

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'G' NEW DELHI**

**BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
&
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER**

**ITA Nos.4429 & 4430/Del/2016
Assessment Years: 2009-10 & 2010-11**

Asstt.Commissioner of Income-tax, Central Circle -13, New Delhi.	vs	Sanskar Homes Pvt. Ltd. D-3, Commercial Complex, Vasant Vihar, New Delhi. PAN: AAJCS2451H
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Appellant

Respondent

Assessee by	Shri B.K. Dhingra, CA
Revenue by	Shri S.S. Rana, CIT DR

Date of Hearing	26.02.2019
Date of Pronouncement	07.03.2019

ORDER

PER K. NARASIMHA CHARY, JM

These two appeals filed by the revenue are directed against the separate orders both dated 23.5.2016 in Appeal Nos.65 & 67/2013-14 passed by the Learned Commissioner of Income-tax(Appeals)-39, New Delhi {"CIT(A)"} for Assessment Years 2009-10 and 2010-11.

2. Since the facts involved in both the appeals are similar, for the sake of convenience, we dispose them off by a common order.

ITA No.4429/Del/2016:

3. During the assessment year under consideration, the assessee was engaged in the business of development and construction of buildings, homes, flats etc. and undertaken the construction/ collaboration of projects. They have filed their return of income on 29.9.2009 u/s 139(1) of the Income-tax Act, 1961 (“the Act”) declaring taxable income of Rs.3,13,59,840/-. The assessee has also filed its return of income u/s 153A of the Act for the AY 2009-10 on 22.6.2011 declaring taxable income of Rs.3,13,59,840/-. During the assessment, learned AO found that an amount of Rs.2.16 crore and Rs.66,25,500/- was paid in violation of Section 40A(3) and, therefore, disallowed the same and added it back to the income of the assessee.

4. Assessee preferred appeal and submitted that the assessee had entered into an agreement to sell on 3.7.2008 and 14.2.2009 with M/s Surya Realtech P. Ltd., (PAN: AAKCS8946G), E-4/4, Vasant Vihar, New Delhi (presently at 83, Poorvi Marg, VasanaVihar, New Delhi-57) and in terms of the agreement M/s Surya Realtech P. Ltd. agreed to sell the entire First and Second floor at F-60, Poorvi Marg, VasanaVihar, New Delhi to the assessee for a total consideration of Rs.6.60 crore and Rs.6.25 crore respectively. Assessee submitted that in the books of accounts, the said payment of advance of Rs.2,82,25,500/- was incorporated stating that this amount was paid in cash and balance was paid through bank. Assessee argued that the provisions of Section 40A(3) are applicable only to purchases/expenditure but not to investments.

5. Learned CIT(A) after considering the submissions of the assessee in the light of their books and financials held that as per the law of Accountancy, an ‘advance’ cannot be equated with expenditure till the former retains its original character thereby implying that an advance at the end of the accounting period

remains in the balance sheet without going through profit and loss account as a claim of deduction and if the advance gets adjusted towards specific expenditure, it loses its original character and falls within the ambit of Section 40A(3) read with Rule 6DD subject to fulfillment of the prescribed conditions. Learned CIT(A) further held that the submissions of the assessee are backed by facts and law. On this premise, learned CIT(A) deleted the addition made.

6. It was submitted on behalf of the Revenue that as per page 61 of assessee's paper book, it has entered into a large number of collaboration agreements for construction of floors, building etc. There was no investment in any property by the assessee upto 31.3.2008, as could be seen from the balance sheet. Even in respect of property at F-60, Poorvi Marg, the assessee has entered into a collaboration agreement and sold the floors. All these facts clearly show that the assessee has entered into a collaboration agreement for construction of floors at F-60, Poorvi Marg, New Delhi as part of its business and the claim of it being investment is an afterthought. Learned DR placed reliance on the judgments in the case of Punjab & Haryana High Court in the case of Attar Singh Gurmukh Singh vs CIT (1982) 136 ITR 589; (ii) CIT vs Kishan Chand Maheshwari Dass 1980) 121 ITR 232; (iii) CIT vs Avatar Singh & Sons (1981) 129 ITR 671; UP Hardware Store vs CIT (1976) 104 ITR 664(Delhi High Court); and Sajowan Lal Jaiswal vs CIT (1976) 103 ITR 706(Orissa High Court) for the proposition that Section 40A(3) is attracted to payments made for acquiring stock-in-trade and other material.

