

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "D", MUMBAI**

BEFORE SHRI RAJESH KUMAR (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 2645/MUM/2017
Assessment Year: 2012-13**

The Income Tax Officer-20(1)-4, R. No. 112, Piramal Chambers, 1 st Floor, Parel, Mumbai - 400031	Vs.	M/s Divinity, Atlas Mill Cound, P.D. Mello Road, Mazgaon, Reay Road, Mumbai - 400031 PAN: AAHFD7084L
(Appellant)		(Respondent)

Revenue by : Shri D.G. Pansari (DR)

Assessee by : Shri Anant N. Pai (AR)

Date of Hearing: 19/02/2019
Date of Pronouncement: 15/05/2019

ORDER

PER RAM LAL NEGI, JM

This appeal has been filed by the revenue against the order dated 18.01.2017 passed by the Commissioner of Income Tax (Appeals)-32 (for short 'the CIT(A), Mumbai, for the assessment year 2012-13, whereby the Ld. CIT(A) has allowed the appeal filed by the assessee against the assessment order passed u/s 143 (3) of the Income Tax Act, 1961 (for short the 'Act').

2. Brief facts of the case are that the assessee firm consisting of three partners namely SV Inovabuild Pvt. Ltd., Sumer Infrastructure Pvt. Ltd. and Stresscrete India Pvt. Ltd., engaged in the business of civil construction filed its return of income for the assessment year under consideration declaring nil income. Since, the case was selected for scrutiny, the AO issued notice u/s 143 (2) and 142 (1) of the Act. In response thereof the authorized representative attended the proceedings from time to time and submitted the details called

for. Since, it was noticed that the assessee had shown an amount of Rs. 3,17,00,000/- as mobilization advance received from Mira Bhayander Municipal Corporation (MBMC), the AO asked assessee to submit details of payment received from MBMC. Information was also sought from MBMC regarding payments made to the assessee. It was further noticed that MBMC has deducted an amount of Rs. 7,00,000/- as TDS towards payment made to the assessee firm. The assessee claimed refund of TDS deducted in the revised computation filed during the assessment proceedings. Accordingly, the AO asked the assessee to show cause as to why the mobilization advance should not be treated as its income as tax has been deducted for the said payments. The assessee submitted that it had filed belated return of income and not claimed TDS at the time of filing the return. It was seen from 26AS details that MBMC has deducted Rs. 7,00,000/- from the amount paid towards the project cost. The assessee further contended that since the mobilization advance is recoverable the same cannot be treated as its income. The AO rejecting the contention of the assessee treated the mobilization advance received during the FY 2010-11 as income of the assessee and added back the same to the income of the assessee and accordingly assessed the income of the assessee at Rs. 3,17,00,000/-.

3. Aggrieved by the assessment order, the assessee challenged the same before the CIT (A). The Ld.CIT (A) allowed the appeal and directed the AO to delete the addition and to give credit of TDS as per 26AS after due verification. The revenue is in appeal before the Tribunal against the said findings of the Ld.CIT (A).

4. The revenue has challenged the impugned order passed by the Ld. CIT (A) on the following effective ground:-

1. *“On the facts and in the circumstances of the case and in law, the ld. CIT (A) has erred in deleting the amount of Rs. 3,17,00,000/- as mobilization advance received from Mira*

Bhayander Municipal Corporation without appreciating the facts of the case.

2. *On the facts and in the circumstances of the case and in law, the ld. CIT (A) erred in deleting the addition made on account of mobilization advance received by the assessee without appreciating the fact that the major part of the fund received in the form of mobilization advance has been siphoned into the partners capital account as repayment of loans received from them thereby not using the funds directly for the construction activity.”*

5. Before us, the Ld. Departmental Representative (DR) relying on the assessment order passed by the AO submitted that the Ld.CIT (A) has erred in deleting the amount of Rs. 3,17,00,000/- as mobilization advance received from MBMC without appreciating the fact that the major part of the funds received by the assessee towards mobilization advance has been siphoned into the partners capital account as re-payment of loans received from them and not used directly for the construction activity. The Ld. DR further submitted that since, the assessee did not file revised return, the AO has rightly rejected the claim of credit of TDS the assessee.

6. On the other hand, the Ld. counsel for the assessee submitted that there is no infirmity in the order passed by the Ld. CIT (A) to interfere with. The mobilization advance is an advance against the work allotted and is to provide capital needs of the entity and recovered as and when the work is completed and payments fall due to the assessee. TDS is deducted at the time of credit of payment whichever is earlier as per the provisions of section 194C. The work was executed in the subsequent years and the mobilization advance was recovered from the payment falling due. The contract shown in the subsequent years are gross amounts inclusive of the mobilization advance and the profit and loss account of the subsequent years. The Ld. counsel relied on the

decisions of the Hon'ble Gujarat High Court in the case of *CIT vs. Narayansingh Gulabsingh* 63. *Taxaann.com* 335, the Hon'ble Karnataka High Court in the case of *Pr. CIT vs. Elsamex-TWS-SNC Joint Venture* ITA No. 248/2016 order dated 28th. Feb., 2016 and decision of the Delhi Bench of the ITAT in the case of *DCIT vs. Five Star Construction Pvt. Ltd* ITA No. 1861/Del/2011 to substantiate his contentions.

