IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G' NEW DLEHI

BEFORE SHRI O.P.KANT, ACCOUNTANT MEMBER
AND
SHRI K. NARSIMHA CHARY, JUDICIAL MEMBER

ITA.Nos.1905, 1906 &1907/Del/2017
Assessment Years: 2007-08, 2012-13, 2013-14

M/s Unitech Limited, **C/o-Luthra & Luthra,** **Law Offices, 103,** **Ashoka Estate,** **Barakhamba Road,** **New Delhi.** **PAN –AAACU1482H**	**vs**	**DCIT,** **Circle-27(1),** **New Delhi.**
(Applicant)		(Respondent)

ITA Nos. 6437 & 4781/Del/2017
Assessment Years-2012-13 & 2013-14

ACIT, **Circle-27(1), Room No.193,** **Saket,** **C.R.Building, New Delhi.**	**vs**	**M/s. Unitech Ltd.,** **6, Community Centre,** **New Delhi-110017.** **PAN –AAACU1482H**
(Applicant)		(Respondent)

Appellant by : Sh. Rohit Tiwari
Ms. Kanika Jain, Adv.
Respondent by : Sh. S.S.Rana, CIT DR

Date of hearing: 17/07/2019
Date of order : 24/07/2019

ORDER

PER BENCH:

Aggrieved by the orders dated 15/4/2015 in respect of the assessment years 2007-08 and 2012-13 passed by the

learned Commissioner of Income Tax (Appeals)-10, New Delhi and order dated 23/02/2017 in respect of the assessment year 2013-14 passed by the learned Commissioner of Income Tax (Appeals)-9 ("Ld. CIT(A)"), the assessee, namely M/s Unitech Ltd ("the assessee") filed ITA Nos. 1905 to 1907/Del/2017 respectively, whereas Revenue filed appeals i.e. ITA Nos.6437 and 4781 /Del/ 2017 in respect of the assessment years 2012-13 and 2013-14 respectively.

2. Since all these appeals emanate from the common set of facts permeating through different years, we find it just and convenient to dispose of all these matters by way of this common order, with primarily reference to the facts of obtaining for the assessment year 2007-08, and wherever it is necessary with reference to other years also.

3. At the outset, it is submitted by Ld. AR and also Ld. DR that though the authorities below passed the orders by placing reliance on the orders relating to the assessment years 2009-10 and 2010-11, facts are very similar for the subsequent years also. They have submitted that in the appeal preferred in respect of the assessment years 2009-10 on 2010-11, a co-ordinate Bench of this Tribunal in ITA No. 5180 and 5718/Del/2013 in respect of assessment year 2009-10 and ITA No. 6181 and 6648/Del/2015 in respect of the assessment year 2010-11, quashing the assessment and preliminary ground of jurisdictional aspect

and while holding that the directions issued by the ACIT for special audit under section 142 (2A) of the Income tax Act, 1961 (in short "the Act") was illegal and thus the assessments were made was barred by limitation. They, therefore, submitted that a co-ordinate Bench of this Tribunal decided the appeal on similar facts for the assessment year 2011-12 by order dated 12/02/2019 and such an order is relevant for the purpose of disposing of these appeals. We, therefore, wherever necessary will take guidance from the order dated 12/02/2019 in assessee's own case for assessment year 2011-12.

4. Briefly stated relevant facts are that the assessee is deriving income from the business of construction and development of real estate projects; that the assessee has a diverse vide product mix comprising residential, commercial, IT parks, retails, amusement parks and hotels; that the core business of the assessee is real estate; that the assessee had many real estate projects all over India ranging from residential to commercial, retail, hospitality, entertainment herbs and slum rehabilitation; that in addition, the assessee was in the process of developing notified SEZ jointly owned with Unitech corporate Park plc. (UCP); that the assessee is providing consultancy related to management of its joint-venture projects; that the assessee has construction business in civil construction and infrastructure projects as one of its business segments.

5. For the assessment year 2007-08, assessee filed return of income on 31/10/2007 declaring total income of Rs. 12,18,53,37,410/-including long-term capital gains of Rs.11,10,82,73,627/-. Learned Assessing Officer, to the extent these appeals are concerned, made additions on account of capital gains treating it as business income to the tune of Rs.1,53,98,17,883/-, loan from BUUIPL treating it as a deemed dividend to the tune of Rs. 11,07,40,708/-, notional interest on share application money to the tune of Rs. 1,85,35,549/-, and notional interest on unsecured loans to the tune of Rs. 2,13,38,368/-.

