anything illegal or irregular in the orders of the authorities below. We are unable to subscribe to the argument advanced on behalf of the assessee that whether or not, time was available for issuance of notice u/s 143(2) of the Act, unless and until such a notice was actually issued, the assessment proceedings cannot be said to have been pending as on the date of the search. There is no force in the submission of the learned counsel of the assessee that if for any one reason the order u/s 153A is set aside or annulled in any legal or other proceedings of court of law, nothing survives in this matter because there is no concluded assessment, as such, other than the assessment u/s 153A. We, therefore, reject this argument of the learned AR and decline to hold that the exercise of jurisdiction by the learned AO to pass the order u/s 153A/143(3) of the Act is unsustainable or bad in law.

14. Now coming to the merits of the case, it is the argument of the learned AR that the authorities below placed reliance on the decision of the Hon'ble Supreme Court in the case of DCIT vs Core Health Care Ltd. (supra) whereas the learned AO relied upon the decision in the case of Dr. V.P. Gopinathan (supra) also. Learned AR submitted that inasmuch as the

assessee is engaged in the construction and development of project of commercial complex and borrowed the amounts for the purchase of land, which is stock-in-trade for them, neither the proviso to Section 36(1)(iii) nor the decision of the Hon'ble Apex Court in the case of DCIT vs Core Health Care P. Ltd. (supra) and Dr. V.P. Gopinathan (supra) are applicable to the facts of the case, and on the other hand, the decision of the Hon'ble Bombay High Court in the case of Lokhandwala Construction Inds. P. Ltd. (supra) (2003) 260 ITR 579 applies to the facts of the case.

15. As stated supra, Learned DR heavily relied on the orders of the authorities below.

16. It is an admitted fact that the Unity group of which both the assessees involved in these appeals are members, engaged in real estate project and mainly in the business of promotion and development of DDA approved commercial complex. It is not in dispute that during the year, the company had started three new projects in Delhi and had purchased land for this but no sales take place in the year nor the company received any interest income.

17. Learned AO placed reliance on the proviso to clause (iii) of Section 36(1) and the decisions referred to above to reach the conclusion that the interest on the sum expended by the assessee on the projects had either have not been started as yet or sale proceeds have not been offered for taxation, needs to be capitalized. For the very same reason, learned CIT(A) endorsed the view of the learned AO to dismiss the appeal.

18. A reading of Section 36(1)(iii), Explanation 8 to Section 43(1) and proviso to Section 32 makes it clear that the interest is disallowable in case

of purchase of fixed assets for which depreciation is allowable on its first use. Land is not a depreciable asset and the rules which are applicable to the depreciable assets cannot be made applicable to the non-depreciable assets. We find force in the argument of the learned AR that the decision of the Hon'ble Apex Court in the case of Core Health Care P. Ltd. (supra) is rendered in the context of depreciable assets like plant and machinery, in which the Hon'ble Supreme Court observed that w.e.f. AY 2004-05, interest paid on the borrowed capital for the plant and machinery would be capitalized till the date of such plant and machinery is put to use in the business of the assessee. Plant and machinery are depreciable assets and that is the reason why both interest on the capital for purchase of such assets and depreciation cannot be allowed. However, in case of land in the hands of a real estate developer, it is stock-in-trade and no depreciation is allowable. We are, therefore, of the considered opinion that to the facts of the case of the assessee, the decision of the Hon'ble Bombay High Court in the case of Lokhandwala Constructions Industries P. Ltd. (supra) is applicable, whereinthe Hon'ble High Court held as under:

> "4. From the facts found by the Tribunal on record, it is clear that assessee undertook two-fold activities. It bought and sold flats. Secondly, the assessee was also engaged in the business of construction of buildings. The profits from the both the activities were assessed under Section 28 of the Income-tax Act. In this case, we are concerned with the second activity (hereinafter referred to, for the sake of brevity, as "Kandivali Project"). According to the Commissioner, loan was raised for securing land/development rights from the Mandal. That, the loan was utilised for purchasing the development rights, which, according to the Commissioner, constituted a capital asset. According to the Commissioner, since the loan was raised for securing capital asset, the interest incurred thereon constituted part of capital expenditure. This finding of the Commissioner was erroneous. In the case of India Cements Ltd. v. CIT, Madras, reported in 60 ITR Page 52, it was held by the Supreme Court