7. We have heard the rival submissions of the parties and also carefully gone through the entire material on record. The only grievance of the revenue is that the Ld. CIT (A) has wrongly deleted the addition made by the AO amounting to Rs. 3,17,00,000/- received by the assessee firm as mobilization advance from MBMC during the previous year. The Ld. CIT (A) has deleted the addition made by the AO holding as under:-

"5. I have carefully considered the facts of the case, grounds of appeal and written submissions made before me. The ground No. 1 against treating the amount of mobilization advance as income of the year, Ground No. 6 & 7 relating to credit for TDS of Rs. 7,00,000/-. I proceed the appeal as under:-

5.1 I found from the assessment order that appellant received amount of Rs. 3,17,00,000/- as mobilization advance received from Mira Bhayander Municipal Corporation to complete the work assigned. The AO in his assessment order mentioned that MBMC made payment to the appellant 67,00,000/- on 31.05.2011 on 1,50,00,000/- and 1,00,00,000/- on 08.07.2011 totaling to Rs. 3,17,00,000/- I note from details filed by the appellant viz. bills dated 31.05.2011 and 08.07.2011 issued from MBMC regarding payments made for Construction of tenement in BSUP project under JNNURM at Jantanagar therein clearly mentioned 'Mobilization Advance' not payment. It clearly proves that amounting received from MBMC is not payment it is only advances.

Further I found that appellant had given bank guarantee to MBMC and from clause 56 of tender document clears that mobilization advance to the extent of 5% of the accepted tender

cost is permissible against bank guarantee. Relevant clause tender document is reproduced as under:-

“56. Mobilization Advance:

Mobilization advance will be given to the extent of 5% of the accepted tender cost at the interest rate of S.B.I. interest rate + 0.5% extra per annum against the submission of Bank Guarantee amounting to mobilization advance amount. This submission of Bank Guarantee amounting to mobilization advance amount. This mobilization advances will be recovered in equal 4 installments from 1st to IVth R.A. bills of the contractor.”

From the above, it is clear that mobilization advance is recoverable, hence is cannot be income of the appellant. From the submission given by the assessee it is apparent that during the year under consideration bills was not raised by MBMC, hence no recovery has been made. As per statement of recovery of mobilization advance provided by the appellant, Rs. 1,75,35,249/- of advance was recovered during the A.Y. 2014-15 and 2016-17. The details of recovery is reproduced as under:-

<i>Asst. Yr.</i>	<i>Turnover</i>	<i>Mobilization Advance Closing Bal</i>	<i>Mobilization Advance Recovered</i>	<i>Closing Balance of Mobilization Advance</i>	
<i>2012-13</i>	<i>-</i>	<i>31700000</i>	<i>0</i>	<i>31700000</i>	<i>Mobilization Advance Received in AY 2012-13</i>
<i>2013-14</i>	<i>12500000</i>	<i>31700000</i>	<i>0</i>	<i>31700000</i>	
<i>2014-15</i>	<i>48658207</i>	<i>26700000</i>	<i>5000000</i>	<i>21700000</i>	
<i>2015-16</i>	<i>14250740</i>	<i>26700000</i>	<i>0</i>	<i>26700000</i>	
<i>2016-17</i>	<i>11355449</i>	<i>26700000</i>	<i>12535249</i>	<i>14164751</i>	

In view of the above, I have no hesitation to allow the appeal in favour of the appellant, accordingly, this ground of appeal is allowed.”

8. We notice that the AO has not accepted the submission of the assessee on the ground that the assessee has filed belated return of income, as per 26AS MBMC deducted the tax at source from the payment of mobilization advance. The assessee did not revised its return in it submitted a revised computation of income and the major part of the funds were utilized by the partners for repayment of loans. The Ld. CIT (A) has pointed out that from the details, it is clear that the mobilization advance is not a payment from MBMC but it is only advances. Since, the mobilization advance is recoverable, the same cannot be income of the appellant. It is apparent from the record that during the year under consideration bills were not raised by MBMC, therefore, no recovery was made. As per the relevant clause in the tender document regarding mobilization advance was given to the extent of 5% of the accepted tender cost at the rate of SBI interest plus 0.5% extra per annum against the submission of bank guarantee amounting to mobilization advance. This clause further contemplates that the mobilization advances will be recovered in four equal installments from 1st to 4th RA Bills of the Contractor.

9. In the case of *CIT vs. Narayansingh Gulabsingh* (supra) the Hon'ble Gujarat High Court has held that mobilization advance received cannot be treated as revenue receipt of the relevant year. In the case of *DCIT vs. Five Star Constructions* (supra) the Delhi Tribunal has held that merely because tax at source has been deducted by the builder, the receipt of mobilization money cannot be deemed as income of the assessee for the year under consideration. In the case of *Pr. CIT vs. Elsamex-TWS-SNC Joint Venture* the Hon'ble Karnataka High Court has upheld the finding of the ITAT that a conjoint reading of section 194C, 199 and 237 of the Act makes it clear that if there is no liability to pay tax the TDS paid is liable to be refunded. Since, the findings of the Ld.CIT (A) are in accordance with the decisions of the Hon'ble High Courts and the Tribunal discussed above, we do not find any infirmity in the

order of the Ld.CIT (A). We accordingly, uphold the findings of the Ld. CIT (A) and dismiss the sole ground of appeal of the revenue.

In the result, appeal filed by the revenue for assessment year 2012-2013 dismissed.

Order pronounced in the open court on 15th May 2019.

Sd/-

(RAJESH KUMAR)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 15/05/2019

Sd/-

(RAM LAL NEGI)

JUDICIAL MEMBER

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai