INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 4757/Del/2015
(Assessment Year: 2011-12)

Vipul Ltd, Regus Rectangle, Level-4, Rectangle-1, D-4, Commercial Complex, Saket, New Delhi PAN: AAACA5396C	Vs.	ACIT, Range-7, New Delhi
(Appellant)		(Respondent)

ITA No. 5145/Del/2015
(Assessment Year: 2011-12)

DCIT, Circle-26(2), New Delhi	Vs.	Vipul Ltd, Regus Rectangle, Level-4, Rectangle-1, D-4, Commercial Complex, Saket, New Delhi PAN: AAACA5396C
(Appellant)		(Respondent)

Assessee by :	Shri Rajesh Arora, CA
Revenue by:	Shri K. Hauthang, Sr. DR
Date of Hearing	11/03/2019
Date of pronouncement	05/04/2019

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. These are the cross appeals filed by the assessee and the learned AO against the order of The Commissioner Of Income Tax (Appeals) – 9, New Delhi dated 24/3/2015 for AY 2011-12.

2. The brief facts of the case show that assessee is a company engaged in the business of real estate development and related activities during the year under consideration. Assessee filed its return of income under section 139 (4) of the act on 30/3/2012 declaring income of INR 86348010/- . However, the assessee paid taxes under the provisions of section 115JB of the act. The return of the assessee was picked up for scrutiny and the learned

assessing officer passed an assessment order u/s 143 (3) on 26/2/2014 at the assessed income of Rs. 119118713/–. The learned assessing officer disallowance u/s 14 A of the act of INR 2304177/–, addition of Rs. 414744/– on account of reconciliation of 26AS with the profit and loss account, disallowance of project expenses on account of transfer from personal expenses of INR 1 16452/–, brokerage of INR 2608832/- and compensation payment of INR 26227500/–. The further addition of INR 1098998/– was made on account of outstanding creditors u/s 41 (1) of the act. The assessee aggrieved with the order of the learned AO preferred an appeal before the learned CIT – A. The learned CIT – A upheld the disallowance u/s 14 A of the act stating that the company has an investment of about INR 145,000,000 during the year and expenditure against such investment would have been incurred. Therefore he confirmed the disallowance u/s 14 A of the act. Therefore, assessee aggrieved with the order of the learned CIT – A has preferred this appeal. The learned assessing officer is aggrieved with the deletion of addition of INR 1 098998/– on account of unchanged sundry creditors and deletion of addition of INR 2 6227500/– on account of payment of compensation. Therefore, the learned assessing officer has preferred this appeal.

3. Adverting to the appeal of the assessee wherein assessee has raised the following grounds of appeal in ITA No. 4757/Del/2015 for the Assessment Year 2011-12:-

"1. The Ld CIT(A) has erred in law and facts of the case in confirming the action of the Id/-AO for invoking the provisions of section 14Aof the Act read with rule8D of Income Tax Rides, 1962, without recording the satisfaction and disregarding the submissions and explanations of the appellant company which is highly arbitrary, unjustified, uncalled for and bad in law.

2. The Ld CIT(A) has erred in law and facts of the case in confirming the action of Ld AO in computing the disallowance amounting to Rs. 23,04,177/- and applying rule 8D of Income Tax Rules, 1962 read with section 14A of the Act which is highly arbitrary, unjustified, baseless and bad in law."

4. Brief facts relating to the disallowance u/s 14 A of the income tax act shows that the assessee has long-term investment of INR 145,000,000 is in its subsidiary companies and equity shares of other companies. The learned

AO asked assessee to prove the Nexus of borrowed funds and the source of investment and asked to explain as to why the disallowance u/s 14 A read with rule 8D should not be made. The assessee submitted that assessee has utilized loans for the purpose of the business and has not utilized the above borrowing for making investment in those equity shares. It was further stated that assessee has the reserve and surpluses of 34 9, 00, 00,000 which is more than sufficient to make the investment during the year. Assessee also submitted that it does not have any exempt income and therefore there cannot be any disallowance u/s 14 A of the act. The learned AO considered the submission of the assessee and stated that it is not acceptable, as assessee has failed to prove the sources of the investment made in the tax-free dividend yielding investment. The learned AO also rejected the explanation of the assessee that it did not have any exempt income relying on the decision of the special bench of the ITAT. Therefore the disallowance u/s 14A applying rule 8D computed the interest disallowance of INR 1 577693 and other expenditure of INR 7 26484, thereby, computing total disallowance of INR 2304177/- .

