

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH: 'B', NEW DELHI)**

**BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
SH. SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No:-5947/Del/2016
(Assessment Year: 2012-13)**

Income Tax Officer Ward – 9 (3), Room No.413A, 4 th Floor, C. R. Building New Delhi	Vs.	M/s. Frontiner Land Development Pvt. Ltd. D-293, Defence Colony, New Delhi – 24 (PAN No. AAACF8742M)
APPELLANT		RESPONDENT

Appellant by : Ms. Ashima Neb, Sr. DR
Respondent by : Sh. Salil Aggarwal, Advocate
Sh. Shailesh Gupta, CA
Sh. Madhur Aggarwal, Advocate

Date of Hearing : 27.05.2019
Date of Pronouncement : 28.05.2019

ORDER

PER: N. K. BILLAIYA, AM

This appeal by the revenue is preferred against the order of the Commissioner of Income Tax [Appeals]-3, New Delhi, dated 10.08.2016 pertaining to A.Y 2012-13.

2. The only grievance of the revenue is that the CIT(A) erred in deleting the addition made by the Assessing Officer amounting to Rs.3.50 crores on account of forfeiture of advance.

3. During the course of scrutiny assessment proceedings the Assessing Officer noticed that the entire capital gains and interest income has been offset with the amount of Rs.3.50 crores claimed as forfeiture of advance. The assessee was asked to justify the offset. The assessee was further asked to show cause why the forfeiture of advance for purchase of property should not be treated as a capital expenditure.

4. In its reply the assessee submitted that the main object of the company is real estate development and the advance was given during the normal course of business. The forfeiture of the same has been treated as on revenue loss. The assessee furnished the copy of conformation from HDIL regarding forfeiture of advance against property and also furnished copy of bank account highlighting advance given for property.

5. The reply filed by the assessee did not find favour with the Assessing Officer who observed as under :-

a. As per details submitted by the assessee, it belongs to group which is leading player in the real estate.

b. The contention of the assessee that they were unable to arrange the balance amount to be paid to M/s HDIL is also not proved as per the balance sheet. The assessee company has given long term loans and advances amounting to Rs.16,30,97,856/- to various concerns including their associates company which also includes the amount of Rs.3.50 Crores paid to

M/s HDIL, which clearly reflects, that the assessee company was having enough amount which could have been utilized for payment of balance amount to M/s HDIL.

c. Further, plea of the assessee company that they were unable to raise loans from outsiders is also incorrect as per their own version stated vide letter dt. 11.03.2015 that...

"the loan of Rs.4 Crores was taken as a mortgage loan which had to be paid in 36 Equated quarterly installments of Rs. 19,36,095/- each commencing from 01/04/2007. In addition to the above, a loan of Rs.6 Crores against property at Plot No.702, Udyog Vihar, Phase-V, Gurgaon was also taken which had to be repaid in 36 Equated quarterly installments of Rs.29,04,142/- each commencing from 01/04/2007".

d. Further, assessee company has also sold the property at Defence Colony during the year under consideration and was having enough amount to be paid to M/s HDIL which were utilized to pay as loans & advances.

e. It is apparent from the above that the entire exercise has been created by the assessee company to adjust the short term capital gains earned due to sale of Defence colony property against forfeiture of advance..

f. The colorful devise of forfeiture of advance is also apparent as the agreement to sale was entered into by the assessee company in 12.10.2004 with M/s HDIL and the substantial amount of Rs.3.50 Crores has been paid and the balance amount of Rs.8.15 Crores was to be paid and all of sudden when assessee company has sold their defence colony property and earned short term capital gains, the forfeiture of advance has arisen.

g. The forfeiture of earnest money by M/s HDIL is nothing but a capital loss & not revenue loss as claimed by the assessee company.

h. It has been held in the number of judicial pronouncements that forfeiture of advance against property is capital receipts not revenue receipt, accordingly the forfeiture of advance paid by the assessee company is also capital expense & not revenue expense as claimed by them. It was held in the case of Travancore Rubber & Tea Co. Ltd. v. C.I.T [2000] 243 ITR158 {SUPREME COURT} that, the advance money forfeited, by the seller of capital asset, shall be reduced from the cost of the assets and if the advance money forfeited, exceeds the cost of

acquisition then the excess shall be a Capital Receipt not taxable.

i. *Further reliance is also placed in the case of CIT v. Jaipur Mineral Develop Syndicate (1995) 216 ITR 469 (Raj), where it has been held that where the payment is towards a capital asset the amount lost upon forfeiture will not be revenue loss though the sum may not have the same consequence or character in the hands of the recipient or beneficiary.”*

6. After making the aforementioned observations, the Assessing Officer was convenience that the forfeiture of advance given in 2004 is nothing but colorful device to adjust the capital gains. The Assessing Officer was of the strong belief that the forfeiture has the character of capital expenditure and accordingly made the addition of Rs.3.50 crores.

7. Assessee strongly agitated the matter before the CIT(A) and reiterated its claim of forfeiture as revenue expenditure.

8. After considering the facts and the submissions and after considering the some judicial decisions the CIT(A) concluded as under :-

“2.2 In the instant case the advance of Rs.3.50 crore was given in the ordinary course of business. If the expenditure is made for acquiring or bringing into existence an asset or advantage for the enduring benefit of the business, it is properly attributable to the capital and is of the nature of capital expenditure. On the other hand, it is not made for the purpose of bringing into existence any such asset or advantage but for running the business or working it with a view to produce the profits, it is a revenue expenditure. The advance of Rs.3.50 crore was given in the ordinary course of business to purchase the land for the development of the real estate. The forfeiture of the advance has been made by M/s HDIL

purely on the revenue account. In view of the facts and circumstances of the case, the Assessing Officer is directed to treat the advance being given in the ordinary course of business and rightly treated as loss incurred by the company. The addition of Rs.3,50,00000/- made by the Assessing Officer is deleted.”