6. When the assessee preferred appeal, Ld. CIT(A) by way of impugned order deleted the addition made on account of deemed dividend under section 2 (22) (e) of the Act and confirmed the other additions. Hence, the assessee preferred appeal.

7. In respect of the issue relating to taxing, the gains arising from the sale of shares, learned Assessing Officer found that the assessee entered into share purchase agreement with various buyers in respect of shares of all the wholly owned subsidiaries who are carrying land and whose land development rights were transferred to the assessee, and held that what was being transferred through the apparent to transfer of shares in all these companies were the properties held by the wholly owned subsidiary company. Learned Assessing Officer relied upon the

assessment orders relating to assessment years 2009-10 and 2010-11 to reach a conclusion that the transactions of sale of shares were in fact in accordance with the ordinary lines of business as defined in MOU and Articles of Association of the company. Learned Assessing Officer further found that the transactions were found to be carried out in a manner which indicates systematic and organised activity with profit motive and, therefore, the transaction of sale of shares of a wholly owned subsidiary companies is infected business profit and not capital gain as the intention of the company was not to earning dividend but again profit by sale of shares of those companies.

8. Ld. CIT(A), on these facts, noticing his predecessors order dated 16/08/2013 for the assessment year 2009-10 in assessee's own case, felt that the said order for the assessment year 2009-10 is self explanatory, exhaustive on the basis of *modus operandi* adopted by the assessee, and to follow the rule of judicial consistency, he found it difficult to take a different view and, therefore, upheld the addition.

9. Ld. AR submitted that this issue is no longer *res integra* and vide paragraph No. 15 of the order dated 12/02/2019 in ITA No. 6585/Del/2015 for assessment year 2011-12, a co-ordinate Bench of this Tribunal held the issue in favour of the assessee. A copy of the order is

produced before us and we have gone through the same. Vide paragraph No. 15, it was held that,-

> *15. "Further the guide line issued by the CBDT, clearly lays down that, what has to be seen is, firstly, the objective of acquiring the shares, that is, whether it has been treated as investment or to enjoy income there from or to make profit by buying and selling shares in short run; secondly, the period of which shares have been held, that is, whether the shares are held for more than three years; thirdly, whether there is frequency of transactions in a particular share; and lastly, the treatment and classification given in the books of accounts has to be given significance. If we apply the said guidelines, then all the factors indicate that intention was never to trade in shares. Here the revenue's stand that there was trading of under lying assets of the subsidiary companies, cannot be upheld in law as shareholder does not have right to assets of the company but only share in profit. The company alone can with the approval of board of directors sell its assets. Thus, we do not find any reason as to why sale of shares is treated as trading in land so as to be taxed as business income in the hands of the assessee. Hence, in view of our discussion made above, we hold that income from sale of shares cannot be taxed as business income but has to taxed as capital gain. In the result, these grounds are allowed."*

10. It is, therefore, clear that under similar set of facts, it was held by the Tribunal that the income from sale of shares cannot be taxable as business income, but has to be taxed as capital gain. Since there is no dispute as to the similarity of facts, in the absence of any reasons compelling us to take a different view, while following the same, we hold the issue in favour of the assessee.

11. Similar is the issue involved in ground No. 1 in ITA No. 1906/Del/2017 in respect of the assessment year 2012-13. Hence, this ground in respect of the assessment year 2012-13 is also held in favour of the assessee.

12. Now coming to the issue relating to the disallowance of proportional interest under section 36 (1)(iii) of the Act on the borrowed funds to the extent of funds advanced in respect of share application money, it is involved for the assessment years 2007-08, 2012-13 and 2013-14. Learned Assessing Officer found certain amounts shown as outstanding balance of share application money, which are exceeding 6 were sold, a period considered reasonable for allotment of shares and, therefore, held that interest should have been charged on these loans as the company is operating on borrowed funds. While following the assessment orders for the assessment years 2009-10 and 2010-11, learned Assessing Officer brought the proportionate interest to tax.