that in cases where the act of borrowing was incidental to carrying on of business, the loan obtained was not an asset. That, for the purposes of deciding the claim of deduction under Section 10(2)(iii) of the Income-tax Act 1922 [section 36(1)(iii) of the present Income-tax Act], it was irrelevant to consider the purpose for which the loan was obtained. In the present case, the assessee was a builder. In the present case, the assessee had undertaken the Project of construction of flats under the Kandivali Project. Therefore, the loan was for obtaining stock-in-trade. That, the Kandivali Project constituted the stock-in-trade of the assessee. That, the Project did not constitute a fixed asset of the assessee. In this case, we are concerned with deduction under Section 36(1)(iii). Since the assessee had received loan for obtaining stock-in-trade (Kandivali Project), the assessee was entitled to deduction under Section 36(1)(iii) of the Act. That, while adjudicating the claim for deduction under Section 36(1)(iii)of the Act, the nature of the expense - whether the expense was on capital account or revenue account -was irrelevant as the Section itself says that interest paid by the assessee on the capital borrowed by the assessee was an item of deduction. That, the utilization of the capital was irrelevant for the purposes of adjudicating the claim for deduction under Section 36(1)(iii) of the Act (See judgment of the Bombay High Court in the case of Calico Dyeing and Printing Works v. CIT, Bombay City-II, reported in 34 ITR 265). In that judgment, it has been laid down that where an assessee claims deduction of interest paid on capital borrowed, all that the assessee had to show was that the capital which was borrowed was used for business purpose in the relevant year of account and it did not matter whether the capital was borrowed in order to acquire a revenue asset or a capital asset. The said judgment of the Bombay High Court applies to the facts of this case.

5. For the reasons given hereinabove, we answer the above question in the affirmative i.e. in favour of the assessee and against the department. The Appeal is accordingly disposed of. No order as to costs.

19. Further, it could be seen from Schedule 10forming part of Balance Sheet and Profit & Loss Accountnotifying the Significant Accounting Policies and Notes to the Accounts to be found at page No.11 of the Paper Book, during the year the company had taken possession of the three commercial plots measuring 4094.57 sq.mts. at Delhi from DDA for which bid was made

in the previous year and that the purchase costs for the aforesaid three plots including related land cost and the construction cost incurred during the year are taken under the head “Inventories (Project WIP)”.

20. It is, therefore, clear that the assessee treated the land as stock-in-trade by taking the same part of “Inventories”. For all these reasons, we are of the considered opinion that there is an error that occurred in applying the proviso to clause (iii) of Section 36 of the Act to the case of the assessee. Facts of the case are attracting the ratio of the Hon’ble Bombay High Court in the case of Lokhandwala Construction Inds. P. Ltd. (supra) because of the fact that the Hon’ble Supreme Court was dealing with depreciable assets in the case of Core Health Care P. Ltd. (supra). Such case has no application to the facts of this case.

17. Further, it could be seen from the record that for the AY 2006-07, the assessee was assessed both u/s 143(3) and 153A of the Act. In the assessment order dated 9.4.2008 u/s 143(3) and order dated 27.12.2011 u/s 153A/143(3) of the Act for the AY 2006-07, the assessee is allowed the interest expense. So also for AY 2007-08 by order dated 27.12.2011 u/s 153A/143(3) of the Act, the interest expense was allowed. There is no dispute on this aspect by the revenue. For these reasons, we are of the considered opinion that the assessee is entitled to the relief and the learned AO is directed to delete the disallowance of interest expense to the tune of Rs.36,50,647/-. ITA No.4772/Del/2015 stands allowed.

ITA No.3506/Del/2015 (AY 2008-09):

18. Facts of this case are also very similar to the facts involved in ITA No.4772/Del/2015 and the addition in this case is Rs.15,84,699/-. For the reasons recorded in ITA No.4772/Del/2015, we allow this appeal of the

assessee and the learned AO is directed to delete the same.

ITA No.3507/Del/2015 (AY 2009-10)

19. Facts of this case are also very similar to the facts involved in ITA No.4772/Del/2015 and the addition in this case is Rs.18,10,393/-. For the reasons recorded in ITA No.4772/Del/2015, we allow this appeal of the assessee and the learned AO is directed to delete the same.

20. In the result, all the three appeals of the assesses are allowed.

Order pronounced in the Open Court on 12th February, 2019.

Sd/-	Sd/-
(R.K. PANDA)	(K. NARASIMHA CHARY)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated: 12th February, 2019.
'VJ'

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

Asstt. Registrar, ITAT

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