9. Aggrieved by this the revenue is before us.

10. The DR strongly supported the findings of the Assessing Officer and in support relied upon the decision of Hon'ble Supreme Court in the case of Durga Prasad More reported in 82 ITR 540, Sumati Dayal reported in 214 ITR 801 and Mc Dowell & Company Limited reported in 1986 AIR 649. It is the say of the DR that the CIT(A) ignored the facts highlighted by the Assessing Officer treating the transaction as a colourable device.

11. Per contra the Counsel for the assessee vehemently supported the findings of the CIT(A). It is the say of the counsel that it is incorrect to say that the transaction is a colourable device when the same has been accepted by the Assessing Officer while treating the write off as capital expenditure.

12. We have given a thoughtful consideration to the orders of the authorities below. There is no dispute that the forfeiture of Rs.3.50 crores claimed by the assessee as revenue expenditure has been treated by the Assessing Officer as capital expenditure. This conclusively establishes the

genuineness of the transaction and therefore, cannot be accepted as a colourable device. All that is now required to be decided is whether the write off is a capital expenditure and revenue expenditure. The judicial decisions relied upon by the Ld. DR (supra) would do no good to the revenue.

13. There is also no dispute that the advance for the purchase of property given to HDIL was given in the year 2004. As per the agreement the assessee had to pay the balance amount of Rs.8.15 crores within three years from the date of agreement. The deal could not be materialized due to the inability of the assessee to pay balance sum of money. This is clear from the conformation letter of HDIL which reads as under :-

"This is to inform you that amount of Rs.3.50 crores paid by you vide pay order / Sh.No. 6020 on UTI Bank Limited for Rs.50,00,000/- (Fifty Lakhs only) dt. 11/11/2014 and vide Ch. No.47390 for Rs.3,00,00,000/- (Three Crore) dt 12/10/2014 against purchase of property from us pursuant to an agreement dt 12/10/2014 stands forfeited on account of failure to pay balance amount within specified time limit as envisaged in the said agreement. Hence we are bound to forfeit the said amount with immediate effect without any recourse from your side as per agreement."

Further vide letter dated 05.03.2015, it was submitted that:

- 1. The total Sale consideration with the HD1L was for Rs.11.65 Crores out of which 30% (Rs.3.50 Crores) was paid as advance. The balance amount of Rs.8.15 Crores was agreed to be paid within 3 years from the date of agreement (i.e., 12th October,2004). The advance was paid in respect of premises at area of building no. 2 including balcony, lift, staircase area, lobby of sector-11, village dangare, Taluka Vasai, Dis. Thane, Maharashtra.*
- 2. The deal could not be materialized due to inability to pay balance amount of consideration by M/s Frontier Land Development Private Limited leading to forfeiture of advance amount of Rs.3.50 Crores by HDJL.*
- 3. The balance amount of Rs.8.15 Crores was expected to be paid by the company out of inter corporate loans and loans from banks / financial institutions."*

14. In our considered opinion the Assessing Officer cannot step into the shoes of the assessee so as to hold that when the funds were available why the balance sum of money was not paid.

15. As mentioned elsewhere by treating the forfeiture as a capital expenditure, the Assessing Officer himself has accepted the transaction of adjustment of Rs.3.50 crores and its write off / forfeiture subsequently. On identical set of facts the coordinate bench in the case of Rekhi Lamba Realtors Vs. ITO in ITA No.888/Mum/2009 held as under :-

"After considering the rival contentions and relevant record. We find that the CIT(A) has not subscribed the view taken by the Assessing Officer on the disallowance of the claim of the assessee but rejected the claim of the assessee on the ground that forfeiture earnest money is a capital loss to the assessee. It is undisputed fact that the forfeiture money deposited was as per the terms and conditions of the agreement executed between the CIDCO and the assessee and not because of in violation of any law which would amounts to any offence and an act which prohibited by law. Therefore, the forfeiture of the earnest money by the CIT(A) as per the terms of the agreement does not fall under the Explanation to Section 37 (1). As far as the nature of loss is concerned since the

assessee in the business of sale – purchase of the property/ land, therefore, the earnest money paid by the assessee was for purchase of plot of land which should have been stock in trade of the assessee and not for acquisition of capital asset. Accordingly, loss due to the forfeiture of the earnest money deposited cannot be a capital loss. The earnest money deposit was made by the assessee was not for acquiring of any capital asset for investment of business assets but it was deposit for the business of the assessee i.e. the sale and purchase of land. Accordingly, the forfeiture of earnest money in the case in hand is a business expenditure. Therefore, we set aside the orders of the lower authorities and the claim of the assessee is allowed.”

16. Considering the facts in totality, in the light of the decision of the coordinate bench we do not find any reason to interfere with the findings of the CIT(A). The appeal filed by the revenue is dismissed.

17. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 28.05.2019.

Sd/-

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Dated: 28.05.2019
Neha

Sd/-

(N.K.BILLAIYA)
ACCOUNTANT MEMBER

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	27.05.2019
Date on which the typed draft is placed before the dictating Member	28.05.2019
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	28.05.2019
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	