13. It is submitted that this issue also is no longer *res integra* and is covered by the order in ITA No. 6585/Del/2015 for the assessment year 2011-12. On a perusal of the order, we find that the Tribunal dealt with this issue vide paragraph numbers 16-21 of the order, and vide paragraph No. 21 held that,-

> *21. "Further, if at all such disallowance is being made on notional and hypothetical basis treating share application money as advance or interest free loan, then AO also needs to take into consideration, whether assessee company has sufficient surplus fund or not; and if surplus fund exceeded the amount of advance, then again, no notional interest or disallowance can be made. Here it is undisputed fact that assessee company has more than Rs. 9281.87 crores of accumulated reserves and during the year itself its reserves have increased by Rs. 1379 crores and amount of share application money advance was only Rs. 245.34 crores. Thus, in such circumstances, presumption is always in the favour of the assessee that these are advances out of surplus funds only and such presumption has been laid down by the Hon'ble Jurisdictional High Court in the case of CIT vs. Max India Ltd. (P&H) High Court, reported in 398 ITR 209. Thus, under the facts and circumstances of this case, we hold that no disallowance can be made. In so far as reliance placed on earlier year orders, Ld. Counsel has brought on record that the revenue's appeals for the Asstt. Year 2009- 10 and 2010-11 have been dismissed by the Tribunal by quashing the assessments on the ground of limitation. Thus, on merits we hold that no addition is called for and consequently the ground no. 4 to 4.2 is treated as allowed."*

14. Since the facts and circumstances are very similar to those involved for the years under consideration, while respectfully following the same, we hold that in view of the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Max India Ltd (P & H High Court), 398 ITR 209 the presumption in favour of the assessee that the advances were only out of this surplus funds and such a presumption does not stand reverted, and consequently the

issue is held in favour of the assessee. Ground No. 2 in assessee's appeals for the assessment years 2007-08, 2012-13, and ground No. 1 in the appeal for the assessment year 2013-14 are answered, accordingly in favour of the assessee.

15. Insofar as the issue relating to the disallowance of interest under section 36 (1)(iii) of the Act on borrowed funds to the extent of funds advanced by the assessee to its subsidiaries, such an issue covers ground No. 3 in the appeals of the assessee for the assessment years 2007-08, 2012-13 and 2013-14. On this aspect, case of the Revenue is that the assessee had shown certain outstanding balance amount is of interest free loans to various subsidiary companies of the assessee, having separate business/Project activities and during the assessment proceedings for the years 2009-10 and 2010-11, it was held that such interest (at the rate of average rate of interest paid by the assessee during the year, which is 11% in 2007-08, on interest free loans to related concerns must be added to the income of the assessee. Learned Assessing Officer, therefore, made such an addition and basing on the same analogy of the earlier year findings of 2009-10 and 2010-11, Ld. CIT(A) also upheld the same.

16. It is brought to our notice that this issue is covered by the order dated 12/02/2019 for the assessment year 2011-12, vide paragraph numbers 27-31 and vide paragraph

numbers 30 and 31, a co-ordinate Bench of this Tribunal held as follows:-

> *27. In ground No. 6 to 7.2 assessee has challenged the disallowance of Rs. 1,32,17,15,364/- as interest imputed by AO on interest free loan/ advance to sister concerns. The facts in brief are that assessee company has given advances during the year to subsidiaries/joint venture/associates for sum of Rs. 233.01 crores. The outstanding balance as on 31.3.2001 aggregated to Rs. 986,67,87,694/-, the details of outstanding balances have been incorporated at page 11 of the assessment order. AO has held that this issue has been examined in detail during the assessment proceedings for the assessment year 2009-10 and 2011-12, wherein it has been held that interest paid by the assessee on this borrowed fund should be disallowed @ 14%. Following the same precedent AO has calculated the disallowance of interest on borrowed capital funds to Rs. 1,32,17,15,364/- by applying the interest rate of 14%.*
>
> *28. Before us, Ld. Counsel has submitted that the assessee has huge surplus funds which is evident from the fact that it has accumulated reserves of Rs. 9281.87 crores, therefore there cannot be any presumption that money has been advanced to subsidiaries out of borrowed funds. In any case the money which has been advanced to these companies/concerns were also engaged in real estate business and such an advance was for the business purpose which is incidental to the business carried out by the assessee, because assessee had entered into joint venture on various projects with these companies. Thus, there was not only commercial expediency but business link in advancing such funds to the companies.*
>
> *29. On the other hand, Ld. DR strongly relied upon the order of the AO.*