5. On appeal before the learned CIT – A the reasons given by the learned assessing officer were upheld. The learned CIT – A also relied upon the decision of the honourable Delhi High Court in case of Maxopp Ltd vs CIT 203 taxman 364. Accordingly, the disallowance was upheld.

6. The learned authorised representative submitted that assessee has not earned any exempt income and therefore disallowance u/s 14 A cannot be made.

7. The learned departmental representative relied upon the orders of the lower authorities.

8. We have carefully considered the rival contention and perused the orders of the lower authorities. Undisputedly during the year, the assessee has not earned any exempt income. In absence of any exempt income earned by the assessee, no disallowance can be made u/s 14 A of the income tax act as held by the honourable Delhi High Court in case of Cheminvest vs CIT [2015] 61 taxmann.com 118 (Delhi)/[2015] 234 Taxman 761 (Delhi)/[2015] 378 ITR 33 (Delhi)/[2015] 281 CTR 447 (Delhi). Therefore, respectfully

following the decision of the honourable Delhi High Court no disallowance can be made u/s 14 A of the income tax act in case of the assessee wherein it has not earned any exempt income. Accordingly the orders of the lower authorities are reversed and the learned assessing officer is directed to delete the above disallowance of INR 2304177/–. Accordingly, ground number 1 and 2 of the appeal of the assessee are allowed.

9. In the result appeal of the assessee in ITA number 4557/del/2015 is allowed.

10. Now we come to the appeal of the revenue wherein the learned AO has raised the following grounds of appeal in ITA No. 5145/Del/2015 for the Assessment Year 2011-12:-

"1. The Ld. CIT(A) has erred in deleting addition of Rs.10,98,998/- made by AO on account of unchanged S. Creditors.

2. The Ld. CIT(A) has erred in law deleting the addition of Rs. 2,62,27,500/- made by AO on account of payment of compensation and failed ;

i) to not realize that the payment of compensation charges of Rs. 2,62,27,500/- shall go on to simultaneously the cost of land, held as stock in trade, and therefore, of closing stock, thus nullifying the claim of expenses by the assesse.

ii) to consider that if the said land was not shown as stock in trade, but as WIP under the percentage completion method, the expenses on compensation paid must also be accounted for in WIP, and not in P & L account."

11. The first ground of appeal is against the deletion of addition of INR 1098998/- made by the learned assessing officer on account of sundry creditors. During the course of assessment the learned AO noted that there are so many unchanged in the creditors for last 3 years and therefore the authorised representative was asked to show cause why the same should not be treated as a liability ceased to exist. The assessee submitted the list of such creditors, explained that party wise position, submitted that since the assessee company is a public limited company, and listed on stock exchange all the documents of the company are public documents. All the amount of the creditors in the financial statement of the company had itself admitted liabilities and therefore it cannot be written off without mutual

consent with the creditors because any creditor can shoot the company for the balance due to him. Hence, there are some creditors, which are stagnant from last 3 years cannot be written off without the consent of the creditors. The learned AO noted that there are 10 parties whose outstanding balance is INR 1098998/- which remained unchanged from financial year 2008 – 09 until 2010 – 11. Therefore, the learned AO noted that as assessee has failed to provide any confirmation from the above parties and in some of the cases the addressee is provided were also not complete. Therefore, the learned assessing officer was of the view that unchanged liability from year to year shows that the above parties either not longer exist or have return of the amount into their books of accounts. Therefore, he held that these liabilities do no longer exist. Hence, he made the addition. The assessee challenged the same before the learned CIT – A who deleted the above disallowance as per para number 2.3 of his order. The learned AO has challenged the same.

