

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: 'B', NEW DELHI

BEFORE SHRI N.K.BILLAIYA, ACCOUNTANT MEMBER
AND SMT. BEENA A PILLAI, JUDICIAL MEMBER

ITA No. 3656/Del/2015

AY: 2009-10

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| ACIT, Circle 8(2) New Delhi | vs. | M/s Endure Realty Pvt.Ltd. 108, Rectangle One, Saket New Delhi 110 017 PAN: AABCE8201D |
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(Appellant)

(Respondent)

Department by : Sh. Mithun Shete, Sr.D.R.
Assessee by : Sh. Alok Gupta, FCA.

Date of Hearing : 14/02/2019
Date of Pronouncement: 03/04/2019

ORDER

PER BEENA A PILLAI, JUDICIAL MEMBER

Present appeal has been filed by revenue against order dated 20/03/2015 passed by Ld. CIT (A)-3, Delhi for assessment year 2009-10 on following grounds of appeal:

"1. On the facts and in the circumstances of the case and in law, Ld. CIT(A) has erred in holding that income of the assessee has to be computed in accordance with POCM method without considering that the assessee had submitted before the AO that the construction of the building has not started during the year and there was no possibility of applying percentage completion method.

2. *On the facts and in the circumstances of the case and in law, Ld. CIT(A) has erred in allowing deduction for various expenses following POCM method without examining as to whether the business of the assessee had started at all or not.*
3. *On the facts and in the circumstances of the case and in law, Ld. CIT(A) has erred in allowing deduction of Rs.35,370/- on account of preliminary expenses without considering that the business of the assessee has not started and it was not eligible for any such deduction.*
4. *On the facts and in the circumstances of the case and in law, Ld. CIT(A) has erred in deleting the addition of Rs.2,17,41,335/- on account of assured return by holding that this expense was in the nature of selling cost and eligible for deduction under POCM method.*
5. *On the facts and in the circumstances of the case and in law, Ld. CIT(A) has erred in deleting the addition of Rs.32,90,015/- on account of other expense by holding that this expense was in the nature of general administrative expenses and eligible for deduction under POCM method.*
6. *On the facts and in the circumstances of the case and in law, Ld. CIT(A) has erred in allowing deduction for assured return and other expense without examining the nature of these expenses as the details in this respect was neither filed before the AO nor before the CIT(A).*
7. *The appellant craves leave to add, alter or amend any ground of appeal raised above at the time of hearing."*

2. Brief facts of the case are as under.

The assessee filed its return of income on 20/09/09 showing total income at 'nil' and loss of Rs. 2,60,99,438/-. The case was selected for scrutiny and notice under section 143 (2) of the Income Tax Act, 1961 (the Act) was issued to assessee. In response to

statutory notice, Representative of assessee appeared before Ld. AO and furnished details as called for.

Ground No.4

2.1. Ld.AO observed that assessee is a company engaged in the business of construction of commercial buildings to be used as office spaces. During the course of assessment proceedings, Ld. AO observed that assessee had shown stock in hand at Rs.68,86,91,281/-under the head income and had claimed expenditure amounting to Rs.2,52,54,490/-. Ld. AO called upon assessee to explain as to why these expenses prior to commencement of business were not capitalized, but claimed as revenue expenses. In reply, assessee submitted that business commenced as on date of incorporation of assessee company and hence expenses incurred from date of incorporation were to be allowed as revenue expenses. Ld. AO after considering submissions, observed that no business activity was carried out during the year and expenses debited to P&L account was on account of salary, legal and professional assured returns, brokerage etc. Ld.AO was of the opinion that these expenses cannot be allowed when no business had been done. Ld.AO further observed that assured returns has been paid by assessee before commencement of construction business which should be capitalised. He thus made addition to the tune of Rs. 2,52,54,490/-being capital expenses disallowed.

3. Aggrieved by order of Ld.AO assessee preferred appeal before Ld.CIT(A), who allow the claim of assessee.

4. Aggrieved by order of Ld.CIT(A), revenue is in appeal before us now.

5. Ld.Sr.DR submitted that Assessing Officer disallowed Rs.2,52,54,490/- as expenses being capital in nature. He submitted that expenses credited to P&L account being preliminary expenses, assured returns and other expenses needs to be capitalized, as these are spent for setting up of business as no business activity had commenced during year under consideration. Further, Ld.Sr.D.R. submitted that such announcement of assured returns to lure Investors have been declared by SEBI as illegal and Ponzi schemes. Ld.Sr.DR submitted that Ld.CIT(A) erred in deleting addition of Rs.2,17,41,335/- which was shown as assured return, Rs.32,90,015/- as other expenses and Rs.35,370/- in P&L account by assessee, by holding that these are in the nature of selling cost as it related directly to sales.