30. After considering the rival submissions and relevant finding given in the impugned orders, we find that nowhere the AO has rebutted the contention of the assessee that these advances to sister concerns were for business purpose or for commercial expediency nor he has tried to establish the nexus between the money advanced from the borrowed funds or has asked the assessee to establish that such advance has been given out of surplus or interest through fund. Here in this case the subsidiary companies/concerns to whom money have been advanced were also engaged in real estate business with whom assessee company had entered into joint venture for various projects. Once such a contention of the assessee has not been rebutted or refuted by the AO, then it has to be accepted that such an advance was for the business purpose. Accordingly, we hold that such an advance was for commercial expediency and therefore, no disallowance could have been made in view of the judgment of Hon'ble Supreme Court in the case of SA Builders Ltd. vs CIT(A) 288 ITR 1(SC). 31. It is further noticed that the assessee company had huge surplus funds which far exceeded the advances; and therefore, without their being a nexus proved by the AO that only borrowed funds were advanced, then presumption can be drawn that such advances have been given out of interest free funds. This view is now well supported by various judgments, like; CIT vs. Reliance Utilities Ltd. reported in 313 ITR 340 (Bom); and CIT vs. Max India Ltd., reported in 398 ITR 209 (P&H). Accordingly, such a disallowance is deleted on this ground also."

17. Revenue does not dispute the applicability of these findings for the years under consideration also and in view of the above finding of the Tribunal, we hold that in the absence of any nexus proved by the learned Assessing Officer that only borrowed funds were advanced, a presumption has to be drawn that such advances were

provided out of interest free funds, in view of the decision of the Hon'ble Punjab and Haryana High Court in the case of CIT vs. Max India Ltd (supra). Hence, ground No. 3 of the appeals of the assessee for the assessment year 2007-08 and 2012-13 and ground No. 2 for the appeal for the assessment year 2013-14 are answered in favour of the assessee and the addition stands deleted.

18. Ld. AR reported that grounds No. 4 and 6 in ITA No. 1906/Del/2017 for assessment year 2012-13 are not pressed. He argued ground No. 5 relating to the disallowance of expenses to the tune of Rs. 4,17,05,381/- sustained by the Ld. CIT(A) under section 14 A r.w.Rule 8D of Income Tax Rules, 1962 ("the Rules") out of the total disallowance of Rs.15,08,87,908/-stating that the assessee voluntarily disallowed a sum of Rs. 2,54,47,498/-under section 14A of the Act and the learned Assessing Officer without recording any satisfaction as to the non-acceptability of this amount under section 14 A of the Act eagerly proceeded to apply Rule 8D of the Rules to the case of the assessee.

19. While placing reliance on the decision of the Hon'ble Delhi High Court in the case of Ld. PCIT vs. Vedanta Limited (2019) 102 taxmann.com 95, he submitted that Rule 8D cannot be invoked and applied unless learned Assessing Officer records is a dissatisfaction recording

correctness of claim made by the assessee in relation to the expenditure incurred to earn any exempt income.

20. It could be seen from the assessment order, learned Assessing Officer had recorded that

> The assessee company has shown evident income of Rs. 4,17,05,381/- earned during the year and claimed the same being exempt income in computation of income filed.
>
> As the provision under section 14 A read with Rule 8D or applicable to the assessee's case, the calculation for the disallowance as per the details furnished in the balance sheet is as follows....

21. It is, therefore, clear that the learned Assessing Officer felt that application of Rule 8D is automatic and any sum falling short of the amount resulted after application of the formula under Rule 8D, shall be added back to the income of the assessee. In a number of decisions, the Hon'ble High Court and Supreme Court held that Rule 8D cannot be invoked and applied unless the learned Assessing Officer records is a dissatisfaction recording correctness of claim made by the assessee in relation to expenditure incurred to earn the exempt income.

22. In view of our finding of fact that, in this matter, learned Assessing Officer failed to record his satisfaction recording the correctness of the claim made by the assessee in relation to expenditure incurred to earn exempt income and therefore, we find it difficult to sustain any

disallowance whatsoever on this aspect. We, therefore, while accepting the contention of the assessee and respectfully following the decision of the Hon'ble Delhi High Court in the case of Vedanta (supra) delete the addition made under section 14 A and Rule 8D.

23. Now coming to the appeals of the Revenue for the assessment years 2012-13 and 2013-14, we find that 3 issues are common for both the years and those related to the addition out of deduction under section 24 of the Act, disallowance of prior period expenses and disallowance of expenses under section 14A of the Act read with Rule 8D of the Rules and all these issues are covered by the order dated 12/02/2019 for the assessment year 2011-12 in assessee's own case in ITA No. 6585/Del/2015. In respect of the assessment year 2013-14, an additional issue is raised by the Revenue relating to the addition of Rs.4,85,65,343/-on account of late payment of PF payable. We shall deal with these aspects hereunder.