12. The learned departmental representative reiterated the findings of the learned assessing officer and stated that when the parties shown as sundry creditors remained unchanged for last three financial years and the assessee has also not provided the addresses of these parties the learned assessing officer has correctly made the addition. It was further stated that the learned CIT – A did not look into the fact that the assessee does not have the correct addresses of these parties also.

13. The learned authorised representative reiterated the same submission made before the learned CIT – A.

14. We have carefully considered the orders of the lower authorities and arguments of the parties. Undisputedly assessee has certain sundry creditors outstanding for more than 3 years. There are no transactions in these accounts. However merely because such creditors are stagnant the liabilities do not ceased to exist. Hence no addition can be made under section 41 (1) of the income tax act as held by the honourable Supreme Court in 102 taxmann 713 and the honourable Delhi High Court in 18 taxmann.com 363. The learned CIT – A also deleted the above addition relying on the decision of the honourable Supreme Court and honourable

Delhi High Court in 343 ITR 408. Even before us, the learned departmental representative could not ring any material on record to establish that the liabilities are seized to exist during the year under consideration. Therefore we do not find any infirmity in the order of the learned CIT – A. Even otherwise this issue has been considered by the coordinate bench in assessee's own case for assessment year 2009 – 10 and on identical facts and circumstances has deleted the addition made under section 41 (1) of the act. Accordingly, ground number 1 of the appeal of the learned assessing officer is dismissed.

15. Second ground of appeal is with respect to the deletion of addition of INR 2 6227500 on account of payment of compensation. Brief facts of the expenditure shows that in the profit and loss account the assessee has claimed general and miscellaneous expenditure of INR 3 1873458 out of which it includes compensation payment of INR 2 6227500/-. The learned assessing officer noted that the assessee has debited these expenses to the profit and loss account, which are related to project expenses, and since the assessee is following project completion, method the same should not be allowed as expenditure in the profit and loss account for the year. The assessee explained that assessee was to launch some plot development and group housing schemes for which the company mobilized section of investors to invest in such properties. To attract them, plots in the group housing were offered at a very attractive price. However later on it was claimed that the company realized that it would not be viable for the company to deliver the project properties at such a low price and that if the company holds the stock the same can give better results in future. Consequently as a business decision, these investors were given exit after duly paying them the compensation on investment made by them. The payments made were for the purposes of the business and hence are allowable expenditure as claimed by the assessee. It was further stated that all these expenses are of revenue nature and are fully vouched and verifiable. The learned assessing officer rejected the contention of the assessee and stated that the nature of these expenses is certainly linked to the project undertaken by the assessee, which are at various stages of the

completion. Since the assessee is following the percentage completion method of revenue recognition, according to which all the purchases and expenses for the purposes of the construction are booked in work in progress and based on the percentage completion method the said amount is transferred to profit and loss account. Therefore, according to the method of accounting followed by the assessee, these expenses of compensation are disallowed for capitalization in work in progress and added to the income of the assessee. Accordingly, he made the disallowance of the above sum. In nutshell according to the assessing officer, the above amount should have been shown as project expenditure and from year to year should have been carried in the project account and not in the profit and loss account. The assessee agitated the same before the learned CIT – A who vide para number 6.4 allowed the claim of the assessee. The reasons given by him for allowing the above expenditure is that since the project itself was given up is not viable there is no question of the compensation being added to the cost of the project or even a percentage of the compensation being considered following the percentage completion method.

16. The learned departmental representative vehemently supported the order of the learned assessing officer and submitted that the assessee has claimed the compensation payment without starting a project and in the same financial year. The evidence does not support the explanation given by the assessee. It was further stated that the amount should have been capitalized in the project cost. Even if the old project is found and not viable and a new project is started, the above cost is the cost of new project because the assessee only for the new project has incurred this cost. According to him, unless this old project was cancelled and this compensation would have been paid the assessee would not have been able to start the new project. Therefore, the above project cost of the new project should have included the cost of this compensation payment made. Even otherwise it was stated that there is no details available that how this compensation has been paid by the assessee to those investors.