5.1. Referring to section 35D, Ld.Sr.DR submitted that, what is allowable under this section is expenditure in connection with preparation of any feasibility report, preparation of project report, conducting market survey or any other survey necessary for business of assessee, engineering services relating to business of assessee so on and so forth specifically mentioned under Sub-Clause 2 of Section 35D. He thus vehemently argued that preliminary expenses allowed by Ld. CIT (A) is not as per law.

6. On the contrary Ld.AR placed reliance upon order of Ld.CIT (A) and referred to decision of *Hon'ble Delhi High Court* in case of *CIT vs*

M/s Doomketu Builders in ITA No. 528-529/2012 delivered on 23/03/13.

7. We have perused submissions advanced by both sides in the light of the records placed before us.

8. Admittedly assessee is following project completion method.

8.1. Ld.AO disallowed these expenses on the ground that assessee had not started its construction during year, but started giving assured return to customers from whom capital has been received.

Ld.Sr.DR seriously disputed allowability of sum of Rs.2,17,41,335/- shown as assured returns in profit and loss account as an expenditure. It has been argued that said sum neither fit into category of preliminary expenses under section 35D of the Act, nor forms part of selling cost, as construction had not started. He submitted that in fact these are capital expenditure that has been incurred to bring into existence a capital asset.

8.2. The nature of expenses incurred by assessee by giving assured returns to customers from whom capital was received from customers which should form part of construction project. In our opinion these expenditure are to be considered as part of capital project. Thus such capital expenditure spending would impact Balance Sheet and cannot form part of Profit & Loss account directly.

We thus do not agree with analogy applied by Ld.CIT(A) regarding assured returns expenses in the nature of 'selling cost'.

8.3. Assessee placed reliance upon decision of *Hon'ble Delhi High Court* in case of *CIT vs M/s Doomketu Builders (supra)*. It is observed

that the issue before *Hon'ble Court* was, whether business in real estate development was set up during relevant accounting year, which is not the case before us. There is no dispute regarding the business being set up during the year.

8.4. We are therefore of the view that Rs.2,17,41,335/-towards assured returns to be capitalized/shown as work-in-progress.

8.5. As regards other expenses amounting to Rs.32,51,545/- deleted by Ld.CIT (A), it is observed that assessee stated it to be in the nature of professional charges and commission.

No details regarding the same was furnished by way of vouchers/bills, to ascertain true nature for its allowability. Before Ld.CIT(A) also assessee has not filed any details, and merely submitted that these are preliminary expenses. Audited accounts filed before us also do not reveal exact nature of these payments. Thus it could not have been ascertained whether these expenses were incurred towards professional charges & commission. Even before us, assessee did not file any details/evidences/documents, which could throw light on nature of expenses.

8.6. We therefore uphold the view taken by Ld.AO and restore disallowance amounting to Rs.32,51,545/-towards other expenses.

8.7. As regards a sum of Rs. 35, 370/-, it is observed that assessee has not provide details regarding the same either before Ld.AO or Ld.CIT(A). We therefore uphold the disallowance by Ld.A.O.

9. Accordingly grounds raised by revenue stands allowed.

10. In the result appeal filed by revenue stands allowed.

Order pronounced in the open court on 03rd April, 2019.

Sd/-

(N.K.BILLAIYA)
ACCOUNTANT MEMBER

Sd/-

(BEENA A PILLAI)
JUDICIAL MEMBER

Dt. 03rd April, 2019

- GMV

Copy forwarded to: -

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

- TRUE COPY -

By Order,

ASSISTANT REGISTRAR
ITAT Delhi Benches

| | Date |
|---|----------|
| Draft dictated on | 29/03/19 |
| Draft placed before author | 03/04/19 |
| Draft proposed & placed before the second member | 03/04/19 |
| Draft discussed/approved by Second Member. | |
| Approved Draft comes to the Sr.PS/PS | |
| Kept for pronouncement on & Order uploaded on : | 03/04/19 |
| File sent to the Bench Clerk | |
| Date on which file goes to the AR | |
| Date on which file goes to the Head Clerk. | |
| Date of dispatch of Order. | |