24. In respect of the addition out of deduction under section 24 of the Act, the Tribunal dealt with this issue vide paragraph numbers 32-35, and vide paragraph No. 35 thereof it was held that,-

> ***35.*** *"After hearing both the parties and on perusal of the impugned order it is seen that, nowhere it has been denied that the rental income by the assessee is from leasing of the premises and such rental income has been declared under the head 'income*

from house property'. The entire finding of the AO is based on presumption that assessee must have incurred certain expenditure in relation to the earning of rental income without identify as to which expenditure can be said to be related to earning of rental income or there is any systematic activity for exploiting the property for commercial or business purpose. Here the entire rental income has been earned from letting out the properties owned by the assessee, hence when income has been earned from simply letting out the property then it has to be taxed under the head 'income from house property'. Hon'ble Supreme Court in the case of Raj Dadarkar & Associates v. Asstt. CIT [2017] 81 taxmann.com 193/248 Taxman 1/394 ITR 592, after considering the earlier judgements of the Hon'ble Supreme Court as cited by the Ld. Counsel has held that wherever there is an income from leasing out of premises and collecting rent, normally such an income is to be treated as income from house property, if the conditions of provisions of Section 22 of the Act are satisfied. Moreover, it has also been pointed out by the Ld. Counsel that all throughout in the earlier years assessee has been showing rental income under the head 'income from house property' which has been accepted by the revenue under the scrutiny proceedings in various years. The details of earlier assessment accepting the rental income as income from house property has been given in the chart enclosed at page 3 of the paper book volume V. Thus, under these facts and circumstances, we hold that rental income cannot be treated as business income and consequently, benefit of standard deduction of 30% has to be allowed."

25. In respect of the addition being disallowed relating to the prior period, this issue was dealt with while paragraph numbers 36 and 37, and vide paragraph No. 37, the Tribunal answered the issue in the following way while deleting the addition:

> ***37.*** *"After considering the rival submissions and on perusal of the relevant finding given in the impugned order, we find that AO has nowhere doubted the veracity of the expenses though the same pertained to previous year. As pointed out by the Ld. Counsel the liability has been crystallised during the relevant assessment year and it was never claimed in preceding assessment year. He also drew our attention to the relevant bills given at page 4 of the additional paperbook -V to show that most of the bills related to consultancy charges and travelling expenses of the Directors which was submitted and received by the assessee during the year and therefore, based on these bills assessee has claimed expenditure. Accordingly, when bills have been received during the year then we do not find any reason as to why such expenditure is to be disallowed and hence same is deleted."*

26. On the aspect of the addition under section 14A of the Act r.w.Rule 8D of the Rules, vide paragraph numbers 18 to 22 (supra), we have dealt with this issue and reached a conclusion that any addition under section 14A of the Act read with Rule 8D of the Rules cannot be sustained in the absence of the learned Assessing Officer recording satisfaction/dissatisfaction in relation to the amount that was voluntarily disallowed by the assessee.

27. In view of the observation taken by the Tribunal in assessee's own case for the assessment year 2011-12 which is applicable to the facts of the case for the assessment years 2012-13 and 2013-14, we find that grounds No. 1 to 3 of ITA No. 6437 and 4781/Del/2017 are liable to be dismissed.

28. Lastly turning to the ground No. 4 in ITA No. 4781/Del/2017, it relates to the addition of Rs.4,85,65,343/- on account of late deposit of PF. Ld. CIT(A) deleted the same by following the decision of the Hon'ble Supreme Court in the case of CIT vs. Vinay Cements Ltd (2007) 213 CTR (SC) 268 and the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. AIMIL Ltd 188 taxman 265 (Delhi). No fact is brought to our notice which renders these two decisions inapplicable to the facts of the case on hand are as to how the Ld. CIT(A) went wrong in following the decision in these 2 cases. We, therefore, do not find any illegality or irregularity in the conclusion reached by the Ld. CIT(A) on this aspect and, therefore, while upholding the same and dismiss this ground of appeal.

29. In the result, all the 3 appeals of the assessee are allowed and the 2 appeals preferred by the Revenue are dismissed.

Pronounced in open court on the 24th of July, 2019.

Sd/- **Sd/-**

(O.P.KANT)
ACCOUNTANT MEMBER

(K. NARSIMHA CHARY)
JUDICIAL MEMBER

Dated: 24/07/2019
'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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