17. The learned authorised representative 1st referred to the submission made by the assessee before the learned assessing officer and the learned CIT – A.

He further stated that the issue has been considered in the case of DCIT vs vatika Township private limited 36 taxmann.com 283 by the coordinate bench where the identical compensation has been allowed. He further placed reliance on coordinate bench decision in case of M/s Gopaldas Estate and housing Ltd for assessment year 1997 – 98 wherein the above compensation was allowed as revenue expenditure. Therefore he submitted that the above said amount of compensation paid by the assessee for upcoming future project which was abandoned cannot be debited to the work in progress as there was no work in progress in respect of such project which could be charged to revenue in a percentage completion basis. He therefore submitted that the issue is not squarely covered in favour of the assessee. On the facts, he referred the page number 46 of the paper book wherein there is a list of 45 persons to whom the compensation have been paid.

18. We have carefully considered the rival contentions and perused the orders of the lower authorities. The claim of the assessee is that during the year it has incurred expenses on compensation for cancellation of the booking amount received of INR 26227500/– the same has been debited to the project expenditure and claimed as revenue expenditure for the year. The assessee's claim is that the assessee was to launch some plot development and group housing for which the company mobilized section of investors to invest in such properties. It was further claimed that to attract them the plots and group housing were offered at a very attractive price and later on the company realized that it would not be viable for it to deliver the product at such a low price and that if the company hold the stock the same can have better result in future. Therefore, the investors were given an exit after duly paying them the compensation for the investment made by them. The AO disallowed the same stating that these are related to the various projects and therefore they should be shown in the project cost and cannot be claimed as deduction of expenditure in this year as assessee according to AO is following project completion method. Therefore the claim of the AO was that the above expenditure needed to be debited to the project for which the expenditure has been incurred and as and when the project gets

completed the income is required to be offered net of the expenditure in that year. The learned CIT – A allowed the claim of the assessee considering the submission of the assessee that assessee is following the percentage of completion method. Therefore the learned CIT – A while allowing the claim of the assessee noted that assessee is following the percentage completion method as per last paragraph of the page number 11 of his order whereas the finding of the AO is at para number 3.2 of his order. Therefore, there is confusion whether the assessee is following the percentage completion method or project completion method. The assessee has also submitted the copies of the balance sheet for the year ended on 31st of March 2011. On reading of the balance sheet, also it is not clear whether the assessee is following percentage completion method or project completion method. Further before us the assessee has submitted a paper book wherein at page number 46 the assessee has given a list of 45 persons to whom the sum of Rs. 26227500/– was paid as compensation. The claim of the assessee is that the project has been abandoned for which the booking has been taken by these investors and therefore over and above the amount invested they have been paid the compensation. However neither the assessing officer nor the learned CIT – A has verified that for which project the bookings were accepted and on what terms and whether the above compensation is the cost of the new project or not. It is also not known that what kind of property was booked by these investors. This is pertinent for the reason that claim of the assessee is that it has accepted the booking for plots and the group housing but later on in the same year it was found that the same is not viable. All these things happened in the one financial year. Therefore, it is necessary for the revenue authorities to look at the reasons for abandoning the project in such a short time. Naturally if the bookings are made for the plots in the group housing scheme, there would necessarily be the supporting of the plot of land and in case of group housing there would be housing schemes for which the investors have made investment. It is highly improbable that a person would pay money to an estate developer without identifying the property itself. Though the assessee has stated before the learned CIT – A that it is submitted all these details before the

assessing officer but neither the AO nor the CIT appeal has discussed these documents. Furthermore, the investors have been given an exit therefore whether the payment was made as compensation or as an interest is also required to be verified. In the list submitted by the assessee at page number 46 of the compensation paid is a simple list where the name and the compensation paid is provided however no detail of the property booked, amount invested, amount of compensation, date of return of the amount invested and the rate or manner of working out compensation are not at all mentioned.