7. On the other hand, it was argued on behalf of the assessee that the re-assessment was made pursuant to the search action and, therefore, the scope of assessment/re-assessment should be confined to undisclosed income as unaccounted u/s 132 and does not give sweeping powers to re-compute regular income. Learned CIT(A) rejected the same holding that in this case time limit

for issue of notice u/s 143(2) was till 30.9.2010 whereas the search took place on 7.8.2010 and it goes without saying that the assessment was pending on that date and, therefore, the powers of AO are not restricted only to the undisclosed income as unaccounted but not to the computation of regular income.

8. It is the argument of the learned AR that the cash component of the sale consideration which was paid as an advance to M/s Surya Realtech Ltd. is not claimed as an expenditure but it is only a part of the investment as could be seen from the books of accounts of the assessee and, therefore, application of Section 40A(3) by the learned AO is not proper. He placed before us the balance sheet that was prepared for the year ending 31.3.2009. He further submitted that the party who received the amount was also an assessee in whose hands such a receipt was accepted by the learned AO. Further the property was sold away in the AY 2011-12 & 2013-14 respectively and at which time the capital gains were accepted and deduction of this amount was allowed. In these circumstances, he submits that it is not proper for the ld.AO to disallow the amount for acquiring a capital asset by way of investment

9. We have gone through the record in the light of the submissions made on either side. It could be seen from the record that the disallowance was made by the learned AO u/s 40A(3) in respect of the cash component of the advance amount paid for purchase of the property. According to the assessee, the nature of the property was an investment whereas according to the revenue, the assessee held it as stock-in-trade and thereby Section 40A(3) is attracted. Learned CIT(A) rightly observed that the books of account of the assessee were not rejected and the addition appears to balance on the only fulcrum of assessee's intention. Basing on the record, learned CIT(A) rejected the conclusion that it was in the nature of investment and Section 40A(3) is not applicable.

10. Assessee produced the balance sheet as on 31.3.2009 with its entire schedule before the Id. AO showing the investments and schedule 'G' clearly shows the first and Second Floor of F-60, Poorvi Marg, NewDelhi as investment in property. This balance sheet was prepared as on 31.3.2009 and the date of balance sheet was 10.7.2009 much prior to the search that took place on 7.8.2010. It could further be seen that the said property was sold in the AY 2011-12 and 2013-14 and the computation of income clearly shows the claim of short term capital gain and the assessment years for those year unmistakably establish the said fact. Assessment order for the AY 2011-12 is at page no.244 and the computation of income is at page no.249 of the paper book so also in respect of the AY 2013-14, assessment order is at page 269b and computation of income is at page 271 of the paper book. Balance sheet dated 10.7.2009 for the year ending 31.3.2009 is at page no.17 whereas Schedule 'G' showing the property now under consideration is at page no.22. These documents clearly establish that it is not an afterthought for the assessee to show that relevant property was acquired not as stock in trade but as an investment. The balance sheet prepared more than one year prior to the search is clearly establishing the same.

11. In the light of the evidence above, we do not find any reason to hold that the impugned order suffers any illegality or irregularity. We uphold the same and find the appeal of the assessee as devoid of merits. Appeal is accordingly dismissed.

ITA No.4430/Del/2016:

12. Facts for this year are identical except the figure relating to the payments during the AY 2010-11. Reasons recorded in the preceding paragraph relating to AY 2009-10 are applicable for this assessment year also with equal force.

We, therefore, hold that the payments were made towards advance to acquire the capital asset as an investment, as such, Section 40A(3) has no application. This appeal, therefore, also stands dismissed.

13. In the result, both the appeals of the Revenue are dismissed.

Order pronounced in the Open Court on 7th March, 2019.

**Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

**sd/-
(K.NARASIMHA CHARY)
JUDICIAL MEMBER**

Dated: 7th March, 2019.
VJ

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

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