19. The learned authorised representative has stated that the issue is squarely covered by the decision of the coordinate bench in case of vatika townships private limited (supra). We have carefully perused above decision and find that facts in that particular case shows that the assessee made a payment of INR 2,100,00 to 4 parties and claimed it is a compensation expense. In that, particular case the advances were received many years back precisely in 1989 and 1994 whereas the agreement stood cancelled for assessment year 2001 – 02. Therefore, it was not the case of paying compensation by obtaining booking in the same financial year, cancelling it and then paying compensation to the buyers. Further, in that particular decision in para number 13 the coordinate bench has held that the payment of interest for advances which kept lying with the assessee for a number of years is entirely justified. Therefore, firstly in that particular decision the coordinate bench allowed it as interest expenditure however in the present case no such claim has been made that it is on interest expenditure but it was claimed as a pure compensation. Further at looking para number 2 of that decision there was specified property of the plot in the present case no such identification was shown for which the amount of compensation is paid and also the investors booked those properties. Therefore the decision relied upon by the learned authorised representative of the coordinate bench does not apply to the facts of the case.

20. The second decision relied upon by the learned authorised representative is of Gopaldas estate and housing private limited of the coordinate bench. The above decision has reached the honourable Delhi High Court and the

decision has been rendered in 103 taxmann.com 334 on 20/03/2019. In that particular decision the honourable Delhi High Court has noted that, the assessee developed 17-storied building and assessee follows the completed contract method. The project was completed in assessment year 95 – 96 and the assessee also paid compensation and 95 – 96 therefore the honourable High Court held that as the project itself has been completed in the same year it should be allowed in that year. Further as per para number 5 of the order this shows the fact that the spaces were allotted to various person who had been surrendering them for various reasons. Those persons have invested the money, which remained with the assessee for a number of years, and therefore they were compensated for the loss of the interest income on such investment. Further in para number 25 there was a specific reason why the advances received for sale were returned with the compensation as the lower ground floor initially approved by NDMC as air condition space and therefore while booking that space prospective buyers proceeded on that basis that it would be for commercial use however in the terms of the completion certificate issued by NDMC , LGF was sanctioned as a storage and therefore the buyers lost the interest and therefore the assessee decided to return the advances received and also compensate the buyers since the buyers funded the assessee for years. However, in the present case no such facts have been demonstrated that what the real reasons for cancellation of the bookings are. The assessee has given a very general answer that the property could be used for better options. Therefore, the decision of the honourable Delhi High Court does not help the case of the assessee.

21. Further the learned AO has looked at from the angle that whether the project expenses are required to be loaded in the project cost or not on the basis of method of accounting followed by the assessee. In the present case, it is also not coming out from the facts which method of accounting the assessee has followed as already stated above.

22. In view of the above facts, we set aside whole issue back to the file of the learned assessing officer with a direction to the assessee to show that

    a. what is the method of accounting employed by the assessee,

b. what the booking was made for stating the nature of the property, the area booked, the rate at which it is booked, consideration paid by the buyers, the relevant agreements between the buyer and the assessee,
c. reasons for cancellation of such bookings,
d. relevant agreements made at the time of surrender of booking,
e. rate of compensation paid,
f. Whether it is in nature of interest or business expenditure, if the provisions of tax deduction at source applies to it or not.

The learned AO may examine the same and then decide the issue about the allowability of such claim in accordance with law after affording proper opportunity of hearing to the assessee. Accordingly, ground number 2 of the appeal of the AO is set aside to the file of the AO.

23. In the result, appeal of the assessing officer is partly allowed for statistical purposes.

Order pronounced in the open court on 05/04/2019.

-Sd/-	-Sd/-
(AMIT SHUKLA) JUDICIAL MEMBER	(PRASHANT MAHARISHI) ACCOUNTANT MEMBER

Dated: 05/04/2019
A K Keot

Copy forwarded to

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

ASSISTANT REGISTRAR
ITAT, New Delhi